

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUN 11 2019

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICKY DAVIS, AKA Rick Dog, AKA Rick
Loks,

Defendant-Appellant.

No. 17-10547

D.C. No.

1:12-cr-00056-AWI-BAM-1

ORDER

Before: HAWKINS and M. SMITH, Circuit Judges, and LYNN,** District Judge.

The petition for rehearing by panel only is DENIED.

** The Honorable Barbara M. G. Lynn, Chief United States District
Judge for the Northern District of Texas, sitting by designation.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 9 2019

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 17-10547

Plaintiff-Appellee,

D.C. No.

1:12-cr-00056-AWI-BAM-1

v.

RICKY DAVIS, AKA Rick Dog, AKA Rick
Loks,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted April 18, 2019
San Francisco, California

Before: HAWKINS and M. SMITH, Circuit Judges, and LYNN,** District Judge.

Ricky Davis appeals his sentence for sexually exploiting a minor in violation of 18 U.S.C. § 2251(a). Davis argues that the district court's imposition of a prison term of 300 months and Special Condition 8 were procedurally and substantively

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Barbara M. G. Lynn, Chief United States District Judge for the Northern District of Texas, sitting by designation.

erroneous, and that the restriction on adult pornography in Special Condition 8 is unconstitutional.

The district court did not abuse its discretion in sentencing Davis to 300 months of incarceration. *See United States v. Carty*, 520 F.3d 984, 992–93 (9th Cir. 2008) (en banc). The record confirms that the district court evaluated the relevant 18 U.S.C. § 3553(a) factors, including the nature and circumstances of the offense and the need to avoid unwarranted sentencing disparities. After completing this analysis, the district court imposed a sentence that was below the Guidelines range of 360 months. We conclude that there was no procedural error and that the sentence of 300 months is substantively reasonable.

However, Davis was not given appropriate notice of the portion of Special Condition 8, which limited Davis’s access to adult pornography, prior to its imposition. *See United States v. Wise*, 391 F.3d 1027, 1033 (9th Cir. 2004). We thus conclude that the district court committed procedural error, and we vacate Special Condition 8 and remand for its reconsideration. Accordingly, we need not address the substantive reasonableness or constitutionality of this condition. *See United States v. Rudd*, 662 F.3d 1257, 1263–64 (9th Cir. 2011). On remand, however, Davis should have the opportunity to argue why Special Condition 8 is improper, including whether it is overbroad and infringes on his liberty more than is reasonably necessary to accomplish the relevant goals of § 3553(a).

AFFIRMED in part; **VACATED** and **REMANDED** in part.

UNITED STATES DISTRICT COURT

Eastern District of California

UNITED STATES OF AMERICA

v.

RICKY DAVIS**AKA: Rick Loks, Rick Dog**

Date of Original Judgment: July 20, 2015
 (Or Date of Last Amended Judgment)

FIRST AMENDED JUDGMENT IN A CRIMINAL CASECase Number: **1:12CR00056-001**

Defendant's Attorney: Peggy Sasso, Assistant Federal Defender

Reason for Amendment:

- ☒ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant to ☐ 18 U.S.C. §2255, ☐ 18 U.S.C. §3559(c)(7), ☐ Modification of Restitution Order

THE DEFENDANT:

- ☐ pleaded guilty to count(s) ____ .
- ☐ pleaded nolo contendere to count(s) ____ which was accepted by the court.
- ☒ was found guilty on count ONE after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense (s):

Title & Section	Nature Of Offense	Date Offense Concluded	Count Number
18 USC §2251(a)	SEXUAL EXPLOITATION OF A MINOR (CLASS B FELONY)	September, 2011	ONE

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) ____ and is discharged as to such count(s).
- ☒ Count TWO is dismissed on the motion of the United States.
- ☐ Indictment is to be dismissed by District Court on motion of the United States.
- ☒ Appeal rights given. ☐ Appeal rights waived.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution or fine, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

12/11/2017

Date of Imposition of Judgment

/s/ Anthony W. Ishii

Signature of Judicial Officer

Anthony W. Ishii, United States District Judge

Name & Title of Judicial Officer

12/19/2017

Date

DEFENDANT: **RICKY DAVIS**

Page 2 of 8

CASE NUMBER: **1:12CR00056-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 300 months.

- ☐ No TSR: Defendant shall cooperate in the collection of DNA.
- ☒ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends that the defendant be incarcerated in a Tucson, Arizona facility, but only insofar as this accords with security classification and space availability. The Court recommends the defendant participate in the 500-Hour Bureau of Prisons Substance Abuse Treatment Program.
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district
- ☐ at ____ on ____.
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before ____ on ____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Officer.
- If no such institution has been designated, to the United States Marshal for this district.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal

By Deputy United States Marshal

DEFENDANT: **RICKY DAVIS**

Page 3 of 8

CASE NUMBER: **1:12CR00056-001**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :
120 months.

The defendant must report to the probation office in the district to which the defendant is released within seventy-two hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two (2) periodic drug tests thereafter, not to exceed four (4) drug tests per month.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.
- ☒ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.), as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of qualifying offense.
- ☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: RICKY DAVIS

Page 4 of 8

CASE NUMBER: 1:12CR00056-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall possess and use only those cell phones and phone numbers (including Voice over Internet Protocol [VoIP] services) that have been disclosed to the probation officer upon commencement of supervision. Any changes or additions are to be disclosed to the probation officer prior to the first use.
2. As directed by the probation officer, the defendant shall participate in a program of outpatient mental health treatment.
3. As directed by the probation officer, the defendant shall participate in a co-payment plan for treatment or testing and shall make payment directly to the vendor under contract with the United States Probation Office of up to \$25 per month.
4. The defendant shall submit to the search of his person, property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects at any time, with or without a warrant, by any law enforcement or probation officer in the lawful discharge of the officer's supervision functions with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
5. The defendant shall not possess or use a computer or any device that has access to any "on-line computer service" unless approved by the probation officer. This includes any Internet service provider, bulletin board system, or any other public or private computer network.
6. The defendant shall have no contact with known children under the age of 18, unless approved by the probation officer in advance. The defendant is not to loiter within 100 feet of school yards, parks, playgrounds, arcades, or other places primarily used by children under the age of 18. This shall include that the defendant is not to engage in any occupation, either paid or volunteer, that causes him to regularly contact known persons under the age of 18.
7. The defendant shall consent to the probation officer and/or probation service representative conducting periodic unannounced examinations of (a) any computer, or (b) computer-related device, or (c) equipment that has an internal or external modem which is in the possession or control of the defendant. The defendant consents to retrieval and copying of all data from any such computer, computer-related device, or equipment as well as any internal or external peripherals to ensure compliance with conditions. The defendant consents to removal of such computer, computer-related device, and equipment for purposes of conducting a more thorough inspection and analysis.

The defendant consents to having installed on any computer, computer-related device, and equipment, at the defendant's expense, any hardware or software systems to monitor the use of such computer, computer-related device, and equipment at the direction of the probation officer, and agrees not to tamper with such hardware or software and not install or use any software programs designated to hide, alter, or delete his computer activities. The defendant consents to not installing new hardware without the prior approval of the probation officer.

8. The defendant shall not possess, own, use, view, or read any material depicting and/or describing sexually explicit conduct involving children, including computer images, pictures, photographs, books, writings, drawings, videos, or video games. "Sexually explicit conduct" as defined in 18 U.S.C. § 2256(2) means actual or simulated (a) sexual intercourse, including genital-genital, oral-genital, or oral-anal, whether between the same or opposite sex; (b) bestiality; (c) masturbation; (d) sadistic or masochistic abuse; or (e) lascivious exhibition of the genitals or pubic area of any person.

In addition, the defendant shall not possess, own, use, view, or read any material depicting and/or describing sexually explicit conduct involving adults, defined as sexually stimulating depictions of adult sexual conduct that are deemed inappropriate by the defendant's probation officer, including computer images, pictures, photographs, books, writings, drawings, videos, or video games depicting such conduct. Furthermore, the defendant shall not frequent any place whose primary purpose is to sell, rent, show, display, or give other forms of access to, material depicting and/or describing sexually explicit conduct.

9. The defendant shall provide all requested business/personal phone records to the probation officer. The defendant shall disclose to the probation officer any existing contracts with telephone line/cable service providers. The defendant shall provide the probation officer with written authorization to request a record of all outgoing or incoming phone calls from any service provider.
10. The defendant shall consent to third-party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon him. This includes any activities in which you are acting as a technician, advisor, or consultant with or without any monetary gain or other compensation.
11. The defendant shall attend, cooperate with, and actively participate in a sex offender treatment and therapy program [which may include, but is not limited to, risk assessment, polygraph examination, and/or Visual Reaction Treatment] as approved and directed by the probation officer and as recommended by the assigned treatment provider.

DEFENDANT: **RICKY DAVIS**

Page 6 of 8

CASE NUMBER: **1:12CR00056-001**

12. The defendant's residence shall be pre-approved by the probation officer. The defendant shall not reside in direct view of places such as school yards, parks, public swimming pools, or recreational centers, playgrounds, youth centers, video arcade facilities, or other places primarily used by children under the age of 18.
13. The defendant shall not associate with any known gang member of the Norteno street gang or any other known member of a criminal street gang, as directed by the probation officer.

DEFENDANT: RICKY DAVIS

CASE NUMBER: 1:12CR00056-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00		

☐ The determination of restitution is deferred until ____ . An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement \$ ____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived for the ☐ fine ☐ restitution

☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ If incarcerated, payment of the fine is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

☐ If incarcerated, payment of the restitution is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: RICKY DAVIS

Page 8 of 8

CASE NUMBER: 1:12CR00056-001

SCHEDULE OF PAYMENTS

Payment of the total fine and other criminal monetary penalties shall be due as follows:

- A. ☒ Lump sum payment of \$ 100.00 (\$150 PAID)
☐ Not later than ____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B. ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C. ☐ Payment in equal ____ (e.g. weekly, monthly, quarterly) installments of \$ ____ over a period of ____ (e.g. months or years), to commence ____ (e.g. 30 or 60 days) after the date of this judgment; or
- D. ☐ Payment in equal ____ (e.g. weekly, monthly, quarterly) installments of \$ ____ over a period of ____ (e.g. months or years), to commence ____ (e.g. 30 or 60 days) after release from imprisonment to a term of supervision; or
- E. ☐ Payment during the term of supervised release/probation will commence within ____ (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendants ability to pay at that time; or
- F. ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
The preliminary order of forfeiture filed May 27, 2015, is hereby made final as to this defendant and shall be incorporated into the judgment

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICKY DAVIS, AKA Rick
Dog, AKA Ricky Loks,
Defendant-Appellant.

No. 15-10402

DC No.
CR 12-0056 AWI

OPINION

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted February 16, 2017
San Francisco, California

Filed April 14, 2017

Before: A. Wallace Tashima and Andrew D. Hurwitz,
Circuit Judges, and Lynn S. Adelman,* District Judge.

Opinion by Judge Tashima

* The Honorable Lynn S. Adelman, United States District Judge for
the Eastern District of Wisconsin, sitting by designation.

SUMMARY**

Criminal Law

The panel affirmed a conviction for sexual exploitation of a minor in violation of 18 U.S.C. § 2251(a), reversed a conviction for attempted sex trafficking of a minor in violation of 18 U.S.C. § 1591(a), vacated the sentence, and remanded for further proceedings.

The panel held that a constructive amendment of the indictment occurred, where the § 1591(a) charge required the government to prove beyond a reasonable doubt that the defendant affirmatively knew of the minor's age or that he recklessly disregarded her minority status, but the jury instructions and the government's closing argument stated that the jurors could convict, even without a finding as to knowledge or recklessness, so long as they determined that the defendant had a reasonable opportunity to observe the minor. The panel remanded to the district court for resentencing on an open record or, alternatively, for the defendant to be retried on the § 1591(a) charge.

The panel addressed other arguments in a concurrently filed memorandum.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Peggy Sasso (argued), Assistant Federal Defender; Heather E. Williams, Federal Defender; Office of the Federal Public Defender, Fresno, California; for Defendant-Appellant.

Brian W. Enos (argued), Assistant United States Attorney; Camil A. Skipper, Assistant United States Attorney & Appellate Chief; Phillip A. Talbert, Acting United States Attorney; United States Attorney's Office, Fresno, California; for Plaintiff-Appellee.

OPINION

TASHIMA, Circuit Judge:

Ricky Davis appeals his convictions for sexual exploitation and attempted sex trafficking of a minor, as well as the resulting sentence. We have jurisdiction under 28 U.S.C. § 1291. We affirm Davis' conviction for sexual exploitation of a minor, but we reverse his conviction for attempted sex trafficking.¹

I.

On September 17, 2011, Ricky Davis brought thirteen-year-old Bianca to his house. Once there, he discussed the possibility of Bianca making money by going on dates, took sexually explicit photos of her, helped to post these images on a website known for advertising escort services, and

¹ In a concurrently filed memorandum, we address and reject Davis' arguments not addressed in this opinion.

introduced Bianca to at least one individual with whom Bianca later had sex in exchange for money. Some months later, after two different men had trafficked Bianca, law enforcement discovered the sexually explicit photographs and arrested Davis.

Davis was indicted for (1) sexual exploitation of a minor, in violation of 18 U.S.C. § 2251(a), and (2) attempted sex trafficking either by force or of a minor, in violation of 18 U.S.C. §§ 1591(a), 1594. Davis was convicted on both counts. The district court sentenced him to concurrent 300-month terms of imprisonment.

This appeal followed. Davis challenges his conviction under § 1591(a) on the ground that the district court's jury instruction constructively amended the indictment.

II.

“When [as in this case] a defendant raises a constructive amendment claim before the district court, we review de novo.” *United States v. Ward*, 747 F.3d 1184, 1188 (9th Cir. 2014).

III.

A. A Constructive Amendment Occurred.

“The Fifth Amendment’s grand jury requirement establishes the ‘substantial right to be tried only on charges presented in an indictment returned by a grand jury.’” *United States v. Antonakas*, 255 F.3d 714, 721 (9th Cir. 2001) (quoting *United States v. Miller*, 471 U.S. 130, 140 (1985)). “A constructive amendment occurs when the charging terms

of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them.” *Ward*, 747 F.3d at 1190 (internal quotation marks and citation omitted). There are two types of constructive amendment: first, where “there is a complex of facts [presented at trial] distinctly different from those set forth in the charging instrument,” and, second, where “the crime charged [in the indictment] was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved.” *United States v. Adamson*, 291 F.3d 606, 615 (9th Cir. 2002) (quoting *United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984)). Here, we are concerned with the second type of amendment.

Our decision in *United States v. Dipentino*, 242 F.3d 1090 (9th Cir. 2001), is an instructive example of the second category. In *Dipentino*, the Court considered a constructive amendment challenge to a conviction for violations of the Clean Air Act. *Id.* at 1093–94. The indictment charged that the defendants had:

. . . caused quantities of scraped and/or loose asbestos-containing debris to be left on floors and other surfaces where such debris was allowed to dry, instead of causing all such debris to be gathered, while wet, and placed in leak-proof containers or wrappings to be removed from the site, as required by work practice standards promulgated pursuant to the Clean Air Act.

Id. at 1094–95. When instructing the jury, however, the district court defined the charged offense as one in which the

defendants “knowingly failed . . . to comply with the work practice standards alleged in the indictment.” *Id.* at 1095. Critically, the district court then defined the relevant work practice standards as requiring that “[a]ll asbestos-containing waste material shall be deposited as soon as is practical by the waste generator at a waste disposal site that meets appropriate federal requirements.” *Id.*

Because the conduct charged in the indictment was substantially different from the conduct described in the jury instructions, we concluded that “[i]t is evident that the district court constructively amended the indictment because the jury instruction permitted the jury to convict the defendants of violating a work practice standard they were not charged in the indictment with violating[.]” *Id.*

This case is closely analogous to *Dipentino*. Here, Count 2 of the indictment charges that Davis violated § 1591(a) when he:

. . . knowingly attempted to recruit, entice, harbor, transport, provide, obtain, and maintain by any means, a person to engage in a commercial sex act, to wit: a minor female victim, . . . *knowing or in reckless disregard of the fact that the person had not attained the age of 18 years*[.]

(Emphasis added.) At trial, however, the jury instruction as to Count 2 provided, in relevant part:

The elements of sex trafficking are: . . .
(2) knowing that Bianca had not attained the age of 18 years, or recklessly disregarded that

fact, *or the defendant had a reasonable opportunity to observe Bianca*, and that Bianca would be caused to engage in a commercial sex act . . . [.]

(Emphasis added.) Elsewhere in the same instruction, the district court charged:

In Count 2 of the Indictment, the defendant is charged with Attempted Sex Trafficking of Children. For the defendant to be found guilty, the Government need not prove that the defendant knew Bianca had not attained the age of 18 *so long as the defendant had a reasonable opportunity to observe Bianca*.² (Emphasis added.)

In its closing argument, the government adopted much the same approach, arguing:

[W]e, again, submit that the evidence shows both, that Bianca had not attained the age of 18, or the defendant recklessly disregarded that fact, *or he had a reasonable opportunity to observe Bianca*, and that she would be caused to engage in a commercial sex act.

(Emphasis added.)

² The italicized language is taken from § 1591(c), which further provides that if the government proves the “reasonable opportunity to observe” prong, it is relieved from proving the defendant’s knowledge or recklessness regarding the victim’s minority.

It is evident that the language of the indictment differs substantially from the jury instruction and the government's closing argument. Specifically, the indictment charged that Davis knew Bianca was a minor or that he recklessly disregarded this fact. Thus, under the indictment, the government was required to prove, beyond a reasonable doubt, either that Davis affirmatively knew of Bianca's age, or, alternatively, that he recklessly disregarded her minority status. In contrast, the jury instructions afforded jurors a *third* option for convicting Davis: namely, they could convict, even without a finding as to knowledge or recklessness, so long as they determined that Davis "*had a reasonable opportunity to observe Bianca.*"

We thus conclude that a constructive amendment occurred because "the crime charged [in the indictment] was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved." *Adamson*, 291 F.3d at 615. *See also United States v. Stewart Clinical Lab, Inc.*, 652 F.2d 804, 807 (9th Cir. 1981) ("The court may not substantially amend the indictment through its instructions to the jury." (citations omitted)). Our holding today is consistent with *United States v. Lockhart*, 844 F.3d 501 (5th Cir. 2016), the facts of which are indistinguishable from this case. There, the Fifth Circuit observed:

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 [the defendant] from one requiring specific mens rea into a strict liability offense.

Id. at 515–16 (footnote and citation omitted). We agree.

B. Davis’ Conviction Under § 1591(a) Must Be Reversed.

“Objections that the trial court improperly instructed the jury about the contents of the indictment generally fall into one of two categories: a constructive amendment or a variance.” *Ward*, 747 F.3d at 1189. And, while “[t]he line that separates a constructive amendment from a variance is not always easy to define,” *id.*, drawing this distinction is nevertheless critical. This is because “a constructive amendment typically mandates reversal, while ‘a variance requires reversal only if it prejudices a defendant’s substantial rights.’” *Id.* (citing *Adamson*, 291 F.3d at 615, and *Antonakeas*, 255 F.3d at 722). We have also held that “amending the indictment to charge a new crime constitutes a per se reversible error.” *Stewart Clinical*, 652 F.2d at 807. *See also United States v. Olson*, 925 F.2d 1170, 1175 (9th Cir. 1991) (“An amendment always requires reversal, because it deprives a defendant of his right to be tried on the grand jury’s charge.”), *abrogated in part by United States v. Cotton*, 535 U.S. 625, 630 (2002).

We have previously articulated the distinction between a constructive amendment and a variance:

An *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has

last passed upon them. A *variance* occurs when the charging terms of the indictment are left unaltered, but the evidence at trial proves facts materially different from those alleged in the indictment.

Von Stoll, 726 F.2d at 586 (quoting *United States v. Cusmano*, 659 F.2d 714, 718 (6th Cir. 1981) (citations omitted)). Here, the district court’s jury instruction and the government’s argument had the effect of altering the terms of the indictment.

Thus, the district court’s error here is properly characterized as a constructive amendment, not as a mere variance. As a result, Davis’ conviction under § 1591(a) must be reversed. See *Ward*, 747 F.3d at 1189 (citing *Adamson*, 291 F.3d at 615, and *Antonakeas*, 255 F.3d at 722).

C. Remand for Resentencing is Required.

The district court sentenced Davis to 300 months’ imprisonment for each count of his conviction, with the terms to run concurrently. Although we affirm Davis’ conviction under § 2251 in our concurrently-filed memorandum, “[w]hen a defendant is sentenced on multiple counts and one of them is later vacated on appeal, the sentencing package comes ‘unbundled.’” *United States v. Ruiz-Alvarez*, 211 F.3d 1181, 1184 (9th Cir. 2000). Under these circumstances, vacating the sentence is required in order to allow the district court “to put together a new package reflecting its considered judgment as to the punishment the defendant deserve[s] for the crimes of which he . . . [remains] . . . convicted.” *Id.* (quoting *United States v. McClain*, 133 F.3d 1191, 1193 (9th Cir. 1998) (other citations omitted)).

We remand to the district court for resentencing on Davis' single remaining conviction on an open record or, alternatively, for Davis to be retried on the § 1591(a) charge.³

IV.

We thus (1) affirm Davis' conviction under § 2251, (2) reverse his conviction under § 1591(a) on grounds of constructive amendment, (3) vacate the sentence, and (4) remand to the district court for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, sentence VACATED, and REMANDED.

³ Because we reverse Davis' § 1591(a) conviction on the constructive amendment ground, we need not reach his other challenges to that conviction. We also do not reach Davis' arguments challenging the propriety or reasonableness of his now-vacated sentence.

UNITED STATES DISTRICT COURT

Eastern District of California

UNITED STATES OF AMERICA

v.

RICKY DAVIS**AKA: Rick Loks, Rick Dog****JUDGMENT IN A CRIMINAL CASE**

(For Offenses Committed On or After November 1, 1987)

Case Number: **1:12CR00056-001**Defendant's Attorney: ANN McGLENON / ANDRAS FARKAS,
Assistant Federal Defender**THE DEFENDANT:**

- ☐ pleaded guilty to count(s) ____ .
- ☐ pleaded nolo contendere to count(s) ____ which was accepted by the court.
- ☒ was found guilty on count(s) ONE and TWO after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense (s):

Title & Section	Nature Of Offense	Date Offense Concluded	Count Number
18 USC §2251(a)	SEXUAL EXPLOITATION OF A MINOR (CLASS B FELONY)	September, 2011	ONE
18 USC §1591(a)(1) and 1594	ATTEMPTED SEX TRAFFICING OF CHILDREN OR BY FORCE, FRAUD, AND COERCION (CLASS A FELONY)	September, 2011	TWO

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) ____ and is discharged as to such count(s).
- ☐ Count (s) ____ dismissed on the motion of the United States.
- ☐ Indictment is to be dismissed by District Court on motion of the United States.
- ☒ Appeal rights given. ☐ Appeal rights waived.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution or fine, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

7/20/2015

Date of Imposition of Judgment

/s/ Anthony W. Ishii

Signature of Judicial Officer

Anthony W. Ishii, United States District Judge

Name & Title of Judicial Officer

7/24/2015

Date

DEFENDANT: **RICKY DAVIS**
CASE NUMBER: **1:12CR00056-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 300 months on each of Counts 1 and 2, to run concurrently for a total term of 300 months.

- ☐ No TSR: Defendant shall cooperate in the collection of DNA.
- ☒ The court makes the following recommendations to the Bureau of Prisons:
Institutional recommendation: Tucson, Arizona
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district
- ☐ at ____ on ____.
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before ____ on ____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Officer.
- If no such institution has been designated, to the United States Marshal for this district.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal

By Deputy United States Marshal

DEFENDANT: **RICKY DAVIS**CASE NUMBER: **1:12CR00056-001****SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of :
120 months on each of Counts 1 and 2, to run concurrently for a total term of 120 months.

The defendant must report to the probation office in the district to which the defendant is released within seventy-two hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two (2) periodic drug tests thereafter, not to exceed four (4) drug tests per month.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.), as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of qualifying offense.
- ☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without permission of the court or probation officer;
2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6. the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: RICKY DAVIS

CASE NUMBER: 1:12CR00056-001

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not possess or have access to any cellular phone without the advance permission of the probation officer. The defendant shall provide all billing records for such devices, whether used for business or personal, to the probation officer upon request.
2. As directed by the probation officer, the defendant shall participate in a program of outpatient mental health treatment.
3. As directed by the probation officer, the defendant shall participate in a co-payment plan for treatment or testing and shall make payment directly to the vendor under contract with the United States Probation Office of up to \$25 per month.
4. The defendant shall submit to the search of his person, property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects at any time, with or without a warrant, by any law enforcement or probation officer in the lawful discharge of the officer's supervision functions with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
5. The defendant shall not possess or use a computer or any device that has access to any "on-line computer service" unless approved by the probation officer. This includes any Internet service provider, bulletin board system, or any other public or private computer network.
6. The defendant shall have no contact with known children under the age of 18, unless approved by the probation officer in advance. The defendant is not to loiter within 100 feet of school yards, parks, playgrounds, arcades, or other places primarily used by children under the age of 18. This shall include that the defendant is not to engage in any occupation, either paid or volunteer, that causes him to regularly contact known persons under the age of 18.
7. The defendant shall consent to the probation officer and/or probation service representative conducting periodic unannounced examinations of (a) any computer, or (b) computer-related device, or (c) equipment that has an internal or external modem which is in the possession or control of the defendant. The defendant consents to retrieval and copying of all data from any such computer, computer-related device, or equipment as well as any internal or external peripherals to ensure compliance with conditions. The defendant consents to removal of such computer, computer-related device, and equipment for purposes of conducting a more thorough inspection and analysis.

The defendant consents to having installed on any computer, computer-related device, and equipment, at the defendant's expense, any hardware or software systems to monitor the use of such computer, computer-related device, and equipment at the direction of the probation officer, and agrees not to tamper with such hardware or software and not install or use any software programs designated to hide, alter, or delete his computer activities. The defendant consents to not installing new hardware without the prior approval of the probation officer.

8. The defendant shall not possess, own, use, view, read, or frequent places with material depicting and/or describing sexually explicit conduct, including computer images, pictures, photographs, books, writings, drawings, videos, or video games. "Sexually explicit conduct" as defined in 18 USC 2256(2) means actual or simulated (a) sexual intercourse, including genital-genital, oral-genital, or oral-anal, whether between the same or opposite sex; (b) bestiality; (c) masturbation; (d) sadistic or masochistic abuse; or (e) lascivious exhibition of the genitals or pubic area of any person.
9. The defendant shall provide all requested business/personal phone records to the probation officer. The defendant shall disclose to the probation officer any existing contracts with telephone line/cable service providers. The defendant shall provide the probation officer with written authorization to request a record of all outgoing or incoming phone calls from any service provider.
10. The defendant shall consent to third-party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon him. This includes any activities in which you are acting as a technician, advisor, or consultant with or without any monetary gain or other compensation.
11. The defendant shall attend, cooperate with, and actively participate in a sex offender treatment and therapy program [which may include, but is not limited to, risk assessment, polygraph examination, and/or Visual Reaction Treatment] as approved and directed by the probation officer and as recommended by the assigned treatment provider.
12. The defendant's residence shall be pre-approved by the probation officer. The defendant shall not reside in direct view of places such as school yards, parks, public swimming pools, or recreational centers, playgrounds, youth centers, video arcade facilities, or other places primarily used by children under the age of 18.
13. The defendant shall not associate with any known gang member of the Norteno street gang or any other known member of a criminal street gang, as directed by the probation officer.

DEFENDANT: **RICKY DAVIS**CASE NUMBER: **1:12CR00056-001****CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$200		

- ☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Totals	\$ _____	\$ _____	

- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ The interest requirement is waived for the ☐ fine ☐ restitution
- ☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:
- ☐ If incarcerated, payment of the fine is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.
- ☐ If incarcerated, payment of the restitution is due during imprisonment at the rate of not less than \$25 per quarter and payment shall be through the Bureau of Prisons Inmate Financial Responsibility Program.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: RICKY DAVIS

Page 6 of 6

CASE NUMBER: 1:12CR00056-001

SCHEDULE OF PAYMENTS

Payment of the total fine and other criminal monetary penalties shall be due as follows:

- A. ☒ Lump sum payment of \$ 200.00 due immediately, balance due
☐ Not later than ____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B. ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C. ☐ Payment in equal ____ (e.g. weekly, monthly, quarterly) installments of \$ ____ over a period of ____ (e.g. months or years), to commence ____ (e.g. 30 or 60 days) after the date of this judgment; or
- D. ☐ Payment in equal ____ (e.g. weekly, monthly, quarterly) installments of \$ ____ over a period of ____ (e.g. months or years), to commence ____ (e.g. 30 or 60 days) after release from imprisonment to a term of supervision; or
- E. ☐ Payment during the term of supervised release/probation will commence within ____ (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendants ability to pay at that time; or
- F. ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.