No. _____

# In the Supreme Court of the United States

ROBERT SYLVESTER KELLY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Should this Court grant *certiorari* to make explicit that under 18 U.S.C. § 1962(c), the members of an "enterprise" must share a common illegal or fraudulent purpose?

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were Petitioner Robert Sylvester Kelly and Respondent United States of America.

## STATEMENT OF RELATED PROCEEDINGS

*United States v. Robert Sylvester Kelly*, No. __-_____ (Supreme Court of the United States)

*United States v. Robert Sylvester Kelly*, No. 22-1481(L), United States Court of Appeals, Second Circuit.

*United States v. Robert Sylvester Kelly*, No. 22-1982 (CON), United States Court of Appeals, Second Circuit.

*United States v. Robert Sylvester Kelly*, No. 19 CR 286, United States District Court, Eastern District of New York.

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## PETITION FOR A WRIT OF CERTIORARI

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Robert Sylvester Kelly petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 128 F.4th 387.

## JURISDICTION

The court of appeals denied a direct appeal on February 12, 2025. (App. B) The time for filing a petition for writ of certiorari is on or before May 13, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The question presented involves Title 28, United States Code, Section 1962, which provides in pertinent part:

**(c)** It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

## STATEMENT OF THE CASE

This case affords the Court an opportunity to provide clear direction to circuit courts of appeals regarding what constitutes an "enterprise" under 18 U.S.C. § 1962(c). This Court's intervention is necessary to make clear that an "enterprise," for purposes of 18 U.S.C. § 1962(c), requires a shared purpose of fraudulent conduct or illegality. While it is well established that an enterprise can have either a legal or illegal structure, a RICO enterprise cannot exist without its members sharing a common purpose to engage in a particular course of fraudulent or illegal conduct. To hold otherwise would mean that any rogue bad actor operating within a legal organization could be prosecuted under RICO as occurred here. This scenario stretches the RICO

statute beyond and contrary to its purpose. As such, this case presents an important issue concerning the future use of the RICO statute and its far-reaching implications for defendants and circuit courts of appeals.

**A. Course of Proceedings.**

Petitioner Robert Sylvester Kelly was convicted by a jury in the United States District Court for the Eastern District of New York for Racketeering in violation of 18 U.S.C. § 1962(c) and 1963 (Count One); Mann Act Transportation, in violation of 18 U.S.C. § 2421(a) (Counts Two, Six and Nine); Mann Act Coercion and Enticement, in violation of 18 U.S.C. § 2422(a) (Counts Three, Seven, and Nine); Mann Act Coercion of a Minor, in violation of 18 U.S.C. § 2422(b) (Count Four); and Mann Act Transportation of a Minor, in violation of 18 U.S.C. § 2423 (Count Five). (App. B) Following a jury trial, Mr. Kelly was convicted on each of the nine counts and a total sentence imposed was three hundred and sixty months (360) on Count One; ten years on counts Two, Six, and Eight; twenty (20) years on Counts Three, Four, Five, Seven, and Nine, all of which are to run concurrently. *Id.*

Mr. Kelly appealed his convictions to the Second Circuit, where he raised, *inter alia*, whether the government failed to prove him guilty of racketeering where the record is devoid of evidence of

an enterprise comprised of members who shared a common illegal or fraudulent purpose.

The Second Circuit affirmed Mr. Kelly's conviction and sentence. *United States v. Kelly,* 128 F.4th 387 (2d Cir. 2025)).

**B. Motions Filed in the District Court.**

**1. Pre-Trial Motions Regarding the Government's Failure to Sufficiently plead a RICO enterprise.**

Petitioner unsuccessfully moved to dismiss the RICO count pre-trial, arguing that the government failed to sufficiently plead a RICO enterprise. (App. C) The district denied the motion in a written order on June 29, 2022. *Id.*

**2. Post-trial Motions Regarding the Indictment's Failure to Allege a Legally Cognizable Enterprise.**

Post-trial, Petitioner filed motions for a judgment of acquittal, or, in the alternative, for a new trial. Petitioner was unsuccessful "in moving to dismiss the Count 1, Petitioner claimed that the indictment did not allege a legally cognizable enterprise within the meaning of RICO." (App. D)

## REASON FOR GRANTING THE PETITION

The Court should grant the writ to make clear that an "enterprise" under 18 U.S.C. § 1962(c) must consist of members who agree to engage in an unlawful activity. An enterprise for RICO purposes does not exist where a defendant merely uses unwitting employees to carry out anodyne tasks that facilitate his criminal activity as was the case here.

### A. Introduction.

Ignoring the distinctly economic legislative history of the RICO statute, the government brought a RICO prosecution against Petitioner, not to remedy widespread criminal activity of an enterprise, but to punish one man whose alleged crimes could no longer be prosecuted by state and local agencies. Under the guise of the "liberal construction clause," the government manufactured an ill-fitting RICO theory that was unsupported by the evidence. To be sure, prosecutors have used RICO in a wide variety of circumstances, but the liberal construction clause is "not an invitation to apply RICO to new purposes that Congress never intended." *Reves v. Ernst & Young,* 492 U.S. 229, 248-49 (1989). In its rush to indict Petitioner, the government stretched the statute beyond its limits, applying it under circumstances leagues removed from the statute's purpose.

**B. General Legal Principles.**

To convict a defendant of racketeering, the government must prove, at a minimum, the existence of an enterprise and a related pattern of racketeering activity. 18 U.S.C. § 1962(c); *United States v. Basciano,* 599 F. 3d 184, 199 (2d Cir. 2010) (citing *United States v. Turkette,* 452 U.S. 576, 582 (1981).

An enterprise includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). This Court has defined a RICO enterprise as "a group of persons associated together for a common purpose of engaging in a course of conduct." *Turkette,* 452 U.S. at 583; *see also Boyle v. United States,* 556 U.S. 938, 950 (2009). An enterprise is demonstrated "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.,* 385 F. 3d 159, 173 (2d Cir. 2004).

For an association of individuals to constitute an enterprise, "the individuals must share a common purpose to engage in a particular fraudulent course of conduct and work to achieve such purposes." *Id.* at 174. The enterprise's purpose must be common to all of its members. *Stein v. World-Wide Plumbing Supply Inc.,* 71 Supp. 3d 320, 325 (E.D.N.Y. 2014); *see also*

*Crab House of Douglaston v. Newsday*, 801 F. Supp. 2d 61, 77 (E.D.N.Y. 2011) (citing *Satinwood*, 385 F. 3d at 174). The "enterprise" is neither the individual defendant nor the "pattern of racketeering activity"; rather, it is "an entity separate and apart from the pattern of activity in which it engaged," and must be alleged and proved separately. However, there must be a nexus between the enterprise and the racketeering activity that is being conducted. *United States v. Indelicato,* 865 F. 2d 1370, 1384 (2d Cir. 1989).

In its third superseding indictment, the government alleged, *inter alia,* that Petitioner, individuals he employed, and members of his entourage constituted a group of individuals associated in fact who functioned as a continuing unit for the common purpose of promoting Petitioner's music and brand and to "recruit" women and girls to engage in "illegal sexual activity." Despite repeated references to Petitioner's "inner circle," which connotes a small group of individuals close to the leader of a group, the government's enterprise evidence came from a handful of low-level employees. These employees were consistent in their account of working for Petitioner; they just followed the rules, some arguably strange but not inherently illegal. They were not privy to Petitioner's sex life or the details of his relationships. Most importantly, they never agreed to assist or help Petitioner engage in

illegal sexual conduct of any kind. The evidence showed that whatever "illegal sexual activity" in which the Petitioner engaged was *concealed* from his employees, and Petitioner took measures to keep his personal sexual life secret. The RICO statute was never intended to remedy criminal conduct of *individuals* who carried out their misdeeds through the use of routine services by their unwitting personal assistants.

In Petitioner's case, the Second Circuit upheld the district court's logic that an entirely rogue actor working in an otherwise entirely legal organization could be prosecuted under RICO for merely duping his associates into facilitating his misdeeds with mundane tasks. As in Petitioner's case, one could think of countless duties asked of an unwitting personal assistant, such as making hotel reservations, calling a car service or taxi, throwing out a bag of garbage, or delivering a message, that could facilitate a crime perpetrated by an individual working in the context of a business. That does not a RICO enterprise make.

In *Turkette*, the Court was tasked with deciding whether an enterprise could include an entirely illegitimate enterprise. *Turkette*, 452 U.S. at 578. In its discussion, the Court compared various associations-in-fact that were entirely criminal in nature with those that were a combination of illegal

and legitimate activities. *Id. Turkette* did not provide any example of an association-in-fact where its members shared only a legal purpose.

In *Boyle,* the defendant was charged with a number of bank thefts that were allegedly conducted by a group of loosely organized individuals operating within a larger structure. *Boyle,* 556 U.S. at 941. As this Court observed, the participants in those crimes included a core group, as well as others who were recruited from time to time. *Id.* Each theft was typically carried out by a group of participants who met beforehand to plan the crime, gather tools, and assign the roles that each participant would play (such as lookout and driver), and the participants generally split the proceeds from the thefts. *Id.* The group was loosely and informally organized, and did not "appear to have had a leader or hierarchy." *Id.* This Court held that this association-in-fact qualified as an enterprise for RICO purposes notwithstanding the absence of a clear leader. The Court was not presented with the question (nor did it answer) presented in Petitioner's case, whether the members of an association-in-fact must share a common purpose to carry out an illegal course of conduct or whether a single bad actor acting within an organization can be guilty of RICO. Indeed, in *Boyle,* the association-in-fact's entire purpose was to carry

out bank robberies, which is a decidedly criminal purpose.

This Court should grant *certiorari* and remand to the appellate court with directions to conduct its analysis consistent with this Court's holding that a RICO enterprise cannot encompass an exclusively legal or legitimate organization. The Court's intervention is required to address what appears to be a trend in expanding the RICO beyond what Congress intended.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 13, 2025

# APPENDIX

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED FEBRUARY 12, 2025**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 22-1481 (L), 22-1982 (CON)

UNITED STATES OF AMERICA,

*Appellee,*

v.

ROBERT SYLVESTER KELLY, AKA R. KELLY,

*Defendant-Appellant.*

Argued: March 18, 2024
Decided: February 12, 2025

**OPINION**

On Appeal from the United States District Court
for the Eastern District of New York

Judge Sullivan concurs in part and dissents in part in a separate opinion.

Chin, Circuit Judge:

Defendant-appellant Robert Sylvester Kelly, a recording artist and singer also known as R. Kelly, appeals

from a final judgment entered in the United States District Court for the Eastern District of New York (Donnelly, *J.*), following a six-week jury trial, convicting him of racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), and transportation and coercion in violation of the Mann Act, 18 U.S.C. §§ 2421(a), 2422(a), 2422(b), and 2423(a). Enabled by a constellation of managers, assistants, and other staff for over twenty-five years, Kelly exploited his fame to lure girls and young women into his grasp. Evidence at trial showed that he would isolate them from friends and family, control nearly every aspect of their lives, and abuse them verbally, physically, and sexually.

On appeal, Kelly challenges primarily (1) the sufficiency of the evidence supporting his racketeering and Mann Act convictions, including the underlying state and federal violations upon which they are predicated; (2) the constitutionality of certain of those underlying state laws; (3) the empaneling of four jurors who were allegedly biased against him; (4) the district court's rulings on the admission of certain evidence at trial; and (5) its order of restitution and the seizure of funds in his Bureau of Prisons ("BOP") inmate account. We conclude that (1) there was sufficient evidence to support each of Kelly's convictions, including for the state and federal violations underlying his Mann Act convictions; (2) the New York state law—upon which some of the Mann Act violations were predicated—was constitutional as applied to Kelly and Kelly's challenges to the California state law—upon which some of the other Mann Act violations were predicated—are untimely; (3) the evidence did not support

Kelly's claim that the four jurors Kelly challenges were biased against him or that trial counsel was ineffective during *voir dire*; (4) the district court did not abuse its discretion in admitting certain evidence; and (5) the district court did not abuse its discretion in ordering restitution and the seizure of Kelly's BOP inmate account funds. Accordingly, the judgment of the district court is AFFIRMED.

## BACKGROUND

### I. The Facts[1]

Following Kelly's initial indictment in June 2019, a federal grand jury returned a third superseding indictment (the operative "indictment") on March 12, 2020, charging Kelly with nine counts. Count One charged Kelly with racketeering in violation of 18 U.S.C. § 1962(c) and set forth fourteen racketeering acts as to six victims. Counts Two through Nine charged Kelly with violations of the Mann Act, 18 U.S.C. §§ 2421-2424. The racketeering acts in Count One and the underlying unlawful conduct in Counts Two through Nine were predicated on various federal and state laws, including, as relevant to this appeal: (1) 18 U.S.C. § 1589(a) (forced labor), (2) California Health and Safety Code ("CHSC") § 120290 (effective 1998)

1. Because Kelly appeals his convictions following a jury trial, "our statement of the facts views the evidence in the light most favorable to the government, crediting any inferences that the jury might have drawn in its favor." *United States v. Rosemond*, 841 F.3d 95, 99-100 (2d Cir. 2016) (quoting *United States v. Dhinsa*, 243 F.3d 635, 643 (2d Cir. 2001)).

(willful exposure of a communicable disease), (3) New York Penal Law ("NYPL") § 120.20 (reckless endangerment), and (4) New York Public Health Law ("NYPHL") § 2307 (knowing exposure of infectious venereal disease). The evidence presented at trial established the following facts.

### A. Kelly's Inner Circle

Kelly is an internationally-recognized musician and performer. His career took off in the late 1980s. By the 1990s, Kelly employed a network of associates consisting of managers, an accountant, recording engineers, personal assistants, drivers, and runners. Kelly's inner circle worked not only to promote his music and professional brand, but also to enable him to exploit his fame and influence to sexually, physically, and verbally abuse a number of victims, many of whom were minors.

#### 1. The Members of Kelly's Inner Circle

Demetrius Smith, one of Kelly's first employees, met Kelly in 1984 when Kelly was a "youngster" performing at a high school talent show in Chicago. Kelly App'x at 558-60. Smith worked as Kelly's personal assistant and tour manager from 1984 to approximately 1996, helping Kelly secure his first record deal. At that time, Kelly employed Barry Hankerson as his business manager. Between 2003 and 2011, Tom Arnold also served as Kelly's studio and road manager. Derrel McDavid eventually took over for Hankerson. In 2004, Diana Copeland began working as Kelly's personal assistant and later became his executive assistant, spending about fifteen years total working for Kelly.

Kelly employed several runners, including Nicholas Williams and Anthony Navarro, who completed miscellaneous errands for Kelly and his entourage. Later in his career, Kelly employed additional associates and personal assistants, including Cheryl Mack and two sisters, Suzette and Alesiette Mayweather.

In many respects, Kelly's staff had the responsibilities expected of individuals working for an internationally famous singer and recording artist. For instance, Navarro, a runner, worked at the recording studio in the basement of Kelly's home in the Chicago suburbs. Navarro's duties included setting up the studio for recording sessions, running errands, and assisting higher-level staff. Arnold, Kelly's road manager, was responsible for maintaining the tour buses and coordinating travel to Kelly's shows.

### 2. Kelly's Staff Facilitated the Abuse of Victims

There was, however, another aspect to the activities of Kelly's inner circle. Kelly's associates and employees made possible his decades-long operation to recruit and exploit young girls and women by enabling, facilitating, and shielding Kelly's abusive behavior from view.

First, at Kelly's direction, members of his entourage handed out Kelly's phone number on slips of paper to young girls Kelly saw at concerts and in public places. Once Kelly began communicating with a girl by phone, FaceTime, or text message, he (or one of his associates) would invite her to visit him, often at his home or studio.

Sometimes, Kelly sent an employee to pick up the girl. Upon arrival, a member of Kelly's staff was usually there to receive the guest, and Kelly would instruct his staff on where to take her.

Kelly's employees were his eyes and ears in his studios, residences, and on the road, helping him to enforce the strict rules he had in place for his guests. They stood guard when Kelly confined his victims to a room or bus for hours or days on end as punishment for breaking his rules. When one victim, Anna, left Kelly's home without permission after an argument, Kelly confronted Copeland, who was then his personal assistant, about how she had let Anna leave. *Id.* at 1069.

Beyond what was required to enforce his rules and communicate his demands and instructions, Kelly instructed his employees not to speak to his female guests. Kelly's employees knew that he abused girls, both verbally and physically. For instance, Navarro overheard Kelly verbally abusing female guests, and Suzette Mayweather heard Kelly hit another victim, Jane, on at least one occasion.

Kelly's employees knew, or at the very least turned a blind eye to, the fact that Kelly's female guests were often minors. Navarro recalled that the girls Kelly invited to the studio "looked really young." *Id.* at 471. Navarro was in his early twenties at the time, and the girls looked "younger than [he did]"—"like mid-aged teenagers." *Id.* at 471-72. Williams, another runner who was nineteen years old when he worked for Kelly, thought the girls looked "very young." *Id.* at 1407.

Kelly's employees were responsible for arranging travel for the female guests to see Kelly, and in doing so would review the girls' identification. When Arnold booked travel, he used the girls'"name[s] as [they] appear[ed] on their ID and date of birth." *Id.* at 677. Cheryl Mack booked travel for Jane when she was a minor. Jane, who admitted at trial that she had been concealing her true age from Kelly, provided her real identification and birthdate to Mack. Suzette Mayweather later learned that Jane was seventeen years old and, so far as the record shows, did not say anything. Juice, one of Kelly's live-in girlfriends, also learned that Jane was seventeen.

Members of Kelly's inner circle also knew that Kelly had a sexually transmitted disease ("STD"). Dr. Kris McGrath was Kelly's primary care physician for approximately twenty-five years beginning in 1994. As early as February 1995, after Kelly had contracted gonorrhea, Dr. McGrath advised Kelly to disclose his STD status to partners and practice safe sex. Although Dr. McGrath could not remember the precise date that Kelly contracted herpes, prescription records indicate that Dr. McGrath was treating Kelly for genital herpes by March 19, 2007. Kelly had runners pick up his herpes medication from the pharmacy. When Anna got tested for STDs, the doctor sent the results directly to Copeland (Kelly's personal assistant). Juice, at Kelly's instruction, booked a doctor's appointment for another victim, Jane, when Jane began to experience herpes symptoms, and accompanied Jane to fill prescriptions for her treatment regimen.

Employees faced consequences when they did not follow Kelly's rules: if Kelly determined that a staff

member broke a rule or otherwise disobeyed him, he would withhold their pay as a fine. He required several members of his inner circle to write letters falsely incriminating themselves as blackmail material. And Kelly was not above threatening his staff to keep them in line. For example, after informing Mack of a lawsuit filed against him by a seventeen-year-old girl, Kelly told Mack that she had to "pick a team" and that "in these types of situations people come up missing." Sealed App'x at 1945.

Kelly and his staff abided by a strict set of rules with respect to his control over the young girls he invited to his home, studio, and tours. The rules ensured that he controlled virtually every detail of their lives while they were with him. Kelly required girls to wear baggy clothing around him. He made girls call him "Daddy," *see*, *e.g.*, Gov't App'x at 826 (Stephanie's testimony), and forbade them from talking to other men. Girls needed permission to move around Kelly's residence or studio and even to use the bathroom. Likewise, girls were required to stay inside Kelly's van when travelling around Chicago. Kelly also required girls to write letters attesting to things that they had never done, like stealing and lying, so that he could use the letters as blackmail and leverage. Kelly subjected his victims to humiliating, degrading, and often coerced sexual intercourse. For instance, he dictated how he wanted them to position their bodies during sex, forced one victim to perform oral sex on him with other people in the car, and demanded another victim to spread urine and feces on her naked body while calling him "Daddy." Kelly also sought to punish the victims by demanding that they record humiliating videos: on one occasion, Kelly

instructed Juice to procure a new iPad so that Jane could use it to film herself eating feces as punishment. He also did not tell his victims that he had herpes, and did not use a condom during sexual intercourse. Several of his victims contracted herpes after their sexual contact with Kelly.

### B. The Victims

The indictment referenced six victims. Because five are directly relevant to the appeal, we provide more detail on those individuals—Aaliyah, Stephanie, Jane, Jerhonda, and Faith.[2]

#### 1. Aaliyah

Kelly met Aaliyah in 1992 through Hankerson—his manager and Aaliyah's uncle—when she was at most thirteen or fourteen years old. Kelly and Aaliyah began working together on music and spent an increasing amount of time alone with each other. At some point, Smith asked Kelly if he was "messing" with Aaliyah, which Kelly denied. Kelly App'x at 583.

In the middle of a 1994 tour, before taking the stage to perform, Kelly told Smith that "Aaliyah's in trouble, man, we need to get home." *Id.* at 585-86. On the plane

2. The sixth victim, Sonja, testified that Kelly invited her to his studio where she was "detained in a room for days." *United States v. Kelly*, 609 F. Supp. 3d 85, 113 (E.D.N.Y. 2022). At the conclusion of trial, the jury found that, with respect to Sonja, the government did not prove the kidnapping and Mann Act violations beyond a reasonable doubt. *Id.*

back to Chicago, Smith learned that Kelly was rushing home because Aaliyah thought she was pregnant. Kelly told Smith that he and McDavid were planning for Kelly to marry Aaliyah. Smith came up with the idea of procuring a false identification card for Aaliyah, who was underage and could not legally marry. The group drove to a welfare office in Chicago, where Smith bribed a city clerk with $500 to create a false identification card. The group created another identification card for Aaliyah which falsely stated that she worked at a FedEx. Kelly and Aaliyah went to City Hall and obtained a marriage license using Aaliyah's false identification cards. A preacher married them at a hotel in a hasty ceremony.

**2. Stephanie**

Stephanie met Kelly in 1998, when she was sixteen years old, at the flagship McDonald's in downtown Chicago. A member of Kelly's entourage approached Stephanie, who was there on a double date with her boyfriend and another couple. The man asked Stephanie's age, and she responded truthfully that she was sixteen. The man handed Kelly's number on a slip of paper to Stephanie, gestured toward Kelly, who was looking at Stephanie from a distance, and told Stephanie that Kelly wanted her to call him. She threw the paper away because she did not intend to call Kelly.

Stephanie encountered Kelly for a second time a year later. They began talking, and Kelly invited Stephanie to the studio, saying he would like to get to know her. Within a couple of weeks, Stephanie visited the studio,

where an employee escorted her to a waiting area. Kelly picked Stephanie up and initiated sexual intercourse. Stephanie and Kelly continued to see each other six to eight times per month for a period of approximately six months. They had sex every time they saw each other, and Kelly sometimes video recorded their sexual activity. Stephanie eventually did not want to see Kelly anymore because their sexual encounters made her feel "used and humiliated and degraded." Gov't App'x at 850. She did, however, attempt to convince Kelly to turn over or destroy the video recordings he had made—he never did.

**3. Jerhonda**

As a devoted fan and active member of Kelly's online fan club, Jerhonda met Kelly outside of federal court in Chicago where Kelly was facing criminal charges in 2008 and where some fans had gathered. In May 2009, one of Kelly's associates, Bubba (Jermaine Maxey), invited Jerhonda and a friend from the online fan club to come to a party at Kelly's home. During the party, Jerhonda and Kelly exchanged numbers. At that time, Jerhonda was only sixteen years old, though she lied and told Kelly she was nineteen.

A couple of days later, Jerhonda returned to Kelly's house after he invited her via text message. Navarro picked Jerhonda up from the train station. Upon her arrival, Kelly told Jerhonda, who had packed a two-piece swimsuit at his instruction, that he would meet her in his indoor pool room. At the pool, Kelly instructed Jerhonda to walk back and forth in front of him and remove one

piece of her swimsuit each time. Jerhonda "did what [she] was told." Kelly App'x at 115. Once she was naked, Kelly "grabbed" Jerhonda and began kissing her. *Id.* at 116. He then picked her up and took her to his game room, where he performed oral sex on her. *Id.*

Jerhonda began to feel uncomfortable, which prompted her to tell him that she was sixteen years old. Kelly told Jerhonda to tell everyone she was nineteen and to "act 21." *Id.* at 117. Jerhonda then performed oral sex on Kelly, and Kelly told Jerhonda that he was going to "train [her] on how to please him sexually." *Id.* Jerhonda and Kelly then had sex, and he did not use a condom or tell Jerhonda about any STDs that he had. Sometime during their roughly six-month relationship, Jerhonda contracted herpes. Kelly arranged for a doctor to see Jerhonda in his home.

Kelly also introduced Jerhonda to Juice, a "girlfriend" who "ha[d] been around since she was [fifteen] years old." *Id.* at 158. During their first interaction, Kelly brought Jerhonda onto his tour bus, where Juice was inside and naked. Kelly told Jerhonda that Juice was going to train Jerhonda on how to sexually please him and that Jerhonda should follow Juice's lead. He then instructed both Juice and Jerhonda to perform oral sex on him.

The last time Jerhonda was in Kelly's home, Kelly became angry at her for not acknowledging him when he walked into a room. He slapped her and choked her until she lost consciousness, and when she got up, he spit on her and told her to put her head down in shame. Once she got up off the floor, Kelly instructed Jerhonda to perform oral sex on him, and she complied.

**4. Jane**

Jane first met Kelly during one of his concerts in April 2015, when she was seventeen years old. At some point during the show, a member of Kelly's entourage handed Jane a slip of paper with Kelly's phone number on it and instructed her not to tell anyone. Sometime later, Kelly contacted Jane over FaceTime and invited her to audition for him as an aspiring R&B singer. Jane, who was seventeen at the time, lied and told Kelly she was eighteen.

Kelly asked Jane to meet him at the Dolphin Hotel in Kissimmee, Florida, for her audition. Once inside the hotel room, Kelly told Jane that "before [she could] audition[,] he needed to cum." *Id.* at 454. Jane told him that she was not there to please him and that she was there to audition. Undeterred, Kelly instructed Jane to remove her clothing. Following Kelly's multiple requests to have sex with her, Jane ultimately allowed him to perform oral sex on her because she "thought it would be better than having [vaginal] sex with [Kelly], " *id.* at 456, and he promised, in return, to "allow [her] to audition, " *id.* at 457. After ejaculating, Kelly permitted Jane to perform a musical audition, at which point he indicated that she "had a lot of potential" and offered to help Jane improve her singing. *Id.* at 460.

Jane proceeded to travel to Los Angeles to see Kelly perform on tour, and Kelly had Cheryl Mack arrange Jane's travel. When providing her information so that Mack could book travel, Jane gave Mack her real birthdate. Jane saw Kelly at his hotel in Los Angeles. He again told her that

he "wanted to teach [her] a few [musical] techniques," but that he "needed to ejaculate again before doing anything." *Id.* at 469. Kelly then performed oral sex on Jane in the Los Angeles hotel.

Later, Kelly arranged for Jane to meet him in Stockton, California. Mack again booked Jane's travel using Jane's real birthdate. In Stockton, Jane and Kelly had sexual intercourse for the first time. Kelly did not use a condom or tell Jane that he had herpes. In May 2015, Mack arranged for Jane to meet Kelly in San Diego, California, where the two had sexual intercourse again without the use of a condom and without Kelly disclosing that he had herpes.

Jane spent the summer after her junior year of high school in Chicago with Kelly. While spending time in Kelly's studio, Jane needed his or an assistant's permission to leave her room. Jane travelled with Kelly while he was on tour that summer, and the two had sex "almost every day." *Id.* at 509. Kelly often recorded their sexual encounters on his iPad.

When she was still seventeen, Jane contracted herpes. She began experiencing pain during sexual intercourse, and her symptoms became so severe that she could not walk. Kelly directed Juice to book a doctor's appointment for Jane. When Jane told Kelly that she had contracted herpes, he became "agitated and said that [she] could have gotten that from anyone." *Id.* at 518. Jane responded that she "had only been intimate with him." *Id.*

At the end of that summer, before returning home to Florida, Jane told Kelly that she was seventeen years old. Kelly and Jane were in Lincoln Park, Chicago, with Juice and one of Kelly's drivers when she told him. In response to the news, Kelly slapped Jane in the face with his open palm and walked away.

**5. Faith**

Faith met Kelly when she was nineteen years old, after members of Kelly's staff invited her and her sister backstage during a March 2017 concert in San Antonio, Texas. Kelly gave Faith his phone number, and when she got home from the concert, she texted her name and a photo of herself to Kelly. Faith and Kelly thereafter started communicating via text, phone, and FaceTime. Kelly told Faith he loved her within a week of their first meeting. He invited Faith to come see him on tour and gave her Diana Copeland's phone number for travel arrangements.

In May 2017, Faith made her first trip to New York to see Kelly. Kelly visited Faith's hotel room the morning after she arrived and they had sexual intercourse, even though Faith told Kelly that she was not ready for sex. Kelly recorded the encounter on his iPad. Kelly did not disclose his herpes diagnosis to Faith or use a condom. Several months later, when Faith travelled with Kelly to Dallas, he directed her to "write . . . something about [her] family that [she] didn't want anybody to know," which he could use to protect himself. *Id.* at 1718. Kelly also instructed Faith to send a text message that said, "Daddy I want to be with you and the girls." *Id.* at 1718.

## II. Proceedings Below

Before trial, the district court prepared a written questionnaire containing 108 questions for jury selection. Approximately 575 prospective jurors completed and returned the questionnaire. After reviewing the questionnaires, the parties agreed that 251 prospective jurors should be struck for cause. Each party then separately challenged additional prospective jurors: Kelly's counsel challenged an additional 145 individuals; the government listed an additional 34. The district court excused all of these individuals before conducting *voir dire*. The remaining 145 underwent in-person *voir dire*, which began on August 9, 2021, and took two days. The court empaneled twelve jurors and six alternates.[3]

Trial commenced on August 18, 2021. Over the course of the six-week trial, the government presented forty-five witnesses and hundreds of exhibits, including written and videotaped evidence of Kelly's treatment of his alleged victims. After the government rested, the defense called five witnesses. Kelly did not testify.

On September 27, 2021, the jury returned a verdict of guilty on all counts. The jury determined that the government proved all the underlying racketeering acts in Count One except Racketeering Acts Three and Four (kidnapping and Mann Act violations as to Sonja). After trial, Kelly moved for a judgment of acquittal and alternatively for a new trial under Federal Rules of Criminal Procedure 29 and 33. On June 29, 2022, the

3. No jurors were excused, and thus no alternate juror was asked to deliberate.

district court denied both motions. *See United States v. Kelly*, 609 F. Supp. 3d 85 (E.D.N.Y. 2022).

The district court sentenced Kelly on June 29, 2022, as follows: 360 months' imprisonment on Count One, ten years on each of Counts Two, Six, and Eight, and twenty years on each of Counts Three, Four, Five, Seven, and Nine, all to run concurrently, followed by a five-year term of supervised release. The court also imposed a $100,000 fine; a $40,000 assessment under the Justice for Trafficking Victims Act ("JTVA"), 18 U.S.C. § 3014; and a $900 special assessment.

On August 4, 2022, the government directed the BOP to seize $27,824.24 in Kelly's inmate trust account.[4] The government then moved for "an order requiring the BOP to turn over the funds to the Clerk of Court for deposit into an interest-bearing account." Sp. App'x at 158 (internal quotation marks omitted). The government sought these funds "either to satisfy [Kelly's] restitution judgment, which [was] yet to be imposed, or to satisfy the Court-ordered fine, which ha[d] already been imposed." *Id.* at 161 (internal quotation marks omitted). On September 9, 2022, the district court granted the motion.

After briefing and a hearing, the district court imposed restitution in the amount of $379,649.90 as to two victims: Jane ($300,668.18) and Stephanie ($78,981.72).

This appeal followed.

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4. Kelly had been arrested approximately three years earlier, on July 11, 2019.

*Appendix A*

## DISCUSSION

On appeal, Kelly challenges virtually every aspect of his trial and sentence, arguing that (1) there was insufficient evidence to support the RICO and the Mann Act convictions, including the underlying violations of NYPL § 120.20 and the federal forced labor statute, 18 U.S.C. § 1589(a); (2) two state laws underlying the RICO and Mann Act violations are unconstitutional or were improperly applied; (3) the court empaneled four jurors who were biased against him and trial counsel was ineffective for failing to seek their dismissal; (4) the district court improperly admitted evidence under Federal Rule of Evidence 404(b); and (5) the district court abused its discretion in (a) ordering restitution as to Jane and Stephanie and (b) authorizing the seizure of funds from Kelly's BOP account. We address each issue in turn.

### I. Sufficiency of the Evidence

Kelly first contends that there was insufficient evidence to support his convictions under RICO (Count One) and the Mann Act (Counts Two through Nine). He also challenges the sufficiency of the evidence of the underlying predicates of his RICO and Mann Act convictions—namely, violations of NYPL § 120.20 (reckless endangerment) and the federal forced labor statute, 18 U.S.C. § 1589(a). We conclude that the evidence was sufficient as to all counts.

### A. Standard of Review

We review preserved sufficiency of the evidence claims *de novo*. *United States v. Capers*, 20 F.4th 105, 113 (2d Cir. 2021). A defendant challenging the sufficiency of the evidence "faces an uphill battle," *United States v. Mi Sun Cho*, 713 F.3d 716, 720 (2d Cir. 2013) (internal quotation marks omitted), and "bears a heavy burden," *United States v. Aguilar*, 585 F.3d 652, 656 (2d Cir. 2009), because a reviewing court must sustain the jury's verdict if, viewing the evidence in the light most favorable to the prosecution, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Construing the evidence in the prosecution's favor means that we "defer to the jury's assessment of witness credibility and its assessment of the weight of the evidence." *United States v. Lewis*, 62 F.4th 733, 744 (2d Cir. 2023) (internal quotation marks omitted). "A court may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *Capers*, 20 F.4th at 113 (internal quotation marks omitted).

### B. The RICO Conviction

Kelly argues that there was insufficient evidence to support his RICO conviction because the government failed to prove that (1) the enterprise had an illegal common purpose, and (2) the enterprise was distinct from Kelly. We disagree.

*Appendix A*

**1. Applicable Law**

The RICO statute provides, in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). To prove a criminal RICO violation, the government must prove "an enterprise and a pattern of racketeering activity." *United States v. White*, 7 F.4th 90, 98 (2d Cir. 2021).

A RICO enterprise includes "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). An association-in-fact enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct," *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), and has three basic features: (1) "a purpose"; (2) "relationships among those associated with the enterprise"; and (3) "longevity sufficient to permit [the] associates to pursue the enterprise's purpose," *Boyle v. United States*, 556 U.S. 938, 946, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009).

In keeping with the principle that courts should "liberally construe[ ]" the RICO statute, the Supreme Court has noted that "[t]he term 'any' ensures that the definition has a wide reach, and the very concept of an association in fact is expansive." *Id.* at 944, 129 S.Ct. 2237 (citations omitted); *accord D'Addario v. D'Addario*, 901 F.3d 80, 100 (2d Cir. 2018) ("In line with this general approach, the Supreme Court has rejected attempts to graft onto the statute formal strictures that would tend to exclude amorphous or disorganized groups of individuals from being treated as RICO enterprises." (internal quotation marks omitted)).

In *Turkette*, the Supreme Court held that RICO covers "both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones." 452 U.S. at 580-81, 101 S.Ct. 2524. In so holding, the Supreme Court emphasized RICO's intentionally broad reach, *id.* at 589, 101 S.Ct. 2524, and noted that though "the primary purpose of RICO is to cope with the infiltration of legitimate businesses," the statute could also be applied to reach exclusively illegitimate—or criminal—enterprises, *id.* at 591, 101 S.Ct. 2524.

For a RICO conviction to stand, there must also be a sufficient nexus between the enterprise and the racketeering activity. *See United States v. Indelicato*, 865 F.2d 1370, 1384 (2d Cir. 1989) (en banc) ("[N]o RICO violation can be shown unless there is proof of the specified relationship between the racketeering acts and the RICO enterprise.").

**2. Application**

While Kelly's arguments on appeal are not entirely clear, we nevertheless understand him to be making two arguments—one primarily legal and the other record-based. With respect to the first, Kelly asserts that members of an enterprise must have a fraudulent or illegal common purpose to be a cognizable enterprise under RICO. As for the second, Kelly contends that the government did not prove at trial the illegal purposes alleged in the indictment. *See* Oral Arg. at 4:08-4:26.[5]

To the extent Kelly argues that the law requires members of an association-in-fact enterprise to have a fraudulent or illegal common purpose, a substantial body

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5. Kelly styled his challenge to his RICO conviction as a sufficiency claim both in his brief and at oral argument. The government points out that Kelly did not object to the district court's instructions to the jury, which read, in pertinent part:

> The term "enterprise" includes legitimate and illegitimate enterprises. An enterprise . . . can be a vehicle used by a defendant to commit crimes. . . . A group or association of people can be an enterprise if these people have associated together for a common purpose of engaging in a course of conduct.

Gov't App'x at 903. Indeed, at oral argument, defense counsel repeatedly emphasized that she was not challenging the jury instructions, and that any such challenge would be "frivolous" because the instructions were a proper articulation of the law. Oral Arg. at 38:06-38:13; *see also id.* at 1:24-1:32 ("I'm not challenging the jury instruction, nor could the jury instruction be challenged.").

of Supreme Court and Second Circuit precedent makes clear that an association-in-fact enterprise need not have a fraudulent or illegal common purpose. In *Turkette*, the Supreme Court held that RICO covers both legitimate and illegitimate enterprises. 452 U.S. at 580-81, 101 S.Ct. 2524. And in *Boyle*, the Supreme Court endorsed its prior holding in *Turkette*, emphasizing that the definition of a RICO enterprise is "obviously broad" as evidenced by the statute's use of the word "any." 556 U.S. at 944, 129 S.Ct. 2237.

Kelly asserts, without citing authority, that "*Turkette* assumed a RICO enterprise would have *some* criminal objective." Kelly Br. at 36. He argues that "*Turkette* never suggested that an enterprise could be established by individuals engaging in a course of conduct with an entirely legal purpose that was unrelated to the alleged racketeering acts of one person in the enterprise." *Id.* (internal quotation marks omitted). His argument lacks merit for two reasons.

First, we do not read any part of *Turkette* to suggest that a RICO enterprise must always have some criminal objective. Indeed, the question before the Court in that case was the inverse: whether RICO could cover exclusively *criminal* enterprises. *See*452 U.S. at 578, 101 S.Ct. 2524. The Court observed that "[i]t is obvious that § 1962(a) and (b) address the infiltration by organized crime of legitimate businesses." *Id.* at 584, 101 S.Ct. 2524. Kelly's reading of *Turkette* to say that a RICO enterprise will always have some criminal objective is clearly wrong.

Second, by arguing that the government must prove an illegal course of conduct to prove a RICO enterprise, Kelly blurs the line between the RICO enterprise on the one hand (which need not be inherently criminal) and the pattern of racketeering activity on the other (which necessarily is the course of criminal activity by the enterprise). The *Turkette* Court expressly anticipated and rejected this line-blurring argument, explaining that:

> In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity, is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. . . . The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages.

*Id.* at 583, 101 S.Ct. 2524 (citation omitted). Kelly's argument that the enterprise's purpose was unrelated to the racketeering acts is an argument about the nexus

between the enterprise and the pattern of racketeering, but it is not an issue we consider when determining whether a RICO enterprise exists in the first place. *See Indelicato*, 865 F.2d at 1384.

In support of his claim that individuals in a RICO enterprise must have a fraudulent or illegal common purpose, Kelly principally argues that we are bound by statements made in our decision in *First Capital Asset Management, Inc. v. Satinwood, Inc.*, 385 F.3d 159 (2d Cir. 2004). Specifically, he relies on our observation there that "for an association of individuals to constitute an enterprise, the individuals must share a common purpose to engage in a particular *fraudulent* course of conduct and work together to achieve such purposes." *Id.* at 174 (emphasis added) (internal quotation marks omitted and alteration adopted).

Kelly's interpretation of *Satinwood* as setting a heightened standard for RICO enterprises overlooks the context of our discussion in that case. That quoted phrase was ancillary to a discussion regarding the nexus requirement between an enterprise and racketeering activity and was merely dicta. Moreover, the quoted language, if read as a holding, would contradict both *Turkette* and *United States v. Mazzei*, 700 F.2d 85 (2d Cir. 1983).[6] *See Turkette*, 452 U.S. at 580-81, 101 S.Ct. 2524

6. In *Mazzei*, we held that proof of a RICO enterprise and pattern of racketeering activity need not be "distinct and independent, as long as the proof offered is sufficient to satisfy both elements." 700 F.2d at 89. The practical effect of *Mazzei* is that the same pieces of evidence can prove the existence of the

("There is no restriction upon the associations embraced by the definition[ ] [of enterprise in Section 1961]. . . . On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope."); *see also Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001) ("The [Supreme] Court has held that RICO . . . protects the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful . . . activity is committed.'" (internal citations omitted)). In light of these cases and the language of the statute, an association-in-fact enterprise need not have an explicitly fraudulent or illegal common purpose to be cognizable as an enterprise under RICO.[7]

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enterprise and the pattern of racketeering activity. Kelly's reading of *Satinwood* as imposing an additional requirement that the government prove a fraudulent or illegal common purpose distinct from the predicate racketeering acts is squarely contradicted by *Mazzei.*

7. District courts in our Circuit have flagged *Satinwood*'s inconsistency with both Supreme Court and Second Circuit precedent. *See JSC Foreign Econ. Ass'n Technostroyexport v. Weiss*, No. 06-CV-6095, 2007 WL 1159637, at *9 (S.D.N.Y. Apr. 18, 2007); *see also Kelly*, 609 F. Supp. 3d at 124-26; *World Wrestling Ent., Inc. v. Jakks Pac., Inc.*, 425 F. Supp. 2d 484, 499 (S.D.N.Y. 2006) ("[T]here also appears to be no doubt that these same statements [in *Satinwood*] are inconsistent with the holdings of *Mazzei* and its progeny."), *aff'd*, 328 F. App'x 695 (2d Cir. 2009); *United States v. Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d 422, 474 n.86 (E.D.N.Y. 2007) ("[T]he quoted portion of [*Satinwood*] is not well-supported by Second Circuit precedent, as evidenced by the fact that [*Satinwood*] cited only one district court opinion in support of it, and it is flatly inconsistent with *Mazzei* and *Turkette*.").

We also reject Kelly's claim that there was no nexus between the enterprise R. Kelly brand and the pattern of racketeering activity. "The requisite vertical nexus between the RICO enterprise and the predicate racketeering acts may be established by evidence that the defendant was enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise." *United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir. 1992) (internal quotation marks, citations, and emphasis omitted). That is precisely the case here.

The record is replete with evidence that Kelly was able to commit the predicate acts because he was the head of a close-knit group of associates and he controlled the affairs of the enterprise. For instance, members of Kelly's entourage participated directly in a predicate act when they devised a plan for Kelly to marry Aaliyah when she was underage. Fearing that Aaliyah was pregnant, Kelly told Smith that he "needed to marry Aaliyah to protect himself," Kelly App'x at 599, and thereafter Smith and McDavid bribed a local clerk to obtain false identification for Aaliyah, in violation of Illinois criminal bribery laws.

Likewise, members of Kelly's entourage helped introduce him to underage girls. With respect to Stephanie, a member of Kelly's entourage approached her at a McDonald's in 1998 and asked her age. Stephanie replied that she was sixteen. Even though Stephanie had disclosed that she was underage, Kelly's associate handed her a slip of paper with a phone number on it and told Stephanie that Kelly—who was watching the interaction

from a distance—wanted to meet her. Stephanie ultimately met Kelly for the first time in 1999, when she was seventeen years old.

Kelly also directed his staff to facilitate his abuse of girls in violation of the Mann Act. Employees arranged for girls' transportation to locations around the country to engage in sex with Kelly, enforced Kelly's strict rules for the girls, and coordinated STD treatment for Kelly and his victims. As an example, Copeland received Jane's STD test results directly from the doctor, and runners picked up Kelly's herpes medication. Juice also knew about Kelly's herpes and took girls to get tested for STDs. There is also overwhelming evidence that Kelly was further enabled to gain access to his victims because of his fame as a renowned singer and performer, a reputation his associates helped him maintain. Indeed, the evidence indicates that Kelly principally relied on his reputation to entice young girls into his orbit—he dangled his influence and clout in the industry to reach his victims. A rational factfinder could therefore have found that the government proved the requisite nexus between the RICO enterprise and predicate racketeering acts.

Kelly's final challenge to his RICO conviction is that the enterprise was indistinct from him because it "had no function unrelated to [him]." Kelly Br. at 38. A defendant charged under RICO must be distinct from the enterprise, such that the entity "is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 161, 121 S.Ct. 2087. Accordingly, we have rejected civil RICO claims where the defendant is a *corporate entity* and the enterprise

is made up of the corporation's employees acting in the course of their employment. *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) ("[W]here employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation.").

Kelly, however, is not a corporate entity. "As we have explained, the plain language and purpose of the [RICO] statute contemplate that a *person* violates the statute by conducting an *enterprise* through a pattern of criminality." *U1it4less, Inc. v. Fedex Corp.*, 871 F.3d 199, 205 (2d Cir. 2017) (internal quotation marks omitted). Kelly, a "natural person," is distinct from the many people at his employ who carried out his—and his brand's—affairs. *See Cedric Kushner Promotions, Ltd.*, 533 U.S. at 161, 121 S.Ct. 2087 ("In ordinary English[,] one speaks of employing, being employed by, or associating with *others*, not oneself." (emphasis added)). Moreover, "the RICO provision . . . applies when a corporate employee unlawfully conducts the affairs of the corporation of which he is the *sole owner*." *Id.* at 166, 121 S.Ct. 2087 (emphasis added). We conclude that the need for two distinct entities is satisfied here. We therefore reject Kelly's sufficiency claim as to the RICO conviction.

### C. Mann Act Violations

Kelly argues that there was insufficient evidence that he transported Jane and Faith with the intent of exposing

them to herpes, in violation of the Mann Act. He contends that the illegal nature of the sexual activity was incidental to the trips, and that he can be found to have violated the Mann Act only if he specifically intended to expose them to herpes. Kelly also argues that he did not coerce or entice Jane or Faith to travel to see him in violation of the Mann Act. We are not persuaded.

### 1. Applicable Law

#### a. Section 2421

The Mann Act makes it illegal to "knowingly transport[ ] any individual in interstate or foreign commerce . . . with intent that such individual engage in . . . any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2421(a). To prove intent under § 2421(a), the government must establish that a dominant purpose of the travel was to engage the individual in the charged illegal activity. *See United States v. Miller*, 148 F.3d 207, 212 (2d Cir. 1998) (internal quotation marks omitted).

#### b. Section 2422

Section 2422(a) of the Act makes it illegal to "knowingly persuade[ ], induce[ ], entice[ ], or coerce[ ] any individual to travel in interstate or foreign commerce . . . to engage in . . . any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2422(a). "The words 'attempt,' 'persuade,' 'induce,' 'entice,' or 'coerce,' though not defined in the statute, are words of common

usage that have plain and ordinary meanings." *United States v. Gagliardi*, 506 F.3d 140, 147 (2d Cir. 2007). To determine whether the defendant had the requisite intent under § 2422(a), which "imposes no requirement that an individual endeavor to 'transform or overcome' the will of his intended victim," the jury need only consider whether the defendant "intended to induce, persuade, and/or entice" the victim to travel to engage in illegal sexual conduct with him, "regardless of whether she expressed (or felt) reluctance, indifference, or, for that matter, enthusiasm at the prospect of doing so." *United States v. Waqar*, 997 F.3d 481, 487-88 (2d Cir. 2021) (describing intent under § 2422(b), which uses language identical to that in § 2422(a)).

**2. Application**

**a. Section 2421**

Kelly argues that any violation of the state laws—which prohibit exposing sexual partners to venereal diseases—was merely incidental to the women's travel. The district court's jury instruction, to which Kelly did not object, read:

> In order to establish this element, it is not necessary that the Government prove that engaging in illegal sexual activity was the only purpose for crossing the state line. A person may have several different purposes or motives for such travel, and each may prompt in varying degrees the act of making the journey. The

> Government must prove beyond a reasonable doubt, however, that a significant or motivating purpose of the travel across a state line was that the defendant would engage in illegal sexual activity with [the victim]. In other words, that illegal activity . . . can't have been merely incidental to the trip.

Gov't App'x at 904.

Kelly contends that the statute requires proof that he specifically intended to expose the girls to herpes, and that a general intent to engage in sexual activity chargeable as a crime would be insufficient. Kelly misreads the statute.

We start with the plain language of § 2421(a), which requires that Kelly "knowingly" transported Jane and Faith with the "intent" that they "engage in . . . sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2421(a). As the district court held, "the government was required to prove that [Kelly] transported Jane and Faith with the intent of engaging in sexual activity with them, and that the intended sexual activity was illegal."*Kelly*, 609 F. Supp. 3d at 134. Nothing in the statute requires a reading that Kelly was required to also possess the specific intent to expose the girls to herpes. Even assuming he did not intend to infect them, he intended to have sex with them, and the intended sexual activity was illegal because he knew he had herpes and intended to engage in unprotected sex without disclosing

his condition.[8] We therefore hold that there was sufficient evidence here to show that Kelly transported Jane and Faith across state lines with the intent to have unprotected sex with them in violation of § 2421.

**b. Section 2422**

Kelly next argues that the government did not prove that he induced, persuaded, enticed, or coerced either Jane or Faith to travel for purposes of engaging in sexual activity in violation of § 2422(a). He argues that it was Jane and her mother who tricked *him* into spending time with Jane, without disclosing that she was underage. Similarly, Kelly argues that because Faith *was* of age, she could not have been coerced or enticed to travel.

These arguments take the focus away from Kelly and direct the focus to the intent of Jane and Faith. The victims' intent, however, is not relevant to this inquiry. Indeed, we have explicitly rejected an approach to § 2422 that "moves the locus of the offense conduct from the intent and actions of the would-be persuader to the effect of his words and deeds on his would-be victim." *Waqar*, 997 F.3d at 487.

With a proper focus on Kelly's intent in his interactions

8. It was also illegal under the California law of statutory rape, which made Jane unable to give effective consent. Cal. Pen. Code § 261.5. This conduct, too, therefore supported Kelly's convictions for transporting Jane in violation of the Mann Act—*i.e.*, Counts Two and Five—as well as the corresponding Racketeering Acts 9A and 9D.

with Jane and Faith, we conclude that there was sufficient evidence for a jury to find that he coerced and enticed them both to travel to engage in sexual activity for which Kelly could be charged with a criminal offense. Kelly argues that he merely invited Jane to see him, and that Jane's mother orchestrated their relationship. Even if it is true that Jane's mother helped Jane craft messages and plan her interactions with Kelly, that does not alter the inferences a rational jury could make about Kelly's mindset and intent. A rational jury could—and did -conclude from this evidence that Kelly coerced and enticed Jane to have sex with him using promises of free travel to see him perform and tutelage from him in her own career, and that this conduct accordingly violated § 2422(a).

The same is true for Faith, even though Kelly argues that Faith—unlike Jane—was a fully consenting adult woman. The government presented evidence at trial that Kelly told Faith he loved her and encouraged her to visit him while he was on tour. He sent Faith Copeland's number so that Copeland could arrange for Faith's travel. He brought up the topic of her visiting him and encouraged Faith to make plans to do so. While these actions were not, in themselves, illegal, there was ample evidence in the record that Kelly did these things so that he could have sex with Faith in his usual manner—without disclosing his herpes diagnosis and without using a condom, in violation of state law.

Accordingly, there was sufficient evidence from which a jury could find inducement under § 2422(a). *See United States v. Rashkovski*, 301 F.3d 1133, 1137 (9th Cir. 2002) ("[I]t is not significant that [the victims] had pre-existing

wishes to [travel], especially considering that they never acted upon those desires until [the defendant] made it attainable.").

### D. New York Penal Law § 120.20

Kelly also challenges the sufficiency of the evidence supporting his violation of NYPL § 120.20, which is the predicate crime upon which two racketeering acts and several Mann Act convictions are based.[9] Kelly asserts that the government failed to prove a violation of section 120.20 because "unprotected sex with a person who carries the herpes virus does not establish a 'substantial risk of physical injury.'" Kelly Br. at 59 (quoting N.Y. Penal Law § 120.20). We disagree and conclude that there was sufficient evidence from which a rational jury could find that Kelly violated section 120.20 based on his sexual conduct with Faith.

#### 1. Applicable Law

Under New York law, a person is guilty of second-degree reckless endangerment, a class A misdemeanor, "when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person." N.Y. Penal Law § 120.20. Serious physical injury is injury that "causes . . . protracted loss or impairment of the function of any bodily organ." *Id.* § 10.00(10).

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9. The two racketeering acts are Racketeering Acts 12 and 14 of Count One. The Mann Act convictions are Counts Six through Nine. All relate to Faith.

**2. Application**

As the jury heard from experts at trial, herpes is a transmissible virus that is both highly contagious and, at times, difficult to detect. The herpes virus stays in a person's central nervous system forever, and it can reactivate to cause outbreaks of "blisters, ulcers, pustules, [and] vesicles," which can cause "numbness" and "severe pain." *Kelly*, 609 F. Supp. 3d at 137 (alterations adopted) (quoting testimony of Dr. Iffath Hoskins). On occasion, but rarely, it can lead to brain and central nervous system complications. Jane's herpes symptoms were so severe at one point that she could not walk.

Kelly did not disclose his herpes diagnosis to sexual partners, including his victims. Nor did he use condoms during sex, despite Dr. McGrath's admonitions to use protection because of his diagnosis. Kelly also had a habit of requesting new Valtrex prescriptions even when Dr. McGrath prescribed him enough medication to last months at a time. Based on this evidence, a jury was free to conclude that Kelly engaged in unprotected sex with his victims without disclosing his herpes infection and was not regularly managing his herpes with medication. A jury could find that in doing so, Kelly created a substantial risk of serious physical injury to the victims by exposing them, including Faith, to genital herpes.

Kelly argues that, because there is no evidence that Faith contracted genital herpes, there is insufficient evidence that he violated section 120.20. This argument is meritless. Section 120.20 criminalizes exposing another

person to "substantial risk of serious physical injury." Under the plain language of the statute, it is not necessary that the person be, in fact, injured. The law merely criminalizes the creation of a substantial risk of injury. *See People v. Roth*, 80 N.Y.2d 239, 245, 590 N.Y.S.2d 30, 604 N.E.2d 92 (1992) ("Since the occurrence of an injury is immaterial, the fact that the defendants could not have foreseen the manner in which this injury occurred does not negate their liability under the statute."). There was sufficient evidence from which the jury could have concluded that Kelly recklessly subjected Faith to a substantial risk of bodily harm by having unprotected sex with her and not telling her about his herpes diagnosis.

### E. Forced Labor

Kelly was convicted of violations of the Mann Act in connection with Jerhonda and Faith, predicated on his violation of the federal forced labor statute, 18 U.S.C. § 1589(a). As to both Jerhonda and Faith, Kelly argues that he merely engaged in consensual "isolated sex act[s]" with each woman and that "no rational juror could conclude" that Kelly obtained their labor or services through force in violation of the federal forced labor statute. Kelly Br. at 70-71. His arguments lack merit considering the evidence adduced at trial.

#### 1. Applicable Law

The federal statute prohibiting forced labor, 18 U.S.C. § 1589(a), requires the government to prove:

> (1) the defendant obtained the labor or services of another person;
>
> (2) the defendant did so . . . (a) through threats of serious harm to, or physical restraint against that person or any other person; or
>
> (b) through a scheme, plan or pattern intended to cause the person to believe that non-performance would result in serious harm to, or physical restraint against, that person or any other person; . . . and
>
> (3) that the defendant acted knowingly.

*United States v. Sabhnani*, 539 F. Supp. 2d 617, 629 (E.D.N.Y. 2008), *aff'd*, 599 F.3d 215 (2d Cir. 2010).

"[L]abor" is the "expenditure of physical or mental effort especially when fatiguing, difficult, or compulsory," and "[s]ervice" is "the performance of work commanded or paid for by another." *United States v. Marcus*, 628 F.3d 36, 44 n.10 (2d Cir. 2010) (quoting *Merriam-Webster's Third New International Dictionary Unabridged* (2002)). Besides showing that a defendant obtained the labor or services of another person, the government must also establish a causal link between the labor and services and the serious harm. "Serious harm" is

> any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all

> the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

18 U.S.C. § 1589(c)(2).

**2. Application**

The evidence presented at trial was sufficient for a jury to conclude that Kelly violated the forced labor statute as to Jerhonda and Faith. Kelly asks us to focus on what he characterizes as the isolated nature of the sex acts themselves, arguing that if we allow his convictions predicated on violations of the forced labor statute to stand, we would be federalizing state law. We understand this concern as a general matter, but we need not address the reach of the forced labor statute at the margins (*i.e.*, whether the statute would cover a single instance of rape), because this is not a marginal case.

As we have described at length in this opinion, there was extensive evidence showing how Kelly ensnared young girls and women into his orbit, endeavored to control their lives, and secured their compliance with his personal and sexual demands through verbal and physical abuse, threats of blackmail, and humiliation. A jury was permitted to infer, from this evidence, that Kelly had in place a "scheme, plan or pattern intended to cause the [girls] to believe" that they would be harmed if they did not comply with his sexual demands. *See Sabhnani*,

599 F.3d at 242 (finding sufficient evidence to support conviction under section 1589 where there was evidence that the defendant witnessed his wife "humiliate" live-in domestic servants, force servants into humiliating and painful punishments, and physically abuse the servants).

There is ample evidence to support the jury's conclusion that Kelly obtained the sexual labor of Jerhonda and Faith during the relevant time periods (in and between May 2009 and January 2010 for Jerhonda; on January 13, 2018, for Faith) through threats of serious harm or physical restraint. Kelly exerted tremendous psychological and physical control over Jerhonda. For instance, he required her to write a letter falsely admitting to stealing $100,000 of jewelry and to lying about contracting genital herpes from Kelly. He hit her when she disagreed with him. He told her that Juice was going to "train" her on "how to sexually please" him. Kelly App'x at 158. He played her a video of them having sex so that he could critique it. On one occasion, he "slapped" her and choked her until she lost consciousness; after Jerhonda came to, Kelly instructed her to perform oral sex on him. *Id.* at 169-70.

Faith was also subject to psychological control by Kelly. In Los Angeles, Kelly kept Faith waiting in a room for hours without food or water because she did not greet him properly when he first saw her. When Kelly returned to where Faith was waiting, he instructed her to take her clothes off and "walk back and forth." *Id.* at 765. Faith said that she "didn't want to have sex with him." *Id.* They went to another, smaller room, where there was a gun on the ottoman. *Id.* at 766-67. Kelly then grabbed Faith's neck

and guided her into performing oral sex on him as the gun was next to him. *Id.* at 769. Faith testified that she did so because she felt "[i]ntimidated" and that she "was under his rules" because "he had a weapon." *Id.* at 769-71. Accordingly, there was sufficient evidence for a jury to find Kelly guilty of forced labor as to Faith.

## II. Constitutionality of the State Statutes

Kelly challenges two state-law convictions that underlie the RICO and Mann Act convictions, arguing, *inter alia*, that the laws are unconstitutionally vague. Specifically, he claims that (1) the government failed to prove that Kelly was "infected" within the meaning of NYPHL § 2307; (2) section 2307 is unconstitutionally vague; (3) the government improperly indicted Kelly under the 1998 version of CHSC § 120290; and (4) section 120290 is also unconstitutionally vague. We disagree with his first two arguments and find that his third and fourth arguments are untimely.

The Due Process Clause of the Fourteenth Amendment requires that every criminal statute "(1) give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, and (2) provide explicit standards for those who apply the statute." *Dickerson v. Napolitano*, 604 F.3d 732, 741 (2d Cir. 2010) (internal quotation marks omitted and alterations adopted). A statute presents vagueness concerns if it does not "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory

enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

Moreover, when, as here, "the interpretation of a statute does not implicate First Amendment rights, it is assessed for vagueness only 'as applied,' i.e., 'in light of the specific facts of the case at hand and not with regard to the statute's facial validity.'" *United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003) (en banc) (quoting *United States v. Nadi*, 996 F.2d 548, 550 (2d Cir. 1993)). "Because 'a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,' we will uphold a statute against an as-applied challenge if 'the particular enforcement at issue is consistent with the core concerns underlying the statute.'" *Mannix v. Phillips*, 619 F.3d 187, 197 (2d Cir. 2010) (alterations adopted) (first quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); and then quoting *Dickerson*, 604 F.3d at 748). Thus, a defendant who brings a facial challenge to a criminal statute that does not touch on First Amendment rights will fail unless he can establish "that no set of circumstances exists under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

**A. Standard of Review**

Where a vagueness challenge is not raised before the district court, we review for plain error on appeal. *Rybicki*, 354 F.3d at 129. "We typically do not find plain

error 'where the operative legal question is unsettled, including where there is no binding precedent from the Supreme Court or this Court.'" *United States v. Bastian*, 770 F.3d 212, 220 (2d Cir. 2014) (quoting *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004)).

### B. New York Public Health Law § 2307

Kelly's challenge to NYPHL § 2307 need not detain us long. He contends that the government presented "*no* evidence . . . at trial demonstrating that [he] was 'infected' with a venereal disease during his sexual interactions with Faith." Kelly Br. at 61. Because Kelly's conduct falls within the core of the conduct prohibited by section 2307, and a person of ordinary intelligence in his position would understand what "infected" means under that section, we reject his vagueness challenge.

Section 2307 provides that "[a]ny person who, knowing himself or herself to be infected with an infectious venereal disease, has sexual intercourse with another shall be guilty of a misdemeanor." N.Y. Pub. Health Law § 2307. Kelly argues that he was not "infected" within the meaning of section 2307 because "infected" must be interpreted to mean "active infection to avoid constitutional concerns." Kelly Br. at 62. Because he was not experiencing an active herpes outbreak when he had sex with Faith, Kelly claims that the government did not prove a violation of the statute. He also argues that the provision is unconstitutionally vague because it effectively prohibits individuals with venereal diseases from having consensual sex.

"Our analysis begins, as it must, with the plain text." *Springfield Hosp., Inc. v. Guzman*, 28 F.4th 403, 418 (2d Cir. 2022). Absent a definition in the statute, we must give "infected" its ordinary meaning when interpreting section 2307. *See Lee v. Bankers Tr. Co.*, 166 F.3d 540, 544 (2d Cir. 1999) ("It is axiomatic that the plain meaning of a statute controls its interpretation, and that judicial review must end at the statute's unambiguous terms." (citation omitted)).

A person is "infected" when he or she "[c]ontain[s] or carr[ies] (a source of ) infection." *Infected*, *Oxford English Dictionary* (2012); *see also Infect*, *Black's Law Dictionary* (12th ed. 2024) (defining "infect" as "[t]o contaminate"). Kelly's contention that a person is "infected" only when he or she is experiencing an active outbreak of some disease or virus strains credulity. To limit the definition of "infected" to active outbreaks would contravene the plain language of "infected" and its commonly understood definition. *See Infected*, Merriam-Webster, https://www.merriam-webster.com/dictionary/infected [https://perma.cc/85XF-HJ62] (last visited July 12, 2024) ("[to be] contaminated with an infective agent (such as a bacterium or virus)"). It would also contravene the statute's purpose, which is designed to protect sexual partners of people who know that they are infected with a virus but might not be obviously infected.

The evidence at trial established that genital herpes is an STD spread by engaging in sexual acts with an infected person, regardless of whether the person is experiencing an outbreak. Once transmitted, the virus stays in an

infected person's nervous system forever, and though it can lay dormant for periods of time, the person can still infect others with the virus.

Kelly also argues that he was not on notice that he was infected, but this argument is meritless considering the evidence at trial that established that Kelly was diagnosed with herpes and was aware of his diagnosis. The remainder of Kelly's vagueness challenge appears to be a facial challenge, which we must reject because section 2307 does not implicate First Amendment rights, and Kelly has not come close to meeting his burden of showing that there is no constitutional application of the statute. *Salerno*, 481 U.S. at 745, 107 S.Ct. 2095.

Kelly purports to invoke the due process rights of the "millions of individuals" who have herpes, and against whom enforcement of the statute may be unconstitutional. Kelly Br. at 65. But because we treat this as an as-applied challenge, Kelly's invocation of the rights of others whose conduct falls at the outer bounds of section 2307 fails. *See Farrell v. Burke*, 449 F.3d 470, 494 (2d Cir. 2006) (explaining that "[f ]ederal courts as a general rule" do not allow litigants to assert "the legal rights and interests of third parties"). Kelly's conduct falls comfortably within section 2307's reach: he knew he had a highly contagious, incurable STD, and he knowingly had unprotected sex with multiple women, including Faith, without disclosing his condition, thus exposing them to the virus without their knowledge. Kelly's vagueness challenge fails.

### C. California Health and Safety Code § 120290

As to CHSC § 120290, Kelly argues he was improperly charged under a now-repealed version of the statute and that the repealed version is unconstitutionally vague. Because this objection was not properly raised in the district court, it was forfeited and we do not reach its merits.

#### 1. Applicable Law

The version of CHSC § 120290 in effect at the time of the conduct charged in the indictment (between April and May 2015) provided:

> [A]ny person afflicted with any contagious, infectious, or communicable disease who willfully exposes himself or herself to another person, and any person who willfully exposes another person afflicted with the disease to someone else, is guilty of a misdemeanor.

Cal. Health & Safety Code § 120290 (1998).[10]

10. The current version of section 120290, which took effect on January 1, 2018, provides that a person is guilty of intentional transmission of an infectious or communicable disease if:

> The defendant knows that he or she . . . is afflicted with an infectious or communicable disease[,] . . . acts with the specific intent to transmit . . . that disease to another person[,] . . . engages in conduct that poses a substantial risk of transmission to that person[, and actually] transmits the infectious or communicable disease to the other person.

Cal. Health & Safety Code § 120290 (2018).

**2. Application**

The government argues that Kelly's claim that he was improperly charged under the 1998 version of section 120290 is untimely under Federal Rule of Criminal Procedure 12(c)(3) and is also meritless.

We agree as to timeliness. Federal Rule of Criminal Procedure 12(b)(3)(B) provides that a defect in the indictment "must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Here, the indictment made clear that the government was charging Kelly under the 1998 version of CHSC § 120290—the version in effect at the time he engaged in the charged conduct. But Kelly did not raise an objection to this use of the 1998 version until "several weeks after trial had commenced." Gov't Br. at 88. Indeed, trial commenced on August 18, 2021, and Kelly did not raise the issue until September 18, 2021, in a letter to the court. His challenge was therefore untimely under Rule 12(b)(3)(B). *See United States v. O'Brien*, 926 F.3d 57, 82-85 (2d Cir. 2019) ("If a motion falling within Rule 12(b)(3) is not made before trial (or before such pretrial deadline as may be set by the court for such motions), it is 'untimely.'")

Moreover, Kelly did not explicitly object to the 1998 version of the statute used in the indictment. Instead, he first raised the issue while trial was underway, when he submitted a letter requesting amendments to the proposed jury instructions. In his letter, he observed that CHSC § 120290's text was different from the text provided (of

the 1998 version) in the jury instruction but proposed no alternative language for use in the instruction. The district court did not explicitly rule on the request but effectively denied it by using the 1998 version of CHSC § 120290 in the issued jury instructions. Before trial, Kelly made no arguments with respect to an improper charge or a defect in the indictment, and he did not ask the court to dismiss the charge. He also did not argue before trial that the 1998 version of the statute was unconstitutionally vague. *See United States v. Crowley*, 236 F.3d 104, 109 (2d Cir. 2000) (finding that, because the defendant "failed to identify any terms in the indictment that were too vague or general" in his *pretrial motion* to dismiss his indictment as vague, his motion was untimely and his objection was forfeited). *But see*Fed. R. Crim. P. 12(c)(3) advisory committee's note to 2014 amendments ("New paragraph (c)(3) governs the review of untimely claims, previously addressed in Rule 12(e), . . . [which] provided that a party 'waives' a defense not raised within the time set under Rule 12(c). . . . [Rule] 12(c)(3) retains the existing standard for untimely claims. The party seeking relief must show 'good cause' for failure to raise a claim by the deadline, a flexible standard that requires consideration of all interests in the particular case."). Because Kelly did not argue, much less demonstrate, good cause for failing to raise a pretrial challenge to his indictment, his argument, in addition to being untimely, was forfeited. In light of this conclusion, we do not address the related merits arguments.

## III. Jury Selection

Kelly argues he was denied a fair and impartial trial, contending that, after conducting *voir dire*, the district

court empaneled four jurors who were biased against him. He also brings an ineffective assistance of counsel claim against trial counsel for the purported failure to "conduct any meaningful *voir dire*" of those jurors. Kelly Br. at 76-77.

### A. Standard of Review

"Despite its importance, the adequacy of *voir dire* is not easily subject to appellate review." *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981). "That is because the trial court, not unlike jurors later on in the trial, is best positioned to reach conclusions as to impartiality and credibility by relying on its own evaluations of demeanor evidence and of responses to questions." *United States v. Nieves*, 58 F.4th 623, 631 (2d Cir. 2023) (internal quotation marks omitted and alterations adopted). Accordingly, the district court enjoys "ample discretion in determining how best to conduct the *voir dire*," *Rosales-Lopez*, 451 U.S. at 189, 101 S.Ct. 1629, and we will not reverse unless we determine that the district court abused its discretion, *see United States v. Lawes*, 292 F.3d 123, 128 (2d Cir. 2002).

When a defendant raises a claim for ineffective assistance of counsel on direct appeal, we may "(1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent petition for writ of habeas corpus . . . ; (2) remand the claim to the district court for necessary factfinding; or (3) decide the claim on the record before us." *United States v. Tarbell*, 728 F.3d 122, 128 (2d Cir. 2013) (quoting *United States v. Morris*, 350 F.3d

32, 39 (2d Cir. 2003)). The Supreme Court has instructed that a habeas petition is the preferable vehicle for lodging an ineffective assistance claim, *see id.* at 128-29, but that we may decide the claims on the merits on direct appeal "when their resolution is beyond any doubt or to do so would be in the interest of justice," *United States v. Kimber*, 777 F.3d 553, 562 (2d Cir. 2015) (internal quotation marks omitted).

### B. Applicable Law

#### 1. Impartial Jury

"The Supreme Court has recognized that the voir dire process 'plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored.'" *Nieves*, 58 F.4th at 631 (quoting *Rosales-Lopez*, 451 U.S. at 188, 101 S.Ct. 1629). "An impartial jury is one 'capable and willing to decide the case solely on the evidence before it,'" *United States v. Perez*, 387 F.3d 201, 204 (2d Cir. 2004) (quoting *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984)), and "[t]rying an accused before a jury that is actually biased violates even the most minimal standards of due process," *United States v. Nelson*, 277 F.3d 164, 206 (2d Cir. 2002).

Although a district court enjoys broad discretion in conducting *voir dire*, it must, at a minimum, "remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence." *Rosales-Lopez*, 451 U.S. at 188, 101 S.Ct. 1629; *accord*

*United States v. Colombo*, 869 F.2d 149, 151 (2d Cir. 1989) ("[T]he defense deserves 'a full and fair opportunity to expose bias or prejudice on the part of veniremen.'" (quoting *United States v. Barnes*, 604 F.2d 121, 139 (2d Cir. 1979))).

"[T]here must be sufficient factfinding at voir dire to allow for facts probative of any of these forms of bias to reveal themselves. Otherwise, fundamental unfairness arises if voir dire is not adequate to identify unqualified jurors." *Nieves*, 58 F.4th at 633 (internal quotation marks omitted and alterations adopted).

For *voir dire* to be so insufficient as to call for reversal,

> the record viewed as a whole must show either: (i) a voir dire so demonstrably brief and lacking in substance as to afford counsel too little information even to draw any conclusions about a potential juror's general outlook, experience, communication skills, intelligence, or life-style; (ii) a failure to inquire about, or warn against, a systematic or pervasive bias, including one that may be short-lived but existent at the time of trial . . . ; or (iii) a record viewed in its entirety suggesting a substantial possibility that a jury misunderstood its duty to weigh certain evidence fairly that would have been clarified by asking a requested voir dire question.

*Lawes*, 292 F.3d at 129 (citations omitted).

### 2. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness, and (2) the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). For prejudice, a defendant must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."*Id.* at 694, 104 S.Ct. 2052.

## C. Application

We have examined the record and conclude that none of the jurors whom Kelly challenges on appeal were improperly empaneled. For that reason, the resolution of Kelly's ineffective assistance of counsel claim is "beyond any doubt," and resolving the claim on appeal is "in the interest of justice." *Kimber*, 777 F.3d at 562.

Kelly contends that Jurors 3, 4, 5, and 12 could not be fair and impartial toward him because of their personal knowledge of his case, their consumption of media about his alleged crimes, and their opinions on STDs. He claims it was reversible error for the district court to empanel them despite their answers to the written questionnaire and their responses during in-person *voir dire*.

We are not persuaded. The district court conducted extensive *voir dire*, beginning with a questionnaire

containing 108 questions that went to a pool of approximately 575 prospective jurors and from which 251 were dismissed for cause based on their answers. *Kelly*, 609 F. Supp. 3d at 107. Kelly's counsel then submitted the names of 145 additional prospective jurors whom they challenged on his behalf; the government submitted a list of an additional 34. These individuals were excused prior to *voir dire*. *Id.* at 107 n.8. The district court also directed the parties to submit any additional questions they wanted for in-person *voir dire*. *Id.* at 107-08. The district court then conducted in-person *voir dire* of the approximately 145 remaining prospective jurors, a process that spanned two days. *Id.* at 107 n.8, 108. During in-person *voir dire*, the district court addressed the prospective jurors as a group and explained basic principles of law, including the presumption of innocence. *Id.* at 108. The district court then questioned the prospective jurors individually, asking about their answers to the written questions and soliciting additional questions from the parties. *Id.*

Bearing in mind the district court's substantial discretion in conducting *voir dire* and the other principles articulated above, we find no reversible error here in the empaneling of Jurors 3, 4, 5, and 12. The record indicates that each juror was subject to thorough questioning by the district judge during in-person *voir dire*. The district court determined, based on that questioning and after giving each side an opportunity to request further questioning, that each juror could be impartial when deciding the case.

The following discussion with Juror 3 is reflective of the exchanges with all four jurors. In response to a

question in the questionnaire asking prospective jurors if they had "read, seen or heard anything about the case, the alleged crimes, or people involved," Juror 3 (Prospective Juror 25) answered, "I saw the documentary, [but] I forgot the name of it." Sealed App'x at 183. The questionnaire also asked prospective jurors if they had "read, seen, or heard about Robert Kelly, also known as 'R. Kelly.'" *Id.* Juror 3 marked the box for "Yes," and wrote, "Entertainer, I heard that he has been sleeping with underage girls." *Id.* Finally, in response to another question, Juror 3 wrote, "I saw a documentary about [Kelly] and his legal troubles. I don't know the full story, so I have no feelings about it. I remain impartial." *Id.*

During in-person *voir dire*, the district judge and Juror 3 had the following exchange:

> THE COURT: Mr. Kelly is presumed innocent and it is the Government that has the burden of proving his guilt beyond a reasonable doubt. If you are selected as a juror I will explain what those terms mean in more detail but is there any reason you can't follow that instruction?
>
> PROSPECTIVE JUROR: No reason at all.
>
> [ . . . ]
>
> THE COURT: Is there any reason at all why you wouldn't be able to give both sides a fair trial?
>
> PROSPECTIVE JUROR: No.

Gov't App'x at 389-90. Following this exchange, defense counsel did not have any other requests. Neither party exercised any challenges to excuse Juror 3, who was seated on the jury. We agree with the district court that "none of the challenges the defendant asserts on appeal would have warranted granting a challenge for cause." *Kelly*, 609 F. Supp. 3d at 152.

These circumstances are nothing like the *voir dire* we found lacking in *Nieves*, where the district court merely "explained several foundational trial concepts" and asked just three or four demographic questions during individualized *voir dire*. 58 F.4th at 629. We are satisfied that the district court here, through its lengthy questionnaire and three-day in-person *voir dire* process, elicited more than "sufficient information . . . to permit [Kelly] to intelligently exercise" his for-cause and peremptory challenges. *Id.* at 633 (quoting *Colombo*, 869 F.2d at 151). The record also illustrates that all four now-challenged jurors represented to the district court that they could be fair and impartial, follow the presumption of innocence, and hold the government to its burden of proof—and that anything they had heard or read about the case would not impair their fairness. The trial court accepted these representations, and it did not abuse its discretion in doing so.

Kelly also cannot meet his burden of showing that counsel's performance was so deficient during *voir dire* that counsel was ineffective. The record shows that counsel's performance did not fall below an objective standard of reasonableness. Indeed, trial counsel actively participated

throughout *voir dire*. Counsel made several successful for-cause challenges over the government's objection. *See*, *e.g.*, Gov't App'x at 455-61 (defense counsel successfully persuaded the district court to dismiss a prospective juror who, as a supporter of the #MeToo movement, stated that she believed that "in most cases women don't lie" about allegations of sexual assault). Kelly therefore cannot meet the requirements of *Strickland* because he cannot show that counsel performed unreasonably during *voir dire*.

**IV. The Rule 404(b) Evidence**

Kelly challenges several of the district court's evidentiary rulings, arguing that "[w]ith virtually no limitation, the district court permitted the prosecution to inundate the jury with excessive bad act evidence, mostly under the theory that the evidence was relevant to the 'means and method' of the enterprise." Kelly Br. at 87. We consider the admissibility of four sets of evidence: (1) evidence that Kelly exposed other women to herpes, offered to establish Kelly's knowledge of his diagnosis and to corroborate other testimony that it was his practice to have unprotected sex; (2) the testimony of an alleged victim of Kelly's uncharged conduct that she saw Kelly performing oral sex on Aaliyah, offered to prove Kelly's motive to obtain false identification for Aaliyah; (3) testimony from alleged victims of Kelly's uncharged conduct regarding his sexual contact with them, offered as evidence of the enterprise's "means and methods"; and (4) video recordings by Kelly of his sexual activity, offered as evidence of Kelly's practice of recording his sexual encounters and as evidence of the enterprise's means and methods.

## A. Standard of Review

We review a district court's evidentiary rulings for abuse of discretion and "will disturb an evidentiary ruling only where the decision to admit or exclude evidence was 'manifestly erroneous.'" *United States v. Litvak*, 889 F.3d 56, 67 (2d Cir. 2018) (quoting *United States v. McGinn*, 787 F.3d 116, 127 (2d Cir. 2015)). "To find such abuse [of discretion], we must conclude that the trial judge's evidentiary rulings were 'arbitrary and irrational.'" *United States v. Paulino*, 445 F.3d 211, 217 (2d Cir. 2006) (quoting *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001)). Even if an evidentiary ruling is manifestly erroneous, we will affirm—and the defendant is not entitled to a new trial—if the error was harmless. *United States v. Siddiqui*, 699 F.3d 690, 702 (2d Cir. 2012).

"We accord great deference to a district court in ruling as to the relevancy and unfair prejudice of proffered evidence, mindful that it 'sees the witnesses, the parties, the jurors, and the attorneys, and is thus in a superior position to evaluate the likely impact of the evidence.'" *Paulino*, 445 F.3d at 217 (quoting *Li v. Canarozzi*, 142 F.3d 83, 88 (2d Cir. 1998)). "When reviewing a district court's Rule 403 determination, we 'generally maximize the evidence's probative value and minimize its prejudicial effect.'" *United States v. McPartland*, 81 F.4th 101, 114 (2d Cir. 2023) (alteration adopted) (quoting *United States v. LaFlam*, 369 F.3d 153, 155 (2d Cir. 2004)).

**B. Applicable Law**

Rule 404(b) of the Federal Rules of Evidence governs the admissibility of "other acts"—"[c]rimes, [w]rongs, or [a]cts" other than those charged. Fed. R. Evid. 404(b). Evidence of other acts is not admissible if offered "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." *Id.* 404(b)(1). Such evidence may be admissible, however, if offered "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* 404(b)(2).

This Court takes an "inclusionary" approach to Rule 404(b), under which all "other act" evidence that does not serve the sole purpose of showing the defendant's bad character is admissible, subject to Rule 402's and Rule 403's respective relevance and prejudice considerations. *United States v. Pascarella*, 84 F.3d 61, 69 (2d Cir. 1996); *see also United States v. Robinson*, 702 F.3d 22, 37 (2d Cir. 2012) (explaining that evidence of uncharged criminal conduct that "is inextricably intertwined with the evidence regarding the charged offense, or . . . necessary to complete the story of the crime on trial" is not generally considered to be evidence of other acts governed by Rule 404(b) at all).

"To determine whether a district court properly admitted other act evidence," we consider "whether (1) it was offered for a proper purpose; (2) it was relevant to a material issue in dispute; (3) its probative value is

substantially outweighed by its prejudicial effect; and (4) the trial court gave an appropriate limiting instruction to the jury if so requested by the defendant." *LaFlam*, 369 F.3d at 156.

Even if evidence is admissible under Rule 404(b), it must still pass the balancing test set forth in Rule 403. *See United States v. Scott*, 677 F.3d 72, 83 (2d Cir. 2012). In other words, the probative value must not be "substantially outweigh[ed] by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."Fed. R. Evid. 403.

### C. Application

To the extent that evidence was "inextricably intertwined" with the evidence of the RICO conspiracy and of the charged conduct, it falls outside the scope of Rule 404(b). Even so, each challenged category of evidence would also be admissible under that Rule, as we now explain.

#### 1. The Evidence of Herpes

Kelly first contends that the district court abused its discretion when it admitted "massive amounts of evidence" that Kelly exposed others to herpes and transmitted it to them. Kelly Br. at 90. We disagree.

It was neither arbitrary nor irrational for the district court to admit evidence that Kelly transmitted herpes

to others. Kelly argues that the evidence was excessive and unduly prejudicial considering Dr. McGrath's "unequivocal[ ]" testimony that Kelly was diagnosed with and receiving treatment for herpes. *Id.* at 91. But as the government points out and the district court noted, evidence that Kelly transmitted herpes to several other women—one of whom told Kelly that she had contracted the disease, and another of whom was with Kelly, in his home, when she received her diagnosis—was directly probative of Kelly's knowledge of his diagnosis, which the government was required to establish to prove Racketeering Acts 8, 12, and 14, as well as Counts 6 through 9. This evidence was relevant and probative especially because defense counsel did not stipulate that Kelly knew he had herpes. *See Kelly*, 609 F. Supp. 3d at 160. The use of this evidence falls squarely within Rule 404(b)'s proper purposes. Furthermore, we cannot say that the district court abused its discretion in balancing the probative value and prejudice of this evidence, especially considering that Kelly put his knowledge of his herpes diagnosis at issue and the government was entitled to refute that assertion.

### 2. Angela's Testimony About Aaliyah

We also conclude that the district court did not abuse its discretion when it allowed Angela to testify about seeing Kelly perform oral sex on Aaliyah. This testimony was admissible because it was probative of Kelly's motive to bribe local officials to fabricate identification for Aaliyah (Racketeering Act 1). The testimony was especially relevant to establish that Kelly and Aaliyah

had a sexual relationship in the first place, given defense counsel's refusal to concede that fact. The probative value of Angela's testimony was not substantially outweighed by unfair prejudice to Kelly, because the testimony about Kelly's sexual relationship with Aaliyah was not "more inflammatory than the charged crime." *United States v. Livoti*, 196 F.3d 322, 326 (2d Cir. 1999).

**3. Other Victim Testimony**

We are also unpersuaded by Kelly's argument that the testimony of other witnesses—Addie, Alexis, Kate, Anna, Angela, Louis, and Alex—was cumulative and unduly prejudicial because none of the listed individuals were associated with any of the charges. The district court acted within its discretion when it admitted the testimony. The testimony of the witnesses, who were all minors at the time their abusive relationships with Kelly began, is evidence that Kelly's behavior toward the charged victims was part of a pattern. *See United States v. Pizzonia*, 577 F.3d 455, 465 (2d Cir. 2009) ("[T]o demonstrate a pattern of racketeering, . . . it is not the number of predicates proved but, rather, 'the relationship that they bear to each other or to some external organizing principle' that indicates whether they manifest the continuity required to prove a pattern." (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 238, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989))).

"It is well settled that in prosecutions for racketeering offenses, the government may introduce evidence of uncharged offenses to establish the existence of the criminal enterprise." *United States v. Baez*, 349 F.3d 90,

93 (2d Cir. 2003); *see also United States v. Mejia*, 545 F.3d 179, 206 (2d Cir. 2008) ("Where . . . the existence of a racketeering enterprise is at issue, evidence of uncharged crimes committed by members of that enterprise, including evidence of uncharged crimes committed by the defendants themselves, is admissible to prove an essential element of the RICO crimes charged—the existence of a criminal enterprise in which the defendants participated." (internal quotation marks omitted)). Indeed, the admissibility of such evidence is not governed by Rule 404(b) at all because it is direct evidence of the charged conduct. *See United States v. Miller*, 116 F.3d 641, 682 (2d Cir. 1997). Likewise, we have noted that "evidence beyond a defendant's own predicate acts—whether alleged or not—is relevant to establishing a charged pattern of racketeering." *United States v. Basciano*, 599 F.3d 184, 206 (2d Cir. 2010). Therefore, we do not hesitate to conclude that the government may introduce evidence of uncharged conduct to establish a pattern of racketeering activity and that the admissibility of such evidence is not governed by Rule 404(b).

With respect to Kelly's Rule 403 challenge, none of the testimony was more inflammatory than the charged acts. As a result, we cannot say that the district court abused its discretion in admitting the testimony of the other victims.

**4. The Video Evidence**

Finally, three of the government's exhibits were videos that Kelly made of his sexual encounters with multiple victims: (1) a recording of Kelly directing two

victims to engage in oral sex; (2) a recording of Kelly spanking a victim, who was crying and robotically calling herself a "slut" and "stupid"; and (3) a recording of a victim covering her naked body in feces. Kelly argues that these videos were unfairly prejudicial and not probative. The videos, however, were properly admitted to show the means and methods of the enterprise, including the level of control and dominance Kelly had over his victims. The videos demonstrated Kelly "[d]emanding absolute commitment . . . and not tolerating dissent," and "[c]reating embarrassing and degrading videos of sexual partners to maintain control over them," Gov't App'x at 22 ¶ 9(b), (d), which were charged means and methods of the RICO enterprise. The feces video corroborated Jane's testimony that Kelly similarly directed her to eat feces as punishment, which is relevant to Kelly's level of control over Jane and whether he coerced her to travel to have sex with him in violation of the Mann Act. The district court did not abuse its discretion in admitting this evidence.

## V. Monetary Awards

### A. Restitution

Kelly challenges the district court's award of restitution to two victims and its directive to the BOP to seize funds in his inmate trust account. He does so on three grounds: (1) the government failed to prove that Jane's and Stephanie's herpes diagnoses were attributable to him, (2) the government failed to prove that Jane or Stephanie required a suppressive rather than ad-hoc or occasional herpes treatment regimen, and (3) the government failed

to prove that Jane or Stephanie required name-brand Valtrex over the generic, and less expensive, valacyclovir.

After the initial hearing, the government requested restitution, as relevant to this appeal: (1) $357,218.18 for Jane pursuant to 18 U.S.C. § 2429 and § 3663 for genital herpes-related medical expenses, therapy costs, and lost income; and (2) $78,981.72 to Stephanie pursuant to 18 U.S.C. § 3663 for genital herpes-related medical expenses and therapy costs. Kelly opposed the government's requests.

At the restitution hearing, the district court imposed $300,668.18 in restitution for Jane ($281,168.18 for herpes treatment and $19,500 for three and three-quarters' years of therapy) and $8,200 for Stephanie's past therapy expenses. The district court concluded that Kelly owed Stephanie restitution for her herpes-related medical expenses, but deferred decision on the amount, subject to further clarification from the government as to whether Stephanie was treating her herpes with Valtrex or valacyclovir, the generic, less expensive version of the drug.

On October 5, 2022, the government submitted revised calculations for Stephanie, seeking $45,587.20 in restitution for Stephanie's herpes treatment expenses. In an order dated November 8, 2022, the district court imposed $70,581.72 in restitution for Stephanie for her herpes treatment and $8,400 as compensation for past therapy costs.

*Appendix A*

### 1. Standard of Review

Our review of a district court's restitution order is deferential, and we will reverse only for abuse of discretion. *United States v. Afriyie*, 27 F.4th 161, 173 (2d Cir. 2022). Questions of law raised by challenges to restitution orders are reviewed *de novo*, while factual questions are reviewed for clear error. *United States v. Reifler*, 446 F.3d 65, 120 (2d Cir. 2006).

### 2. Applicable Law

"Federal courts have no inherent power to order restitution." *United States v. Zangari*, 677 F.3d 86, 91 (2d Cir. 2012). "A sentencing court's power to order restitution, therefore, depends upon, and is necessarily circumscribed by, statute." *Id.* There are two restitution statutes relevant to this appeal: 18 U.S.C. § 2429 and 18 U.S.C. § 3663.

Section 2429 is the mandatory restitution provision for Mann Act violations. A court "shall order" restitution to victims of Mann Act offenses in the "full amount of the victim's losses." 18 U.S.C. § 2429(a), (b)(1). "Victim" means "the individual harmed as a result of a crime under this chapter." *Id.* § 2429(d). The "full amount of the victim's losses" is defined as including:

> [A]ny costs incurred, or that are reasonably projected to be incurred in the future, by the victim, as a proximate result of the offenses involving the victim . . . including—(A) medical services relating to physical,

> psychiatric, or psychological care; (B) physical and occupational therapy or rehabilitation; (C) necessary transportation, temporary housing, and child care expenses; (D) lost income; (E) reasonable attorneys' fees, as well as other costs incurred; and (F) any other relevant losses incurred by the victim.

*Id.* § 2259(c)(2).[11]

Section 3663 is the Victim and Witness Protection Act and permits a sentencing court to order that the defendant make restitution to any victim of an offense under Title 18. *Id.* § 3663(a)(1)(A). Under that statute, restitution is not mandatory, but "the purpose of [§ 3663] is to require restitution whenever possible." *United States v. Porter*, 41 F.3d 68, 70 (2d Cir. 1994). A "victim" is

> a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

18 U.S.C. § 3663(a)(2).

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11. Section 2429(b)(3) states that the term "'full amount of the victim's losses' has the same meaning as provided in section 2259(b)(3)." But the cross-reference is erroneous, because 18 U.S.C. § 2259(b)(3) deals with enforcement, not the amount of a victim's losses. The parties and we agree that § 2259(c)(2) now provides the applicable definition.

Under § 3663, a court may require a defendant to

> (A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment; (B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and (C) reimburse the victim for income lost by such victim as a result of such offense.

*Id.* § 3663(b)(2).

The government bears the burden of proving the amount of restitution sought, and "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." *Id.* § 3664(e). And while we require restitution awards to "be tied to the victim's actual, provable, loss," *Zangari*, 677 F.3d at 91, the amount of restitution need only reflect a "reasonable approximation of losses supported by a sound methodology," *United States v. Gushlak*, 728 F.3d 184, 196 (2d Cir. 2013).

**3. Application**

**a. Jane**

Kelly contends that the district court abused its discretion in ordering restitution as to Jane because

in his view the government did not meet its burden of establishing that (1) Jane was infected with herpes as a result of the charged conduct; (2) Jane is being treated with a suppressive regimen of Valtrex; and (3) Jane will actually treat her herpes with Valtrex rather than the cheaper generic, valacyclovir. We disagree.

First, we find that the government met its burden of proving that Jane was infected with herpes as a result of the charged conduct, specifically his violation of the Mann Act as to Jane. The district court did not abuse its discretion in determining that Kelly's Mann Act conduct was sufficiently connected to Jane's harm. Jane testified that she contracted herpes when she was seventeen and during her relationship with Kelly. She also told Kelly that she had been intimate with only him. From this evidence, and the ample evidence that Kelly had herpes, we cannot say that the district court's conclusion that Jane is a victim entitled to mandatory restitution rests on a clearly erroneous view of the facts or on legal error.

Turning to Kelly's second and third objections, we also conclude that the district court acted within its discretion in ordering Jane restitution in an amount to cover a suppressive regimen of Valtrex. While we agree that restitution for losses must be grounded in some reasonable approximation and not mere conjecture or speculation, *see United States v. Maynard*, 743 F.3d 374, 378 (2d Cir. 2014), we decline Kelly's invitation to undo the experienced district judge's careful rulings after briefing and a thorough restitution hearing. We agree that the government proved the victim's loss by

a preponderance of the evidence, and, given the broad remedial measures of the restitution statute, the district court reasonably ordered a suppressive regimen to keep Jane "in an outbreak-free state to the extent possible." Gov't Br. at 125.

We are also satisfied that the district court acted within its discretion in ordering restitution based on the cost of a name-brand rather than a generic drug. Covering Jane's costs for a name-brand drug does not give her a windfall.[12] Here, Jane would not have had to purchase herpes medication if Kelly had not infected her with the virus. And like the district court, we are not aware of any authority requiring the victim to "pursue the cheapest option to minimize a defendant's restitution expenses." Sp. App'x at 177. Moreover, the record indicates that both Jane and Kelly were being treated with Valtrex at the time.[13]

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12. In *Maynard*, cited by Kelly, we held that a district court's restitution order gave the victim an improper windfall. 743 F.3d at 379-80. There, a bank had been robbed, and the district court ordered restitution to cover the employees' salaries for two days of paid time off that the bank had given them to recover from robbery-related stress. *Id.* We noted that, because the bank would have had to pay the employees for these two days even if it had not been robbed, the order of restitution to cover the salaries constituted a windfall. *Id.*

13. Additionally, because there was no evidence here suggesting that Jane would or should be treated with the generic drug instead of Valtrex, we disagree with the dissent's suggestion that the district court abused its discretion in awarding damages in the amount of the cost of the brand-name drug. Although generics and brand-name drugs are often identical, "[companies]

**b. Stephanie**

As to Stephanie, Kelly argues that there is no evidence that Stephanie contracted herpes from Kelly because his medical records confirm that he tested negative for herpes in June 2000, and Stephanie claims that she contracted herpes in 1999. He also argues that the district court abused its discretion by inflating the amount of restitution that it awarded her.

We agree that Stephanie presents a closer question because of the timing of her herpes diagnosis. And based on our review of the record and the trial transcripts below, we note that Stephanie did not testify about herpes at trial—the evidence of her infection comes from materials submitted for sentencing. We nevertheless

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aren't required to show that the two versions are therapeutically equivalent, meaning that they don't have to do tests to make sure that patients respond to these drugs the same way they do the brand-name version." Staying Healthy, *Do Generic Drugs Compromise on Quality?*, Harv. Health Publ'g (February 12, 2021), https://www.health.harvard.edu/staying-healthy/do-generic-drugs-compromise-on-quality [https://perma.cc/26DP-M8BU]. There have also been repeated reports of generic drugs found to contain contaminants, including carcinogens, and reported difficulties faced by the FDA when attempting to inspect drug manufacturing facilities located overseas, as many generic manufacturers are. *E.g.*, Arthur L. Kellermann, *FDA Pushes Back on Calls for Safety Tests of Generic Drugs*, Forbes (Jan. 10, 2024), https://www.forbes.com/sites/arthurkellermann/2024/01/10/we-should-test-generic-drugs-to-assure-safety-the-fda-hates-the-idea/ [https://perma.cc/TM76-H2WE]; Daniel A. Hussar, *Is the Quality of Generic Drugs Cause for Concern?* 26 J. Managed Care & Specialty Pharm. 597 (2020).

conclude that the district court did not abuse its discretion in determining that the government met its burden of proving that Stephanie was a victim by a preponderance of the evidence. At trial, Dr. McGrath testified that herpes tests can yield false negatives, and that Kelly's June 2000 test was "not conclusive." Kelly App'x at 373. And in light of Stephanie's testimony that she had a sexual relationship with Kelly when she was seventeen years old for about six months and her prior statements that she was not having sexual relations with anyone else at the time, we are satisfied that the government has met its burden in this respect.

Our analysis as to Kelly's challenge to the amount of restitution awarded Stephanie mirrors our analysis as to Jane. The district court's order of restitution was based on the government's reasonable approximation of Stephanie's losses. We therefore affirm the district court's restitution order in all respects.

### B. The Seizure of Funds

On August 4, 2022, the BOP seized approximately $27,000 from Kelly's inmate trust account upon the direction of the government. The government then sought an order from the district court directing the BOP to turn over the seized money to the Clerk of Court for deposit in an interest-bearing account pending a restitution determination. The district court granted the order.

Kelly challenges this, arguing that the district court lacked authority to authorize the turnover because Kelly

was not in default on any fines and was not provided with any notice of default. He contends that there is no authority "for the proposition that the government may restrain [his] property preemptively for use against a future restitution award that has yet to be entered." Kelly Br. at 105. He also argues that the "government acted prematurely and without legal authority when it ordered the BOP to seize [his] monies from his trust account absent any showing that [he] defaulted." *Id.* at 106.

**1. Applicable Law**

Under the Mandatory Victims Restitution Act (the "MVRA"), "a judgment imposing a fine may be enforced against all property or rights to property of the person fined." 18 U.S.C. § 3613(a). A fine, assessment, or restitution order imposed under certain statutes acts as a lien in favor of the government on "all property and rights to property" of the defendant. *Id.* § 3613(c). Under the MVRA, "[i]f a person obligated to provide restitution, or pay a fine, receives substantial resources from any source . . . during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed."*Id.* § 3664(n). "The MVRA expressly states that criminal restitution orders may be enforced against *all* property or rights to property, making quite clear that absent an express exemption, all of a defendant's assets are subject to a restitution order." *United States v. Shkreli*, 47 F.4th 65, 71 (2d Cir. 2022) (citation and internal quotation marks omitted), *cert. denied sub nom. Greebel v. United States*, ___ U.S. ___, 143 S. Ct. 2560, 216 L.Ed.2d 1180 (2023) (mem).

**2. Application**

As explained above, a judgment imposing a fine or restitution is a lien on all property and rights to property of the person fined. 18 U.S.C. § 3613(c). While Kelly makes much of the fact that his BOP funds were seized before an order of restitution was entered, he ignores that the government sought these funds "either to satisfy [Kelly's] restitution judgment, which [was] yet to be imposed, *or* to satisfy the Court-ordered fine, which ha[d] already been imposed." Sp. App'x at 161 (emphasis added) (internal quotation marks omitted). Indeed, the district court had already ordered a $100,000 fine, $900 special assessment, and $40,000 assessment under the Justice for Victims of Trafficking Act, which well exceeded the approximately $27,000 in Kelly's BOP account. Because Kelly's BOP funds are not exempt from seizure under 18 U.S.C. § 3613(a), the district court acted within its discretion in ordering Kelly's BOP funds be seized to pay outstanding restitution and fines. We see no error here.

**CONCLUSION**

We have considered all the arguments presented by Kelly on appeal and concluded they are without merit. For the reasons set forth above, we AFFIRM the district court's judgment.

Richard J. Sullivan, Circuit Judge, concurring in part and dissenting in part:

I join the majority's excellent opinion with respect to nearly all of defendant Robert Sylvester Kelly's challenges on appeal. I write separately only to address what is, in my view, the district court's error in calculating victim Jane's restitution award. I agree with the majority that the government met its burden of proving that Jane was infected with herpes as a result of the charged conduct and that the district court was within its discretion to award Jane restitution for a suppressive regime of herpes medication. Nevertheless, I believe that the district court abused its discretion in calculating Jane's restitution based on a lifetime supply of the brand-name drug, Valtrex, rather than the significantly cheaper generic drug, valacyclovir. Accordingly, I would remand for the district court to either make additional findings or modify the restitution award.

Before the district court, Kelly argued that the government inflated the cost of Jane's herpes medication by requesting restitution based on the cost of Valtrex, rather than the generic drug. Specifically, Kelly noted that the generic valacyclovir cost, on average, $15.31 for a thirty-day supply, resulting in a total lifetime expenditure of $9,829.02. Valtrex, by comparison, cost $421.29 for a thirty-day supply and $270,466.18 over the course of Jane's lifetime. In response to these objections, the district court simply noted that Jane "would not have had to spend money on herpes medication had the defendant not infected her with the incurable disease when she was

17 years old" and that a victim is not required to "pursue the cheapest option to minimize a defendant's restitution expenses." Sp. App'x at 177.

While both of these observations are correct, our case law requires a district court to do more in crafting a restitution award. Specifically, a district court must ensure that the award is a "reasonable approximation of losses." *United States v. Gushlak*, 728 F.3d 184, 196 (2d Cir. 2013). With respect to restitution awards for future medical expenses, we have explained that a district court's estimate of those expenses must be made "with some reasonable certainty." *United States v. Pearson*, 570 F.3d 480, 486 (2d Cir. 2009) (quoting *United States v. Doe*, 488 F.3d 1154, 1160 (9th Cir. 2007)). Here, nothing in the record suggests a qualitative difference between Valtrex and the generic drug, or that Jane used Valtrex exclusively.[1] As a result, I do not think that the district court could say with "reasonable certainty" that Jane would purchase Valtrex rather than the generic drug for the rest of her life, nor could the district court say that the restitution award of $270,466.18 was a "reasonable approximation"

1. The majority argues that "the record indicates that both Jane and Kelly were being treated with Valtrex." Maj. Op. at 429. However, the record merely shows that Jane once requested the most expensive medication to alleviate her pain, not that Jane was ever actually treated with Valtrex. Likewise, the fact that Kelly was *prescribed* Valtrex does not establish that he actually purchased the brand-name drug as opposed to the generic. *See*, *e.g.*, Ill. Admin. Code tit. 77, § 790.40(c) (permitting a pharmacy to fill a prescription listing a brand-name drug with the generic instead).

of Jane's future medical expenses. This is especially true considering that the district court calculated the restitution award for another victim—Stephanie—using an estimated price for the generic herpes medication, which was only $35.74 per month. *See* Sp. App'x at 181. The district court provided no explanation for treating Jane differently from Stephanie.[2]

Furthermore, we have previously held that a district court abuses its discretion when a restitution award provides "a windfall" to the victim. *United States v. Maynard*, 743 F.3d 374, 379-80 (2d Cir. 2014). While it is true of course that Jane would not have had to purchase herpes medication had Kelly not infected her, there is still a concern that the district court's restitution award will provide Jane with an impermissible windfall: Jane could use the restitution award to purchase the generic valacyclovir and then pocket the substantial difference of over $405 per month, which amounts to more than $260,000 over the course of her lifetime.

For all these reasons, I believe that the district court abused its discretion in calculating Jane's restitution

2. While the majority notes that drug manufacturers are not required to show that generic and brand-name drugs are therapeutically equivalent and raises concerns about substandard generic drugs, *see* Maj. Op. at 429-30 n.13, none of the authorities relied on by the majority are actually in the record, and the district court never articulated these reasons in crafting the restitution award. The fact that the district court calculated restitution for Stephanie based on the generic valacyclovir suggests that such considerations formed no part of the district court's analysis.

award based on a lifetime supply of the brand-name drug, Valtrex, rather than the generic drug, valacyclovir. I therefore respectfully dissent from this portion of the majority's opinion and would vacate the district court's restitution award as to Jane and remand for further proceedings. The district court would then be free either to make additional findings on whether awarding the cost of Valtrex was a reasonable approximation of Jane's losses or to modify Jane's restitution award. In all other respects, I join the majority opinion.

## APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED JUNE 29, 2022

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

19-CR-286 (AMD)

UNITED STATES OF AMERICA,

- against -

ROBERT SYLVESTER KELLY,

*Defendant.*

Signed 06/29/2022

### MEMORANDUM DECISION AND ORDER

**ANN M. DONNELLY**, United States District Judge:

The defendant, an international music star, was charged with using his fame and organization to lure young people into abusive sexual relationships—a racketeering enterprise that the government alleged spanned about 25 years. Over the course of a six-week trial, the government presented the testimony of 45 witnesses and introduced hundreds of exhibits, including written, videotaped and audiotaped evidence of the abuse to which the defendant, enabled by his employees and associates, subjected his

victims. On September 27, 2021, a jury convicted the defendant for that conduct.[1]

Before the Court are the defendant's motions pursuant to Federal Rules of Criminal Procedure 29 and 33 for a judgment of acquittal, or, in the alternative, for a new trial. (ECF Nos. 270, 273, 276, 282, 283.) In seeking this relief, the defendant attacks almost every aspect of his trial—the sufficiency of the evidence, the credibility of the witnesses, his trial lawyers' competence and the Court's evidentiary rulings. The government opposes. (ECF Nos. 277, 278, 288.) For the reasons explained below, I deny the defendant's motions in their entirety.

## BACKGROUND

### I. Indictment

The defendant was charged in a third superseding indictment with racketeering in violation of 18 U.S.C. § 1962(c) (Count 1); transportation of Jane for the purpose of illegal sexual activity in violation of 18 U.S.C. § 2421(a) (Count 2); coercion of Jane for the purpose of illegal sexual activity in violation of 18 U.S.C. § 2422(a) (Count 3); coercion of Jane, as a minor, for the purpose of illegal sexual activity in violation of 18 U.S.C. § 2422(b) (Count

1. The defendant is charged in the Northern District of Illinois with participating in a conspiracy to obstruct justice and receive child pornography. *See United States v. Kelly et al.*, No. 19-CR-567 (N.D. Ill.) The trial in that case is set to commence on August 15, 2022. The defendant also faces charges in Illinois and Minnesota state court.

4); transportation of Jane, as a minor, for the purpose of illegal sexual activity in violation of 18 U.S.C. § 2423(a) (Count 5); transportation of Faith for the purpose of illegal sexual activity in violation of 18 U.S.C. § 2421(a) (Count 6); coercion of Faith for the purpose of illegal sexual activity in violation of 18 U.S.C. § 2422(a) (Count 7); transportation of Faith for the purpose of illegal sexual activity in violation of 18 U.S.C. § 2421(a) (Count 8); and coercion of Faith for the purpose of illegal sexual activity in violation of 18 U.S.C. § 2422(a) (Count 9). (ECF No. 43.)

## II. *Curcio* Hearing

On June 14 and 24, 2021, the government advised the Court that Nicole Blank Becker, one of the four attorneys who represented the defendant at trial, had potential conflicts of interest in representing the defendant.[2] (*See* ECF Nos. 107, 114.) The government asserted that, in the summer of 2019, Ms. Blank Becker may have entered into an attorney-client relationship with someone who was then represented by Gloria Rodriguez in Chicago, and who ultimately testified as a government witness.[3]

2. Two other lawyers—Steven Greenberg and Michael Leonard—represented the defendant from the time of his indictment until they moved to withdraw in June of 2021. (ECF No. 99.) Thomas Farinella and Nicole Blank Becker also represented the defendant beginning in August of 2019 and April of 2021, respectively. (ECF Nos. 20, 95.) Devereaux Cannick joined the defense team in June of 2021, and Calvin Scholar joined shortly thereafter in July of 2021. (ECF Nos. 113, 130.)

3. The government raised other potential conflicts of interest that are not relevant to this decision.

(*See* ECF No. 114.) The Court appointed independent counsel—Ilana Haramati—to advise the defendant. (*See* ECF No. 112.) The Court conducted a *Curcio* hearing on June 17 and July 15, 2021. Ms. Blank Becker and Ms. Rodriguez made written submissions, and both answered a series of questions posed by the Court. (*See* ECF Nos. 108, 110, 125, 126.)[4]

After considering the submissions and the attorneys' representations, the Court concluded that Ms. Blank Becker had potential conflicts in representing the defendant, but that the conflicts were waivable. (*Curcio* Tr. 32.)[5] In particular, the Court found that Ms. Blank Becker "had substantial contacts with potential witnesses," including Jane, "and may have developed a relationship of trust with them even though she [was] never formally retained as their lawyer." (*Id.*) Due to Ms. Blank Becker's "confidentiality obligations to them," and "given the nature and extent of those communications and the content of them, she would have a conflict if she were to cross-examine either one of them." (*Id.*) The Court also determined that Ms. Blank Becker's communications with both women, knowing that they were represented by another attorney, could raise ethical concerns. (*Id.* at 33.) That, too, created potential a conflict because "a person would be motivated to defend himself or herself from

4. The Court conducted a portion of the inquiry of Ms. Rodriguez *in camera*, because it implicated confidential communications between Ms. Rodriguez and her clients. Those portions are not relevant to the defendant's claims.

5. "*Curcio* Tr." refers to the July 15, 2021 proceeding.

the accusation in a way that might keep the lawyer from asking certain questions or calling certain witnesses." (*Id.*)

Addressing the defendant, the Court explained in detail the risks of being represented by a lawyer who had the potential conflicts that the Court identified. (*Id.* at 34-39.) The Court also explained that if the Court determined that the defendant's waiver was knowing and voluntary, the defendant would not be able to cite Ms. Blank Becker's conflict as a reason to overturn a conviction. (*Id.* at 46.) The defendant responded that he understood the risks, including his waiver of the right to use the conflict as the basis for a challenge to a conviction, and, at the Court's request, explained his understanding of the potential conflicts. (*Id.* at 34-46.) Ms. Haramati, *Curcio* counsel, confirmed that she had sufficient time to meet with the defendant, that she explained the conflicts to him, that he understood them and that he was capable of making an informed waiver of his right to conflict-free counsel.[6] (*Id.* at 29-31, 37-38.) The defendant explained that he wanted to continue with Ms. Blank Becker as one of his lawyers, and waived the conflicts. (*Id.* at 46.) Based on the record, the Court accepted the defendant's knowing and intelligent waiver. (*Id.* at 47.)

## III. Pre-Trial Motions

In February and March 2020, the defendant moved to dismiss Count 1 of the indictment and the counts of the

6. The Court gave the defendant time to consult with Ms. Haramati, first during the period between June 17 and July 15, 2021, and again on July 15, 2021 for approximately a half hour. (*Curcio* Tr. 28.)

indictment incorporating New York Public Health Law Section 2307. (ECF Nos. 41, 42.) In moving to dismiss the Count 1, the defendant claimed that the indictment did not allege a legally cognizable enterprise within the meaning of RICO. (ECF No. 41 at 5-10.) In the second motion, the defendant moved to strike the charges that cite Section 2307 on the theory that the law is unconstitutionally overbroad and vague. (ECF No. 42.) The Court denied both motions in a written decision on May 22, 2020. (ECF No. 69.) On the morning that the oral portion of jury selection was set to begin, the defendant moved to dismiss the indictment on other grounds (ECF Nos. 159, 169); the Court denied that motion also, issuing a subsequent written decision. (ECF No. 252.) Before the final pre-trial conference on August 3, 2021, both parties filed motions *in limine*. (ECF Nos. 121, 133, 135, 136, 137.) As relevant here, the government sought to admit certain uncharged conduct. (ECF No. 133.) The defendant responded. (ECF No. 146.) At the August 3, 2021 pre-trial conference and prior to opening statements on August 18, 2021, the Court ruled on most of the parties' requests, except for those on which the Court reserved decision pending hearing the trial evidence. On November 4, 2021, the Court issued a written opinion explaining the rationale for its rulings. (ECF No. 255.)

**IV. Jury Selection**

The Court employed the following system for jury selection. At the Court's direction, the parties submitted a joint proposed jury questionnaire. (*See* ECF No. 54.) Subsequently, both the government and the defense submitted requests for additions and changes to the

questionnaire (*see, e.g.*, ECF Nos. 96, 105); the Court reviewed the submissions and modified the questionnaire accordingly. (*See* ECF No. 115.)[7] The end result was a 28-page questionnaire with 108 questions. Approximately 575 prospective jurors completed the questionnaire. Next, the parties reviewed the completed questionnaires, and agreed that 251 jurors should be stricken for cause.[8] (ECF Nos. 152, 157.) The Court directed the remaining prospective jurors, whom neither party had challenged, to appear for an in-person *voir dire*. In addition, the Court directed the parties to submit any questions that they wanted the Court to put to the prospective jurors. The parties filed those questions before the oral *voir dire*.

On August 9 and August 10, 2021, the prospective jurors appeared for questioning. The Court addressed them as a group, and explained the rules that they must follow and the principles of law that applied, including that the defendant was presumed to be innocent, and that the government had the burden of proving the defendant's guilt beyond a reasonable doubt. (J.S. Tr. 17-21, 197-200.) The Court questioned the prospective jurors individually and asked the written questions the parties submitted. The Court also asked the parties whether they had additional questions for jurors and put those questions to

7. In an October 8, 2020 written order, the Court granted the government's motion for an anonymous and partially sequestered jury. (ECF No. 79.) The defendant does not challenge that decision.

8. The government submitted 34 additional names that it challenged, and the defendant submitted 145 additional names that he challenged. This group of prospective jurors was not in the final group that participated in the *voir dire*.

the jurors. Following the in-person *voir dire*, the parties exercised their challenges, both peremptory and for cause.[9] At the end of jury selection, which took place over the course of three days, the Court empaneled 12 jurors and six alternate jurors.[10]

## V. Trial

The evidence at trial established the following facts. From the early 1990s until his arrest in 2019, the defendant, a famous recording artist and professional singer and performer, was the head of an organization comprised of employees and associates, including managers, engineers, accountants, personal assistants and so-called "runners," who promoted the defendant's music and brand, but also catered to his personal needs and demands. For nearly 25 years, the defendant used his fame and his enterprise to lure young victims—girls, boys, young women and men—into abusive sexual relationships, often promising to advance their musical careers. The defendant exerted control over his victims by limiting their access to family and friends, requiring them to engage in degrading sexual acts with him and with multiple partners while he recorded them, forcing them to write and record false and degrading things about themselves or their families for the defendant to use as "insurance," among other things. He also exacted punishments for violations of his rules; he spanked them, beat them, forced them to have sex with

9. Both sides exercised all their peremptory challenges.

10. The Court excused one of the six alternate jurors due to a financial hardship. (T. Tr. 144, 464-65.)

him and recorded them during forced sexual encounters and performing other humiliating acts. His underlings enabled him by recruiting victims, transporting them, and enforcing the defendant's rules.

The defendant lived in various residences in Chicago from the early 1990s until his arrest. (T. Tr. 4053 (40 East 9th Street), 1336 (1010 George Street), 3143 (Olympia Fields and Trump Towers).) He recorded music at CRC Recording Company in the 1990s, 865 North Larabee Street (formerly known as Chicago Trax) from 2003 to 2004, and the basement of his Olympia Fields residence beginning in 2004—the Larabee Street and Olympia Fields studios were called the "Chocolate Factory." (T. Tr. 684, 1420-22, 1424-26, 1464.)

The defendant had many employees who worked for him in various capacities at different times, seeing to his professional and personal needs. These employees and associates included Demetrius Smith, the defendant's personal assistant and tour manager (T. Tr. 667-68, 673); Barry Hankerson, another manager (T. Tr. 673); Derrel McDavid, an accountant and manager (T. Tr. 707); Donnie Lyle, a musical director (T. Tr. 1518); Tom Arnold, a studio manager and road manager (T. Tr. 1422-24); and Diana Copeland, the defendant's personal assistant, and then executive assistant. (T. Tr. 3132-34.) The defendant also hired "runners" including Nicholas Williams and Anthony Navarro. (T. Tr. 556, 3511, 3514-15.) Jermaine Maxey, nicknamed "Bubba," was the defendant's close friend and a member of his entourage. (T. Tr. 1518, 1949.) Cynthia Oliphant ("Candy") handled security. (T. Tr.

3140.) "Top Gun" was one of the defendant's drivers. (T. Tr. 3142.) The defendant's numerous personal assistants included Suzette Mayweather, her twin sister Alesiette Mayweather, Diana Copeland, Bruce Kelly, George Kelly ("June Bug"), Milton Brown ("June"), Cheryl Mack and Van Pullen. (T. Tr. 1942, 1946, 1950, 3139, 3341, 3388.)

These people and the defendant's other employees helped the defendant with all aspects of his life. For example, Arnold "looked after the building," made sure there were runners available, provided cash for supplies and helped engineers with documentation. (T. Tr. 1422-23.) He was responsible for stocking the tour buses and coordinating travel and accommodation. (T. Tr. 1424.) The runners answered phones, took messages in the studio, transported "guests" and ran errands, among other tasks. (T. Tr. 488-91, 3514-15.) Copeland handled "household responsibilities," and made sure the defendant attended meetings on time. (T. Tr. 3135-36.)

The defendant's employees were also charged with contacting young women and girls for him, including those that he selected at his concerts or saw at other locations. For example, members of the defendant's staff routinely handed out the defendant's phone number to young women and girls in the audiences at his concerts (T. Tr. 1507-10), and invited them backstage or to afterparties. (T. Tr. 771, 2130, 2552, 2819.) In addition, these employees would look for women and girls at local malls and other places, and would give them the defendant's contact information. When the defendant wanted a young woman or girl—referred to at the trial as his "girlfriends" or "female

guests"—to travel to meet him, the assistants arranged their flights and hotels. (T. Tr. 3158, 3401.) The employees were also charged with escorting these "guests" when they went out in public—to shopping malls, to nail salons and to the defendant's basketball games. (T. Tr. 972-73, 3150, 3413-14.) The runners drove the defendant's "guests" to and from the Larabee studio and the Olympia Fields residence, and ordered food for young women and girls. (T. Tr. 495-96, 499-500, 1426-28, 1437.) In addition, the employees made sure that the defendant had his backpack, which contained his iPads and the other devices that he used to record his sexual encounters and his "guests." (T. Tr. 792, 845, 971-72, 2165, 2887-88, 3581.)

The defendant relied on his employees to enforce his various rules and to report any transgressions. For example, if a young woman or girl needed to use the bathroom or wanted to leave the defendant's home or studio, she was required to ask an employee, who then had to get the defendant's permission. (T. Tr. 821-22, 1439-40, 2003-05, 2029-31, 2209-2210, 2830-33.) If the "guest" wanted something to eat or drink, she had to ask an employee. (T. Tr. 2829-33.) The defendant required his underlings to report any "guest" who left her room without permission. (T. Tr. 506-07.)

When the defendant punished young women or girls for breaking his rules, including, for example, by forcing them to stay in a room or on a tour bus, sometimes for days, the defendant's assistants were required to monitor them. (T. Tr. 2220, 2222-27, 2229-32.) If the defendant believed that his employees had been insufficiently watchful or

had permitted one of the women to break his rules, he confronted them and often punished them, including by docking their pay. (T. Tr. 3167-69.)

**a. The Defendant's Herpes Diagnoses**

Dr. Kris McGrath, the defendant's primary care physician from 1994 until 2019, treated the defendant for herpes, beginning after June 5, 2000, and before March 19, 2007. (T. Tr. 400-05, 421.) Dr. McGrath advised the defendant to inform his sexual partners that he had herpes and to use a condom during sex, prompting the defendant to acknowledge that he should use a condom when he had sex. (T. Tr. 406, 463.) Dr. McGrath prescribed Valtrex for the defendant, which his underlings often picked up from the pharmacy. (T. Tr. 407-09.)

**b. The Charged Crimes and the Victims**

**i. Angela**

"Angela" met the defendant in 1991 when she was 14 or 15 years old, through her friend Tiffany. (T. Tr. 3274-76.) Angela wanted to be a singer and dancer, and Tiffany, who was also in high school, was an aspiring singer. (*Id.*) Tiffany told Angela about the defendant, and brought her to his apartment in Chicago, along with two other girls who were also in high school. (T. Tr. 3276-77.) The defendant and members of his entourage—Bruce Kelly, Demetrius Smith and Larry Hood—were in the apartment when the girls arrived. (T. Tr. 3278-80.)

The girls followed the defendant into another room "one by one." (T. Tr. 3281-82.) There were already three girls in the room when Angela walked in: one girl was removing her clothes, another was "standing there," and the third was "taking off her shirt." (T. Tr. 3282). The defendant asked Angela "to climb on top of him" and to "straddle [] and [] ride him." (T. Tr. 3282-83.) Angela was "a little startled," but did as the defendant asked. (T. Tr. 3283.) She asked if the defendant had "protection;" he did not, so she got a condom, put it on him, and they had sexual intercourse in front of the three girls. (T. Tr. 3284.) The defendant had intercourse with at least one other girl in the room, and engaged in sexual contact with all of them. (*Id.*) When Angela left the room, Demetrius Smith, Bruce Kelly and Larry Hood were still in the apartment. (T. Tr. 3284-85.)

For the next few years, Angela saw the defendant with Tiffany and "a different assortment of young ladies on a regular basis." (T. Tr. 3286.) At some point in 1991, the defendant told her to choose between going to school or a singing career. She stopped going to school, and she, Tiffany and another girl formed a group that the defendant called "Second Chapter." (T. Tr. 3286-87, 3293-96.)

From the time she was 15 until she was 17, Angela had sexual intercourse with the defendant at his apartment, at his recording studio in Chicago, and while they were "on the road." (T. Tr. 3287-88.) She did not want to have sex with him, but the defendant told her and other girls that they had to "pay [their] dues." (T. Tr. 3288-89.)

*Appendix B*

**ii. Aaliyah (Count 1: Racketeering Act 1)**

In 1992, the defendant and Demetrius Smith met Aaliyah Haughton, Barry Hankerson's niece, in Detroit, Michigan. (T. Tr. 676-78.) On Aaliyah's 12th birthday, the defendant introduced her as "the next up and coming artist" to Angela and the other girls in the group. (T. Tr. 3292-94, 3296.) The defendant told Aaliyah that the three girls would be her friends and her background vocalists and dancers. (T. Tr. 3295-96.) Angela saw Aaliyah regularly in Chicago while Aaliyah worked on her first album, "Age Ain't Nothing But a Number," which the defendant wrote and produced. (T. Tr. 3296-97.) Demetrius Smith was concerned that the defendant was "messing with" or "seducing" Aaliyah. (T. Tr. 687-92.) In 1992 or 1993, Aaliyah joined the defendant on tour. (T. Tr. 3298-99.) During a stop in Washington, D.C., Angela saw the defendant performing oral sex on Aaliyah in the tour bus. (T. Tr. 3306.)

In the middle of a 1994 tour, the defendant told Smith, "Aaliyah's in trouble, man, we need to get home." (T. Tr. 692-93.) There were still other shows on the tour, but Smith made travel arrangements, and they flew to Chicago after the show. (T. Tr. 693, 697.) During the flight, the defendant cried, and told Smith that Aaliyah believed she was pregnant (T. Tr. 703, 708), and that Derrel McDavid said he had to marry Aaliyah to avoid going to jail. (T. Tr. 704, 706.) When Smith said that Aaliyah was too young, the defendant asked "whose side [he] was on." (T. Tr. 710.)

*Appendix B*

The defendant, Smith, McDavid and Tyree Jameson met Aaliyah in a hotel room. (T. Tr. 711.) The defendant and the other men talked about the marriage, including the fact that they would have to get false identification for Aaliyah, who was only 15 years old and too young to get a marriage license. (T. Tr. 712-14.) Smith said that he could pay someone at the local "welfare office" to create a fake identification card for Aaliyah. (T. Tr. 714.) Smith got $500 from McDavid, and the group drove to the "welfare office." (T. Tr. 715-18.) Smith went inside and offered $500 to an employee, who agreed to create the false identification card. (T. Tr. 718-19.) The defendant waited in the car while Aaliyah went inside the office. The employee photographed her, gave her the card and she returned to the car. (T. Tr. 720-21.) The defendant knew someone at a local FedEx, where they got a fake work identification card for Aaliyah. (T. Tr. 722-24.)

Smith, McDavid, the defendant and Aaliyah went to the Maywood City Hall, where the defendant and Aaliyah applied for a marriage license. (T. Tr. 724-25.) The defendant, June and Smith asked Keith Williams to find a minister for the wedding; Williams recommended Nathan Edmond. (T. Tr. 1344-45.) Edmond officiated the ceremony, which was at most 10 minutes long in the hotel room, and, about an hour later, Smith, the defendant and Jameson flew back to the concert venue. (T. Tr. 746-47, 2418-19, 2422-23.) Aaliyah stayed behind. (T. Tr. 747.) Shortly after the wedding, the marriage was annulled. (GX 804.)[11]

11. Aaliyah died in an August 25, 2001 airplane crash. (T. Tr. 3291-92.)

### iii. Stephanie (Count 1: Racketeering Act 2)

Stephanie was born on October 16, 1981, and grew up in Chicago; she graduated from the Chicago Academy for the Arts in 1999. (T. Tr. 1620.) She met the defendant when she was 16 years old, at the Rock 'N Roll McDonald's in downtown Chicago. (T. Tr. 1622.) A man approached her and asked for her age; she responded that she was 16. (T. Tr. 1623.) He asked if she knew R. Kelly, and she said she did; he gestured to the defendant, who was seated at a booth, and said that the defendant wanted her to call him. (T. Tr. 1623-24.) He handed her a note with a phone number. (*Id.*) Stephanie threw the note away because she did not intend to call the defendant. (T. Tr. 1624.)

She saw the defendant about a year later, in the summer of 1999, when she was 17. (T. Tr. 1625-26.) She asked if he would listen to her friend, an aspiring singer. (T. Tr. 1628-29.) The defendant agreed to meet Stephanie's friend and perhaps help her with her career but wanted to "get to know" Stephanie and asked her if she would "cuddle" with him; Stephanie replied that she would, and the defendant gave her his number. (T. Tr. 1630.)

Stephanie went to the defendant's recording studio a week or two later. (T. Tr. 1630-31.) An employee took her to a second floor waiting room and told her to wait for the defendant. (T. Tr. 1632-33.) The defendant arrived a few hours later. (T. Tr. 1633.) He told her that he wanted her to call him "daddy," and they had sexual intercourse. (*Id.*)

Stephanie continued to see the defendant for the next six months, mostly at his studio, and they had sexual

intercourse every time she saw him. (T. Tr. 1634, 1637-38.) Occasionally, one of the defendant's employees picked her up and dropped her off at the studio. (T. Tr. 1635-36.) The defendant "was one of two ways. He was either very nice and charming, jovial, or he was very controlling, intimidating. He'd raise his voice at me and he could . . . put the fear of God in me very quickly." (T. Tr. 1637.) Sex with the defendant was "humiliating." (T. Tr. 1638.) He told her what sounds to make and often ejaculated on her face. (T. Tr. 1638-39.) The defendant also "position[ed]" Stephanie's body in "very specific" ways, and sometimes would leave her "completely naked with [her] butt in the air" for "hours." (T. Tr. 1638.) If she was not in the same position when the defendant returned, he got "very angry" and yelled at her. (*Id.*) He did not allow her to speak to other men. (T. Tr. 1648.)[12] Following one of his basketball games, he directed her to perform oral sex on him, even though there were two other people in the car; he told her to "make noises" because "he wanted the people in the car to know." (T. Tr. 1652.)

While Stephanie was still 17, the defendant videotaped their sexual encounters. On one occasion, he gave her instructions about what she should do, including when to undress. (T. Tr. 1645.) He placed his video camera in front of Stephanie, who was completely naked, had sex with her from behind and put a dildo in her mouth. (T. Tr. 1645-47.)

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12. During a dinner with two rappers, the defendant said that he "like[d] young girls and that people make such a big deal of it but it really isn't a big deal because even, look at Jerry Lee Lewis, he's a genius and I'm a genius and we should be allowed to do whatever we want because of what we give to this world." (T. Tr. 1648-49.)

*Appendix B*

Following a trip to Florida, during which the defendant used a small, hand-held camera to record her performing oral sex on him, she decided to end the relationship because she "felt used and humiliated and degraded." (T. Tr. 1657.) She also wanted him to destroy the "sex tapes," so she saw him one or two more times, but he did not destroy the tapes. (T. Tr. 1657-58.) When she called and asked if she could get the videotapes, or if they could destroy them together, he said it was possible if she came to the studio. (T. Tr. 1658.) She realized that he did not intend to destroy the tapes, and she never spoke to him again. (*Id.*)

**iv. Addie**

"Addie" met the defendant at a Miami concert on September 2, 1994 when she was 17 years old. (T. Tr. 1730; GX 201.) The defendant announced from the stage that women over 18 could go backstage. (T. Tr. 1735, 1737-38.) Addie did not go because she was only 17. (T. Tr. 1736-37.) Minutes later, however, two "bouncers" asked Addie and her friend if they wanted the defendant's autograph. (T. Tr. 1735-36, 1767.) The men did not ask the girls their age, and led them to the defendant's dressing room. (T. Tr. 1738.)

The defendant autographed Addie's program. (T. Tr. 1738-39; GX 201.) When Addie said that she was an aspiring artist, the defendant wrote his hotel room number on her program and suggested that she come to his room for an "audition." (T. Tr. 1740-41; GX 201.) Addie also told the defendant that she was 17. (T. Tr. 1740, 1742.) The defendant said something to his bouncers, who escorted

everyone else out of the dressing room; they told Addie and her friend to "stay." (T. Tr. 1742-43.)

The defendant played a song from an upcoming movie, and told the girls that he wanted to play a "game" to determine which girl was the better kisser. (T. Tr. 1743-44.) The defendant kissed Addie's friend, and then kissed Addie; when she tried to pull away, the defendant held her wrists, pulled down her shorts and had unprotected sex with her from behind. (T. Tr. 1744-46.) Addie was in "complete shock," and her mind "just basically went blank." (T. Tr. 1746.) When the defendant finished, Addie pulled up her shorts, opened the door, which had been locked, and ran out of the room with her friend. (T. Tr. 1746-47.)

**v. Kate**

"Kate" started a sexual relationship with the defendant in 2001 when she was 27. (T. Tr. 2627-28.) Before she had sex with him for the first time, Kate asked if he was "okay," and if he was going to use protection. (T. Tr. 2636-37.) The defendant said that he was not going to use protection. (*Id.*) He did not tell her that he had herpes. (*Id.*)

Kate, who was not sexually active with anyone else at the time, subsequently contracted genital herpes. (T. Tr. 2638.) The defendant did not respond or ask any questions when she said, "I think you gave me something." (T. Tr. 2638-39.) In 2004, Kate retained a lawyer; the defendant paid her $200,000 to release her claims and to refrain from making public statements about her relationship with the defendant. (T. Tr. 2639-44; GX 930.)

### vi. Sonja (Count 1: Racketeering Acts 3 and 4)

The jury heard testimony from Sonja, a 21 year-old intern at a local radio station, who met the defendant at a shopping mall in West Valley City, Utah in August 2003 and wanted to interview him. (T. Tr. 2744, 2748.) He invited her to Chicago for the interview. (T. Tr. 2753-54.) Once she arrived at the studio, she was detained in a room for days. (T. Tr. 2759-68.) When an employee brought her something to eat, she passed out after only a few bites. (T. Tr. 2769.) She awoke to find that her underwear had been removed, that her vaginal area and thighs were wet, and saw the defendant pulling up his pants. (T. Tr. 2770.) The jury found that Racketeering Acts 3 and 4, which charged the defendant with kidnapping and Mann Act violations, were not proven beyond a reasonable doubt. Nevertheless, the government maintains that the evidence "also constituted evidence of the existence of the enterprise, the means and methods of the enterprise and the defendant's pattern of racketeering." (ECF No. 278 at 26 n.33.)

### vii. Alexis

Alexis met the defendant in Jacksonville, Florida on March 26, 2006, when she was 15 years old. (T. Tr. 2589; GX 212.) A man told Alexis and her friend that the defendant wanted to meet them backstage. (T. Tr. 2552.) The defendant gave Alexis his number, and they met the next day on the defendant's tour bus in a mall parking lot, where he made her sign a nondisclosure agreement. (T. Tr. 2555-57.) Alexis "may" have told the defendant that she was only 15 years old; "his general response was just

there's nothing wrong with platonic friendship at that time and then if it turns into something over time, then so be it.' (T. Tr. 2557.)

Alexis saw the defendant repeatedly for the next few years, including in Jacksonville, Miami and Chicago. (T. Tr. 2557-59.) She first had sex with the defendant when she was in her "teens," but not before she was 18. (T. Tr. 2558-59.) The defendant did not use protection and did not tell her that he had herpes. (T. Tr. 2559.)

**viii. Louis**

"Louis" was born on February of 1989. (GX 811.) He met the defendant in 2006, when he was 17 and working at a McDonald's in Markham, Illinois. (T. Tr. 1804-06; GX 154.) The defendant asked Louis if he could "hook it up" for the defendant and Louis's manager. (T. Tr. 1807.)[13] The defendant then handed Louis and the manager his phone number, and told Louis to call. (T. Tr. 1807-08.) Louis gave the number to his mother. She called the defendant and said that Louis was an aspiring rapper and a "big fan" of the defendant's music. (T. Tr. 1810.) Louis and his parents attended a Christmas party at Olympia Fields. (T. Tr. 1810-11.) At one point, the defendant whispered to Louis that "it would be best" if he came to see the defendant by himself. (T. Tr. 1815.)

Louis's mother called the defendant again about Louis's interest in music, and the defendant invited

13. The manager did not know who the defendant was. (T. Tr. 1807.)

Louis to his studio. (T. Tr. 1815-16.) Louis rapped for the defendant and another man; they told him he had "potential," and the defendant invited him to come back the next day. (T. Tr. 1816-21.) Louis returned and recorded a song. (T. Tr. 1821.) The defendant listened for only a few seconds but said he did not like it. (T. Tr. 1821-23.) Louis left the studio feeling "discouraged." (T. Tr. 1823.)

Shortly thereafter, the defendant invited Louis back to the studio. (T. Tr. 1823-26.) He took Louis into a garage, and asked what Louis was "willing to do for the music." (T. Tr. 1828.) As Louis started to explain how hard he would work, the defendant interrupted and asked if Louis had "any fantasies." (T. Tr. 1828.) The defendant got onto his knees, unzipped Louis's pants and performed oral sex on him. (T. Tr. 1829.) In the ensuing months, Louis and the defendant had additional sexual encounters, which the defendant recorded on a "camcorder tripod or an iPad." (T. Tr. 1843-44.) The defendant asked Louis to call him "Daddy," and called Louis his "little brother." (T. Tr. 1844.)

The defendant also instructed Louis to have sex with women, which the defendant recorded. On one occasion, the defendant took Louis to the garage, and when the defendant "snapped his fingers three times," a naked, "very petite" "young lady" crawled out from under a boxing ring. (T. Tr. 1844-47.) When the defendant ordered her to "come here," she crawled over to him, and performed oral sex on him. (T. Tr. 1846.) The defendant told Louis to pull down his pants, and directed the young woman to "do" Louis "the same way she did him." (*Id.*) She complied, and the defendant told her to say Louis's name and tell him that she liked him. (T. Tr. 1844-46.)

The defendant also met one of Louis's friends, "Alex," who was a year younger than Louis. On one occasion, the defendant directed Louis and Alex to kiss and "touch" each other. (T. Tr. 1862-63.) Neither wanted to do it, so the defendant told Alex, "[L]et's show him how it's supposed to be done," and Alex and the defendant had sex. (T. Tr. 1863-64.)

One of the defendant's "girlfriends," Dominique, went to Louis's high school, and was a few years younger than Louis. (T. Tr. 1851-53.) The defendant found out that Louis was talking with Dominique on the phone. (T. Tr. 1853-56.) He directed her not to talk to Louis, and "didn't want anything to do" with Louis after that. (T. Tr. 1856-57.)

In 2019, Louis met the defendant at the Trump Towers in Chicago. (T. Tr. 1875.) The defendant dictated a letter, which Louis wrote, to the effect that "some people" wanted to pay Louis to say that he had a sexual relationship with the defendant. (T. Tr. 1875-79.) The defendant told Louis that the letter was for their "protection." (T. Tr. 1878.)

**ix. Alex**

As explained above, the defendant met Alex through Louis. Alex had multiple sexual encounters with the defendant, in the defendant's home, studio and tour bus. (T. Tr. 3345-62, 2883-84.) The defendant called Alex "Nephew," and told Alex to call him "Daddy." (T. Tr. 3349, 3352.) The defendant also directed Alex to have sex with different women while the defendant recorded the encounters; sometimes the defendant participated,

and other times he masturbated. (T. Tr. 3345-51.) The defendant was "in charge" during these encounters, and gave instructions to Alex and whichever woman was involved, including to "do it like [you] mean it." (T. Tr. 3445-46, 3448, 3552-56.) During these encounters, the women appeared "zombie-ish." (T. Tr. 3358.)[14]

**x. Jerhonda (Count 1: Racketeering Acts 5, 6 and 7)**

Jerhonda Pace, born on April 19, 1993 (T. Tr. 105), admired the defendant and his music, and was a member of his "fan club." She met him in April 2008 outside a Chicago courthouse when she was 14 years old. She spoke to him occasionally during the next two months. (T. Tr. 110-13.) In May 2009, when she was 16 years old, the defendant's employee "Bubba" invited her to a party at the defendant's house in Olympia Fields, which she attended. (T. Tr. 114.) The defendant said he remembered her "from court." (T. Tr. 118.) She said she was 19, and they exchanged phone numbers. (T. Tr. 119.)

The defendant invited her to his house a few days later and told her to bring her bathing suit. (T. Tr. 119, 121.) A runner named Anthony picked her up from the train station. (T. Tr. 120.) Once at the house, Anthony walked Jerhonda to a room with a swimming pool, and she put on her bathing suit. (T. Tr. 121-22.) The defendant arrived and told to take off her bathing suit and to walk back and

14. The government introduced video and photographic evidence of some of these encounters. (GX 341, 342, 343.)

forth. (T. Tr. 122.) After Jerhonda complied, the defendant walked her to another room and performed oral sex on her. (T. Tr. 123.) Jerhonda "felt uncomfortable," told him she was 16 years old, and showed him her state ID. (*Id.*) The defendant responded that she should "continue to tell everyone that [she] was 19 and to act 21," and then had sexual intercourse with her. (T. Tr. 124-25.) The defendant did not use protection and did not tell her that he had herpes. (T. Tr. 125-26.) Jerhonda had a drink and felt ill, so the defendant took her to the "mirror room" to rest. (T. Tr. 126-27.) The next morning, she texted the defendant that she was leaving; a runner brought her $50, and dropped her off at the train station. (T. Tr. 128-30.)

The defendant also suggested that she bring a friend to his house; she introduced him to Dominique, who was 17 at the time and another member of "the fan club." (T. Tr. 130-31, 138-39.) Jerhonda learned that Dominique was visiting the defendant's house, but did not see her there because, according to the defendant's rules, they were not permitted to leave their rooms. (T. Tr. 131-32.) One night, the police came to the house looking for Dominique. (T. Tr. 139.) The defendant, using the speaker phone, told his lawyer that the police were at his house. (T. Tr. 139-40.)[15]

Jerhonda continued to see the defendant over the next six months. They had sex each time she was there, and the defendant recorded their sexual activities with his Apple iPhone and a Canon camera on a tripod. (T. Tr.

15. Officer Garrick Amschl went to the defendant's house, looking for "a missing juvenile" on June 13, 2009. (T. Tr. 370-71.)

168-69.) Jerhonda contracted herpes while she was seeing the defendant. (T. Tr. 173.) He arranged for her to see a doctor. (T. Tr. 173-74.)

The defendant required Jerhonda to follow his rules. For example, she had to wear baggy clothing and was not permitted to leave a room without the defendant's permission. (T. Tr. 154, 163.) If she needed to use the bathroom, she had to text him or call one of his employees. (T. Tr. 163-64.) She had to call the defendant "Daddy," and "acknowledge[]" him when he came into the room. (T. Tr. 164.) On one occasion, the defendant called her and directed Jerhonda to come outside to his tour bus, which was parked next to the house. (T. Tr. 165.) When she arrived, the defendant was there with a naked young woman named "Juice," who the defendant said had been with him since she was 15 years old. (*Id.*) He told Jerhonda that he was going to "train" her "on how to sexually please him," and then ordered her and Juice to perform oral sex on him. (T. Tr. 165-66.)

The defendant made Jerhonda sign a non-disclosure agreement. (T. Tr. 149-50.) He also directed her to write a letter in which she falsely said that she stole $100,000 in jewelry and cash, that her sister forced her to say that the defendant gave her herpes, that she was the defendant's employee and that he fired her. (T. Tr. 149-52.)

The defendant punished Jerhonda when she broke his rules. He slapped her when she disagreed with him. (T. Tr. 166-68.) In January 2010, Jerhonda did not greet him appropriately because she was texting with a friend.

(T. Tr. 175-76.) He slapped her and choked her until she passed out. (*Id.*) He "spit in [her] face and told [her] to put [her] head down in shame." (T. Tr. 176-77.) The defendant ordered her to perform oral sex on him and ejaculated on her face. (T. Tr. 177.) She used her t-shirt to wipe her face. (T. Tr. 177-78.)

Jerhonda hired a lawyer to bring a civil suit against the defendant. (T. Tr. 180.) She gave the firm the t-shirt she used to wipe her face, and her cell phone.[16] (T. Tr. 183.) The lawyer settled the case for $1.5 million. (T. Tr. 190-91.)

**xi. Anna**

Anna went to one of the defendant's concerts in 2016 when she was 19 or 20 years old, and afterwards Bubba told her that the defendant wanted to meet her. (T. Tr. 2818-19.) Anna met the defendant in his dressing room, and they exchanged contact information. Shortly thereafter, they began a sexual relationship. (T. Tr. 2820-21.) Anna lived in the defendant's Trump Towers apartment in Chicago, and traveled with him in his Sprinter van to his concerts around the country. (T. Tr. 2822-23.) The defendant paid for Anna's travel and hotel, which his assistants arranged. (T. Tr. 2822.)

The defendant became "more controlling" during the course of their relationship and required Anna to follow his rules. (T. Tr. 2821, 2828.) She had to call him "Daddy"

16. DNA testing confirmed that the defendant's semen was on the t-shirt. (T. Tr. 1373-74, 2469.)

(T. Tr. 2889), could not talk to or look at other men (T. Tr. 2840), and had to get the defendant's permission go anywhere, even to the bathroom or to get food. (T. Tr. 2828-29, 2831-33.) The defendant required her to wear baggy clothing and a baseball cap when she went out in public. (T. Tr. 2835.) He also controlled her use of social media and the internet (T. Tr. 2838-40), and monitored her conversations. (T. Tr. 2834.)

The defendant administered "punishments," which he frequently recorded, when he believed that Anna broke a rule. (T. Tr. 2857-62, 2840-44; 3018-19.) He spanked her so hard that he left bruises, and then demanded that Anna send him text messages that she enjoyed the beatings. (T. Tr. 2842-44.) On one occasion, he forced Anna, who was crying, to walk back and forth, wearing only high heels, and to repeat, over and over, that she was a "slut" and "stupid," while the defendant slapped her. (T. Tr. 2836-38, 2845-46, 2852-54; GX 328(a).) The defendant recorded these "punishments."

The defendant ordered Anna to write letters, which he dictated, in which she made false and embarrassing statements about herself and her family; he kept these letters for "protection" in the event that "down the line . . . something were to happen." (T. Tr. 2863-65, 3653; GX 420(a), 430(b), 430(c), 430(d), 449.)[17] The defendant would not let Anna see her mother until the mother wrote a

17. The defendant ordered his other victims to write similar letters. (T. Tr. 149-52, 985-99, 2197-99; GX 302, 444, 445, 455, 456, 461.) Anna found one from Dominique at the defendant's guesthouse. (T. Tr. 2877-79.)

letter falsely admitting to a blackmail scheme against the defendant, in the event that Anna's mother "were to come against him in any type of way." (T. Tr. 2879-80.) The defendant told Anna to give the letter to Copeland. (T. Tr. 2880.)

The defendant also forced Anna to do "embarrassing" and dehumanizing things, which he recorded. (T. Tr. 2876.) For example, he ordered her to be "sexual and seductive with bodily fluids"—covering herself with urine and feces, while the defendant told her what to say. (T. Tr. 2876-77.)[18]

Also at the defendant's direction, Anna had sex with him and others, including Jane, Dominique, Joy and Alex, while the defendant recorded the encounters on his iPad. (T. Tr. 2881-86; GX 68.) The defendant never used a condom. (T. Tr. 2886.) Anna was tested for sexually transmitted diseases but did not see the results because the doctor sent them directly to Copeland. (T. Tr. 2825-26.) Anna's relationship with the defendant ended some time in 2018. (T. Tr. 2821, 2888.)

### xii. Jane (Count 1: Racketeering Acts 8, 9, 10 and 11; Counts 2, 3, 4 and 5)

Jane was born on December 30, 1997. (T. Tr. 770.) She met the defendant at an Orlando concert in April 2015, when she was 17 years old. (T. Tr. 769-70.) Jane, a high school junior, was active in varsity sports and in

18. The government introduced a portion of this recording at trial. (GX 329(a).)

her school choir and hoped to be a professional singer. (T. Tr. 776-77.) During the concert, a member of the defendant's entourage handed Jane a sheet of paper with the defendant's phone number. (T. Tr. 773.) Jane texted with the defendant and spoke with him by video call. (T. Tr. 779.) She told him that she was a musician and that she was 18 years old. (T. Tr. 781.) The defendant invited her to "audition" at his hotel room. (T. Tr. 781-82.) When she arrived, the defendant was in a Sprinter van; he asked her to sit on his lap and give him a kiss, which she did. (T. Tr. 786-88.) They went to his hotel room, and the defendant told her that he needed to ejaculate before Jane sang. (T. Tr. 788-89.) Jane did not want to have intercourse with him, but at the defendant's direction, took off her clothes, and the defendant "lick[ed] [her] butt." (T. Tr. 791-92.) Meanwhile, Jane's parents were trying to find her, and security officers arrived. (T. Tr. 793-94.) Jane told them that she was 18 and handed them her identification, which showed that she was only 17, but they left. (T. Tr. 794-95.) The defendant continued the sexual contact, ejaculated, and then told Jane to sing. (*Id.*) He praised her, and said he wanted to "see [her] again and teach [her] a few techniques." (T. Tr. 795-96.)

The defendant invited Jane travel to Los Angeles, one of the next stops on his tour. (T. Tr. 798-99.) His assistant, Cheryl Mack, made Jane's travel arrangements, and Jane flew to California. (T. Tr. 800.) The defendant had sexual contact with her at a hotel. (T. Tr. 804-05.) He also told her about some of his "rules:" that she must wear "loose and baggy" clothing, call him "Daddy," and get his permission

to leave the hotel room. (T. Tr. 810-11.)[19] Jane traveled to Stockton, California, where she and the defendant had sexual intercourse for the first time. (T. Tr. 818-19.) The defendant did not use a condom and did not tell her that he had genital herpes. (T. Tr. 819-20.)

Jane stayed with the defendant in Chicago during the summer of 2015. (T. Tr. 837-38.) The defendant would not permit her to leave her room without calling him or an assistant first. (T. Tr. 838-40.) If she had to use the bathroom and could not reach the defendant or one of his employees, she had to urinate in a cup. (T. Tr. 841.)[20] She and the defendant had "sex almost every day," which the defendant frequently recorded using iPads that he kept in a backpack. (T. Tr. 843-46.) Jane, still 17 years old, contracted genital herpes, with pain so severe that she could not walk. (T. Tr. 851-52.) Juice booked a doctor's appointment for Jane. (T. Tr. 852.) When the doctor told her that she had herpes, Jane was "devasted." (T. Tr. 853.)

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19. During the time she was with the defendant, Jane kept notes to remind herself of the defendant's rules. In one note, she wrote: "Do not be goofy, extra, or act young when told something in private or around others. Do not play games when on phone with daddy. Just say I love you before I hang up. . . . Trust daddy and do whatever he says, [whenever] he says, with no rebuttal, disrespect or rebellion." (T. Tr. 858-59; GX 325.) She also wrote other reminders, including, "Tell daddy one thing that I appreciate about him and continue to lift him up," and, "Stop defending myself. Anything daddy says is to help me. Thank him and be happy and fix the problem." (T. Tr. 859-60; GX 331.)

20. The defendant did not allow Jane to leave his van without permission, either, even to use the bathroom, so there were times when she had to use a cup. (T. Tr. 974-75.)

She told the defendant, who was "agitated" and told her that she "could have gotten that from anyone." (T. Tr. 853.) Jane responded that she had "only been intimate with him." (*Id.*) From that point on, Jane got herpes medication either from the defendant or his doctor. (T. Tr. 853-54.) The defendant told her that "everyone has it," and that "it was no big deal." (T. Tr. 854.)

Before she went back to Orlando for her senior year of high school, Jane told the defendant she was only 17. (T. Tr. 860-61.) He slapped her face and walked away. (T. Tr. 861.) He returned and told her that they "would figure this out." (T. Tr. 861-62.) Jane went back to Orlando, but she and the defendant convinced her parents to let her live in Chicago and do "virtual online" homeschooling. (T. Tr. 863-64.) The defendant arranged for Juice's mother to act as Jane's legal guardian. (T. Tr. 863-68.) The defendant's assistant booked Jane's travel to Chicago, for which the defendant paid. (T. Tr. 868.) Afterwards, Jane joined the defendant on his tour, traveling on his tour bus from city to city. (T. Tr. 869-70.) At one point during the tour, Jane thought she was pregnant and asked the defendant what he would do; he said that "he would want [her] to get an abortion because he wanted [her] to keep [her] body tight," and that "if [she] was any other age, it wouldn't make a difference." (T. Tr. 881-83.)

As Jane learned, the defendant had other so-called "live-in girlfriends"—Juice, V, Dominique and Joy. (T. Tr. 969.) And the defendant had more rules. Jane had to kiss the defendant as soon as he came into a room. (T. Tr. 856.) He did not want Jane to talk to friends or to have

access to social media. (T. Tr. 856-57.) She could not share personal information with the other "girlfriends." (T. Tr. 908.) He did not allow any of these young women to look at or be around other men; they had to turn away, leave the area and tell the defendant "immediately." (T. Tr. 970-71.) They attended the defendant's nightly basketball games but could look only at him. (T. Tr. 972-75.) The defendant required Jane to report any rule-breaking by the other young women, who in turn had to report Jane and one another. (T. Tr. 975-76.)

The defendant often made Jane write letters with false admissions for his protection. (T. Tr. 992, 995-97.) Sometimes, he forced Jane to "make videos as punishments." (T. Tr. 997-99.) For example, he recorded her making a false claim that her father molested her. (T. Tr. 995, 998.) Another time, the defendant forced her to smear feces on her face and to "put it in [her] mouth and act like [she] liked" it, while he recorded her. (T. Tr. 998-99.)

The defendant spanked Jane "nearly every two to three days," sometimes with such force that he bruised her and tore her skin. (T. Tr. 911-12.) On one occasion, the defendant confronted Jane about a conversation she had with a friend. The defendant accused her of lying, and hit her "all over her body" first with his hand and then with a shoe, "until [she] finally broke." (T. Tr. 913-16.) He regularly kept her in a room as punishment, for example, when Juice reported that Jane bought overly "tight" sweatpants. (T. Tr. 918-25.) He also held her on his tour bus or in the studio, sometimes for more than a day.

(T. Tr. 931-32, 2010-11.)[21] The defendant also assaulted the other young women, which Jane saw. (T. Tr. 925.) At times, the defendant compelled Jane to have sex with other women and men—the other "girlfriends," his employees and Alex, whom Jane knew as "Nephew." (T. Tr. 955-61, 964-65, 1045-50.) In these encounters, which he recorded, the defendant "orchestrate[d] everything." (T. Tr. 965, 1046-47.)

### xiii. Faith (Count 1: Racketeering Acts 12, 13 and 14; Counts 6, 7, 8 and 9)

Faith met the defendant when she was 19 years old, after a March 2017 concert in San Antonio, Texas. (T. Tr. 2125-26.) Two of the defendant's staff members invited Faith and her sister to an afterparty backstage. (T. Tr. 2130-31.) The defendant gave Faith a piece of paper with his phone number on it (T. Tr. 2133-34), and invited her and her sister to his dressing room. (T. Tr. 2136-38.) He asked Faith to text him her name with a picture of herself, which she did when she got home. (T. Tr. 2140-41.) After that, they communicated regularly. (T. Tr. 2141-44.) The defendant told her to call him "Daddy," and hung up on her when she did not. (T. Tr. 2143-44.) The defendant told Faith that he loved her and invited her to see him on tour;

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21. The Mayweather sisters exchanged text messages in which they discussed the punishments. In one exchange, they said that the defendant was "holding" Jane in the back room of the studio "all day." (T. Tr. 2014-19; GX 240(b).) In another exchange, they wrote that the defendant kept Jane on the Sprinter van for days without "feed[ing] her." (T. Tr. 2053-55; GX 240(d).)

he told her that Diana Copeland would arrange her travel, and gave her Copeland's number. (T. Tr. 2145.)

In May 2017, Faith traveled to New York and went to the defendant's concert. (T. Tr. 2152-58.) The defendant went to Faith's hotel room early the next morning, and they had sexual intercourse, which the defendant recorded on his iPad. (T. Tr. 2163-66, 2169-74.) He did not wear a condom, nor did he tell Faith that he had herpes. (T. Tr. 2178.) He also said that she could tell "Daddy" if she was "really like 16." (T. Tr. 2174.)

Faith saw the defendant in Chicago in June 2017, and in Dallas in December 2017. (T. Tr. 2184, 2190.) They engaged in sexual activity on both trips. (T. Tr. 2187-88, 2193, 2195-96.) The defendant told Faith that her "legs should never be pointed to another man when [she's] in public with him." (T. Tr. 2192.) He said he had "a group of women that [he] raised," but the defendant dismissed her concerns, telling her that ultimately it was only his sexual gratification that mattered. (T. Tr. 2198.) He also suggested that she sign "some papers" to "protect" him, and to write something about her family, even if it was untrue. (T. Tr. 2197-99.) He directed Faith to send him a text message that said, "Daddy I want to be with you and the girls." (T. Tr. 2199.) The defendant also told Faith that he had rules for his girlfriends, including a requirement that they greet him whenever he entered a room. (T. Tr. 2200-01.)

When she went to Dallas, the defendant told Faith that they were going to a hookah bar. Faith, Joy and the

defendant got into the back of the Sprinter van, while Diana Copeland got into the front passenger seat. (T. Tr. 2206-07.) When they arrived, the defendant and Copeland went inside the bar so that the defendant could see how many men were there, leaving Faith and Joy waiting for "hours." (T. Tr. 2208.) Faith had to use the bathroom and tried to open the door, but Joy told her that the door was broken and she had to "ask" to leave. (T. Tr. 2208-09.) Faith texted Copeland that she was "about to pass out." (T. Tr. 2210.) The defendant and Copeland finally returned, and drove Faith to an IHOP to use the bathroom. (*Id.*) Copeland followed her and Joy to the bathroom, and stood outside the stall but did not use the bathroom herself. (T. Tr. 2210-11.) They all returned to the hotel. (T. Tr. 2213.) Faith continued to communicate with the defendant after the Dallas trip. He wanted her to get his permission to go out, to tell him where she was going, and who she saw. (T. Tr. 2214-19.)

In January 2018, the defendant paid for, and Copeland arranged, Faith's travel to Los Angeles, California. (T. Tr. 2220.) When Faith arrived at the defendant's studio, Copeland told her to wait in the Sprinter, which was parked outside. (T. Tr. 2222-23.) After more than an hour, Faith texted Copeland that she needed to use the bathroom. (T. Tr. 2224.) Copeland escorted her to the restroom in the studio, then back to the Sprinter. (T. Tr. 2224-26.) Later, Copeland took Faith to a room in the studio. (T. Tr. 2226.) At one point, the defendant came into the room, but left. (T. Tr. 2229.) Faith asked Copeland if she could go back to her hotel room, or whether the defendant wanted her to wait; Copeland told her to wait. (T. Tr. 2230-31.) When

the defendant showed up hours later, he told Faith that he would have come sooner if she had shown any excitement when he saw her earlier. (T. Tr. 2247-48.) The defendant directed her to take her clothes off and walk back and forth. (T. Tr. 2248.) Faith did not want to have sex with him, and said she was "on [her] period." (T. Tr. 2248.) The defendant sighed, and said, "Well, why did you come?" (T. Tr. 2249.) He then told Faith to take off her pants and walk back and forth in her body suit. (*Id.*)

When the defendant then took Faith to another room, she hesitated because she saw a gun on the ottoman. (T. Tr. 2249-50.) The defendant told her, "Don't look at it." (T. Tr. 2250.) His "demeanor changed," and "[h]e got real serious," sat in a chair and told her to "stand across from him;" at this point he had "moved the gun by him." (T. Tr. 2250-51.) The defendant told Faith to "pose" while he took pictures with his iPad, and was irritated because she was "not being sexy enough." (T. Tr. 2251.) He started asking her questions: "How many men have seen you naked?" "How many male friends do you have?" (*Id.*) Faith responded that none of her male friends had seen her naked, and the defendant said, "You want to take that back?" (*Id.*) With a "stern look on his face," the defendant claimed that he "would know if [Faith] was lying to him." (T. Tr. 2251-52.) The defendant then put a pillow on the floor, and told Faith to get on her knees. (T. Tr. 2252.) He "grabbed the back of [her] neck forward," and instructed her to perform oral sex on him. (*Id.*) Faith did not want to give the defendant oral sex but was intimidated; the gun was now on the defendant's seat, and Faith felt that she could not leave because she was "under his rules and he had a weapon." (T. Tr. 2252-54.)

Faith traveled to see the defendant for the last time in New York in February 2018. (T. Tr. 2261.) He tried to have sexual intercourse with her, but she was "clenching on purpose." (T. Tr. 2265.) The defendant got his iPad that he had used to record them, and masturbated while he watched a video of himself and other women having sex. (T. Tr. 2266.)

**c. Other Evidence**

The jury heard additional testimony and saw other evidence that corroborated the victims' testimony, including from the defendant's associates and employees. In addition, the government introduced evidence from the defendant's storage facility, including an altered birth certificate for Jerhonda that changed her birth date from 1993 to 1990, multiple false confession letters from the victims and employees, and recordings including an audio recording in which the defendant, accompanied by George Kelly, accused "Kyla" (Jane Doe #20) of stealing one of the defendant's watches. (GX 485.) The defendant said, "You know how I am with cameras," and claimed to have "cameras everywhere," including in his studio, garage and van. (*Id.*) Kyla admitted that she took a watch, a t-shirt, earrings and "porno tapes," prompting the defendant to say the following:

> There's only one way you're gonna get rid of this. For me to trust your ass again. You're gonna do the fuck I tell you to do. When you made the fuckin tape for me and I looked at that shit, you was hiding your fucking face all over that shit because you didn't want to be seen

> . . . . And you ain't gonna hide your fucking face on me. You're gonna do what the fuck I tell you to do and you're gonna do it fuckin right. Then I'm gonna gain my fuckin trust back with your ass. If I even detect you trying to hide on that shit, I'm gonna blow this shit the fuck up. Do you hear this shit I'm telling you. I fucking raised your ass. I raised you. . . . You better not ever in my mother fucking life take from me again or I will be in Florida and something will happen to you.

(*Id.*) The defendant ordered Kyla to the garage and to stay there until he told her she could come out. (*Id.*) He added: "When I come and get you . . . you better be fucking like you're supposed to fuckin' be. . . . You're not going to tape until I tell you. When I tell you, I don't give a fuck if you're coming out of your sleep. You better be fucking ready. Do you understand? . . . You make no fucking calls except the studio or me." (*Id.*)

**d. Defense Case**

The defense called five witnesses at trial: Dhanai Ramnaran, an aspiring rapper who worked with the defendant for approximately 15 years (T. Tr. 3990-91,4000, 4022);[22] Larry Hood, the defendant's childhood friend and a former Chicago police officer was on the defendant's security team (T. Tr. 4038-44); Jeffrey Meeks, who worked for the defendant for more than ten years, including

22. Ramnaran testified that his job was "to observe and to learn and to become." (T. Tr. 4000.)

as a "runner" (T. Tr. 4104-07, 4126); John Holder, the defendant's accountant from 2018 to 2019 (T. Tr. 4135, 4138); and Julius Darrington, a music consultant who worked with the defendant for about four years. (T. Tr. 4214-15.)

The defense witnesses testified that they never saw the defendant "strike a woman," "lock a woman in a room," or prevent a woman from eating or using the bathroom. (T. Tr. 3991, 3996, 4049, 4106, 4141, 4218-19.) Some of them testified that the defendant permitted them to be around his "female guests," and that the "female guests" were not required to "look away" or "look at a wall." (T. Tr. 3992, 4137, 4219-20.) Hood, who regularly accompanied the defendant from the gym to White Castle or McDonald's and to the studio, did not hand out the defendant's phone number or "recruit women" for the defendant. (T. Tr. 4046-47.) He did not see the defendant with "underage women" during his time as the defendant's security guard. (T. Tr. 4048-49.)[23] Meeks, who checked IDs at the front desk of the defendant's studio, did not recall any women being "under age," although he was "not sure if [he] inspected every ID, you know, thoroughly[.]" (T. Tr. 4105.) Ramnaran never saw the defendant "verbally abuse a woman." (T. Tr. 3991; *see also* T. Tr. 4137-38 (Holder never saw the defendant "abuse any of his girlfriends").)

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23. Although Hood claimed that he never saw the defendant with a minor, he also said he was with the defendant "when he met Aaliyah in her living room," and that he never saw the defendant act "inappropriately with Aaliyah." (T. Tr. 4040.) He saw Angela, whom he described as one of "Aaliyah's little friends," but never saw the defendant act inappropriately with Angela. (T. Tr. 4043.)

**VI. Verdict**

On September 27, 2021, the jury convicted the defendant of all counts. The jury found that the government had proved all the predicate racketeering acts except Racketeering Acts 3 and 4 relating to Sonja. (*See* ECF No. 238.)

## DISCUSSION

### I. Motion for Acquittal

The defendant makes a Rule 29(c) challenge to the sufficiency of the evidence for every count of the indictment—the racketeering count, and each predicate act, and all eight Mann Act counts.[24] These challenges are unavailing.

A court evaluating a Rule 29(c) motion views "the evidence in the light most favorable to the prosecution" and will uphold the jury's verdict if it determines that "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Facen*, 812 F.3d 280, 286 (2d Cir. 2016) (emphasis in original) (citation omitted); *United States v. Mahaffy*, 499 F. Supp. 2d 291, 294 (E.D.N.Y. 2007) ("To succeed, any Rule 29 motion must demonstrate that, viewing the evidence in the light most favorable to the government, no

24. As relevant here, a defendant may move for a judgment of acquittal pursuant to Rule 29(c) "within 14 days after a jury verdict." Fed. R. Crim. P. 29(c). "If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal." *Id.*

rational trier could have found the essential elements of the crime charged beyond a reasonable doubt." (internal quotation marks and citation omitted)), a*ff'd*, 283 F. App'x 852 (2d Cir. 2008). Viewing the evidence in the light most favorable to the prosecution means "drawing all inferences in the government's favor and deferring to the jury's assessments of the witnesses' credibility." *United States v. Aguiar*, 737 F.3d 251, 264 (2d Cir. 2013) (internal quotation marks and citation omitted). A court "must consider the Government's case in its totality rather than in its parts," and that the sufficiency test "may be satisfied by circumstantial evidence alone." *United States v. Wexler*, 522 F.3d 194, 207 (2d Cir. 2008) (internal citations omitted). Thus, a defendant challenging the sufficiency of the evidence "bears a heavy burden." *United States v. Hawkins*, 547 F.3d 66, 70 (2d Cir. 2008) (internal quotation marks and citation omitted). The defendant has not sustained his burden.

**a. Racketeering**

The RICO statute makes it unlawful for "any person employed by or associated with any enterprise" whose activities affect interstate or foreign commerce "to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). The statute further defines "enterprise" to include "any . . . group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). As the Supreme Court has observed, the "enumeration of included enterprises is obviously broad," and "the term 'any' ensures that the definition has a wide reach." *Boyle*

*v. United States*, 556 U.S. 938, 944, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009) (citations omitted); *see also United States v. Gershman*, 31 F.4th 80, 2022 WL 1086464, at *8 (2d Cir. Apr. 2022) ("Congress defined 'enterprise' for purposes of RICO broadly."). "[A]n association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle*, 556 U.S. at 946. An association-in-fact enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981); *United States v. Pierce*, 785 F.3d 832, 838 (2d Cir. 2015) ("[A]n association-in-fact enterprise is simply a continuing unit that functions with a common purpose." (quoting *Boyle*, 556 U.S. at 948)).

The Supreme Court has consistently rejected arguments aimed at narrowing the statute's broad reach. Thus, an enterprise "need not have 'a hierarchical structure' or a 'chain of command'; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc." *Boyle*, 556 U.S. at 948. Further, "[m]embers of the group need not have fixed roles," and "[t]he group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies." *Id.* "While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity

punctuated by periods of quiescence." *Id. Boyle* also makes clear that the RICO statute is not "limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach." *Id.*

Against this backdrop, I address the defendant's arguments that the government did not establish the existence of an enterprise, that the enterprise's activities affected interstate or foreign commerce, or a pattern of racketeering activity.

**i. Enterprise**

In challenging the existence of the enterprise, the defendant does not appear to contest the evidence that he was at the top of an organization, and that he had groups of employees—an inner circle—who worked to promote the defendant's music and brand, and to tend to his personal needs. (ECF No. 273-1 at 12-20.)

Relying on *First Capital Asset Management, Inc. v. Satinwood, Inc.*, 385 F.3d 159 (2d Cir. 2004), the defendant insists that the government did not prove a RICO enterprise. In *Satinwood*, the Second Circuit stated that "[f]or an association of individuals to constitute an enterprise, the individuals must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes." *Satinwood*, 385 F.3d at 174 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 820 F. Supp. 89, 98 (S.D.N.Y. 1993) *aff'd*,

27 F.3d 763 (2d Cir. 1994), and *Moll v. U.S. Life Title Ins. Co. of N.Y.*, 654 F. Supp. 1012, 1031 (S.D.N.Y. 1987)). Citing this language, the defendant contends that the government had to establish that the "Defendant, his employees, and entourage came together with the common purpose of recruiting women and girls to engage in 'illegal sexual activity' and produce pornography—not merely the broader purpose of promoting Defendant's music or brand." (ECF No. 273-1 at 12-14.)

To the extent that *Satinwood* imposes a more stringent standard for pleading the existence of an enterprise, it conflicts with binding Second Circuit and Supreme Court precedent, as several district courts in this circuit have found.[25] *See World Wrestling Ent., Inc. v. Jakks Pac., Inc.*, 425 F. Supp. 2d 484, 499 (S.D.N.Y. 2006), *aff'd*, 328 F. App'x 695 (2d Cir. 2009); *JSC Foreign Econ. Ass'n Technostroyexport v. Weiss*, No. 06 CIV. 6095, 2007 U.S. Dist. LEXIS 28954, 2007 WL 1159637, at *9 (S.D.N.Y. Apr. 18, 2007); *United States v. Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d 422, 474 n.86 (E.D.N.Y. 2007). In *Technostroyexport*, the Honorable John G. Koeltl explained that in *Turkette*, the Supreme Court distinguished the elements of enterprise and pattern of racketeering:

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25. While the Second Circuit has cited the *Satinwood* language in a published decision and a few summary orders, *see Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 120 (2d Cir. 2013) (quoting *Satinwood*, 385 F.3d at 174)); *see also, e.g., Vidurek v. Koskinen*, 789 F. App'x 889, 894 (2d Cir. 2019), it did not discuss it extensively. I agree with Judge Koeltl and the other judges who have discussed *Satinwood* that the language at issue conflicts with binding Second Circuit and Supreme Court precedent.

> The enterprise is an entity, for present purposes a group of persons associated together for a common purpose in engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise.

452 U.S. at 583. "One element addresses group organization, while the other addresses conduct." *JSC Foreign Econ. Ass'n Technostroyexport*, 2007 U.S. Dist. LEXIS 28954, 2007 WL 1159637, at *10. In *Turkette*, the Supreme Court held that individuals in an enterprise must share a common purpose to engage in a "course of conduct;" the Court did not say that the course of conduct must be "fraudulent." *Turkette*, 452 U.S. at 583; *see also Boyle*, 556 U.S. at 944. The *Satinwood* language conflicts with well-established precedent that RICO covers "both legitimate and illegitimate enterprises."[26] *Turkette*, 452 U.S. at 580; *see Cedric Kushner Promotions, Ltd. v.*

26. In *Turkette*, the Supreme Court assumed that RICO applied to legitimate enterprises; the issue in *Turkette* was whether "an enterprise consisting of a group of individuals was . . . covered by RICO if the purpose of the enterprise was exclusively criminal." *Turkette*, 452 U.S. at 581; *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 260, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994) (explaining that in *Turkette*, the Supreme Court addressed "whether 'enterprise' as used in § 1961(4) should be confined to 'legitimate' enterprises").

*King*, 533 U.S. 158, 164, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001) ("The [United States Supreme] Court has held that RICO . . . protects the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful . . . activity is committed.'" (internal citations omitted)); *see also United States v. Cianci*, 378 F.3d 71, 88 n.8 (1st Cir. 2004) ("It is true that members of an association-in-fact enterprise, such as is now charged, must be connected by a common thread of purpose; and one might often expect such a purpose to be of a criminal nature. But the ultimate question is whether an association-in-fact exists. For this, it is not required that each participant have a separate mens rea so long as each can reasonably be said to share in the common purpose." (citing *Turkette*, 452 U.S. at 578)).

As Judge Koeltl explained, if *Satinwood* required that a plaintiff allege a "course of fraudulent or illegal conduct separate and distinct from the alleged predicate racketeering acts themselves, . . . the decision would appear to conflict with *United States v. Mazzei*, 700 F.2d 85 (2d Cir. 1983), in which the Court of Appeals held that proof of the separate elements of a RICO 'enterprise' and a 'pattern of racketeering activity' need not be "distinct and independent, as long as the proof offered is sufficient to satisfy both elements." *JSC Foreign Econ. Ass'n Technostroyexport*, 2007 U.S. Dist. LEXIS 28954, 2007 WL 1159637, at *9 (citing *Mazzei*, 700 F.2d at 89); *see also World Wrestling Ent.*, 425 F. Supp. 2d at 499 ("[T]here also appears to be no doubt that these same statements are inconsistent with the holdings of *Mazzei* and its progeny."); *Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d at 474 ("This Court agrees with *World Wrestling*

*Entertainment* on that point—the quoted portion of *First Capital* statement is not well-supported by Second Circuit precedent, as evidenced by the fact that *First Capital* cited only one district court opinion in support of it, and it is flatly inconsistent with *Mazzei* and *Turkette*."). And as the Honorable Kenneth M. Karas explained, "neither the Second Circuit nor the Supreme Court has expressly overruled *Mazzei*. This is critical because this Court cannot ignore binding Second Circuit precedent, unless it is expressly or implicitly overruled." *World Wrestling Ent.*, 425 F. Supp. 2d at 499.

Finally, Judge Koeltl noted that "the validity of the enterprise pleading requirement was not in fact squarely before the *Satinwood* court," and that it was "unclear why the Court of Appeals went on to discuss in dicta the adequacy of the complaint with respect to the RICO 'enterprise' element when that issue was not raised on appeal and not briefed by the parties." *JSC Foreign Econ. Ass'n Technostroyexport*, 2007 U.S. Dist. LEXIS 28954, 2007 WL 1159637, at *9.

Accordingly, the government did not need to prove that every member of the enterprise shared a common criminal purpose. *See Crabhouse of Douglaston Inc. v. Newsday Inc.*, 801 F. Supp. 2d 64, 79-81 (E.D.N.Y. 2011) (determining whether the alleged members of the enterprise "shared a common purpose, lawful or unlawful").[27]

27. For the same reasons, I reject the defendant's argument that "the government has failed to demonstrate that the purpose of the enterprise was distinct from the racketeering activities."

I also reject the defendant's claim that one of the enterprise's objectives—promoting the defendant's music—had "no nexus to the underlying racketeering activity." (ECF No. 273-1 at 14.) In this circuit, the "nexus between the RICO enterprise and the predicate racketeering acts may be established by evidence that the defendant was enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or that the predicate offenses are related to the activities of that enterprise." *United States v. Minicone*, 960 F.2d 1099, 1106 (2d Cir. 1992) (internal quotation marks and emphasis omitted).

The jury could rationally find both that the defendant was able to commit the predicate acts—predominantly illegal sexual activity with women and girls—because of his leadership position and control over the affairs of the enterprise, and that his underlings enabled his commission of the predicate acts. *See United States v. White*, 621 F. App'x 889, 894 (9th Cir. 2015) ("The jury could rationally find that Hardiman was able to sell drugs by virtue of his rank within the gang and that his drug sales were related to the gang."); *United States v. Megal*e, 363 F. Supp. 2d 359, 364 (D. Conn. 2005) ("The Government

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(ECF No 273-1 at 16.) As explained above, the government need not establish that the enterprise had a common illegal purpose. Further, while the enterprise and the pattern of racketeering activity are separate and distinct elements, "proof of a pattern of racketeering activity may be sufficient in a particular case to permit a jury to infer the existence of an . . . enterprise." *Boyle*, 556 U.S. at 951; *see also Mazzei*, 700 F.2d at 89.

. . . will try to prove that defendants' debt collection was successful because of their positions within the Gambino Family organization. If so, such proof would satisfactorily connect the unlawful debt collection [with] the charged RICO enterprise."). The defendant's employees recruited young women and girls, including by locating them in the audiences of the defendant's concerts and inviting them backstage or to parties, by passing them notes with the defendant's phone number, and by trolling shopping malls and places like McDonald's and handing out the defendant's contact information. The defendant's employees arranged travel for his victims and enforced his rules. In turn, the defendant controlled his employees and ensured they implemented his rules. He punished them when they did not enforce the rules, for example by withholding their pay (*e.g.*, T. Tr. 2037-39 (testimony by Suzette Mayweather about the defendant "fining" her for having discussions with his "girlfriends")), or by requiring them to write letters falsely incriminating themselves. (*E.g.*, T. Tr. 3198-3201 (testimony by Copeland about the defendant ordering her to write a letter falsely stating that she had stolen from him).)

The defendant also argues that "the government failed to prove an enterprise distinct from the Defendant" because the members of the enterprise—the defendant's inner circle— "associated together for no purpose other than to carry out Defendant's needs." (ECF No. 273-1 at 17-20.) The cases on which he relies, however, are distinguishable, as they involve enterprises that "consist[ed] merely of a corporate defendant associated with its own employees or agents carrying on the regular

affairs of the defendant." *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) (bank and its employees); *see also Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063 (2d Cir. 1996) (holding company and its wholly-owned subsidiaries), *vacated on other grounds*, 525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998); *Atkinson v. Anadarko Bank & Tr. Co.*, 808 F.2d 438, 441 (5th Cir. 1987) (bank, its holding company, and its employees). As the Second Circuit explained, "[b]ecause a corporation can only function through its employees and agents, any act of the corporation can be viewed as an act of such an enterprise, and the enterprise is in reality no more than the defendant itself." *Riverwoods*, 30 F.3d at 344; *see also Palatkevich v. Choupak*, No. 12-CV-1681, 2014 U.S. Dist. LEXIS 10570, 2014 WL 1509236, at *13 (S.D.N.Y. Jan. 24, 2014) ("In the Second Circuit, the distinctness requirement bars a corporate entity from being named as both the defendant 'person' and the 'enterprise' on its own.").

The defendant is not a corporate entity. "[A]n individual defendant" who "acts through a corporation . . . may have formed an association-in-fact with an entity distinct from himself." *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1357 (11th Cir. 2016); *see Cedric Kushner*, 533 U.S. at 163 (holding, in a case involving "a corporate employee . . . [who] allegedly conduct[ed] the corporation's affairs in a RICO-forbidden way," that a "corporate owner/employee, a natural person, is distinct from the corporation itself" (internal citation and quotation marks omitted)); *see also Fitzgerald v. Chrysler Corp.*, 116 F.3d

225, 227 (7th Cir. 1997) ("The prototypical RICO case is one in which a person bent on criminal activity seizes control of a previously legitimate firm and uses the firm's resources, contacts, facilities, and appearance of legitimacy to perpetrate more, and less easily discovered, criminal acts than he could do in his own person."). The defendant is clearly distinct from his enterprise, which included the defendant and a group of other people. The fact that the group associated to support the defendant and meet his needs does not make it indistinguishable from the defendant. As the Supreme Court has held, there is "nothing in the statute that requires more 'separateness' than that." *Cedric Kushner*, 533 U.S. at 163.

**ii. Interstate Commerce**

The defendant also disputes the interstate commerce aspect of the government's case. To satisfy the RICO statute's interstate commerce element, the government must prove that the enterprise "engaged in" interstate or foreign commerce or that its "activities . . . affect[ed]" interstate or foreign commerce. 18 U.S.C. § 1962(c). However, "[o]nly a minimal effect on interstate commerce need be proven." *United States v. Price*, 443 F. App'x 576, 579 (2d Cir. 2011); *see United States v. Mejia*, 545 F.3d 179, 203 (2d Cir. 2008) ("[A]ny . . . conduct having even a *de minimis* effect on interstate commerce suffices." (citing *United States v. Davila*, 461 F.3d 298, 306 (2d Cir. 2006))). "Transporting goods . . . across state lines is a classic example of engaging in interstate commerce;" "[u]se of an instrumentality of commerce, such as telephone

lines, is also generally viewed as an activity that affects interstate commerce." *Mejia*, 545 F.3d at 203.[28]

At trial, the government established that members of the enterprise arranged travel across states and internationally for the defendant, other members of the enterprise, and the defendant's victims. (*See, e.g.*, T. Tr. 1532-33, 1535, 3158.) As explained in more detail below, multiple predicate acts allege that the enterprise members arranged the interstate transportation of the defendant's victims in violation of the Mann Act. That evidence, which the jury credited, is sufficient to establish an effect on interstate commerce. *See United States v. Carcione*, 272 F.3d 1297, 1301 (11th Cir. 2001) (finding that—in the context of a Hobbs Act violation, which "only requires a minimal effect on interstate commerce to support a conviction"—the defendant's travel across states as part of a robbery scheme "clearly demonstrates an effect on interstate commerce"). The government also presented evidence that the defendant used phones—an instrumentality of interstate commerce—to communicate with victims located in different states, and that enterprise

28. The defendant takes an overly narrow view of the law, maintaining that if "the purpose of the enterprise was to promote Defendant's illegal sexual activities and create pornography," the government was required to prove that "those activities affected interstate commerce." (ECF No. 273-1 at 22.) As explained above, the purpose of the enterprise need not be criminal; on the contrary, a defendant may use a legitimate enterprise to commit crimes. Indeed, the defendant concedes that "[i]f Defendant's legitimate music collective constituted an enterprise for RICO purposes"—which it does—"the government's argument would be well taken." (ECF No. 282 at 10.)

members communicated by phone with the defendant's victims. That, too, is sufficient to establish an effect on interstate commerce. *See Mejia*, 545 F.3d at 203; *United States v. Muskovsky*, 863 F.2d 1319, 1325 (7th Cir. 1988) (finding effect on interstate commerce based on the "use of the interstate phone system to get approval for credit card transactions").

### iii. Pattern of Racketeering

A "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this [statute] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). The government "must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) (emphasis in original). These requirements "protect defendants from RICO charges based on isolated or sporadic criminal acts." *United States v. Burden*, 600 F.3d 204, 216 (2d Cir. 2010).

"[P]redicate acts must be related to each other and to the enterprise." *United States v. Daidone*, 471 F.3d 371, 376 (2d Cir. 2006); *Minicone*, 960 F.2d at 1106 ("The racketeering acts must be related to each other ('horizontal' relatedness), and they must be related to the enterprise ('vertical' relatedness)."). Continuity "is both a closed-and open-ended concept, referring either

to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *H.J. Inc.*, 492 U.S at 241. The defendant disputes the evidence on every predicate act, and the evidence of relatedness and continuity as to some acts.

**1. Bribery**

Racketeering Act 1 charged the defendant with bribing a public official "with the intent to influence . . . the creation of a fraudulent identification document for [Aaliyah]." (ECF No. 43 ¶ 13.) The defendant argues that the evidence did not prove that he caused Demetrius Smith to pay a public employee to secure identification for Aaliyah. Specifically, the defendant contends that the record does not show that he knew of or facilitated the bribery. He cites portions of Smith's testimony, including Smith's testimony that Derrel McDavid gave him the cash to pay the bribes, and that he was "not positive" whether he discussed the bribery with the defendant. (ECF No. 273-1 at 25; *see* T. Tr. 719, 758-59.) The evidence, viewed as a whole, sufficiently tied the defendant to the bribery.

Indeed, there was ample evidence from which a rational jury could conclude that the defendant knew of and facilitated the bribery. After all, the defendant was the only person who stood to gain from the bribery. He feared that Aaliyah, then only fifteen years old, was pregnant, which would have revealed the defendant's sexual relationship with her. As he told Smith, he "needed to marry Aaliyah to protect himself." (T. Tr. 703-06.) Smith, the defendant and McDavid discussed "how to

. . . make the marriage happen," especially since Aaliyah was too young to be married without parental and judicial approval at the time. Smith suggested that he could obtain fraudulent identification to enable the defendant to marry Aaliyah. (T. Tr. 712-13.) The defendant was part of the group that drove to the welfare office and a FedEx office to get Aaliyah's fraudulent identification. (T. Tr. 718, 722.) Using those documents, the defendant and Aaliyah applied for and received a marriage license at the Maywood City Hall. (T. Tr. 724-25.) An official, recommended by the defendant's friend, conducted the hasty ceremony that took place in the hotel room. (T. Tr. 746, 1345, 2419-23.)

The jury was entitled to infer from this evidence, including the defendant's obvious interest in the protecting himself, that he knowingly participated in or facilitated the bribery. *See United States v. Blackwood*, 366 F. App'x 207, 210 (2d Cir. 2010) ("[A] defendant's knowing and willing participation in a conspiracy . . . may be inferred from his presence at critical stages of the conspiracy that could not be explained by happenstance, [and] . . . may also be established by evidence that the defendant participated in conversations directly related to the substance of the conspiracy, . . . or engaged in acts exhibiting a consciousness of guilt." (alterations, internal quotation marks and citations omitted)).

To be sure, Smith, a recalcitrant and combative witness, sometimes hedged about the extent of the defendant's role in the bribery. (*See* T. Tr. 714 ("I actually didn't have any discussion with Robert, it was with Derrel."); T. Tr. 743 ("I'm not sure if Robert was there

. . .")). At other times he confirmed that the defendant was present during the bribery conversation. (*See* T. Tr. 743 ("I don't remember precisely each time but I'm pretty sure [the defendant] was there."); T. Tr. 744 ("I'm pretty sure [the defendant] was there with me so I guess I could say yes.")).

In deciding a Rule 29 motion, "[w]here there are conflicts in the testimony, [the Court] must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses." *United States v. Persico*, 645 F.3d 85, 104 (2d Cir. 2011). "A jury is entitled to believe part and disbelieve part of the testimony of any given witness." *United States v. Flores*, 945 F.3d 687, 711 (2d Cir. 2019). Smith was explicit that he did not want to testify (T. Tr. 653 ("Yes, I don't want to be here, period.")), and that he was uncomfortable testifying about the defendant's marriage to Aaliyah. (T. Tr. 726 ("I'm uncomfortable with this, Your honor. I'm truly uncomfortable. We're continuously talking about Aaliyah. Her parents are not here and I don't understand why I got to do that.").) Moreover, he was reluctant to incriminate the defendant, having known him since 1984 as "just like [his] brother." (T. Tr. 759.) A rational jury could credit the portions of Smith's testimony confirming the defendant's participation in the bribery, and reject his conflicting testimony.

The defendant's further argument that the predicate act of bribery lacks vertical and horizontal relatedness is also unpersuasive. As explained above, vertical relatedness "may be established by evidence that the defendant was enabled to commit the predicate

offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or that the predicate offenses are related to the activities of that enterprise." *Minicone*, 960 F.2d at 1106 (emphasis and internal quotation marks omitted). In this case, the defendant was able to commit bribery because of his position as the head of the enterprise, and his ability to direct the members of the enterprise to do his bidding. Further, the jury could reasonably find that the bribery was necessary to further the enterprise. The marriage to Aaliyah protected the defendant, his image and his career by shielding him from the consequences of having sex with a minor: prison, shame and disgrace. The evidence also established horizontal relatedness; the defendant and his associates committed the bribery as part of and in order to facilitate the defendant's sexual activity with women and young girls, including illegal sexual activity. *See H.J. Inc.*, 492 U.S. at 240 (predicate acts are horizontally related when they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.").[29]

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29. The defendant also posits that "because the Act did not occur within 10 years of any other predicate Act that was sufficiently proven, the Act is time-barred." (ECF No. 273-1 at 27.) As explained below, the evidence was sufficient for the jury to conclude that the defendant was guilty of the charged offenses. As to the defendant's timing claim, the bribery took place in 1994, and the conduct alleged in Racketeering Act 2—sexual exploitation of a child, Stephanie—occurred five years later, in 1999, clearly less than 10 years apart. In any event, Section 1961(5) "requires only that the *last* predicate act happen within ten years of another predicate act." *Zimmerman v.*

### 2. Production of Sexually Explicit Material

Racketeering Acts 2 (Stephanie), 7 (Jerhonda) and 10 (Jane) charged the defendant with sexual exploitation of a child. *See* 18 U.S.C. § 2251(a). The government was required to prove that "(1) the victim was less than 18 years old; (2) the defendant used, employed, persuaded, induced, enticed, or coerced the minor to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct; and (3) the visual depiction was produced using materials that had been transported in interstate or foreign commerce." *United States v. Broxmeyer*, 616 F.3d 120, 124 (2d Cir. 2010).

The defendant does not deny the evidence that he taped his sexual encounters with these three victims; nor does he dispute that they were minors at the time he taped them. Instead, claiming that the government had to "prove that Defendant did something more than just film the sexually explicit conduct" (ECF No. 273-1 at 28), he contends that the government did not prove that he "did *anything* to persuade, induce, entice or coerce [Stephanie, Jerhonda or Jane] into the sexual activity that was recorded." (ECF No. 273-1 at 28, 35, 51 (emphasis in original).) The defendant misstates the applicable law and the facts established at trial.

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*Poly Prep Country Day Sch.*, 888 F. Supp. 2d 317, 329 (E.D.N.Y. 2012) (finding that predicate act that occurred more than 10 years before the next predicate act could still be considered part of a pattern of racketeering activity, where the last predicate act occurred within 10 years of a prior act).

"[A] defendant can be found to have 'used' a minor to produce child pornography if the minor serves as the subject of the illicit photographs taken by the defendant." *United States v. Sirois*, 87 F.3d 34, 43 (2d Cir. 1996); *see also Ortiz-Graulau v. United States*, 756 F.3d 12, 18 (1st Cir. 2014) (agreeing with the Second Circuit); *United States v. Fadl*, 498 F.3d 862, 866 (8th Cir. 2007) (same); *United States v. Wright*, 774 F.3d 1085, 1091 (6th Cir. 2014) (same); *United States v. Laursen*, 847 F.3d 1026, 1033 (9th Cir. 2017) (same). As the defendant concedes, "several circuits, including the Second Circuit, have held that the 'use' element set forth in § 2251(a) is satisfied when a defendant intentionally films a minor's sexually explicit conduct[.]" (ECF No. 282 at 11.) Nevertheless, the defendant argues that the Second Circuit's interpretation would "render the remaining terms in the statute 'persuade, induce, entice or coerce' superfluous." (ECF No. 282 at 11-12.) But district courts are "bound to follow controlling Second Circuit precedent unless that precedent is overruled or reversed," *Unicorn Bulk Traders Ltd. v. Fortune Mar. Enters.*, No. 08-CV-9710, 2009 U.S. Dist. LEXIS 3576, 2009 WL 125751, at *2 (S.D.N.Y. Jan. 20, 2009); thus, this Court is bound by the Second Circuit's holding in *Sirois*.

In any event, the defendant's challenge is meritless. Section 2251(a) requires "proof of active or coercive conduct by a defendant upon a minor." *United States v. Overton*, 573 F.3d 679, 692 (9th Cir. 2009). The broad interpretation of "use" applies when a defendant engages in active conduct—for example, if the defendant photographs or films a minor, or directs the photography or filming of a minor. *See Sirois*, 87 F.3d at 43 (finding that the "use"

element was satisfied where the photographs were "taken by the defendant"); *Laursen*, 847 F.3d at 1032-33 (finding that the "use" element was satisfied where the defendant directed the minor's actions).[30] A defendant may engage in coercive conduct, and persuade, induce, entice or coerce a minor to produce child pornography, for example, by persuading a minor to take pornographic photographs of herself or himself. *Cf. Broxmeyer*, 616 F.3d at 126 (finding that the government had not adduced sufficient evidence that certain pornographic photos taken by a minor were "taken at [the defendant's] behest"). Accordingly, the words "persuade, induce, entice or coerce" in Section 2251(a) are not rendered meaningless by the Second Circuit's interpretation of "use."

In any case, the defense's argument is foreclosed by evidence showing that the defendant engaged in persuasive and coercive conduct with Stephanie, Jerhonda and Jane. They testified, as did other witnesses, about the punishments that the defendant exacted when they broke his rules, and the physical and emotional manipulation they endured to meet the defendant's sexual demands. (*See, e.g.*, T. Tr. 1637-38 (Stephanie); T. Tr. 121-22, 163-70, 173-78 (Jerhonda); T. Tr. 838-41; 858-62; 901; 911-25 (Jane).) Based on this testimony, a reasonable juror could

30. The Ninth Circuit in *Laursen* explained that though "application of the statute in these contexts may lead to harsh results," the court was mindful that "Congress may legitimately conclude that even a willing or deceitful minor is entitled to governmental protection from self-destructive decisions that would expose him or her to the harms of child pornography." 847 F.3d at 1033 (quoting *United States v. Fletcher*, 634 F.3d 395, 403 (7th Cir. 2011)).

find that the defendant similarly persuaded or coerced the victims to engage in the sexually explicit conduct.

The defendant also argues that the government did not prove that he acted with a purpose of "producing" a visual depiction, and that the jury charge on this element was wrong. (ECF No. 273-1 at 28.) An examination of the charge itself, to which the defendant did not object, refutes that claim. The Court explained that Racketeering Acts 2, 7 and 10 charged the defendant with using a minor "to engage in sexually explicit conduct for the purpose of producing one or more visual depictions of such conduct." (T. Tr. 4648, 4671, 4684-85.) The Court then quoted the relevant portion of 18 U.S.C. § 2251(a), which provides:

> A person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of that conduct, shall be punished . . . if such person knows or has a reason to know that the visual depiction will be transported in interstate or foreign commerce or mailed[,] if that visual depiction was produced using materials that had been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if the visual depiction has actually been transported in interstate or foreign commerce or mailed.

(T. Tr. 4648-49.) Finally, the Court discussed the elements that the government had to prove:

> To prove that the defendant committed this racketeering act, the government must prove the following three elements beyond a reasonable doubt:
>
> First: That Stephanie was under the age of 18 at the time of the acts alleged in the indictment.
>
> Second: That the defendant used, employed, persuaded, induced, or enticed Stephanie to take part in sexually explicit conduct for the purpose of producing or transmitting a visual depiction of that conduct.
>
> Third: That the visual depiction was produced using materials that had been mailed, shipped, or transported in and affecting interstate and foreign commerce.
>
> . . .
>
> While the government must prove that the defendant acted with the purpose of producing a sexually explicit visual depiction, the government does not need to prove that a visual depiction of sexually explicit conduct was actually produced[.]

(T. Tr. 4649-51.) The Court's charge, viewed in its entirety, made it clear that the jurors had to determine whether the defendant's purpose was to produce a visual depiction. Accordingly, the jury instructions, "taken as a whole

and viewed in light of the evidence, show no tendency to confuse or mislead the jury as to principles of law which are applicable." *Rippy-El v. Makram*, 210 F.3d 355, at *1 (2d Cir. 2000).

Finally, the defendant maintains that the government failed to prove the interstate commerce element—that the visual depictions were produced using materials that had been mailed, shipped, or transported in interstate or foreign commerce—for Racketeering Acts 2 and 7. (ECF No. 273-1 at 29, 35.) This claim is also unpersuasive. Stephanie testified that the defendant filmed her in Illinois using a video camera with VHS tape. (T. Tr. 1645.) The defendant acknowledges that the parties stipulated that the type of film used in VHS tapes was not produced in Illinois during the relevant time period. (*See* ECF No. 273-1 at 29; GX 1006.) That is sufficient to satisfy the interstate commerce element. *See United States v. Culver*, 598 F.3d 740, 747 (11th Cir. 2010) (interstate commerce element met where component of videotape at issue was manufactured out-of-state); *United States v. Joubert*, 778 F.3d 247, 255-56 (1st Cir. 2015) (interstate commerce element met where VHS tape was made out-of-state).

Jerhonda testified that the defendant made a recording of her in Illinois using an iPhone and a Canon camera. (T. Tr. 168-69.) Despite this testimony, the defendant claims that the government did not "establish what device, if any, was used to make these recordings," and therefore its "'affecting interstate' commerce evidence was insufficient." (ECF No. 273-1 at 35.) However, the jury was entitled to credit Jerhonda's testimony about the devices

the defendant used, and the government's evidence that both devices were produced out of state. (GX 1006, 957; T. Tr. 2431-32.) Accordingly, there was sufficient evidence to convict the defendant of Racketeering Acts 2, 7 and 10.

### 3. Exposure to a Sexually Transmitted Disease—Intent

Racketeering Acts 8A (Jane), 12A (Faith) and 14A (Faith)[31] charged the defendant with transporting a person in interstate commerce with the intent to engage in sexual activity that exposed the person to herpes, which violated certain state criminal and public health statutes. *See* 18 U.S.C. § 2421(a) ("Whoever knowingly transports any individual in interstate or foreign commerce . . . with intent that such individual engage in . . . any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be" punished). The defendant claims that the government did not prove that he transported Jane or Faith "with the *intent* of exposing her to herpes." (ECF No. 273-1 at 36, 54.) Once again, the Court charged the jury on the element of intent, a charge to which the defendant did not object:

> In order to establish this element, it is not necessary that the Government prove that engaging in illegal sexual activity was the only purpose for crossing the state line. A person may have several different purposes or motives

31. Racketeering Acts 12A and 14A correspond to Counts 6 and 8, respectively.

> for such travel, and each may prompt in varying degrees the act of making the journey. The Government must prove beyond a reasonable doubt, however, that a significant or motivating purpose of the travel across a state line was that the defendant would engage in illegal sexual activity with [the victim]. In other words, that illegal activity [] can't have been merely incidental to the trip.

(T. Tr. 4658.)

The defendant maintains that the illegal sexual activity must be the "dominant purpose" of the travel, as opposed to "merely a 'significant' or 'motivating' purpose." (ECF No. 273-1 at 37.) That is not the standard in this circuit. The word "'dominant' . . . [does not] appear in the statutory language;" courts in this circuit have adopted the "significant or motivating purpose" standard. *United States v. An Soon Kim*, 471 F. App'x 82, 84 (2d Cir. 2012) (citing 18 U.S.C. § 2421) (approving "significant or motivating purpose" standard); *United States v. Maxwell*, No. 20-CR-330, 2021 U.S. Dist. LEXIS 245288, 2021 WL 5999410, at *8 (S.D.N.Y. Dec. 19, 2021) (using "significant or motivating purpose" standard in jury charge for violation of 18 U.S.C. § 2423(a)—transportation of a minor with intent to engage in illegal sexual activity); *see also United States v. Hayward*, 359 F.3d 631, 638 (3d Cir. 2004) (approving same standard in 18 U.S.C. § 2423(a) case).

The defendant does not challenge that the evidence at trial demonstrated he contracted genital herpes between

2000 and 2007, that his doctor, Dr. Kris McGrath, informed him of the diagnosis, and that Dr. McGrath told him to use a condom during sexual intercourse and to let his sexual partners know of his diagnosis. (T. Tr. 404-11, 421, 462-63.) Nor does he appear to challenge that the evidence showed that he never used a condom during sex with Jane and Faith, and that he never told Jane or Faith that he had been diagnosed with herpes. Rather, the defendant argues that there is no evidence that "Defendant's actions of arranging for Jane and Faith to travel to meet him was motivated by an intent to *expose* Jane and Faith to STDs[,] . . . rather than to simply have sex with them." (ECF No. 282 at 12-13 (emphasis in original); *see also* ECF No. 273-1 at 54 ("Because the Defendant's purported violation of a New York Public Health Law prohibiting him from exposing a partner to herpes was *incidental* to Faith's trip rather than a motivating purpose in transporting Faith, the intent requirement of the statute cannot be sustained." (emphasis in original)).)

The plain language of 18 U.S.C. § 2421(a) requires that the defendant transported Jane and Faith with the "intent" that they "engage in . . . sexual activity for which any person can be charged with a criminal offense." Thus, as the Court instructed the jury, the government was required to prove that the defendant transported Jane and Faith with the intent of engaging in sexual activity with them, and that the intended sexual activity was illegal. The record established, and the defendant appears to concede, that his motivation in arranging for Jane and Faith to travel to meet him was to engage in sexual activity with them. In light of Jane's and Faith's testimony, as well as

other witnesses' testimony about their sexual experiences with the defendant, the jury could reasonably conclude that the defendant intended to have sex with them without a condom, and without informing them that he had herpes. And as explained in Section I.a.iii.5 below, the defendant could be "charged with [] criminal offense[s]" for that sexual activity—because he exposed Jane and Faith to genital herpes, which violated state criminal and public health statutes in existence at the time. Accordingly, the evidence was sufficient to prove the intent element.

#### 4. Exposure to a Sexually Transmitted Disease—Persuasion, Inducement, Enticement or Coercion

Racketeering Acts 8B (Jane), 12B (Faith) and 14B (Faith)[32] charged the defendant with persuading, inducing, enticing and coercing a person to travel in interstate commerce to engage in sexual activity that exposed the person to herpes, which violated certain state criminal and public health statutes. *See* 18 U.S.C. § 2422(a) ("Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce . . . to engage in . . . any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be" punished).

The defendant asserts that there is no evidence that he "took any action to induce, persuade, entice, or coerce

32. Racketeering Acts 12B and 14B correspond to Counts 7 and 9, respectively.

Jane into traveling to California in April — May 2015;" instead, he says, citing text messages between Jane and her mother, that "the record shows that Jane's mother purposefully and strategically *enticed* Defendant with her 17-year-old daughter." (ECF No. 273-1 at 41 (emphasis in original); GX 233.) According to the defendant, he merely "invited Jane to join him, and she excitedly accepted." (ECF No. 273-1 at 47.) In his challenge to the evidence about Faith, he maintains that he "invited a grown woman to meet him in New York, and she accepted." (*Id.* at 55.)

The words "'persuade,' 'induce,' 'entice,' or 'coerce,' though not defined in the statute, are words of common usage that have plain and ordinary meanings." *United States v. Gagliardi*, 506 F.3d 140, 147 (2d Cir. 2007). Section 2242 "imposes no requirement that an individual endeavor to 'transform or overcome' the will of his intended victim;" in fact, the jury need only consider whether the defendant "intended to induce, persuade, and/or entice" the victim to travel to engage in sexual activity with him, "regardless of whether she expressed (or felt) reluctance, indifference, or, for that matter, enthusiasm at the prospect of doing so." *United States v. Waqar*, 997 F.3d 481, 487-88 (2d Cir. 2021). The jury was entitled to conclude from the evidence that the government proved the elements of these charges.

As Jane testified, the defendant made it clear from their first meeting, when she was a junior in high school, that his interest in her was sexual. Thus, he persuaded her to engage in sexual contact with him, telling her he needed to ejaculate before she could "audition" for him.

(T. Tr. 789-95.) He also told Jane that he wanted to see her again, and "teach [her] a few techniques." (T. Tr. 795-96.) He proposed that she meet him in Los Angeles, California and gave her the number of his assistant Cheryl Mack, so that Mack could make the travel arrangements, for which he paid. (T. Tr. 798-801.)

Similarly, it was clear that the defendant was interested in having sex with Faith when she met him after his San Antonio, Texas concert in March 2017. (T. Tr. 2128-30.) After the defendant gave Faith his contact information, they communicated regularly. (T. Tr. 2133-35.) The defendant told Faith that he loved her, and invited her to meet him while he was on tour so that they could "hang out," which would "be fun." (T. Tr. 2134, 2142, 2144-46, 2151.) As he did with Jane, the defendant gave Faith Diana Copeland's number. Faith contacted Copeland, who arranged her travel to New York in May 2017; the defendant paid for the flight. (T. Tr. 2151-53.) Copeland also booked and the defendant paid for her trip to New York in February 2018. (T. Tr. 2261-62.)

A reasonable jury could find that the defendant did far more than simply "invite" Jane and Faith to meet him, and that he persuaded, induced, or enticed Jane to travel by offering "incentives"—suggesting that he would teach her singing techniques, *Waqar*, 997 F.3d at 487—and by offering to "make and pay for the necessary travel arrangements." *United States v. Rashkovski*, 301 F.3d 1133, 1137 (9th Cir. 2002). The jury could also rationally find that the defendant persuaded, induced and enticed Faith to travel in May 2017 by telling her that he loved

her, by assuring her that the trip would be "fun," and by arranging and paying for all of her travel. The fact that Jane and Faith may have been willing or even eager to travel is not relevant. *Waqar*, 997 F.3d at 487 (holding that "it is the defendant's intent that forms the basis for his criminal liability, not the victims'"); *Rashkovski*, 301 F.3d at 1137 (holding that "it is not significant that [the victims] had pre-existing wishes to" travel, when "they never acted upon those desires until [the defendant] made it attainable").

### 5. Exposure to a Sexually Transmitted Disease—Criminal and Public Health Statutes

As discussed above, Racketeering Acts 8 (Jane) and 12 (Faith) charged the defendant with Mann Act violations based on violations of state criminal and public health statutes—specifically, New York Penal Law ("NYPL") § 120.20, New York Public Health Law ("NYPHL") § 2307 and California Health and Safety Code ("CHSC") § 120290. The defendant argues that the evidence at trial was insufficient to establish a violation of NYPL § 120.20, and that NYPHL § 2307 is unconstitutionally vague. (ECF No. 273-1 at 57-59.) He also asserts that the government improperly charged him with an older version of CHSC § 120290, and in any event that the evidence did not establish a violation of CHSC § 120290. (*Id.* at 38-41.) I address these arguments in turn.[33]

33. In connection with the defendant's Rule 29 motion, the Court directed the parties to submit supplemental letters on two issues: (1) whether the defendant's claims about NYPHL § 2307 and CHSC

*Appendix B*

NYPL § 120.20 provides that a "person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person." "Serious physical injury" is "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." N.Y.P.L. § 10.00. The defendant argues that "unprotected sex with someone who has genital herpes does not establish a substantial risk of serious physical injury" because "[h]erpes is not deadly and rarely causes any serious, protracted health impairments." (ECF No. 273-1 at 57-58.) He also claims that "there is no evidence that he was contagious or had an outbreak" when he was in New York. (*Id.* at 58; *see* ECF No. 282 at 15.)

The defendant's claim that herpes "is not deadly and rarely causes any serious, protracted health impairments" (ECF No. 273-1 at 58), as an initial matter, ignores the entirety of the statutory definition, which includes not only causing death or creating a substantial risk of death, but also causing "serious and protracted disfigurement, protracted impairment of health or protracted loss or

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120290 are the proper subjects of a motion for a judgment of acquittal under Rule 29, and (2) whether the defendant's arguments about CHSC 120290 are untimely because he did not assert them before trial, and if so, whether he waived them. (May 19, 2022 Order.) In response, the defendant conceded his claim about NYPHL § 2307, and that some of his claims about CHSC § 120290, are "constitutional" in nature (ECF No. 298), and thus exceed the permissible scope of a Rule 29 motion.

impairment of the function of any bodily organ." N.Y.P.L. § 10.00. A rational jury could find from the trial evidence, expert and otherwise, that the defendant's exposure of his victims to an incurable disease met these definitions. Dr. Iffath Hoskins, the Director of Patient Safety in the Obstetrics and Gynecology Department at New York University, explained that herpes is incurable, and a "very contagious, transmissible virus." (T. Tr. 3027-30, 3035-36.) Once the virus enters the central nervous system, "it's going to stay there" and "it's always there so it can reactivate and when it reactivates, it can cause a result or an effect . . . [in] other parts of the body." (T. Tr. 3037-39.) Herpes manifests as "blisters, ulcers, pustules, vesicles," causing burning, tingling, . . . numbness . . . [and] [s]evere pain." (T. Tr. 3040-42.) Outbreaks can be triggered by various factors—"menstruation," "a common cold or cough," "sunlight," and "other illnesses" such as "asthma, cancer, hypertension, [and] diabetes"—and can "last anywhere from several days to several weeks." (T. Tr. 3044, 3054.) Herpes can cause other medical complications, including to the central nervous system, the brain or the bloodstream. (T. Tr. 3049.) While these complications are "rarer," they "always" remain a risk for someone with herpes. (T. Tr. 3050.) The jury could reasonably find based on Dr. Hoskins's expert testimony that transmission of genital herpes—a permanent and incurable disease that causes recurring outbreaks with potentially life-threatening complications—constitutes a serious physical injury. *See United States v. James*, 957 F.2d 679, 680 (9th Cir. 1992) (finding that transmission of genital herpes constituted a permanent or life-threatening bodily injury); *see also Com. v. Kerrigan*, 2007 PA Super 63, 920 A.2d

190, 201 (Pa. Super. Ct. 2007) (finding that transmission of HPV/genital warts constituted serious bodily injury, and collecting cases). Moreover, the defendant's victims testified about the intensity of their physical symptoms, as well as the psychological effects of being saddled with an incurable sexually transmitted disease.

As for the defendant's suggestion that he might not have been "symptomatic," Dr. Hoskins explained that someone with herpes can transmit the virus even if he is asymptomatic, because the virus can be "excreted" at a time when there is "no evidence that it has reactivated." (T. Tr. 3046.) While taking medications like Valtrex—which the defendant took—can reduce the risk of transmission, "there will never be a situation where there's a [one] hundred percent protection;" there will still be a "10 to 20 percent" possibility of transmitting the virus, and "a missed dose" or "a missed window of time" can add to that percentage. (T. Tr. 3059-61.) Similarly, the defendant's doctor, Dr. Kris McGrath, not only described the symptoms of herpes but also advised the defendant to use a condom during sex, prompting the defendant himself to acknowledge that he should use a condom when having sex. (T. Tr. 406.) Dr. McGrath also told the defendant to warn his partners that he had herpes, and repeatedly prescribed Valtrex for the defendant. (T. Tr. 406, 418-19, 463.) Moreover, Kate and Jane contracted herpes from the defendant in the early 2000s and 2015. (T. Tr. 851-53, 2636-39.) Given this evidence, a rational jury could find that there was a substantial risk of transmission that the defendant consciously ignored.

NYPHL § 2307 provides that "[a]ny person who, knowing himself . . . to be infected with an infectious venereal disease, has sexual intercourse with another shall be guilty of a misdemeanor." The defendant repeats the arguments he made before trial in seeking dismissal of these counts: that the statute is "unconstitutionally vague."[34] (ECF No. 273-1 at 59.) In addition, he claims that the statute does not define the term "infected." (*Id.*)

The defendant concedes that his constitutional claims regarding NYPHL § 2307 are not challenges to the sufficiency of the evidence (ECF No. 298 at 2), and thus not properly the subject of a Rule 29 motion. *See United States v. Tareq Mousa Al Ghazi*, No. 07-CR-354, 2009 U.S. Dist. LEXIS 48474, 2009 WL 1605741, at *2 (S.D.N.Y. June 9, 2009) ("Rule 29 . . . only authorizes motions challenging the sufficiency of the evidence presented at trial." (citing Fed. R. Crim. P. 29 and *United States v. McDaniel*, No. 03-CR-550, 2004 U.S. Dist. LEXIS 8301, 2004 WL 1057627, at *1 (S.D.N.Y. May 10, 2004))); *United States v. Barret*, No. 10-CR-809, 2012 U.S. Dist. LEXIS 110339, 2012 WL 3229291, at *20 (E.D.N.Y. Aug. 6, 2012) (noting that the defendant's vagueness challenge to a charge in the indictment was "not properly raised on a motion for judgment of acquittal pursuant to Rule 29"), *aff'd*, 677 F. App'x 21 (2d Cir. 2017).

The defendant argues that the government did not prove he violated CHSC § 120290, because "the government charged Defendant with a repealed version

34. The Court incorporates by reference the portion of its May 22, 2020 Order that decided these issues. (*See* ECF No. 69 at 8-18.)

of the statute no longer in effect" and proposed jury instructions that "rewrote [the statute] in clear violation of various constitutional provisions." (ECF No. 273-1 at 38-41.) He also characterizes the statute as impermissibly vague and claims there was insufficient evidence to prove the charge in any event. (*Id.*) Each of the defendant's arguments is unavailing.

The 1998 version of CHSC § 120290 was in effect at the time of the charged conduct in April and May of 2015. (ECF No. 43 ¶¶ 23-24.) That version of the statute, which remained effective through 2017, provided:

> Except as provided in Section 120291 or in the case of the removal of an afflicted person in a manner the least dangerous to the public health, any person afflicted with any contagious, infectious, or communicable disease who willfully exposes himself or herself to another person, and any person who willfully exposes another person afflicted with the disease to someone else, is guilty of a misdemeanor.

CHSC § 120290 (effective 1998).[35] The current version of Section 120290, which did not take effect until January 1, 2018, makes it unlawful for someone to transmit an

35. The 1998 version of CHSC § 120290 included a reference to CHSC § 120291, which made it a felony for "[a]ny person who exposes another to the human immunodeficiency virus (HIV) by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his or her HIV-positive status, and acts with the specific intent to infect the other person with HIV." CHSC § 120291.

infectious or communicable disease, provided that he "knows that he . . . is afflicted with an infectious or communicable disease;" "acts with the specific intent to transmit . . . that disease to another person;" "engages in conduct that poses a substantial risk of transmission to that person;" and "transmits the infectious or communicable disease to the other person." CHSC § 120290 (effective 2018). Thus, while the 1998 version required, among other things, that a defendant act willfully in exposing himself to another person, the 2018 version requires that a defendant act with the specific intent to transmit the disease.

The indictment made it clear that the 1998 version of § 120290 formed the basis for the Mann Act violations charged in Racketeering Act 8A and 8B. (*See* ECF No. 43 ¶ 23 ("[T]he defendant . . . together with others, did knowingly and intentionally transport an individual, to wit: [Jane], . . . in interstate commerce, with intent that such individual engage in sexual activity for which a person can be charged with a criminal offense, to wit: violations of Cal. Health and Safety Code § 120290 (effective 1998) (willful exposure of a communicable disease), in that [the defendant] engaged in unprotected sexual intercourse with [Jane] without first informing [her] that he had contracted herpes and obtaining her consent to sexual intercourse in these circumstances."); *see also id.* ¶ 24.) Similarly, when the Court instructed the jury regarding CHSC § 120290, it quoted the 1998 version of § 120290, and set forth the elements that the government was required to prove in order to establish a violation under that version:

> In this Racketeering Act, the illegal sexual activity that is charged is a violation of

California law. Specifically, California Health and Safety Code Section 120290. And under that law, any person who is afflicted with any contagious, infectious or communicable disease who willfully exposes himself or herself to another person shall be punished. This is what the Government must prove beyond a reasonable doubt:

First, that the defendant knew that he was afflicted with any contagious and infectious and communicable disease.

Second, that the defendant exposed himself to Jane by engaging in unprotected sexual activity with her.

Third, that the defendant acted willfully.

And fourth, that the defendant did not inform Jane that he had a contagious, infectious or communicable disease and obtain her consent to expose himself in these circumstances prior to engaging in the exposure. A communicable disease is any disease that was transferable through the exposure incident. With respect to the third element, I have already defined this for you. I think that's willfully, that means with knowledge of the consequences or purposefully. It does not require that the defendant intended to expose another person to a contagious or infectious or communicable disease.

(T. Tr. 4674-75.) The Court then instructed the jury about these same elements for the Mann Act coercion and enticement offense charged in Racketeering Act 8B. (T. Tr. 4676.)

Federal Rule of Criminal Procedure 12 requires that certain objections to a prosecution or indictment "must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3). "This requirement serves a number of purposes, including sparing the court, the witnesses, and the parties, the burden and expense of a trial, and insuring that indictments are not routinely challenged (and dismissed) after the jury has been seated and sworn." *United States v. O'Brien*, 926 F.3d 57, 82 (2d Cir. 2019) (internal quotation marks and citations omitted).

While "[a] motion that the court lacks jurisdiction may be made at any time while the case is pending," a motion that asserts "a defect in instituting the prosecution," or "a defect in the indictment" must be made before trial if (i) "the basis for the motion is then reasonably available" and (ii) "the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(A)-(B); *United States v. Sampson*, No. 13-CR-269, 2016 U.S. Dist. LEXIS 23678, 2016 WL 756565, at *9 (E.D.N.Y. Feb. 26, 2016). Rule 12(b)(3) includes a list of commonly raised claims under each category, including "failure to state an offense" and "lack of specificity" in an indictment, among others. Fed. R. Crim. P. 12(b)(3)(B)(iii) & (v). If a defendant does not make a motion that falls within Rule 12(b)(3) before

trial, or by the deadline set for the court for such motions, "the motion is untimely" and is deemed waived absent a showing of "good cause." Fed. R. Crim. P. 12(c)(3); *O'Brien*, 926 F.3d at 83 ("If the motion is untimely, the court may nonetheless entertain it if the movant shows 'good cause' for his failure to make it prior to the deadline.").

The defendant's claims about the California statute should have been made in a Rule 12 motion, because he is claiming that there were "defect[s] in the indictment." Fed. R. Crim. P. 12(b)(3); *see, e.g.*, *O'Brien*, 926 F.3d at 82-84 (rejecting defendant's post-trial constitutional challenge to indictment charging unlawful conduct with respect to methylone, because the claim asserted a defect in the prosecution's institution or a failure to state an offense); *United States v. Muresanu*, 951 F.3d 833, 839 (7th Cir. 2020) (finding that defendant's post-trial challenge to an indictment charging attempted aggravated identity theft was a claim that the indictment was defective for failure to state an offense, not jurisdictional and therefore waived); *Sampson*, 2016 U.S. Dist. LEXIS 23678, 2016 WL 756565, at *7-*11 (finding that the defendant waived his argument that he was improperly convicted of witness tampering under 18 U.S.C. § 1503 because that argument raised a defect in the indictment for failure to state an offense, which Rule 12 "treat[s] as a defect that must be raised before trial").

The defendant has not adequately explained his failure to raise his current arguments about CHSC § 120290 earlier. His only justification is that "the government did not apprise the defense of its intent to have the jury charged

pursuant to a repealed version of the statute that it also rewrote." (ECF No. 298 at 2 & n.1.) But the information supporting the defendant's challenges to § 120290 was reasonably available to him as early as March 12, 2020 when the superseding indictment was returned against him, making clear that the government charged the 1998 version of § 120290 rather than the 2018 version. (*See* ECF No. 43 ¶¶ 23-24.) On July 2, 2021, little more than a month before the trial, the government submitted proposed jury instructions, which also alerted the defendant that the charge was based on the 1998 version of the statute. (ECF No. 117-1 at 57-61.)[36] The information the defendant cites for his vagueness argument was also available to him before trial. *See Sampson*, 2016 U.S. Dist. LEXIS 23678, 2016 WL 756565, at *7 ("The [] Indictment currently at issue is the same document Defendant reviewed before trial; so if that document is vague now, then it was vague then, which is when Defendant should have voiced his concerns." (citing *United States v. Crowley*, 236 F.3d 104, 108 (2d Cir. 2000))). In fact, the defendant raised vagueness arguments about NYPHL § 2307 in his pre-trial motion to dismiss and to strike; he could have made similar challenges to CHSC § 120290, which he did not. (ECF

36. Defense counsel pointed out that the jury instructions included an older version of the statute in a September 18, 2021 letter, copied the text of the current version of the statute and asked the Court to require the government to clarify whether the claim is that the defendant "intentionally exposed others," which is required under the current version of § 120290, or that he "willfully exposed others," which is required under the older version. (ECF No. 219 at 5-6.) But as explained above, the defense was on notice far earlier that the defendant was charged with violating the statute in existence when he committed the predicate act.

No. 69.) The defendant has not established "good cause" for his failure to challenge CHSC § 120290 in a Rule 12 motion. *See* Fed. R. Crim P. 12(c)(3). Accordingly, not only are the defendant's constitutional claims about CHSC § 120290 beyond the scope of a Rule 29 motion, *see Tareq Mousa Al Ghazi*, No. 07-CR-354, 2009 U.S. Dist. LEXIS 48474, 2009 WL 1605741, at *2; *Barret*, No. 10-CR-809, 2012 U.S. Dist. LEXIS 110339, 2012 WL 3229291, at *20, they are also untimely and, as a result, waived.[37]

In any event, the defendant's arguments are without merit. He challenges the 1998 version of the statute on as-applied and facial grounds, arguing that it "fails to provide adequate definitions that put individuals with *any* chronic and potentially contagious diseases on notice of what amounts to criminal conduct, including communicable diseases that are not sexually transmitted." (ECF No. 273-1 at 40 (emphasis in original).) He theorizes that "anyone with Herpes Simplex I (also known as cold sores) who kisses another person without disclosing that they have Herpes Simplex I, is guilty of a misdemeanor." (*Id.*)

The defendant is foreclosed from challenging CHSC § 120290 for vagueness, either on an as-applied or on a facial basis. The Due Process Clause of the Fourteenth

37. I address the defendant's constitutional claims in an excess of caution because, even though he conceded that they did not challenge the "sufficiency of the evidence" and "may not constitute a proper Rule 29 issue" (ECF No. 298 at 1), he suggested that the Court must "first decid[e] whether the jury was properly instructed pursuant to the applicable law" before it can decide the Rule 29 question, that is, whether there was sufficient proof at trial. (*Id.* at 2.)

Amendment requires that every criminal statute "(1) give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, and (2) provide explicit standards for those who apply the statute." *Dickerson v. Napolitano*, 604 F.3d 732, 741 (2d Cir. 2010) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (alterations and citation omitted)); *Johnson v. United States*, 576 U.S. 591, 595, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (a criminal statute is unconstitutionally vague in violation of due process if "it fails to give ordinary people fair notice" or is "so standardless that it invites arbitrary enforcement" (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983))). "Even if there is ambiguity as to the margins of what conduct is prohibited under the statute," *Dickerson*, 604 F.3d at 747, it is clear to an ordinary person that CHSC § 120290 would prohibit the defendant's conduct—having unprotected sex knowing he had herpes and without informing his partner. Moreover, an "as-applied vagueness challenge" supported by a law's potential for arbitrary enforcement must fail if "the enforcement at issue is consistent with the 'core concerns' underlying [the statute]." *Id.* at 749. The defendant's conduct falls within § 120290's clear core—protecting the public from the spread of infectious venereal diseases. *See Doe v. Roe*, No. 12-CV-01644, 2013 U.S. Dist. LEXIS 59364, 2013 WL 1787175, at *5 (D. Nev. Apr. 25, 2013) (noting that the transmission of an infectious disease is the type of injury the statute was designed to prevent). Accordingly, the defendant cannot show that the statute is vague as applied to him.

Nor is a facial challenge available to the defendant. "[O]utside of the First Amendment context . . . [facial] challenges are permitted only when 'no set of circumstances exists under which the [law] would be valid,'" *Dickerson*, 604 F.3d at 743 (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)), or where the law infringes upon another constitutionally-protected right. *Id.* at 744 ("*Morales* does suggest that facial challenges are permissible outside of the First Amendment context, but that case only permitted such a challenge in the presence of a constitutionally-protected right." (citing *City of Chicago v. Morales*, 527 U.S. 41, 53, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (Stevens, J., plurality))). The defendant does not premise his vagueness challenge to § 120290 on the violation of some other constitutionally-protected right, let alone a First Amendment right. As a result, the defendant cannot challenge § 120290 on facial grounds, unless he can show there is no set of circumstances under which the statute would be valid. As explained above, § 120290 clearly proscribes his conduct and is not vague as applied to him. *Id.* at 743-44 (noting that *Salerno* "effectively eliminates facial challenges outside of the First Amendment context that could not also be brought as an as-applied challenge, since any law that is unconstitutional in every set of circumstances is also necessarily unconstitutional when applied to any plaintiff"); *United States v. Scott*, 979 F.3d 986, 993 (2d Cir. 2020) ("Outside of the First Amendment context, we look to whether the 'statute is vague as applied to the particular facts at issue.'" (quoting *Holder v. Humanitarian L. Project*, 561 U.S. 1, 18, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010))).

Whether the indictment properly charged the 1998 version of CHSC § 120290 presents a closer question. The conduct relevant to this question is the Mann Act conduct—transporting Jane in interstate commerce with the intent to engage in sexual activity criminalized by state law, and coercing or enticing her to travel in interstate commerce to engage in sexual activity criminalized by state law. 18 U.S.C. §§ 2421(a), 2422(a); (s*ee* ECF No. 43 ¶¶ 23-24.) The defendant argues that "[t]he government had no authority to charge [him] with a statute that was repealed or inoperative at the time of prosecution." (ECF Nos. 273-1 at 38, 282 at 16-17.) The government responds that "[i]n the racketeering context, the relevant consideration is whether the predicate racketeering act was a violation of the relevant state or federal law at the time that the underlying conduct was committed." (ECF No. 278 at 91.)

The RICO statute defines "racketeering activity" as, among other things, certain acts "chargeable" under state law, and certain acts "indictable" under federal law. *See* 18 U.S.C. § 1961(1). Neither party cites a case that addresses the issue in this case—whether the underlying sexual acts must violate state law at the time the defendant committed them, or at the time of the indictment. (*See* ECF No. 273 at 38-39; ECF No. 278 at 91; ECF No. 282 at 16-17.) Nevertheless, the case on which the government relies, *United States v. Davis*, 576 F.2d 1065 (3d Cir. 1978), provides at least persuasive support for the notion that the indictment properly charged the defendant with violating a state law that was in effect at the time he committed the conduct. In *Davis*, the Third Circuit held

that the defendant's violation of a state bribery statute could serve as a RICO predicate, despite the fact that the state law's statute of limitations had expired by the time of the RICO indictment. 576 F.2d at 1066-67. According to *Davis*, the time-barred bribery properly served as a RICO predicate because the acts were chargeable under state law at the time they were committed. *Id.* In so ruling, the court defined "chargeable under State law" in 18 U.S.C. § 1961(1)(A) as "chargeable under State law at the time the offense was committed." *Id.* (rejecting the defendant's interpretation that "chargeable under State law" meant "presently chargeable under State law"); *see also United States v. Castellano*, 610 F. Supp. 1359, 1383 (S.D.N.Y. 1985) (applying *Davis* and holding that, for statute of limitations purposes, "the relevant question is whether a charge of participating in the enterprise, and not whether particular acts of racketeering could still be charged under applicable state or federal law").[38]

Although *Davis* addressed a slightly different question—whether time-barred state acts could

38. This view also comports with the legislative purpose of RICO, which was not designed to punish the predicate state law violations themselves, but "to punish the impact on commerce caused by conduct which meets the statute's definition of racketeering activity." *United States v. Forsythe*, 560 F.2d 1127, 1135 (3d Cir. 1977); *see also id.* (concluding that "[s]tate law offenses are not the gravamen of RICO offenses," and are incorporated into RICO for "definitional purpose[s]" only); *United States v. Licavoli*, 725 F.2d 1040, 1047 (6th Cir. 1984) ("The gravamen of section 1962 is a violation of federal law and reference to state law is necessary only to identify the type of unlawful activity in which the defendant intended to engage." (internal quotation marks and citation omitted)).

nevertheless constitute racketeering acts in a RICO indictment—its reasoning is persuasive in the context of this case. Because the defendant's 2015 conduct was "chargeable under State law at the time the offense was committed," *Davis*, 576 F.2d at 1066-67, and thus "indictable" under the Mann Act at the time he engaged in the conduct, the government appropriately charged the 1998 version of CHSC § 120290.

Finally, the defendant argues that "[e]ven if the elements of the statute were as the government alleged, insufficient evidence existed to sustain the charge." (ECF No. 273-1 at 40-41.) The defendant makes the same claims he makes about Racketeering Act 12 (Faith)—that there was no evidence that he was "contagious, infected, or had the capacity to transmit herpes" when he had sexual contact with Jane in 2015, and that the government cannot show that he acted "willfully with knowledge of the consequences." (*Id.* at 40.) These claims—the only claims about this conduct that are cognizable in a Rule 29 motion—have no merit.

Jane testified that she contracted genital herpes after the defendant had unprotected sex with her in the summer of 2015. (T. Tr. 844-53.) She experienced "discomfort in [her] pelvis and in [her] lower abdomen," and saw a doctor in August 2015 when her symptoms got worse, "to the point where [she] couldn't physically even walk." (T. Tr. 852.) The doctor diagnosed her with herpes and prescribed her medication. (*Id.*) When the defendant told her that she "could have gotten that from anyone," she responded that she had been "intimate" only with him;

Jane's medical records also reflect that the defendant was her only sexual partner. (T. Tr. 853.) Jane's testimony, as well as the evidence that the defendant infected multiple other victims with herpes, provided a reasonable basis for the jury to conclude that the defendant was infected with herpes when he had sex with Jane in 2015, and that his act in exposing Jane to the disease was willful or purposeful. *See People v. Valdez*, 27 Cal. 4th 778, 787-88, 118 Cal. Rptr. 2d 3, 42 P.3d 511 (2002) ("The word 'willfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate [the] law, or to injure another, or to acquire any advantage." (internal quotation marks and citation omitted)). It was equally reasonable for the jury to find that the defendant acted "with knowledge of the consequences," in that he knew that unprotected sexual contact with Jane would expose her to herpes; the defendant knew he had herpes, his doctor warned him of the risk, and directed him to alert his sexual partners of his condition.

### 6. Sexual Activity with Minors

Racketeering Acts 5 (Jerhonda) and 9 (Jane) charged the defendant with Mann Act violations based on sexual activity with minors. *See* 18 U.S.C. § 2421(a); 18 U.S.C. § 2422(a); 18 U.S.C. § 2422(b) ("Whoever, using the mail or any facility or means of interstate or foreign commerce, . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in . . . any sexual activity for which any person can

be charged with a criminal offense, or attempts to do so, shall be" punished.); 18 U.S.C. § 2423(a) ("A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, . . . with intent that the individual engage in . . . any sexual activity for which any person can be charged with a criminal offense, shall be" punished.).

To convict a defendant under Section 2422(b), the government had to prove that the defendant "(i) used a facility of interstate commerce; (ii) to knowingly persuade, induce or entice . . . ; (iii) any individual who is younger than eighteen-years old; (iv) to engage in sexual activity of a criminal nature." *United States v. Brand*, 467 F.3d 179, 201-02 (2d Cir. 2006), *abrogated on other grounds by United States v. Cabrera*, 13 F.4th 140 (2d Cir. 2021).

With respect to Racketeering Act 5, the government charged the defendant with violating Illinois Criminal Code § 5/12-16(d), which provides that an individual "commits aggravated criminal sexual abuse if he or she commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was at least 5 years older than the victim."

The defendant contends that the government did not prove the first element—the use of a facility of interstate commerce—because purely intrastate use of cell phones does not constitute use of a facility of interstate commerce. (ECF No. 273-1 at 29.) However, the Second Circuit has interpreted use of a facility of interstate commerce to

include intrastate use of that facility. *See United States v. Giordano*, 442 F.3d 30, 39 (2d Cir. 2006) ("[Section] 2425's prohibition on the transmission of the name of a minor 'using . . . any facility or means of interstate . . . commerce' for the specified purposes includes the *intrastate* use of such a facility or means."); *United States v. Perez*, 414 F.3d 302, 305 (2d Cir. 2005) (finding that "wholly intrastate communications" made using a national telephone network constituted use of a facility of interstate commerce). Accordingly, intrastate cell phone calls satisfy the first element of Section 2422(b).

Next, the defendant asserts that the government did not show a nexus between the use of the interstate facility and the "persuasion, coercion, enticement or inducement." (ECF No. 273-1 at 30.) Jerhonda testified that she attended a party at the defendant's Olympia Fields residence in May 2009, and exchanged phone numbers with the defendant. (T. Tr. 114, 118.) They communicated by text messaging and phone calls. (T. Tr. 119, 153.) She went to his home "every time [she] was invited;" during the six-month period she spent with the defendant, she had sexual contact with him "[e]very time [she] was there." (T. Tr. 154, 168.) On one occasion, when Jerhonda was at the defendant's house, he called her and told her to get in his tour bus and directed her to have sex with him and Juice. (T. Tr. 165-66.) This evidence was sufficient to show that the defendant used interstate commerce to "persuade, induce or entice" Jerhonda.

A rational jury could also find that the defendant did persuade, induce or entice Jerhonda to engage in sexual

conduct. Words like "persuade," "induce," and "entice" are "all words of causation." *United States v. Naim*, No. 13-CR-660, 2015 U.S. Dist. LEXIS 65976, 2015 WL 3440253, at *21 (E.D.N.Y. May 20, 2015) (internal quotation marks omitted), *aff'd*, 710 F. App'x 12 (2d Cir. 2017); *see also United States v. Holley*, 819 F. App'x 745, 749 (11th Cir. 2020) (holding that "'induce' means 'to stimulate the occurrence of or to cause'"). The evidence from multiple witnesses—victims and members of the defendant's enterprise—established that the defendant implemented strict rules in and out of his home, that he expected that his victims and employees obey his commands, and that he exacted punishment for perceived violations. A rational juror could infer from the defendant's direction to Jerhonda to leave his house and go to his tour bus that he induced or coerced her into having sex with the defendant and Juice. *Naim*, 2015 U.S. Dist. LEXIS 65976, 2015 WL 3440253, at *21 (finding inducement where the jury could have inferred that the defendant made a request for an additional video of a minor "with the intent to cause, or bring about, the creation of that video").

Equally unpersuasive is the defendant's argument that "no reasonable juror could conclude that Defendant knew that Jerhonda was 16 years old when they allegedly engaged in sexual activity between May 2009 and January 2010." (ECF No. 273-1 at 30.) Jerhonda testified that she told the defendant the first time they engaged in sexual activity that she was 16 years old, and showed him her identification. (T. Tr. 123.) The jury was entitled to credit her testimony, and find that the defendant did not believe

that Jerhonda was 17 years or older when he had sex with her.[39]

In Racketeering Act 9,[40] the government charged the defendant with Mann Act violations based on violations of California Penal Law ("CPL") §§ 261.5(a), (b), which provide that "[a]ny person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty," where "[u]nlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor," and "a 'minor' is a person under the age of 18 years."[41]

The defendant acknowledges Jane's testimony that she told the defendant her true age—17 years old—in 2015, but argues that the evidence was nevertheless insufficient because "the record does not reflect precisely when she

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39. Investigators searched the defendant's storage facility and found a forged birth certificate and state ID card in Jerhonda's name. (GX 413, 414.) Both stated that she was born in 1990 rather than in 1993, the actual year of her birth. (T. Tr. 3635-37.)

40. Sub-predicate Racketeering Acts 9A, 9B, 9C and 9D correspond to Counts 2, 3, 4 and 5, respectively.

41. In challenging the government's proof for Racketeering Act 9A, the defendant mistakenly incorporates by reference his arguments in connection with Racketeering Act 8A, which was based on a violation of CHSC § 120290 for willful exposure. (ECF No. 273-1 at 48.) Racketeering Act 9A, on the other hand, was based on violations of Sections 261.5(a) and 261.5(b) of the CPL. (ECF No. 43 ¶ 25.)

told Defendant her true age." (ECF No. 273-1 at 48-49.) Jane testified that she told the defendant she was 17 years old in Chicago, when "[s]ummer ended and [she] had to go back to school for [her] senior year in high school." (T. Tr. 860.) She returned to Florida, but moved back to Chicago and then joined the defendant on his tour. (T. Tr. 860-62, 869.) Moreover, the letter from Jane's parents authorizing Juice's mother to be Jane's guardian until she turned 18 years old was dated September 19, 2015 (GX 475(a), 476(a)), and Suzette Mayweather testified that the defendant and his entourage left New York for California on September 29, 2015. (T. Tr. 1966.) Based on this evidence, a rational juror could conclude that the defendant knew Jane was less than 18 years old prior to their California trip.

With respect to Racketeering Acts 9B (18 U.S.C. § 2422(a)) and 9C (18 U.S.C. § 2422(b)), the defendant maintains that there is no evidence that he took any action to induce, persuade, entice or coerce Jane to travel to California between September and October 2015. (ECF No. 273-1 at 49.) As explained previously, the government did not need to prove that the defendant overcame Jane's resistance, or that Jane did not want to travel. The evidence showed that the defendant arranged for Jane to enroll in virtual schooling, and for Juice's mother to serve as her legal guardian. (T. Tr. 862-68.) The defendant paid for Jane to travel back to Chicago. She subsequently traveled with the defendant from city to city for his shows. (T. Tr. 868-70.) Accordingly, a reasonable jury could find that the defendant persuaded, coerced, induced or enticed Jane to travel to California.

*Appendix B*

In his challenge to Racketeering Act 9C, the defendant also asserts that there was no "nexus between the use of a facility of interstate commerce (a cell phone, computer) and the words of persuasion, entice, or coercion." (ECF No. 273-1 at 50.) However, when the defendant enticed Jane to travel from New York to California in October of 2015, she used interstate highways, including I-80, which courts recognize as a facility of interstate commerce. (Tr. 2728); *see, e.g.*, *United States v. D'Souza*, No. 09-CR-131, 2012 U.S. Dist. LEXIS 14928, 2012 WL 487638, at *2 (E.D. Cal. Feb. 7, 2012) (noting that an interstate highway is an example of an interstate commerce facility in a Mann Act case); *cf. United States v. Daley*, 564 F.2d 645, 649 (2d Cir. 1977) (noting that "an interstate highway, [] is an instrumentality of interstate commerce" for purposes of the Hobbs Act). A reasonable juror could therefore conclude that the defendant used facilities of interstate commerce in the course of his criminal conduct involving Jane.

With respect to Racketeering Act 9D (18 U.S.C. § 2423(a)), the defendant argues that his "purpose in traveling to California was to perform and he arranged for his girlfriend to go with him," and any sexual activity was "purely incidental to the purpose of the trip." (ECF No. 273-1 at 50.) Jane testified that she and the defendant had "sex almost every day" in the summer of 2015, and that they had sexual contact while traveling on tour. (T. Tr. 844, 872.) The jury was entitled to rely on Jane's testimony, as well as testimony from the defendant's other sexual partners, and conclude that sexual activity was

the defendant's significant or motivating purpose when he arranged Jane's travel with him.

### 7. Forced Labor

Racketeering Acts 6 (Jerhonda), 11 (Jane) and 13 (Faith) charged the defendant with forced labor. *See* 18 U.S.C. § 1589(a) ("Whoever knowingly provides or obtains the labor or services of a person . . . (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person; (2) by means of serious harm or threats of serious harm to that person or another person; (3) by means of the abuse or threatened abuse of law or legal process; or (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint, shall be punished."). To convict the defendant of forced labor, the government must prove: "(1) the defendant obtained the labor or services of another person; (2) the defendant did so . . . (a) through threats of serious harm to, or physical restraint against that person or any other person; or (b) through a scheme, plan or pattern intended to cause the person to believe that non-performance would result in serious harm to, or physical restraint against, that person or any other person; . . . and (3) that the defendant acted knowingly." *United States v. Sabhnani*, 539 F. Supp. 2d 617, 629 (E.D.N.Y. 2008), *aff'd*, 599 F.3d 215 (2d Cir. 2010). "Serious harm" is defined as "any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the

surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm." 18 U.S.C. § 1589(c)(2).

The defendant makes multiple attacks on the evidence supporting the jury's verdict on Racketeering Acts 6 (Jerhonda), 11 (Jane) and 13 (Faith). The theme of these attacks is that there was no evidence that the defendant coerced his victims to do what was charged in the forced labor racketeering acts. In fact, victims' testimony provided a rational basis for the jury's conclusion that the defendant was guilty of the charges. Moreover, the jurors had a larger context in which to place the testimony of the individual victims. Not only did the victims support one another's testimony, the additional evidence that the jurors heard corroborated what the victims described. Thus, they heard and saw vivid evidence of the defendant's means and methods of domination and control: a videotape in which he forced Anna to walk back and forth, completely naked, calling herself "slut" and "stupid," while the defendant smacked her (T. Tr. 2845-46, 2852-55, 3018-19; GX 328(a), 328(b)); an audiotape in which the defendant, convinced that Kyla had stolen from him, ordered her to describe what she had done, berated her for "holding back" on a videotape and then directed her to go to the closet in his garage and said, "When I come and get you this time, you better be fucking like you're supposed to fuckin' be." (GX 485.) The defendant's employees, too, were well-aware of what the defendant did to his victims, as evidenced by the text exchanges between the Mayweather sisters, describing the defendant's treatment of Jane. (T.

Tr. 2014-19, 2053-55; GX 240(b), 240(d).) In short, the evidence supporting the charges was more than sufficient to establish the defendant's guilt, and his attacks on that proof are nothing more than disagreements with the jury's resolution of the evidence. Nevertheless, I address each claim in turn.

As to Racketeering Act 6, the defendant argues that the government "did not establish a causal link between the isolated act of oral sex" with Jerhonda "and any threat of physical violence." (ECF No. 273-1 at 33.) As explained multiple times in this opinion, Jerhonda, like other witnesses, testified that the defendant required her to follow his rules (T. Tr. 132, 163-64), that he severely punished her when she broke them (T. Tr. 148-49), slapped her when she disagreed with him (T. Tr. 166-67), and when she questioned his direction to use a sex toy on him (T. Tr. 167-68), ordered her to write a letter to "gain[] his trust," in which she falsely admitted that she stole one hundred thousand dollars' worth of jewelry. (T. Tr. 150-51.)

And in January 2010, the defendant was "angry" that Jerhonda did not greet him. (T. Tr. 176.) He "slapped" her, choked her into unconsciousness, "spit" on her face and told her to "put [her] head down in shame." (*Id.*) Finally, he forced her to perform oral sex on him and ejaculated on her face. (T. Tr. 177.) The graphic testimony about the defendant's rules and the consequences of breaking them obviously gave the jury a reasonable basis to infer that Jerhonda complied with the defendant's orders because she feared that he would hurt her if she disobeyed. *See United States v. Toure*, 965 F.3d 393, 402 (5th Cir. 2020)

(finding sufficient evidence that the defendant committed forced labor in part because he "employed violence as a consequence for [the victim's] noncompliance with . . . demands").

Citing *United States v. Toviave*, 761 F.3d 623 (6th Cir. 2014), the defendant also contends that the forced labor statute does not encompass the conduct alleged in Racketeering Act 6 because it "bear[s] virtually no resemblance to those paradigmatic forced labor cases and their victims." (ECF No. 273-1 at 34.) *Toviave* is an entirely different case. There, the Sixth Circuit held that "forcing children to do household chores" was not "forced labor" within the meaning of the statute, because such an interpretation would "make a federal crime of the exercise of . . . widely accepted parental rights." *Toviave*, 761 F.3d at 625. The court described the defendants' conduct as more akin to child abuse, which is "traditionally regulated by the states," *id.* at 627, and noted the obvious distinction between household chores and "paradigmatic forced labor, such as prostitution, forced sweatshop work, or forced domestic service." *Id.* at 626. The defendant had no similar "right" to order Jerhonda to engage in sexual activity, and his conduct—physical and psychological coercion intended to make her submit—is not traditionally addressed by state law.[42] Accordingly, the forced labor statute covers the

42. Because the defendant exerted both physical and psychological control over Jerhonda, the fact that she was physically able to leave the defendant's house does not undermine the jury's findings. *See Paguirigan v. Prompt Nursing Empl. Agency LLC*, 286 F. Supp. 3d 430, 439 (E.D.N.Y. 2017) (holding that forced labor does not require that victims "be kept under literal lock and key,"

defendant's conduct as alleged in Racketeering Act 6. *See Marcus v. United States*, No. 14-CV-5780, 2015 U.S. Dist. LEXIS 80875, 2015 WL 3869689, at *20-21 (E.D.N.Y. June 22, 2015) (distinguishing *Toviave*, and finding that the forced labor statute applied where the defendant forced the victim, a former sexual partner, to work on a website and punished her with extreme sex acts).[43]

The defendant also attacks the proof that he committed the crimes charged in Racketeering Act 11, asserting that the "record is devoid of any evidence that Jane was forced within the meaning of the statute to have sex with individuals other than the Defendant." (ECF No. 273-1 at 52.) Jane testified about the defendant's rules—that he dictated the way she dressed, whether she could talk to or even look at other men, how she was required to greet him, whether she could use her phone, among other things. (T. Tr. 810, 840, 855-56.) Just as he did with other victims, the defendant exacted punishment or "chastisements," when 17 year-old Jane stepped out of line: trapping her for days inside a tour bus while his minions stood guard, spanking her so hard that he left bruises and torn skin, beating her with his shoe until she "broke," forcing her to repeat lies about her family, and degrading her in the

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and that the "fundamental purpose of § 1589 is to reach cases of servitude achieved through nonviolent coercion").

43. The defendant also argues that the forced labor statute does not reach "isolated acts" of labor or service. (ECF No. 273-1 at 60.) But the plain language of the statute does not require multiple acts, and the Court declines to read that requirement into the statute. *See United States v. Sabhnani*, 599 F.3d 215, 244 (2d Cir. 2010) (holding that a single act was sufficient to support the defendant's conviction for conspiracy to commit forced labor).

most egregious ways, including forcing her to eat her own feces. (T. Tr. 909-16, 931-32, 991-99.) Jane explained that the defendant "chastised" her "nearly every two to three days." (T. Tr. 910-11.)

Jane was not the defendant's only victim. She was witness to his assault on his other "live-in girlfriends" (T. Tr. 970), and realized that she "needed to listen even more because that could also happen to [her]." (T. Tr. 925.) Given the control—both physical and psychological—that the defendant exerted over Jane, it would have been rational for the jury to conclude that the defendant forced her into sexual contact with other women and men, even in the absence of testimony. (T. Tr. 955-65.) But she did testify that the defendant forced her into these encounters, testimony that the jury was entitled to credit. She explained that when she resisted the defendant's direction to have sex with women, the defendant "usually chastised" her by spanking her. (T. Tr. 966-67.) She also testified that the defendant forced her to have sex with "Nephew" as "punishment" for violating one of the defendant's rules—sharing personal information with another victim living with the defendant—and that she did not resist because she would "probably be left somewhere for a long time" or have "gotten chastised." (T. Tr. 1034-37, 1047-48, 1050.) In short, this evidence, as well as the evidence of the defendant's pattern of behavior with other victims, gave the jury ample reason to find that the defendant was guilty of Racketeering Act 12.

Next, the defendant attacks the proof regarding Racketeering Act 13, which, according to the defendant, did not establish "a causal link between the isolated act of

oral sex" by Faith and "any threat of physical violence." (ECF No. 273-1 at 60.) The jury found otherwise, and there was a rational basis for its decision. Just as he did with other victims, the defendant told Faith about the "rules" that the "group of women that [he] raised" were required to follow, including that the women needed to greet the defendant in a certain way upon entering a room. (T. Tr. 2197-98, 2200-01.) The defendant introduced Faith to one of these young women, Joy, who greeted the defendant by calling him "Daddy" and kissing him and repeatedly complimenting Faith, before the three of them went to the Sprinter van. (T. Tr. 2202-06.) When Faith tried to leave the van to use the bathroom, Joy told her, "You have to ask." (T. Tr. 2208-10.) She finally was permitted to use the bathroom, but the defendant's employee Copeland followed her and waited outside the stall. (T. Tr. 2210-11.)

When Faith went to Los Angeles in January 2018, the defendant kept her waiting in a van and in his studio for hours without food or water because she did not greet him properly when he first saw her. (T. Tr. 2220, 2230-32.) After he finally arrived, he led Faith to a small room in the studio, where she saw a gun on an ottoman. (T. Tr. 2249-50.) The defendant's "demeanor changed," and he "got real serious," moving the gun so that it was next to him, ordering Faith to "pose" while he took pictures with his iPad, and becoming irritated because she was "not being sexy enough." (T. Tr. 2250-51.) He grilled her about her relationships with men, how many male friends she had, and how many had "seen [her] naked." (T. Tr. 2251.) The defendant moved the gun to his chair, ordered Faith to get on her knees, "grabbed the back of [her] neck forward,"

and instructed her to perform oral sex on him. (T. Tr. 2252.) Faith, "[i]ntimidated" because the defendant was "unpredictable," did not think she could leave because she "was under his rules and he had a weapon." (T. Tr. 2252-54.) The jurors were entitled to conclude from this evidence that the defendant obtained oral sex from Faith by means of an implied threat of force, or a pattern of conduct that was intended to cause her to believe that non-performance would result in serious harm.

**b. Other Counts**

The defendant challenges the sufficiency of the evidence as to Counts Two through Nine. As noted throughout this order, these counts correspond to certain predicate acts. As explained above, because there is sufficient evidence establishing each predicate act, there is also sufficient evidence of Counts Two through Nine.

## II. Motion for a New Trial

Rule 33 provides that, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. The court has "broad discretion . . . to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice," but that discretion should be exercised "sparingly and in the most extraordinary circumstances." *United States v. Ferguson*, 246 F.3d 129, 133-34 (2d Cir. 2001) (internal quotation marks and citation omitted); *see also United States v. Gambino*, 59 F.3d 353, 364 (2d Cir. 1995) ("Because motions for a new trial are disfavored in this

Circuit the standard for granting such a motion is strict."). "In considering whether to grant a new trial, a district court may itself weigh the evidence and the credibility of witnesses, but in doing so, it must be careful not to usurp the role of the jury." *United States v. Canova*, 412 F.3d 331, 348-49 (2d Cir. 2005). The court should grant a Rule 33 motion only if "letting a guilty verdict stand would be a manifest injustice," because of "a real concern that an innocent person may have been convicted." *Ferguson*, 246 F.3d at 134 (internal quotation marks and citation omitted). The defendant's arguments provide no basis for this extraordinary relief.

**a. Ineffective Assistance of Counsel: *Voir Dire***

The defendant attacks the performance of his trial lawyers during the *voir dire* process; finding fault with eight of the 12 regular jurors, and with one alternate juror who did not deliberate, the defendant claims that his counsel did not do a meaningful *voir dire* of potential jurors, and should have "probe[d]" more by asking additional questions and challenging certain jurors as unqualified. (ECF No. 270-1 at 6-8.) This argument fails for multiple reasons.

A defendant claiming that his lawyer was ineffective must meet the two-pronged test articulated in *Strickland v. Washington*: (1) "that counsel's representation fell below an objective standard of reasonableness," and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Under the first prong of *Strickland*, a defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." 466 U.S. at 690. "Judicial scrutiny of counsel's performance must be highly deferential," and courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "[R]elief may be warranted when a decision by counsel cannot be justified as a result of some kind of plausible trial strategy." *Jackson v. Leonardo*, 162 F.3d 81, 85 (2d Cir. 1998) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 385, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)).

Selecting a jury and strategy are "inseparable." *United States v. Lawes*, 292 F.3d 123, 128 (2d Cir. 2002); *see also Ciaprazi v. Senkowski*, 151 F. App'x 62, 63-64 (2d Cir. 2005) (recognizing that whether to seat a particular juror is a "paradigmatically strategic" decision). Counsel has to evaluate not only the juror's words but must assess the juror's credibility by considering her demeanor, her reactions to questions, and other intangible factors that a cold record will not reflect. In addition, counsel must make judicious use of peremptory challenges, as well as compare jurors with one another in an effort to select the best jurors for his client. For these reasons, "courts are loathe to second-guess the decisions of counsel during jury selection." *Ptak v. Superintendent*, No. 08-CV-409, 2009 U.S. Dist. LEXIS 71252, 2009 WL 2496607, at *8 (W.D.N.Y. Aug. 13, 2009) (citing *Doleo v. Reynolds*, No. 00-CV-7927, 2002 U.S. Dist. LEXIS 8090, 2002 WL 922260, at *5 (S.D.N.Y. May 7, 2002)). "It is not the role of the court to second-guess counsel's reasonable strategic decisions at jury selection, especially considering that

'counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Doleo*, 2002 U.S. Dist. LEXIS 8090, 2002 WL 922260, at *5 (quoting *Strickland*, 466 U.S. at 690); *see also Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001) ("Counsel is . . . accorded particular deference when conducting *voir dire*. An attorney's actions during *voir dire* are considered to be matters of trial strategy."); *Bell v. United States*, 351 F. App'x 357, 360 (11th Cir. 2009) ("Review of counsel's performance is highly deferential in any case, but the case for deference is even greater when counsel is evaluating credibility.").

To satisfy the prejudice prong of *Strickland*, the petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "The level of prejudice the defendant need demonstrate lies between prejudice that 'had some conceivable effect' and prejudice that 'more likely than not altered the outcome in the case.'" *Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001) (quoting *Strickland*, 466 U.S. at 693). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

A defendant alleging ineffective assistance during *voir dire* "must show that the juror was actually biased against him" in order to show prejudice. *Figueroa v.*

*Heath*, No. 10-CV-121, 2011 U.S. Dist. LEXIS 51568, 2011 WL 1838781, at *12 (E.D.N.Y. May 13, 2011); *see Beard v. Unger*, No. 06-CV-405, 2009 U.S. Dist. LEXIS 116768, 2009 WL 5042696, at *4 (W.D.N.Y. Dec. 15, 2009) ("In order to establish that trial counsel was ineffective for failing to challenge a prospective juror on *voir dire*, actual bias must be established."). "Actual bias is 'bias in fact,'" or "the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997). Actual bias can be found where "the juror admits partiality," or where partiality can be inferred from "the juror's *voir dire* answers." *Id.*

The defendant falls far short of this exacting standard. The record shows that the lawyer who conducted the *voir dire*—a lawyer with years of criminal trial experience in both state and federal courts—participated actively in the process. Before the Court questioned the prospective jurors, counsel went through the questionnaires, and made decisions about which jurors were appropriate to question, and which to challenge for cause. Once the oral *voir dire* began, counsel demonstrated a thorough knowledge of the information in questionnaires, and frequently asked that the Court pose additional questions to prospective jurors. (*See, e.g.*, J.S. Tr. 41, 46, 54, 129, 169, 180, 215, 223, 242, 261, 270, 296, 301, 309, 315-17, 327, 397.) He successfully challenged prospective jurors for cause over the government's objection (*see, e.g.*, J.S. Tr. 130-34, 282-83, 424-25, 429-30), and made *Batson* challenges to the government's use of peremptory challenges. (J.S. Tr. 435-47.) He also exercised peremptory challenges when

he deemed it appropriate. (J.S. Tr. 434-57.) This "active participation in *voir dire* indicates that any decisions to challenge (or not to challenge) jurors were made as part of a reasonable trial strategy, rather than as a result of counsel's failure to provide effective assistance." *Figueroa*, 2011 U.S. Dist. LEXIS 51568, 2011 WL 1838781, at *11; *see Parsons v. Artus*, No. 06-CV-6462, 2020 U.S. Dist. LEXIS 89330, 2020 WL 2572739, at *39 (W.D.N.Y. May 21, 2020) (finding that decision to seat juror was "part of a reasonable strategic approach to selecting a jury" where "counsel actively participated in *voir dire* and asserted a *Batson* challenge").

Not only does the record thoroughly refute the defendant's argument on ineffectiveness, it is also clear that the defendant has not established that any juror was actually biased, let alone all nine about whom the defendant complains.

The defendant claims, nevertheless, that counsel was obligated to challenge any juror who had watched "Surviving R. Kelly," a documentary about the defendant, or who had heard something about the defendant's prior criminal prosecution. (ECF No. 270-1; ECF No. 283.) But "[q]ualified jurors need not . . . be totally ignorant of the facts and issues involved," and "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *York v. Fischer*, No. 04-CV-1467, 2006 U.S. Dist. LEXIS 50225, 2006 WL 6461993, at *9 (E.D.N.Y. July 21, 2006) (quoting *Murphy v. Florida*, 421 U.S. 794, 799-800, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975)). Each juror confirmed his or her ability to render a fair impartial verdict.

Moreover, none of the challenges the defendant asserts on appeal would have warranted granting a challenge for cause. In an excess of caution, however, I address the defendant's complaints about individual jurors.

**i. Juror No. 3 (Prospective Juror No. 25)**

Citing just a portion of Juror No. 3's questionnaire, the defendant argues that counsel should have challenged the juror for cause because the juror said, in response to questions about whether he had heard of the defendant and his "impressions" of what he had heard, that he "heard that [the defendant] has been sleeping with underage girls," and that had "[seen] a documentary about him and his legal troubles." (ECF No. 270-1 at 9; ECF No. 290-1 at 62.) However, the juror also wrote the following: "I don't know the full story, so I have no feelings about it. I remain impartial." (ECF No. 290-1 at 62.) The juror observed, "The media tends to demonize people. I deal with facts." (*Id.* at 63.) During the in-person *voir dire*, he identified himself as "a stickler for the law," and a "rule guy" and confirmed that there was no reason why he would not be able to give both sides a fair trial. (J.S. Tr. 63.) No experienced lawyer would have expected a challenge for cause to be successful—it would not; nor was there any nonstrategic reason to exercise a peremptory challenge.[44]

44. As the government points out, this juror also expressed negative feelings about law enforcement, stemming from two arrests. (ECF No. 277 at 18.)

**ii. Juror No. 4 (Prospective Juror No. 52)**

In the questionnaire, Juror No. 4 wrote that he "[found] transmission of STDs in a nonconsensual act to be particularly repulsive," and had a "close friend" who had been a victim of "sexual assault and infection with HIV from the police in a foreign country." (ECF No. 290-1 at 120, 124.) He also wrote, in response to a question, that Jeffrey Epstein was the person he least admired. (*Id.* at 129.) The defendant argues that his trial counsel should have "inquire[d] further," and questioned the juror about these responses on the theory that his statements reflected an aversion to "precisely" what the government charged. (ECF No. 270-1 at 9-10.)

As an initial matter, a juror is not inherently biased simply because he finds "transmission of STDs in nonconsensual circumstances" objectionable. Presumably, most normal jurors would feel the same way. What counsel had to determine was whether the juror could evaluate the evidence fairly and dispassionately, and hold the government to its burden of proof. In this case, the juror's answers were in the context of an attack on close friend by the police in another country. (ECF No. 290-1 at 124.) During the *voir dire*, at which counsel could evaluate the juror in person, the juror said that he understood that he must base his decision on the "evidence, testimony and [the Court's] instructions on the law," an assurance that counsel was entitled to credit. (J.S. Tr. 78-79); *see Figueroa*, 2011 U.S. Dist. LEXIS 51568, 2011 WL 1838781, at *9 (holding that trial counsel's decision not to challenge a juror in a drug case, who initially expressed concerns because of her family's history with drug addiction, was

reasonable where she later affirmed her ability to be fair and impartial). The juror did not seem to be familiar with the defendant—although he had "heard the name" and "seen news articles," he initially thought the defendant might be a cartoonist, and he had to "remind [himself] who it was." (J.S. Tr. 74, 78.) Under these circumstances, counsel's strategic choice does not form the basis for a credible ineffective assistance claim.[45]

### iii. Juror No. 5 (Prospective Juror No. 87)

The defendant claims that trial counsel should have challenged Juror No. 5 because she wrote that her "impression" of the defendant was that he "love[s] underage girls." (ECF No. 270-1 at 10-11; ECF No. 290-1 at 146.) This claim is based on an incomplete reading of the record. During the in-person *voir dire*, the Court asked the juror if she could "put aside anything that [she'd] heard about the case," and "judge it on the evidence that [she] hear[s] in the courtroom," the juror responded that she could, and promised to follow the law and the Court's instructions. (J.S. Tr. 91-93 (THE COURT: "And is there any reason that you can think of that you couldn't give both sides a fair trial in this case?" JUROR #5: ". . . I think I'll give it a shot.").) (J.S. Tr. 93; ECF No. 270-1 at 11.) The Court asked again, "Any reason why you can't give both sides a fair trial?" (J.S. Tr. 94.) The juror responded, "I don't think so." (J.S. Tr. 94.) The Court clarified, "What I want to hear is how you actually feel about it," and the juror responded, "Yeah, I think I can do that." (J.S. Tr. 94-95.) The Court asked if the juror was "positive" she

45. This juror, too, had negative views about law enforcement.

could give both sides a fair trial; she said that she could. (*Id.*); *see Beard*, 2009 U.S. Dist. LEXIS 116768, 2009 WL 5042696, at *5 (finding no actual bias where juror was asked whether his experience as a police officer would carry over into the trial, and he responded, "I would certainly like to be able to say that it wouldn't and I would certainly do my best to see that it did not").

**iv. Jurors No. 7 (Prospective Juror No. 145), No. 8 (Prospective Juror No. 147), No. 9 (Prospective Juror No. 156) and No. 11 (Prospective Juror No. 153)**

For other jurors who had heard about the case or about the defendant, the defendant criticizes counsel because he did not ask the Court to question them about what they had heard. (ECF No. 270-1 at 11-12.) This simply is not a basis for a challenge to counsel's competence, especially given what the jurors said. As explained above, jurors "need not . . . be totally ignorant of the facts and issues involved" as long as "the juror can lay aside his [or her] impression or opinion and render a verdict based on the evidence presented in court." *York*, 2006 U.S. Dist. LEXIS 50225, 2006 WL 6461993, at *9. Like all the jurors whom the defendant criticizes, these jurors all confirmed that they could be fair.

Thus, Juror No. 7 had a "Neutral" impression of the defendant, and explained that "[m]ost of the information you hear about celebrities are not always true. It's mainly either for or against the person." (ECF No. 290-1 at 203.) At the in-person *voir dire*, she confirmed that she could put

aside what she had heard, and affirmed her fairness and impartiality. (J.S. Tr. 152-55.) Juror No. 8 had a "Neutral" impression of the defendant and "no feeling toward the defendant." (ECF No. 290-1 at 231.) He confirmed that he would put aside anything he heard, would follow the court's instructions, and be fair and impartial. (J.S. Tr. 156-58.) In any event, Court elicited some information about what Juror No. 8 had heard about the defendant. (*See* J.S. Tr. 156-57.)

Although Juror No. 9 knew the defendant "had issues with the law before," she "couldn't tell [] exactly what for." (ECF No. 290-1 at 286.) She also had a "Neutral" impression of the defendant. (*Id.* at 287.) The defendant cites her answer about the effect of the "Me Too" movement—that "[t]he power structure of the male dominated movie industry has been turned on its head"—as something that warranted further inquiry. (ECF No. 270-1 at 12; ECF No. 290-1 at 298.) The defendant's contention is unavailing for two reasons. First, the juror had never supported or participated in the movement. (*Id.*) Second, during in-person *voir dire*, the juror assured the Court that she would put aside what she had heard about the defendant's prior legal issues, and promised to be fair and impartial. (J.S. Tr. 175-77.)[46]

Juror No. 11 "saw the case mentioned on the news when [the defendant] was first being investigated," and knew "there were allegations of misconduct lodged against him." (ECF No. 290-1 at 258.) However, she had a

46. Juror No. 9 had a relative who had been convicted of a crime.

"Neutral" impression of the defendant and "[did] not know enough information about the defendant or the case." (*Id.* at 259.) She promised to put aside what she had heard, and affirmed that she would be fair and impartial. (J.S. Tr. 220-25.)

**v. Juror No. 12 (Prospective Juror No. 163)**

In answering what he had heard about the defendant, Juror No. 12 wrote in the questionnaire that he had heard about "sex with minors, specific details do not come to mind, parodies on TV regarding details of defendant's personal life (Saturday Night Live, Dave Chapelle), was in jail prior then released." (ECF No. 290-1 at 314.) The defendant faults trial counsel for not asking the Court to question the juror about these responses. (ECF No. 270-1 at 12-13 ("It is beyond comprehension that trial counsel would not have sought to inquire further of this juror about his prior knowledge about allegations against Defendant . . . .").)

The juror had a "Somewhat Negative" impression of the defendant, which was "an emotional one impacted by the nature of the charges against him." (ECF No. 290-1 at 315.) In another part of the questionnaire, the juror stated that because his friend was related to Bill Cosby, he had followed Cosby's case "closely." (*Id.* at 321.) The juror believed that "trial by media is scarier to me than a jury." (*Id.*) During the in-person *voir dire*, the juror explained that he had heard "minor things in the press," and could not "recall any specific details;" in fact, he learned of some "accusations" through the questionnaire. (J.S. Tr. 227.) In any event, he promised to put aside whatever he had heard

(J.S. Tr. 227-28), and to follow the Court's instructions and give both sides a fair trial. (J.S. Tr. 231-32.)

**vi. Alternate Juror No. 4 (Prospective Juror No. 206)**

Since Alternate Juror 4 was precisely that—an alternate, whose "presence had no effect on the verdict" *United States v. Teman*, 465 F. Supp. 3d 277, 331 (S.D.N.Y. 2020)—there is no reason to address the particulars of the defendant's complaint, except to point out that counsel did ask the Court to excuse the juror after she told the Court's deputy that she wanted Gloria Allred's autograph. (T. Tr. 3265-66); *see United States v. Hill*, 643 F.3d 807, 836 (11th Cir. 2011) (finding that the defendant "cannot prove that he was prejudiced by the district court's failure to exclude [the allegedly biased juror] because [she] was an alternate juror who never participated in the jury's deliberations").[47]

"There are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689.

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47. In an effort to demonstrate that he did not acquiesce in counsel's strategic decisions, the defendant submits a declaration, in which he claims that counsel did not consult with him, that he expressed concerns that certain jurors watched "Surviving R. Kelly" (simultaneously claiming that he did not know they had seen the show), and that he was merely a "bystander" during *voir dire*. (ECF No. 283 at 4; ECF No. 283-1.) The defendant raised none of these concerns during jury selection, and does not include a declaration from any of the four lawyers who represented him. In any event, counsel's decisions were well within the realm of sound trial strategy, and the defendant has not come close to establishing bias.

The defendant's criticisms of counsel, viewed collectively or independently, are precisely the kind of "Monday morning quarterbacking" that *Strickland* rejected. *See DiMattina v. United States*, 949 F. Supp. 2d 387, 414 (E.D.N.Y. 2013) ("Perceptive Monday morning quarterbacking . . . does not trump well-reasoned, on-the-scene decision-making."); *United States v. Peterson*, 896 F. Supp. 2d 305, 315 n.7 (S.D.N.Y. 2012) ("In applying the *Strickland* test . . . courts must resist a natural temptation to engage in 'Monday morning quarterbacking.'" (quoting *Mui v. United States*, 614 F.3d 50, 57 (2d Cir. 2010))).

**b. Conflict of Interest**

The defendant argues that he is entitled to a new trial because "he was denied his Sixth Amendment constitutional guarantee of conflict-free counsel." (ECF No. 270-1 at 17.) This claim has no merit. The Court held a *Curcio* hearing after the government advised the Court that Ms. Blank Becker might have a conflict. The defendant does not claim that the hearing was deficient. Nor does he deny that the Court appointed competent counsel to advise the defendant, that the evidence established that the defendant was capable of making a knowing and intelligent waiver, or that he waived the conflict. (*Curcio* Tr. 32-47.) The defendant also does not deny that, as part of that waiver, he acknowledged that he was "giving up the right to have [Ms. Blank Becker] represent [him] without a conflict of interest," and that he could not "later claim that [his] lawyer, Ms. [Blank] Becker, wasn't an effective lawyer because she had these conflicts or potential conflicts." (*Id.* at 46.) Nevertheless, the defendant now asserts that the conflict that he explicitly waived—Ms.

Blank Becker's possible attorney-client relationship with Jane—was not waivable. According to the defendant, the supposedly unwaivable, *per se* conflict was Ms. Becker's "communicat[ion] about the case with the government's key witness, notwithstanding that the witness had her own counsel and did not consent to the communications," which subjected Ms. Becker to "accusations of misconduct."[48] (ECF No. 270-1 at 20.)

"The right to counsel under the Sixth Amendment encompasses 'a correlative right to representation that is free from conflicts of interest.'" *United States v. Lewis*, 850 F. App'x 81, 82 (2d Cir. 2021) (quoting *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981)). "When a district court is sufficiently apprised of even the possibility of a conflict of interest"—as the Court was here—it "must investigate the facts and details of the attorney's interests to determine whether the attorney in fact suffers from an actual conflict, a potential conflict, or no genuine conflict at all." *United States v. Levy*, 25 F.3d 146, 153 (2d Cir. 1994). If the Court finds that defense counsel has a "genuine conflict, it has to determine whether the conflict is so severe as to require the attorney's disqualification or whether it is a lesser conflict that can be waived in a *Curcio* hearing." *United States v. Arrington*, 941 F.3d 24, 40 (2d Cir. 2019).

The defendant may knowingly and intelligently waive his right to conflict-free counsel "[i]n most cases where

48. There is no basis for the defendant's claim that Ms. Blank Becker could have been accused of "an attempt to influence a government witness on behalf of her client." (ECF No. 270-1 at 20.)

a defendant's attorney has a conflict;" only "[i]n rare cases" is "an attorney's conflict . . . unwaivable." *Id.*; *see also United States v. Perez*, 325 F.3d 115, 127 (2d Cir. 2003) (recognizing that attorney's conflict is unwaivable if "no rational defendant . . . would have knowingly and intelligently desired that attorney's representation" (alternations omitted)). The Second Circuit has found "*per se*" conflicts of interest "only where trial counsel is not authorized to practice law and where trial counsel is implicated in the same or closely related criminal conduct for which the defendant is on trial." *United States v. Williams*, 372 F.3d 96, 103 (2d Cir. 2004) (internal quotation marks omitted); *United States v. Marley*, No. 16-CR-374, 2022 U.S. Dist. LEXIS 75031, 2022 WL 1210844, at *5 (S.D.N.Y. Apr. 25, 2022) ("A *per se* conflict exists only where trial counsel is not authorized to practice law or is implicated in the very crime for which his client is on trial.").

The fact that Ms. Blank Becker's contact with the witness might have subjected her to claims of professional misconduct—a subject that the Court explored thoroughly at the *Curcio* hearing—does not make the conflict unwaivable. As explained in *Fulton*, "[t]he *per se* rule applies when an attorney is implicated in the crimes of his or her client since, in that event, the attorney cannot be free from fear that a vigorous defense should lead the prosecutor or the trial judge to discover evidence of the attorney's own wrongdoing." *United States v. Fulton*, 5 F.3d 605, 611 (2d Cir. 1993). But "the *per se* rule does not apply any time a court learns that an attorney may have committed a crime; the attorney's alleged criminal

activity must be sufficiently related to the charged crimes to create a real possibility that the attorney's vigorous defense of [her] client will be compromised." *Id.* As the Court explained at the *Curcio* hearing, Ms. Blank Becker's communications with Jane in 2019, knowing she was represented by another attorney, could have been an ethical violation. But that is neither a crime nor sufficiently related to the crimes with which the defendant was charged—RICO and Mann Act violations committed in 2018 and earlier—to constitute a *per se* conflict.

Next, the defendant asserts that Ms. Blank Becker "suffered from an actual conflict of interest that could not be waived" because she had previously represented Jane, and "[t]hat conflict was imputed to her trial partners."[49] (ECF No. 270-1 at 21.) The defendant cites *United States v. Stein*, in which the court held that "an attorney's conflicts are ordinarily imputed to his firm based on the presumption that 'associated' attorneys share client confidences." 410 F. Supp. 2d 316, 325 (S.D.N.Y. 2006) (alterations omitted). But the lawyers in that case were part of the same "small tax firm." *Id.* The lawyers in this case were not partners, they did not work in the same firm, and there is no evidence that Ms. Blank Becker shared any confidential information with the other lawyers. "[N]o presumption of confidence sharing arises between

49. The defendant's reference to Ms. Blank Becker's "simultaneous representation of Defendant and government witness, Jane" is inaccurate. (ECF No. 283 at 7.) As the Court found, Jane "never formally retained" Ms. Blank Becker (*Curcio* Tr. 32), and nothing in the record suggests she represented Jane at the time of the trial.

a law firm that received confidential information and a separate firm serving as co-counsel with it." *Benevida Foods, LLC v. Advance Magazine Publrs., Inc.*, No. 15-CV-2729, 2016 U.S. Dist. LEXIS 81186, 2016 WL 3453342, at *12 (S.D.N.Y. June 15, 2016) (internal quotation marks omitted); *see Anwar v. United States*, 648 F. Supp. 820, 827 (N.D.N.Y. 1986), *aff'd*, 823 F.2d 544 (2d Cir. 1987) (finding that conflict was not imputed to co-counsel where the evidence did not "indicate a general partnership relationship between [the attorneys] extending beyond the representation of petitioner himself").

The defendant was represented by four lawyers, three of whom had no conflict or potential conflict. Ms. Blank Becker's conflict related only to Jane, whom Ms. Blank Becker did not cross-examine. Mr. Cannick, lead trial counsel, cross-examined Jane. (T. Tr. 1073-1221.)

In short, to the extent that Ms. Blank Becker had an actual conflict of interest, that conflict was clearly waivable. *See Anwar*, 648 F. Supp. at 826 ("Whenever a defense attorney has previously represented an important government witness who testifies against [her] client, the possibility of a conflict of interest exists."); *Perez*, 325 F.3d at 127 ("[L]esser conflicts, such as an attorney's representation of two or more defendants or [her] prior representation of a trial witness, are generally waivable"); *United States v. Basciano*, 384 F. App'x 28, 34 (2d Cir. 2010) (affirming district court's refusal to order a new trial based on lead defense counsel's "conflict of interest arising from his previous representation of a cooperating witness for the government," where the defendant waived the conflict).

**c. Evidentiary Rulings**

The defendant also challenges the Court's evidentiary rulings, and claims that the Court permitted "irrelevant and excessive bad character evidence" that was minimally probative and unduly prejudicial. (ECF No. 276-1 at 2.) Specifically, the defendant challenges the Court's admission of (1) Angela's testimony that she saw the defendant perform oral sex on Aaliyah, (2) evidence that defendant exposed other women to herpes, (3) testimony by Addie, Alexis, Kate, Anna, Angela, Louis and Alex and (4) the defendant's video recordings of sexual activity involving the defendant, Alex, Dominique and Anna. (*Id.* at 4-11.) The defendant also contends that his lawyers did not adequately challenge the introduction of some of this evidence. (*Id.* at 2-3, 6, 8, 10-11.) As explained below, none of the defendant's arguments has any merit, let alone warrants a new trial.

Under the Federal Rules of Evidence, evidence is admissible only if it is relevant. Fed. R. Evid. 402. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence," and "the fact is of consequence in determining the action." Fed. R. Evid. 401. Under Rule 403, evidence that is relevant may nevertheless be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. In applying Rule 403, the court "conscientiously

balance[s] the proffered evidence's probative value with the risk" of the enumerated dangers. *United States v. Awadallah*, 436 F.3d 125, 131 (2d Cir. 2006).

As a general matter, although evidence of "any other crime, wrong, or act" cannot be used to show a person's bad character, it is admissible to prove other purposes, including motive, opportunity and intent, among other things. *See* Fed. R. Evid. 404(b)(1), (2); *United States v. Cadet*, 664 F.3d 27, 32 (2d Cir. 2011). Thus, the Second Circuit "follows the 'inclusionary' approach to 'other crimes, wrongs, or acts' evidence, under which such evidence is admissible unless it is introduced for the sole purpose of showing the defendant's bad character, or unless it is overly prejudicial under Fed. R. Evid. 403 or not relevant under Fed. R. Evid. 402." *United States v. Pascarella*, 84 F.3d 61, 69 (2d Cir. 1996) (internal citations omitted).

Moreover, evidence of other crimes or acts can be admitted without reference to Rule 404(b) if it is direct evidence of the existence of a RICO enterprise, if it is inextricably intertwined with the evidence regarding the charged offense or if it provides necessary background to the charged offenses. *See United States v. Rivera*, No. 13-CR-149, 2015 U.S. Dist. LEXIS 52959, 2015 WL 1875658, at *2 (E.D.N.Y. Apr. 22, 2015) ("When a defendant has been charged with racketeering offenses, it is well settled that 'the government may introduce evidence of uncharged offenses to establish the existence of the criminal enterprise.'" (quoting *United States v. Baez*, 349 F.3d 90, 93 (2d Cir. 2007))); *United States v. Carboni*,

204 F.3d 39, 44 (2d Cir. 2000) ("[E]vidence of uncharged criminal activity is not considered other crimes evidence under [Rule 404(b)] if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial." (quoting *United States v. Gonzalez*, 110 F.3d 936, 942 (2d Cir. 1997))). The admissibility of the evidence for these additional purposes must also meet the Rule 403 requirement that its probative value outweigh the danger of unfair prejudice. *See United States v. Robinson*, 702 F.3d 22, 37 (2d Cir. 2012).

**i. Angela's Testimony about Sexual Contact Between the Defendant and Aaliyah**

The defendant argues that the Court should have excluded Angela's testimony that she saw the defendant perform oral sex on Aaliyah in 1992 or 1993, when Aaliyah was 13 or 14 years old. (ECF No. 276-1 at 8-9; T. Tr. 3298.)

Angela's testimony was relevant to the bribery charge in Racketeering Act 1 and was not barred by Rule 404(b). *See* Fed. R. Evid. 403, 404(b). In particular, evidence that the defendant had a sexual relationship with Aaliyah was evidence of his motive in connection with the bribery case. The government asserted that the defendant concocted the plan to marry Aaliyah—which could only be accomplished by bribing the official—in order to keep secret his sexual relationship with a young teenager. Thus, testimony from a witness who actually saw them having sex was relevant. Nor was the testimony's probative value substantially

outweighed by a risk of unfair prejudice, as evidence of the defendant's sexual contact with Aaliyah was no more inflammatory than the charged offenses. *See* Fed. R. Evid. 403; *Rivera*, 2015 U.S. Dist. LEXIS 52959, 2015 WL 1875658, at *3 ("Evidence shall be excluded as unfairly prejudicial when it is 'more inflammatory than the charged crime.'" (quoting *United States v. Livoti*, 196 F.3d 322, 326 (2d Cir. 1999))).

The defendant contends that the government established the defendant's motive for bribery in other ways, including Demetrius Smith's testimony that "[the defendant] mentioned . . . that Aaliyah was in trouble" and thought she was pregnant. (T. Tr. 692, 702; ECF No. 276-1 at 8-9.)[50] But Smith, unlike Angela, did not see the defendant having sexual contact with Aaliyah while she was a minor. As the government points out, Angela's testimony was particularly probative in view of defense counsel's refusal to concede that the defendant and Aaliyah engaged in sexual activity before their marriage. (*See* ECF No. 288 at 3-4; Aug. 3, 2021 Pre-Trial Conf. Tr. 13-14.) Therefore, Angela's testimony was admissible.

**ii. Evidence that the Defendant Exposed Other Women to Herpes**

As discussed above, Racketeering Acts 8 (Jane), 12 (Faith) and 14 (Faith) charged the defendant with Mann Act violations based on the defendant's exposing Jane

50. In his motion for acquittal, however, the defendant asserts that Smith's testimony was insufficient to prove the bribery. (ECF No. 273-1 at 25-26.)

and Faith to herpes in violation of certain state criminal and public health statutes. The defendant asserts that other evidence about the other victims the defendant exposed to herpes was "unnecessary, cumulative, and unduly prejudicial," because the defendant's physician, Dr. McGrath, testified that the defendant had herpes and about the course of treatment. (ECF No. 276-1 at 7.) Specifically, the defendant objects to the testimony that (1) the defendant had herpes before his sexual relationship with Jane and Faith, (2) that he infected Jerhonda with herpes, (3) infected Kate with herpes and (4) infected Anna with herpes.[51] (*Id.*) According to the defendant, this evidence was unsupported by other theories of admissibility and therefore amounted to "rank propensity evidence." (*Id.* at 7-8.) The defendant is wrong.

Jerhonda testified that she contracted genital herpes in 2009 or 2010, and told the defendant about it. (T. Tr. 172-73.) Similarly, Kate testified that she contracted genital herpes, and told the defendant that she believed he gave her a sexually transmitted disease. (T. Tr. 2638-39.) Evidence that Jerhonda and Kate conveyed this information to the defendant was probative of the defendant's knowledge that he had herpes, which the government was required to establish beyond a reasonable doubt to prove Racketeering Acts 8, 12 and 14, as well as

51. Anna did not, as the defendant claims, testify that the defendant gave her herpes. Rather, she testified that the defendant did not use protection when he had sex with her and other people, and that a doctor tested her for STDs but she never saw the results because the doctor sent them directly to the defendant's assistant, Diana Copeland. (T. Tr. 2825-26, 2886.)

Counts 6 through 9. (ECF No. 43 ¶¶ 22-24, 32-34, 36-38, 43-46); Fed. R. Evid. 401.

Contrary to the defendant's assertions, the record does not reflect that the defendant conceded that he had genital herpes, knew he had the disease or knowingly exposed others to the disease.[52] During the August 3, 2021 pretrial conference the Court asked the defense if it would stipulate that the defendant knew he had herpes; the defense did not stipulate. (Aug. 3, 2021 Tr. at 16-17 ("I don't know to what extent the defense has considered stipulating to some of this evidence. This is regarding the transmission of . . . herpes. . . . [T]he government is saying that this is relevant to show the defendant's knowledge of the condition, but I think some of this, if there's a stipulation about that it becomes less relevant.").) Moreover, the defense suggested in cross-examining Drs. McGrath and Hoskins that the defendant did not have herpes, because no one had given him a blood test.[53]

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52. The defense appears to fault the Court for admitting the very evidence that he says the government did not establish. In his motion for acquittal, the defendant asserts that there was insufficient evidence to establish that "he was contagious or had an outbreak" when he had intercourse with Faith, or that he was "contagious, infected, or had the capacity to transmit herpes" when he had sexual contact with Jane in 2015. (ECF No. 273-1 at 40-41, 58.)

53. Counsel asked Dr. McGrath, "Is it fair to say, Dr. McGrath, that from your experience in treating Mr. Kelly, sitting here in court today you cannot say that 100 percent he has herpes?" (T. Tr. 439.) In a similar effort to suggest that the defendant might not have herpes, defense counsel asked Dr. Hoskins if a blood test was "the best way to determine if a person has herpes[.]" (T. Tr. 3074.)

Kate and Jerhonda's testimony was relevant to show that the defendant knew he had herpes, which established his knowledge for the charged offenses involving Jane and Faith. (T. Tr. 4-5; ECF No. 255 at 8-9.)

The testimony was relevant even if counsel had stipulated, as it corroborated other victims' testimony that the defendant's practice was to have unprotected sex without disclosing his sexually transmitted disease. The testimony was thus admissible as probative of one of the enterprise's means and methods charged in the indictment—in particular, "engaging in and facilitating sexual activity without disclosing a sexually transmitted disease [the defendant] had contracted[.]" (ECF No. 43 ¶ 9(a)); Fed. R. Evid. 401.

The defendant faults trial counsel for not challenging "the excessive amount of herpes evidence from numerous other witnesses" (ECF No. 276-1 at 8), but does not cite any specific piece of "herpes evidence" to which his trial counsel failed to make an objection. To the extent that he means to complain about testimony discussed above, there were multiple grounds supporting the testimony's admissibility under the Federal Rules of Evidence. Thus, trial counsel's decision not to object to the evidence was not objectively unreasonable. Nor can the defendant claim that the result of the proceeding would have been any different if counsel had objected, since the evidence was admissible. *See Strickland*, 466 U.S. at 694.

### iii. Testimony by Addie, Alexis, Kate, Anna, Angela, Louis and Alex

The defendant also argues that the Court improperly allowed testimony by "seven additional witnesses"—Addie, Alexis, Kate, Anna, Angela, Louis and Alex—"to testify about graphic uncharged bad act evidence[.]" (ECF No. 276-1 at 9.) The defendant challenges this witness testimony as "cumulative and unduly prejudicial," and faults trial counsel for not "competently" objecting to it. (*Id.* at 10-11.) The defendant's arguments do not warrant relief under Rule 33.

As explained at the trial and in my earlier written decision, the testimony of Addie, Alexis, Kate,[54] Anna, Angela, Louis and Alex was admissible to show either the existence of the enterprise, "a purpose [and] relationships among those associated with the enterprise," *Boyle*, 556 U.S. at 946, or the enterprise's means and methods as charged in the indictment. (*See* ECF No. 255 at 7 (Addie's testimony about the defendant's sexual contact with her while she was a minor was evidence of one of the purposes of the enterprise—to recruit girls to have sex with the defendant—and thus "probative of the existence of the enterprise and the way it operated" (citing ECF No. 43 ¶ 1-4)); *id.* at 10 (Alexis's testimony about the defendant's sexual contact with her while she was a minor was "evidence of the enterprise, its purposes and

54. The Court properly allowed Kate's testimony about contracting herpes from the defendant for the reasons explained above. Accordingly, the Court need not repeat that rationale here.

its means and methods");[55] *id.* at 11-12 (Anna's testimony that the defendant sexually abused her was admissible under multiple theories, including as evidence of the enterprise's purposes and means and methods, as it "showed the defendant's control over his associates and the victims of the enterprise"); T. Tr. 2849-50 (Angela's testimony that the defendant had sexual contact with her was relevant to the existence of the enterprise, including because it tended to show that the defendant's associates knew what he was doing, and because it was inextricably intertwined with her testimony about observing the sexual encounter between the defendant and Aaliyah); ECF No. 255 at 5-6 (reiterating the Court's ruling regarding Angela's testimony); *id.* at 10 (Louis's testimony about the defendant's sexual contact with him while he was a minor was "evidence of the enterprise's purposes, as well as its means and methods," particularly because one of the enterprise's purposes was to produce pornography, including child pornography (citing ECF No. 43 ¶ 2)); Aug. 3, 2021 Tr. 27-28, 30-31 (finding testimony that the defendant required Alex to engage in sexual encounters with other women, and that the defendant filmed those encounters was "direct evidence of the enterprise's means and methods" and showed "the control that the defendant exercised over victims as alleged in the indictment")). In addition, I balanced the probative value of each piece of evidence against the potential for undue prejudice, as required by Rule 403, and concluded that the proffered testimony was not unduly prejudicial. Fed. R. Evid. 403;

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55. It is unclear why the defendant cites Alexis's testimony as unfairly prejudicial because while she testified that she had sex with the defendant when she was in her "teens," it was not before she was 18. (T. Tr. 2557-58.)

(*see* ECF No. 255 at 5-6, 7, 10-12; Aug. 3, 2021 Tr. 19, 21, 27-28, 30-31; T. Tr. 2850.)[56]

The defendant argues that his lawyers did not make adequate objections to the introduction of the bad act evidence at trial, and that they "affirmatively introduce[d] other prior bad act evidence." (ECF No. 276-1 at 10-11.) As a threshold matter, since the evidence was properly admitted, counsel cannot be ineffective, even if they did not challenge the evidence at all. In any event, counsel did object that the defense had not been given timely notice of the government's intent to offer the evidence, and argued that the Court should exclude the testimony regardless of the timeliness issue. (ECF No. 146 at 4.) Trial counsel filed a supplemental brief on August 6, 2021, objecting to the admission of uncharged crime evidence under Rule 404(b) and Rule 403. (ECF No. 156.) In addition, in an August 26, 2021 letter filed under seal, the defendant's lawyers moved to preclude the testimony of Addie and Louis. (ECF No. 180.) Under these circumstances, there is simply no basis to find that trial counsel's representation fell outside "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689).[57]

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56. The victims' testimony about the defendant's uncharged acts was also admissible under Rule 413 because it was relevant to the charged sexual assaults of Jerhonda, Jane and Faith. *See* Fed. R. Evid. 413(a) ("In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault" so long as the evidence is relevant.).

57. Nor was counsel ineffective because he "opened the door" to evidence that the defendant was the subject of a criminal case in Illinois, for the simple reason that the jury never heard that evidence.

**iv. Video Exhibits**

The defendant also disagrees with the Court's decision to admit certain "graphic" video evidence. (ECF No. 276-1 at 11.) Government Exhibits 341 through 343 depict sexual encounters between Alex, Dominique and the defendant. (GX 341, 342, 343.) In one of these recordings, the defendant guided Dominique's head while she performed oral sex on Alex. In Government Exhibit 328(a), the defendant spanked Anna, who was naked while she walked back and forth, crying and robotically repeating that she was a "slut" and "stupid". (GX 328(a); T. Tr. 2845-46, 2852-55.) In Government Exhibit 329(a), a nine-minute recording of which the jury saw only a few minutes (T. Tr. 3674), Anna spread feces on her naked body and called the defendant "Daddy." (GX 329(a).) The defendant objects that this evidence "was not relevant to any 'means and methods' of an enterprise since there was no enterprise," and "[w]hatever probative value it had, was substantially outweighed by its prejudicial effect." (ECF No. 276-1 at 11.)

The video depictions of sexual activity between Alex, Dominique and the defendant were properly admitted into evidence. First, the evidence showed the control that the defendant exerted over his victims, and therefore demonstrated the means and methods of the enterprise alleged in the indictment. (ECF No. 43 ¶¶ 7-9.). The defendant directed Alex and Dominique (whom Alex described as "zombie-ish" (T. Tr. 3358)) how to have sex, what to do to each other and how to react. Second, the videos were direct evidence of one of the purposes of the enterprise—to recruit women and girls to engage in

sexual activity with the defendant as well as to produce pornography. (ECF No. 43 ¶¶ 2-3.) Third, the video evidence corroborated Alex's testimony and provided support for the testimony of other victims, including Jane and Louis, that the defendant required them to have sexual contact with others, which the defendant filmed. (*See* T. Tr. 956, 1034-50, 1844-47, 1865-72.) The videos were admissible under Rule 403 because they were relevant and probative, and not unduly prejudicial. The exhibits corroborated the trial testimony, and were "no more inflammatory than the offenses" with which the defendant was charged. *See Rivera*, 2015 U.S. Dist. LEXIS 52959, 2015 WL 1875658, at *19.

The video recording of the defendant's "punishing" Anna, while graphic and disturbing, was properly admitted under Rule 404(b), and its probative value was not substantially outweighed by any risk of unfair prejudice. *See* Fed. R. Evid. 401, 403, 404(b). The means and methods of the enterprise included, among other things, "[d]emanding absolute commitment to [the defendant] and not tolerating dissent;" "[o]btaining sensitive information about sexual partners and members and associates of the Enterprise to maintain control over them;" and "[c]reating embarrassing and degrading videos of sexual partners to maintain control over them." (ECF No. 43 ¶ 9.) The video recording of Anna (Government Exhibit 328(a)) was direct evidence of the enterprise and the way it operated. It was an "embarrassing and degrading video," which the defendant created, and demonstrated the force he used to control his victims—spanking them and ordering them to say degrading things about themselves. The video also corroborated Anna's testimony as well as

Jane's and Jerhonda's about the ways that the defendant punished them for breaking his rules. (T. Tr. 148-49, 166-68, 901, 909-18, 973-78, 1053-57, 1318, 2840-46, 2852-55, 3015, 3018-3019.)

The second video exhibit—also explicit and horrifying—was similarly admissible as evidence of the ways in which the defendant used humiliation and punishment to control his victims. The recording supported Anna's testimony that the defendant made her do dehumanizing, humiliating acts involving bodily fluids. (T. Tr. 2876-77, 2880.) The video also corroborated Jane's testimony that the defendant punished her by forcing to eat feces and spread it on her body. (T. Tr. 998-1000.) Because the recordings served these legitimate purposes, they were appropriately admitted. The video recordings were awful, but the crimes charged were awful, involving (1) sexual exploitation of minors, (2) forced labor—the defendant's violent, degrading assault on Jerhonda to force her to perform oral sex on him (T. Tr. 176-79) and the defendant's threats, including the presence of gun, to force Faith into oral sex (T. Tr. 2249-55)—(3) kidnapping, and (4) aggravated criminal sexual abuse. Therefore, the Court's decision to admit the foregoing video recordings does not warrant a new trial.[58]

Finally, the defendant faults trial counsel for challenging the videos "belatedly." (ECF No. 276-1 at

58. The government played only a "very short portion" of the video (T. Tr. 3669, 3674; *see also* T. Tr. 2254 ("[W]e are going to play very limited snippets.")), and did not play it again during summation. (T. Tr. 4424 ("I'm not going to play [GX 329(a)] for you again.").)

11.) As explained above, the evidence was admissible, so counsel could not have been ineffective, even if "making a belated objection" constituted ineffective assistance of counsel. In any event, counsel moved *in limine* to exclude the evidence involving Alex and Dominique as "highly inflammatory, needlessly cumulative, and [because] the probative value, if any, of the material is outweighed by the danger of unfair prejudice to the defendant." (ECF No. 203.) The defense initially objected to the admission of Government Exhibit 329(a) (*see* T. Tr. 2518), objected to playing Government Exhibit 328(a) (*see* T. Tr. 3671-72), and successfully challenged the admissibility of another video of Joy.[59] In sum, the Court's evidentiary rulings were appropriate exercises of discretion.

**CONCLUSION**

For these reasons, the defendant's motions for a judgment of acquittal and for a new trial are denied.

**SO ORDERED**.

59. The Court excluded the video of Joy with feces as "cumulative . . . unfairly prejudicial and [] not related to anybody who [wa]s testifying." (T. Tr. 2520-28.)

## APPENDIX C — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK, FILED OCTOBER 26, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

19-CR-286 (AMD)

UNITED STATES OF AMERICA,

– against –

ROBERT SYLVESTER KELLY,

*Defendant.*

Filed Octobeer 26, 2021

### MEMORANDUM DECISION AND ORDER

ANN M. DONNELLY, United States District Judge:

The defendant was charged with racketeering in violation of 18 U.S.C. §§ 1962(c) and 1963, three counts of Mann Act transportation to engage in illegal sexual activity in violation of 18 U. S.C. § 2421(a), three counts of Mann Act coercion and enticement to engage in illegal sexual activity in violation of 18 U.S.C. § 2422(a), one count of Mann Act coercion of a minor to engage in illegal sexual activity in violation of 18 U.S.C. § 2422(b), and one count of Mann Act transportation of a minor with intent to engage in illegal sexual activity in violation of 18 U.S.C. § 2423(a).

(ECF No. 43.) On September 27, 2021, the jury convicted the defendant of all counts. (T. Tr. 4765-73.)

In February and March 2020, the defendant moved to dismiss Count One of the indictment and the counts of the indictment incorporating New York Public Health Law Section 2307. (ECF Nos. 41, 42.) I denied the motion. (ECF No. 69.) On the morning of jury selection, the defendant filed a second motion to dismiss the indictment, making some of the same arguments he made in the first motion.[1] (ECF No. 159.) The government opposed. (ECF No. 168.) I denied the motion on August 18, 2021. (T. Tr. 4.) This opinion sets forth the basis for that decision.

## BACKGROUND

The third superseding indictment, returned on March 12, 2020, charged the defendant with racketeering and violations of the Mann Act. (ECF No. 43.) Specifically, and as is relevant to the motion to dismiss:

Two of the racketeering acts (Racketeering Acts Twelve and Fourteen) and four of the Mann Act counts (Counts Six through Nine) included allegations that the defendant had sexual intercourse with Jane Doe #6 in violation of Section 120.20 of the New York Penal Law ("CPL")—reckless endangerment in the second degree—and Section 2307 of the New York Public Health Law ("PHL"), which prohibits someone who knows that he

1. In the second motion, the defendant sought dismissal of the entire indictment.

has "an infectious venereal disease" from having sexual intercourse with another person. The indictment alleged that the defendant "engaged in unprotected sexual intercourse with Jane Doe #6 without first informing [her] that he had contracted herpes and obtaining her consent to sexual intercourse in these circumstances." (*Id.* ¶¶ 33-34, 37-38, 43-46.)

Racketeering Act One charged that the defendant, together with others, bribed a public employee "[o]n or about August 30, 1994" "in violation of Illinois Criminal Code Sections 5/33- 1(a) and 5/5-1." (*Id.* ¶ 13.) Racketeering Act Three charged that the defendant, together with others, confined Jane Doe #3 against her will "[i]n or about and between 2003 and 2004" "in violation of Illinois Criminal Code Sections 5/10-1 and 5/5-1." (*Id.* ¶ 15.)

Three of the racketeering acts charged (Racketeering Acts Two, Seven and Ten) accused the defendant of inducing a minor "to engage in sexually explicit conduct for the purpose of producing one or more visual depictions of such conduct." (*Id.* ¶¶ 14, 21, 30.)

## DISCUSSION

The defendant raised three challenges to the third superseding indictment.[2] First, he argued that the PHL

2. It is not clear that this second motion to dismiss was timely. The defendant filed it on August 9, 2021, after prospective jurors completed questionnaires, and on the morning that questioning of individual prospective jurors began. Federal Rule of Criminal Procedure 12(b)(3) requires certain motions to "be raised . . .

Section 2307 and CPL Section 120.20 charges should have been dismissed on the theory that the government could not prove the elements as a matter of law; the defendant contended that dismissing these charges would make venue inappropriate in the Eastern District of New York, and that the indictment should have been dismissed accordingly. (ECF No. 159 at 5-10.) Next, the defendant argued that Racketeering Acts One and Three should have been dismissed because they were untimely under Illinois state statutes of limitations. (ECF No. 159 at 11.) Third, the defendant claimed that Racketeering Acts Two, Seven and Ten, which charged the defendant with coercing a minor to create child pornography, should have been dismissed because "there [was] no evidence that visual depictions exist[ed]." (*Id.* at 12.)

## I. Racketeering Acts Twelve and Fourteen and Counts Six Through Nine

The defendant moved to dismiss Racketeering Acts Twelve and Fourteen, as well as Counts Six though

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pretrial." Motions that fall under 12(b)(3) include claims of improper venue and defects in the indictment. Fed. R. Crim. P. 12(b)(3). Rule 12(c)(3) provides that "if a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely." The defendant's attempt to evade this result by styling his motion as a 12(b)(2) motion not subject to 12(c)(3) is not persuasive. The arguments in this motion (which are discussed in detail in the sections below) clearly fall within 12(b)(3). Nor did the defendant establish good cause for the tardy filing. Indeed, the defendant moved to dismiss many of the same charges more than a year and a half before filing this motion. (*See* ECF Nos. 41, 42.)

Nine. These counts charged that the defendant violated the Mann Act when he "engaged in unprotected sexual intercourse with Jane Doe #6 without first informing [her] that he had contracted herpes and obtaining her consent to sexual intercourse in these circumstances," in violation of PHL Section 2307 and CPL Section 120.20. (ECF No. 43 ¶¶ 33-34, 37-38, 43-46.) The defendant argued that pretrial dismissal was warranted because as a matter of law, the government could not establish that the defendant violated either state statute. This argument is unavailing for the reasons explained below; thus, the venue challenge also fails.

**a. PHL Section 2307**

PHL Section 2307 prohibits someone who knows that he has "an infectious venereal disease" from having sexual intercourse with another person. The indictment charged that the defendant had sexual intercourse with Jane Doe #6 without informing her that he had herpes, or obtaining her consent to have sexual intercourse in those circumstances. (ECF No. 43 ¶¶ 33-34, 37-38, 43-46.) According to the defendant, herpes is not a "venereal disease" within the meaning of the statute. (ECF No. 159 at 5-8.) This argument is not persuasive.

The language of PHL 2307 is unambiguous, and provides that "[a]ny person who, knowing himself or herself to be infected with an infectious venereal disease, has sexual intercourse with another shall be guilty of a misdemeanor." Herpes falls within the statute's plain terms. *See People ex rel. Negron v. Superintendent, Woodbourne*

*Corr. Facility*, 36 N.Y.3d 32, 36 (2020) (quoting *State of New York v. Patricia II.*, 6 N.Y.3d 160, 162 (2006)) ("[W]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning."). Courts "construe words of ordinary import with their usual and commonly understood meaning" and "dictionary definitions [are] useful guideposts in determining the meaning of a word or phrase." *Walsh v. New York State Comptroller*, 34 N.Y.3d 520, 524 (2019) (quoting *Nadkos, Inc. v Preferred Contrs. Ins. Co. Risk Retention Grp. LLC*, 34 N.Y.3d 1, 7 (2019)) (using Merriam-Webster's Collegiate Dictionary and Black's Law Dictionary to interpret a state statute). "Venereal disease" is just an antiquated term for "sexually transmitted disease." *See* Venereal Disease, Sexually Transmitted Disease, Black's Law Dictionary (1 1 th ed. 2019) (the entry for "venereal disease" says "see sexually transmitted disease[;]" which, in turn, is defined as a "disease transmitted only or chiefly by engaging in sexual acts with an infected person" and "[a]lso termed *venereal disease*.") (emphasis in original). Merriam Webster likewise defines "venereal disease" as "a contagious disease (such as gonorrhea or syphilis) that is typically acquired in sexual intercourse." *Venereal Disease*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/venereal%20disease (last visited Oct. 25, 2021). Genital herpes is one such disease. The Centers for Disease Control ("CDC") defines genital herpes as "a common sexually transmitted disease (STD) that any sexually active person can get." *Genital Herpes—CDC Fact Sheet*, CDC, https://www.cdc.gov/std/herpes/stdfact-herpes.htm (last visited Oct. 25, 2021).

Moreover, New York courts have found that PHL Section 2307 includes herpes. *See Maharam v. Maharam*, 123 A.D.2d 165, 170-71 (1st Dep't 1986) (finding a duty to disclose genital herpes based on PHL Section 2307); *Fan v. Sabin*, 49 Misc. 3d 1201(A) (N.Y. Sup. Ct. 2015) (same).

To support a narrower reading of the statute, the defendant cited not case law, but a statement by the New York Department of Health's Public Health and Health Planning Council about a proposed (now adopted) amendment to include HIV in the conditions that "constitute the definition of sexually transmitted diseases for the purpose of" certain sections of the Public Health Law. *See* N.Y. Comp. Codes R. & Regs. tit. 10, § 23.1. "Some commenters expressed concern that the proposed regulation could have the effect of making it a misdemeanor under PHL § 2307 for HIV-positive individuals to have sexual intercourse in some circumstances." *See* NYDOH, Comments and Reponses on Proposed Amendment to Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York Sections 23.1 and 23.2 (May 18, 2016), https://regs.health.ny.gov/sites/default/files/pdf/recently_adopted_regulations/Expansion%20of%20Minor%20Consent%20for%20HIV%20Treatment%20%20Access%20and%20Prevention.pdf (last visited Oct. 25, 2021). The agency responded that it "interprets the law as only applying to individuals who knowingly expose another individual to acute, bacterial venereal disease such as syphilis or gonorrhea." *Id.* The agency's response says nothing about herpes; the agency was not asked to and did not express a view about herpes. Nor does the statement

overcome the plain meaning of "venereal disease." The statutory language is unambiguous, and the Court need not look beyond the plain meaning of the statute's terms.

**b. CPL Section 120.20**

In addition to charging violations of PHL Section 2307, Racketeering Acts Twelve and Fourteen, and four of the Mann Act counts charged that the defendant violated New York Penal Law Section 120.20, which provides that "[a] person is guilty of reckless endangerment in the second degree when he [(i)] recklessly engages in conduct [(ii)] which creates a substantial risk of serious physical injury to another person." "Serious physical injury" is "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." N.Y. Penal Law § 10.00(10).

The defendant maintained that this charge is a "factual impossibility" because "adult consensual intercourse . . . usually does not lead to a serious physical injury which would create a risk of death." (ECF No. 159 at 9-10.) In fact, there is a "substantial risk" that consensual sexual intercourse can lead to serious physical injury, "protracted impairment of health," "protracted disfigurement," or "protracted loss or impairment of the function of any bodily organ," if, for example, one participant does not inform the other that he has a sexually transmitted disease. The defendant was charged with doing exactly that: having sexual intercourse with another person,

while he knew but did not disclose that he had a sexually transmitted disease. (ECF No. 43 ¶¶ 33-34, 37-38, 43-46.) Moreover, "serious physical injury" under the statute need not create a risk of death. As the statute clearly says, "serious physical injury" also includes "serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." N.Y. Penal Law § 10.00(10). New York courts applying the reckless endangerment statute have determined that infecting someone with a sexually transmitted disease without prior disclosure can lead to criminal liability under the statute. *People v. Williams*, 24 N.Y.3d 1129 (2015).

The defendant cited *People v. Centola*—a vehicular assault case—as support for his claim that the conduct alleged in the indictment was not "reckless." (ECF No. 159 at 9-10 (citing 61 Misc.3d 1205(A) (Sup. Ct. 2018)).) *Centola* is entirely different. Centola was alleged to have driven his truck into a pedestrian so slowly that the collision merely "push[ed]" the victim and "made [him] stumble." *Centola*, 61 Misc.3d 1205(A). The court determined that Centola's conduct was "ill-advised, unwise, and imprudent[,]" but that there did "not appear to be any reasonable evaluation of the facts which would lead to the conclusion that because of the actions of the defendant, [the victim] was in danger of a substantial risk of death, or [that the defendant's actions could cause] death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." *Id.* Those facts have nothing to do with this case. In short, a person who has sexual intercourse

with another, knowing but neither disclosing that he has a sexually transmitted disease nor obtaining his partner's consent, exposes that person to a protracted health impairment—the sexually transmitted disease.

The defendant also argued that the indictment did not "allege[] the defendant caused serious physical injury." (*Id.* at 10.) Racketeering Acts Twelve and Fourteen, as well as Counts Six through Nine were pled properly. An indictment "need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States v. Yannotti*, 541 F.3d 112, 127 (2d Cir. 2008) (quoting *United States v. Alfonso*, 143 F.3d 722, 776 (2d Cir. 1998)).

18 U.S.C. § 2421(a) makes it a crime to "knowingly transport[] any individual in interstate commerce . . . , with intent that such individual engage in . . . any sexual activity for which any person can be charged with a criminal offense." Section 2422(a) makes it a crime to "knowingly persuade[], induce[], entice[], or coerce[] any individual to travel in interstate commerce . . . to engage in . . . any sexual activity for which any person can be charged with a criminal offense."

Counts Six and Eight charged that the defendant "did knowingly and intentionally transport an individual, to wit: Jane Doe #6, in interstate commerce, with intent that such individual engage in sexual activity for which a person can be charged with a criminal offense, to wit: violations of New York Penal Law Section 120.20 (reckless endangerment) and New York Public Health Law Section

2307 (knowing exposure of infectious venereal disease)[.]" (ECF No. 43 ¶¶ 43, 45.) Counts Seven and Nine charged that the defendant "did knowingly and intentionally persuade, induce, entice and coerce an individual, to wit: Jane Doe #6, to travel in interstate commerce, to engage in sexual activity for which a person can be charged with a criminal offense, to wit: violations of New York Penal Law Section 120.20 (reckless endangerment) and New York Public Health Law Section 2307 (knowing exposure of infectious venereal disease)[.]" (*Id.* ¶¶ 44, 46.) Racketeering Acts Twelve and Fourteen charged the same conduct. (*Id.* ¶¶ 33-34, 37-38.) Racketeering Acts Twelve and Fourteen, as well as Counts Six through Nine, also included approximately when and where the conduct was alleged to have occurred. (*Id.* ¶¶ 33-34, 37-38, 43-46.) Because the indictment recites each element of the federal offense charged and the approximate time and place each charge was alleged to have occurred, the charges were well pled.[3]

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3. The defendant also asserted that permitting the reckless endangerment charge would amount to "criminalizing adult, consensual, sexual intercourse"—conduct which is "unequivocally legal." (ECF No. 159 at 9-10.) This is similar to the challenge to the public health law charges that the defendant raised in his first motion to dismiss. (*See* ECF No. 42.) The allegation in this case is that the defendant had sexual intercourse knowing that he had a sexually transmitted disease, without disclosing this information or obtaining his partner's consent to have sexual intercourse in those circumstances. As discussed above, this is a cognizable theory of reckless endangerment under New York law. *See Williams*, 24 N.Y.3d 1129 (2015).

## II. Racketeering Acts One and Three

The defendant also moved to dismiss Racketeering Acts One and Three as untimely.[4] Racketeering Act One charged that the defendant, together with others, bribed a public employee "[o]n or about August 30, 1994" "in violation of Illinois Criminal Code Sections 5/33-1(a) and 5/5-1." (*Id.* ¶ 13.) Racketeering Act Three charged that the defendant, together with others, confined Jane Doe #3 against her will "[i]n or about and between 2003 and 2004" "in violation of Illinois Criminal Code Sections 5/10-1 and 5/5-1."[5] (*Id.* ¶ 15.) The defendant argued that because the Illinois Criminal Code provides for a three-year limitations period for these offenses, these predicate acts should have been dismissed.

RICO charges are not governed by state statutes of limitations. Moreover, a racketeering act is not an independent count; instead, it is part of the overarching RICO offense. The relevant statute for evaluating the timeliness of a RICO action is 18 U.S.C. § 3282, which prescribes a five-year limitations period. *See United*

4. The defendant seems to have misstated the charges he moved to dismiss as untimely. In section IV of his brief, the defendant argued that "[t]he allegations contained in Count 1 racketeering act 1, racketeering act 3, racketeering act 5 should be dismissed . . . ." (ECF No. 159 at 11.) But the defendant did not discuss Racketeering Act Five in section IV. (*See id.*) In any event, Racketeering Act Five was timely for the same reasons that Racketeering Acts One and Three were.

5. The jury found Racketeering Act Three "not proved" beyond a reasonable doubt (T Tr 4765.)

*States v. Hunter*, No. 05-CR-188, 2008 WL 268065, at *9 (E.D.N.Y. Jan. 31, 2008), *aff'd sub nom. United States v. Payne*, 591 F.3d 46 (2d Cir. 2010), and *aff'd*, 386 F. App'x 1 (2d Cir. 2010). The Second Circuit "has held in the statute-of-limitations context that jurisdiction over a single RICO predicate act confers jurisdiction over other predicate acts." *United States v. Wong*, 40 F.3d 1347, 1367 (2d Cir. 1994). Thus "[a] prosecution for [allegedly] violating § 1962(c) is [timely if] the defendant committed at least one predicate act within the limitations period." *Hunter*, 2008 WL 268065, at *9. Accordingly, and as the Second Circuit has recognized, "a defendant may be liable under [§ 1962(c)] for predicate acts the separate prosecution of which would be barred by the applicable statute of limitations, so long as that defendant committed one predicate act within the five-year limitations period. "[6] *Wong*, 40 F.3d at 1367.

The indictment charged the defendant with racketeering acts alleged to have taken place as recently as December 2018. (*See* ECF No. 43 ¶ 3 1.) Thus, the charges were timely.

**III. Racketeering Acts Two, Seven and Ten**

The defendant moved to dismiss Racketeering Acts Two, Seven and Ten. Each charged the defendant with inducing a minor "to engage in sexually explicit conduct

6. The defendant did not address this well-established rule in his reply brief; instead, he simply reiterated his claim that state law statutes of limitations govern federal RICO cases.

for the purpose of producing one or more visual depictions of such conduct" in violation of 18 U. S.C. § 2251(a). (*Id.* ¶¶ 14, 21, 30.) To prove this charge, the government was required to prove three elements beyond a reasonable doubt: that "(1) the victim was less than 18 years old; (2) the defendant used, employed, persuaded, induced, enticed, or coerced the minor to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct; and (3) the visual depiction was produced using materials that had been transported in interstate or foreign commerce." *United States v. Puglisi*, 458 Fed. App'x 31, 33 (2d Cir. 2012) (citing *United States v. Broxmeyer*, 616 F.3d 120, 124 (2d Cir. 2010)).

Racketeering Acts Two, Seven and Ten were pled properly. As explained in section I.b, an indictment "need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States v. Yannotti*, 541 F.3d at 127. The indictment alleged the required elements. Each of Racketeering Acts Two, Seven and Ten stated that the defendant "did knowingly and intentionally employ, use, persuade, induce, entice and coerce a minor . . . to engage in sexually explicit conduct for the purpose of producing one or more visual depictions of such conduct, which visual depictions were produced using materials that had been mailed, shipped and transported in interstate and foreign commerce." (ECF No. 43 ¶¶ 14, 21, 30.) Each also stated the time and place these acts were alleged to have occurred. (*Id.*)

In asserting that "there is no evidence that visual depictions exist," (ECF No. 159 at 12), the defendant confused the standards of pleading with the standards of proof at trial. "Unless the government has made what can fairly be described as a full proffer of the evidence it intends to present at trial . . . , the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment." *United States v. Alfonso*, 143 F.3d 772, 776-77 (2d Cir. 1998). The government was entitled to present its evidence at trial, after which the defendant could challenge the sufficiency of that evidence pursuant to a Rule 29 motion. *United States v. Raniere*, 384 F. Supp. 3d 282, 302 (E.D.N.Y. 2019); Fed. R. Crim. P. 29. Before the trial began, the government had not made a full proffer of its evidence in this case. Nor was there a "stipulated record." (*See* ECF No. 159 at 3.) Thus, so long as the indictment was facially valid—which it was for the reasons described above—pretrial dismissal was not warranted.[7]

7. The defendant also argued that pretrial dismissal is warranted "where the operative facts are undisputed and the government fails to object to the district court's consideration of those undisputed facts in making the determination regarding a submissible case." (ECF No. 159 at 4 (citing *United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994)).) But the operative facts were disputed. (*See* ECF No. 168 at 8n7)

*Appendix C*

**CONCLUSION**

For these reasons, the motion to dismiss was denied.

**SO ORDERED.**

s/Ann M. Donnelly
ANN M. DONNELLY
United States District Judge

Dated: Brooklyn, New York
October 26, 2021

## APPENDIX D — RELEVANT STATUTORY PROVISION

18 U.S.C.A. § 1962

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.