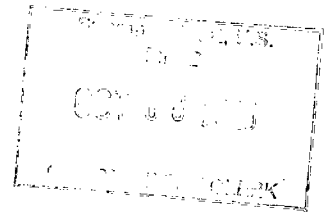


20-6032

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES



TIMOTHY NOLAN – PETITIONER

vs.

COMMONWEATH OF KENTUCKY – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

KENTUCKY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Timothy Nolan
Inmate #299094
Lee Adjustment Center
168 Lee Adjustment Center Drive
Beattyville, KY 41311

QUESTION(S) PRESENTED

I. The requirement to provide notice of what conduct is considered to be human trafficking will forever be changed by the answer to the question: Is it possible to sustain a prosecution for human trafficking when no one is trafficked? The answer will determine if a statute which plainly provides notice for some elements does not constitutionally inform and provide notice to every application government officials deem detestable to forever brand a person as a human trafficker.

II. Timothy Nolan petitions this Honorable Court to hold Kentucky accountable to the Due Process Clause of the Fourteenth Amendment resolving any doubt for the people when an error requested to be deemed clerical is an error of law and the point at which jurisdiction is necessary to make a change rather than a correction of a judgment which has become final.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

Petitioner
Timothy Nolan
Inmate #299094
Lee Adjustment Center
168 Lee Adjustment Center Drive
Beattyville, KY 41311

Respondent
Commonwealth of Kentucky
Office of the Attorney General
Hon. James C. Shackelford,
Assistant Commonwealth Attorney
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40401

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4 – 22
REASONS FOR GRANTING THE WRIT	23
CONCLUSIONS	24

INDEX TO APPENDICES

APPENDIX A	Decision of State Supreme Court of Kentucky case no. 2018-SC-000321-MR Unpublished decision as reported by West Law 2020 WL 4047517
APPENDIX B	Decision of State Supreme Court of Kentucky same as appendix A but as reported by LexisNexis 2020 Ky. Unpub. LEXIS 49
APPENDIX C	Order (for amended judgment) Entered March 08, 2019 Campbell Circuit Court Case No. 17-CR-00487
APPENDIX D	Amended Final Judgment and Sentence Entered March 08, 2019 Campbell Circuit Court Case No. 17-CR-00487
APPENDIX E	Final Judgment and Sentence Entered May 24, 2018 Campbell Circuit Court Case No. 17-CR-00487
APPENDIX F	Superseding Indictments Entered September 14, 2017
APPENDIX G	Order (accepting submission of guilty plea) Entered May 24, 2018 Campbell Circuit Court Case No. 17-CR-00487

APPENDIX H	Amended Order (accepting submission of guilty plea) Entered May 27, 2018 Campbell Circuit Court Case No. 17-CR-00487
APPENDIX I	Plea Agreement Entered February 06, 2018 Campbell Circuit Court Case No. 17-CR-00487
APPENDIX J	Motion to Correct Clerical Error in Judgment Entered November 05, 2018 Campbell Circuit Court Case No. 17-CR-00487
APPENDIX K	Response to Motion to Correct Clerical Error in Judgment Entered November 15, 2018 Campbell Circuit Court Case No. 17-CR-00487
APPENDIX L	Revised Motion for Bill of Particulars Entered October 06, 2017
APPENDIX M	Response to Revised Motion for Bill of Particulars Counts 1-10 Response to Revised Motion for Bill of Particulars Counts 11-25 Entered October 06, 2017
APPENDIX N	Revised Reply in Support of Motion for Bill of Particulars Entered October 20, 2017
APPENDIX O	Order Entered December 28, 2017
APPENDIX P	KRS 218A.010
APPENDIX Q	KRS 529.010
APPENDIX R	KRS 529.020
APPENDIX S	KRS 529.040
APPENDIX T	KRS 529.100 (2012)
APPENDIX U	KRS 529.100 (2020)

APPENDIX V	KRS 529.150
APPENDIX W	KRS 530.064
APPENDIX X	KRS 531.010
APPENDIX Y	KRS 531.300
APPENDIX Z	<u>Harris v. Commonwealth</u> (unpublished opinion) 2016 WL 7665871, 2016 Ky. Unpub. LEXIS 87.
APPENDIX AA	<u>Chen v. Pawul</u> , (unpublished decision) 2018 WL 3814764, 2018 Ky. App. Unpub. LEXIS 550
APPENDIX BB	22 USC §7101
APPENDIX CC	14TH Amendment

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Nolan v. Commonwealth</u> , 2020 WL 4047517, 2020 Ky. Unpub. LEXIS 49	4
<u>North Carolina v. Alfred</u> , 400 U.S. 25 (1970)	4
<u>Connally v. General Constr. Co.</u> , 269 U. S. 385, 391 (1926)	7
<u>United States v. Harriss</u> , 347 U.S. 612, 617 (1954)	7
<u>City of Chicago v. Morales</u> , 527 U.S. 41, 56 (1999)	7
<u>United States v. Mazurie</u> , 419 U.S. 544, 550 (1975)	7
<u>Maynard v. Cartwright</u> , 486 U.S. 356, 361-62 (1988)	7
<u>United States v. Batchelder</u> , 442 U.S. 114, 123 (1979)	9
<u>Lanzetta v. New Jersey</u> , 306 U.S. 451, 453 (1939)	9
<u>Johnson v. United States</u> , 576 U.S. 591, 595 (2015)	10
<u>Chambers v. Commonwealth</u> , 723 S.W.2d 868 870-71 (Ky. App. 1986)	11
<u>Adams v. Commonwealth</u> , 231 S.W.2d 55, 56 (Ky. 1950)	11
<u>Hood v. Commonwealth</u> , 230 S.W.3d 596, 599 (Ky. App. 2007)	11
<u>Logston v. Commonwealth</u> , 973 S.W.2d 70, 73 (Ky. App. 1998)	11; 12
<u>New York v. Ferber</u> , 458 U.S. 747, 756-764 (1982)	12
<u>Osborne v. Ohio</u> , 495 U.S. 103, 109-10 (1990)	12
<u>Milanovich v. United States</u> , 365 U.S. 551, 554 (1961)	13
<u>Harris v. Commonwealth</u> , 2016 WL 7665871, 2016 Ky. Unpub. LEXIS 87	14
<u>FCC v. Fox TV Stations, Inc.</u> , 567 U.S. 239, 253 (2012)	15
<u>Skilling v. United States</u> , 561 U.S. 358, 403 (2010)	15

<u>Grayned v. City of Rockford</u> , 408 U.S. 104, 108-09 (1972)	15
<u>Kolender v. Lawson</u> , 461 U.S. 352, 358 (1983)	15
<u>Allen v. Commonwealth</u> , 997 S.W.2d 483 (Ky. App. 1998)	15
<u>Chen v. Pawul</u> , 2018 WL 3814764, 2018 Ky. App. Unpub. LEXIS 550	16
<u>International Harvester Co. v. Kentucky</u> , 234 U.S. 216, 221 (1914).....	16
<u>Collins v. Kentucky</u> , 234 U.S. 634, 638 (1914)	16
<u>Bard v. Commonwealth</u> , 359 S.W.3d 1, 6 (Ky. 2011).....	17
<u>Fagan v. Commonwealth</u> , 374 S.W.3d 274, 279 (Ky. 2012).....	19
<u>Brown v. Commonwealth</u> , 326 S.W.3d 469, 473 (Ky. App. 2010).....	19
<u>United States v. Arrington</u> , 763 F.3d 17, 24 (DC Cir. 2014).....	19
<u>Commonwealth v. Gross</u> , 936 S.W.2d 85, 87 (Ky. 1996).....	19
<u>Rogers v. Commonwealth</u> , 366 S.W.3d 446, 452 (Ky. 2012).....	20
<u>MacFadden v. United States</u> , 213 U.S. 288, 296 (1909).....	21
<u>Thompson v. Whitman</u> , 85 U.S. 457, 467 (1873).....	21
<u>Machniak v. Commonwealth</u> , 351 S.W.3d 648, 652 (Ky. 2011)	21
<u>Simon v. Southern R. Co.</u> , 236 U.S. 115 (1915).....	22
<u>United States v. Ball</u> , 163 U.S. 662, 669-70 (1896).	22

STATUTES AND RULES

KRS 529.100 – Human trafficking (2012)	7
KRS 529.100 – Human trafficking (2020)	7
22 USCS § 7101(a) – Purposes and findings	7
18 USC Chapter 77 – Peonage, slavery, and trafficking in persons (§§ 1581 — 1597)	7

18 USC Chapter 77 § 1589 – Forced labor	7
22 USCS § 7101(b)(2) – Purposes and findings	9
KRS 529.010 – Definitions	9
KRS 529.010(5) – Forced labor or services (definition)	9
18 USCS § 1591	10
KRS 509.010(2) – Advancing prostitution (definition)	11
KRS Chapter 531 – Pornography (§§ 531.010 — 531.370)	11
KRS 531.010(3) – Obscene (definition)	11
KRS 531.300(3) – Obscene (definition)	11
KRS §§ 531.310 — 531.370 – labeled Sexual Exploitation of Minors	12
KRS 529.010(10) – Minor (definition)	12
KRS 510.040 – Rape in the first degree	13
KRS 529.040 (2006) – Promoting prostitution	13
KRS 529.150 – Forfeiture of property used in connection with human trafficking — Distribution of proceeds	13
KRS 218A.405 to 218A.460 – Forfeited Property	14
Chapter 218A – Controlled Substances (§§ 218A.005 — 218A.994)	14
KRS 218A.010(56) – Traffic (definition) ..	14
KRS 530.064 – Unlawful transaction with a minor in the first degree	14
OTHER	
Kentucky Constitution (Ky. Const.) §115	6
Fourteenth Amendment	passim

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

the list should include the court in question, the docket number and case caption for the proceeding, and the date of entry of the judgment.

Kentucky Supreme Court (not to be published)
Nolan v. Commonwealth
2020 WL 4047517 (Appendix A)
2020 Ky. Unpub. LEXIS 49 (Appendix B)
Case No. 2018-SC-000321-MR
Rendered July 9, 2020

Campbell Circuit Court (Appendix D)
Amended Judgment and Sentence
Case No. 17-CR-00487
Commonwealth v. Nolan
Entered March 08, 2019

Campbell Circuit Court (Appendix E)
Final Judgment and Sentence
Case No. 17-CR-00487
Commonwealth v. Nolan
Entered May 24, 2018

JURISDICTION

The date on which the highest state court decided my case was July 09, 2020.
A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a)

CONSTITUTINAL AND STATUTORY PROVISIONS INVOLVED

Kentucky Revised Statute (KRS)

KRS 529.010 appears at Appendix Q.

KRS 529.100 (2012) appears at Appendix T.

United States Constitution (U.S. Const.)

Fourteenth Amendment appears at Appendix CC.

INTRODUCTION

In his request for review Timothy Nolan (hereinafter Tim or Petitioner) presents two (2) claims of error. Both claims were properly preserved in the trial court and reviewed by the states highest court the Kentucky Supreme Court on appeal. Nolan v. Commonwealth, 2020 WL 4047517, *1, 2020 Ky. Unpub. LEXIS 49, *1. (Appendix A; B)

In state court Tim raised three (3) claims of error. His first claim challenging the constitutionality of Kentucky's human trafficking statute at the state level contained two components: KRS 529.100 is unconstitutionally vague as applied to him, and the included “force, fraud, or coercion” element has a fatal lack of clarity; the former is argued herein, the later is not presented in this petition. Tim's second claim argued the trial court improperly interfered with the Defendant's right to counsel of his choosing is not presented to this Court. Tim's third claim to the state court is presented to this Court in the second of his two claims, and challenges the amending of his final judgment and sentence as made without the court having jurisdiction as the change was judicial, not a clerical error.

STATEMENT OF THE CASE

A Campbell County grand jury originally indicted Nolan on twenty-two counts, and later added eight more in a superseding indictment. (Appendix F). This case was resolved by a reduction of charges by the Commonwealth in exchange for Tim's entering a plea of guilty.¹ Tim's challenge to the human trafficking statute is under counts 13, 21, and 24 of the indictment. The facts as found in the plea agree for the three challenged charges are:

¹ Petitioner's agreement with the Commonwealth contained both conditional and unconstitutional pleas of guilty. All pertinent claims were conditional pleas of guilty entered pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), and referenced only as a plea of guilty.

[Count 13:] From August 2016 through September 2016, the defendant subjected J.T. to Human Trafficking after she had run away from a residential drug treatment program, taking her to stay with him, and paying her to engage in sexual conduct with him on a daily basis, and threatening to turn her in to law enforcement if she did not engage in the sexual conduct for money.

[Count 21:] From June 2011 through April 2016, the defendant subjected Ca.S. to Human Trafficking by telling her he would get her suboxone to "get clean," but instead gave her money to buy heroin knowing she was addicted, and threatened physical harm to her unless she agreed to engage in sexual conduct with him for money, and perform sexual acts which he photographed or filmed.

[Count 24:] From 2012 through March 2016, defendant subjected S.G. to Human Trafficking by using physical force to keep her in his house when she wanted to leave, by threatening to turn her in for being behind paying child support, and knowing she was addicted to heroin, using physical force on her unless she engaged in sexual conduct with him for money, and perform[ed] sexual acts which he photographed or filmed.

Nolan, 2020 WL 4047517 at *2, 2020 Ky. Unpub. LEXIS 49 at *3-4.

The superseding indictment contains thirty (30) based on allegations from more than twenty (20) people. Kentucky has adopted the short form of indictments which generally do not contain the factual particulars which make up the alleged crime. The human trafficking statute includes but is not limited to the prohibition of "commercial sexual activity" which references three (3) different statutes in the penal code. This multi-element definition was relied upon for the prosecution of Tim. The constitutional challenge to Kentucky's human trafficking statute for this case is in large part due to the Attorney General's Office failure to provide specific definitions for elements and facts associated to each individual charge. Several pretrial pleadings and responses were submitted over the defense's request for a bill of particulars². The prosecution

² Petitioner has included the following: Revised motion for bill of particulars (Appendix L); the Commonwealth's response (Appendix M); Defenses reply (Appendix N); and the order by the court (Appendix O).

responded that the material necessary to preparing a defense was provided in discovery and by providing unlimited access through its “open file” discovery policy. The Court agreed with the prosecution “that it is not required to elect a single theory of “commercial sexual activity” prior to trial.” (Appendix O at 3). The Attorney General's Office is responsible for defending the laws of the Commonwealth. The special prosecutor from the Attorney General's Office is charged with understanding and requirements of each law passed by the General Assembly. The failure to identify which of the multiple available elements were applied to the facts from each count in the indictment supports the vagueness of the statute and ability to arbitrarily prosecute under the same.

Claim I

Tim asserts that Kentucky Revised Statute (KRS) 529.100, the statute proscribing human trafficking, is unconstitutionally vague as applied to him. This claim was argued extensively both in pleadings and orally in limine to the trial court, prior to Tim's entering a plea of guilty. On direct appeal³ the constitutional challenge to the statute was the first argument presented to and addressed by the court.

A Campbell County, Kentucky grand jury indicted Tim in 2017 for crimes which occurred between 2012-2016. Tim pled guilty to twenty-one crimes, including sixteen related to human trafficking, and was sentenced to a total of twenty years in prison by the Campbell Circuit Court. Tim entered conditional plea of guilty according to North Carolina v. Alfred⁴, to three charges of human trafficking of an adult, KRS 529.100, reserving the right to appeal those convictions on the grounds the human trafficking statute is unconstitutional.

³ “[T]here shall be allowed as a matter of right at least one appeal to another court[.] Kentucky Constitution (Ky. Const.) §115.

⁴ North Carolina v. Alfred, 400 U.S. 25 (1970).

The first and most fundamental principle in our legal system is that laws which regulate persons must give fair notice of what conduct is forbidden or required. Connally v. General Constr. Co., 269 U. S. 385, 391 (1926). The constitutional requirement is to ensure no man shall be prosecuted for offending a criminal statute without a reasonable understanding of its prohibited conduct. United States v. Harriss, 347 U.S. 612, 617 (1954). The void for vagueness doctrine is offended when men of common intelligence must necessarily guess at its meaning and differ as to its application. Connally v. General Constr. Co., 269 U. S. at 391. Vagueness further invalidates a criminal law when it may authorize and even encourage arbitrary and discriminatory enforcement. City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

“When vagueness permeates the text of such a law, it is subject to facial attack.” Morales, 527 U.S. 41, 55 (1999) (footnote omitted). Vagueness challenges to a statute not threatening First Amendment interests are examined in light of the facts of the case at hand and judged on an as-applied basis. United States v. Mazurie, 419 U.S. 544, 550 (1975). Valid claims of vagueness under the due process clause resting on lack of notice are valid when reasonable persons would not know their conduct falls within the assigned statute. Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988). While Tim's conduct is open for prosecution under other statutes in the Kentucky Penal Code, KRS 529.100 is unconstitutionally vague and does not provide adequate notice for prosecution of human trafficking when one is both opportunist and patron.

In the year 2000 the United States Congress passed the Trafficking Victims Protection Act (TVPA) to combat the increase in human trafficking. The purpose as explained “to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their

victims.” 22 USC § 7101(a). (Appendix BB). In 2007 the Kentucky Legislature ratified its version by reorganizing penal statute on prostitution offenses KRS Chapter 529. The purpose behind Senate Bill 43⁵ was to deter human trafficking in the commonwealth by criminalizing forced or coerced labor and commercial sexual activity and provide additional resources for victims of human trafficking. Unfortunately Kentucky departed from the federal blue print. Whereas 18 USC Chapter 77 contains three sections specifically proclaiming the prohibited conduct, Kentucky created only one.⁶ Unlike its federal equivalents which contain the few definitions for any terms which could be considered vague, KRS 529.100 is the very definition of vague.

At the time of indictment and during the times listed therein the law read as follows:

529.100. Human trafficking.

(1) A person is guilty of human trafficking when the person intentionally subjects one (1) or more persons to human trafficking.

(2)

(a) Human trafficking is a Class C felony unless it involves serious physical injury to a trafficked person, in which case it is a Class B felony.

(b) If the victim of human trafficking is under eighteen (18) years of age, the penalty for the offense shall be one (1) level higher than the level otherwise specified in this section.

Michie’s™ Kentucky Revised Statutes, Kentucky Code Archive 2012 – 2017.⁷ (Appendix T)

The statute's circular construction requires every man to decide for himself what constitutes human trafficking. The statute further fails to direct the reader as to any definitions provided elsewhere in the penal code.. “It is a fundamental tenet of due process that no one may

⁵ 2007 Ky. SB 43, ch. 19

⁶ 18 USC Chapter 77 §§ 1589 — 1591; KRS 529.100. (Both federal and state law incorporate promotion, conspiracy, and other supporting criminal actions in separate statutes.)

⁷ KRS 529.100 was amended through 2020 Ky. HB 2, ch. 75, § 7 in 2020. (Appendix U).

be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." United States v. Batchelder, 442 U.S. 114, 123 (1979) quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). Any statute which criminalizes an act in terms so vague as to make one guess or allows for debate of its meaning violates constitutional protections. Connally v. General Const. Co., 269 U.S. 385, 391 (1926) (citations omitted). On its face KRS 529.100 is overly vague and fails to provide notice of the prohibited behavior as required by the Fourteenth Amendment.

Without searching for statutory definitions, the layman considers human trafficking to mean the buying and selling of people from one person to another. The quintessential case of buying women in one country, bringing them into this country to be sold into prostitution. See e.g. 22 USCS § 7101(b)(2) (Appendix BB). In a smaller local scenario one who profits from prostitution through the use of force, "a pimp." To find the substance of KRS 529.100 the search begins with KRS 529.010(5) defining human trafficking:

(5) "Human trafficking" refers to criminal activity whereby one (1) or more persons are subjected to engaging in:

(a) Forced labor or services; or

(b) Commercial sexual activity through the use of force, fraud, or coercion, except that if the trafficked person is under the age of eighteen (18), the commercial sexual activity need not involve force, fraud, or coercion.

KRS 529.010(5) (Michie's™ Kentucky Revised Statutes, Kentucky Code Archive 2012 – 2017).⁸ (Appendix Q)

The inclusion of "criminal activity" is surplusage language, giving no effect to the statute but adding a road bump to what will be an exhausting effort to grasp the totality of that which is covered under KRS 529.100. Notwithstanding the statutory provided definition for human

⁸ (enacted in 2007 Ky. SB 43, ch. 19, § 4; unaltered by the 2013 amendment to the statute in 2013 Ky. HB 3, ch. 25, § 7).

trafficking, one must consult further definitions to ascertain the proscribed criminal activity. A review for the element of forced labor or services (KRS 529.010(5)(a)) is unnecessary to this claim, but if it were applicable the proviso would require traversing from the original KRS 529.100 through 6 subsections within 3 separate statutes.

Tim's claim as described by the Kentucky Supreme Court:

The statutory scheme at issue in Nolan's as-applied challenge encompasses KRS 529.100, codifying the offense of human trafficking; KRS 529.010's definitions for "human trafficking," and the "commercial sexual activity" and "force, fraud, or coercion," terms used to define human trafficking; and KRS 509.010(2)'s definition, referenced in KRS 529.010's "force, fraud, or coercion" definition.

Nolan, 2020 WL 4047517 at *3, 2020 Ky. Unpub. LEXIS 49 at 7.

The the question of trafficking as applied to Tim all comes back to the commerce aspect involved with commercial sexual activity and the failure to provide notice the statute allows for prosecution if a person is trafficked to himself. Improper application can make a statute clearly give notice to some prohibited behavior while a provision is unmistakably vague as applied to an individual. Johnson v. United States, 576 U.S. 591, 595 (2015) (“although statements in some of our opinions could be read to suggest otherwise, our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision’s grasp.”).

The federal equivalent to the charged offense 18 USC § 1591 was amended twice prior to enactment of KRS 529.100. Refined to evolve with the ever changing illegal activity, it provided an example of what is necessary to provide constitutionally adequate notice for the conduct targeted to combat sex trafficking. Ignoring available templates, Kentucky defined the illicit

conduct through reference to three (3) predicate offenses. The statute in relevant part defines “Commercial Sexual Activity” as “prostitution . . . participation in the production of obscene material as set out in KRS Chapter 531 . . . or engaging in a sexually explicit performance.” KRS 529.010(2). Applied to adults who are trafficked, the three separate offenses contained within commercial sexual activity require the additional element committed “through the use of force, fraud or coercion.” Id. at (5), (“if the trafficked person is under the age of eighteen (18), the commercial sexual activity need not involve force, fraud, or coercion.” Id.).

Under the statutory construction utilized KRS 529.100 is constitutionally valid only if it adequately provides notice for how human trafficking applies to the three predicate offenses. All three of the offenses require two people in and of themselves, and occur because of an monetary motive. The metamorphosis of these crimes into human trafficking occurs with the introduction of a third party and a commercial enterprise aspect. Otherwise the three relevant offenses would be the appropriate crime charged.

Prostitution by definition includes a transaction for monetary gain. KRS 529.020⁹; Chambers v. Commonwealth, 723 S.W.2d 868, 870-71 (Ky. App. 1986). Offenses through the use of prostitution are committed by a third party designed for economic gain. Adams v. Commonwealth, 231 S.W.2d 55, 56 (Ky. 1950); Hood v. Commonwealth, 230 S.W.3d 596, 599 (Ky. App. 2007).

Participation in the Production of Obscene Material as defined by KRS chapter 531 is the second offense covered by Commercial Sexual Activity, where in it is defined twice. KRS 531.010(3) and 531.300(3). (Appendix X; Y) Kentucky and Federal courts have already acknowledged production of materials and “economic motive” go hand-in-hand. Logston v.

⁹ (Appendix R).

Commonwealth, 973 S.W.2d 70, 73 (Ky. App. 1998) quoting New York v. Ferber, 458 U.S. 747, 756-764 (1982). see also Osborne v. Ohio, 495 U.S. 103, 109-10 (1990).

Traversing from the human trafficking statute to the definitions first what conduct is human trafficking and then the commercial sexual activity leads to last of the three predicated offenses: “engaging in a sexually explicit performance. 529.100 – 529.010(5) – 529.010(2) respectfully. This definition for this offense is defined separately for adults and Minors.

Applied to minors, referencing back to “human trafficking” no “force” is required. Without being directed to the applicable statute, what constitutes a “Sexually Explicit Performance” is defined through consulting multiple terms in KRS 531.300. This defining terms are limited to KRS §§ 531.310 — 531.370 – labeled Sexual Exploitation of Minors.

Applied to adults “Engaging in a Sexually Elicit Performance” is defined in KRS 529.010(10).¹⁰ Reference back to “human trafficking” requires the element of “force, fraud or coercion,” (with its own definition).

Engaging in a Sexually Explicit Performance is criminalized in KRS 531.310 – Use of a minor in a sexual performance, ranging from a class C to a class A felony. When force is added to any of the defined conduct with an adult a crime other than human trafficking has been

10 (10) "Sexually explicit performance" means a performance of sexual conduct involving:

- (a) Acts of masturbation, homosexuality, lesbianism, bestiality, sexual intercourse, or deviant sexual intercourse, actual or simulated;
- (b) Physical contact with, or willful or intentional exhibition of, the genitals;
- (c) Flagellation or excretion for the purpose of sexual stimulation or gratification; or
- (d) The exposure, in an obscene manner, of the unclothed or apparently unclothed human male or female genitals, pubic area, or buttocks, or the female breast, whether or not subsequently obscured by a mark placed thereon, or otherwise altered, in any resulting motion picture, photograph, or other visual representation, exclusive of exposure portrayed in matter of a private, family nature not intended for distribution outside the family.

During the 2013 Legislative session KRS 529.020 was amended in House-bill 3 moving the definition of "Sexually explicit performance" from subsection (10) to subsection (12) the definition itself was unaltered.

committed. For example “force” applied to sexual intercourse is rape as charged in KRS 510.040. To hold commerce is not the target of human trafficking renders the statute pointless. Rather than to have identical conduct covered in two separate statutes, the legislative intent seems clear. Target those individuals who buy or sell those trafficked persons for the purpose of the overlapping crimes. The same bill that enacted human trafficking repealed promoting prostitution in the first and third degrees, and amended promoting prostitution in the second degree. Noticeably absent from the amended promoting prostitution is the “business or entrepreneur” element. KRS 529.040 (2006).¹¹ The legislature did not seek to decriminalize this prohibited conduct, but incorporate it as part of the new enacted human trafficking statutes. The overlap of elements in human trafficking with other statutes across the penal code were not intended for prosecution of the same act but for “trying to reach a new group of wrongdoers.” see Milanovich v. United States, 365 U.S. 551, 554 (1961).

The prostitution predicate of commercial sexual activity was relied upon for the prosecution of Tim. Nolan, 2020 WL 4047517 at *6. 2020 Ky. Unpub. LEXIS 49, *15-16. It is safe to say the layman would have difficulty trying to traverse through all of the statutes and definitions to derive the objective of that which has been promulgated as illegal activity covered by KRS 529.100. The commonality of all is the inclusion of commerce for the trafficked person. Far easier for the layman to understand is the notice given in KRS 529.150 (Appendix V) explaining what property in-connection with human trafficking is subject to forfeiture. The

¹¹ 529.040. Promoting prostitution in the second degree. (2006 version) (Appendix S).

(1) A person is guilty of promoting prostitution in the second degree when he knowingly advances or profits from prostitution by managing, supervising, controlling or owning, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two (2) or more prostitutes.

(2) Promoting prostitution in the second degree is a Class D felony.

determination of forfeited property will be “the same process as set out in KRS 218A.405 to 218A.460” the chapter for controlled substances. *Id.* The definition for traffic as published for Chapter 218A: “Traffic, . . . means to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance.” KRS 218A.010(56). (Appendix P). Trafficking in drugs and people are both global epidemics. Removing humanity, whether trafficking in people of black market illicit substances, trafficking is trafficking, the commerce of buying and selling of goods for profit.

Another example of the legislative intent for human trafficking to incorporate commerce as a required element may be found in KRS 530.064 – Unlawful transaction with a minor in the first degree. Under this statute, in relevant part, “a person is guilty . . . when he or she knowingly induces, assists, or causes a minor to engage in: (a) Illegal sexual activity.” Continuing KRS 530.064 (Appendix W) excludes “those offenses involving minors in KRS Chapter 531 and in KRS 529.100 where that offense involves commercial sexual activity.” In its exclusion of particular offenses, the legislature specifically distinguishes human trafficking from all the crimes against minors in Chapter 531. The statute itself is also distinguished from human trafficking. If the prosecutions application of human trafficking to Tim is upheld there would be no reason for the legislature to make that which is distinguished. Since force as element for minors is not required further illustrates the failure to include commerce as part of KRS 529.100, human trafficking now becomes not an overlap but a duplication of offenses and no longer covers the buying and selling of minors. An example of this can be found in Harris v. Commonwealth, 2016 WL 7665871, 2016 Ky. Unpub. LEXIS 87. (Appendix Z) In Harris, the parents of a young boy were indicted on counts of human trafficking and complicity to sodomy

committed by Harris. 2016 WL 7665871 at ___, 2016 Ky. Unpub. LEXIS at *3-4. The human trafficking charges were appropriate because the parents received payment from Harris in return for sex with the young boy. In other words making an exchange of a person in return for something of value, in the Harris case, drugs. Without an exchange taking place only the complicity to sodomy charge is appropriate.

The right to notice includes the entitlement that all men are to be informed as to what a state statute commands or forbids. FCC v. Fox TV Stations, Inc., 567 U.S. 239, 253 (2012). The failure of a law to comply with this demand violates the first essential protection of due process. The Fourteenth Amendment requires “the invalidation of laws that are impermissibly vague.” Id. KRS 529.100 is written in “terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). A standardless statute which fails to provide minimal guidelines authorizes discriminatory enforcement. Skilling v. United States, 561 U.S. 358, 403 (2010). Arbitrary prosecution lessens the certainty to which citizens are provided notice, and impermissible delegates basic policy matters to policemen and judges allowing for them to peruse their own personal agendas, and juries for resolution on an ad hoc and subjective basis. See Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Kolender v. Lawson, 461 U.S. 352, 358 (1983).

The lack of notice and arbitrary application provided for in KRS 529.100 is what allowed for Tim to be prosecuted for human trafficking. This principle is exemplified by two Kentucky Cases. First, the offenses of promoting prostitution in the first degree and use of a minor in a sexual performance were charged in Allen v. Commonwealth, 997 S.W.2d 483 (Ky. App. 1998). The predecessor to the human trafficking embodied in the promoting prostitution statute was not

charged against Allen for engaging in sexual conduct with the minor. However, it was charged for his conduct in which Allen convinced the minor to work for him as a prostitute in which he advanced and profited. *Id.* at 485. After the enactment of the human trafficking and promotion thereof, in 2014 Kentucky pursued the charge of human trafficking for forced labor practices. *Chen v. Pawul*, 2018 WL 3814764 at ___, 2018 Ky. App. Unpub. LEXIS 550 at *2. (Appendix AA). However instead of charging human trafficking for commercial sexual activity, authorities elected for promotion promotion of prostitution¹² for conduct consisting of “Chen had offered to “loan out” female “employees” on an overnight basis.” *Id.* 2018 WL 3814764 at ___, 2018 Ky. App. Unpub. LEXIS 550, *8.

The concept of commercial sexual activity is the conduct conveyed in Allen and Chen. In Allen, he was the one to profit from money gained from a third-party through controlling of a minor to work for him as a prostitute. The charges against Tim do not involve a third-party and fatally fail from lack of commerce. The crimes pursued against Chen occurred in 2014 the middle of the time span for the charges against Tim (2012-2016). In Chen it is clear the alleged activity involved three parties. It is unclear whether Chen would receive payment for the alleged loaning out of female employees, which would clearly meet the requirements of a charge for human trafficking. The charges against Tim do not include the loaning out nor the receiving of payment, yet the prosecution still charged him for human trafficking. It is clear the target of prosecution for human trafficking is conduct which dehumanizes people using them in a transaction for profit. The confusion of multiple definitions and employment of imprecise

¹² 529.040. Promoting prostitution.

- (1) A person is guilty of promoting prostitution when he knowingly advances or profits from prostitution.
- (2) Promoting prostitution is a Class A misdemeanor unless the person managed, supervised, controlled, or owned, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two (2) or more prostitutes, in which case it is a Class D felony.

language allowed Kentucky to apply the statutes in this case to define them in a way to reach conduct which they Loathsome and detestable. The illustration of unconstitutional and arbitrary application of definitions and statutes to conduct not covered was shown in Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) citing International Harvester Co. v. Kentucky, 234 U.S. 216, 221 (1914); Collins v. Kentucky, 234 U.S. 634, 638 (1914).

The Fourteenth Amendment has been violated by the application of KRS 529.100 to Tim. Human Trafficking is not limited to the Commonwealth of Kentucky, but occurs in every state across the country both at the state and federal level. Statutes criminalizing the targeted conduct were designed to combat the contemporary manifestation of slavery. The failure of this Court to intervene will allow Kentucky to set a new standard for what is to be considered human trafficking opening a Pandora's box of what conduct will allow personal agendas to determine who to brand a Human Trafficker.

Claim II

Tim takes the position the amended judgment by the trial was not a clerical error, but was a judicial error made without jurisdiction and therefore void. This issue was preserved at the trial court level through written motion objecting to any amendment to Tim's final judgment and sentence. This was the third and last argument presented to and decided by the Kentucky supreme Court. Nolan, 2020 WL 4047517 at *9-10, 2020 Ky. Unpub. LEXIS 49 at *27-31.

Tim appeared in open court on February 09, 2018 to enter his plea of guilty in agreement to the amended charges presented by the prosecution. The agreement and contract was signed by Tim, his counsel, and special prosecutor the Hon. Barbara Maines Whaley Assistant Attorney General. (Appendix I). All of the charges in the binding agreement do not contain “commercial

sexual activity” as part of the terms charged. *Id.* The court accepted the agreement and entered its written order reciting the charges as listed in the plea agreement, and ordered for a presentence investigation report to be conducted. (Appendix G). Prior to final sentencing Tim appeared in court and moved to withdraw his guilty plea. At Final judgment and Sentencing the court orally denied Tim's motion, then pronounced judgment finding him guilty of the amended offenses. The court's oral finding were reproduced to written order entered on May 24, 2018. (Appendix E). The court's jurisdiction over Tim's case ended ten (10) days later. Bard v. Commonwealth, 359 S.W.3d 1, 6 (Ky. 2011).

In accordance with statute Tim submitted a motion for shock probation which prompted the Attorney General's Office to enter a motion to correct clerical error. The prosecution complained the element of “commercial sexual activity” were accidentally omitted from eight (8) specific charges in the written judgment which need to be corrected. (Appendix J). In its motion the prosecution relies on that details of “commercial sexual activity were read aloud during sentencing.” *Id.*, at 1. The prosecution never asserts or specifies at what point during sentencing commercial sexual activity was pronounced by the court. Counsel for Tim submitted a response contesting the Assistant Attorney General's assumption of clerical error as one of judicial error and terms not understood to be a part of the agreement. (Appendix K). On March 08, 2019, the trial court entered an order and separate amended judgment and sentence. (Appendix C; D). In its order the court found the signed plea agreement “failed to include the words commercial sexual activity in the name of the amended charges that were not dismissed.” *Id.*, at 2. The court further found that even though the words commercial sexual activity were omitted, the error was one that is clerical in nature. *Id.*, at 3. In the amended judgment and sentence the court first added

“commercial sexual activity” to the amended charges listed from the signed agreement. The erroneous addition does not appear nor were agreed to in the signed agreement. (c.f. Judgment and sentence Appendix D, at 5-7 with Agreement Appendix R). Then despite the prosecution requesting adding the wording commercial sexual activity to eight (8) specific offenses (Appendix J), the court amend substantially more courts in the amended judgment. (Appendix D).

A clerical error occurs from improper transcription of the oral pronounced to written order. "Some inaccuracies are clearly clerical errors, such as an incorrect or missing date on a document in the record, a mistake made when transcribing numbers, or a mathematical error when calculating a judgment." Fagan v. Commonwealth, 374 S.W.3d 274, 279 (Ky. 2012) (footnote omitted). A omission of judicial action cannot be corrected as clerical error. Id. The amendment made by the trial court is one of substance with additional legal requirements to Tim and cannot be considered as clerical error. Bard v. Commonwealth, 359 S.W.3d 1, 7 (Ky. 2011). See also Brown v. Commonwealth, 326 S.W.3d 469, 473 (Ky. App. 2010). This same principle is incorporated in federal jurisprudence. United States v. Arrington, 763 F.3d 17, 24 (DC Cir. 2014) (listing cases). Both federally and in Kentucky a mistake that is not clerical but one of legal consequence may be amended within a proscribed time limit. That time limit in Kentucky ends in ten (10) days. Commonwealth v. Gross, 936 S.W.2d 85, 87 (Ky. 1996).

In striking down Tim's argument the Kentucky Supreme Court found “[t]he written plea agreement, signed by Nolan, failed to include the words “commercial sexual activity” in referencing the amended charges[.]” Nolan, 2020 WL 404517 at 9-10, 2020 Ky. Unpub. LEXIS 49 at 29. However the court qualified its acknowledgment by determining “the facts for the

human trafficking-related convictions involved sexual activity in exchange for payment of money or drugs, which constitutes commercial sexual activity." Id. Further relied upon was the court during the plea colloquy read the facts to which Tim agreed or plead guilty to through Alfred plea. Id. Lastly the supreme court pointed to the judgment and sentence contained collateral consequences which accompany sex crimes. Id., WL at 10, Lexis at 30-31.

Glaringly absent from the supreme court's decision is the ability to rely on that the trial court orally pronounced during sentencing commercial sexual activity as part of the offenses. Abundantly clear is the trial court did not make an oral finding at the sentencing that the relevant convictions were for commercial sexual activity, thus making the written amendment a wholly new addition to the sentencing order. Kentucky has clearly established clerical errors results "from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." Rogers v. Commonwealth, 366 S.W.3d 446, 452 (Ky. 2012). The determination by the Kentucky Supreme Court that the error made in Tim's judgment and sentence was clerical and not judicial fails to follow its own law and violates due process required by the Fourteenth Amendment to the United States Constitution.

The trial court sent a copy of the final judgment to the Attorney General's Office for the prosecution to review. Both Ky. R. Crim. P. 10.02¹³ and Ky. R. Civ. P. 52.02¹⁴ allow the court

13 Rule 10.02. Motion for new trial.

(1) Upon motion of a defendant, the court may grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice. If trial was by the court without a jury, the court may vacate the judgment, take additional testimony and direct the entry of a new judgment.

(2) Not later than ten (10) days after return of the verdict, the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a defendant, and in the order shall specify the grounds therefor.

14 Rule 52.02. Amendment.

Not later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

ten (10) days to review any final order of judgment for amendments or corrections which need to be made. After 10 days the trial court may again acquire jurisdiction through a properly filed motion according to rule or statute. The prosecution filed a motion pursuant to Ky. R. Crim. P. 10.10 to correct clerical error. A court may under this rule make corrections to an order or final judgment, but is not granted jurisdiction to amend the orders or judgments to change their legal consequences. Even the ability to correct a clerical error is not absolute, the court must first be able to obtain jurisdiction. From the time of final judgment Tim had thirty (30) days to file his notice of appeal, which was entered on June 19, 2018, bestowing jurisdiction with the Kentucky Supreme Court. The prosecution entered its motion to the trial court on November 05, 2018, five months after the trial court had lost jurisdiction, and over three (3) months after the Clerk's Office had certified the record on appeal.

The law is clear a court order made without jurisdiction is void. MacFadden v. United States, 213 U.S. 288, 296 (1909). And a void judgment is a legal nullity. Thompson v. Whitman, 85 U.S. 457, 467 (1873). The trial court failed to state orally “commercial sexual activity” when pronouncing judgment. Following the oral pronouncement the written order did not contain “commercial sexual activity” as part of the judgment. If there is a discrepancy between the two the written judgment controls. Machniak v. Commonwealth, 351 S.W.3d 648, 652 (Ky. 2011). In this case there is no variance between the two, therefore a clerical error was not made. Id., at 657. “[T]he trial court's failure to state in the written Judgment the same sentence pronounced at the sentencing hearing was a clerical error.” Id. The amending of a sentence failing to conform to the proscribed requirements is void, resulting in the original judgment and sentence as binding. Id. A judgment of the court without having jurisdiction is void and a violation of due process

embodied in the Fifth Amendment applicable to the states through the Fourteenth Amendment. Simon v. Southern R. Co., 236 U.S. 115 (1915); United States v. Ball, 163 U.S. 662, 669-70 (1896).

It is a foregone assumption that all courts must have jurisdiction prior to hearing for parties and making a ruling. The citizens of this country look to the federal government to provide leadership and continuity to the states. Now more than ever Americans are focused on this Court for what leadership will be disseminated. allowing a void judgment to stand breeds contempt for the integrity and good faith of our judicial system. It destroys the confidence of citizens in the operation of their government and invites them to disregard their obligations. During times of civil unrest Americans must be shown strong leadership will prevail in the upholding our constitution which governs all people. The failure of this Court hold Kentucky accountable for allowing basic jurisdictional requirements to be broken will leave its peoples lacking in confidence.

REASONS FOR GRANTING THE PETITION

I. The most basic of axioms in the establishment of law and order is the conduct of man, required or prohibited, will be promulgated to give notice to one and all. Ask five men what is meant by human trafficking and you will get five different answers. But all will have one common theme – commerce. The very matter missing from the allegations, indictment, and facts in prosecuting Tim. Kentucky has arbitrarily forced the human trafficking statute (KRS 529.100) to cover conduct, that while reprehensible and not legal, fails to all under acts proclaimed as human trafficking. Arbitrary application of law by government officials is an abuse of power resulting in distrust by its citizens. The failure of this Court to grant review and intervene will allow Kentucky Officials to continue their disregard for the most basic of rights ensured to all by the United States Constitution.

II. The masses look to the judicial system to rectify atrocities committed by personnel in the executive and legislative branches of government. If the people loose faith in the judicial system anarchy will rein. Under the guise of a claimed clerical error, five months after its entry the prosecution moved the trial court to amend Tim's final judgment for a legal error (if error at all) which impacts the ramifications of his sentence. While on appeal and jurisdiction resided with the Kentucky Supreme Court, the trial court accepted the prosecution's reasoning and amended the legal terms of Tim's final judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



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Date: 10-8-20