ORAL ARGUMENT REQUESTED
Nos. 06-3125, 07-3012, 07-3040, & 07-3179

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ARLAN DEAN KAUFMAN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
THE HONORABLE MONTI L. BELOT

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF RELATED CASES

United States v. *Linda Kaufman*, Nos. 06-3099, 06-3124, and 07-3151

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 06-3125, 07-3012, 07-3040, & 07-3179

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ARLAN DEAN KAUFMAN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF THE ISSUES

1. The district court did not violate defendants' Confrontation Clause rights when it ordered defendants to avoid eye contact with the victim-witnesses during the trial.

2. The district court correctly instructed the jury on the meaning of "labor" and "services" for the involuntary servitude and forced labor counts (Counts 2, 3, and 5).

3. There is sufficient evidence that defendants compelled their victims within the meaning of 18 U.S.C. 1584 for Count 6.

STATEMENT OF THE CASE

On June 15, 2005, the Grand Jury issued a 34-Count Second Superseding Indictment, charging both defendants as follows: conspiracy to commit forced labor, involuntary servitude, health care fraud, and obstruction of justice in violation of 18 U.S.C. 371 (Count 1); forced labor in violation of 18 U.S.C. 1589 as to victims Mary H.[1] and Barbara (Counts 2 and 3); involuntary servitude in violation of 18 U.S.C. 1584 as to Mary and Barbara (Counts 4 and 5); and involuntary servitude in violation of 18 U.S.C. 1584 as to victims James, Kevin, and Jonathan (Count 6). Doc. 121.[2] Defendants were also each charged with violating 18 U.S.C. 1347 (Counts 7-22, health care fraud), 18 U.S.C. 1341 (Counts 23-31, mail fraud), 18 U.S.C. 1035 (Count 32, making a false writing to Medicare),

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[1] Two Marys lived at Kaufman House, but because this brief refers to only Mary H., all subsequent references are to "Mary."

[2] This brief uses the following abbreviations: "Tr.__" refers to the page number of the trial transcript. "Doc. __, at __" refers to the document number on the district court docket sheet, followed by a page number of the document, if applicable. The location of these documents can be found in the index with the record. "A.Br. ___" refers to defendant Arlan Kaufman's opening brief. "GX __" refers to the government's trial exhibits. "DX__" refers to the defendants' trial exhibits. "Clip __" refers to excerpts of the video exhibits played at trial.

18 U.S.C. 1516 (Count 33, obstructing a federal audit), and 18 U.S.C. 982 (Count 34, criminal forfeiture). Doc. 121.

After a five-week trial, on November 7, 2005, the jury found defendant Arlan Kaufman guilty on Counts 1-27, 29-30, 32, and 33. Doc. 311; Tr. 3686-3693,[3] and Linda Kaufman guilty on the same counts except Count 32. Doc. 311; Tr. 3686-3693.[4] The jury also found that defendants should forfeit $85,187.67 as a money judgment for the fraud crimes, and three homes and their farm as facilitating property. Doc. 311; Tr. 3731-3736.

On January 23, 2006, the district court sentenced defendants. Doc. 482. It sentenced Arlan Kaufman to a term of 360 months. Doc. 482, at 155-156; Doc. 352. It sentenced him to a term of 240 months for each count of involuntary servitude and forced labor (Counts 2-6), to run concurrently with each other, an additional term of 120 months for each of the health care fraud counts (Counts 7-

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[3] The transcript is consecutively numbered and divided into the following volumes: Vol. 1 (Tr. 1-331); Vol. 2 (Tr. 332-800); Vol. 3 (Tr. 801-1211); Vol. 4 (Tr. 1212-1585); Vol. 5 (Tr. 1586-1952); Vol. 6 (Tr. 1953-2397); Vol. 7 (Tr. 2398-2798); Vol. 8 (Tr. 2799-3179); Vol. 9 (Tr. 3180-3517); Vol. 10 (Tr. 3518-3739). The trial transcript is found at volumes 11-21 of the record. Each of those record volumes corresponds to the transcript volumes (*e.g.*, Vol. 3 of the trial transcript is Vol. 13 of the record).

[4] Before the case went to the jury, the government dismissed Count 31, Tr. 2381, and the court granted defendants' Rule 29 motion on Count 28. Tr. 2854.

22), to run concurrently with each other, and a term of 60 months for each of the remaining counts (Counts 1, 23-27, 29-30, 32-33), to run concurrently with the other counts. Doc. 352. The court sentenced Linda Kaufman to a term of 84 months, for each count of involuntary servitude, forced labor, and health care fraud (Counts 2-22), to run concurrently with each other, and to a term of 60 months for each remaining count (Counts 1, 23-27, 29-30, 33-34), to run concurrently with Counts 2-22. Doc. 353.

STATEMENT OF THE FACTS

For over 20 years, from 1981 through their arrest in October 2004, defendants Arlan and Linda Kaufman engaged in a conspiracy to commit forced labor, involuntary servitude, health care fraud, and obstruction of justice.[5] Dr. Kaufman, a licensed clinical social worker, GX50J, and Mrs. Kaufman, a registered nurse, Tr. 529-533, operated Kaufman House Residential Care

[5] This brief incorporates by reference the government's factual statement in its briefs in the related cases involving defendant Linda Kaufman numbered 06-3099, 06-3124, and 07-3151. Fed. R. App. P. 28(I).

Treatment Center (Kaufman House),[6] an unlicensed group home for severely and chronically mentally ill adults, Tr. 2990-3007, 1960.

Over 20 mentally ill individuals lived in poor conditions[7] at Kaufman House. Defendants made their living by operating the group home and providing "therapy" that was charged to the residents, their families, Medicare and private insurance. Tr. 285, 313, 325, 398, 1037-1053, 2162-2163, 2328-2335; GX6F; GX6G; GX6J. This "therapy" included forced nudity and group sexual activities, including residents' masturbating and touching and shaving each other's genitals, as well as Dr. Kaufman's touching their genitals. Tr. 1748; see, *e.g.*, GX117C, Pt2 7:24-14:47; GX108C, Pt3, 16:27-21:25; GX104C, Pt3, 1:34. The so-called "therapy"

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[6] Defendants operated Kaufman House at two residences, 321 West Seventh Street (Seventh Street House), 119 West Eighth Street (Eighth Street House), and a third house, 413 West Broadway Street, which served as an office and meeting place. Tr. 143, 225 227-229, 559, 572, 2710, 3018. Defendants lived at a separate residence. Tr. 231. Defendants also owned a farm outside of Potwin, Kansas in Butler County. Tr. 72; GX3B-3D.

[7] See, *e.g.*, Tr. 1632-1641; GX306, 306B-D, 306J. The Seventh Street House was dirty, bug-infested, and "run down." Tr. 833, 1627-1631. In the kitchen, there were cockroaches, and electrical current from the refrigerator shocked residents. Tr. 553. Defendants did not replace the air-conditioning after it failed in the Eighth Street residence. Tr. 553. An upstairs toilet leaked and dripped into the dining room below. Tr. 833. There were periods during which there was only one working toilet and no working showers or baths. Tr. 1627-1631. The Seventh Street House's functioning shower was in the basement next to a rotted wall. Tr. 1640; GX306-01.

also included farm work. Tr. 92-93, 109-110. None of these activities was part of any legitimate therapy. Tr. 704-705, 736, 738, 778, 1321, 1335, 1342, 1364.[8] Defendants videotaped much of the nudity, sexual activities, and farm work and retained the "movies" for their benefit. Tr. 308-309, 1705.

The residents named in Counts 2-6 were seriously mentally ill and unable to care for themselves. Tr. 726-728, 2583. Their mental condition impaired their thinking and rendered them passive and vulnerable to manipulation and control. Tr. 253, 712, 724-725, 1596, 2335, 2337, 2576; GX47. Defendants forced the residents to engage in sexual activities and farm work by means of force and coercion that included use of a stun gun, choking, isolation in a seclusion room for long periods of time, threats regarding unpaid debts, and placement in mental institutions, nursing homes and other facilities, which would be more restrictive of the residents' freedom of movement.

When defendants' scheme was finally exposed, investigators seized over 40 videotapes from defendants' master bedroom depicting the residents in the nude and engaged in sexual activities. Tr. 1218. Dr. Kaufman was the "director" and

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[8] Because defendants have not challenged their convictions for health care fraud (Counts 7-22), mail fraud (Counts 23-30), making a false writing (Count 32), obstructing a federal audit (Count 33), and criminal forfeiture (Count 34), this statement does not recite the facts underlying those convictions.

the mentally ill residents were the performers in what amounted to a library of sexually explicit movies.

1. Videotaping Sexual Activities And Nudity

Beginning in the 1980s, defendants held regular sessions of what they called the "sexuality group," and residents were required to attend and be nude. Tr. 1646, 1653, 1659, 1752, 1874; GX359. Residents involved in the "sexuality group" included those named in Counts 2-6, James, Jonathan, Barbara, Mary, and Kevin, as well as Gerald, Tr. 1846 (Kevin's testimony), Tom and Eldon, GX114B, Pt2 (videotape); GX117C, Pt1, 30:50, 40:30 (videotape).

In the sexuality group and at other times, defendants forced residents to participate in sexual activity, including masturbation, GX108C, Pt2, 31:28; GX111B, Pt3, 32:10-36:00; GX117C, Pt2, 7:24-14:47; Clip 117-4; GX119B, Pt1, 3:38, 4:57, nude massage, GX119B, Pt1, 00:14; Clip 119-1; Tr. 1224, 1233-1236; GX110B, Pt3, 35:37; GX 112C, Pt1, 00:06; GX112C, Pt3, 48:06; GX113C, Pt2, 21:03; GX122C, Pt1, 32:35, genital touching, Tr. 1756-1757; GX117C, Pt2, 26:58; Clip 117-6; Tr. 345; shaving each other's genitals, Tr. 1224, 1238-1239; GX108C, Pt3, 16:27-21:25; GX112C, Pt1, 8:04, 10:00; GX113C, Pt3, 29:23, 32:00; GX119B, Pt1, 8:16; GX124B, Pt1, 5:18; GX124B, Pt2, 4:04; GX124B, Pt3, 00:01; GX125C, Pt2, 24:32; GX133B, Pt1, 32:11, oral sex, Tr. 1758-1759, 1863;

GX107C, Pt1, 7:02, 16:38-16:58; GX 107C, Pt2, 25:23-25:53, and nude hula-hooping, GX112C, Pt1, 16:54-20:59. On many occasions, defendant Arlan Kaufman touched the residents' genitals. Tr. 1846-1847, 1755-1757, 2713; GX104C, Pt3, 1:34; Clip 104-2; GX117C, Pt2, 27:35; GX124B, Pt1, 4:51; GX116B, Pt3, 28:31; Tr. 3445. He touched Kevin's genitals 30-40 times, and Mary's and Barbara's genitals hundreds of times. Tr. 1847. The victims named in Counts 2-5, Mary and Barbara, were each compelled to perform dozens of sexual acts, which Dr. Kaufman videotaped.[9]

Agent Philip McManigal, of the Kansas Attorney General's Office, summarized the contents of the tapes. Almost all of the 48 videos included nudity. Tr. 1217-1218. Fourteen tapes depict residents masturbating, some with multiple scenes of masturbation. Tr. 1218. Five tapes show residents shaving each other's genitalia, including some with multiple examples. Tr. 1218. At least six of the tapes contain scenes of nude residents massaging each other. Tr. 1219.

Dr. Kaufman acted as the film director, see, *e.g.*, GX100C, Pt1, 5:33-6:10, 7:28; GX108C, Pt2, 31:28-32:28; GX122B, Pt1, 21:32, described himself as the

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[9] Linda Kaufman is also seen and heard consistently in the videotapes. Tr. 517. For instance, in Government Exhibit 117C, in which Mary displays her genitalia, Linda is seen directly behind Mary. GX117C, Pt1; Clip 117-1; Tr. 517; see also Tr. 341.

"cameraman," Tr. 3453, and referred to segments of the movies as "scenes," GX100C, Pt2, 10:04; GX103B, Pt2, 38:26, 48:58 (asking what other "scenes" he should "shoot"). He posed residents, repeatedly took close-up shots of the residents' genitalia, and told them to perform specific sexual activities. Tr. 1219.

For example, in one tape, he directs Barbara and James to reenact a phone sex scene, even going so far as to give them props. GX100C, Pt1, 8:46-9:30; Tr. 1221. He tells a posing James to move closer to the television for a photo and to "work on [his] erection." GX100C, Pt1, 6:57, 7:28; see also Tr. 1221 (Agent McManigal's testimony concerning tape). In 112C, Dr. Kaufman tells a posing Barbara that she is "looking pretty," and then instructs her to lie down. GX112C, Pt1, 7:04, 7:22. He discusses filming a close up of Jonathan and James and remarks that they "got Mary exposed again." GX112C, Pt1, 7:57, 15:21. While filming the residents nude hula-hooping, he positions and tells Jonathan to "free up" his penis, and directs Barbara to face the light. GX112C, Pt1, 17:27, 18:29. He also zooms in on Kevin's penis. GX112C, Pt1, 19:26. In another video, he tells James to stand up and "work on it" and get an erection. GX108C, Pt2, 31:33. One video, devoted to filming Mary, contains a whiteboard displaying the title, "A Day in the life of Mary H___." GX122C, Pt1, 21:32; see also GX122C, Pt1, 28:09 (asking Mary to face camera); GX122C, Pt2, 12:29 (stating that he had captured

some "close-ups" of Mary's "bottom."); GX122C, Pt3, 3:58 (Dr. Kaufman referring to "movie time"); GX122C, Pt3, 12:51 (stating that Mary was giving him a good "butt shot"); GX125C, Pt2, 16:43 (referring to a close-up of Mary's "tail"); GX133B, Pt1, 31:55 (stating that he did not have a good position, but that he "got most of the action."); GX101C, Pt3, 29:44-30:00 (directing residents where to stand); GX103B, Pt1, 00:23 (directing Kevin to different position); GX109B, Pt1, 1:29 (directing Mary to turn); GX100C, Pt1, 3:46 (adjusting lighting); GX107C, Pt1, 00:14 (stating he wanted to get close up); GX102C, Pt2, 3:39, 4:26, 10:56 (focusing on genitalia); GX106C, Pt4, 24:30 (same); GX112C, Pt1, 00:47, 7:59, 12:51, 15:16 (same).

Dr. Kaufman stated that he enjoyed watching the residents, GX116B, Pt3, 9:55, Clip 116-3; Tr. 1236, and kept the videotapes in his master bedroom, Tr. 1750, 308-309. Defendants also sought to share the tapes with Cypress Cove, a nudist colony in Orlando, Florida. Tr. 362, 365-366, 1263-1264; Clip 128-1; GX407; GX408.

2. Forced Farm Labor

Sometime in the mid-1990s, defendants began forcing residents to perform manual labor on their farm, usually in the nude. Tr. 1727. This work included removing items from a mouse-infested house, pulling up a tree stump, tearing

down a fence, working on a tractor, shoveling manure, moving cement blocks, and other manual labor. Tr. 326; GX102C; GX104, Pts 1 & 2.

Dr. Kaufman, usually, took the residents to the farm, but Mrs. Kaufman occasionally did as well. Tr. 1726. The residents repeatedly went to the farm for photo shoots, at which time, Dr. Kaufman was always present. Tr. 1740-1741. Mrs. Kaufman also often took photographs of nude residents on the farm. Tr. 1745.

Government Exhibit 102C is representative of the tapes showing residents working on the farm. Tr. 334. It shows James, Kevin, Mary, and Jonathan working in the nude on a variety of projects in September and October 1998. GX102C; Tr. 324-326. Both defendants were present. GX102C, Pt1, 14:125; Tr. 326. Dr. Kaufman primarily focused the camera on the residents' genitalia. See, *e.g.*, GX102C, Pt2, 3:39; Tr. 327.

On November 8, 1999, the Butler County Sheriff's Department responded to a call about people working on defendants' farm in the nude and found Jonathan, James, Kevin, and Mary performing manual labor. Tr. 72, 82, 137, 2010. Two of the men were pulling nails from lumber in the nude. Tr. 76, 102. Mary and Kevin were tearing down the barn. Tr. 2627. As the sheriff's officers arrived, Dr. Kaufman instructed the residents to go to a minivan and get dressed. Tr. 77. As an

officer took photographs of the scene, Dr. Kaufman forcefully told the sheriff's deputies that they did not have a right to be there and to stop taking photographs. Tr. 80; GX405, 405A. He stated that he was treating these people and that they were in a therapy group. Tr. 93, 109-110. The officers thought the residents appeared nervous and scared. Tr. 82.

3. The Residents' Mental Illness

Barbara, Kevin, James, Jonathan and Mary all suffered from schizophrenia. Tr. 712, 1596, 724, 253, 2420, 2610; GX47. Schizophrenia is a disorder of thinking patterns that affects a person's ability to think logically and perceive reality adequately. Tr. 675, 677-678. It involves delusions, hallucinations, and disordered and magical thinking. Tr. 675. Passivity is a characteristic of an individual with chronic schizophrenia, regardless of intelligence, that makes the individual vulnerable to exploitation, manipulation, suggestion, and control. Tr. 2335, 2337, 2576.

Government expert Dr. Walter Menninger testified that Barbara, Mary, Jonathan, Kevin, and James were probably not competent to give informed consent to so-called nude therapy because of their mental illness. Tr. 726-728. Defense expert Dr. George Hough testified that Barbara could not have consented to any of the alleged therapy. Tr. 2583.

The evidence shows that certain residents, and especially Barbara and Mary, who scored very low on a clinical scale that measures ability to function, were particularly vulnerable. Tr. 685, 706, 715, 718, 721. From 1981 through May 2004, Barbara lived at Kaufman House and never had an outside job. Tr. 1607. Dr. Kaufman testified that Barbara was unreliable and unable to make responsible personal financial decisions, Tr. 3255; GX200A, and that it was "possible in some areas" to take advantage of her, Tr. 3269. Mary, whom Dr. Kaufman described as "functionally retarded" and as "requir[ing] considerable daily supervision," Tr. 3278; GX228, lived at the Seventh Street House from 1986 until December 2001, Tr. 849, 1610.

4. Control And Means Of Compelling Labor And Servitude

Defendants controlled residents by establishing rules and practices affecting every aspect of their lives and by punishing or threatening those who did not obey. These rules and practices required nudity, participation in the sexuality group, and work on the farm.

Defendants controlled what and when the residents ate, Tr. 1643-1644, when they could wear clothes, Tr. 1645, what they watched on television, Tr. 1647, and when they could use the telephone, Tr. 1604. The residents were completely dependent on defendants, who were both landlords and caretakers. Tr. 295-296;

GX200A-GX200E. Defendant Linda Kaufman also controlled the residents' medication and contact with outside psychiatrists and acted as representative payee for social security. Tr. 3411; GX23-GX31; Tr. 2449, 2461, 2535, 295-296. Defendant Arlan Kaufman was Barbara's guardian and controlled her trust fund. Tr. 1845; GX529. As explained, *infra* pp. 23-27, defendants isolated the residents and cut off contact with outsiders.

Defendants used a variety of means to coerce compliance with the rules including force and threats of force, physical restraint, creation of indebtedness, and threats of loss of freedom and institutionalization.

a. Physical Force And Threats Of Physical Force

Defendants repeatedly used and threatened physical force against the residents. For example, Dr. Kaufman grabbed Barbara by the hair, Tr. 1509, put his hands over her mouth, Tr. 1509, dragged her up a flight of stairs, Tr. 2695, 2704, and often struggled with and strangled her, producing welts on her throat, Tr. 1686-1687.

Peter testified that Dr. Kaufman beat him. Tr. 1580-1581. Jonathan, testified that when he did not come to an evening group session, Dr. Kaufman sent word that if he did not attend group, they would come and get him. Tr. 2623-2624.

Defendants repeatedly used and threatened to use a stun gun on residents. Over a number of years, Dr. Kaufman repeatedly used the stun gun on Peter. Tr. 1501, 1527; see also GX262. Dr. Kaufman usually applied the stun gun to Peter's testicles, once drawing blood, but also used it on his chest. Tr. 1501, 1567.

Dr. Kaufman demonstrated the stun gun to Mary and Barbara by using it on Peter. Tr. 1502. Both defendants, Barbara, and Mary all took turns "zapp[ing]" Peter with the stun gun. Tr. 1504-1505. Jonathan testified that Dr. Kaufman demonstrated the stun gun to residents and threatened that he would not "hesitate to use it" on them if they misbehaved. Tr. 2638.

b. Physical Restraint

Defendants also used physical restraint to coerce residents. They placed residents who failed to adhere to their rules in a seclusion room, which had dirty carpet, boarded-up windows, and no furniture. Tr. 835-836, 848, 909-912, 1492. The seclusion room had no bathroom and, at times, residents had to use a bucket placed in the room. Tr. 841, 1496. Defendants also punished noncompliant residents by taking away their clothes.

Dr. Kaufman usually decided who went into the seclusion room. Tr. 837. Mrs. Kaufman was "very aware" of how the seclusion room was used because she

sometimes put people in the room. Tr. 837, 840. All the residents knew when someone was locked in the seclusion room. Tr. 841.

Nancy, a former resident, testified that Dr. Kaufman locked her in the seclusion room on a number of occasions because she was not "compliant to the rules." Tr. 838. On these occasions, he forced her to strip down to her bra and panties while he watched. Tr. 839-840. Once when Nancy was locked in the seclusion room, Dr. Kaufman came in and discussed the sexual abuse that she suffered at the hands of her father and brother. Tr. 843. He then summoned Barbara and had her touch Nancy's breast as her father had touched her. Tr. 844.

Because of that incident, Nancy tried to harm herself and needed medical attention. Tr. 845. When she returned to Kaufman House, Dr. Kaufman placed her in the seclusion room and told her she would be there "for a while." Tr. 847. Nancy subsequently escaped from the seclusion room and telephoned a mental hospital seeking help. Tr. 847. After Dr. Kaufman learned of the call, he locked her in the seclusion room for a week or two. Tr. 848; see also Tr. 1493 (Peter placed in seclusion more than 20 times), 1495; Tr. 2707 (Jerald J placed in seclusion).

Barbara and Mary were locked in the seclusion room at various times. Tr. 1497. When Barbara first became a resident, Dr. Kaufman placed her in the

seclusion room for many months, Tr. 1695, and allowed her out only for group sessions and meals, and only if she removed her clothing. Tr. 1695-1696. Dr. Kaufman also created a "Behavior Modification Program," GX210; Tr. 3390, that required Barbara to be in the seclusion room from 4-5:30 and 6-7 p.m. daily. GX210B; Tr. 3392; see also GX210C; Tr. 1672.

Defendants also limited Barbara and Mary's freedom of movement in other ways. Tr. 1662, 1673. They barred Barbara from answering the door and leaving the house without supervision, Tr. 2640, 825, 942, controlled where she could go, Tr. 1662, 1664, 1665, and locked her in her room every night. Tr. 830.

Mary was not allowed to leave the house alone or without permission. Tr. 1674, 2639; GX110B, Pt4, 4:13; GX125C, Pt1, 36:51. Her father confirmed that most of the time, Mary "was not free to come and go as she pleased." Tr. 1097. For a period of time, Mary was locked in her bedroom each night. Tr. 1701. Defendants also locked up Mary's clothes at night, Tr. 849, 1674, 2641; GX120B, Pt9, 20:50, and prevented her from wearing clothing on many occasions. Tr. 1700.

c. Threats Of Institutionalization And Loss Of Freedom

Dr. Kaufman inculcated and reinforced the belief that the residents were lucky to live at Kaufman House because other placements would be more restrictive. Kevin testified that: "Arlan * * * said* * * Kaufman House, was the

best it possibly gets and anything from here on out if we were to leave there for any reason was going down hill." Tr. 1617-1618. Kevin also testified that they "were considered lucky to be living" "freely" in "private housing rather than in an institutional setting." Tr. 1787. Dr. Kaufman told Jonathan that there were no places like Kaufman House, and very few halfway houses where he could reside. Tr. 2652. Dr. Kaufman also made the alternatives to Kaufman House sound oppressive and restrictive. Tr. 2653-2654; GX121C, Pt1, 00:43-1:12.

Dr. Kaufman specifically threatened Barbara, Peter, and Jonathan with institutionalization when they disobeyed. He threatened Barbara with hospitalization at a state mental facility if she failed to comply with the rules, and that if she continued acting as she was, she would end up as a "nut back at the state hospital." Tr. 826, 1690. Barbara appeared fearful in response to these threats and often retreated to her bedroom. Tr. 827, 1692. When Peter misbehaved, Dr. Kaufman threatened to send him to a state hospital. Tr. 1511. Dr. Kaufman told Jonathan that if he did not cooperate, he might be sent to a nursing home or back to the hospital. Tr. 2651. Once, when Kevin expressed to Dr. Kaufman his fear of being kicked out of Kaufman House for refusing to do things that were painful or illegal, Dr. Kaufman responded, threateningly, that he had not yet kicked Kevin out. Tr. 1798-1799.

Residents feared leaving Kaufman House because defendants told them that it was their only alternative to restrictive institutionalization. Jonathan testified that he feared being institutionalized or sent to a nursing home. Tr. 2651; see Tr. 1798 (Kevin). Prior to arriving at Kaufman House, Peter lived in a number of institutions, Tr. 1521, and consequently believed that state hospitals were horrible, Tr. 1511.

Mary also expressed concern about being sent to a state hospital or removed from Kaufman House. GX120B, Pt5, 8:05; GX 118B, Pt3, 28:36. Barbara often expressed fear of being sent to a state hospital or removed from Kaufman House. GX131B, Pt1, 00:21-00:35, 9:37-9:50; GX131B, Pt3, 7:55-8:08; see also Tr. 3387.

d. Creation Of Indebtedness

Defendants used debt and threats of debt to coerce residents. Defendants organized and took residents on a trip to Cypress Cove nudist colony, and required them to pay back their airfare and amusements by working on the farm. Tr. 1711. Kevin testified that the debt for the Florida trip never ended. Tr. 1729. When residents complained about going to the farm, Dr. Kaufman reminded them that they still owed time to reimburse him for the trip to Cypress Cove. Tr. 1729.

Dr. Kaufman also threatened residents with indebtedness to attempt to obtain their consent to share the videotapes. GX117C, Pt2 15:00-24:42; Clip 117-5.

When Barbara expressed concern and hesitation, Dr. Kaufman warned that unless she acquiesced, she would be charged for the last two years of nude therapy. GX117C, Pt2 18:55-20:10; Clip 117-5.[10]

5. Secrecy And Isolation

To maintain their control and exploit residents, defendants established and enforced a code of silence and secrecy, creating what one resident called a "secluded small cult-like organization." Tr. 1906-1907. Kevin testified that there was an "absolute rule that you did not share what went on inside the house with anyone outside the house, including family, doctors, psychiatrists, anybody else." Tr. 1759. Defendants repeated this rule to the residents time and time again. Tr. 1759. Dr. Kaufman drafted a document stating that residents should not "give out any private information about [themselves] or anyone else in the house." Tr. 1764; GX350; see also Tr. 1762; GX353; Tr. 1787 (Kevin describing this to mean that he was "[s]imply not" to share "any in-house information with anybody outside of the

[10] There is other evidence of defendants' coercive actions. On one video, Mary cries and complains that Dr. Kaufman forced her to watch Kevin while he masturbated. GX100C, Pt1, 18:59-30:30; Clip 100-2; Tr. 1268-1269. Dr. Kaufman forcefully responds that she *did* want to watch. GX100C, Pt1 22:30-24:00; Clip 100-2; Tr. 1269; see also GX101C, Pt1, 00:33 (Mary expressing anger at having to watch someone masturbate). Expert testimony confirmed the coercive nature of Dr. Kaufman's actions in the videotapes. See Tr. 1205, 1354, 1356, 1360, 1362, 1366, 2584.

house, period"). Kevin stated that they were taught that "to maintain [their] ability to live in private housing, [they] not only had to take care of [themselves]," but they also needed to avoid "shar[ing] anything that was going on in the house with other people or that would jeopardize our opportunity to live freely like that." Tr. 1787.

Defendants also limited residents' access to family members and friends. Defendants restricted when Nancy could see and what she could discuss with friends. Tr. 851. When a friend came to pick up a resident, he or she sat outside on the porch. Tr. 1760-1761. Mary's father testified that defendants curtailed his family's access to the Seventh Street House during Mary's residency (1986-2001), Tr. 1053-1056, 1122, such that by 1998, they were no longer allowed in the house. Tr. 1058, 1147. Defendants also confiscated and censored letters sent to and from residents. Tr. 1510-1511, 1664, 2220, 3331-3334.

Defendants, and most particularly Mrs. Kaufman, also closely monitored the residents' access and information provided to psychiatrists and medical professionals. Tr. 2449, 2535; see also Tr. 2461, 2468, 2472. For example, when Nancy tried to harm herself by sticking three or four thumbtacks up her vagina in response to Dr. Kaufman's reenacting her experience of sexual abuse, Linda Kaufman took her to a clinic, but did not let Nancy out of her sight. Tr. 845-846.

When a nurse practitioner asked Nancy why she had hurt herself, Linda Kaufman responded for Nancy. Tr. 847. Nancy believed that if she had said what had happened, she would have gotten in trouble. Tr. 943.

Defendants told residents that law enforcement and Kansas Social Rehabilitation Services (SRS) employees were "not to come into the Kaufman House." Tr. 1760. Dr. Kaufman taught residents that police and SRS officers and employees had no right to enter without a search warrant, Tr. 1760, and that the residents were not to reveal anything about their personal lives without a court order. GX353.

The week after the November 8, 1999, farm incident, a Butler County sheriff's deputy and two employees of SRS interviewed Mary, Kevin, Jonathan, and James in Mrs. Kaufman's presence. Tr. 146, 154, 159, 2015. Throughout their interviews, all four residents looked to Mrs. Kaufman before and while answering questions. Tr. 160-162, 2015, 2064. One investigator suspected that Mrs. Kaufman was giving the residents subliminal signals. Tr. 176. Another stated that Mrs. Kaufman "stopped [the residents] from talking further when a certain question was asked." Tr. 2016.

Residents who broke the code of silence were punished. For instance, Dr. Kaufman first placed Nancy in the seclusion room when she allowed a friend from

church into the house. Tr. 906-907. Residents who spoke to the SRS agents in November 1999, "got in quite a bit of trouble [with defendant Arlan Kaufman] for basically spilling [their] guts." Tr. 1789. Defendants penalized Barbara for talking to the police and SRS representatives when they came to the Seventh Street House in February 2004. Tr. 2028-2029, 2252, 2260. Defendants' control of the residents was so complete that defendants carried out their scheme for over 20 years without detection by outsiders.

SUMMARY OF ARGUMENT

Defendants challenge their convictions on Counts 2, 3, 5, and 6 for involuntary servitude, under 18 U.S.C. 1584, and forced labor, under 18 U.S.C. 1589. They argue that (1) the district court violated their Sixth Amendment rights in ordering them to refrain from making direct eye contact with the victim-witnesses; (2) the district court erred in instructing the jury on the meaning of "labor" and "services" for purposes of involuntary servitude and forced labor charges (Counts 2, 3, and 5); and (3) there was insufficient evidence that defendants coerced victims Kevin and Jonathan to work on their farm in violation of 18 U.S.C. 1584. Arguments (1) and (2) were not raised at trial and are subject to plain error review. All these arguments lack merit, and this Court should affirm the convictions.

1. The district court's order prohibiting defendants from making direct eye contact with victim-witnesses did not violate the Confrontation Clause. The court's order, based on prior incidents involving defendants, was aimed at preventing defendants from intimidating the victim-witnesses. Defendants were not deprived of the face-to-face meeting that the Confrontation Clause protects. No physical obstruction prevented the witness and defendants from seeing each other. The jury was able to see and observe the witnesses. Defense counsel were free to cross-examine the victim witnesses. In such circumstances, other circuits and numerous state courts have found no Confrontation Clause violation. Consequently, the district court's order was not error and certainly not plain error.

2. Defendants challenge their convictions for forced labor as they apply to victims Barbara (Count 3) and Mary H (Count 5), and for involuntary servitude as they apply to Barbara (Count 2). Defendants do not challenge the sufficiency of the evidence as to those counts, but contest only the district court's jury instructions. They contend that the instructions were erroneous because they failed to narrowly define "labor" and "services" to include only acts * * * that amount to work in [the] ordinary, economic sense." A.Br. 68.

The district court correctly defined the terms "labor" and "services" in accordance with their ordinary meanings. Moreover, defendants' claim that the

jury instructions are inconsistent with the purposes of Sections 1584 and 1589 is based on a total misunderstanding of the Thirteenth Amendment, which the statutes are enacted to enforce. Because controlling precedent, the legislative history of the Thirteenth Amendment, and recent congressional action all demonstrate that Congress intended the Amendment to abolish *all* compulsory servitude and incidents of slavery, instructions that would have narrowly defined "labor" and "services," as defendants belatedly suggest, would have been contrary to the purposes of the Thirteenth Amendment.

Assuming *arguendo*, that the district court erroneously instructed the jury, the error does not warrant reversal because it is not clear and obvious under controlling precedent, did not affect the outcome of the proceedings, and is not particularly egregious so as to result in a miscarriage of justice.

3. There is sufficient evidence that defendants coerced Kevin and Jonathan to work on their farm in violation of 18 U.S.C. 1584 (Count 6). The government introduced ample evidence showing the climate of coercion defendants created at Kaufman House. Indeed, defendants do not challenge the sufficiency of this evidence to support convictions for involuntary servitude and forced labor on Counts 2, 3, and 5. This evidence included actual and threatened physical force and restraint, as well as threats of ejection from Kaufman House and

institutionalization, each of which gives rise to a condition of involuntary servitude in violation of 18 U.S.C. 1584, as interpreted by the Supreme Court in *United States* v. *Kozminski*, 487 U.S. 931 (1988). Moreover, victims Kevin and Jonathan were both seriously mentally impaired and, thus, had the kind of special vulnerabilities the Supreme Court held relevant in *Kozminski*. Consequently, a reasonable jury could easily conclude that defendants used the requisite coercion to compel Kevin and Jonathan to work on their farm in violation of 18 U.S.C. 1584.

ARGUMENT

I

THE DISTRICT COURT DID NOT VIOLATE DEFENDANTS' CONFRONTATION CLAUSE RIGHTS WHEN IT ORDERED DEFENDANTS TO AVOID DIRECT EYE CONTACT WITH THE VICTIM-WITNESSES

Defendants argue (A.Br. 35) that the district court violated their Confrontation Clause rights when it ordered them to avoid direct eye contact with the victim-witnesses. Their arguments fail.

A. Standard Of Review

Where an appellant, as here, fails to object below, this Court reviews for plain error. *United States* v. *Ruiz-Gea*, 340 F.3d 1181, 1185 (10th Cir. 2003). Plain error is "(1) an error, (2) that is plain, which means clear or obvious under current law, and (3) that affect[s] substantial rights." *Ibid*; see also *United States* v. *Whitney*, 229 F.3d 1296, 1309 (10th Cir. 2000); *United States* v. *Brown*, 316 F.3d 1151, 1158 (10th Cir. 2003). Error is not plain where the "Supreme Court or Tenth Circuit precedent" has not addressed an issue "on facts similar to those presented" in the current case and this Court "cannot say * * * that the district court was clearly wrong." *Ruiz-Gea*, 340 F.3d at 1187-1188; see also *United States* v. *Edgar*, 348 F.3d 867, 871 (10th Cir. 2003). Where error is plain and affects substantial

rights, a court "may exercise discretion to correct it if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Dowlin*, 408 F.3d 647, 669 (10th Cir. 2005). This analysis is applied "less rigidly when reviewing a potential constitutional error." *Ibid.* (citations omitted).

B. The District Court's Order

Prior to trial, a magistrate held a hearing regarding the government's motion to detain defendants. The government detailed two instances in which defendants met with Mary, who was in a mental health facility in Indiana, Tr. 1105-1106, while Kansas was investigating whether to revoke Mrs. Kaufman's nursing license. Doc. 11, at 4. During both visits, defendants attempted to prevent facility staff from sitting in on their meeting and also attempted to take Mary out of the facility. Doc. 11, at 4. As a result, Mary's father sought a protective order to keep defendants away from her. Doc. 11, at 4. The magistrate expressed "great concern" over the "possibility that defendants' continued contact with the former residents could be detrimental to the mental health of * * * and could result in improper influence * * * over [those residents] * * * and their testimony at trial." Doc. 50, at 9, 15. Consequently, the magistrate ordered that defendants have "no contact of any kind, verbal or written, with *any* former resident of Kaufman House,

nor * * * have such contact through use of any of defendants' family members as intermediaries." Doc. 50, at 15 (emphasis added).

In September 2005, just before trial, an attorney for many of the former residents, moved to assert their rights as victims under 18 U.S.C 3771(a).[11] The motion stated that certain residents were afraid of defendants. Doc. 266, at 2. It also noted that a defense investigator had interviewed a former resident and failed to inform her of his affiliation until the end of their interview. Doc. 266, at 2-3. Consequently, on September 30, 2005, the district court, in an attempt to prevent further obstructive and intimidating conduct by defendants, continued the magistrate's order and, in addition, ordered defendants to "avoid eye contact with the victims when * * * in court" to "*the extent possible*." Doc. 268, at 2 (emphasis added).

Nevertheless, during a trial break, an incident occurred between Dr. Kaufman and Kevin inside the courtroom. In response, the district court reiterated its no eye contact order. The district court's admonition was aimed at avoiding obstruction and intimidation: "There isn't going to be any *eyeballing* of any of these witnesses. There's no eye contact. There's no verbal contact. That is my

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[11] These rights include the "right to be reasonably protected from the accused," and the "right to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. 3771(a)(1), (8).

order. If you violate it, you'll be in contempt and you will go straight to jail." Tr. 1818 (emphasis added).

Subsequently, the district court further explained the rationale for its order when it denied defendants' motions for a new trial.[12] It stated that it was "aware from other cases that intimidation can occur through means other than direct verbal threats, even when the person who is the object of the intimidation has no mental impairment." Doc. 339, at 14. The district court reiterated that it was aware of the magistrate's no contact order and that the district court's order was designed to "insure that defendants clearly understood that they were not to have contact with any of the victims, thus avoiding collateral problems which potentially would interfere with the orderly progress of the trial." Doc. 339, at 14. The district court further noted that the witnesses were not screened off from defendants, but were, in fact, required to walk within several feet of defendants when they entered the courtroom to testify. Doc. 339, at 14.

[12] Linda Kaufman's Motion For Judgment Of Acquittal Or For New Trial asserted that the district court's failure to make particularized findings before ordering no eye contact violated the Confrontation Clause. Doc. 328, at 7.

In fact, all witnesses at trial were seated directly facing the jury and perpendicularly – at a 90-degree angle – to defendants.[13] Thus, to look at defendants, witnesses would have had to turn their heads around and over their shoulders.

C. The Prohibition On Eye Contact Did Not Violate Defendants' Sixth Amendment Rights

Defendants argue that under *Coy* v. *Iowa*, 487 U.S. 1012 (1988), and *Maryland* v. *Craig*, 497 U.S. 836 (1990), this Court is required to find that the no eye contact order violated the Confrontation Clause. A.Br. 40. They claim that *Coy* stands for the proposition that the "face-to-face meeting" protected by the Confrontation Clause means "the ability of a witness to look the accused in the eye, and *vice versa*." A.Br. 44. The district court's order "made this impossible," they argue, and, therefore, "denied" them the "right to confront the residents." A.Br. 44. Their argument amounts to the contention that the Confrontation Clause requires – absent certain exceptions – a defendant have the opportunity to gaze directly into the eyes of his accusers if they look at him. Defendants' argument fails.

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[13] Because defendants did not object at trial, the record does not reflect the precise seating arrangement in the courtroom during trial. The government can obtain a formal declaration of the courtroom arrangement and move to supplement the record, should this Court desire. Fed. R. App. P. 10(e)(2).

The Sixth Amendment provides a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const., amend. VI. The Supreme Court has long emphasized that the "primary" purpose of the Confrontation Clause is to "prevent depositions or ex parte affidavits * * * being used against" a defendant "in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity * * * of compelling [the witness] to *stand face to face with the jury* in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States*, 156 U.S. 237, 242-243 (1895) (emphasis added). The "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding *before the trier of fact*." *Craig*, 497 U.S. at 845 (emphasis added). "[A] primary interest secured by [the Confrontation Clause] is the right of cross-examination." *Kentucky* v. *Stincer*, 482 U.S. 730, 735 (1987) (quoting *Douglas* v. *Alabama*, 380 U.S. 415, 418 (1965)).

Although, the "Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact," *Coy*, 487 U.S. at 1016, it does not guarantee an "*absolute* right to a face-to-face meeting with witnesses * * * at trial," but "reflects a *preference* for face-to-face confrontation at trial," a

preference that "must occasionally give way to considerations of public policy and the necessities of the case," *Craig*, 497 U.S. at 844, 849 (internal citations omitted); see also *Paxton* v. *Ward*, 199 F.3d 1197, 1207 (10th Cir. 1999). In the absence of face-to-face confrontation, the "presence of * * * [an] oath, cross-examination, and observation of the witness' demeanor [] adequately ensures that * * * testimony is both reliable and subject to rigorous adversarial testing." *Craig*, 497 U.S. at 851.

Indeed, face-to-face meeting does not mean "'*eyeball-to-eyeball*' stare-down. Rather, the underlying value [of the Confrontation Clause] is grounded upon the *opportunity to observe* and to cross-examine. The physical distance between the witness and the accused, and the particular seating arrangement of the courtroom, are not at the heart of the confrontation right." *State* v. *Self*, 564 N.E.2d 446, 452 (Ohio 1990) (emphasis added).

Several circuits have recognized that the Confrontation Clause does not require direct eye contact. In *Ellis* v. *United States*, 313 F.3d 636, 639 (1st Cir. 2002), cert. denied, 540 U.S. 839 (2003), the First Circuit declined to find a Confrontation Clause violation where a child victim of sexual assault testified facing the jury and away from the defendant. Even though the witness "could only have made eye contact with the petitioner by looking over her right shoulder" and

did not "avail herself of this opportunity," *ibid.*, the First Circuit held that "a defendant does not have a constitutional right to force eye contact with his accuser" and declined "to fashion a bright-line rule that the lack of such an opportunity, in and of itself, automatically translates into a constitutional violation," *id*. at 652. Indeed, the court found no Confrontation Clause violation because (1) the seating arrangement was "custom-tailored to fit the exigencies of [the] particular case," (2) "no physical barrier separated" the defendant and witness, (3) the defendant's view was not substantially different from what it would have been had the witness testified normally, and (4) the defendant could sufficiently view the witness' demeanor. *Id.* at 651-652.

The Second Circuit has adopted a similar approach. It found no Confrontation Clause violation where a witness, because of her fear of the defendant, testified while wearing dark sunglasses. *Morales* v. *Artuz*, 281 F.3d 55, 62 (2d Cir.), cert. denied, 537 U.S. 836 (2002). The court explained that the sunglasses did not impair the witness' ability to see the defendant and only minimally impaired the defendant's and jury's ability to see the witness' eyes. *Id*. at 60-62. Thus, it doubted that this was contrary to the Constitution. *Id*. at 62.[14]

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[14] The Second Circuit stated that, even assuming that Supreme Court precedent established "a generalized right to face-to-face confrontation," the state

(continued...)

The court also cited to Common Law and an English trial where the court declined to order a witness to look the defendant in the eye and held that the face-to-face right was satisfied where the defendant could see the witness. *Id*. at 62 n.6.

In *United States* v. *Gigante*, 166 F.3d 75 (2d Cir. 1999), cert. denied, 528 U.S. 1114 (2000), the Second Circuit held that the use of two-way closed-circuit television testimony did not violate the defendant's Sixth Amendment rights. The court found no Confrontation Clause violation because the district court "employed a two-way system that preserved * * * face-to-face confrontation." *Id*. at 81. Because the procedure required the witness to be under oath and testify in full view of the jury, court, defense counsel, and defendant, the defendant had lost "none of the constitutional protections of confrontation." *Id*. at 80. Thus, the court rejected the contention that the Confrontation Clause right "could only be preserved by a face-to-face confrontation with [the witness] *in the same room*." *Ibid*.

State courts have also declined to define the face-to-face meeting as eye-to-eye contact, as defendants propose. In a case analogous to this case, a Louisiana appellate court held that the trial court did not violate the defendant's Confrontation Clause rights when it threatened to remove him from the courtroom

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[14](...continued)
courts had not made "an unreasonable application of such law." *Ibid*.

if he stared at and attempted to intimidate witnesses. *State* v. *Roberts*, 541 So.2d 961, 964-965 (La. Ct. App. 2 Cir. 1989); see also *People* v. *Sharp*, 36 Cal. Rptr. 2d 117, 123 (Cal. Ct. App. 1994), cert. denied, 514 U.S. 1130 (1995) (stating that a defendant has no "constitutional right to *stare down* or otherwise *subtly intimidate*" a witness) (emphasis added). Numerous other state cases stand for the proposition that where no physical barrier prevents a defendant and witness from seeing each other and other assurances of testimonial reliability are present, there is no Confrontation Clause violation. See, *e.g.*, *Smith* v. *State*, 8 S.W.3d 534, 537 (Ark. 2000); *State* v. *Miller*, 631 N.W.2d 587, 594-595 (N.D. 2001); *State* v. *Brockel*, 733 So.2d 640, 644-646 (La. Ct. App. 1999); *Brandon* v. *State*, 839 P.2d 400, 409-410 (Alaska Ct. App. 1992).

Defendants do not cite a single case that has found a Sixth Amendment violation in circumstances similar to these. Nor do *Coy* and *Craig* support the conclusion defendants urge. Those cases involved facts markedly different from this case. *Coy* was a prosecution for sexual abuse of a child, where the trial court, pursuant to a state statute, allowed two minor girls to testify from behind an opaque screen. The state argued that this was necessary to protect the victims. 487 U.S. at 1020. The witnesses could not see the defendant, but the defendant could "dimly * * * perceive the witnesses." *Id*. at 1015. The Court concluded that there

was a Confrontation Clause violation because the arrangement allowed "the complaining witnesses *to avoid viewing appellant* as they gave their testimony." *Id*. at 1020 (emphasis added).

In *Craig*, the trial court, pursuant to a state statute enacted to protect child victims, allowed a child sex abuse victim to testify via one-way closed circuit television. The Court recognized that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers *in court*," 497 U.S. at 853 (emphasis added), and remanded for the lower court to determine "whether use of the *one-way closed circuit television procedure* is necessary to protect the welfare of the particular child witness who seeks to testify" *id.* at 855 (emphasis added).

The circumstances of this case clearly differ from *Coy* and *Craig*. First, the victim-witnesses, here, were present in the courtroom and able to see defendants. There was no barrier – physical or otherwise – preventing them from looking at defendants both before and during their testimony. Defendants also could observe the witnesses. Thus, contrary to defendants' assertion, they were not "barred from exercising [their] right to look upon the residents who made accusations against [them]." A.Br. 39. Rather, they simply could not stare down or otherwise

intimidate the witnesses. Moreover, all the other guarantors of testimonial reliability that *Craig* emphasized were present. The witnesses were under oath, subject to full cross-examination, and were observable by the judge, jury, and defendants as they testified. Finally, here, unlike in *Coy* and *Craig*, the district court's rationale for limiting eye contact was to ensure the integrity of the fact-finding process by guarding against intimidation of witnesses. Thus, *Coy* and *Craig* do not control this case.

Indeed, this Court and other circuits have declined to extend *Coy* and *Craig* beyond their facts. In *Vigil* v. *Tansy*, the trial court admitted videotaped testimony of a minor sexual abuse victim, during which the defendant was present and his counsel cross-examined the witness. 917 F.2d 1277, 1278 (10th Cir. 1990), cert. denied, 498 U.S. 1100 (1991). Rejecting the defendant's argument that *Coy* established that his confrontation rights were violated, this Court explained: "The case before us does not present this situation" because the defendant "was present and *could see* and *be seen* by his victim as she gave her sworn testimony." *Id*. at 1279 (emphasis added). This Court likewise distinguished *Craig* explaining that there, "the defendant was *completely deprived* of his right to face-to-face confrontation with the child witness as the witness testified * * * *out of the presence of the defendant*." *Ibid*. (emphasis added). Similarly, the First Circuit,

distinguished *Coy* because it involved "an opaque physical barrier," and the defendant saw substantially less of the witnesses' faces than he would have had they testified normally. *Ellis*, 313 F.3d at 651-652. See also *Morales*, 281 F.3d at 58 (*Craig* and *Coy* inapposite because they establish "appropriate test where the witness is *physically separated* from the defendant"); *Gigante*, 166 F.3d at 81. State courts have similarly distinguished *Coy* and *Craig*. See, *e.g.*, *Smith*, 8 S.W.3d at 537; *Miller*, 631 N.W.2d at 594-595; *Boatright* v. *State*, 385 S.E.2d 298, 301-302 (Ga. Ct. App. 1989).

D. The District Court Did Make A Case-Specific Finding When It Ordered Defendants To Have No Eye Contact With The Victim-Witnesses

Even assuming there was some limitation on confrontation and that the *Craig* standard applies here, the district court met that standard. Under *Craig*, a "defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." 497 U.S. at 850; see also *Coy*, 487 U.S. at 1021 (recognizing the possibility of exceptions when necessary "to further an important public policy" and only when the trial court makes "something more than * * * [a] generalized finding"). The determination of a public policy necessity

must be "case-specific." *Craig*, 497 U.S. at 855. In *Craig*, the Supreme Court required a hearing and individualized findings to determine whether each child witness would suffer psychological harm from testifying in front of the defendant. *Id*. at 855-856. However, "the less the intrusion on Sixth Amendment rights, the less detail is required in a trial court's findings." *Ellis*, 313 F.3d at 650. Such findings need not be explained at the time of the limitation, but can be explained post-conviction. See *id.* at 650-651.

The district court's order met all of the *Craig* requirements. First, as articulated by the district court in its order, there was a clear public policy reason for the district court's order dispensing with eye-to-eye contact. Contrary to defendants' claims (A.Br. 42), it was entered to prevent them from interfering with and intimidating the witnesses. See, *e.g.*, *Davis* v. *Washington*, 126 S. Ct. 2266, 2280 (2006) (stating that "Sixth Amendment does not require courts to acquiesce" when a defendant "seek[s] to undermine the judicial process by procuring or coercing silence from witnesses and victims"); *Rice* v. *Marshall*, 709 F.2d 1100, 1102 (6th Cir. 1983), cert denied, 465 U.S. 1034 (1984). In fact, a defendant can waive his or her right to confrontation by his own misconduct. *Illinois* v. *Allen*, 397 U.S. 337, 342-343 (1970); see also *Rice*, 709 F.2d at 1102-1103.

Second, the district court made a case-specific finding when it prohibited direct eye contact. Its order was based on defendants' obstructive conduct in *this* case, and did not rely on a generalized notion that all mentally ill witnesses need special protection from eye contact. It also sought to limit any potential interference and intimidation by defendants, rather than psychological harm to the victim-witnesses.

Third, there is no dispute that the other indicia of testimonial reliability were present. The residents testified under oath, in front of the jury, and defendants were able to cross-examine them fully. Thus, the district court's order to avoid eye contact fulfilled *Craig*'s requirements.

E. Error, If Any, Was Not Plain

Assuming, *arguendo*, that the district court's order constituted error, it does not amount to plain error.

1. Not Clear And Obvious

Contrary to defendants' claims (A.Br. 44-45), any asserted error is certainly not clear and obvious. Because abundant case law supports the district court's order, and defendants have not cited any contrary precedent, the district court's order is not contrary to well-settled law.

2. No Reasonable Probability Of Different Outcome

Defendants have failed to meet their "burden of establishing" that the alleged error had an impact upon their "substantial rights," *United States* v. *Harlow*, 444 F.3d 1255, 1261 (10th Cir. 2006), or that there exists "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different," *United States* v. *Corchado*, 427 F.3d 815, 818-819 (10th Cir. 2005), cert. denied, 547 U.S. 1086 (2006); see also *Edgar*, 348 F.3d at 871.

Defendants, relying on *Coy*, claim (A.Br. 45-46) that this analysis must be made without considering the testimony of the former residents. This claim is incorrect. In *Coy*, the limitation on confrontation had an obvious effect. The screen *was* present. The witnesses could *not* see the defendant. Here, by contrast, any harm is purely speculative. There is no indication that this order had any practical effect on defendants. Every witness in this case faced the jury and was seated perpendicularly to defendants. Nor is there any indication in the record that defendants ever had to look away from the victim-witnesses. Defendants ask this Court to disregard the victims' testimony based on what *might* have occurred, rather than what the record shows did occur (as in *Coy*). Thus, defendants' argument fails.

3. No Miscarriage Of Justice

Finally, defendants have not demonstrated that a failure to correct the alleged error would result in a "miscarriage of justice." *United States* v. *Wallace*, 429 F.3d 969, 977 (10th Cir. 2005) (quoting *United States* v. *Olano*, 507 U.S. 725, 736 (1993)); *United States* v. *Gonzalez-Huerta*, 403 F.3d 727, 737 (10th Cir.), cert denied, 546 U.S. 967 (2005). Defendants' simple assertion that the "no-eye-contact order *may very well* have undermined Dr. Kaufman's testimony by making him appear guilty when he did not look at those making damning and sensational allegations against him," (A.Br. 57 (emphasis added)), does not even begin to meet the standard. See *Gonzalez-Huerta*, 403 F.3d at 737. Accordingly, defendants' claim does not entitle them to relief.

II

THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR WHEN IT INSTRUCTED THE JURY ON THE DEFINITION OF LABOR AND SERVICES AS TO COUNTS 2, 3, AND 5

For the first time on appeal, defendants contend that the district court erroneously instructed the jury as to Counts 2 and 3, convictions for violations of 18 U.S.C. 1589 (forced labor or services with regard to Barbara and Mary), and Count 5, convictions for violations of 18 U.S.C. 1584 (involuntary servitude with regard to Barbara), because it failed to narrowly define the terms "labor" and "services" to include only "acts * * * that amount to work in [the] ordinary economic sense." A.Br. 68. According to defendants (A.Br. 74), the alleged "instructional error allowed [their] convictions" on Counts 2, 3, and 5 to be based on their conduct of compelling two mentally impaired patients to repeatedly and routinely perform sexually explicit acts on videotape. Defendants contend (A.Br. 32) because "the involuntary servitude and forced-labor statutes reach only compelled acts that are work in the traditional sense[,]" those counts should be reversed.

The district court did not commit error, and certainly not plain error, when it instructed the jury. First, the district court correctly defined the terms "labor" and

"services" in accordance with their ordinary meanings. In addition, defendants have not cited *any* authority that establishes that the jury instructions are error. Moreover, defendants' claim that the definitions of "labor" and "services" are inconsistent with the purposes of 18 U.S.C. 1584 and 1589, and the Thirteenth Amendment is based on a total misunderstanding of the scope of the Thirteenth Amendment. Because controlling precedent, the legislative history of the Thirteenth Amendment, and recent congressional action all demonstrate that Congress intended the Amendment to abolish *all* compulsory servitude and incidents of slavery, instructions that would have narrowly defined "labor" and "services," as defendants belatedly suggest, would have been contrary to the purposes of the Thirteenth Amendment.

Assuming *arguendo*, that the district court erroneously instructed the jury, the error does not warrant reversal on Counts 2, 3, and 5, because it is not clear and obvious under controlling precedent, did not affect the outcome of the proceedings, and is not particularly egregious so as to result in a miscarriage of justice.[15]

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[15] Defendants do not contend that the alleged error in the instructions entitles them to reversal of their convictions on Count 4 for "involuntary servitude" in violation of 18 U.S.C. 1584. See A.Br. 75 n.4. Rather, they concede (A.Br. 75 n.10) the contrary. To the extent that defendants maintain (A.Br. 75 n.10) that their convictions on Count 4 should be reversed based on the "cumulative error" arising from their Confrontation Clause *and* jury instruction claims, their argument

(continued...)

A. Standard Of Review

The appropriate standard of review is plain error. See pp. 27-28, *supra*.

B. The District Court Correctly Defined The Terms "Labor" And "Services" In Accordance With Their Ordinary Meanings

A question of statutory interpretation "begin[s] with the text" of the statute. *United States* v. *Gonzales*, 456 F.3d 1178, 1181 (10th Cir. 2006). "The preeminent canon of statutory interpretation requires [courts] to 'presume that [a] legislature says in a statute what it means and means in a statute what it says[.]'" *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004) (quoting *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992)). As a result, when the language of a statute is unambiguous, "[t]he inquiry begins * * * and ends [with its] text" without consideration of the statute's purpose. *Id*. at 177. See *United States* v. *Torres-Laranega*, 476 F.3d 1148, 1157 (10th Cir.), cert. denied, 128 S. Ct. 176 (2007) ("[L]egislative purpose is expressed by the ordinary meaning of the words used.") (internal quotation marks omitted). See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yesky*, 524 U.S. 206, 212 (1998) ("in the context of an unambiguous statutory text" congressional purpose is "irrelevant"). Accordingly, when the "legislative

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[15](...continued)
fails because they have not demonstrated error as to either, much less error that is plain and warrants reversal.

directive" is "clear[,]" courts are "not * * * to carve out statutory exceptions." *United States* v. *Gonzales*, 520 U.S. 1, 10 (1997). See *Brogan* v. *United States*, 522 U.S. 398, 403 (1998) ("[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy."). See, *e.g.*, *Salinas* v. *United States*, 522 U.S. 52, 59 (1997) (refusing "to exclude conduct clearly intended to be within * * * scope" of a penal statute) (internal citation omitted).

When a statute includes terms that are not defined, it is well-settled that they "must [be] give[n] * * * their 'ordinary or natural' meaning." *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) (quoting *Smith* v. *United States*, 508 U.S. 223, 228 (1993)). Consequently, it is appropriate for "[c]ourt[s] [to] turn[] to dictionary definitions to discern the plain meaning of a word." *United States* v. *Montgomery*, 468 F.3d 715, 720 n.3 (10th Cir. 2006), cert. denied, 127 S. Ct. 1389 (2007). See, *e.g.*, *Federal Deposit Ins. Corp.* v. *Meyer*, 510 U.S. 471, 476 (1994); *Chapman* v. *United States*, 500 U.S. 453, 462 (1991); *Gonzales*, 456 F.3d at 1182; *In re Luna*, 406 F.3d 1192, 1199 (10th Cir. 2005).

Section 1584 makes it a crime to knowingly and willfully hold another person to "involuntary servitude." In *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988), the Supreme Court interpreted that provision to criminalize only

servitude that results from the "use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." See 22 U.S.C. 7101(b)(13).

In response to *Kozminski*, Congress enacted 18 U.S.C. 1589, as part of the Victims of Trafficking and Violence Protection Act of 2000. See 22 U.S.C. 7101(b)(13); H.R. Rep. No. 939, 106th Cong., 2d Sess. 99-100 (2000). See also *United States* v. *Bradley*, 390 F.3d 145, 150 (1st Cir. 2004) ("[S]ection 1589 was intended expressly to counter *United States v. Kozminski*."). That provision makes it a crime to knowingly obtain the "labor or services of another person," 18 U.S.C. 1589, by various means, including "nonviolent coerci[ve]" means. 22 U.S.C. 7101(b)(13). See H.R. Rep. No. 939, at 24-25, 99-100.

In the instant case, Counts 2 and 3 charged defendants with violations of 18 U.S.C. 1589, for forcing two mentally impaired patients to repeatedly and routinely perform sexually explicit acts, including "masturbation, genital shaving, massage, and nude hula-hooping," on videotape. A.Br. 73. The district court instructed the jury on those counts together and explained that "'[l]abor' means the expenditure of physical or mental effort[,] [while] '[s]ervices' means conduct or performance

that assists or benefits someone or something." Doc. 305, at Instr. No. 16.[16] Because the district court defined both statutory terms in accordance with their ordinary meanings, its instructions are an accurate statement of the law. See *Webster's Third New International Dictionary* 1259, 2075 (unabridged 1993) (defining "labor" as "expenditure of physical or mental effort esp. when fatiguing, difficult, or compulsory" and "service" as "an act done for the benefit or at the command of another"). See, *e.g.*, *Hackwell* v. *United States*, 491 F.3d 1229, 1233-1234 (10th Cir. 2007) (relying on *Random House Dictionary of the English Language* 1750 (2d ed. 1987) that defines "'service' as 'an act of helpful activity;

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[16] With regard to the first element, the district court instructed:

> In considering the first element, you must decide whether the defendant obtained the labor or services of another person, namely, the alleged victim named in the particular count of the indictment. "Obtain" means to gain, acquire, or attain. *"Labor" means the expenditure of physical or mental effort. "Services" means conduct or performance that assists or benefits someone or something.*
>
> If you find beyond a reasonable doubt that the defendant obtained the labor or services of the alleged victim named in Count 2 and/or 3 of the indictment, then the first element has been satisfied.

Doc. 305, at Instr. No. 16 (emphasis added).

help; aid: to do someone a service' and * * * 'services' as the *performance of any duties* or work for another" to determine plain meaning of "services rendered" in the Radiation Exposure Compensation Act) (emphasis added); *Gonzales*, 456 F.3d at 1182 (holding no error in district court's refusal to give defendant's requested jury instruction since undefined statutory term construed in accordance with its dictionary definition was contrary to defendant's proposed charge).[17]

Defendants nonetheless argue that the district court erred when it failed *sua sponte* to narrow the definitions of "labor" and "services" to include only acts that

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[17] See *Funk & Wagnalls New Standard Dictionary of the English Language* 1371, 2235 (1946) (defining "labor" as "[p]hysical or mental effort, particularly for some useful or desired end; exertion of the powers for some end other than recreation or sport, especially with the hands and for gain; toil; work"; and "service" as "labor performed in the work of a slave, hired man, employee, or person in any way held to obedience and duty; * * * [a]ny work done for the benefit of another; the act of helping another or of promoting his interests in any way; hence, also a benefit or advantage conferred"); *The American Heritage Dictionary of the English Language* 1004, 1649 (3d ed. 1992) (defining "labor as "[p]hysical or mental exertion, especially when difficult or exhausting; work"; and "service" as "[w]ork or duties performed for a superior[;] [t]he occupation or duties of a servant"); 8 *The Oxford English Dictionary* 559 (2d ed. 1989) and 15 *The Oxford English Dictionary* 34 (2d ed. 1989) (defining "labour" as "[e]xertion of the faculties of the body or mind, esp. when painful or compulsory; bodily or mental toil" and "service" as "[t]he condition of being a servant; the fact of serving a master. The condition, station, or occupation of being a servant"); *Webster's Ninth New Collegiate Dictionary* 668, 1076 (1985) (defining "labor as an "expenditure of physical or mental effort esp. when difficult or compulsory" and "service" as "contribution to the welfare of others" or "a helpful act").

"amount to work in its ordinary economic sense." A.Br. 68. Their claim fails for several reasons.

First, defendants' restrictive definitions of "labor" and "services" are contrary to the ordinary meanings of those terms.[18] Defendants also ignore the fact that there are no textual indicia that Congress intended to depart from, restrict the scope of, or apply any narrowing construction to the ordinary meanings of those words. See, *e.g.*, *United States* v. *Schaefer*, 501 F.3d 1197, 1201 (10th Cir. 2007). Additionally, because defendants cannot dispute that "labor" and "services" can properly refer to a large class of activity that is unrelated to work and has no economic value, the selection and use of those terms without qualification or limitation implies that Congress, at a minimum, did not intend them to have the

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[18] Defendants contend (A.Br. 71) that the district court failed to define "labor" and "services" according to "their ordinary, accepted definitions" because those terms have multiple meanings some of which "involve work in the economic sense." See A.Br. 70-71 (quoting *Webster's Ninth New Collegiate Dictionary* 668 (1985) (principally copyrighted in 1983) and *Webster's Third New International Dictionary* 1259, 2075 (unabridged 1993). The fact that a word has multiple meanings, however, does not suggest it lacks an "ordinary," "primary," "basic" meaning, which may be substantially different from its alternative definitions. See *Muscarello* v. *United States*, 524 U.S. 125, 128 (1998). See, *e.g.*, *Webster's Third New International Dictionary* 1259 (unabridged 1993) (defining "labor" as a "prolonged series of involuntary contractions of the * * * abdominal wall" that typically occurs immediately prior to giving birth). Consequently, defendants' recognition that "labor" and "services" have alternative meanings does not demonstrate that the district court failed to correctly define those terms in accordance with their ordinary meanings.

restrictive meanings that they suggest. See *Luna*, 406 F.3d at 1199 ("We presume Congress intended for the courts to apply the plain language of the statute unless such interpretation would lead to an absurd result.").

The instructions are also not error because defendants have not provided *any* authority that establishes that the jury was wrongly charged. They do not cite a single case that holds that a jury should, much less must, be instructed as they maintain, or that Sections 1584 and 1589 apply only when a defendant compels work in an economic sense. Nor may they properly rely on the statutes' purposes to argue that the district court erroneously defined "labor" and "services" since "aids to [statutory] interpretation can be used only to resolve ambiguity and never to create it." 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:04, at 146 (6th ed. 2000). Accordingly, because the district court correctly defined the terms "labor" and "services" in accordance with their ordinary meanings and defendants have failed to establish that the instructions are error, they are not entitled to relief. A.Br. 68.

C. The District Court Correctly Instructed The Jury In Accordance With The Plain Statutory Language Because The Thirteenth Amendment Was Intended To Prohibit <u>All</u> Compelled Servitude And Incidents Of Slavery

Defendants contend (A.Br. 68, 63) that the district court was required to define "labor" and "services" to include only acts that "amount * * * to work in

[the] ordinary, economic sense" because the Thirteenth Amendment forbids only conduct that "would traditionally be thought of as work." Defendants' claim is based on a misunderstanding of the Amendment and is contradicted by the terms and purpose of the Amendment and controlling precedent interpreting it.

The Thirteenth Amendment's prohibition against "involuntary servitude" is unqualified. It proscribes all conditions of enforced compulsory service without regard to the nature of the benefit provided. The Amendment likewise authorizes Congress to prohibit all badges and incidents of slavery notwithstanding the character of the prohibited activity. Accordingly, to conclude that Sections 1584 and 1589 criminalize only conduct that amounts to work in an economic sense is fundamentally inconsistent with the Thirteenth Amendment.

1. Precedent Dictates That The Thirteenth Amendment Was Intended To Bar <u>All</u> Compelled Servitude And Incidents Of Slavery

a. The defendants correctly state (A.Br. 32) that Sections 1584 and 1589 were both enacted to enforce the Thirteenth Amendment's prohibition against "slavery" and "involuntary servitude." The Thirteenth Amendment provides:

> SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XIII. The Amendment's prohibition against "slavery" and "involuntary servitude" is a "grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 69 (1872).

Slavery is "'the state of entire subjection of one person to the will of another,'" and a slave is said to be "a person who is held in bondage to another." *Hodges* v. *United States*, 203 U.S. 1, 17 (1906) (quoting Noah Webster, *Noah Webster's First Edition of an American Dictionary of the English Language* n.pg. (New York, S. Converse 1828)); *Hodges*, 203 U.S. at 8 (internal quotation marks omitted). See *Hodges*, 203 U.S. at 31 (Harlan, J., dissenting) (A slave is a person who is forced into "compulsory service * * * for the benefit of the master [and] is restrain[ed] [in] his movements except by his master's will."). See also *United States* v. *Nelson*, 277 F.3d 164, 179 (2d Cir.), cert. denied, 537 U.S. 835 (2002) ("[T]he most basic feature of 'slavery' * * * [is] the subjugation of one person to another by coercive means."); *United States* v. *Booker*, 655 F.2d 562, 566 (4th Cir. 1981) ("[A] slave is a person who is wholly subject to the will of another, one who has no freedom of action and whose person and services are wholly under the control of another, and who is in a state of compulsory service to another.").

"The words involuntary servitude have a 'larger meaning than slavery.'" *Bailey* v. *Alabama*, 219 U.S. 219, 241 (1911) (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 69). The term forbids all "condition[s] of enforced compulsory service of one to another" without regard to the type of service that is elicited. *Hodges*, 203 U.S. at 16. See, *e.g.*, *United States* v. *Shackney*, 333 F.2d 475, 486 (2d Cir. 1964) (Friendly, J.) (Io "hold[] in involuntary servitude means * * * action by the master causing the servant to have, or believe he has, no way to avoid continued service or confinement.").

The Supreme Court has repeatedly reaffirmed this interpretation. Most recently, it explained that, although "[t]he primary purpose of the [Thirteenth] Amendment was to abolish the institution of African slavery as it had existed in the United States at the time of the Civil War, * * * the phrase 'involuntary servitude' * * * extend[ed] [the Amendment's reach] 'to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results.'" *Kozminski*, 487 U.S. at 942 (quoting *Butler* v. *Perry*, 240 U.S. 328, 332 (1916)). See *Clyatt* v. *United States*, 197 U.S. 207, 218 (1905) ("[T]he use of the word 'servitude' was intended to prohibit the use of *all forms of involuntary slavery, of whatever class or name.*") (quoting *Plessy* v. *Ferguson*, 163 U.S. 537, 542 (1896)) (emphasis added).

As a result, it is well-settled that the Thirteenth Amendment's "prohibition of 'slavery and involuntary servitude'" abolishes slave-like conditions "*in all forms, and in all degrees*." *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 49-50, 72 (emphasis added). Indeed, the Supreme Court has repeatedly emphasized:

> The plain intention [of the Amendment] was to abolish slavery of *whatever name and form* and *all its badges and incidents*; to render *impossible any* state of *bondage*; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude.

Bailey, 219 U.S. at 241 (emphasis added). See *Kozminski*, 487 U.S. at 951 (The Thirteenth Amendment was "intended to prohibit '*slavelike' conditions of servitude*.") (emphasis added) (internal quotation marks omitted).

b. Nearly a half century ago, the Supreme Court overturned earlier precedent narrowly construing the Thirteenth Amendment and definitively determined that its protections extend beyond uncompensated forced labor. See, *e.g.*, *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 443 (1968) (housing); *Runyon* v. *McCrary*, 427 U.S. 160 (1976) (education); *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1973) (public accommodation). In *Jones*, 392 U.S. at 441 n.78, the Court held that Section Two of the Amendment empowers Congress to prohibit racial discrimination in the private sale or rental of property merely because it is a

"vestige[] and incident[]" of the antebellum slave system. The Court, explained, "whatever else * * * the badges and incidents of slavery" "may * * * encompass," we "recognized long ago that * * * its 'burdens and disabilities' [] include[] restraints upon 'those fundamental rights which are the essence of civil freedom, namely, the * * * right * * * to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property.'" *Id.* at 441 & n.78 (quoting *The Civil Rights Cases*, 109 U.S. 3, 22 (1883)). Indeed, the Amendment "clothe[s] Congress with power to pass all laws necessary and proper for abolishing *all* badges and incidents of slavery in the United States," regardless of the nature of the prohibited conduct. *Id.* at 439 (emphasis added) (quoting *The Civil Rights Cases*, 109 U.S. at 20). See *Clyatt*, 197 U.S. at 217 ("acts of individuals" "ha[ve] only to do with slavery and its incidents" to be prohibited by Congress pursuant to the Thirteenth Amendment). See also *Griffin* v. *Breckenridge*, 403 U.S. 88, 105 (1971).

This Court and other courts of appeals have repeatedly reaffirmed that the Thirteenth Amendment authorizes Congress to prohibit *any* type of conduct so long as it constitutes a vestige of slavery. See, *e.g.*, *Fisher* v. *Shamburg*, 624 F.2d 156, 162 (10th Cir. 1980); *United States* v. *Allen*, 341 F.3d 870, 884 (9th Cir. 2003), cert. denied, 541 U.S. 975 (2004); *Nelson*, 277 F.3d at 183; *United States* v.

Bledsoe, 728 F.2d 1094, 1097 (8th Cir.), cert denied, 469 U.S. 838 (1984). For example, this Court concluded that Congress could enact a statute pursuant to the Thirteenth Amendment that criminalizes racially motivated conspiracies that interfere with the enjoyment of a place of public accommodation. This Court explained:

> [T]he Thirteenth Amendment authorizes Congress "to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation. * * * [Thus,] Congress not only [has the power] to outlaw *all* forms of slavery and involuntary servitude but also to eradicate the *last vestiges and incidents* of society half slave and half free[.]"

Fisher, 624 F.2d at 159, 160 (quoting *Jones*, 392 U.S. at 440, 441 n.78). Consequently, the Supreme Court and this Court's precedent unequivocally contradict defendants' claim (A.Br. 68) that conduct "must qualify as work" to be barred by the Thirteenth Amendment.

Moreover, defendants' interpretation of the Thirteenth Amendment would unjustifiably allow a broad range of coerced servitude and forced services to go unpunished. As the Second Circuit explained, "it would be grotesque to read 'involuntary servitude' as not covering a situation where an [individual] was physically restrained by guards" or "isolated in a secluded farm with barbed wire fences and locked gates" only because the servitude or services a defendant compels

do not constitute "work in an economic sense." *Shackney*, 333 F.2d at 486; A.Br. 68. See *Hodges*, 203 U.S. at 34 (Harlan, J., dissenting) ("One who is shut up by superior or overpowering force, constantly present and threatening, from earning his living in a lawful way of his own choosing, is as much in a condition of involuntary servitude as if he were forcibly held in a condition of peonage."). Consequently, because the Supreme Court and this Court have recognized that conduct that is unrelated to work and noneconomic in nature can be prohibited pursuant to the Thirteenth Amendment, the district court was not required to define "labor" and "services" to include only acts that amount to work in an economic sense.

2. The Legislative Debates Surrounding The Enactment Of The Thirteenth Amendment Demonstrate That Congress Intended The Amendment To Bar <u>All</u> Badges And Incidents Of Slavery

The district court also correctly defined "labor" and "services" because the congressional debates, surrounding the Thirteenth Amendment's enactment, clearly establish that Congress intended the Amendment to eliminate *all* the badges and incidents of slavery.

a. "The true spirit and meaning of the [Thirteenth] [A]mendment[] * * * cannot be understood without keeping in view the history of the times when [it was] adopted." *Strauder* v. *West Virginia*, 100 U.S. 303, 306 (1879). While the

institution of slavery in the antebellum south unquestionably involved forced labor, its most abusive aspects did far more than compel slaves to work for the economic gain of their master. See Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 Harv. L. Rev. 1359, 1370-1371 (1992); Neal Kumar Katyal, *Men Who Own Women*: *A Thirteenth Amendment Critique of Forced Prostitution*, 103 Yale L.J. 791, 797-798 (1993); Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South*, 197-199 (1956). To conclude otherwise, as defendants propose (A.Br. 60-68), is to ignore history that establishes that sexual servitude and abuse were components of slavery. See, *e.g.*, Katyal, 103 Yale L.J. at 797-798; Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. Marshall L. Rev. 299, 311 (2006); Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 Wash. & Lee Race & Ethnic Anc. L.J. 11, 12-25 (2001); Joyce E. McConnell, *Beyond Metaphor*: *Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 Yale J.L. & Feminism 207, 217, 219 (1992).

Prior to the Civil War, the power of the master to exploit his slaves for his own sexual pleasure and economic gain is well-documented. See, *e.g.*, Katyal, 103 Yale L.J. at 798-800; Goring, 39 J. Marshall L. Rev. at 311; Bridgewater, 7 Wash.

& Lee Race & Ethnic Anc. L.J. at 12-25; McConnell, 4 Yale J.L. & Feminism at 118-120. Not only were slaves denied the most basic of human rights, but they were routinely coerced into breeding and sexual activity. Shaheen P. Torgoley, *Trafficking and Forced Prostitution: A Manifestation of Modern Slavery*, 14 Tul. J. Int'l & Comp. L. 553, 556 (2006); Kaytal, 103 Yale L.J. at 798-799.

b. The legislative record likewise makes clear that the Amendment was intended to eliminate *all* the badges and incidents of slavery, without exception. The Amendment's drafters repeatedly emphasized the Amendment would "remov[e] every vestige of African slavery from the American Republic," by "obliterat[ing] the last lingering vestiges of the slave system; its chattelizing [*sic*], degrading and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, [and] everything connected with it or pertaining to it." Cong. Globe, 38th Cong., lst Sess. 1324 (1864); Cong. Globe, 38th Cong., 2d Sess. 155 (1865) As Senator Charles Sumner emphasized, the Amendment

> abolishes slavery entirely[.] * * * It abolishes it root and branch. It abolishes it in the general and the particular. It abolishes it in length and breadth and then in every detail. * * * Any other interpretation belittles the great amendment and allows slavery still to linger among us in some of its insufferable pretensions.

Cong. Globe, 42d Cong., 2d Sess. 728 (1872).

Moreover, despite Victorian standards that made public discussion of sexual conduct taboo, see Katyal, 103 Yale L.J. at 802-803, several sponsors and supporters of the Amendment identified various forms of sexual exploitation that were inextricably linked to slavery and would be prohibited by the Amendment. For example, Senator Clark, describing the evils of slavery, declared:

> [Slavery] has degraded the people to the infamous business of raising negroes for sale, and living upon their increase. She has practiced concubinage, destroyed the sanctity of marriage, and sundered and broken the domestic ties.

Cong. Globe, 38th Cong., lst Sess. 1369 (1864). Other supporters focused on the propensity of slave masters to father slave children. See, *e.g.*, *id.* at 1481 (Sen. Sumner) ("[W]hat 'just compensation' shall be voted for the renunciation of that Heaven-defying pretension, too disgusting to picture in its details, which despoils the slave of wife and child, and hands them over to lust or avarice?"); *id*. at 1160 (Sen. Morrill) (describing that by the "gentlemanly instincts of the superior race" a half million "mulattoes" had been fathered). And, Senator James Harlan of Iowa, who is credited with coining the term "incidents of servitude" as a shorthand description of the conditions barred by the Amendment, see Alexander Tsesis, *Furthering American Freedom: Civil Rights & The Thirteenth Amendment*, 45 B.C.

L. Rev. 307, 372 (2004), identified various vestiges of slavery, including interference with the conjugal and familial relationships, that the Amendment would abolish. See Cong. Globe, 38th Cong., lst Sess. 1439 (1864).

Thus, because the congressional debates establish that Congress intended the Thirteenth Amendment's prohibition against "slavery and involuntary servitude" to eliminate *all* the badges and incidents of slavery, the district court was not required to define "labor" and "services" to include only "acts * * * that amount to work in [the] ordinary economic sense." A.Br. 68. Accordingly, the district court properly instructed the jury in accordance with the commonly understood definitions of those terms.

D. Defendants Are Not Entitled To Reversal Of Counts 2, 3, And 5

Assuming, *arguendo*, that the district court erred in instructing the jury, defendants are not entitled to reversal of their convictions on Counts 2, 3, and 5 because they cannot establish any of the other criteria under plain error analysis necessary to obtain such relief.

1. As previously noted, *supra*, defendants have not cited "any decision adopting [their] argument," demonstrating that the district court's instructions are error, or holding that Sections 1584 and 1589 apply only when a defendant compels and/or forces "acts * * * that amount to work in [the] ordinary economic sense."

United States v. *Huskey*, 502 F.3d 1196, 1198 (10th Cir. 2007); A.Br. 68; *Gonzales*, 456 F.3d at 1182. In addition, the district court defined the terms "labor" and "services" in accordance with their dictionary definitions. Consequently, the alleged error as to the jury instructions is not plain. See, *e.g.*, *United States* v. *Smith*, 413 F.3d 1253, 1274 (10th Cir. 2005), cert denied, 546 U.S. 1120 (2006) (error not plain since jury "instruction[s] * * * not contrary to well-settled law").

2. Defendants are also not entitled to reversal of their convictions because the alleged error did not affect the "result[s] of the proceeding." *United States* v. *Corchado*, 427 F.3d 815, 818 (10th Cir. 2005), cert. denied, 547 U.S. 1086 (2006); see also *United States* v. *Edgar*, 348 F.3d 867, 872 (10th Cir. 2003). First, the evidence as to Counts 2, 3, and 5 is overwhelming as illustrated by the fact that defendants have not challenged its sufficiency on appeal. See, *e.g.*, *United States* v. *Robertson*, 473 F.3d 1289, 1292-1294 (10th Cir. 2007) (erroneous instruction as to required element of the offense did not affect substantial rights given strength of the government's case). Consistent with the jury's verdict, the evidence, including the 34 videotapes introduced by the government, establishes that defendants repeatedly compelled and/or forced Mary and Barbara, the named victims of the aforementioned counts, to each perform dozens of sexually explicit acts, including masturbation, nude hoola-hooping, genital shaving, fondling of genitalia, and nude

massages on videotape. See, *e.g.*, Clip 117-4; GX116B, Pt3, 28:27; GX100C, Pt1, 7:28; GX119B, Pt1; GX108C, Pt3, 16:27-21:25; GX112C, Pt1, 8:05, 10:00.

Moreover, defendants correctly concede (A.Br. 73) that "forcing a person to be an actor in an actual pornographic movie would no doubt be work of an economic nature," and do not dispute that Barbara and Mary were forced to perform sexual activities on film. Thus, even under defendants' definition, Mary and Barbara's conduct amounted to work. To the extent that defendants contend (A.Br. 73) that their victims were not actors because their films are not actually pornographic, the content of, and the fact that all 34 videos were seized from their bedroom, rather than Kaufman House or a home office, indicates otherwise. In any event, it is irrelevant whether the films are characterized as pornographic because it is not the subject matter of the films, but that defendants forced their victims to perform in them that establishes that their victims were engaged in work. Accordingly, because the victims' conduct qualifies as "labor" and "services" even under defendants' narrow definitions of those terms, the district court's jury instructions could not have prejudiced defendants.

In addition, the evidence reflects that Dr. Kaufman was the film director for the videotapes, and that Barbara and Mary, along with the other residents of Kaufman House, were his actors. At trial, Dr. Kaufman described himself as the

"cameraman," Tr. 3453, and referred to filming or shooting "scenes," GX100C, Pt2, 10:04; GX103B, Pt2, 38:28, 41:58. With regard to much of the sexual conduct on film, Dr. Kaufman repeatedly told residents what to do, GX108C, Pt2, 31:28; GX119B, Pt1, 17:39, where to stand, GX101C, Pt3, 29:44-30:00; GX103B, Pt1, 00:23; GX 122C, Pt, 28:09, and how to position themselves, GX109B, Pt1, 1:29; GX112C, Pt1, 7:22; GX119B, Pt1, 00:22, 7:32. He also adjusted the lighting conditions, GX 100C, Pt1, 3:46-4:10, and furnished his actors with props, GX 100C, Pt1, 8:59-9:12. For example, Dr. Kaufman directed Barbara to face the light, GX 112C, Pt1, 18:29, and to lie down, GX112C, Pt1, 7:05, 7:22, ordered Barbara and James to reenact a phone-sex scene complete with props, GX100C, Pt1, 8:59-9:12, demanded that Jonathan "free up" his penis, GX119B, Pt1, 17:39, and declared that he had captured "most of the action" of one scene, GX133B, Pt1, 32:04; see also GX 107C, Pt1, 00:15 (stating he wanted to get a close up). Almost like an artistic director, Dr. Kaufman often focused the camera to get close-up views of the actors' genitalia. See, *e.g.*, GX102C, Pt2, 3:39, 4:26, 10:56; GX106C, Pt4, 24:30; GX112C, Pt1, 00:47; GX119B, Pt1, 8:09, 12:30, 15:27.

Defendants cannot dispute that they acquired something of economic value as a result of their criminal conduct relating to Counts 2, 3, and 5. They clearly believed that the videotapes had value, as evidenced by the fact that they wrote a

letter proposing to share the tapes with the Cypress Cove Library. GX408; Tr. 364-366; see also Tr. 1263; GX129B, Clip 128-1. The fact that these videos were not for sale, but were for consumption by the Kaufmans and for offering to the Cypress Cove nudist colony is immaterial, just as it would be immaterial if defendants compelled their victims to produce furniture for their private use rather than for sale on the commercial market. In addition, because defendants were successful in coercing and forcing their victims to repeatedly perform sexually explicit acts on videotapes, they did not need to hire and pay actors to do the same, or incur the cost of obtaining pornographic films for viewing. Furthermore, because defendants coerced their victims to perform the sexually explicit acts most often during so-called therapy sessions, these activities were an integral part of the scheme that allowed them to bill the government fraudulently for thousands of dollars.

The defendants forced their victims to perform in their movies. The victims' conduct as performers had economic value for the defendants, and the defendants believed their videotapes had value to others. Thus, the alleged "instructional error" clearly did not "allow" their convictions on Counts 2, 3, and 5 to be "based on acts" that "do not amount to work in its ordinary, economic sense." A.Br. 73, 68. Accordingly, defendants cannot demonstrate the alleged error affected the outcome of the proceedings.

3. Finally, defendants have failed to demonstrate that the alleged error is "particularly egregious and * * * result[s] in a miscarriage of justice." *United States* v. *Bruce*, 458 F.3d 1157, 1165 (10th Cir. 2006), cert. denied, 127 S. Ct. 999 (2007). First, the alleged defect in the instructions can hardly be characterized as "particularly egregious" because, as noted, *supra*, the district court defined the statutory terms "labor" and "services" in accordance with their ordinary meanings. In addition, because the evidence relating to the "involuntary servitude" and forced "labor or services" counts is particularly strong, this Court's refusal to overturn defendants' convictions will not result in a miscarriage of justice. See, *e.g.*, *id*., at 1165-1166 (relying on strength of government's case in concluding that district court's *sua sponte* failure to give instruction first requested on appeal did not affect the fairness, integrity, and reputation of the proceedings).

III

THERE IS SUFFICIENT EVIDENCE THAT DEFENDANTS USED THE REQUISITE COMPULSION UNDER 18 U.S.C. 1584 TO FORCE KEVIN AND JONATHAN TO LABOR ON THE FARM

Defendants argue that there is insufficient evidence for the jury to have concluded that they compelled Kevin and Jonathan to labor on their farm on November 8, 1999. They contend that the testimony of Kevin and Jonathan demonstrates that each consented and, therefore, was not forced to work on the farm that day. A.Br. 76, 77-83. Their argument fails as there is sufficient evidence to support convictions on Count 6 as to Kevin and Jonathan.

A. Standard Of Review

A defendant seeking to reverse his conviction based on insufficiency of the evidence faces a "high hurdle." *United States* v. *Hanzlicek*, 187 F.3d 1228, 1239 (10th Cir. 1999). "Evidence is sufficient to support a conviction if a reasonable jury could find the defendant guilty beyond a reasonable doubt, given the direct and circumstantial evidence, along with reasonable inferences therefrom, taken in a light most favorable to the government." *United States* v. *Wilson*, 107 F.3d 774, 778 (10th Cir. 1997) (quoting *United States* v. *Mains*, 33 F.3d 1222, 1227 (10th Cir. 1994)). This Court does "not weigh conflicting evidence or consider the credibility

of the witnesses, but simply 'determine[s] whether [the] evidence, if believed, would establish each element of the crime.'" *United States* v. *Vallo*, 238 F.3d 1242, 1247 (10th Cir.), cert. denied 532 U.S. 1057 (2001) (quoting *United States* v. *Evans*, 42 F.3d 586, 589 (10th Cir. 1994)). It reviews the "whole record," *United States* v. *Trotter*, 483 F.3d 694, 699 (10th Cir. 2007), which means that this Court does not evaluate the evidence in "bits and pieces * * * but consider[s] the collective inferences to be drawn from the evidence as a whole," *Wilson*, 107 F.3d at 778 (internal citation omitted). Where "the government has met this standard," this Court "must defer to the jury's verdict." *Vallo*, 238 F.3d at 1247 (10th Cir.) (citing *Evans*, 42 F.3d at 589).

B. There Is Sufficient Evidence That Defendants Employed The Requisite Compulsion To Force Kevin And Jonathan To Work On The Farm

Section 1584 criminalizes involuntary servitude, which requires that "the victim is forced to work * * * by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." *United States* v. *Kozminski*, 487 U.S. 931, 953 (1988). In assessing whether services were compelled by prohibited means, the relevant inquiry is not whether any particular act was compelled by a particular use or threat of force, but rather whether the totality of defendants' conduct created a climate of fear that overcame the victims'

will, resulting in their compliance with defendants' demands. See *United States* v. *Alzanki*, 54 F.3d 994, 999 (1st Cir. 1995), cert. denied, 516 U.S. 1111 (1996) (describing acts that gave rise to "climate of fear"); *United States* v. *King*, 840 F.2d 1276, 1281 (6th Cir.), cert denied, 488 U.S. 894 (1988) (finding that force, threats, and other coercion created "pervasive climate of fear"); *United States* v. *Warren*, 772 F.2d 827, 833-834 (11th Cir. 1985), cert. denied 475 U.S. 1022 (1986) (noting "use, or threatened use, of physical force to create a climate of fear"); *United States* v. *Booker*, 655 F.2d 562, 566 (4th Cir. 1981) (discussing how assaults and threats created "climate of fear").

The record contains extensive evidence detailing the coercion defendants employed to force residents to obey their instructions, including use and threats of force and physical restraint and threats of institutionalization due to ejection from Kaufman House. In fact, defendants do not challenge the sufficiency of the evidence of coercion supporting Counts 2-5. A.Br. 35, 47-50. This same evidence supports the jury's verdict on Count 6.

The evidence shows that defendants created a climate of coercion by controlling virtually every aspect of the residents' lives and punishing those who disobeyed their orders. See pp. 13-23, *supra*. That evidence included using and threatening use of a stun gun on disobedient residents, Tr. 1501-1502, 2638,

choking and manhandling residents, Tr. 1509, 1687, physically restraining residents and placing them in the seclusion room for long periods of time, without clothing and adequate toilet facilities, Tr. 835, 838, 841, 1695, 2707, and threatening residents with ejection from Kaufman House and placement in a nursing home or other institution that would restrain their freedom of movement, Tr. 826, 1690, 2651-2652.

Kevin and Jonathan were aware of punishment inflicted on those who disobeyed. See pp. 14-25, *supra*. They knew about the violence and the seclusion room. Tr. 841, 1686-1687, 2638. Indeed, much of the evidence of assaults and isolation of residents came through their testimony. In addition, they both feared being ejected from Kaufman House and sent to a nursing home or other institution. Tr. 1798, 2651. Each of these forms of coercion, consisting of actual and threatened physical force and restraint, as well as threats of legal coercion in the form of institutionalization, gives rise to a condition of involuntary servitude in violation of Section 1584. See *Kozminski*, 487 U.S. at 948 ("threatening an incompetent with institutionalization * * * could constitute the threat of legal coercion that induces involuntary servitude.").

Kevin also testified that the farm labor was repayment of a debt defendants said he and the residents owed them for a trip to Cypress Cove. Tr. 1729; see also

Tr. 1711-1712. Defendants concede that such a debt, coupled with the threat of physical or legal coercion if work is not done, "may conceivably satisfy *Kozminski*." A.Br. 79. This is precisely what the evidence in this case proved. The never-ending Cypress Cove debt was enforced against the backdrop of defendants' use and threats of physical force and restraint.

Moreover, the evidence showed that Kevin and Jonathan had the kind of special vulnerabilities that the Supreme Court considered relevant in *Kozminski*. 487 U.S. at 952 ("[T]he vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve."); see also *id*. at 948. They both suffered from serious mental illness, Tr. 1596, 725, and this mental illness made them particularly vulnerable to exploitation, manipulation, and control, Tr. 2337, 2576. Indeed, it is unlikely that Jonathan and Kevin were capable of giving informed consent to an unrecognized mental health therapy. Tr. 726-728. From this a jury could easily conclude that Jonathan and Kevin did not freely consent to working on the farm.[19]

Defendants nonetheless contend that the evidence is insufficient as to Kevin because he testified that he told the police and SRS investigators shortly after the

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[19] Dr. Kaufman claimed that the nude farm labor was therapy. Tr. 92, 109-110.

November 8, 1999, incident that he enjoyed working in the nude, that working in the nude was good for him, and that working on the farm was his choice. A.Br. 77 (citing Tr. 1838, 1933). But Kevin also testified that defendants forced him to work on the farm. Tr. 1839. In fact, when asked to comment on a document drafted by Arlan Kaufman concerning the farm work, DX 8/606, Kevin specifically stated that the portion of the document describing the farm work as voluntary was false. Tr. 1841. He stated that the activities at the farm "were not voluntary. When the group went out, you were expected to go out." Tr. 1841; see also Tr. 1843. He admitted to feeling like a slave at the farm. Tr. 1843. He also said that if he had declined to go "there would have been consequences." Tr. 1843; see also Tr. 1730 (going to farm "not a choice").

Defendants argue (A.Br. 78) that Kevin's testimony that they forced him to work on the farm contradicts and "cannot overcome his contemporaneous belief" that he freely engaged in this labor. Even assuming some contradiction or inconsistency between what Kevin told investigators in November 1999 and what he testified to under oath at trial, defendants' argument is unavailing. As this Court has made clear, it "accept[s] the jury's resolution of conflicting evidence and its assessment of the credibility of witnesses." *United States* v. *LaVallee*, 439 F.3d 670, 697 (10th Cir. 2006) (quoting *United States* v. *Owens*, 70 F.3d 1118, 1126

(10th Cir. 1995)); see also *United States* v. *Pearson*, 798 F.2d 385, 387 (10th Cir. 1986). Juries routinely are asked to sift through witnesses' testimony, including seeming contradictions or inconsistencies.

It was reasonable for the jury to credit Kevin's later explanation of the circumstances surrounding the farm labor in light of the overwhelming evidence of coercion of the residents. Moreover, taking into consideration Kevin's compromised mental state, the jury could easily conclude that contemporaneous comments made while Kevin was still under the defendants' control were less reliable.

Defendants likewise argue (A.Br. 80-83) that Jonathan's testimony shows he was not coerced to labor on the farm. While Jonathan did state that he voluntarily engaged in farm labor, see Tr. 2620, 2629, he also testified that he acceded to defendants' demands, including working in the nude, because he feared being expelled from Kaufman House. Tr. 2652, 2654. Defendants argue that Jonathan's statement that he felt apprehension about refusing defendants' demands did not occur until after Gerald's death, which was after 1999. Defendants contend (A.Br. 82 (citing Tr. 2667)) that Jonathan testified that Dr. Kaufman only once told Jonathan that he had no other alternative to Kaufman House because, in other

houses, residents were forced to live in a structured and 24-hour supervised environment. See Tr. 2653.

A fair reading of that comment, however, only supports the conclusion that Dr. Kaufman mentioned the lack of alternative housing *at least* once. Tr. 2667 ("Q: And in your testimony you'd also mentioned that Dr. Kaufman one time had mentioned that there weren't many alternatives. A: Yes."). Given the testimony of other witnesses that Dr. Kaufman repeatedly employed this thinly veiled threat, the jury could reasonably conclude that Jonathan was referring to a more generalized fear about being ejected, which occurred before, as well as after, November 8, 1999.

Defendants also argue that defendant Arlan Kaufman's threatening residents with a stun gun if they did not cooperate was too remote in time from the farm labor to serve as proof of compulsion. A.Br. 83. But there was testimony that the use of the stun gun continued as late as 1998. See Tr. 1501. In any event, that argument fails because defendants' focus on one point in time is too narrow. There need not be a one-to-one relationship between a particular coercive measure and the work on the farm. Rather, it is enough under 18 U.S.C. 1584 that defendants established a climate of coercion continuing over a period of time where failure to follow their orders could result in physical force, restraint, or institutionalization. See, *e.g.*, *Alzanki*, 54 F.3d at 999; *King*, 840 F.2d at 1281; *Booker*, 655 F.2d at 566; *United*

States v. *Pipkins*, 378 F.3d 1281, 1297 (11th Cir. 2004) (prostitution ring where general climate of coercion induced nightly commercial sex acts); *Warren*, 772 F.2d at 833-834. The jury was free to rely on all of the coercion evidence, including the actual and threatened instances of physical force and physical restraint, and the threats of removal from Kaufman House and institutionalization, in considering whether Kevin and Jonathan felt compelled to work on the farm.

In light of the record as a whole, there is more than sufficient evidence from which a jury could reasonably conclude that defendants used the requisite coercive means to force Kevin and Jonathan to work on the farm on November 8, 1999.[20] The conviction should be upheld.

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[20] It is also important to note that the jury in this case demonstrated how carefully it weighed the evidence as to each resident charged under Count 6. It unanimously found that defendants employed the requisite compulsion as to Jonathan and Kevin, but declined to find that defendants used such compulsion against James.

CONCLUSION

The Court should affirm defendants' convictions.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument has been tentatively scheduled in these cases for the week of May 12, 2007.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief exceeds the type-volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Wordperfect 9.0 and contains 17,110 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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December 17, 2007

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2007, an electronic copy of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE was sent via electronic mail to the Clerk of the United States Court of Appeals for the Tenth Circuit and simultaneously served by electronic mail on the following:

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I further certify that, on December 18, 2007, copies of the United States' brief will be sent by Federal Express overnight delivery, postage prepaid, to the Clerk of the United States Court of Appeals for the Tenth Circuit and the counsel listed above.

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December 17, 2007

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