UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 20 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DON ARTHUR WEBSTER, Jr., Defendant-Appellant.	No. 08-30311 D.C. No. 3:06-CR-00096-HRH-1 District of Alaska, Anchorage ORDER

Before: KLEINFELD and CALLAHAN, Circuit Judges.

Appellant's pro se motion to recall the mandate [Docket #71] is denied. The mandate issued on January 25, 2012. No further filings will be entertained in this closed case.

APPENDIX-A
1-OF-2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 21 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In re: DON ARTHUR WEBSTER, Jr.

DON ARTHUR WEBSTER, Jr.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA,

Respondent,

UNITED STATES OF AMERICA,

Real Party in Interest.

No. 20-71342

D.C. No. 3:06-cr-00096-HRH
District of Alaska,
Anchorage

ORDER

Before: SILVERMAN, NGUYEN, and COLLINS, Circuit Judges.

Petitioner has not demonstrated that this case warrants the intervention of the court by means of the extraordinary remedy of mandamus. *See Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

The motion to recall or amend the mandate in appeal No. 08-30311 has been filed in that case.

No further filings will be accepted in this closed case.

DENIED.

APPENDIX - A
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 19 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DON ARTHUR WEBSTER, Jr.,	No. 18-73272
Applicant,	
v.	ORDER
UNITED STATES OF AMERICA,	
Respondent.	

Before: McKEOWN, BYBEE, and OWENS, Circuit Judges.

In this application for authorization to file a second or successive 28 U.S.C. § 2255 motion in the district court, the applicant contends that his convictions under the Trafficking Victims Protection Act ("TVPA"), 18 U.S.C. § 1591, must be vacated in light of *Bond v. United States*, 572 U.S. 844 (2014). The applicant has not made a prima facie showing that *Bond* is applicable and supports his request for authorization. *See Henry v. Spearman*, 899 F.3d 703, 705-08 (9th Cir. 2018) (discussing prima facie showing necessary under 28 U.S.C. § 2244(b)(2)(A) to "rely on" on a new, retroactive rule of Supreme Court law); *see also United States v. Walls*, 784 F.3d 543, 547 (9th Cir. 2015) (distinguishing the statute in *Bond* from the TVPA and concluding that Congress intended the TVPA to "address[] sex trafficking at all levels of activity"). *Compare* 28 U.S.C.

APPENDIX-B
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§ 2244(b)(2)(A) *with* 28 U.S.C. § 2255(h)(2). The application is denied. The applicant has not made a prima facie showing under section 2255(h) of:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Any pending motions are denied as moot.

No further filings will be entertained in this case.

DENIED.

APPENDIX-B
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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DON ARTHUR WEBSTER, Jr., Defendant - Appellant.	No. 08-30311 D.C. No. 3:06-CR-00096-HRH-1 MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DON ARTHUR WEBSTER, Jr., Defendant - Appellant.	No. 09-30182 D.C. No. 3:06-CR-00096-HRH-1

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, Senior District Judge, Presiding

Argued and Submitted July 27, 2011
Anchorage, Alaska

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

APPENDIX - C
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Before: B. FLETCHER, KLEINFELD, and CALLAHAN, Circuit Judges.

Don Webster, Jr., was convicted of two counts of sex trafficking of children in violation of 18 U.S.C. § 1591; nine counts of sex trafficking by force, fraud, or coercion, also in violation of § 1591; and fourteen counts of distribution of cocaine in violation of 21 U.S.C. § 841. He was sentenced to 360 months imprisonment and ordered to pay over $3.6 million in restitution to the women victims he trafficked. Webster appeals his convictions of sex trafficking by force, fraud, or coercion, his sentence, and the restitution order. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I

Webster's challenge to his convictions of sex trafficking by force, fraud, or coercion is two-fold. First, Webster challenges the jury instruction defining "force." Second, he argues that the adult victims' testimony demonstrates voluntary participation in prostitution.

Section 1591 prohibits sex trafficking "knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion . . . , or any combination of such means will be used to cause the person to engage in a commercial sex act." The statute defines "coercion," but leaves undefined the

terms "force" and "fraud." Over Webster's objection, the district court instructed the jury that "[f]orce is defined as any form of violence, compulsion or constraint exercised upon or against a person." Webster contends that this jury instruction allowed the government to argue that Webster's practice of giving the women cocaine and then refusing to provide drugs unless the women prostituted themselves constituted "force."

Even assuming the definition of force was too broad, any error was harmless because Webster was prosecuted under alternative theories of guilt, and the evidence established that Webster would have been convicted based on coercion. *See Hedgpeth v. Pulido*, 555 U.S. 57, 61–62 (2008) (per curiam) (an instructional error arising in the context of multiple theories of guilt is subject to harmless-error analysis); *United States v. Skilling*, 130 S. Ct. 2896, 2934 n.46 (2010) (extending the holding of *Pulido*, which was a case on collateral review, to cases on direct appeal). An error is harmless if a court, after a "thorough examination of the record," is able to "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Neder v. United States*, 527 U.S. 1, 19 (1999).

The evidence shows that Webster took away the women's identification cards and cell phones and required them to follow numerous rules designed to

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ensure his control of all aspects of the women's lives. Webster enforced his rules by punishing and beating the violators himself or with the help of other women, and made sure that the other women knew about the consequences when one woman disobeyed his rules. Wendy Ross testified that she witnessed a "family meeting" called by Webster that left one woman bleeding on the floor. Jessica Houser, in addition to being beaten herself by Webster and, on Webster's orders, by other women, witnessed Webster punch another woman in the face and ribs to make "an example out of her." There are other similar stories testified to by the women and girls who worked for Webster. Additionally, Webster required that the women make themselves available to him sexually; if they declined, they risked being raped by Webster. He told some of the women that they were doing "life without parole" and that he would track them down if they dared to leave. Although some women were able to leave without interference, Webster found and dragged one woman back by her hair after she tried to escape.

The severe beatings that Webster administered, which he had the other women and girls attend and observe, would naturally cause the observers to infer that similar violence might be inflicted on them if they disobeyed any of Webster's rules. Webster's pattern of fostering an environment of fear of physical harm where violations of various rules were severely punished constituted a "scheme,

plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person . . . ." 18 U.S.C. § 1591 (e)(2)(B) (defining "coercion"). This evidence is more than sufficient to sustain a conviction for sex trafficking through the use of coercion. *United States v. Todd*, 627 F.3d 329, 334 (9th Cir. 2010). Here, any instructional error regarding the district court's definition of "force" was harmless, and we affirm Webster's convictions.

II

Next, Webster challenges his sentence. Because under the Sentencing Guidelines the base offense level for Webster's drug trafficking offenses dwarfed the levels for his sex trafficking offenses, the quantity of drugs Webster distributed to the women drove the determination of his Guidelines range. *See United States v. Culps*, 300 F.3d 1069, 1076 (9th Cir. 2002); U.S.S.G. § 2D1.1(a), (c) (2004).

The district court's determination of drug quantity is a factual issue reviewed for clear error. *United States v. Alvarez*, 358 F.3d 1194, 1231 (9th Cir. 2004). "Approximations of drug quantity must meet three criteria." *Culps*, 300 F.3d at 1076. First, "the government is required to prove the approximate quantity by a preponderance of the evidence . . . [which means that] [t]he district court must conclude that the defendant is more likely than not actually responsible for a

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quantity greater than or equal to the quantity for which the defendant is being held responsible." *Id.* (internal quotation marks and citation omitted). Second, "the information which supports an approximation must possess sufficient indicia of reliability to support its probable accuracy." *Id.* (internal quotation marks omitted). Third, since the "sentence depends in large part upon the amount of drugs . . . and approximation is by definition imprecise, the district court must err on the side of caution" in approximating the drug quantity. *Id.*

The district court determined that Webster distributed a total of 6.2 kilograms of cocaine to the underage women and 29 kilograms to the adult women. Both quantities yielded a base offense level of 34. The court then added a four-level role adjustment and a two-level multi-count adjustment to arrive at a total offense level of 40. Given Webster's criminal history category of V, this yielded an advisory Guidelines range of 360 months to life.

In determining the quantity of drugs, the district court employed a version of the accepted multiplier method: the number of weeks trafficked, times the number of days trafficked per week, times the number of sex acts per day, times the quantity of cocaine received per sex act, plus relevant conduct (other cocaine that Webster distributed to a victim). *See id.* at 1077. The method is permissible where there are sufficient indicia of reliability for each of the figures included in the

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equation. *Id.*

Webster argues the district court failed to "err on the side of caution" because it did not use the lowest figure testified to for the weight of an "issue" (the quantity of cocaine Webster gave the girls for each "date"), 0.5 grams. However, the district court based its average weight of cocaine per issue on the witnesses' testimony. The witnesses were not all in complete agreement as to the weight of an issue, but most testified an issue was about a gram, and only one witness estimated an issue was 0.5 grams. A sentencing judge may choose between equally plausible estimates when approximating drug quantities, so long as he takes the margin of error into account when doing so. *United States v. Scheele*, 231 F.3d 492, 499 (9th Cir. 2000). In *Scheele*, the district court arrived "at a quantity that was barely above the amount that would have led to a significantly lower sentencing range" — slightly over one percent above the minimum amount for a base offense level of 34. *Id.* at 499. Here, the sentencing judge noted that even if the amount actually trafficked by Webster was only half what the judge had calculated, the Guidelines range would not change. We are persuaded that in actuality, it appears that the error would have to be about 45% to affect the Guidelines range. The district court sufficiently erred on the side of caution in approximating the quantity of drugs trafficked by Webster.

III

Webster argues that the district court improperly deprived him of the constitutional right to have restitution decided by a jury. We have already rejected this argument. *See United States v. Bussell*, 414 F.3d 1048, 1060 (9th Cir. 2005). Webster's remaining arguments are that the district court erred by awarding prostitution proceeds as restitution, that restitution should be limited to the victim's actual losses, and that the district court's computation of the restitution was flawed.

We review de novo the legality of a restitution order and, if the order is within statutory bounds, we review the amount of restitution for abuse of discretion. *United States v. Kuo*, 620 F.3d 1158, 1162 (9th Cir. 2010). The statutory language is clear that mandatory restitution includes not only the victims' actual losses, but also the defendant's ill-gotten gains. *See* 18 U.S.C. § 1593(b)(3).

Webster challenges the amount of the district court's restitution order. The district court relied on a multiplier method similar to that used for the drug quantity calculation. The formula employed was as follows: the number of weeks trafficked times the average number of days worked per week times the average number of dates per day times $150—the minimum amount the victims charged for a date, not including the fees for any sex acts.

Any error in the district court's figure is more than offset by the conservative

estimate of the fee per date used to determine restitution. The court used $150 per date in determining restitution, while most of the girls testified that they regularly made substantially more per date. Three of the women testified that they regularly made between $400 and $700 per date and sometimes thousands. The district court need only "estimate, based on facts in the record," the victims' losses "with some reasonable certainty." *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007). Although there may have been some uncertainty, the district court's restitution determination met this standard.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. DON ARTHUR WEBSTER, JR., Defendant.	)	No. 3:06-cr-0096-HRH

REVISED ORDER

Motion under 28 U.S.C. § 2255

Defendant moves to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255.[1] After defendant filed his motion, the court entered an order advising defendant of his right to request counsel.[2] Defendant made no request for counsel and the court entered an order setting the briefing schedule for the instant motion.[3]

Plaintiff timely filed its response to defendant's motion.[4] As a result of the court granting defendant's request for an extension of time,[5] defendant's reply brief was due on June 24, 2013. When no reply was received by June 28, 2013, the court ruled

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[1]Docket No. 585.

[2]Order re Case Status, Docket No. 588.

[3]Docket No. 589.

[4]Docket No. 590.

[5]Docket No. 592.

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Defendant has failed to show either cause and prejudice or actual innocence. Defendant's foreign commerce, nexus issue might have been, but was not raised in defendant's direct appeal. Thus, he has procedurally defaulted on his claims in Grounds One, Two, and Three that this court lacked subject matter jurisdiction as to the plaintiff's TVPA charges. On the merits of defendant's arguments as to Grounds One, Two, and Three, this court does have subject-matter jurisdiction. As discussed in greater detail below, the TVPA does require as an element of plaintiff's TVPA charges proof of either a foreign commerce or interstate commerce nexus, but not both; and defendant does not challenge the plaintiff's evidence of an interstate commerce nexus in this case.

In Ground Four of his motion, defendant makes an ineffective assistance of counsel claim. "Constitutionally ineffective assistance of counsel constitutes sufficient cause to excuse a procedural default." Ratigan, 351 F.3d at 964-65. "Claims of ineffective assistance of counsel are governed by Strickland, which requires a petitioner to demonstrate: (1) 'that counsel's performance was deficient' and (2) 'that the deficient performance prejudiced the defense.'" Hein v. Sullivan, 601 F.3d 897, 918 (9th Cir. 2010) (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)).

Defendant contends generally that trial counsel's performance was ineffective "during the pre-trial, trial and sentencing "ect

[sic] direct appeal process[;]"[24] and in Ground Four and in his briefs asserts that:

> GROUND FOUR: Defense Counsel's failure to challenge defective indictment; Government's Non Legal Standing; Nor the court's lack of subject matter jurisdiction; Denied movant Sixth Amendment right to effective legal representation.
>
> (a) Supporting facts.... Counsel had an obligation to know (or inform itself) that the T.V.P.A. could not be lawfully applied absent required foreign nex-for [sic] the criminal prosecution of it's client.

Defendant contends that his trial counsel was ineffective because throughout the prosecution proceedings he failed to raise the foreign commerce nexus argument. This is not a viable claim of ineffective assistance of trial counsel because as a matter of law there is no foreign commerce nexus required for the TVPA violations as to which an interstate commerce nexus has been proved.

Section 1591(a) of Title 18 of the United States Code provides, in pertinent 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, or maintains by any means a person; ...
>
> ..."knowing," or 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,

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[24]Docket No. 585 at 4.

required by § 1591(a) was met by the plaintiff's proof, there was no legal requirement that plaintiff prove a foreign nexus.

Although the Ninth Circuit has never directly addressed defendant's foreign commerce argument, it has affirmed TVPA convictions that involved interstate commerce but which did not have an obvious foreign commerce nexus. See United States v. Jackson, 697 F.3d 1141 (9th Cir. 2012); United States v. Brooks, 610 F.3d 1186 (9th Cir. 2010). In this case, plaintiff showed that defendant's sex trafficking affected interstate commerce by the use of cell phones, the use of hotels that host out-of-state travelers, and the use of condoms produced outside the state. That showing was sufficient to satisfy the jurisdictional element of a TVPA violation. See United States v. Evans, 476 F.3d 1176, 1179-80 (11th Cir. 2007) ("Evans's use of hotels that served interstate travelers and distribution of condoms that traveled in interstate commerce are further evidence that Evans's conduct substantially affected interstate commerce").

Conclusion

Defendant's foreign commerce contentions, including his subject matter jurisdiction argument, all fail for purposes of defendant's Grounds One, Two, and Three. Defendant's ineffective assistance claim in Ground Four based upon counsel's failure to raise an argument that a TVPA violation requires a foreign commerce nexus also fails because defendant's trial and appellate counsel cannot be faulted for failing to mount meritless challenges.

Defendant's motion pursuant to 28 U.S.C. § 2255[29] is denied.

DATED at Anchorage, Alaska, this 19th day of September, 2013.

/s/ H. Russel Holland
United States District Judge

[29]Docket No. 585.

Additional material from this filing is available in the Clerk's Office.