

# APPENDIX

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

OCT 27 2025

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHRISTOPHER ADIN GRAHAM,

Defendant - Appellant.

No. 25-5766

D.C. Nos. 3:12-cr-00178-AN-1  
3:17-cv-01559-MO

District of Oregon,  
Portland

ORDER

Before: S.R. THOMAS and BENNETT, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown that “jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Gonzalez v. Crosby*, 545 U.S. 524, 530-31 (2005); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *Ortiz v. Stewart*, 195 F.3d 520, 520-21 (9th Cir. 1999).

Any pending motions are denied as moot.

**DENIED.**

**UNITED STATES OF AMERICA v. CHRISTOPHER ADIN GRAHAM, Defendant.  
 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON  
 2025 U.S. Dist. LEXIS 164346; 2025 LX 360253  
 Case No.: 3:12-cr-00178-AN-1  
 August 22, 2025, Decided  
 August 22, 2025, Filed**

**Editorial Information: Prior History**

United States v. Graham, 2021 U.S. Dist. LEXIS 197790 (Aug. 24, 2021)

**Counsel** {2025 U.S. Dist. LEXIS 1} U.S. Attorneys: Glen H. Ujifusa, LEAD ATTORNEY, Multnomah County District Attorney's Office, Portland, OR USA; Amy Elizabeth Potter, United States Attorney's Office, Eugene, OR USA; Leah K. Bolstad, US Attorney's Office, District of Oregon, Portland, OR USA; Scott M. Kerin, United States Attorney's Office, Portland, OR USA; Ethan Bodell, USAO, Portland, OR USA.

**Judges:** Adrienne Nelson, United States District Judge.

**Opinion**

**Opinion by:** Adrienne Nelson

**Opinion****OPINION AND ORDER**

Defendant Christopher Adin Graham moves for relief from judgment pursuant to Federal Rule of Civil Procedure ("FRCP") 60(b)(1), (3), and (6). For the reasons set forth below, the motion is DENIED.

**BACKGROUND**

On March 11, 2014, defendant was convicted by a jury of one count of sex trafficking by force, fraud, or coercion and two counts of witness tampering. Jury Verdict, ECF [118]. He was sentenced to a total of 360 months imprisonment and a life term of supervised release. Am. J., ECF [163].

On October 2, 2017, defendant moved to vacate or correct his sentence under 28 U.S.C. § 2255. Mot. to Vacate or Correct Sentence, ECF [183]. Then-District Judge Michael W. Mosman issued an Opinion and Order on May 7, 2018 ("Order"), denying the motion and declining to issue a certificate of appealability. Op. & Order of May 7, 2018, ECF{2025 U.S. Dist. LEXIS 2} [198]. Defendant appealed the Order, and the Ninth Circuit dismissed the appeal on October 11, 2018. See Order of Dismissal of Appeal, ECF [202]. Defendant then filed a petition for writ of certiorari, which the United States Supreme Court denied. See Notice, ECF [204].

On June 10, 2019, defendant moved for reconsideration of the Order. Mot. for Reconsideration, ECF [205]. Judge Mosman denied that motion. Order of June 13, 2019, ECF [206].

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On June 26, 2025, defendant moved for relief from the Order pursuant to FRCP 60(b). Mot. for Relief from J. ("Def. Mot."), ECF [280].

Aside from the motion to vacate or correct his sentence, defendant also filed a "Motion for Resentencing and Appointment of Counsel" on May 29, 2024. Mot. for Resentencing & Appt. of Counsel, ECF [263]. This Court denied that motion as an unauthorized second or successive 28 U.S.C. § 2255 motion and declined to issue a certificate of appealability. Order of August 26, 2024, ECF [275]; Order, ECF [278]. Defendant also appealed that order, and the Ninth Circuit dismissed the appeal on January 24, 2025. Order of Dismissal of Appeal, ECF [279].

## DISCUSSION

Defendant argues for relief from the Order based on "fraud upon the court, misapprehension of the{2025 U.S. Dist. LEXIS 3} essential statutory elements, misrepresentation, ineffective assistance of counsel, recently discovered evidence, and a complete breakdown of the adversarial process, resulting i[n] a miscarriage of justice that justifies relief." Def. Mot. 1.

Defendant's motion fails for at least two reasons. First, the motion is untimely. Pursuant to FRCP 60(b), a court may grant relief from an order when there is "mistake, inadvertence, surprise, or excusable neglect"; "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party"; or "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1), (3), (6). A motion under FRCP 60(b)(1) or (3) must be made "no more than a year after the entry of the . . . order[.]" Fed. R. Civ. P. 60(c)(1). To the extent that defendant argues mistake, fraud upon the court, or misrepresentation, those are bases under FRCP 60(b)(1) and (3) upon which relief may be granted. However, defendant filed the instant motion on June 26, 2025, well over a year after Judge Mosman issued the Order on May 7, 2018. Accordingly, defendant's motion is untimely.

Second, although defendant styles the motion as an FRCP 60(b) motion, the motion is in substance a successive 28 U.S.C. § 2255 motion. A motion, even though labeled as one under FRCP 60(b), will be treated{2025 U.S. Dist. LEXIS 4} as a successive section 2255 motion if it raises a "claim" as defined in 28 U.S.C. § 2244. "[A] 'claim' is an asserted federal basis for relief from a . . . judgment of conviction." *Gonzalez v. Crosby*, 545 U.S. 524, 530, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005). A successive section 2255 motion cannot be considered unless it has first been certified by the court of appeals to contain either "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense," or "(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h).

Here, defendant again repeats many of the arguments that he has raised in previous section 2255 motions. In essence, defendant continues to argue that his trial counsel was ineffective and that the jury was not instructed on a fourth element that the offense "was effected by means of force, fraud[,] or coercion" for the count of Sex Trafficking by Force, Fraud, or Coercion. *Compare* Def. Mot. 2-8, with Mot. to Vacate or Correct Sentence 4-8, and Mot. for Resentencing & Appt. of Counsel 4-7. Because defendant presents the same claims denied in{2025 U.S. Dist. LEXIS 5} his first section 2255 motion, his motion is a successive section 2255 motion, and the motion must be certified by the Ninth Circuit before it can be heard by this Court. *United States v. Washington*, 653 F.3d 1057, 1059 (9th Cir. 2011).

A Certificate of Appealability is appropriate when a petitioner has made a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and "the issues are debatable among jurists of reason," *Allen v. Ornoski*, 435 F.3d 946, 951 (9th Cir. 2006); *see also Slack v. McDaniel*, 529 U.S.

473, 478, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) ("[W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [Certificate of Appealability] should issue . . . if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."). Jurists of reason would not find it debatable that defendant's motion constitutes an unauthorized successive section 2255 motion and that the Court lacks jurisdiction to consider the motion before it has been certified by the Ninth Circuit. Accordingly, the Court declines to issue a Certificate of Appealability.

#### CONCLUSION

For the foregoing reasons, defendant's Motion for Relief from {2025 U.S. Dist. LEXIS 6} Judgment, ECF [280], is DENIED. The Court DECLINES to issue a Certificate of Appealability.

IT IS SO ORDERED.

DATED this 22nd day of August, 2025.

/s/ Adrienne Nelson

Adrienne Nelson

United States District Judge

STATEMENT OF RELATED CASES

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CIRCUIT JUDGE M. SMITH concurring opinion:

"Of course, a defendant could have also argue that force, fraud or coercion was not actually used at any point. Had Todd made this argument he could have asked for, and would be entitled to, the appropriate jury instructions. See Conde V. Henry,, 198 f.3d, 734, 740 (9th Cir. 1999) . It is well established that a criminal defendant is entitled to adequate instructions on the defensive theory of the case". US-V. TODD 627 f.3d 329; 2010

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¶ 47A.03 Sex Trafficking (18 U.S.C. § 1591)

Instruction 47A-17 The Indictment and the Statute

To satisfy this element, the government must prove that force, fraud, or coercion, as I just defined those terms, was used, and also that the defendant knew (for conduct after Dec. 23, 2008, add: or was in reckless disregard of the fact) that it would be used, against the victim.

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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

UNITED STATES OF AMERICA

No. 3:12-cr-00178-BR

v.

INDICTMENT

CHRISTOPHER ADIN GRAHAM,

18 U.S.C. §§ 1512(b)(3), 1591(a)(1),  
1591(b)(1) and 1594(a)

Defendant.

UNDER SEAL

THE GRAND JURY CHARGES:

COUNT 1

[Sex Trafficking by Force, Fraud and Coercion]

Beginning on or about January 2010 and continuing until on or about November 2010, in the District of Oregon and elsewhere, CHRISTOPHER ADIN GRAHAM, defendant herein, did knowingly and attempt to, in and affecting interstate commerce, recruit, entice, harbor, transport, provide, obtain, and maintain by any means a person, to-wit: M.L., knowing that means of force, threats of force, fraud, and coercion would be used to cause M.L. to engage in a commercial sex act; all in violation of Title 18, United States Code, Sections 1591(a)(1), 1591(b)(1), and 1594(a).

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THE JURY INSTRUCTION IN THE TRIAL OF US. V CHRISTOPHER GRAHAM  
PROVIDED BY THE AUTHORITY OF JUDGE BROWN

Judge Brown presented 3 elements to the jury to be found by a reasonable doubt.

Jury Instructions

First, beginning on or about January 2010 and continuing until November 2010, the defendant knowingly recruited, enticed, harbored, transported, provided, or obtained Misty Losinger.

Second, the defendant did so knowing that threats of force, fraud -- pardon me. That threats of force -- force, fraud, or coercion would be used to cause Misty Losinger to engage in a commercial sex act.

And, third, that the defendant's actions were in or affecting interstate commerce.

## Preliminary Jury Instructions

1 THE JURY INSTRUCTIONS IN THE TRIAL OF US. V JOHN L JACKSON  
2 PROVIDED BY THE AUTHORITY OF JUDGE MOSMAN  
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5 For Count 4, the government must prove: First,  
6 beginning on or about August 1, 2018, and continuing through on  
7 or about September 6, 2018 the defendant either knowingly  
8 recruited, enticed, harbored, transported, provided, obtained  
9 or maintained by any means M.T. to engage in a commercial sex  
10 act or benefited financially or by receiving anything of value  
11 from participation in a venture that did so.

12 Second, the defendant knew or was in reckless  
13 disregard of the fact that by means of force, threats of force,  
14 fraud, coercion or any combination of such means would be used  
15 to cause M.T. to engage in a commercial sex act.

16 Third, the defendant's acts were in or affecting  
17 interstate or foreign commerce.

18 And fourth, the offense was effected by means of  
19 force, threats of force, fraud or coercion.  
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1 MS. BOLSTAD: (Nods head.)

2 THE COURT: You can argue that, but don't ask the  
3 witness that.

4 Okay. Folks, I want you back on Monday morning at  
5 8:30, so that we can be ready for the jury at nine o'clock. I  
6 would like, as a priority, for you to address your time to  
7 writing a joint statement of the case that I can read to the  
8 jury, and I'll probably modify to include in the written jury  
9 instructions. Which really hasn't been addressed. And that is  
10 something both sides can live with as a neutral statement of  
11 what is at issue here.

12 And then you can give further consideration,  
13 Ms. Shipsey, to the notion of narrowing the issues, or not.

14 That the defendant has pleaded not guilty is clearly  
15 the case, and he is presumed innocent. And he absolutely  
16 denies the use of any force or coercion, fraud, or any other  
17 illegal motivator to cause Ms. Losinger to engage in commercial  
18 sex acts. But if the landscape can be narrowed a bit, that, I  
19 think, will be helpful for the jury understanding both sides of  
20 the case. Which, from my mind, boils down to this: It was a  
21 willing relationship. There was no violence. You can't  
22 believe Ms. Losinger. That's the theme I've been picking up  
23 from the defense. And from the Government, not true. She's  
24 credible. She was beaten. It wasn't willing. It was  
25 compelled. Don't believe him.

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Opening Statement - By Ms. Shipsey 310

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7 At some point the case in state court is dismissed  
8 and the case is initiated in federal court, where he now sits  
9 before you.

10 He now sits before you, not charged with promoting  
11 prostitution -- for which he discussed in all of his phone  
12 calls -- but for compelling prostitution and for tampering with  
13 witnesses.

14 I'll end now by telling you now what I'll tell you at  
15 the end of the case, which I expect to be in a week.

16 Mr. Graham fully admits some bad behavior, even some criminal  
17 behavior. But as the judge recently instructed you, just less  
18 than an hour ago, you're not here to judge Mr. Graham on his  
19 past, as hard as that may be.

20 The only -- only issue that's really contested here  
21 with respect to the prostitution is whether force, fraud, or  
22 coercion were used to compel Ms. Losinger to perform commercial  
23 sex acts. Not -- not whether there was a profit. Not what  
24 Mr. Graham used that money for. But whether or not force,  
25 fraud, or coercion were used.

26 Certainly the defense position -- and you'll hear  
27 Mr. Graham talk about this -- that this was an activity that  
28 Ms. Losinger knowingly and willingly chose to do.

1           It seems giving him anything in excess of that is  
2 harsh and unneeded. And for that, we ask that your Honor  
3 impose a sentence of 15 years.

4           THE COURT: All right. Thank you.

5           Anything else?

6           MS. BOLSTAD: No, your Honor. Thank you.

7           (Pause, referring.)

8           THE COURT: You can be seated, I need a few moments.

9           Thank you.

10          (Pause, referring.)

11          THE COURT: There are a number of matters I need to  
12 address as part of the sentencing analysis here.

13          The order in which I address them is not intended to  
14 reflect a sense that one is more important than the other.  
15 There are just many things that I need to note so that the  
16 record is clear that I have considered the arguments the  
17 parties have presented.

18          First, with respect to Counts 2 and 3, the  
19 presentence report reflects that they are being grouped with  
20 respect to Count 1 for purposes of the guideline analysis  
21 because they're seen as part of the same transaction and  
22 occurrence.

23          On the other hand, for purposes of actual sentencing,  
24 I view the conduct that amounted to obstruction as serious and  
25 deserving of a sentencing recognition separate and apart from

1 the primary crime of conviction because the act of tampering  
2 with witnesses is -- as the Government has argued today and  
3 emphasized -- something that threatens the fundamental fairness  
4 of the judicial process itself. And the interests at stake in  
5 prosecutions to vindicate that interest are, I think, separate  
6 and apart from the other very important issues the Court must  
7 take into account with respect to the first offense.

8           There's been so much discussion this afternoon about  
9 what Mr. Graham did or didn't do. I wanted to come back to the  
10 primary offense.

11           Sex Trafficking by Force, Fraud, or Coercion. I  
12 instructed the jury that the elements of that offense were  
13 three.

14           First, that beginning on or about January 10 -- 2010,  
15 and continuing until November 2010, the defendant knowingly  
16 recruited, enticed, harbored, transported, provided, or  
17 obtained Misty Losinger.

18           Second, the defendant did so knowing that threats of  
19 force, force, fraud, or coercion, would be used to cause Misty  
20 Losinger to engage in a commercial sex act.

21           And, third, the defendant's actions were in or  
22 affecting interstate commerce.

23           It seems to me that the thrust of the defendant's  
24 presentation is to deny the second element of this offense that  
25 the jury clearly did find was true beyond any reasonable doubt.

1 The defendant is admitting in letters to me and in his  
2 presentations today that he engaged Misty Losinger in  
3 prostitution, but he is refusing to acknowledge the primary  
4 element of this offense, which is that he did that knowing the  
5 threats of force, force, fraud, or coercion would be used to  
6 cause her to engage in commercial sex activity.

7 This case was not tried on a fraud theory by any  
8 means. I instructed the jury that coercion meant threats of  
9 serious harm or physical restraint against any person; or any  
10 scheme, plan, or pattern intended to cause a person to believe  
11 that failure to perform an act would result in serious harm to  
12 or physical restraint against any person; or that the abuse or  
13 threatened abuse -- or it amounted to abuse or threatened abuse  
14 of law or the legal process.

15 There isn't any doubt in my mind that the jury found  
16 beyond a reasonable doubt that the defendant used force and the  
17 threats of force against -- against Misty Losinger. This is  
18 not a case about a fraudulent enticement to engage in  
19 commercial sex activity. The entire trial was focused on this  
20 element that the defendant clearly did challenge and his  
21 capable counsel tried to undermine at every turn.

22 It's not just that Mr. Graham does not accept  
23 responsibility. He is ignoring the fundamental thrust of the  
24 charge against him and the fact that he was found guilty of it.

25 Now, that acceptance of responsibility is taken into

1 account in the guideline range calculation.

2 He's at Level 38. And if he had accepted  
3 responsibility in some way, he would be at Level 35. And just  
4 for comparison purposes, 35, Criminal History Category 3 is 210  
5 to 262 months; whereas his current guideline range is 292 to  
6 365 months.

7 So the guidelines themselves take into account the  
8 fact that he still speaks eloquently and passionately and in  
9 his own interests, and ignores the primary thrust of the crime  
10 of conviction.

11 So I have a guideline range of a little more than 24  
12 years and a little more than 30 years as the range recommended  
13 by the Sentencing Commission; taking into account the  
14 seriousness of this kind of crime, adjusting it upward based on  
15 the two adjustments we described.

16 And what I need to consider in toto is whether that  
17 advisory prediction is enough but not too much. Whether it's  
18 too much, as the defendant asserts.

19 The argument that I should be focusing on a sentence  
20 that would return the defendant to the community misses the  
21 point. This is not about trying to determine what's going to  
22 be easiest on the defendant's family. That's not a statutory  
23 factor here.

24 I'm required to take into account what's enough to  
25 punish Mr. Graham, to protect the community from someone who

1 already spent ten years in prison for a not dissimilar crime  
2 and, while on supervision for that very crime, engaged in this  
3 criminal conduct.

4 I agree with the Government's emphasis that that is  
5 an extraordinary aggravating factor here.

6 Now, his criminal history gives him an upcharge of  
7 two points because he did commit this crime while on  
8 supervision. But it is telling, with respect to predicting the  
9 future, how Mr. Graham responded in the past when he presumably  
10 had at least some supervisory resources available to him  
11 through his state post-prison supervision, and yet he puts  
12 himself in this situation where he commits the Count 1 crime  
13 and then these witness tampering charges. It's -- defies  
14 reason to try to rationalize what he did and how he got here.

15 There isn't any doubt that Mr. Graham is a very  
16 intelligent and sometimes charming person. He persuaded the  
17 Home Depot to take him in as a salesperson to market carpet  
18 cleaning services. He was doing modeling. He was presenting  
19 himself in a favorable light around the community. And he  
20 could have continued doing just that.

21 I think the Government's right to emphasize that his  
22 interest in this sex trafficking crime was driven by greed. He  
23 had a taste for the better life, he wanted it, and he wasn't  
24 earning it in the way that he wanted, fast enough.

25 He's a person who has the capacity to have made much

1 of his life, and he didn't. And now, as unfortunate as it is,  
2 he's looking at a prison term that is going to take him out of  
3 commission for much of the rest of his adult life. He's  
4 44-years-old. A sentence of just the mandatory minimum takes  
5 him to the end of his 50s. A sentence that the Government  
6 wants takes him to the end of his 70s.

7 But, as I've said, the focus is not what -- what's  
8 easiest for Mr. Graham, coming out at the end, but what's  
9 required here.

10 This crime is extremely serious, in its own right,  
11 committed without any of the aggravating factors that exist  
12 here. It's an extremely serious crime when it's committed with  
13 one victim, one time.

14 And when it's done by a person who, like Mr. Graham,  
15 already has been incarcerated and punished for doing the very  
16 thing, it leaves a sentencing judge with little confidence that  
17 another ten-year-or-so sentence would make any difference to  
18 him. It is not as if he went for years and years and years and  
19 slipped up and fell into an old pattern. It was a very rapid  
20 descent into this predatory behavior.

21 It's not necessary for me to resolve as a matter of  
22 fact every testimonial allegation that Ms. Losinger made  
23 against Mr. Graham about violence. I am satisfied certainly by  
24 a preponderance of the evidence, by clear and convincing  
25 evidence indeed, that there was a component of physical force

1 in their relationship. And when it wasn't physical, it surely  
2 was coercive.

3 That it was happening in the context of recidivist  
4 behavior is alarming. It requires the Court to revisit all of  
5 the notions of what's enough to protect the community.  
6 Because, in the end, that is the beginning. That's the  
7 first -- first consideration the Court needs to weigh.

8 I want to emphasize that the defendant's decision to  
9 go to trial plays no part in my sentencing decision today. He  
10 had an absolute right to put the Government to its proof, and  
11 he did. No more, no less. He's not going to be sentenced to a  
12 longer prison term because he exercised his right to trial;  
13 which, in turn, required Ms. Losinger to come to this public  
14 courtroom and recount, subject to cross-examination, all of  
15 what she did.

16 But that's, unfortunately from the perspective of a  
17 crime victim, what is required for our system of due process to  
18 be exercised.

19 It clearly was a significant burden on her. I can  
20 see from her presentation today, compared to how she presented  
21 at trial, that she seems to be doing well. And I guess that's  
22 a tribute to the human spirit and the ability to recover from  
23 even grievous harm.

24 But I do not want my remarks to be mistaken as some  
25 kind of impression that because the Government mentioned the

1 defendant choosing to go to trial as some kind of aggravating  
2 factor that I view it as such. I don't. It is what it is.  
3 And the failure to accept responsibility, as already noted, has  
4 been taken into account in the guideline calculation.

5 I am by no means able to resolve the social debate  
6 about how to put this behavior to an end. Our Congress has  
7 spoken clearly that a person convicted of the Count 1 charge  
8 here must serve a mandatory minimum sentence of 15 years.  
9 That's any person convicted of this charge; not a person who's  
10 done ten years for a comparable charge and was on supervision  
11 for that. So I don't believe the mandatory minimum sentence is  
12 nearly enough, nearly sufficient to accomplish the statutory  
13 purposes in this context.

14 On the other hand, a 35-year sentence is significant.  
15 And I understand the Government is arguing it's unprecedented  
16 by way of comparison here in our district because no one else  
17 has done what Mr. Graham has done in this context. But that  
18 argument only goes so far.

19 All right. Mr. Graham, would you stand, please.

20 THE DEFENDANT: Yes.

21 THE COURT: I am going to impose a sentence of 25  
22 years on Count 1, which is below the low end of the guideline  
23 range. But a sentence that I believe is warranted in light of  
24 the seriousness of your conduct, in light of the fact that you  
25 were on supervision for very similar criminal behavior, and

1 because it's obvious that even a ten-year sentence with  
2 supervision was not enough to persuade you not to engage in  
3 this conduct again.

4 On each of Counts 2 and 3, I'm imposing five years.  
5 Counts 2 and 3 will run concurrent to each other but  
6 consecutive to Count 1, for a total of 30 months [sic].

7 The five years for the Witness Tampering charges, I  
8 believe, are warranted because that is, as I've already noted,  
9 a separate and very serious breach of the duty of a witness, of  
10 a party in a case, and one that threatens the -- the very  
11 fairness of our system of justice.

12 And so with those -- with that imposition, you will  
13 have a total of 30 years. The five to run consecutive to Count  
14 1, 25 years. And Counts 2 and 3 to run concurrent to each  
15 other.

16 Do you understand?

17 THE DEFENDANT: Yes, I do, your Honor. Yes, I do.

18 THE COURT: On each of those three counts, there is a  
19 \$100 statutory assessment.

20 On Count 1, I'm imposing a period of lifetime  
21 supervised release because I'm not persuaded that any term less  
22 than that will be enough for the Court to ensure that you obey  
23 the law when you are back in the community.

24 With respects to Count 2 and 3, periods of  
25 supervision will be five years, but they'll be running along

## Colloquy

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1           In order to have been found guilty under the  
2 applicable statute, which is ORS 167.017, the trier of fact had  
3 to find the defendant knowingly used force or intimidation to  
4 compel Ms. Lee to engage in prostitution.

5           Because the defendant at least twice, then, knowingly  
6 used force or intimidation to compel Ms. Lee to engage in  
7 prostitution in 1999, the trier of fact could find in this case  
8 that the defendant knew in 2010, when he allegedly engaged  
9 Ms. Losinger to engage in prostitution, that he would use the  
10 same pattern of force or intimidation with Ms. Losinger.  
11 That's exactly the logic the Court applied in the **Todd** case.

12           The trier of fact in the case at issue -- the jury --  
13 could find that the prior behaviors of the defendant in 1999,  
14 in compelling prostitution, show that in 2010, when he's  
15 engaging Ms. Losinger, he has the same forward-looking mens rea  
16 in mind.

17           The underlying conduct -- which is to say the prior  
18 acts of compelling another person by force or intimidation to  
19 engage in prostitution -- is relevant. If the defendant  
20 concedes, as a matter of fact, that it was determined in 1999  
21 that he in fact engaged knowingly with the use of force or  
22 intimidation to compel Ms. Lee to engage in prostitution, it  
23 may be possible to refer to those behaviors without noting that  
24 he was also found guilty of that offense.

25           If the defendant doesn't concede that he engaged in

## Colloquy

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1 conduct in 1999, that is the knowing use of intimidation or  
2 force to compel another to engage in prostitution, then the  
3 only way to establish in the jury's presence that that was the  
4 defendant's conduct then would be through introducing the  
5 affirmative act of the conviction.

6 The underlying relevance is established in **Todd**. The  
7 primary argument the defense has to it is the gap in time  
8 between the 1999 conduct and 2010.

9 Of course, the most -- the majority of the time  
10 between 1999 and 2010, the -- the primary way to account for  
11 the difference in time between 1999 and 2010 is to note that  
12 the defendant was in fact incarcerated. So he could not have  
13 been engaging in the same M.O. from the time he was convicted  
14 in 1999 until he was released in about 2008.

15 From 2008 to 2010, the evidence is equivocal about  
16 the extent to which the defendant would or wouldn't be engaging  
17 in pimping activities. So I don't find persuasive at all the  
18 argument that the 1999 conduct is too remote in time to be  
19 relevant to a 2010 state of mind. The evidence is relevant.  
20 The question then is whether it is unfairly prejudicial.

21 For the same reasons the Court admitted the evidence  
22 in the **Todd** case, I don't find it is unfairly prejudicial in  
23 this case.

24 So the Government is going to be able to put before  
25 the jury the fact that, in 1999, the defendant knowingly used

## Colloquy

75

1 force or intimidation on at least -- on two occasions. Can't  
2 say at least, because we don't know if there were more or less.  
3 But on two occasions to compel another person to engage in  
4 prostitution. And they may use it for the limited purpose of  
5 reflecting on the defendant's state of mind in 2010.

6           If the defendant wants to keep out, for this purpose,  
7 the purpose of knowledge, the fact that he was found guilty of  
8 state criminal law violations, then I think that's fair under  
9 Rule 403. To call it a conviction adds a piece of a risk of  
10 unfair use by the jury of the evidence. The -- the probative  
11 value is the fact of the prior behaviors.

12           So at the defendant's -- if the defendant admits --  
13 that it stipulates, so that we don't even have to fuss with a  
14 witness about the underlying foundation -- if the defendant  
15 stipulates that in 1999 he knowingly used force or intimidation  
16 to compel Angie Lee to engage in prostitution on two occasions,  
17 it is not necessary for the Government to call that a criminal  
18 conviction for the purpose asserted here; the purpose being to  
19 prove knowledge, as it's required to do.

20           If the defendant does not agree to that, then the  
21 establishment of that undisputed fact by conviction has to --  
22 has to come by way of an instruction or the explanation that  
23 there was a conviction and what the elements are.

24           If the defendant testifies, a different analysis  
25 applies. And that is whether the fact of the 1999 five

## 1. PROMOTING A COMMERCIAL SEX ACT OR PROHIBITED SEXUAL CONDUCT

Historical Note: Effective November 1, 1987. Amended effective November 1, 2000 (see Appendix C, amendment 592); November 1, 2002 (see Appendix C, amendment 641).

### §2G1.1. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor

(a) Base Offense Level:

- (1) 34, if the offense of conviction is 18 U.S.C. § 1591(b)(1); or
- (2) 14, otherwise.

(b) Specific Offense Characteristic

- (1) If (A) subsection (a)(2) applies; and (B) the offense involved fraud or coercion, increase by 4 levels.

(c) Cross Reference

- (1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) or 18

U.S.C. § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

(d) Special Instruction

- (1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the promoting of a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

*Commentary Statutory Provisions: 8 U.S.C. § 1328 (only if the offense involved a victim other than a minor); 18*

*U.S.C. §§ 1591 (only if the offense involved a victim other than a minor), 2421 (only if the offense involved a victim other than a minor), 2422(a) (only if the offense involved a victim other than a minor).*

Application Notes:

- 1. Definitions.—For purposes of this guideline:

"Commercial sex act" has the meaning given that term in 18 U.S.C. § 1591(e)(3).

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"Promoting a commercial sex act" means persuading, inducing, enticing, or coercing a person to engage in a commercial sex act, or to travel to engage in, a commercial sex act.

"Victim" means a person transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct, whether or not the person consented to the commercial sex act or prohibited sexual conduct. Accordingly, "victim" may include an undercover law enforcement officer.

2. Application of Subsection (b)(1).—Subsection (b)(1) provides an enhancement for fraud or coercion that occurs as part of the offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. *See* Chapter Five, Part K (Departures). For purposes of subsection (b)(1), "coercion" includes any form of conduct that negates the voluntariness of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. This characteristic generally will not apply if the drug or alcohol was voluntarily taken.

3. Application of Chapter Three Adjustment.—For the purposes of §3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim.

4. Application of Subsection (c)(1).—

(A) Conduct Described in 18 U.S.C. § 2241(a) or (b).—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person by: (i) using force against the victim; (ii) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the victim unconscious; or

(iv) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.

(B) Conduct Described in 18 U.S.C. § 2242.—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2242 is: (i) engaging in, or causing another person to engage in, a sexual act with

*another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (ii) engaging in, or causing another person to engage in, a sexual act with a victim who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.*

5. Special Instruction at Subsection (d)(1).—*For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.*

6. Upward Departure Provision.—*If the offense involved more than ten victims, an upward departure may be warranted.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 157 and 158); November 1, 1990 (see Appendix C, amendment 322); November 1, 1996 (see Appendix C, amendment 538); November 1, 2000 (see Appendix C, amendment 592); May 1, 2001 (see Appendix C, amendment 612); November 1, 2001 (see Appendix C, amendment 627); November 1, 2002 (see Appendix C, amendment 641); November 1, 2004 (see Appendix C, amendment 664); November 1, 2007 (see Appendix C, amendment 701); November 1, 2009 (see Appendix C, amendment 737).

## Concur

Concur by: M. SMITH

M. SMITH, Circuit Judge, concurring:

I join in full the panel's amended opinion affirming Todd's convictions and sentence for sex trafficking in violation of 18 U.S.C. § 1591, and conspiracy to engage in sex trafficking in violation of 18 U.S.C. § 371. I write separately only to explain my decision to join in the amended opinion. We previously held, *sua sponte*, that Todd's sentence violated *United States v. Booker*, 543 U.S. 220, 236, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), because the jury was not asked whether "the offense was effected by force, fraud, or coercion." See *United States v. Todd*, 584 F.3d 788, 793-94 (9th Cir. 2009). Having reconsidered the issue in light of the government's petition for rehearing, I have changed my perspective. 1

As I read 18 U.S.C. § 1591, there {2010 U.S. App. LEXIS 15} is no "hole in the statute." *Contra Todd*, 584 F.3d at 793. Rather, 18 U.S.C. § 1591(a) covers only those instances of sex trafficking in which force, fraud, or coercion was actually used, or where the trafficking involved children under the age of 14 or between ages 14 and 18. Subsection (b)(1) simply establishes the punishment for those offenses. Where a defendant engages in sex trafficking without the use of force, fraud, or coercion, or where children are not involved, his conduct is criminalized by a different set of statutes. This reading is compelled both by a plain reading of the statute and by its legislative history.

Title 18, section 1591 is titled "Sex trafficking of children or by force, fraud, or coercion." "Although statutory titles are not part of the legislation, they may be instructive in putting the statute in context." *Singh v. Gonzales*, 499 F.3d 969, 977 (9th Cir. 2007). By using this title, Congress intended to criminalize two forms of sex trafficking it considered "severe forms of trafficking in persons": sex trafficking where the victim is under 18 years of age, and sex trafficking in which the act is induced by force, fraud, or coercion. See Pub. L. No. 106-386, 114 Stat. 1464, 1466, 1470 (2000) {2010 U.S. App. LEXIS 16} (explaining that in passing the Trafficking Victims Protection Act of 2000, which enacted 18 U.S.C. § 1591, Congress was especially concerned {627 F.3d 336} with these two "severe forms of trafficking in persons").

Subsection (a) bears this out. A prosecution may be brought under subsection (a) where a person "recruits, entices, harbors, transports, provides, or obtains by any means a person," "knowing" either that: (1) "force, fraud, or coercion . . . will be used to cause the person to engage in a commercial sex act," or (2) the victim "has not attained the age of 18 years and will be caused to engage in a commercial sex act." 18 U.S.C. § 1591(a) (emphasis added).

The phrase "will be used" in subsection (a) does not leave open the possibility that force, fraud, or coercion was not eventually used in committing the offense. Rather, it simply allows for a conviction even where the defendant did not personally use force, fraud, or coercion. In other words, a defendant will only be charged with violating the statute if force, fraud, or coercion was actually used at some point in commission of the offense. By using the phrase "will be used" as opposed to something more speculative such as "could be used" {2010 U.S. App. LEXIS 17} or "might be used," the statute describes definitive conduct.

Had force, fraud, or coercion not actually been used to cause the victim to engage in a commercial sex act, Todd could not have been prosecuted under 18 U.S.C. § 1591. The appropriate statutes criminalizing sex trafficking not involving the use of force, fraud, or coercion are 18 U.S.C. §§ 2421 and 2422. Section 2421 proscribes "knowingly transport[ing] any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." Unlike the minimum 15-year term of imprisonment under section 1591, section 2421 carries a 10-year maximum. Section 2422 criminalizes "knowingly persuad[ing], induc[ing], entic[ing],

or coerc[ing] any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." 2 It carries a 20-year maximum sentence. The government's decision to prosecute the case is a backwards-looking exercise. The use of force, fraud, or coercion to cause a victim to engage in a commercial sex act brings the case into the realm of section 1591, and the government must then ask whether the defendant "knew" that force, fraud, or coercion would be used. The only question, and that which Todd argued in his appeal, is whether the defendant knew at the time he committed the offense that force, fraud, or coercion would be used. 3 As the panel members now agree, Todd's knowledge that force, {627 F.3d 337} fraud, or coercion would actually be used "does not require knowledge in the sense of {2010 U.S. App. LEXIS 19}certainty as to a future act." Amended Maj. Op. at 18515. Based on an established pattern of conduct, Todd knew that force, fraud, or coercion would be used to cause his victims to engage in commercial sex acts.

Under this reading of section 1591(a), there is no gap in the statute. Section 1591(b) provides that "if the offense was effected by force, fraud, or coercion" the defendant is to be sentenced to a mandatory 15-year minimum prison term. So too if no force, fraud, or coercion was involved but the victim is under 14. If no force, fraud, or coercion was involved, but the victim is between 14 and 18, the defendant is to be sentenced to no less than 10 years imprisonment. 4 If a jury finds that the defendant knew "force, fraud, or coercion" would be used to cause a person to engage {2010 U.S. App. LEXIS 20}in a commercial sex act, it necessarily finds that "the offense was effected by means of force, fraud, or coercion." Indeed, a defendant who satisfies the elements of subsection (a) "shall be punished as provided in subsection (b)." 18 U.S.C. § 1591(a) (emphasis added). This reading comports with Congress's desire that the "sentencing provision of section 1591(b). . . correspond fully with the language in the substantive offense provision in section 1591(a)." H.R. Rep. No. 108-264, pt. 1 (2003) (emphasis added).

The record in this case shows that Todd in fact used such "force, fraud, or coercion" to commit the offense. Whitney T. testified that once in May 2007, Todd demanded she perform oral sex on him. After she refused, Todd grabbed her by her throat, threw her backwards over the bed, and threatened to hit her with a bottle over her head while "screaming at the top of his lungs." On another occasion, Todd woke Whitney {2010 U.S. App. LEXIS 21}T. up in the middle of the night and began screaming at her for talking to another pimp. Todd punched her in the back, then grabbed her by the throat and threw her up against the wall while calling her an "out-of-pocket bitch." On a third occasion, Todd beat her because she met with a black male friend of hers. According to Todd, all black men are potential pimps and so Todd forbade Whitney T. from any contact with them. After Whitney T. violated this rule, Todd choked her and punched her in the chest until she was black and blue.

Because of this evidence, all of which the jury heard, the government prosecuted and the jury convicted Todd of violating section 1591(a). Indeed, the jury was asked whether Todd knew that "force, fraud, or coercion *would be* used to cause [Whitney T.] to engage in a commercial sex act." Amended Maj. Op. at 18515 (emphasis added). By finding that Todd knew that force, fraud, or coercion *would be* used, the jury necessarily found that force, fraud, or coercion was actually used. 5

#### Footnotes

1

Although the government's petition gave me the opportunity to reconsider my reading of 18 U.S.C. § 1591, I read the statute differently than does the government.

2

Though both sections 1591 and 2422 include a "coercion" element, {2010 U.S. App. LEXIS 18}one can imagine a situation in which the defendant does not himself coerce the victim to engage in a commercial sex act, yet coercion is eventually used by another member of the defendant's sex trafficking organization. Indeed, in enacting section 1591 Congress found that "[t]rafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises." 114 Stat. at 1467. Such conduct would be prosecuted under section 1591 but not section 2422, since section 2422 requires the defendant to have personally coerced the victim.

3

Of course, a defendant could also argue that force, fraud, or coercion was not actually used at any point. Had Todd made this argument, he could have asked for, and would have been entitled to, the appropriate jury instruction. See *Conde v. Henry*, 198 F.3d 734, 740 (9th Cir. 1999) ("It is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case.").

4

With respect to children, section 1591 covers a wider range of conduct than 18 U.S.C. § 2423, which makes it a crime to knowingly transport a minor with the intent that the minor engage in prostitution. Again, section 1591 targets larger sex trafficking organizations.

5

The example Judge Noonan provides in the panel opinion illustrates the point. A judge knows that his law clerks "will use Westlaw" based on the judge having observed the work of previous {2010 U.S. App. LEXIS 22}law clerks over the years. At the end of one particular law clerk's term, the judge's judicial assistant might be asked whether the judge knew, at the time he hired the law clerk, that the law clerk would use Westlaw during his clerkship. If the law clerk never used Westlaw during his clerkship, the judicial assistant would be forced to answer "no" because answering "yes" would be contrary to the facts. The judge could not know that the law clerk "would use" Westlaw if the law clerk never actually used Westlaw.

1  
2           **A.    Rejection of the June 18, 2013, Plea Offer**

3           Defendant asserts trial counsel rendered ineffective  
4 assistance when they provided Defendant with "poorly considered  
5 advice," which caused Defendant to reject the government's  
6 June 18, 2013, plea offer.

7           Defendant concedes in his Declaration that Shipsey "did  
8 urge [him] to accept the 139-month offer," but he rejected it  
9 because he

10                           was laboring under the erroneous belief, which I  
11                           developed based on my communications with my  
12                           attorneys, that to prove a violation of 18 U.S.C.  
13                           § 1591 the government would have to prove beyond a  
14                           reasonable doubt both that force was actually used  
15                           against the victim and that serious injury  
16                           resulted. I did not believe, based on my  
17                           discussions of the evidence with my attorneys,  
18                           that the government would be able to prove that I  
19                           had actually used force against Misty Losinger in  
20                           order to get her to work as a prostitute. My  
21                           attorneys did not adequately explain the  
22                           significance of the *United States v. Todd* decision  
23                           interpreting 18 U.S.C. § 1591 to me. They also  
24                           did not adequately explain to me how my previous  
25                           state court conviction would be used by the  
26                           government to prove my *mens rea* and pattern of  
27                           conduct in this trial.  
28

### § 3A1.3. Restraint of Victim

If a victim was physically restrained in the course of the offense, increase by 2 levels.

Commentary

*Application Notes:*

1. "Physically restrained" is defined in the Commentary to § 1B1.1 (Application Instructions).
2. Do not apply this adjustment where the offense guideline specifically incorporates this factor, or where the unlawful restraint of a victim is an element of the offense itself (e.g., this adjustment does not apply to offenses covered by § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint)).
3. If the restraint was sufficiently egregious, an upward departure may be warranted. See § 5K2.4 (Abduction or Unlawful Restraint).

**§ 1591. Sex trafficking of children or by force, fraud, or coercion**

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 25 years, or both.

(e) In this section:

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1

(1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term “coercion” means—

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term “commercial sex act” means any sex act, on account of which anything of value is given to or received by any person.

(4) The term “participation in a venture” means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).

(5) The term “serious harm” means 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 commercial sexual activity in order to avoid incurring that harm.

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