

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH GRAHAM,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Title 18, Section 1591(a)(1) defines in relevant part as a felony where anyone:

knowingly ... recruits, entices, harbors, transports, provides, obtains, or maintains, by any means a person... knowing, or, in reckless disregard... that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act

Section 1591 (c) provides also that:

(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, or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years.

Should this Court resolve a direct conflict with decisions of the Fifth and Ninth Circuits, presented by the holding of the court of appeals below that charging the jury as to the “reasonable opportunity to observe” theory in Section 1591(c) when no such charge was contained in the indictment, did not constructively amend the indictment because it merely presented an “alternative theory” to the charge that was in the indictment? Should this Court further resolve lingering questions left unclarified since *Stirone v. United States*, 361 U.S. 212, 216 (1960) whether any prejudice must be shown on a constructive amendment of the indictment claim?

2. Title 18, Section 3509(b)(1)(B), provides in part that a “court may order that the testimony of [a] child be taken by closed-circuit television ... if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

- (i) The child is unable to testify because of fear.
- (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.

* * *

Should this Court resolve the conflict in approach between the court of appeals, apparently, with all other federal courts to address this situation, where a child witness was allowed to testify by closed-circuit television on the basis of an expert report *without testimony* that she would suffer “specific psychiatric trauma” on the ground that subsection (i) concerning fear, and not mandating expert testimony, could apply in lieu of subsection (ii) concerning “emotion trauma” that must be “established by expert testimony”?

STATEMENT PURSUANT TO RULE 14.1(b) AND RULE 29.6

The names of all parties to this petition appear in the caption of the case on the cover page. The parties have no parent or subsidiary companies and do not issue stock.

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OPINIONS BELOW

The September 5, 2017 summary order of the court of appeals affirming the judgment of the district court may be found at *United States v. Graham*, 707 Fed.Appx.23 (2d Cir. 2017), and is reproduced at Appendix A. The November 28, 2017 order denying the petition for rehearing is reproduced at Appendix B. *United States v. Graham*, 15-3703 (2d Cir. November 28, 2017). A January 11, 2013 decision from the bench of the district court allowing a government witness to testify by closed circuit television is reproduced at Appendix C. *United States v. Graham*, 12-CR-311 (W.D.N.Y. Jan. 11, 2013).

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2017.

App. A. The order denying the petition for rehearing was entered on November 28, 2017. App. B. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases [involving inapplicable exceptions]

2. The Sixth Amendment to the United States Constitution provides in part:

In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...

3. At all relevant times, 18 U.S.C. § 1591 (2008) provided in pertinent part:

(a) Whoever knowingly--

(1) in or affecting interstate or foreign commerce..., 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).

* * *

(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, or maintained, the Government need not prove that the defendant knew that the person had not attained the age of 18 years.

* * *

(e) In this section:

* * *

(5) The term “venture” means any group of two or more individuals associated in fact, whether or not a legal entity.¹

4. At all relevant times, 18 U.S.C. § 3509(b)(1)(B)(2009), provided in pertinent part that a “court may order that the testimony of [a] child be taken by closed-circuit television ... if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

- (i) The child is unable to testify because of fear.
- (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.
- (iii) The child suffers a mental or other infirmity.
- (iv) Conduct by the defendant or defense counsel causes the child to be unable to continue testifying

¹ This is the version of the statute in force since 2008 at the time of the charges and trial below. Amendments not material to this petition were made by congress in 2015. Pub.L. 114-22, Title I, §§ 108(a), 118(b), May 29, 2015, 129 Stat. 238, 247.

STATEMENT OF THE CASE

A. District Court Proceedings

1. Defendant was charged in the Western District of New York with three violations of 18 U.S.C. § 1591(a). Generally, Section 1591(a) prohibits promotion of prostitution where the defendant knows or recklessly disregards that the prostitute will be caused to engage in commercial sex acts through (i) force fraud or coercion or (ii) is under the age of 18. Two forms of promotion of prostitution under these circumstances are prohibited: (i) where the defendant “recruits, entices, harbors, transports, provides, obtains, or maintains” the prostitute as prohibited by subsection (a)(1); (ii) where the defendant “benefits, financially or by receiving anything of value, from participation in a venture” involving such prostitution as prohibited by subsection (a)(2).

With respect to underage victims, the statute allows an alternative theory in subsection (c) whereby in a prosecution under subsection (a)(1) charging that the defendant actually recruited, enticed, etc. the victim, the government can show that “defendant had a reasonable opportunity to observe” the victim, rather than show that defendant knew or recklessly disregarded that the victim was under 18. (This theory is not available under subsection (a)(2) where the defendant is alleged to have benefitted from a venture that recruited the victim.) The indictment in this case, did not, however, make any allegations under that theory, nor did it cite subsection (c).

Count One charged that defendant recruited Victim One (under subsection

(a)(1)), or benefitted from a venture that recruited her (under subsection (a)(2)), knowing or in reckless disregard that she would be caused to engage in prostitution through force, fraud or coercion. Count Two charged that defendant recruited (or benefitted from a venture that recruited) Victim Two knowing or in reckless disregard that she would be caused to engage in prostitution, though force, fraud or coercion, or that she was less than 18 at the time. Count Three charged that defendant recruited (or benefitted from a venture that recruited) Victim Three to engage in prostitution with knowledge or reckless disregard that she was less than 18 at the time. Second Circuit Appendix (hereafter, “A__”) at A29-32.

2. Each of the three alleged victims testified at trial along with law enforcement and other witnesses. The testimony of Victim Three, who was 16 during the events in question and 17 at the time of trial, was of particular note. On motion by the government, the district court permitted her to testify by closed circuit television on the basis of her fear of defendant. App.C. The indictment did not charge nor did the proof at trial establish any violence towards her. At a voir dire hearing (A116-18/154-61), she was unable to articulate any specific threat made or presented by Graham but claimed to generally fear retribution. Her basis was that he was “not a very good man. I don’t know. I just know by being next to him. He’s very sneaky and he plot some plans a lot, I guess you could say.”

A117/159.

In granting the motion to allow her to testify remotely, the district court relied on her testimony as well as a sealed report of a psychiatrist who was not

called to testify. The court stated that it was not relying on 18 U.S.C. § 3509(b)(1)(B(ii) which allows closed circuit testimony of a child where there is a “substantial likelihood” that the child would “suffer emotional trauma from testifying” but this must be “established by expert *testimony*.” *Id.* (emphasis added). App.C. at 4. Instead the court used the report to support its conclusion under subsection (i) which allows such testimony where “the child is unable to testify because of fear.”²

3. With respect to Counts Two and Three which both involved victims under 18, although the indictment did not charge the theory under Section 1591(c) that “defendant had a reasonable opportunity to observe” the victim, rather than show that defendant knew or recklessly disregarded that the victim was under 18, the jury was charged as to this theory in any event.

The jury returned guilty verdicts on all three counts and returned a special verdict accepting all charged theories. With respect to the charges involving minors, Counts Two and Three, the jury found that defendant (A) recruited, enticed, harbored, etc. a victim under 18, with a “reasonable opportunity to observe” her and (B) participated in a financial venture knowing or in reckless disregard that the victim was under 18. With respect to the coercion charges, Counts One and Two, the jury that defendant both (A) recruited, enticed, harbored, etc. and (B)

² It is noteworthy that, much more so than the other victims, Victim Three’s credibility was vigorously disputed due to evasiveness on the witness stand as well as dubious testimony claiming that defendant promoted her prostitution at a hotel where defendant was not present and she was in the company of another man the hotel itself considered to be a pimp. A215-16/40-42. In short, the witness who was permitted to testify remotely was the witness whose credibility was most disputed.

participated in a financial venture, knowing or in reckless disregard that force, fraud or coercion would be used to cause her to engage in a commercial sex act.

B. Decision of the Court of Appeals

The court of appeals affirmed in a 13-page summary order on September 5, 2017. App.A. Only those aspects of the decision relevant to this petition are described here.

1. The court rejected petitioner's claims as to Counts Two and Three that the indictment was constructively amended when the jury was charged under Section 1591(c) that it could convict because "defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored,...[and] need not prove that the defendant knew that the person had not attained the age of 18 years." Notwithstanding decisions of the Fifth and Ninth Circuit finding constructive amendment of the indictment on this very issue, the court of appeals rejected this argument, concluding that "Subsection (c), however, does not state a separate offense; it expressly refers to 'prosecution[s] under subsection (a)(1)' and it provides 'an alternative to proving any mens rea with regard to the defendant's awareness of the victim's age.'" App.A at 6-7. Alternatively, the court of appeals held that there was no prejudice "because the jury returned separate guilty verdicts under both subsections (a)(1) and (a)(2)" and "thus necessarily found that Graham knew or recklessly disregarded his victims' respective ages (which is necessary under (a)(2))." App.A at 7.³

³ It is relevant to the constructive amendment claim that the court of appeals declined to decide whether the evidence was sufficient to establish whether petitioner participated in a "venture" under

2. The court of appeals deemed petitioner’s claim that the district court abused its discretion in allowing Victim Three to testify by closed circuit camera, “such a close case,” App.A at 11 and acknowledged that her statements that she was afraid of testifying “may fail to meet our demanding constitutional standard absent specific indicia of the emotional trauma the child witness would experience ‘not by [testimony in] in the courtroom generally, but by the presence of the defendant.’” App.A at 10 (quoting *Maryland v. Craig*, 497 U.S. 836, 856 (1990)). However, the court found the balance tipped by the sealed psychiatric assessment “that the child witness would suffer specific psychological trauma and be unable to reasonably communicate if forced to testify in the live presence of the defendant.” App.A at 10. The court did not explain how it was appropriate to rely on a report by an expert who did not testify when under 18 U.S.C. § 3509(b)(1)(B)(ii) reliance on “a substantial likelihood ... that the child would suffer emotional trauma from testifying” must be “established by expert testimony.”

subsection (a)(2) which was an alternative theory under all three counts to the theory under subsection (a)(1) that petitioner recruited or otherwise enticed the victims into prostitution. Petitioner argued that under the definition of “venture” in the statute, which requires at least one other person participating in the venture, such proof was completely lacking. The court of appeals ruled, however, that because the jury returned special verdicts of guilty on both theories, it was unnecessary to determine this question. App.A at 4.

REASONS FOR GRANTING THE PETITION

I. Denial of the Constructive Amendment of the Indictment Claim Poses an Important Conflict With Recent Decisions of the Fifth and Ninth Circuits: Whether a Jury Can be Charged With an “Alternative” Theory of Proof Not Charged In the Indictment.

The Court should also review this case to decide a conflict between the court below and the Fifth and Ninth circuits whether charging a jury with the theory of strict criminal liability in 18 U.S.C. § 1591(c) constructively amends an indictment not containing that charge. This case also presents an opportunity to resolve lingering questions left unclarified since *Stirone v. United States*, 361 U.S. 212 (1960) whether *any* prejudice must be shown on a constructive amendment of the indictment claim.

A. This Court has held that after a grand jury issues an indictment, the “charges may not be broadened through amendment except by the grand jury itself.” *Stirone v. United States*, 361 U.S. at 216. Unlike mere “variances between the indictment and the narrower trial proof,” a constructive amendment is thought to be per se prejudicial. *United States v. Miller*, 471 U.S. 130, 139-40 (1985). “Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.” *Stirone*, 361 U.S. at 217. Thus, even if an indictment could have been drafted to include the alternate theory, where “only one particular kind of [criminal conduct] is charged ... a conviction must rest on that charge and not another.” *United States v. Zingaro*, 858 F.2d 94, 99 (2d Cir.1988) (internal quotation omitted).

There is no dispute as to the age-related charges in Counts Two and Three

that the indictment charged only that defendant knew or recklessly disregarded that the victims were less than 18 years of age as set forth in 18 U.S.C. § 1591(a). *See* App.A. at 6. Neither by words nor citation did the indictment reference Section 1591(c) allowing mere proof of “an opportunity to observe” the victim. By all appearances this broadened the theory of prosecution by substituting strict liability in place of a more traditional *mens rea* showing of knowledge or recklessness otherwise applicable under the statute. *See United States v. Robinson*, 702 F.3d 22, 32-34 (2d Cir. 2012). “The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” *Dennis v. United States*, 341 U.S. 494, 500 (1951).

The court below concluded, however, that there was no constructive amendment of the indictment. According to the court of appeals, subsection (c) “does not state a separate offense; it expressly refers to “prosecution[s] under subsection (a)(1)” and consequently provides a mere “alternative to proving any mens rea with regard to the defendant’s awareness of the victim’s age.” App.A.at 6-7 (citing *Robinson*, 702 F.3d at 32).

B. Two other Courts of Appeal, however, have decided this very issue the other way. In *United States v. Lockhart*, 844 F.3d 501 (5th Cir. 2016), the Fifth Circuit reversed in a Section 1591 case where, as here, the alternative “opportunity to observe” theory was charged to the jury though it had not been included in the indictment. Reviewing the seminal decision of this Court in *Stirone v. United States*, 361 U.S. at 212 and local precedent at length, the Court held:

By including the language found in § 1591(c), the district court materially modified an essential element of the indictment by transforming the offense with which the indictment charged [defendant] from one requiring a specific mens rea into a strict liability offense.

Id. at 515-16. Specifically contradicting the explanation of the court below, the Fifth Circuit reasoned that the indictment was constructively amended precisely “*because* the district court instructions allowed the jury to convict on the basis of an *alternative* theory permitted by the statute, not charged in the indictment. *Id.* (emphasis added; internal citations and quotations omitted).

The Ninth Circuit has also held that charging the jury with the Section 1591 “opportunity to observe” theory constructively amends an indictment not containing it. *United States v. Davis*, 854 F.3d 601 (9th Cir. 2017). Agreeing with *Lockhart*, the court in *Davis* emphasized the contrast between the indictment and the jury charge: “In contrast, the jury instructions afforded jurors a *third* option for convicting [defendant]: namely, they could convict, even without a finding as to knowledge or recklessness, so long as they determined that [defendant] ‘*had a reasonable opportunity to observe [the victim].*” *Id.* at 605 (emphasis in original). Again, the existence of the subsection (c) theory as an “option” or alternative was the reason why the indictment was deemed constructively amended. *See also United States v. Curry*, ___ Fed.Appx. ___, 2018 WL 721674 **4-5 & n.1. (6th Cir. Feb. 6, 2018)(suggesting it may have been “problematic” had jury been charged with “opportunity to observe theory” when not in indictment but government declined to argue that theory); *United States v. Bolds*, 620 Fed.Appx. 592 (9th Cir.

2015)(reversing for constructive amendment in charging “opportunity to observe” theory).

C. This case also furnishes an opportunity to clarify to whether prejudice has any role in evaluating a constructive amendment violation. The court of appeals also concluded that in any event the jury, by virtue of its special verdict under subsection (a)(2), “necessarily found that Graham knew or recklessly disregarded his victims’ respective ages (which is necessary under (a)(2)), so the inclusion of the lesser ‘opportunity to observe’ instruction in the charge cannot have altered the verdict.” App.A. at 7.⁴

Any notion, however, that the jury would have convicted anyway is in tension with the proposition ascribed to *Stirone* that constructive amendment is a per se violation. As even the court below explained in a prior en banc decision, “[o]ur rule that a constructive amendment is *per se* prejudicial is grounded in the recognition that [t]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.” *United States v.*

⁴ It should also be noted as to Count Three in particular, that both special verdicts are clearly unsustainable on this record. Special Verdict A included the “opportunity to observe” theory that constructively amended the indictment. Special Verdict B, while it required a showing of knowledge or reckless disregard of age, *also* required proof under subsection (a)(2) that defendant “benefit[ed] ... from participation in a venture” engaged in sex trafficking. The statute defines venture in Section 1591(e)(5) as “any group of two or more individuals associated in fact, whether or not a legal entity.” As set forth in *United States v. Afyare*, 632 Fed. Appx. 272, 286 (6th Cir. 2016), the concept is akin to conspiracy: “Two or more people who engage in sex trafficking *together* are a sex-trafficking venture.” (emphasis added). Without question, there was no proof of a second individual who joined defendant in any venture as to any of the victims. The court of appeals incorrectly concluded that it did not need to decide this issue because of the special verdicts finding guilt as to the non-venture charges in the indictment. *See* App.A. at 4. But this was clearly wrong as to Count Three in particular, given that both of the Count Three special verdicts were invalid – one for failure to show a venture and the other for constructive amendment of the indictment.

Thomas, 274 F.3d 655, 670 (2d Cir.2001) (en banc) (quoting *Stirone*, 361 U.S. at 218 and adding emphasis).

In fairness, though, *Stirone* does not use the construct of “per se” error although, as noted above, it rejects any notion of “harmless error.” 361 U.S. at 217. With respect to the specific question at hand, the Ninth Circuit in *Davis* cited two formulations: one, that constructive amendment constitutes “per se” error; the other, that it “typically mandates reversal” without a showing of prejudice. *See* 854 F.3d at 605-06 (citations omitted). Curiously, the Fifth Circuit in *Lockhart* conducted an analysis whether it was “plausible that the jury convicted McCullough on a theory that even though he did not know her age or recklessly disregard it, he did have a reasonable opportunity to observe her.” *See* 844 F.3d at 516.

For these reasons, in addition to affording an opportunity to resolve the conflict whether an “alternative theory” allowed by a statute but not charged in an indictment constitutes a constructive amendment of the indictment, this case provides a further opportunity to speak for the first time in decades to what degree constructive amendment claims require any showing of prejudice.

II. Allowing Closed Circuit Testimony Of a Child Witness On the Basis of an Expert’s Report Predicting the Child Will Suffer Trauma But Without Testimony of the Expert Flaunts the Child Abuse Act of 1990 and Conflicts With the Approach of Multiple Lower Courts.

Contrary to the approach of apparently all other federal courts under the Victims of Child Abuse Act of 1990, 18 U.S.C. § 3509, the court of appeals allowed a child witness to testify by closed circuit television on the basis of an expert’s report predicting the child would suffer trauma, but without requiring the expert to testify.

Title 18, Section 3509(b)(1)(B), provides in part that a “court may order that the testimony of [a] child be taken by closed-circuit television ... if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:

- (i) The child is unable to testify because of fear.
- (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.

* * *

Although the Act requires expert testimony under subsection (ii) where “[t]here is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying,” the decision below evades the testimonial requirement by cabining decision under subsection (i) where “[t]he child is unable to testify because of fear.” Although subsection (i) does not on its face require expert testimony, the court of appeals’ reliance on an expert’s written report predicting Victim Three “would suffer specific psychiatric trauma” seems to flaunt subsection (ii)’s requirement that predicted “trauma” be supported by expert testimony. This Court should intervene because the approach of the court below performs an end run against Congress’ judgment in the Victims of Child Abuse Act and sharply conflicts with the approach of other lower courts, perhaps all, who do not subvert the expert testimony requirement in this fashion.

A. The court of appeals found the basis for Victim Three’s fear to be inadequately supported, and relied instead on the expert’s prediction, furnished only in a sealed report, that she would suffer trauma. When asked why she could not testify in open court, Victim Three said defendant was “not a very good man. I

don't know. I just know by being next to him. He's very sneaky and he plot some plans a lot, I guess you could say." A117/159. When asked who might threaten her, she said "relative, friend, I'm not sure." *Id.* The district court did *not* allow the testimony under subsection (ii) which would have required the expert's testimony, but rather, found Victim Three's testimony, together with the expert's written report to support the "fear" rationale under subsection (i). App.C at 5-6.

The court of appeals concluded that Victim Three's testimony failed to establish the requisite degree of fear, commenting that her statement and nervousness "may fail to meet our demanding constitutional standard absent specific indicia of the emotional trauma the child witness would experience 'not by [testimony in] the courtroom generally, but by the presence of the defendant.'" App.A at 10 (citing *Maryland v. Craig*, 497 U.S. 836, 856 (1990)).⁵ The court of appeals however, relied principally on the sealed psychiatric report concluding that the witness "would suffer specific psychiatric trauma and be unable to reasonably communicate if forced to testify in the live presence of the defendant." App.A at 10. Although the court of appeals said it would have preferred a "more complete record," it could not say on the entire record that the district court committed clear

⁵ This Court elaborated in *Craig* on the necessary considerations to satisfy the Sixth Amendment right to confrontation:

[T]he trial court must hear evidence and determine whether ... the ... procedure is necessary to protect the welfare of the particular child who seeks to testify. The trial court must also find the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.... Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than "mere nervousness or excitement or some reluctance to testify." *Id.* at 855-56

error. App.A at 11.

On its face, the court of appeals' decision seems to flaunt the statutory requirement in subsection (ii) that a finding of a likelihood that "the child would suffer emotional trauma from testifying" must be "established by expert testimony." 18 U.S.C. § 3509(b)(1)(B)(ii). Although the court of appeals was apparently relying on the "fear" provision in subsection (i) as did the district court, the court of appeals conclusion that Victim Three "would suffer specific psychiatric trauma" seems clearly to fall under authority of subsection (ii)'s reference to "emotional trauma from testifying." That provision required the *testimony* of an expert.⁶

B. The approach of the court of appeals seems sharply at odds with apparently all reported decisions by other federal courts in this area. Among many decisions relying on experts, no decision could be located where a court relied specifically on an expert report predicting trauma should the witness testify, but without requiring the expert to testify under subsection (ii).

Certainly, the Act does not mandate expert testimony in all cases to establish fear in subsection (ii), and it is not hard to imagine description of a specific threat that would satisfy that standard without need for an expert. The district court relied on two such cases. App.C at 6. Citing *United States v. Giordano*, 172. Fed.

⁶ On the petition for rehearing below, counsel called to the Court's attention that the sealed report suggests that defendant introduced Victim Three to prostitution. Rehearing Petition at 7 n.2, Docket #153 (October 19, 2017). In fact, she testified that she was already working as a prostitute when she met defendant. See App.A at 12 ("The government brought out through the testimony of [Victims One and Three] that they had worked as prostitutes prior to their first contact with Graham.") In short, the psychiatrist may not have been dealing with fully accurate information about the relationship between petitioner and Victim Three, further calling into question reliance on the report without testimony.

Appx. 340 (2d Cir. 2006)(no indication fear finding based on expert report without testimony); *United States v. Rouse*, 111 F.3d 561 (8th Cir. 1997)(fear finding based on in chambers interviews during trial and prior expert *testimony* prior to trial).

Here, however, the court of appeals specifically stated that the victim's testimony was insufficient to establish a basis for closed-circuit testimony, and specifically invoked the written findings of an expert on "trauma" that the witness would suffer, without requiring that expert to have testified as subsection (ii) requires as to "trauma" prognostications. If this is not an end run around subsection (ii)'s requirement of expert testimony it is hard to imagine what is.

No decisions in this area rely on an expert's written prediction of "trauma" to be experienced by the witness without also having that professional testify. Even where the basis of the decision, in whole or part, is that the witness feared testifying, to the extent that expert opinion is used to establish such fear, the expert is called to testify.

For example, in *United States v. Garcia*, 7 F.3d 885, 888-90 (9th Cir. 1993), the court upheld the sufficiency of findings that the witness both feared testifying under subsection (i) and would suffer emotional trauma from testifying under subsection (ii). In support of both conclusions, two experts testified, one a children's health specialist who had counseled the girl in question, the other a psychiatrist with expertise in the area though he did not examine the witness. Together, the experts testified that the witness was frightened of testifying in person and would suffer psychological trauma if forced to do so.

In *United States v. Farley*, 992 F.2d 1122, 1124-25 (10th Cir. 1992), a psychologist testified at length based on his examination of the witness, and the district court therefore could properly determine both that the witness was in fear of testifying, and that the witness would suffer emotional trauma. *See also United States v. Carrier*, 9 F.3d 867, 869-71 (10th Cir. 1992)(expert testified adequately as to both fear and predicted trauma).

In *United States v. Moses*, 137 F.3d 894, 897-901 (6th Cir. 1998), the Sixth Circuit reversed a conviction on two grounds. First it found that the witness had testified that she was not fearful of testifying. Second, it concluded that the social worker who testified was not properly qualified to speak to the issues of fear and whether the witness would suffer from trauma. Again, however, even if deemed unqualified, the expert *testified* on both points. *See United States v. Weekley*, 130 F.3d 747, 752-54 (6th Cir. 1997)(expert testified both as to fear and trauma). *See also United States v. Partin*, 2014 WL 2831665 (M.D. Ala. 2014)(expert testified both as to fear and trauma); *United States v. Twiddy*, 2007 WL 3256649 (D. Colo. 2007)(calling for expert testimony to expand on written submissions).

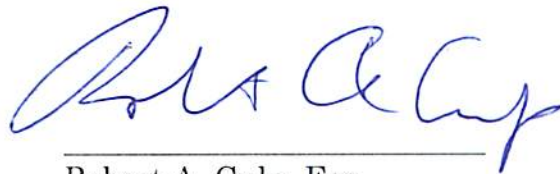
Congress' determination that expert predictions of child "trauma" in testifying must be supported by expert testimony, would be completely subverted by the approach of the court below where a written expert report was relied upon without testimony on the basis that it also relates to "fear." Because "fear" will always be a component in such cases, the only way to clarify and prevent such undermining of Congressional will is through review of this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: February 26, 2018

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Robert A. Culp", written over a horizontal line.

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