#C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1631

UNITED STATES OF AMERICA

v.

KEVINO GRAHAM,
Appellant

(E.D. Pa. Crim. No. 2-14-cr-00623-001)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ *Peter J. Phipps*
Circuit Judge

Date: December 14, 2020
Lmr/cc: Michelle Morgan
Kevino Graham

#A

ALD-305 **September 17, 2020**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **20-1631**

UNITED STATES OF AMERICA

VS.

KEVINO GRAHAM, Appellant

(E.D. Pa. Crim. No. 2:14-cr-00623-001)

Present: MCKEE, SHWARTZ, and PHIPPS, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,
Clerk

ORDER

The foregoing request for a certificate of appealability is denied. Appellant has failed to make a "substantial showing of the denial of a constitutional right" as to any of his claims. See 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). For substantially the same reasons as those given by the District Court, reasonable jurists would not find debatable or wrong the District Court's rejection of Appellant's ineffective assistance of counsel claims. See 28 U.S.C. § 2253(c)(2); Strickland v. Washington, 466 U.S. 668, 687 (1984); Werts v. Vaughn, 228 F.3d 178, 203 (3d Cir. 2000) ("[C]ounsel cannot be deemed ineffective for failing to raise a meritless claim.").

By the Court,

s/ Peter J. Phipps
Circuit Judge

Dated: October 23, 2020
tmm/kr/cc: Kevino Graham
Michelle Morgan, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

#B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :

v. : CRIMINAL ACTION NO. 14-623-1

KEVINO GRAHAM
Defendant.

MEMORANDUM

Jones, II J. **February 21, 2020**

I. Introduction

In response to a conviction on three Counts of sex trafficking and/or attempt to do so, Defendant Kevino Graham brings the instant Petition for habeas relief pursuant to 28 U.S.C. § 2255. For the reasons set forth below, said Petition shall be denied.

II. History

On November 20, 2014, Kevino Graham and two co-defendants were charged by Indictment with two counts of sex trafficking, attempt, and aiding and abetting. (ECF No. 1.) On January 22, 2015, a Superseding Indictment was filed, adding another count for the same offenses, involving a third victim. Finally, on June 18, 2015, a Second Superseding Indictment was filed, adding a third co-defendant to the list of alleged offenders contained within Count I. The case was designated as "complex" and placed on a special case management schedule, with jury selection to ultimately commence on January 25, 2016.

Upon his indictment, Mr. Graham retained the legal services of a private attorney. Not long afterwards, he complained to the court that he was not satisfied with counsel's representation

and could no longer afford to pay for legal services. Accordingly, this Court appointed a new attorney. However, this would only be the beginning of Mr. Graham's resolute discontent with attorneys, the court, and the judicial process in general. In all, four different attorneys represented him throughout the course of this matter, including Mr. Kenneth Edelin, who was appointed as standby counsel when Mr. Graham insisted on representing himself at trial. Shortly thereafter, Mr. Graham conceded that he required assistance and Mr. Edelman was appointed as trial counsel. Upon conclusion of a ten (10)-day trial, Mr. Graham was found guilty on all counts. Expressing once again his dissatisfaction with counsel, several statuses were held to discuss the manner in which the case would proceed. A *Peppers*[1] colloquy was ultimately administered and Mr. Edelin was permitted to withdraw from the case so that Mr. Graham could represent himself, as he so vehemently desired. After numerous issues regarding access to documents pertaining to his case were addressed by the court, Mr. Graham filed a motions for post-trial relief pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure. Said Motions were denied and the matter was scheduled for sentencing. However, Defendant filed a Notice of Appeal to this Court's Order denying his Rule 33 Motion. (ECF No. 418.) Said Appeal was ultimately dismissed for Defendant's failure to file a brief. (ECF No. 437.) Defendant then filed a Notice of Appeal to the Judgment and Commitment Order entered by this Court. (ECF No. 449.) Again, said Appeal was dismissed by the Third Circuit, this time on the basis of untimeliness. (ECF No. 459.) The instant Motion, with subsequent amendment thereto, followed. (ECF No. 460, 464.)

---

[1] *See United States v. Peppers*, 302 F.3d 120 (3d Cir. 2002) (discussing the nature of the colloquy that should be administered by the court when a criminal defendant expresses his or her dissatisfaction with counsel and wishes to proceed pro se).

III. Standard of Review

A Motion to Vacate, Set Aside, and/or Correct Sentence under 28 U.S.C. § 2255 may be granted when "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[.]" 28 U.S.C. § 2255(a). However, § 2255 contains a one-year statute of limitations, which starts from the latest of:

> (1) the date on which the judgment of conviction becomes final;
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. §2255(f)(1)-(4).

When assessing a § 2255 Motion, a *pro se* habeas petition and any supporting submissions must be construed liberally and with a measure of tolerance. *Lewis v. Attorney General*, 878 F.2d 714, 721-22 (3d Cir. 1989). The court must grant an evidentiary hearing if the records in the case are "inconclusive on the issue of whether movant is entitled to relief." *United States v. McCoy*, 410 F.3d 124, 131 (3d Cir. 2005) (citing *Solis v. United States*, 252 F.3d 289, 294-95 (3d Cir. 2001)). "The standard governing...requests [for evidentiary hearings] establishes a reasonably low threshold for habeas petitioners to meet." *Id.* (quoting *Phillips v. Woodford*, 267 F.3d 966, 973 (9th Cir. 2001)). A § 2255 Motion "can be dismissed without a hearing [only] if (1) the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or (2) the

allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *United States v. McCoy*, 410 F.3d at 134 (quoting *Engelen v. United States*, 68 F.3d 238, 240 (8th Cir. 1995)).

IV. Discussion

Mr. Graham presents six (6) grounds for review by this Court, all of which allege ineffectiveness by trial counsel for: (1) failure to challenge 18 U.S.C. § 1591(a) as unconstitutionally vague; (2) failure to object to the jury instructions and for not requesting a unanimity instruction on the first element of 18 U.S.C. § 1591(a) for all three Counts of the Second Superseding Indictment; (3) failure to move for judgment of acquittal on Count 3 of the Second Superseding Indictment when the government failed to prove interstate commerce was "affected" by his conduct; (4) failure to move to dismiss the Second Superseding Indictment with regard to Person 2's non-minor status; (5) failure to object to the jury instruction regarding 18 U.S.C. § 1591(b)(1); and, (6) failure to challenge the Indictment as *ex post facto* based upon the government's reliance on advertisements. (ECF No. 464.)

A. Effectiveness Standard

The Sixth Amendment right to counsel "is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). To prove that counsel was ineffective, Petitioner must establish that: (1) counsel's performance was constitutionally deficient; and (2) that deficiency prejudiced Petitioner. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance "requires showing that counsel made errors so serious that he or she was not functioning as the 'counsel guaranteed to the defendant by the Sixth Amendment.'" *Id.* In essence, Petitioner must show that "counsel's representation fell below an objective standard of

reasonableness" under prevailing professional norms. *Id.* at 688. Petitioner must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Id.* at 690 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Prejudice requires showing that counsel's errors were serious enough to deprive the defendant of a fair trial. *Id.* at 687.

B. 18 U.S.C. § 1591

Defendant Graham was charged with violations of 18 U.S.C. § 1591, which—at the time of the charged offenses—provided as follows:

> § 1591. Sex trafficking of children or by force, fraud, or coercion
> (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; 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 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).

18 U.S.C.S. § 1591(a) (2008).

i. Failure to Challenge 18 U.S.C. § 1591(a) as Unconstitutionally Vague

Petitioner first asserts that Section 1591(a) is unconstitutionally vague because of the alleged "uncertainty as to whether the statute defines one offense or multiple offenses." (ECF No. 464 at 11); *see also* ECF No. 469 at 1-7.

A plain reading of Section 1591(a) reveals no such ambiguity. Petitioner has been challenging the constitutionality of Section 1591(a) since first being charged with same because

he refuses to acknowledge the "either/or" language provided therein. There was never any assertion that this matter involved minors, yet Petitioner's constitutional challenge necessarily rests on that particular section of the statute. The portion of the statute that applies to Petitioner clearly delineates the circumstances under which he could be held accountable. For the reasons set forth in this Court's prior ruling on the matter, said issue is without merit. *See* ECF No. 183 n.1. Inasmuch as Section 1591 is not unconstitutionally vague, counsel cannot be deemed ineffective fore failing to raise a duplicitous and meritless objection.

ii. Unanimity Instruction

Petitioner next argues trial counsel was ineffective "for failing to object to jury instructions and for not requesting unanimity insurction [sic] on the first element of all three counts." (ECF No. 464 at 16.) Specifically, Petitioner argues counsel "failed to object to the jury instructions in relation to the combining of venture trafficking and individual trafficking into one element and his "Sixth Amendment right to a unanimous jury verdict was violated when the District Court's instructions on the first element collapsed both venture trafficking . . . and individual trafficking . . . into one element." " (ECF No. 464 at 16-17) (internal citations omitted); *see also* ECF No. 469 at 7.

At the time this Court was to charge the jury in this case, there was no Third Circuit model instruction in existence. The language of those portions of the instructions to which Defendant now objects were agreed upon by all counsel after lengthy discussion at a charging conference held by this Court. (Trial Tr. 2/3/16 at 23-30, 39.) With that said, this Court instructed the jury in

pertinent part as follows:[2]

> I am going to talk about the elements of the offenses at this time, beginning with "knowingly." The offenses of sex trafficking in the second superseding indictment require that the Government prove that each defendant acted knowingly with respect to certain elements of the offenses. This means that the Government must prove beyond a reasonable doubt that a defendant was conscious and aware of the nature of his actions and of the surrounding facts and circumstances as specified in the definition of the offenses charged. In deciding whether a defendant acted knowingly, you may consider evidence about what the defendant said, what the defendant did and failed to do, how the defendant acted, and all of the other facts and circumstances shown by the evidence that may prove what was in the defendant's mind at that time. The Government is not required to prove that the defendant knew his acts were against the law. The offenses of attempt charged in the indictment requires that the Government prove that each individual defendant acted intentionally, meaning "with intent," with respect to certain elements of the offenses. This means that the Government must prove beyond a reasonable doubt that -- either that it was Mr. Graham's or Mr. Robinson's or both's conscious desire or purpose to act in a certain way or to cause a certain result, or that either or both knew that he was acting in that way or would be practically certain to cause that result. In deciding whether either or both acted intentionally -- again, meaning intent, you may consider evidence about what either or both said, what he failed to do, or how he acted, and all other facts and circumstances shown by the evidence that may prove what was in Mr. Graham's mind at that time, and what was in Mr. Robinson's mind at that time.
>
> Motive. Motive is not an element of the offenses with which the defendants are charged. Proof of bad motive is not required to convict. Further, proof of bad motive alone does not establish that a defendant is guilty, and proof of good motive alone does not establish that a defendant is not guilty. Evidence of a defendant's motive may, however, help you find that defendant's intent. Intent and motive are different concepts. Motive is what prompts a person to act. Intent refers only to the state of mind with which a particular act is done. Personal advancement and financial gain, for example, are motives for much of human conduct. However, these motives may prompt one person to intentionally do something perfectly acceptable, while prompting another person to intentionally do an act that is a crime.

(Trial Tr. 2/4/16 at 124-126.)

---

[2] Although lengthy at times, this Court will be setting forth verbatim portions of the transcript as they relate to Petitioner's claims, as said claims rely on carefully chosen excerpts from the record which Petitioner has presented out of context.

* * * *

Before I discuss the elements of the offenses charged in the second superseding indictment, I want to instruct you in the meaning of the word "and" when it is used in statutes or indictments. It is not uncommon that a given criminal statute will prohibit not merely one form of action, but several related forms of action in what lawyers call "the disjunctive," that is, separated by the word "or." For example, the sex trafficking statute which is found in the law in Title 18, United States Code, Section 1591(a) prohibits certain conduct involving knowingly recruiting, enticing, harboring, transporting, providing, obtaining or maintaining by any means a person or benefitting financially or by receiving anything of value from a venture that engages in such an act. This statute prohibits eight different actions: recruiting, enticing, harboring, transporting, providing, obtaining and maintaining the person and benefitting financially or by receiving anything of value. All eight of these crimes are separated by the word "or" within the statute, yet when you look at the second superseding indictment, it is permissible for the Government to charge all eight and separate them with the word "and." This, however, does not mean that if the Government does so, it must prove that the defendant violated the sex trafficking statute in all eight ways. If only one of those alternatives is proved to beyond a reasonable doubt, that is sufficient for a conviction. Thus, for example, if the evidence proves that a defendant harbored a person, it is irrelevant whether or not he also transported that person.

* * * *

The first element of the offense which the Government must prove beyond a reasonable doubt may be proved in one of two ways. First, the Government may prove beyond a reasonable doubt that a defendant knowingly transported or recruited or enticed or harbored or provided or obtained or maintained the victim by any means. Now, to "harbor" someone means simply to provide shelter to that person. To "obtain" someone means to acquire, control or possess that person, even if only for a short period of time. I have already described for you to do an act knowingly. ***The first element of the offense may also be proved a second way, which is if the Government proves beyond a reasonable doubt that the defendant benefitted financially or by receiving anything of value from participation in a venture which recruited, enticed, harbored, transported, provided, obtained or maintained the victim by any means. The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity. <u>If the Government proves beyond a reasonable doubt that a defendant benefitted financially or by receiving anything of value from his participation in such a venture, the Government need not prove that a defendant himself recruited, enticed, harbored, transported, provided, obtained or maintained the victim</u>.***

(Trial Tr. 2/4/16 at 131-132) (emphasis added).

The charge given to the jury in no way "collapsed both venture trafficking . . . and individual trafficking . . . into one element" as Petitioner so contends. Again, when read in context with the court's instruction to the jury regarding the statute's use of the words "and" and "or," that portion of the charge dealing with venture versus individual participation was wholly proper. As such, counsel cannot be deemed ineffective for failing to object to this instruction.

With respect to his unanimity instruction claim,

> "'[T]he unanimity rule . . . requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged.' It follows that the proper focus of our unanimity analysis is on the defendant's conduct, i.e., defendant's performance of culpable acts. ***We have never required that jurors be in complete agreement as to the collateral or underlying facts which relate to the manner in which the culpable conduct was undertaken.***

United States v. Jackson, 879 F.2d 85, 88 (3d Cir. 1989) (emphasis added); *see also United States v. Gonzalez,* 905 F.3d 165, 185 (3d Cir. 2018) (same).

In this case, there was no requirement that the jurors' decisions be unanimous regarding the *means* by which each defendant committed a violation of Section 1591—only that the statutory elements were satisfied by *any* of the alternative means. Accordingly, counsel cannot be deemed ineffective for failing to request a unanimity charge and Petitioner's claim is without merit.

iii. Failure to Move for Judgment of Acquittal on Count III for Government's Failure to Prove Interstate Commerce Element

Petitioner next asserts that trial counsel was ineffective for "failing to move for judgment of acquittal on Count 3 when the Government failed to prove an affect on interstate commerce." (ECF No. 464 at 21); *see also* ECF No. 469 at 8-9.

Inasmuch as this Court has already determined that the evidence against Petitioner was sufficient to convict on all Counts and specifically addressed the issue of affecting interstate commerce, the same discussion shall not be repeated here. (ECF No. 410 at 6.) The issue is without merit, therefore counsel cannot be deemed ineffective.

iv. Failure to Move for Dismissal of the Second Superseding Indictment

Petitioner's next allegation of error is that counsel "was ineffective for failing to move to dismiss the Second Superseding Indictment when the Government misled the Grand Jury into believing that Person 2 in Count 2 was a minor. Then [sic] during trial introduced an adult as Person 2." (ECF No. 464 at 23); *see also* ECF No. 469 at 10-12.

Count Two of the Second Superseding Indictment speaks for itself:

> THE GRAND JURY FURTHER CHARGES THAT:
>
> 7. The allegations of Paragraphs 1 through 6 of Count One are incorporated by reference.
>
> 8. Between on or about September 1, 2011, through on or about January 31, 2012, in the Eastern District of Pennsylvania and elsewhere, defendants
>
> KEVINO GRAHAM,
> BRIAN WRIGHT, and
> RENATO TEIXEIRA
>
> in and affecting interstate commerce, knowingly recruited, enticed, harbored, transported, provided, obtained, and maintained Person 2, whose identity is known to the Grand Jury, and benefitted financially from participation in a venture which engaged in the knowing attempted recruitment, enticement, harboring, transporting, providing, obtaining, and maintaining of Person 2, attempted to do so, and aided and abetted the same. At the time that defendants did this, they knew and acted in reckless disregard of the fact that means of force, threats of force, fraud, coercion, and any combination of such means would be used to cause Person 2 to engage in a commercial sex act.
>
> In violation of Title 18, United States Code, Sections 1591 and 1594(a) and

2.

(ECF No. 85 at 3.)

The above reflects the findings of the Grand Jury. Nothing therein refers to a minor. There was no evidence presented at trial to show Person 2 was a minor. Nothing in the charge to the jury referenced the existence of a minor. Defendant was clearly put on notice of the charges against him with regard to Person 2 and counsel cannot be deemed ineffective for failing to seek dismissal of the Second Superseding Indictment.

v. Sufficiency of Instruction Regarding Force, Threats of Force, Fraud or Coercion

Petitioner next claims counsel was ineffective "for failing to object to the jury instructions when it [sic] omitted requiring a finding by the Jury that the 'offense was affected by means of force, threats of force, fraud, or coercion' as is required by the language of 18 U.S.C. § 1591(b)(1), thereby resulting in a violation of Petitioner's Sixth and Fifth Amendment Rights." (ECF No. 464 at 26) (emphasis in original); *see also* ECF No. 468 at 13-14.

Again, that portion of the record containing this Court's charge speaks for itself:

> Counts 1 through 3 of the second superseding indictment charge sex trafficking and attempting to commit sex trafficking by force, threats of force, fraud, coercion or any combination of such means. Sex trafficking is a violation of Section 1591 of Title 18 of the United States Code. That section provides as follows. "Whoever knowingly, 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 person -- by any means a person; or benefits, financially or by receiving anything of value from participation in a venture which has engaged in an act just described; knowing or in reckless disregard of the fact that means of force, threats of force, fraud or coercion or any combination of such means will be used to cause the person to engage in a commercial sex act shall be guilty of a crime." That's the definition. Thus, it is a Federal crime for anyone in or affecting commerce either to recruit, entice, harbor, transport, provide, obtain or maintain by any means a person or to benefit financially or by receiving anything of value for participation in a venture which

recruited, enticed, harbored, transported, provided, obtained or maintained by any means a person, 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, or to attempt to do so. In order to prove a defendant guilty of sex trafficking, the Government must prove each of the following elements beyond a reasonable doubt. First, either that the defendant knowingly transported or recruited or enticed or harbored or provided or obtained or maintained a person by any means, or that the defendant benefitted financially or by receiving anything of value for participation in a venture which recruited, enticed, harbored, transported, provided, obtained or maintained by any means a person. Second, that the defendant committed such act knowing or in reckless disregard of the fact that means of force, threats of force, fraud, coercion or any combination of such means would be used to cause the person to engage in a commercial sex act. Third, that the defendant's conduct was in or affecting interstate or foreign commerce. The first element of the offense which the Government must prove beyond a reasonable doubt may be proved in one of two ways. First, the Government may prove beyond a reasonable doubt that a defendant knowingly transported or recruited or enticed or harbored or provided or obtained or maintained the victim by any means. Now, to "harbor" someone means simply to provide shelter to that person. To "obtain" someone means to acquire, control or possess that person, even if only for a short period of time. I have already described for you to do an act knowingly. The first element of the offense may also be proved a second way, which is if the Government proves beyond a reasonable doubt that the defendant benefitted financially or by receiving anything of value from participation in a venture which recruited, enticed, harbored, transported, provided, obtained or maintained the victim by any means. The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity. If the Government proves beyond a reasonable doubt that a defendant benefitted financially or by receiving anything of value from his participation in such a venture, the Government need not prove that a defendant himself recruited, enticed, harbored, transported, provided, obtained or maintained the victim. The second element of the offense which the Government must prove beyond a reasonable doubt is that the defendant knew or was in reckless disregard of the fact that force, threats of force, fraud, coercion or any combination of such means would be used to cause the person to engage in a commercial sex act. "Fraud," as I've just used that term, means that a defendant knowingly made a misstatement or omission of a material fact to entice the victim. A "material fact" is one which would reasonably be expected to be of concern to a reasonable person in relying upon the representation or statement made in making a decision. "Coercion," as I've just used that term, means a threat of serious harm or physical restraint against a person or any 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 a person. A "threat" is a serious statement expressing an intention to inflict harm at once or in the future as distinguished from idle or careless talk,

exaggeration or something said in a joking manner. A statement is a threat ***if it was made*** under such circumstances that a reasonable person hearing the statement would understand it as a serious expression of intent to cause harm or a reasonable person making the statement would foresee that the recipient would understand it as a serious expression of intent to cause harm. The term "serious harm" includes both physical and non-physical types of harm including psychological, financial or reputational harm that is sufficient under all of the surrounding circumstances to compel a person -- a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring the harm. ***In determining whether the defendant or either defendant made a threat of serious harm that could reasonably be believed by the victim,*** you should consider the victim's particular station in life, physical and mental condition, age, education, training, experience and intelligence. A threat of serious harm must be sufficient in kind or degree to completely overcome the will of an ordinary person having the same general station in life as that of the victim, causing a reasonable belief that there was no reasonable choice except to engage in a commercial sex act as directed by either defendant or both. "Coercion," as I've just used that term, also means that a ***defendant engaged*** in a course of behavior intended to cause the victim to believe that if he or she did not engage in a commercial sex act as directed by a defendant, that the victim or her family would suffer serious harm. To satisfy this element, ***the Government must prove that force, fraud, coercion as I've just defined those terms, was used*** and also that ***a defendant knew or was in reckless disregard of the fact*** that it would be used to cause the person to engage in a commercial sex act. Whether or not a defendant had this knowledge is a question of fact to be determined by you on the basis of all of the evidence. I've already explained what it means to do something knowingly. ***If you find that the evidence establishes beyond a reasonable doubt that a defendant acted, actually knew that force, fraud or coercion would be used, then this element is satisfied. If the evidence does not establish actual knowledge, this element is satisfied if you find that the Government has proved beyond a reasonable doubt that a defendant acted with reckless disregard of the facts concerning the use of force, fraud or coercion***. The phrase "reckless disregard of the facts" means deliberate indifference to facts which if considered and weighed in a reasonable manner indicate the highest probability that force, threats of force, fraud or coercion would be used to cause the victim to engage in a commercial sex act. A "commercial sex act" is any sex act on account of which anything of value is given to, or received by, any person. The third element which the Government must prove beyond a reasonable doubt is that a defendant's conduct was in or affecting interstate commerce. "Interstate commerce" simply means the movement of goods, services, money and individuals between any two or more states, between one state and the District of Columbia, or between a state and a United States territory or possession. To satisfy this element, the Government must prove that the defendant's conduct affected interstate commerce in any way, no matter how minimal. You do not have to find that a defendant's

> conduct actually affected interstate commerce if you find that the defendant's conduct would have affected interstate commerce if the defendant had successfully and fully completed his actions. Finally, the Government is not required to prove that the defendant knew he was affecting interstate commerce. Using a facility of interstate commerce affects interstate commerce. A facility of interstate commerce is something, tool, device, that is involved in interstate commerce such a bridges, roads, telephone network and the internet for all facilities of interstate commerce.

(Trial Tr. 2/4/16 at 130-136) (emphasis added).

Petitioner claims the instructions to the jury only required a finding of knowledge or reckless disregard of the fact that means of force, threats of force, fraud or coercion or any combination of such means *will be used* to cause the person to engage in a commercial sex act but did not require the jury to find any of these means *actually were used.* (ECF No. 464 at 27.) As such, he claims imposition of the mandatory minimum sentence set forth in 18 U.S.C. § 1591(b) was improper. In support of same, Defendant relies upon *United States v. Williams*, 428 F. App'x 134 (3d Cir. 2011), wherein Williams was facing numerous charges, including conspiracy and sex trafficking of both "adolescent girls and young women" under 18 U.S.C. § 1591(a). *Id.* at 136. It was determined that because "the verdict slip only asked the jury to find, under Count Eight, whether he was guilty of 'Sex Trafficking of Children or by Force, Fraud, or Coercion[,]' the manifest inconsistency between the statutory language, the verdict slip, the indictment (incorporated by reference into the former), and the District Court's instructions to the jury [made] it impossible to ensure that the jury did not determine that Williams was guilty of an offense that could merit only up to 40 years' imprisonment." *Id* at 143. Such is not the case here. Importantly, the instant matter did not involve a conspiracy or any charge of sex trafficking anyone under the age of 18. Therefore, unlike the situation in *Williams*, the only question for the jury in Defendant Graham's case was whether he personally utilized "force, threats of force, fraud

or coercion or any combination of such means." The jury was properly instructed and ultimately determined that Petitioner "engaged in acts of physical violence to maintain the participation of females in his prostitution business," as charged in the Second Superseding Indictment. (ECF Nos. 85, 235.) Petitioner's reliance on one small portion of the charge taken out of context in conjunction with a case that is wholly distinguishable on the facts, does not support his claim of ineffectiveness. When read *in toto*, the extensive record, in conjunction with the court's charge to the jury, the Second Superseding Indictment, and the Jury Verdict Slip, all unambiguously demonstrate that the mandatory sentence set forth in Section 1591(b) was properly applied. Accordingly, counsel cannot be deemed ineffective and Petitioner's fifth issue is without merit.

vi. Use of Advertising

Petitioner's final issue pertains to counsel's alleged ineffectiveness for failing "to challenge the indictment for being in violation of ex post facto [sic], due to the Government's use of Advertise as the conduct that was in or affecting interstate commerce, when Advertise only became a method of affecting commerce in 1591(a) after the alleged behavior in Petitioner's case." (ECF No. 464 at 29) (emphasis in original); *see also* ECF No. 469 at 15-16.

For the time period during which Petitioner was charged with sex trafficking, advertisement was not an enumerated means by which the second element of Section 1591 could be proved. Instead, recruiting, enticing, harboring, transporting, providing, obtaining, ***or*** maintaining "by any means" was the standard. To show Petitioner "provided" Persons 1, 2 and 3 to paying customers for purposes of engaging in commercial sex acts, the government utilized information taken from online advertisements. *See e.g.* Trial Tr. 1/27/16 at 127:20-22 ("[T]he guys were going to the [web]site and they would pick the girls sometimes off the site and make

dates through that way. Or they would call."). The government further demonstrated that Defendant provided the girls to customers in several other ways. For example, customers could pay a daily fee and Defendant would provide them with a girl and a bed at the Warren Street house. (Trial Tr. 1/29/16 at 63:20-22.) They could pay a flat fee and Defendant would allow them to "have sexual encounters with every girl[.]" (Trial Tr. 1/29/16 at 72:17-20.) Customers could also pay extra for an "out call," in which Defendant would have the girl meet the customer at their desired location. (Trial Tr. 1/29/16 at 66:9-13.) Regardless of any advertising, the government presented overwhelming evidence to show how Kevino Graham "provided" the victims to customers in exchange for money.

The government also used the online advertisements to establish an affect on interstate commerce, which was wholly permissible. *See United States v. Baston*, 818 F.3d 651, 664 (11th Cir. 2016) (noting that "[t]he phrase 'in commerce' refers to the 'channels' and the 'instrumentalities' of interstate commerce" and concluding that evidence of the defendant's communication by phone to further his business, as well as text messaging and advertising of services on Backpage.com, was sufficient to satisfy this element of Section 1591) (citations omitted); *see also* ECF No. 410 at 6.

Review of the specific Counts set forth in the Second Superseding Indictment do not mention the word "advertise," nor did this Court's instruction. Accordingly, there was no *ex post facto* violation and trial counsel cannot be deemed ineffective for not trying to create one.