QUESTIONS PRESENTED

I. THE DISTRICT COURT ERRED WHEN IT DENIED MR. KETTLES' MOTION TO ADMIT EVIDENCE PURSUANT TO F.R.E. 608 AND 412 AND THE CIRCUIT RECOGNIZED THIS ERROR, BUT ERRED AGAIN IN FINDING IT HARMLESS

II. THE DISTRICT COURT ERRED WHEN IT ACCEPTED THE GOVERNMENT'S VERDICT FORM AS IT RELATED TO THE INDICTED OFFENSES UNDER 18 U.S. § 1591(a)(1)

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I. OPINIONS BELOW

The reported opinion of the Court of Appeals for the Sixth Circuit and the judgment of conviction in the United States District Court for the Middle District of Tennessee are attached to this petition as the Appendix. Mr. Kettles the Sixth Circuit for En Banc review and the denial of his petition is included below.

II. JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 12, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), the petitioner having asserted below and asserting in this petition the deprivation of rights secured by the United States Constitution.

III. STATUTORY PROVISIONS INVOLVED

This matter involves violations of the United States Code, specifically, 18 U.S. § 1591 as well as evidentiary matters related to F.R.E. 412 and 608.

IV. STATEMENT OF THE CASE

A. Procedural Background

The matter was briefed for the Sixth Circuit Court of Appeals and, after considering the matter on the briefs submitted, the Court issued an Opinion dated August 12th, 2020, denying all relief. Mr. Kettles petitioned the Sixth Circuit for En Banc review of the issues presented. The Court issued an Order dated September 9th, 2020, denying Mr. Kettles request for such review. Mr. Kettles now makes this timely application.

B. Statement of Facts

CAMERON BEALL

Agent Beall is employed by the Federal Bureau of Investigation (FBI) as an agent investigating child related crimes in June of 2016. (R., 465, Trial Transcript Vol. 1-B, PageID#2887-2888) Agent Beall testified that he had received a referral in this case from a non-profit agency and he had subpoenaed records from Backpage.com which he explained was a website that was used to advertise women for prostitution. (R., 465, Trial Transcript Vol. 1-B, PageID#2889-2890) He also reviewed an interview that had previously been conducted with A.D., that Backpage.com postings, which could be paid for by Bitcoin, could be traced to a specific user and he obtained hotel records from a Super 8 hotel in Hermitage, Tennessee. (R., 465, Trial Transcript Vol. 1-B, PageID#2891-2892)

Agent Beall discussed various photographs of the Super 8 motel, specifically noting Room 214 and a video camera located in the second-floor hallway. (R., 465, Trial Transcript Vol. 1-B, PageID#2893-2896) He also showed videos of Mr. Kettles, Ms. Whittemore and A.D. entering Room 214 on June 18th, 2016, and then, approximately thirty minutes later, Mr. Kettles and Ms. Whittemore exiting the room and another unknown male arriving, staying for a short period of time, then leaving. (R., 465, Trial Transcript Vol. 1-B, PageID#2904-2906) This same scenario repeated again two more times on June 18th, 2016, at later times with two different unknown males and each time, Mr. Kettles and Ms. Whittemore return after the unknown males leave the room. (R., 465, Trial Transcript Vol. 1-B, PageID#2907-2911) Agent

Beall obtained a copy of A.D.'s birth certificate that confirmed she was born in October of 2002. (R., 465, Trial Transcript Vol. 1-B, PageID#2912; Exhibit #4)

After Ms. Whittemore was arrested, she gave consent for law enforcement to search her cellular phone. (R., 465, Trial Transcript Vol. 1-B, PageID#2912-2914) Mr. Kettles contacted law enforcement and, when he came to be interviewed, had his cell phone seized, then searched after a warrant was obtained. (R., 465, Trial Transcript Vol. 1-B, PageID#2915-2916) Mr. Kettles acknowledged knowing A.D., but denied having photographs of her, which the phone search disproved. (R., 465, Trial Transcript Vol. 1-B, PageID#2925-2926) Mr. Kettles said he believed A.D. was seventeen years-old and denied being a pimp but said he would "consider[ed] himself helping". (R., 465, Trial Transcript Vol. 1-B, PageID#2926-2927) During the interview, Mr. Kettles had a very demonstrable emotional reaction after he was told A.D. was only thirteen years-old. (R., 465, Trial Transcript Vol. 1-B, PageID#2927-2928).

On cross-examination, Agent Beall acknowledged that Ms. Whittemore was actively involved in renting the hotel room and he did not know if she had extended the rental after the first day or not. (R., 466, Trial Transcript Vol. 2, PageID#2950-2951) During his interview, Agent Beall agreed that Mr. Kettles stated he did not want to be involved in whatever plan Ms. Whittemore had with A.D. and that Mr. Kettles denied knowing A.D. was under 14 years old during these events. (R., 466, Trial Transcript Vol. 2, PageID#2954) He agreed that, after being informed that A.D.

was 13 years old, Mr. Kettles had an "emotional outburst" that lasted between fifteen and twenty minutes. (R., 466, Trial Transcript Vol. 2, PageID#2955-2956)

CHRIS BRENNAN

Detective Brennan worked for the Metropolitan-Nashville Police Department (MPD) in 2016 and he prepared a report after he examined the phone provided by A.D. (R., 466, Trial Transcript Vol. 2, PageID#3010-3013) In her address book entries, A.D. listed a person named "Low Low" and the entry corresponded with Mr. Kettles' phone number as well as an entry for "Stormy" associated with Ms. Whittemore's number. (R., 466, Trial Transcript Vol. 2, PageID#3014-3015) Detective Brennan reviewed numerous photographs of A.D. and others extracted from the cell phone. (R., 466, Trial Transcript Vol. 2, PageID#3016-3017) He reviewed a text message sent to Mr. Kettles by A.D. demanding more money than she received for prostitution activities and a reply from Mr. Kettles' phone suggested $60. (R., 466, Trial Transcript Vol. 2, PageID#3018-3019) Detective Brennan also prepared a report after examining Mr. Kettles' phone and it contained Ms. Whittemore as a contact, various photographs and a web browsing history under the name Martez Stanley linked to Backpage purchases and postings over the course of several days from June 16th, 2016, onward. (R., 466, Trial Transcript Vol. 2, PageID#3020-3025) Some of these postings advertised meeting a girl using A.D.'s shortened name. (R., 466, Trial Transcript Vol. 2, PageID#3026-3027)

STORMY WHITTEMORE

Ms. Whittemore testified for the Government in this matter and she identified her phone as one of the ones that had been reviewed and noted that, in June of 2016, she had been searching for a job. (R., 466, Trial Transcript Vol. 2, PageID#3033-3036) Ms. Whittemore met Mr. Kettles on June 15th, 2016, whose nickname is "Low" in Instagram. (R., 466, Trial Transcript Vol. 2, PageID#3036-3037) She stated Mr. Kettles messaged with her over the internet and flattered her about her appearance and ability to make money. (R., 466, Trial Transcript Vol. 2, PageID#3038-3039)

Ms. Whittemore confirmed several text message exchanges with Mr. Kettles wherein they discuss their relationship, earning large amounts of money, Ms. Whittemore learning how to make money, using marijuana and keeping their profits away from the Government. (R., 466, Trial Transcript Vol. 2, PageID#3042-3048) After meeting Mr. Kettles, she agreed to have sex with men for money as the means to achieve the lifestyle he discussed with her. (R., 466, Trial Transcript Vol. 2, PageID#3052-3053) She agreed to be posted on Backpage.com as a means to get "johns" which were men who would pay for sex with her both at the hotel (in calls) and at their residences (out calls) while Mr. Kettles made the arrangements and set the price. (R., 466, Trial Transcript Vol. 2, PageID#3054-3055) Mr. Kettles purchased clothing and other items for her and, once she saw how much money could be made, she agreed to do more "calls", somewhere between ten and twenty, over four days. (R., 466, Trial Transcript Vol. 2, PageID#3062-3063) They took numerous

photos of her that were then posted to Backpage.com as part of her advertisement. (R., 466, Trial Transcript Vol. 2, PageID#3064-3066)

Ms. Whittemore had known A.D. for five to six years at the time of this incident, she was thirteen years old at that time and she referred to her as "cousin" in her phone. (R., 466, Trial Transcript Vol. 2, PageID#3066-3068) A.D. called her early in the morning on June 16th, 2016, asking for a ride to her home, which she and Mr. Kettles provided. (R., 466, Trial Transcript Vol. 2, PageID#3068-3069) The following day, the two spoke and A.D. came to spend time with Ms. Whittemore and Mr. Kettles where they smoked marijuana, got a pedicure and bought new clothes that Mr. Kettles paid for. (R., 466, Trial Transcript Vol. 2, PageID#3069-3071) After this, Ms. Whittemore went to perform an outcall and while A.D. remained in the car with Mr. Kettles. (R., 466, Trial Transcript Vol. 2, PageID#3071-3073) Once Ms. Whittemore returned and handed the money to Mr. Kettles, she exchanged text messages with A.D. explaining what had happened in the house and recruiting A.D. to engage in prostitution, promising her things like clothing and food in exchange. (R., 466, Trial Transcript Vol. 2, PageID#3074-3077) Ms. Whittemore stated she tried to use the same methods Mr. Kettles used with her on A.D. to entice her into prostitution. (R., 466, Trial Transcript Vol. 2, PageID#3077-3078)

She then went with Mr. Kettles to the Super 8 motel where she assisted him in renting a room. (R., 466, Trial Transcript Vol. 2, PageID#3079) Ms. Whittemore testified that Mr. Kettles rented the room with cash for three days, re-rented the room later and her ID was used for it. (R., 466, Trial Transcript Vol. 2, PageID#3080-3082)

She stated she received text messages from A.D. on June 17th, 2016, stating that she was interested in engaging in prostitution so Ms. Whittemore coordinated with her. (R., 466, Trial Transcript Vol. 2, PageID#3083-3085) Ms. Whittemore admitted that A.D. trusted her so she was the one convincing her to engage in prostitution as well as providing the details of how it was done. (R., 466, Trial Transcript Vol. 2, PageID#3086-3087) She and Mr. Kettles got photographs of A.D. to post to Backpage.com advertisements. (R., 466, Trial Transcript Vol. 2, PageID#3087-3088)

A.D. engaged in prostitution that weekend and the johns contacted Mr. Kettles from the Backpage.com ads that had been posted to arrange the meetings. (R., 466, Trial Transcript Vol. 2, PageID#3089-3090) She and Mr. Kettles left in order for the johns to make their appointments and then returned when A.D. texted them to tell them the appointment had been completed. (R., 466, Trial Transcript Vol. 2, PageID#3091-3093) Mr. Kettles collected the money that A.D. made from this encounter. (R., 466, Trial Transcript Vol. 2, PageID#3096) Ms. Whittemore read texts messages between herself and Mr. Kettles arranging a meeting for A.D. for prostitution as well as messages with A.D. about further prostitution activities the following day on June 18th, 2016. (R., 466, Trial Transcript Vol. 2, PageID#3097-3100) She testified that she and Mr. Kettles went shopping with A.D. that afternoon and then arranged another in call that afternoon wherein A.D. had sex with an unknown male and she and Mr. Kettles return to the room afterwards. (R., 466, Trial Transcript Vol. 2, PageID#3101-3105) Later that day, Ms. Whittemore left with A.D. and Mr. Kettles to perform an outcall, and then they returned to the hotel for A.D. to

perform an incall wherein she had sex with a john. (R., 466, Trial Transcript Vol. 2, PageID#3106-3109) Ms. Whittemore stated that on June 19th, 2016, A.D. performed an outcall which was the final time she prostituted that weekend. (R., 466, Trial Transcript Vol. 2, PageID#3109-3110)

The following day on June 20th, 2016, Ms. Whittemore and A.D. had a text message exchange disputing the amount of money she had been paid for the prostitution wherein A.D. claimed that she and Mr. Kettles unfairly kept most of the money earned. (R., 466, Trial Transcript Vol. 2, PageID#3111-3115) Eventually, Ms. Whittemore told A.D. she would get $60 more and claimed Mr. Kettles instructed her to state that. (R., 466, Trial Transcript Vol. 2, PageID#3116) A.D. and Ms. Whittemore continued to argue about the amount of money she should receive, including in a phone call and, eventually, she and Mr. Kettles put $60 in A.D.'s mailbox. (R., 466, Trial Transcript Vol. 2, PageID#3116-3119)

On June 23rd, 2016, Ms. Whittemore received additional texts from A.D. wherein she informed her that her mother had reported this incident to law enforcement and she and Mr. Kettles were concerned because law enforcement had been contacted. (R., 466, Trial Transcript Vol. 2, PageID#3120-3122) Ms. Whittemore then discussed various pictures and videos of her and Mr. Kettles that discuss prostitution related activities. (R., 466, Trial Transcript Vol. 2, PageID#3123-3124)

Over the course of the following two years, she wrote numerous letters to Mr. Kettles while in custody expressing anger and frustration with Mr. Kettles, though

she also offered to exonerate him from these offenses. (R., 466, Trial Transcript Vol. 2, PageID#3130-3131) In those same letters, Ms. Whittemore was angry and frustrated with A.D. and made disparaging comments about her. (R., 466, Trial Transcript Vol. 2, PageID#3134-3135) Also, in those same letters, Ms. Whittemore stated that she was trying to create a false impression of her naivete but that she eventually entered a plea to charges related to this conduct and was awaiting sentencing at the time of trial. She believed she would receive a seventy-two month sentence for her cooperation with the Government which could be revoked if she testified falsely. (R., 466, Trial Transcript Vol. 2, PageID#3135-3138)

On cross-examination, Ms. Whittemore acknowledged that if she was not helpful in convicting Mr. Kettles, the Government would not want her testimony and she would not receive her reduced sentence. (R., 466, Trial Transcript Vol. 2, PageID#3140-3141) She agreed that Mr. Kettles would hold all the money she earned but food, clothes and other expenses for herself and A.D. also came out the money she had earned which Mr. Kettles held. (R., 466, Trial Transcript Vol. 2, PageID#3146-3148)

Ms. Whittemore agreed that in her July 12th, 2016, interview with Agent Beall, she never mentioned that Mr. Kettles instructed her what to text A.D. about the money dispute they had, nor did she mention that Mr. Kettles held all the money A.D. made, nor did she mention that he instructed her to tell A.D. they were in Miami to deceive her. (R., 466, Trial Transcript Vol. 2, PageID#3149-3150) Ms. Whittemore agreed that she was the one who approached A.D. and convinced her to prostitute

herself and, while claiming it was to make money for herself and Mr. Kettles, she agreed that is inconsistent with what she stated in her July of 2016 interview. (R., 466, Trial Transcript Vol. 2, PageID#3150-3151) She agreed that she was the one who instructed A.D. on the details of what to do in her encounters and about the business and only now at trial was she claiming that Mr. Kettles instructed her to engage A.D. in this business. (R., 466, Trial Transcript Vol. 2, PageID#3152-3153) Ms. Whittemore agreed that, only after she received a lawyer and advice from a lawyer, did she decide to cooperate with the Government. (R., 466, Trial Transcript Vol. 2, PageID#3153-3154) She also agreed that, when she gave these statements a year after the incident, she was aware of what the Government's recommendation for her sentence would be and she would not have done without knowing what her sentence. (R., 466, Trial Transcript Vol. 2, PageID#3156-3158)

Ms. Whittemore agreed that she excluded Mr. Kettles from the initial conversations with A.D. about prostitution on purpose and A.D. reached out to her, not Mr. Kettles, to express willingness to participate, that she had A.D. come to the hotel and that she was the one who told her she would not eat unless she worked at prostitution, not Mr. Kettles, because she was the one who controlled A.D. (R., 466, Trial Transcript Vol. 2, PageID#3158-3160) She agreed that the Backpage.com ad from June 16th, 2016, that had A.D.'s name was a posting for herself and the use of the name was coincidental and the pictures taken of A.D. were never posted on Backpage.com. (R., 466, Trial Transcript Vol. 2, PageID#3161-3164) Ms. Whittemore agreed that, while she was aware that A.D. was thirteen years old at the time, she

looked and acted older than she was. (R., 466, Trial Transcript Vol. 2, PageID#3164) She agreed that neither A.D. nor herself told Mr. Kettles her actual age, but rather that she was sixteen or seventeen. (R., 466, Trial Transcript Vol. 2, PageID#3165) She also recalled sending Mr. Kettles a text stating that she brought the situation she was in on herself. (R., 466, Trial Transcript Vol. 2, PageID#3169) Ms. Whittemore acknowledged that favorable sentencing was a main factor in her decision to cooperate. (R., 466, Trial Transcript Vol. 2, PageID#3169-3170)

Ms. Whittemore stated that there were many letters from Mr. Kettles she received but only when she was in custody and they expressed his desire to remain in a relationship with her. (R., 466, Trial Transcript Vol. 2, PageID#3183-3184) She also stated that, though the pictures of A.D. were never posted to the internet, they would be sent to johns after an appointment was made. (R., 466, Trial Transcript Vol. 2, PageID#3185)

On recross examination, Ms. Whittemore reiterated that she stated in a letter to Mr. Kettles that she was "play[ing] my role" in the investigation and that her motive in protecting him initially disregarded her future husband's role in her child's life. (R., 466, Trial Transcript Vol. 2, PageID#3186)

A.D.

A.D. testified that she was fifteen years old and, in 2016, she was thirteen years old. (R., 467, Trial Transcript Vol. 3, PageID#3209-3210) On the weekend of June 16th through 19th, 2016, her father was out of state and her mother was working when she needed a ride home one evening so she contacted Ms. Whittemore. (R., 467,

Trial Transcript Vol. 3, PageID#3213-3214) She was dropped off that night by Ms. Whittemore and Mr. Kettles and met up with them again the following day when they took Ms. Whittemore to a home where she met an older gentleman for what A.D. assumed was prostitution. (R., 467, Trial Transcript Vol. 3, PageID#3215-3217) After the appointment was complete, they picked up Ms. Whittemore and she handed Mr. Kettles money from her clothing. (R., 467, Trial Transcript Vol. 3, PageID#3218-3219) A.D. stated that over the course of the weekend, she discussed prostitution primarily with Ms. Whittemore who explained to her the details of the interactions and the only contribution Mr. Kettles made was to say if she was in trouble to call them and to claim she was eighteen years old if asked. (R., 467, Trial Transcript Vol. 3, PageID#3219-3221)

A.D. stated that she had discussed her true age in front of Mr. Kettles and Ms. Whittemore stated that she was thirteen. (R., 467, Trial Transcript Vol. 3, PageID#3221) She had both Ms. Whittemore's and Mr. Kettles' numbers if she needed help and (R., 467, Trial Transcript Vol. 3, PageID#3222-3223) She testified that Mr. Kettles informed her she could keep "tips" if she received them, but otherwise the money would go to him and Ms. Whittemore. (R., 467, Trial Transcript Vol. 3, PageID#3223-3224) She agreed to engage in this conduct in order to make money which her family could use because they struggled and she preferred incalls to outcalls. (R., 467, Trial Transcript Vol. 3, PageID#3225) In order to make appointments, Mr. Kettles would post ads on Backpage.com then negotiate with the

johns and she provided them with photographs though they were not posted with the ads. (R., 467, Trial Transcript Vol. 3, PageID#3225-3228)

When an incall would take place, Mr. Kettles and Ms. Whittemore would vacate the room after arranging the price and location, then she would have sex with the john, then they would return to the room and should would give either one or the other of them the money. (R., 467, Trial Transcript Vol. 3, PageID#3230-3235) On the following day, June 18th, 2016, she went shopping with Mr. Kettles and Ms. Whittemore where Mr. Kettles purchased numerous items for her and Ms. Whittemore. (R., 467, Trial Transcript Vol. 3, PageID#3236-3239) A.D. recounted her incalls and various videos were shown of men coming in and out of the hotel room on June 18th, 2016, indicating she made several hundred dollars for each appointment and the money went to Ms. Whittemore and Mr. Kettles. (R., 467, Trial Transcript Vol. 3, PageID#3240-3244) Both she and Ms. Whittemore performed outcalls as well that weekend, with Mr. Kettles driving and the money going to him. (R., 467, Trial Transcript Vol. 3, PageID#3245-3246) A.D. described being frightened during her first outcall and her encounter during a second outcall. (R., 467, Trial Transcript Vol. 3, PageID#3246-3249) She recalled having a total of six calls, that the money always went to Mr. Kettles and that she smoked a lot of marijuana over the course of the weekend. (R., 467, Trial Transcript Vol. 3, PageID#3250-3251)

On cross-examination, A.D. agreed that it was Ms. Whittemore who induced her to participate in this conduct. (R., 467, Trial Transcript Vol. 3, PageID#3276-3278) A.D. agreed that in her police interview in June of 2016, she did not mention

that Mr. Kettles was directly involved in discussing prostitution with her, just Ms. Whittemore. (R., 467, Trial Transcript Vol. 3, PageID#3279-3281) She stated that she did not want anyone to get in trouble so she intentionally omitted information from these 2016 interviews. (R., 467, Trial Transcript Vol. 3, PageID#3281-3282) A.D. agreed that she had implicated Ms. Whittemore in that interview and had not included the depth of Mr. Kettles' involvement which she testified to at trial. (R., 467, Trial Transcript Vol. 3, PageID#3283-3285) A.D. admitted that at the time of those interviews, she frequently smoked marijuana and she agreed that she had told both police and civilian interviewers that she forgot things often and did not have a good memory. (R., 467, Trial Transcript Vol. 3, PageID#3285-3286) She agreed again that in her interviews in 2016, closer to the time of the incident, she did not inculpate Mr. Kettles as she had in her trial testimony. (R., 467, Trial Transcript Vol. 3, PageID#3291-3292)

A.D. agreed that Mr. Kettles and Ms. Whittemore had access to one another's phones and she did not know who sent her the message from Mr. Kettles' phone offering her sixty additional dollars. (R., 467, Trial Transcript Vol. 3, PageID#3292-3293) She also stated that the text messages telling her to leave him out of this arrangement did appear to come from Mr. Kettles, that she only gave money she earned to Ms. Whittemore and the ad that was on Backpage.com was for Ms. Whittemore and not for her. (R., 467, Trial Transcript Vol. 3, PageID#3293-3295) She stated she became involved in this because of Ms. Whittemore and she had no connection to Mr. Kettles. (R., 467, Trial Transcript Vol. 3, PageID#3296-3297)

C. Sixth Circuit Opinion

The Sixth Circuit determined that the District erred, pursuant to *United States v. Willoughby* 742 F.3d 229, 234 (6th Cir. 2014), when it restricted Mr. Kettles' cross-examination under F.R.E. 412. The Sixth Circuit then determined that this error was harmless pursuant to the standards espoused in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed 1557 (1946). The Sixth Circuit affirmed the District Court's rulings and the jury's findings in all other respects.

STANDARDS OF REVIEW

This Court will apply the abuse of discretion standard in its review of severance and gang references. "A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard." *Ross v. Duggan*, 402 F.3d 575, 581 (6th Cir.2004)

SUMMARY OF ARGUMENT

The District Court erred when it denied his motion to cross-examine the alleged victim about prior acts of dishonesty under F.R.E. 608(a) and (b) as these acts potentially related to F.R.E 412. The district court failed to distinguish between improper cross-examination about acts that did occur under F.R.E. 412(a) and withdrawn or recanted allegations which do not fall under the purview of the Rule pursuant to case law and the Advisory Comments to the Rule. The Sixth Circuit agreed that the District Court had committed error, but deemed it to be harmless under the standard in *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed 1557 (1946). This decision was also erroneous. The Sixth Circuit should have

adopted the standard from *Kotteakos* that error is not harmless when "the error itself had a substantial influence" on the outcome of the trial. *Kotteakos*, 328 U.S. at 765. Using this standard from *Kotteakos* is more appropriate rather than other language from *Kotteakos* adopted by the Sixth Circuit stating the error must have "substantially swayed" the outcome of the trial. The District Court error should be evaluated under the standard that it had "a substantial influence" on the outcome of the trial and his application should be granted by this Court to clarify the Sixth Circuit's harmless error standard.

The District Court erred when it accepted the Government's proposed verdict form because it relieved the Government of the burden of proving a necessary element beyond reasonable doubt and it, effectively, amended the indictment. 18 U.S. § 1591(a) requires a defendant to have the "reasonable opportunity to observe" that a person trafficked was under 18, a portion of the *mens rea* element of the offense. The statute does not make reference to a similar opportunity for a person under 14, but the Government's indictment of Mr. Kettles references the alleged victim being under 14 at the time of the offense. The verdict form permitted the jury to determine that the alleged victim was under 14 without requiring the Government to prove it beyond a reasonable doubt any intent to traffic a person under 14 by Mr. Kettles. It also permitted the Government to amend their indictment after the proof at trial. This Court should grant his application to clarify the requirements to violate 18 U.S. § 1591(a) as to a person under the age of 14.

I. THE DISTRICT COURT ERRED WHEN IT DENIED MR. KETTLES' MOTION TO ADMIT EVIDENCE PURSUANT TO F.R.E. 608 AND 412 AND THE CIRCUIT RECOGNIZED THIS ERROR, BUT ERRED AGAIN IN FINDING IT HARMLESS

The Sixth Amendment to the United States Constitution provides a criminal defendant the right "to be confronted with the witnesses against him" and cross-examination of an accusing witness is "principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974); see also *Mayes v. Sowders*, 621 F.2d 850, 855 (6th Cir. 1980).

Mr. Kettles motioned the district court to permit cross-examination about acts by A.D. that implicated both F.R.E. 608(a) and (b). (R. 295, Motion to Reconsider) Due to the nature of some of the alleged acts, Mr. Kettles submitted a sealed statement of facts relating to conduct of A.D. that also, potentially, implicated F.R.E. 412 and requested permission from the district court to permit cross-examination as to these particular events. (R. 297, Statement of Facts for Motion to Reconsider) Several acts by A.D. would be specific instances of conduct as contemplated in 608(b) that shed light on her character for truthfulness, or lack thereof. Further, information in the referenced reports also implicated 608(a) and her general reputation for truthfulness, or lack thereof.

The district court's ruling in this matter was erroneous and it abused its discretion in arriving at its decision thereby committing reversible error. The primary error of the district court was that it ignored F.R.E 412(a) when making its ruling which prohibited evidence of "other sexual behavior" of A.D. as it related specifically to her

prior withdrawn allegations from various dates and other comments on prior sexual assaults, or lack thereof. Far from attempting to solicit evidence of "other sexual behavior", Mr. Kettles was attempting to solicit the opposite. He attempted to show that she had not had any prior sexual assaults and was untruthful with the police and her counselors. This untruthfulness would impeach her credibility in the eyes of the jury. The district court cited the cases of *Boggs v. Collins*, 226 F.3rd 728 (6th Cir. 2000) and *United States v. Cardinal*, 782 F.2d 34 (6th Cir. 1986) in its ruling on this matter, but both are distinguishable from Mr. Kettles' case and the district applied them erroneously.

The district court erroneously concluded that since exclusion of this evidence is not a *per se* Constitutional violation, that meant that it either must exclude it, or may exclude it without consideration of F.R.E 412(a) and 608(a) and (b). Other than remarking that this "material is inextricably interwoven with evidence that is inadmissible under Federal Rule of Evidence 412", the district court does not further elaborate on the basis for its decision, nor does it justify how false allegations of sexual assault run afoul of F.R.E. 412 since they, necessarily, do not comment on "other sexual behavior" of the witness since the moving party's impetus for seeking admission is that they were, in fact, false. This is an abuse of discretion because it "improperly applie[d] the law or use[d] an erroneous legal standard." *Ross* at 581.

The Sixth Circuit Court recognized the distinction between seeking to solicit evidence about a false, or withdrawn, allegation of sexual assault in order to impeach a witness' credibility from that which is protected by F.R.E. 412 in *United States v.*

Willoughby. The *Willoughby* court noted, in a case where the facts and the purpose of the motion were nearly identical to that of Mr. Kettles, that the testimony of the alleged victim's "recantation was not 'offered to prove that [alleged victim] engaged in other sexual behavior'—because the testimony's whole predicate was that there was no 'other sexual behavior' to begin with. For the same reason, the testimony was not 'offered to prove [alleged victim]'s sexual predisposition.' Thus, by its terms, the Rule does not apply here." *United States v. Willoughby* 742 F.3d 229, 234 (6th Cir. 2014). The *Willoughby* court also distinguishes these situations from the *Cardinal* decision, which the district court relied on in Mr. Kettles case, stating:

> In *Cardinal*, we applied a prior version of Rule 412—the original 1978 one—to uphold the district court's exclusion of an allegedly false accusation of sexual misconduct. Since then Rule 412 has been amended three times and substantially rewritten—in part to "expand the protection afforded alleged victims of sexual misconduct[,]" but in part to "diminish some of the confusion engendered by the original rule[.]" Advisory Comm. Notes, 1994 Amendments. And the Committee Notes—not to mention the amended Rule itself—specifically make clear that "[e]vidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412." *Id.* That of course is precisely the evidence at issue here; and thus the revised Rule 412 did not exclude it.[1]

The advisory comments make specifically clear that situations like the information that Mr. Kettles sought to introduce do not fall under the purview of F.R.E. 412.

The Sixth Circuit, correctly, agreed with Mr. Kettles' argument related to *Willoughby*, and determined the District Court was erred in not permitting cross-examination in this area, but then erroneously determined that the error was harmless. The Panel noted that the Circuit's standard for harmless error review has

[1] The *Boggs* decision which the district court relies in its Order denying Mr. Kettles request was decided in 2000 when the 1994 Amendments to the Rule had already been implemented.

had several differing interpretations over time. Relying on *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed 1557 (1946), the Panel determined that either the standard espoused in *United States v. Chavez*, 951 F.3d 349, (6th Cir. 2020), or in *United States v. Kilpatrick*, 798 F.3d 365, (6th Cir. 2015) were applicable in Mr. Kettles case despite the differences in the exact language of the standard in these two cases. Mr. Kettles asserts that neither of these standards were met in his case and this Honorable Court should review this erroneous application of the harmless error standard. The Court should apply the more expansive standard announced in *Kotteakos*, that "the error itself had substantial influence" on the outcome of the trial, to all cases in the Sixth Circuit during harmless error review.

The Sixth Circuit Panel reached the erroneous conclusion that the error of the District Court was harmless, noting that to align with the ruling in *Kotteakos*, the Circuit must adopt either the *Chavez* standard or the *Kilpatrick* standard, but determining that, under either standard, the error was harmless and Mr. Kettles was not entitled to relief.

The Sixth Circuit Opinion referenced language from *Kotteakos* which provided:

> But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had a substantial influence.

Kotteakos, 328 U.S. at 765. Prior panels of the Sixth Court infused the Circuit's case law with portions of the above standard. In *Kilpatrick*, the Court stated, when analyzing harmless error under Rule 52(a), "the Government must show by a preponderance of the evidence that the error did not materially affect the verdict" and cited *Kotteakos*'s test for whether the verdict was "substantially swayed" by the impact of the error. *Kilpatrick*, 798 F.3d at 378. In *Chavez*, the Court stated, similarly, but not exactly, that "even if the District Court abused its discretion, we may not grant a new trial if the record gives us a 'fair assurance' that the verdict wasn't 'substantially swayed' by the evidentiary error" again citing *Kotteakos*. *Chavez*, 951 F.3d at 358. Mr. Kettles, instead, urges the Court to adopt the standard from *Kotteakos* that if the error had "substantial influence" on the verdict of the jury, then it cannot be deemed harmless. The term "sway" has been defined as "a controlling influence" while, juxtaposed, the term "influence" has been defined as "the power or capacity of causing an effect in indirect or intangible ways".[2] The use of the term sway implies that an error must affect the outcome of the verdict while using the definition of the term influence broadens the ways in which the evidence may affect the verdict. Use of the latter term from *Kotteakos* and its definition is the standard for harmless error that this Court should adopt.

Fed.R.Crim.P 52(a) provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Upon review, an error of the District Court is not harmless if the error had a substantial and injurious effect

[2] Merriam-Webster's Dictionary

or influence in determining the outcome of the case. *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Doan v. Carter*, 548 F.3d 449, 459 (6th Cir.2008). Undertaking this analysis, the question is "whether the guilty verdict actually rendered in this trial was surely unattributable to that error." *Doan*, 548 F.3d at 459 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Reversal is required if the record is "so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error." *O'Neal v. McAninch*, 513 U.S. 432, 437–38, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995)).

The information complained of by Mr. Kettles and erroneously restricted by the District Court prevented Mr. Kettles from full and effective impeachment of the minor victim's credibility, a witness who was essential to the Government's case. In a proffer at trial, when confronted with documentation about numerous previously reported incidents of sexual assault alleged by her, she stated that she had either been misunderstood on repeated occasions, or that she wanted to falsify information to law enforcement in order to avoid a prosecution. (R. 467, Trial Transcript Vol. 3, PageID#3402-3409) The primary evidence against Mr. Kettles at trial was the testimony of his co-defendant who cooperated with the Government and was repeatedly impeached and the testimony of the minor victim. The other corroborative evidence related to his activities at the hotel where most of the sexual encounters took place, the posted images on the internet and his statement to law enforcement were insufficient to prove that he was a principal in the act, or in the conspiracy to commit the act. The only direct evidence came from the two witnesses, one of which

was the subject of this improperly restricted cross-examination into prior incidents of untruthfulness on her part. The Panel erred when it determined that this impeachment evidence could not have "substantially swayed" the jury had they heard it and that there was "fair assurance" that the "verdict … was surely unattributable to that error". *Chavez*, 951 F.3d at 358; *Doan*, 548 F.3d at 459. Though attempting to conform the Circuit's standards to *Kotteakos* uniformly throughout the Circuit's prior rulings, the Court ignored the remainder of the language of *Kotteakos*, which cautions that the review should encompass not "merely whether there was enough to support the result[ing]" verdict but "rather ... whether the error itself had a substantial influence" on the outcome of the trial. *Kotteakos*, 328 U.S. at 765. While the Sixth Circuit believed that there was substantial other evidence to support Mr. Kettles' conviction notwithstanding the District Court's error, that was an insufficient basis to deem the error harmless. Instead, this Court should grant review of the issue to incorporate the more inclusive and standard contained in *Kotteakos* that the error "had a substantial influence" on the outcome of the trial which is broader and more deferential than whether the evidence "substantially swayed" the outcome which appears to require that the evidence would have mandated a different result.

II. THE DISTRICT COURT ERRED WHEN IT ACCEPTED THE GOVERNMENT'S VERDICT FORM AS IT RELATED TO THE INDICTED OFFENSES UNDER 18 U.S. § 1591(a)(1)

The conviction offense in both counts of the indictment in Mr. Kettles' case was related to 18 U.S. §1591 - Sex trafficking of children or by force, fraud, or coercion which states in part:

(a) Whoever knowingly-

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is-

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

> (c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

The Government's Indictment stated that Mr. Kettles had violated §1591(a) in counts one and two of the indictment by trafficking a person "that …. had not attained the age of 14 years", placing him on notice that he had violated the statute in the manner set forth in the Indictment. (R. 283, Second Superseding Indictment, PageID#1854-1855) The district court, over Mr. Kettles' objection, erroneously created a jury verdict form that permitted the jury to determine that A.D. was under 14 years of age at the time of the offensive conduct without requiring the jury to determine Mr. Kettles' intent, or lack thereof, to engage in the offense conduct with a person under 14. The form was in error as it disregarded the language in 18 U.S. § 1591(c) which requires that the Government show the "defendant had a reasonable opportunity to observe the person" was not yet 18 years of age. (R. 370, Verdict Form, PageID#2224-2225) Though the statutory language does not specifically reference the "reasonable opportunity to observe" whether a person so trafficked was under 14 or not, the decision by the district court allowed the Government to treat one of the essential elements of the offense as a status crime and relieved them of the burden of proving Mr. Kettles had a reasonable opportunity to observe that A.D. was under 14 years of age at the time of the offensive conduct. Further, the Government indicted him with having violated the statute because A.D. was under 14 years of age at the time, rather than under 18, multiple times.

In *Apprendi v. New Jersey*, the Supreme Court determined that any fact which served to increase a defendant's sentence must have been found beyond a reasonable doubt by the jury to be applicable. *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435(2000). In *Alleyne v. United States*, the Supreme Court further determined that the holding in *Apprendi* "applies with equal force to facts increasing the mandatory minimum." *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 2160, 81 U.S.L.W. 4444, 186 L.Ed.2d 314 (2013) *Alleyne* also provides that "[d]efining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment." *Id.* at 2161.

The United States Supreme Court noted "we have long recognized that determining the mental state required for commission of a federal crime requires 'construction of the statute and . . . inference of the intent of Congress.'" *Staples v. United States*, 511 U.S. 600, 605 (1994) (quoting *United States v. Balint*, 258 U. S. 250, 253 (1922); see also *Liparota v. United States*, 471 U.S 419, 423 (1985)). The Court in *Staples* went further to add that to permit a statute to criminalize behavior without an intent element should be rare and have clear legislative history to support the lack of *mens rea*. *Id.* at 606. ("we have stated that offenses that require no *mens rea* generally are disfavored…. some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime"); see also *Liparota* at 426.

Other Supreme Court case law has underscored this point that *mens rea* is typically required in a criminal offense and the lack of an explicit *mens rea* requirement in the language of a statute does not preclude such a requirement as an element of the offense. *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978)("intent generally remains an indispensable element of a criminal offense") See also *Morissette v. United States*, 342 U. S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil").

The inclusion of the language in § 1591(c) requiring the Government to prove that a defendant had the "reasonable opportunity to observe" the person trafficked served to qualify the *mens rea* requirement related to the age of the victim, even if the *mens rea* required may have been the standard of recklessness. Mr. Kettles had to intend to traffic someone under the prohibited age and had to have a reasonable reason for knowing that the person was under that age. As interpreted by the district court in Mr. Kettles' case, the enhanced penalty for trafficking a person under 14 years requires no finding of *mens rea* at all, not even by the standard of recklessness, simply that he had the reasonable opportunity to observe that she was under 18 and she had, in fact, been under 18. The ruling, in effect, permits sentencing for a greater punishment while removing the requirement that there be any intent to traffic a person under 14, even a reckless intent. All of this was despite the fact that the

Government charged him with violating § 1591(a) by trafficking a person under 14 rather than 18.

The Government's argument at trial, which was accepted by the district court, was that this statute should be akin to enhanced drug penalties based on quantity of drugs possessed and formulated the verdict form based on that theory. This argument is misplaced and the verdict form created error for two distinct reasons. First, the patterned Sixth Circuit jury instructions contained in 14.07A which requires the jury to find the quantity of drugs, in the purportedly similarly situated scenario, begins with the greatest amount which is the charged offense and then proceeds to the lesser amount which can be determined without a separate finding of intent to possess that particular amount. The opposite is true for the verdict form used in Mr. Kettles case wherein the jury only needed to find that he intended to violate §1591(a) which the jury instructions related to the victim's age contained in §1591(c) and then, without any additional, greater, or even equal finding of intent, they could find the victim was under 14 and thus, ultimately, a greater mandatory minimum was applied at sentencing. (R. 370, Verdict Form, PageID#2224-2225) & (R. 368, Jury Instructions, PageID#2195-2196) This created a situation where the jury was able to find him guilty of a greater offense without the necessity of finding any *mens rea* to commit that greater offense which contrasts with the Government's example of drug amounts which actually reduce in severity without an additional *mens rea* based on the jury verdict form.

Secondly, the verdict form utilized in Mr. Kettles' case amounts to an actual amendment to the indictment based on the plain language of the indictment. "An indictment may be the subject of an actual amendment, a constructive amendment, or a variance." *United States v. Budd*, 496 F.3d 517, 521 (6th Cir., 2007). When reviewing this issue, this Court reviews "the language of the indictment, the evidence presented at trial, the jury instructions and the verdict forms utilized by the jury." *United States v. Kuehne*, 547 F.3d 667, 683-684 (6th Cir. 2008). Mr. Kettles bears the burden of proof in demonstrating an amendment has occurred. *United States v. Hynes*, 467 F.3d 951, 962 (6th Cir. 2006). The Government indicted Mr. Kettles three times in this matter including Docket Entry 283 containing the trial offenses. In his first indictment, Mr. Kettles was charged in count one, the conspiracy count, with the victim being over 18, but in the substantive count in count two with "knowing and in reckless disregard of the fact that person 'A' had not attained the age of 14 years". (R. 32, Indictment, PageID#206-207) In the second indictment he is charged similarly, but not exactly, with "knowing and in reckless disregard of the fact, and having had a reasonable opportunity to observe 'A,' that person 'A' had not attained the age of 14 years." (R. 219, Superseding Indictment, PageID#1485-1486) This language was specifically altered in the Second Superseding Indictment as to count one, but in all three indictments, Mr. Kettles was charged in count two with engaging in this conduct when the victim was under 14 years of age, the last indictment stating that "having had a reasonable opportunity to observe "A", that person "A" had not attained the age of 14 years" he engaged in this conduct. All three indictments

charged that he had the opportunity to observe that A.D. was under 14 at the time of the offense. At trial, the district court created the verdict form that was materially different from the language on the indictment thereby amending it without the consent of Mr. Kettles. The form, and the instructions accompanying the form, neither required the jury to find that he had the reasonable opportunity to observe that A.D. was under 14, nor did it require the jury to find that he was in violation of the statute because she was 14 rather than 18. (R. 370, Verdict Form, PageID#2224-2225) & (R. 368, Jury Instructions, PageID# 2195-2196) & (R. 467, Trial Transcript Vol. 3, PageID3 3380:12-19) This is reversible error.

Kettles was prejudiced by this decision when the jury did find that he had violated the statute in this manner without the requisite finding that he had a reasonable chance to observe that A.D. was 14 years of age. Testimony from Ms. Whittemore confirmed that Mr. Kettles was unaware that A.D. was thirteen years-old at the time of the offensive conduct. (R., 466, Trial Transcript Vol. 2, PageID#3165) Agent Beall also confirmed that Mr. Kettles conveyed his lack of knowledge about her true age during his interview with him. (R., 466, Trial Transcript Vol. 2, PageID#2954) He was subsequently subject to a greater mandatory minimum sentence after trial which was applied and he received a sentence of no less than 60 months greater than he would have received without this error. He is entitled to a new trial due to reversible error.

CONCLUSION

For the aforementioned reasons, Mr. Kettles prays that this Honorable Court will grant his request for a writ of certiorari in order to review the questions of presented relating the various erroneous and prejudicial evidentiary and legal rulings by the District Court, affirmed by the Circuit Court, that created reversible error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing writ of certiorari and the accompanying appendix has been served via electronic mail upon counsel for the Respondent, Mrs. Kathryn Risinger, Assistant United States Attorney, Office of the United States Attorney, 110 Ninth Avenue South, Suite 961-A, Nashville, TN 37203, Mrs. Sangita Rao, and Mr. Jeff Wall, Acting Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington D.C. 20530-0001, this 13th day of October, 2020.

/s/ Manuel B. Russ
Manuel B. Russ