No. 19-10032

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WEI LIN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE NORTHERN MARIANA ISLANDS

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

This is defendant Wei Lin's second appeal in this case. In the initial appeal, this Court remanded the case to the district court for resentencing. *United States* v. *Lin*, 841 F.3d 823 (9th Cir. 2016). After additional proceedings below, the district court entered a final amended judgment on February 1, 2019. E.R. 1-7.[1] Lin

[1] "E.R. __" refers to the Excerpts of Record. "S.E.R. __" refers to the Supplemental Excerpts of Record, which the government filed in three volumes. "Doc. __" refers to entries on the district court docket. "Br. __" refers to the page number of Lin's opening brief.

timely appealed that same day challenging his sentence and the district court's denial of his motion to withdraw his guilty plea. E.R. 37.

The district court had jurisdiction under 18 U.S.C. 23, 18 U.S.C. 3231, and 48 U.S.C. 1822. This Court has jurisdiction under 18 U.S.C. 3742, 28 U.S.C. 1291, 28 U.S.C. 1294, 48 U.S.C. 1821, and 48 U.S.C. 1824.

STATEMENT OF THE ISSUES

This is the second appeal arising from Lin's conviction and sentence for conspiring to commit sex trafficking. The parties agree that Sentencing Guidelines § 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) applies to Lin's conduct. The parties disagree, however, about Lin's base offense level. Lin argues that it is 14 under Section 2G1.1(a)(2), while the government argues—and the district court properly concluded below—that it is 30 under the cross reference under Section 2G1.1(c)(1). Lin also argues that if his base offense level is 30, the district court should have permitted him to withdraw his guilty plea because defense counsel misadvised him about his likely sentence.

This appeal presents the following two questions:

1. Whether, in calculating Lin's recommended custodial sentence, the district court properly considered and applied the cross reference at Section 2G1.1(c)(1) based on clear and convincing evidence that Lin and his co-

conspirators used threats and fear to cause three women to engage in commercial sex.

2. Whether the district court acted within its broad discretion in denying Lin's renewed motion to withdraw his guilty plea because the evidence showed that Lin was well aware of his sentencing exposure.

STATEMENT OF THE CASE

1. Factual Background[2]

In 2010, Wei Lin recruited three women from the People's Republic of China—H.Z., P.C., and E.W.—to travel to Saipan under the false promise of lawful employment. E.R. 329, 359-360; S.E.R. 2, 15; PSR 6-7. Lin charged the women a fee to arrange their travel and provide instructions and documents to enable them to pass through U.S. customs. E.R. 360; S.E.R. 2-3, 15; PSR 7-8. His true purpose was to force the women to engage in commercial sex for his financial benefit. E.R. 329, 359-360; S.E.R. 2, 15; PSR 6-7.

[2] These facts are drawn from the following sources: the superseding indictment against Lin and his co-conspirator Yanchun Li (E.R. 358-363); Lin's plea agreement (E.R. 328-333); the factual basis the government offered for Lin's plea agreement (S.E.R. 1-5); Li's plea agreement (S.E.R. 6-16); and the First Amended Revised Presentence Investigation Report. Among other evidence, the victims' statements (S.E.R. 46-105) and law enforcement summaries of victim and other witness interviews (E.R. 206-262; S.E.R. 44-45, 101-110) corroborate the information in the above sources.

When each woman arrived in Saipan, Lin picked her up from the airport and took her to the apartment building where the women would reside. E.R. 359, 361; S.E.R. 2-3, 15. Lin made each woman pay him $4,000, turn over her passport, and sign an employment contract with him. E.R. 361; S.E.R. 2-3, 15; PSR 7-8. Lin told the women that criminals likely would kill them if they went outside. E.R. 361; S.E.R. 2, 15.

Once all three women were in Saipan, Lin revealed that they would be hostesses who fraternized and had sex with karaoke bar customers—not waitresses or hotel housekeepers as they had been told. E.R. 360-361; S.E.R. 2-3; PSR 8-9. The women objected, asking multiple times for Lin to return their passports and money and permit them to return to China. S.E.R. 3; PSR 8. Lin refused and told the women that if they broke their employment contracts they would owe him even more money. S.E.R. 3; PSR 9. He also told them that because he had their passports, they could go back to China only if they were deported. S.E.R. 3; PSR 8. Under threat of debt and deportation, the women performed the hostessing work and engaged in commercial sex. S.E.R. 3; PSR 8.

Lin closely monitored and controlled the women's activities. He employed others, including his associate Yanchun Li, to supervise the women and drive them between the apartment and the karaoke bar or hotels. E.R. 359, 361; S.E.R. 2-3, 15-16; PSR 10. Lin required that the women primarily serve customers who did

not speak Mandarin, which was the only language the women knew other than their local dialects. E.R. 361; S.E.R. 2-3, 16. Although the karaoke bar charged customers a fee for the women's services, the women were not paid. E.R. 359, 361; S.E.R. 2-3, 16; PSR 10. Instead, the bar shared a portion of the proceeds from the women's work with Lin, who kept it for himself. E.R. 359, 361; S.E.R. 4; PSR 10.

Lin used fear tactics to secure the women's compliance with his sex trafficking scheme. He and his associates verbally abused the women, threatened them with physical violence, and claimed connections to corrupt government officials in Saipan. S.E.R. 2, 16; PSR 10. They also told the women that if they were disobedient, Lin would turn them over to immigration authorities and they would be jailed. PSR 8-9. Lin and his associates also suggested that Lin could kill the women with impunity because the authorities in Saipan did not care what happened to Chinese people. PSR 9-10.

2. Procedural Background

Because of the posture of this appeal and the nature of the issues presented, we set forth the lengthy procedural background in considerable detail below.

a. Events Preceding Lin's Guilty Plea That Provided Notice Of His Sentencing Exposure

i. In May 2011, a federal grand jury in the Northern Mariana Islands indicted Lin on two counts of immigration document fraud in violation of 18

U.S.C. 1546(a) and one count of false statements to a federal agent in violation of 18 U.S.C. 1001(a)(2).[3] Soon thereafter, a prosecutor from the U.S. Attorney's Office advised Lin's then-attorney, Joseph Camacho, that the government was pursuing additional charges against Lin. S.E.R. 17-22. These included foreign labor contracting fraud, alien smuggling, and, as relevant here, sex trafficking and sex trafficking conspiracy under 18 U.S.C. 1591 and 1594, respectively. S.E.R. 17-22. In a letter to Lin's attorney, the prosecutor detailed Lin's sentencing exposure for these charges. S.E.R. 21-22. He wrote that for the sex trafficking offenses, Lin's "likely" base offense level under Section 2G1.1(a)(1) of the Sentencing Guidelines was 34, which would increase to 38 under Section 2G1.1(d)(1) because the offense involved multiple victims. S.E.R. 22. As a result, the recommended custodial sentence would be 235 to 293 months. S.E.R. 22.

A week later, the prosecutor sent another letter to Camacho describing Lin's exposure and the terms of a possible plea agreement to one count of conspiracy to commit foreign labor contracting fraud under 18 U.S.C. 1349 and one count of conspiracy to commit sex trafficking under 18 U.S.C. 371. S.E.R. 28-29. The letter noted that even though the Sentencing Guidelines range for a violation of 18

[3] A jury ultimately found Lin guilty of all three counts and the district court sentenced him to six months' incarceration and one year of supervised release. Doc. 47, at 1-3, *United States* v. *Lin* (D. N. Mar. I. Oct. 25, 2011) (No. 1:11-cr-00008).

U.S.C. 371 likely would be very high, "like it would for a [Section] 1594(c) conspiracy to commit sex trafficking charge," the statutory maximum sentence for the two counts in the plea agreement would be ten years as compared to life under Section 1594(c). S.E.R. 29-30.

Camacho and a translator visited Lin, whose first language is not English, to discuss these letters. S.E.R. 23-27. It was Camacho's regular practice to have the translator read correspondence to his client, and to bring a Sentencing Guidelines chart to demonstrate the defendant's exposure. S.E.R. 23-24, 26-27. According to Camacho, Lin understood the serious charges against him and the Sentencing Guidelines. S.E.R. 23-24, 26.

The parties were unable to reach a plea agreement, and in September 2011, a federal grand jury returned an 18-count indictment against Lin charging foreign labor contracting fraud and alien smuggling violations. E.R. 364-373. Camacho withdrew as Lin's counsel after becoming a local judge, and two new attorneys, David G. Banes and Michael W. Dotts, took over Lin's defense.

ii. A federal grand jury returned a five-count superseding indictment against Lin and Yanchun Li in April 2012. E.R. 358-363; *United States* v. *Lin*, 841 F.3d 823, 825 (9th Cir. 2016) (*Lin I*). The superseding indictment charged Lin and Li with one count each of conspiracy to commit sex trafficking and to benefit financially from a sex trafficking venture in violation of 18 U.S.C. 1594(c),

1591(a)(1) and (a)(2); three counts each of sex trafficking by force, fraud or coercion in violation of 18 U.S.C. 1591(a)(1); and one count each of financially benefiting from a sex trafficking venture in violation of 18 U.S.C. 1591(a)(2). E.R. 358-363; *Lin I*, 841 F.3d at 825.

Defense counsel indicated that Lin was willing to enter into a plea agreement to one count of conspiracy to commit sex trafficking under Section 1594(c) in which he admitted to the elements of the offense but not the underlying facts the government was prepared to establish. E.R. 336-338, 344-347, 352-357. In an email forwarding the government's final offer, the prosecutor asked Lin's counsel to ensure that Lin was aware that even under such an arrangement, the government would put forth at sentencing "our theory of the case exactly as we would have had he proceeded to trial." E.R. 357.

Three days later, Lin and his counsel met to discuss the government's final offer. E.R. 337. According to Lin, Banes told him that his recommended sentence likely would be three to six years and that the judge usually imposed a within-Guidelines sentence. E.R. 341. Banes also told Lin, however, that the judge "does not have to follow the Guidelines" and that his maximum sentence was life imprisonment. E.R. 341. Lin decided to accept the offer. E.R. 338.

b. Lin's Plea Agreement And Change-Of-Plea Hearing

Lin signed the plea agreement, admitting guilt to one count of conspiring to commit sex trafficking by force, threats of force, fraud, or coercion under 18 U.S.C. 1594(c). E.R. 328-333. The agreement stated that Lin and Li conspired to commit sex trafficking "knowing or in reckless disregard that means of force, threats of force, fraud or coercion, or any combination of such means" would be used to cause the victims to engage in commercial sex. E.R. 329. The agreement contained no language about Lin's base offense level. Rather, in signing the agreement, Lin expressly acknowledged that his sentence could be as severe as life imprisonment and that any prior sentencing predictions he might have received were not binding on the district court. E.R. 329-331. Lin also acknowledged that any discrepancies between the U.S. Probation Office's recommended custodial sentence and his attorney's predictions would not be a basis for withdrawing his guilty plea. E.R. 331.

The district court held a hearing on Lin's change of plea. The district court judge provided all the required advisements under Federal Rule of Criminal Procedure 11(b). Lin stated that he understood the charges and the plea agreement, as well as the rights he was forfeiting by pleading guilty. E.R. 277-279, 281-287, 300-319. Lin also stated that he understood he faced a serious (but as-yet undetermined) sentence of up to life imprisonment. E.R. 285, 287-291, 297-299.

He also affirmed that he was pleading guilty voluntarily and not because of any promises or threats, and that he was satisfied with his attorneys. E.R. 278-281.

The court addressed Lin's sentencing exposure in some detail. Early in the hearing, the court confirmed that the parties had not agreed to a base offense level. E.R. 280. The judge explained that that the parties' views on sentencing—and the Sentencing Guidelines themselves—were only recommendations for the court's consideration. E.R. 289-290, 297-299. She also explained that she could sentence Lin to a term outside the recommended Guidelines range. E.R. 299. Lin said that he understood. E.R. 299.

The court made clear that Lin could face a very long sentence. The judge noted on four occasions that the offense to which Lin was pleading guilty carried a sentence of up to life in prison. E.R. 271, 285, 287, 289. She also addressed the very issue about which Lin later claimed he was misadvised: that is, whether his base offense level would be a 14 or instead higher than 30. She explained that depending on how the guidelines were interpreted, Lin's base offense level could be as "high" as "31 or 34" or "depending on the application, it could be at 14." E.R. 298. Lin stated, "I understand." E.R. 298.

The court also addressed the factual allegations to which Lin was admitting guilt. Lin's attorney, Dotts, stated that Lin admitted only to the elements of the offense contained in the plea agreement, but confirmed that Lin was "aware of

what the government has alleged" and of the separate statement of facts supporting the plea that the government had submitted to the court. E.R. 306-308. The judge explicitly noted that she would not be limited at sentencing to the facts included in the plea agreement but instead could consider "any other facts that may come before the Court that relate to * * * relevant conduct to the offense." E.R. 309. Dotts said that he shared this understanding and acknowledged that Lin's sentencing hearing might be lengthy due to "issues over the guidelines, as well as factual disputes." E.R. 310.

The court confirmed the scope of Lin's admissions in the plea agreement. Lin admitted that he and Li conspired to commit sex trafficking "knowing or in reckless disregard that means of force, threats of force, fraud or coercion * * * would be used." E.R. 311. Dotts asserted that Lin was only "admitting to reckless disregard of the fact that fraud was going on," but the judge noted that the other statutory options "are acknowledged, and that this is accepted as proven." E.R. 312-313. The judge recited the definition of "coercion" under 18 U.S.C. 1591(e)(2), which includes "threats of serious harm * * * or physical restraint" and "the abuse or threatened abuse of law or the legal process." E.R. 314. She again reminded Lin that the court would decide the facts based on the evidence presented in sentencing proceedings. E.R. 314-315. Lin said that he understood. E.R. 315.

After additional admonishments, the court accepted Lin's guilty plea. E.R. 319-321. The hearing lasted approximately 90 minutes. Br. 7.

c. Sentencing Disputes And Lin's Motion To Withdraw His Guilty Plea

Consistent with its longstanding position, the government sought a substantial sentence for Lin's sex trafficking conspiracy conviction. The government argued that Sentencing Guidelines § 2G1.1(a)(1) provided a base offense level of 34 for Lin's conviction under 18 U.S.C. 1594(c). See, *e.g.*, Doc. 51; E.R. 381. Sentencing Guidelines § 2X1.1(a) instructs that the base offense level for a conspiracy offense not covered by a specific offense guideline, such as 18 U.S.C. 1594(c), is "the base offense level from the guideline for the substantive offense." Section 2G1.1(a)(1) provides a base offense level of 34 when the offense of conviction is 18 U.S.C. 1591(b)(1), the provision that penalizes the substantive offense Lin conspired to commit, 18 U.S.C. 1591(a)(1). Lin maintained that Section 2G1.1(a)(2) and base offense level 14 applied because, among other things, he pleaded guilty to 18 U.S.C. 1594(c), not 18 U.S.C. 1591(b)(1). See, *e.g.*, Doc. 50; E.R. 381.

Lin then moved to withdraw his guilty plea, asserting that Banes and Dotts misadvised him about his possible sentence. Docs. 127, 147; E.R. 386, 389; see also Br. 8. Lin, Banes, and Dotts submitted affidavits claiming that Banes and

Dotts had advised Lin that his base offense level would be 14 and that he was likely to receive a sentence of three to six years. E.R. 334-349.

The court denied Lin's motion and proceeded to sentencing. Doc. 179; E.R. 391; *Lin I*, 841 F.3d at 825. The judge determined that Lin's base offense level was 34 and that his adjusted offense level was 38, yielding a recommended custodial sentence of 235 to 293 months. Doc. 234; E.R. 397; *Lin I*, 841 F.3d at 825. The court sentenced Lin to 235 months' imprisonment. Doc. 235; E.R. 397; *Lin I*, 841 F.3d at 825.

d. Lin's First Appeal

Lin appealed, arguing that: (1) the district court incorrectly determined his base offense level to be 34 under Section 2G1.1(a)(1); (2) if the court's base offense level determination was correct, then the court erred in denying his motion to withdraw his guilty plea; and (3) the sentence imposed was substantively unreasonable. *Lin I*, 841 F.3d at 825. This Court agreed with Lin that Section 2G1.1(a)(1)—and its base offense level of 34—did not govern his conviction for conspiring to commit sex trafficking in violation of 18 U.S.C. 1594(c). The Court remanded the case to the district court for resentencing.[4] *Id*. at 827.

[4] Given its holding, the Court did not address Lin's other arguments, noting only that the plea withdrawal issue was moot because Lin only wanted to withdraw his plea to the extent the Court affirmed that his base offense level was 34. *Lin I*, 841 F.3d at 825 n.1.

As relevant here, this Court reasoned that Section 2G1.1(a)(1) did not apply because Lin's "offense of conviction" was not 18 U.S.C. 1591(b)(1) but instead 18 U.S.C. 1594(c). *Lin I*, 841 F.3d at 825-826. The Court explained that the district court's approach of looking to Lin's conduct to determine his offense of conviction, rather than the conspiracy offense reflected in his plea agreement and the judgment, was incorrect. The Court reasoned, in part, that the United States Sentencing Commission knew how to reference *conduct*, rather than a *conviction*, in the Guidelines and did not do so when assigning a base offense level of 34 in Section 2G1.1(a)(1). *Id*. at 827. The Court contrasted this with Section 2G1.1(c)(1), *ibid.*, which cross references to Sentencing Guidelines § 2A3.1 when "the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) or 18 U.S.C. § 2242." Accordingly, the Court reversed the district court's determination, vacated Lin's sentence, and remanded for resentencing. *Ibid.* The Court did not specify Lin's correct base offense level.

e. Proceedings On Remand

On remand, the district court conducted new sentencing proceedings, resulting in new disputes about Section 2G1.1's application and another motion to withdraw Lin's guilty plea.

(i) Lin's New Recommended Guidelines Range

The U.S. Probation Office produced an Amended Revised Presentence Investigation Report (PSR) adopting the government's position that Lin's base offense level should be 30. PSR 15-16; see also Doc. 269 (government's timely PSR objection). Under Sentencing Guidelines § 2X1.1(a), the base offense level for a conspiracy conviction for which no guideline is specified is taken from the guideline for the "substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty." PSR 15-16. Consistent with this Court's ruling in *Lin I*, the PSR used Section 2G1.1(a)(2), not Section 2G1.1(a)(1), as a starting point for Lin's amended Guidelines calculations. PSR 15-16.

Section 2G1.1(a)(2) provides a base offense level of 14 for promoting commercial sex by an adult when the offense of conviction is not 18 U.S.C. 1591(b)(1). PSR 15-16. Next, the Probation Office considered any applicable adjustments, and used Section 2G1.1(c)(1)'s cross reference to Section 2A3.1 because Lin's offense involved conduct described in 18 U.S.C. 2241(a) or (b) or 2242—specifically, the use of threats or fear to cause victims to engage in

commercial sex.[5] PSR 15-16. Applying Section 2A3.1(a)(2), the PSR arrived at a base offense level of 30. PSR 15-16.

In so doing, the PSR relied on numerous sources of information the government offered in support of the cross reference's application. These included the plea agreements of Lin and Li, as well as statements and law enforcement interviews of Lin's victims and three other witnesses. Docs. 269, 312; E.R. 402-403, 407; PSR 6. Li's plea agreement fleshed out the admitted elements of the sex trafficking conspiracy offense in Lin's plea agreement. Li admitted that he and Lin forced the women to engage in commercial sex by saying they could not return home until they had paid off their debts, taking all of the women's earnings, monitoring them around the clock, and preventing them from talking to customers who spoke Mandarin. S.E.R. 16. Li also admitted that he and Lin caused the

[5] Sentencing Guidelines § 2G1.1(c)(1) states: "If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) or 18 U.S.C. § 2242, apply § 2A3.1." The Section's application notes explain that conduct described in 18 U.S.C. 2241 includes "using force against the victim [or] threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping." Sentencing Guidelines § 2G1.1, comment. (n.4(A)). Conduct described in 18 U.S.C. 2242 includes, in relevant part, "engaging in, or causing another person to engage in, a sexual act * * * by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping)." Sentencing Guidelines § 2G1.1, comment. (n.4(B)).

women to engage in commercial sex through verbal abuse, threats of physical violence, and false claims of connections to Saipan officials. S.E.R. 16.

H.Z., P.C., and E.W.'s statements and law enforcement interview summaries further described the fear and intimidation that led the women to perform commercial sex acts for Lin's benefit. H.Z. reported that Lin told her that it would be easy to kill someone like her in Saipan because Chinese people were considered low-rank and the government did not care if they died. E.R. 243-244, 252; S.E.R. 92; PSR 9. Lin also said that if the women did not listen to him, they would not have a good life to lead, and if they complained too loudly the police would arrest them. E.R. 243; S.E.R. 92. Lin told H.Z. that if she did not obey his orders one of his associates, Aqiu, would beat her, and that Chinese people who defied him in the past had disappeared or died. E.R. 244, 253; S.E.R. 92. H.Z. was scared of Lin and acceded to his demands that she engage in commercial sex. E.R. 245, 252, 255; S.E.R. 92-93.

P.C., too, reported that Lin forced her to engage in commercial sex by threatening her safety and holding her debt and immigration status over her. When the women were perceived as misbehaving, Lin threatened that if they "want[ed] to play tricks, [he] will also play the same until [the women] die," adding that he had influence with the governor and the police "can never touch [him]." S.E.R. 60. He also told P.C. that local authorities did not care what happened to Chinese people.

E.R. 214; S.E.R. 60. Lin threatened P.C. and told her about a Chinese man who had disappeared, which made her fearful whenever she saw Lin's car coming. S.E.R. 61. P.C. said Lin also told the women that they had to do as he said because he had their passports and employment contracts, and he could put them in jail if they did not obey his demands and have sex with customers. E.R. 208, 211, 214; S.E.R. 60-61.

E.W.'s account was similar. She reported that Lin said he would find the women if they ran away and he also would go after their families. S.E.R. 74. Lin also told her that it would be easy to kill a Chinese person in Saipan, and law enforcement would not care because the Chinese were considered inferior. E.R. 230-231; S.E.R. 74. Like H.Z., E.W. believed that Aqiu would beat the women if they disobeyed Lin. E.R. 230-231; S.E.R. 74; PSR 10. In fear for her and her family's safety, and overwhelmed by her indebtedness to Lin, E.W. felt she had no choice but to perform commercial sex acts. E.R. 231; S.E.R. 74.

Other witnesses corroborated the women's accounts. A karaoke bar customer, Edick Wan, said that Lin controlled the women by holding their passports and earnings and keeping them under constant supervision. S.E.R. 44. The bar's owner, Meen Jung Kim, reported essentially the same. S.E.R. 108. Lauri Ogumoro, a social worker and manager at a women's shelter that hosted the three women, said they were distressed and showed signs of severe trauma

consistent with being victims of sex trafficking, and that one woman was suicidal. S.E.R. 101-102.

After the Probation Office issued its revised PSR, Lin objected to the use of the Section 2G1.1(c)(1) cross reference and again moved to withdraw his guilty plea. Docs. 276, 278; E.R. 403. More than a year later (and after seeking seven continuances),[6] Lin submitted a memorandum and evidence regarding application of the cross reference. Doc. 300; E.R. 406. In support of his position, Lin relied on statements from accomplices and bystanders who denied observing Lin threatening the women and who alleged that the women were willing participants concerned primarily with money. Doc. 300 (citing E.R. 169-186). Lin also submitted a private investigator report that supposedly showed through hotel records that the women were prostitutes before traveling to Saipan. Doc. 300 (citing E.R. 187-205).

The district judge denied Lin's motion to withdraw his guilty plea but later recused herself from the case. Doc. 313; E.R. 407. The case was reassigned to a different judge, who vacated the order denying Lin's motion and took the motion under consideration himself. Doc. 324; E.R. 408.

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[6] In addition to the seven continuances Lin requested prior to re-sentencing, he sought nine continuances between his conviction and his original sentencing. See Docs. 57-1, 96, 120, 195, 201, 206, 210, 218, 222, 284, 286, 288, 291, 293, 296, & 298; E.R. 381, 384, 386, 393, 395, 396, 404, 405. The basis for most of these motions was additional time to investigate and prepare for sentencing.

(ii) The District Court's Combined Hearing On Lin's Renewed Motion And Sentencing

On January 29, 2019, the newly-assigned district judge conducted a hearing on Lin's renewed motion to withdraw his guilty plea (E.R. 38-82), followed by a sentencing hearing (E.R. 85-168).

As for Lin's motion, the court found that Lin could not establish a "fair and just" reason for withdrawing his guilty plea under Federal Rule of Criminal Procedure 11(d)(2)(B) and accordingly denied the motion. E.R. 8, 80. The court explained that Lin could not claim justifiable reliance on defense counsel's advice that he would receive a relatively low sentence in light of all the evidence to the contrary. E.R. 8, 80. This evidence included the initial letters from the prosecutor to Lin's first attorney, Camacho, stating a possible offense level of 38 and a sentencing range of 235-293 months, which the attorney conveyed to Lin; the written plea itself, which explained that Lin's sentence could be as great as life imprisonment; and the district court's thorough plea colloquy advising Lin that the parties disputed the proper base offense level, which could be upwards of 30. E.R. 9-10, 81-82.

The court proceeded to sentencing and considered the parties' central dispute—that is, whether Section 2G1.1(c)(1)'s cross reference should apply. As an initial matter, the court first determined that "fear" (as used in 18 U.S.C. 2242(1) and in the application notes for the cross reference) "should be construed

broadly" and is not limited to fear of bodily harm, as Lin argued. E.R. 13, 29, 140. The court next found that clear and convincing evidence supported application of the cross reference. E.R. 26, 35-36, 153-154. The court summarized the government's evidence, highlighting the admissions contained in Lin's and Li's plea agreements and the statements of H.Z., P.C., and E.W. E.R. 18-20, 31-33, 143-145.

The court rejected Lin's arguments that the cross reference should not apply. First, the court explained that contrary to Lin's assertion, evidence of prior prostitution is irrelevant to whether the victims consented to engage in commercial sex for Lin's benefit in Saipan. E.R. 25, 35, 152. Second, the court stated that Lin made specific threats against the women that "were not general statements about the dangers of Saipan; they were pointed examples used to signal to these women that [Lin] could kill or harm them with impunity." E.R. 25, 35, 152. Finally, the court rejected Lin's argument that the women's real complaint was with being cheated out of money rather than being forced to engage in commercial sex. E.R. 25-26, 36, 152-153. The court noted that the women may have been too ashamed or afraid to admit they engaged in illegal prostitution. E.R. 26, 36, 153.

Accordingly, the court calculated Lin's base offense level to be 30. It then applied a four-level enhancement based on Lin's role as the leader of a criminal activity involving five or more people, and a three-level reduction for Lin's

acceptance of responsibility. E.R. 156-159. The court calculated Lin's adjusted offense level to be 31. E.R. 159. The parties stipulated to a criminal history level of I, which yielded a recommended custodial sentence of 108 to 135 months. E.R. 159-160.

After considering the required factors under 18 U.S.C. 3553, the court imposed a 120-month prison sentence, followed by five years of supervised release. E.R. 160-163. The court issued an amended judgment three days later, and Lin timely filed his notice of appeal the same day. E.R. 37.

SUMMARY OF ARGUMENT

On appeal, Lin argues that the district court erred in considering and applying the cross reference for the first time on remand. Br. 23-31. He also argues that the district court erred in denying his renewed motion to withdraw his guilty plea on the basis that Banes and Dotts misadvised him about his likely sentence. Br. 32-41. Because both arguments fail, this Court should affirm Lin's conviction and sentence.

1. The district court properly considered and applied the cross reference at Sentencing Guidelines § 2G1.1(c)(1) in resentencing Lin to a 120-month prison term, which is roughly half his original 235-month sentence. First, consistent with this Court's order in *Lin I* remanding the case for resentencing, the district court conducted *de novo* sentencing proceedings and did not rely on Section 2G1.1(a)(1)

(the guideline provision at issue in *Lin I*) in calculating Lin's revised sentence. It was not only appropriate, but necessary, for the court to consider Section 2G1.1's proper application and the parties' evidence anew. The court's consideration and application of the cross reference did not cause Lin unfair prejudice. Indeed, Lin was long aware of the facts that supported application of the cross reference, and of the government's intent to rely on these facts at sentencing.

Second, the court properly decided to apply the cross reference. Section 2G1.1(c)(1) applies, *inter alia*, when a defendant causes a victim to engage in a sex act by threatening or placing the victim in fear (other than fear of death, serious bodily injury, or kidnapping). The court correctly determined that the "fear" necessary to support application of this cross reference is broad and not limited to fear of bodily harm. The government offered clear and convincing evidence that supported the court's conclusion that Lin threatened or placed the women in fear within the meaning of the cross reference and 18 U.S.C. 2242(1), one of the statutes to which it refers, by threatening their safety and manipulating their indebtedness and immigration status. Contrary to Lin's arguments on appeal, the court properly considered hearsay evidence that was consistent and corroborated, and thus had the required indicia of reliability to constitute "relevant information" under Sentencing Guidelines § 6A1.3(a). The court also properly rejected Lin's invitation to consider evidence of the victims' alleged prior engagement in

commercial sex, as this Court has found such evidence to be impermissible in sex trafficking cases.

2. The district court also acted within its broad discretion to deny Lin's motion to withdraw his guilty plea, concluding that fair and just reasons did not support Lin's request. Contrary to Lin's assertions, he repeatedly was apprised of the possibility of a very serious sentence from the earliest stages of his case. Further, the court thoroughly advised Lin of his sentencing exposure before accepting his plea and Lin confirmed that he understood.

Because both of Lin's arguments fail, this court should affirm his conviction and sentence.

ARGUMENT

I

IN CALCULATING LIN'S BASE OFFENSE LEVEL, THE DISTRICT COURT CORRECTLY APPLIED THE CROSS REFERENCE AT SENTENCING GUIDELINES § 2G1.1(C)(1)

A. Standard Of Review

A district court's decision to apply a particular guideline provision has three components: (1) "identify[ing] the correct legal standard"; (2) "find[ing] the relevant historical facts"; and (3) "apply[ing] the appropriate guideline to the facts of the case." *United States* v. *Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir.) (en banc), cert. denied, 138 S. Ct. 229 (2017). The Court "review[s] the district court's

identification of the correct legal standard *de novo* and the district court's factual findings for clear error." *Ibid.* "[A] district court's application of the Sentencing Guidelines to the facts of a given case should be reviewed for abuse of discretion."[7] *Ibid.*

Under clear error review, this Court asks "whether, on the entire evidence, [the Court] is left with the definite and firm conviction that a mistake has been committed." *United States* v. *Aubrey*, 800 F.3d 1115, 1132 (9th Cir. 2015) (citation and internal quotation marks omitted), cert. denied, 136 S. Ct. 1477 (2017). This Court may find that a district court has abused its discretion "only if its conclusion [that a guideline provision applies] is 'illogical, implausible, or without support in inferences that may be drawn from facts in the record.'" *Gasca-Ruiz*, 852 F.3d at 1175 (quoting *United States* v. *Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc), cert. denied, 563 U.S. 936 (2011)).

B. In Accordance With This Court's Order, The District Court On Remand Correctly Conducted Sentencing Proceedings Anew

Lin argues that it was improper for the district court to consider the applicability of Sentencing Guidelines § 2G1.1(c)(1)'s cross reference for the first

[7] Lin relies on cases decided prior to this Court's en banc decision in *Gasca-Ruiz* in incorrectly claiming that *de novo* review applies to both the district court's interpretation and application of the Guidelines. Br. 3 (citing *United States* v. *Rivera*, 527 F.3d 891 (9th Cir. 2008), and *United States* v. *Garcia*, 497 F.3d 964 (9th Cir. 2007)). *Gasca-Ruiz* resolved an intra-circuit conflict on this issue, holding that the latter is reviewed for abuse of discretion. 852 F.3d at 1170.

time on remand, as this allegedly caused him unfair prejudice. Br. 23-28. Lin offers no legal or factual support for his argument. In any event, his argument fails. First, in the procedural posture of this case, it was entirely proper for the district court to hear new arguments and evidence in resentencing Lin, including application of the cross reference. Second, Lin was long aware of the facts the government intended to present at sentencing, and the timing of the government's assertion of the cross reference followed entirely from the outcome of Lin's first appeal.

1. This Court's General Remand Allowed The District Court To Consider The Applicability Of The Cross Reference

In *Lin I*, this Court "reverse[d] the district court's base offense level determination, vacate[d] Lin's sentence, and remand[ed] for resentencing" after concluding that Section 2G1.1(a)(1) did not apply to Lin's conviction under 18 U.S.C. 1594(c). *United States* v. *Lin*, 841 F.3d 823, 827 (9th Cir. 2016). This general remand allowed the district court "to consider any matters relevant to sentencing, even those that may not have been raised at the first sentencing hearing." *United States* v. *Matthews*, 278 F.3d 880, 885 (9th Cir.) (en banc), cert. denied, 535 U.S. 1120 (2002); see also, *e.g.*, *United States* v. *Audette*, 923 F.3d 1227, 1241-1242 (9th Cir. 2019); *United States* v. *Luong*, 627 F.3d 1306, 1309 (9th Cir. 2010), cert. denied, 565 U.S. 855 (2011).

In light of this Court's decision in *Lin I*, it was appropriate and foreseeable for the district court to consider new arguments on remand about how to apply Section 2G1.1. Because this Court vacated Lin's sentence and remanded for resentencing, the district court was not constrained simply to apply Section 2G1.1(a)(2) and stop there. Rather, it was proper for the district court to perform the Guidelines calculation anew. See *Matthews*, 278 F.3d at 885. In doing so, the United States Sentencing Commission instructs district courts to determine the applicable guideline range by first identifying the appropriate guideline provision (here, Section 2G1.1) and next determining the "base offense level" and applying "any appropriate specific offense characteristics, cross references, and special instructions." Sentencing Guidelines § 1B1.1(a)(1)-(2). Nothing in *Lin I* precluded the district court from considering application of the cross reference in the second step of the guideline range calculation. 841 F.3d at 827.

Accordingly, the approach that the government advocated and the district court adopted in resentencing Lin was consistent with the Sentencing Commission's instructions and this Court's opinion. Because this Court held that Section 2G1.1(a)(1) and base offense level 34 did not apply, the district court on remand applied Section 2G1.1(a)(2) and considered whether Lin's base offense level was 14 or whether it should increase through application of the Section 2G1.1(c)(1) cross reference to Sentencing Guidelines § 2A3.1. E.R. 27, 137-138.

Indeed, this Court in *Lin I* specifically discussed the cross reference, explaining that unlike Section 2G1.1(a)(1), the cross reference directs courts to compare the defendant's offense conduct to the "conduct described in 18 U.S.C. § 2241(a)" or (b) or 18 U.S.C. 2242. *Lin I*, 841 F.3d at 827 (quoting Section 2G1.1(c)(1)). In its decision on remand, the district court performed this conduct-matching exercise and concluded that Lin's base offense level should be 30. E.R. 16-26, 31-36, 143-153.

Because the district court correctly reconsidered Lin's guideline range, it is unsurprising that Lin cites no authority for his claim that application of the cross reference on remand was unfair or violated his due process rights. Lin asserts that there is a "natural analogy * * * to a defendant's speedy trial rights" (Br. 26), but the analogy is inapt. The Supreme Court has held that the Sixth Amendment's speedy trial guarantee does not apply once a defendant has pleaded guilty. See *Betterman* v. *Montana*, 136 S. Ct. 1609, 1612 (2016). Although a defendant may have some due process-based protections during the sentencing phase of a case, *ibid.*, we have found no court that holds that new arguments or evidence raised in timely resentencing proceedings interfere with a defendant's constitutional rights.[8]

[8] Some courts of appeals have held that "oppressive delay" in sentencing a defendant can constitute a violation of a defendant's due process rights if a defendant meets the "heavy burden" of showing that the delay was the government's fault and that it caused him prejudice. *E.g.*, *United States* v.

(continued…)

2. Consideration Of The Cross Reference On Remand Did Not Prejudice Lin

Lin argues that application of the cross reference on resentencing prejudiced him because it "forced [him] to try and defend against newly at issue factual allegations." Br. 26. Not so. Lin and his counsel long knew of the evidence that supports application of the cross reference and of the government's intent to rely on these facts at sentencing.

First, the superseding indictment alleged that Lin caused his victims to engage in commercial sex through "force, fraud, and coercion." E.R. 358-363. The indictment specifically alleged that Lin and Li secured H.Z., P.C., and E.W.'s compliance through manipulation of debts and immigration status, threats of violence, constant monitoring, claims of corrupt government connections, and theft of earnings. E.R. 360-361. Lin was sufficiently aware of these allegations to refuse to include them in his plea agreement and to insist on pleading guilty only to

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(…continued)
*Sander*s, 452 F.3d 572, 580 (6th Cir. 2006) (citing *United States* v. *Lovasco*, 431 U.S. 783 (1977)), cert. denied, 550 U.S. 920 (2007). Lin's dispute here is not with delay in conducting his initial sentencing or resentencing, but instead with the arguments and evidence properly considered in resentencing him. Moreover, as discussed above, Lin cannot show prejudicial delay attributable to the government.

Finally, Lin's invocation of the civil doctrine of laches is unpersuasive. This Court has noted that "laches traditionally is not a defense against the United States" and "[w]e have found no case applying a laches defense in the criminal context." *United States* v. *Batson*, 608 F.3d 630, 633 n.3 (9th Cir. 2010) (brackets in original) (quoting *United States* v. *Milstein*, 401 F.3d 53, 63 (2d Cir. 2005)).

the elements of an 18 U.S.C. 1594(c) violation. E.R. 336-337, 344-347, 352-357. The government agreed to this, but pressed Lin's counsel to confirm that Lin understood that the government would present at sentencing "our theory of the case exactly as we would have had he proceeded to trial." E.R. 357.

Second, the colloquy during Lin's change-of-plea hearing provided further notice of the facts that Lin now claims prejudiced him on resentencing. The district court told Lin that it could consider any facts that came before it regarding his offense. E.R. 309, 314-315. Lin's own attorney acknowledged that the sentencing hearing might be lengthy due to "issues over the guidelines, *as well as factual disputes*." E.R. 310 (emphasis added). Further, in confirming that Lin understood his plea the court explained that Lin was admitting to use of "force, fraud or coercion," not simply fraud. E.R. 312-313. The court also described in detail the meaning of "coercion" as used in 18 U.S.C. 1591, which includes threats of harm and abuse of process. E.R. 314.

Finally, as Lin's case proceeded to sentencing, the government made good on its promise to present its version of the facts. In support of its original sentencing memorandum and sentencing-related filings submitted in December 2012 and January 2013 (only a few months after Lin's guilty plea), the government offered the very same exhibits on which it later relied in arguing for application of the cross reference. Docs. 58, 60, 78-79; E.R. 381-383. Thus, Lin's claim that

these facts were "newly at issue" on remand is demonstrably false. He knew and had the opportunity to investigate the facts years prior to resentencing proceedings in 2017.

Even if it were true that the government's allegations came as a surprise to Lin, he is incorrect that any delay is attributable to the government. Br. 26. Ongoing district court proceedings—slowed by Lin's nine continuance requests prior to his original sentencing and seven continuance requests prior to re-sentencing—and Lin's first appeal are the reason for the passage of time between the underlying criminal conduct and assertion of the cross reference. Once this Court decided that the district court erroneously applied Section 2G1.1(a)(1), the United States timely argued in an objection to the revised PSR that the court should consider applying the cross reference. See p. 15, *supra*.

C. The District Court Correctly Concluded That "Fear" Is Broad And Not Limited To Fear Of Bodily Harm

Lin next argues that even if the district court was correct to consider application of the cross reference, it construed the guideline's language too broadly. Br. 28-29. He argues that the cross reference applies only where the defendant causes the victim to fear bodily injury. *Id.* at 29. This argument is atextual and contrary to law. The language of the cross reference and the statutes it references, 18 U.S.C. 2241 and 2242, encompasses a broad range of intimidating conduct—including threats to a victim's safety and manipulation of vulnerabilities

such as debt and immigration status—used to cause another person to engage in sex.

The cross reference applies if the offense committed "involved conduct described in 18 U.S.C. § 2241(a) or (b) or 18 U.S.C. § 2242." Sentencing Guidelines § 2G1.1(c)(1). The Application Notes to Section 2G1.1, mirroring the language of the latter two statutes,[9] describe the conduct that triggers this cross reference. The notes provide that "conduct described in 18 U.S.C. § 2241(a) or (b)" includes, in relevant part, "using force against the victim" and "threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping." Sentencing Guidelines § 2G1.1, comment. (n.4(A)). Central to this appeal, the notes also provide that "conduct described in 18 U.S.C. § 2242" includes "causing another person to engage in[] a sexual act with another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping)." *Id.*, comment. (n.4(B)).

[9] Section 2242(1) proscribes "caus[ing] another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping)." Section 2241(a) proscribes causing another person to engage in a sex act "by using force against another person" or "threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping."

The district court correctly held that the term "fear" should be construed broadly, rejecting Lin's view that it is limited to fear of bodily harm. E.R. 13, 29, 140. This Court has held that 18 U.S.C. 2242(1) encompasses "*all fears of harm to oneself or another* other than death, serious bodily injury or kidnapping." *United States* v. *Gavin*, 959 F.2d 788, 791 (9th Cir. 1992) (emphasis added), cert. denied, 506 U.S. 1067 (1993); see also *United States* v. *Sneezer*, 983 F.2d 920, 923 (9th Cir. 1992) ("[Section] 2242(1) requires any other type of fear" than the forms of fear enumerated in Section 2241(a)), cert. denied, 510 U.S. 836 (1993). This Court in *Gavin* declined to find the statute impermissibly boundless as Lin urges, explaining that under any ordinary understanding of "fear," "it is possible to think of harms, such as embarrassment, not encompassed by the statute." 959 F.2d at 791.[10]

Other courts of appeals that have addressed the scope of fear as it is used in the cross reference and 18 U.S.C. 2242(1) have reached similar conclusions regarding the scope of these provisions. See, *e.g.*, *United States* v. *Guidry*, 817

[10] Because there is no "grievous ambiguity or uncertainty" about the meaning of "placing [a] victim in fear," there is no need to apply the rule of lenity, as Lin also argues. Br. 28 (citing *United States* v. *Wing*, 682 F.3d 861, 874 (9th Cir. 2012)). Even if the Court were to apply the rule of lenity and resolve the dispute about the cross reference in Lin's favor, a requirement of fear of bodily harm would not render the cross reference inapplicable. As discussed below, Lin and his co-conspirators threatened H.Z., P.C., and E.W. with bodily harm to force them to engage in commercial sex. See pp. 37-39, *infra*.

F.3d 997, 1008 (7th Cir.) (concept of fear is broad, and fear for one's safety is sufficient), cert. denied, 137 S. Ct. 156 (2016); *United States* v. *Fish*, 295 F. App'x 302, 305 (10th Cir. 2008) (fear is "very broad" and need not pertain to bodily harm); *United States* v. *Johns*, 15 F.3d 740, 743 (8th Cir. 1994) (construing fear broadly and noting that "[S]ection 2242(1) envisions a lesser degree of fear" than Section 2241). Although some courts of appeals have held that fear of "some bodily harm" is *sufficient* to support application of the cross reference and 18 U.S.C. 2242(1), they do not hold that fear of bodily harm is a *requirement*. In *United States* v. *Lucas*, for example, the Fifth Circuit held that 18 U.S.C. 2242(1)'s "fear" element "is satisfied when the defendant's actions implicitly place the victim in fear of some bodily harm." 157 F.3d 998, 1002 (5th Cir. 1998). But the court explained that "fear" is very broad and "can be inferred from the circumstances, particularly a disparity in power between defendant and victim," including "a defendant's control over a victim's everyday life." *Id*. at 1002-1003; see also, *e.g.*, *United States* v. *Castillo*, 140 F.3d 874, 885 (10th Cir. 1998) (noting that fear of bodily harm satisfies Section 2242 but that threat of bodily harm may be implied from "the nature of the circumstances" between perpetrator and victim); *United States* v. *Cherry*, 938 F.2d 748, 755 (7th Cir. 1991) (fear of bodily harm satisfied Section 2242).[11]

[11] Lin is incorrect that *Cherry* stands for the proposition that a victim must (continued…)

In sum, the district court correctly understood the cross reference to encompass a broad range of fears, not limited to fear of bodily harm.

D. The District Court Acted Well Within Its Discretion In Applying The Cross Reference Based On Clear And Convincing Evidence That Lin Used Threats And Fear To Force His Victims To Engage In Commercial Sex

Finally, Lin argues that the government failed to provide sufficient evidentiary support for the cross reference to apply and that the district court improperly weighed the evidence. Br. 28-31. This argument also fails. Clear and convincing evidence supported the court's conclusion that Lin and his co-conspirators used threats and fear of serious personal harm to cause the victims to engage in commercial sex.[12] Further, the court properly relied on consistent and corroborated hearsay evidence and properly declined to consider evidence of the victims' alleged other commercial sex activities.

1. It is well settled that at sentencing a district court may consider any relevant conduct, not just the crime of conviction. There is no limitation at

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(…continued)
fear bodily harm to establish a violation of 18 U.S.C. 2242(1). Br. 29. Subsequent decisions of the Seventh Circuit include no bodily harm requirement and confirm the government's interpretation of *Cherry*. See *Guidry*, 817 F.3d at 1008; *United States* v. *Henzel*, 668 F.3d 972, 977 (7th Cir. 2012).

[12] The court was required to find that clear and convincing evidence supported application of the cross reference because it greatly increased Lin's base offense level, from 14 to 30. *United States* v. *Zitlalpopoca-Hernandez*, 632 F. App'x 335, 337 (9th Cir. 2015) (citing *United States* v. *Gonzalez*, 492 F.3d 1031, 1039 (9th Cir. 2007), cert. denied, 552 U.S. 1153 (2008)).

sentencing on "the information concerning the background, character, and conduct of a person convicted of an offense which a [district court] may receive and consider." 18 U.S.C. 3661; see also *United States* v. *Watts*, 519 U.S. 148, 151-152 (1997) (per curiam); *United States* v. *Yamashiro*, 788 F.3d 1231, 1241 (9th Cir. 2015). The Sentencing Guidelines explain that in deciding whether a cross reference applies, the court evaluates "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," as well as those foreseeably taken in furtherance of joint criminal activity. Sentencing Guidelines § 1B1.3(a)(1). Contrary to Lin's suggestions (Br. 30), therefore, his admissions in pleading guilty did not limit what constitutes relevant conduct for sentencing. Cf. *United States* v. *Speelman*, 431 F.3d 1226, 1231-1232 (9th Cir. 2005) (dismissal of a charge pursuant to a plea agreement does not bar consideration of the conduct underlying the dismissed charge to support application of a cross reference at sentencing).

A sentencing court also may consider hearsay evidence, although it must "bear some minimal indicia of reliability." E.R. 33 (citing *United States* v. *Petty*, 982 F.2d 1365, 1370 (9th Cir.), amended, 992 F.2d 1015 (9th Cir. 1993)); see also Sentencing Guidelines § 6A1.3(a). A district court may rely on a co-defendant's out-of-court statements at sentencing where factors such as external consistency render the statements credible, even though they are not inherently reliable

statements against interest. See *United States* v. *Berry*, 258 F.3d 971, 976-977 (9th Cir. 2001); see also, *e.g.*, *United States* v. *Valencia-Guillen*, 650 F. App'x 925, 926 (9th Cir. 2016) (consistency of hearsay statements made by co-defendants and other witnesses provided sufficient indicia of reliability). Accordingly, the district court properly relied on the consistent and corroborated hearsay statements of the defendants, victims, and third-party witnesses that the government offered in support of applying the cross reference.

2. The district court held that Lin and Li's admissions, along with victim and witness statements, established that Lin and his associates used threats and fear to cause H.Z., P.C., and E.W. to engage in commercial sex. E.R. 16-18, 31-33, 144-147. Specifically, the court found that the evidence showed the women: (1) "were afraid for their own safety and their family members' safety"; (2) "were afraid of being deported or being reported to the police"; and (3) "feared the repercussions of not being able to pay back the significant debt they had accrued to come to the United States." E.R. 26, 36, 153.

Lin argues that in pleading guilty, he only admitted to defrauding his victims. Br. 30. But he admitted in his plea agreement to conspiracy to commit sex trafficking by "force, threats of force, fraud or coercion, or any combination of such means." E.R. 329. Indeed, the court emphasized in its plea colloquy that Lin was pleading guilty to more than fraud. E.R. 312-314. Also, the plea agreement of

Lin's co-conspirator Li confirmed Lin's admissions and made clear that fear was a key tool in securing the victims' compliance. E.R. 17-18, 31-32, 144-145. According to Li's agreement, the conspiracy involved: telling the women they could not return to China until they had paid off their debts; taking all of their earnings; monitoring them around the clock; preventing them from talking to customers who spoke Mandarin; verbal abuse; threats of physical violence; and false claims of connections to Saipan officials. E.R. 17-18, 31-32, 144-145 (citing S.E.R. 15-16).

The victims' statements, which were corroborated by law enforcement interview summaries, are consistent with each other and confirm the efficacy of the fear tactics outlined in Li's plea agreement. Indeed, the court concluded that the victims' statements included "pointed examples used to signal to these women that Defendant could kill or harm them with impunity." E.R. 25, 35, 152. As the court highlighted, the women reported that Lin told them that they could die if they did not comply with his demands. E.R. 17-20, 32-33, 145-147 (citing S.E.R. 60, 74, 92). The statements also included Lin's false claims to the women that he could act with impunity because he had government connections in Saipan, and that Chinese people were considered worthless there. E.R. 18-19, 32-33, 145-147 (citing S.E.R. 60, 74, 92). Further, Lin told at least one woman that he would find her if she fled and that he would come after her family. E.R. 18, 33, 147 (citing

S.E.R. 74). The women also reported that they were fearful of Lin because he manipulated their indebtedness to him and their immigration status, which was compounded by his confiscation of their wages and passports. E.R. 17-19, 33, 146-147 (citing S.E.R. 60, 74). These fears, the women said, led them to engage in commercial sex. E.R. 17-18, 32-33, 146-147 (citing S.E.R. 60, 92).

Witness statements further corroborated Li's admissions and the victims' accounts. E.R. 31, 143. Edick Wan, a karaoke bar customer, and Meen Jung Kim, a bar owner, reported that Lin controlled the women by holding their passports and earnings and monitoring their behavior. S.E.R. 44, 108. Lauri Ogumoro, a social worker and shelter manager who assisted the women after they left Lin's control, also reported that they were distressed and traumatized, and that and one woman was suicidal. S.E.R. 101-102. A therapist who worked with the women, Sister Stella Mangona, also reported that they were traumatized and extremely fearful of what Lin could do to them and their families. S.E.R. 109-110.

Lin asserts that the evidence is "murky" and that "reliable evidence" shows that he only used fraud to secure his victims' compliance. Br. 30-31. But he offers little support for these claims. The court considered, but declined to give weight to, the handful of statements Lin presented from accomplices and bystanders, which contain scattershot claims that Lin was not observed making threats or that

his victims were willing participants concerned primarily with money.[13] Br. 15-19. Lin does not explain why the court should have credited these hearsay statements over the consistent accounts the government offered. Further, the court correctly rejected Lin's invitation to consider supposed evidence of the victims' other commercial sex activities (E.R. 25, 35, 152), as this Court generally has prohibited the use of such evidence to prove consent in sex trafficking cases. See *United States* v. *Haines*, 918 F.3d 694, 697 (9th Cir. 2019) (evidence of victim's prior prostitution "implicates her other sexual behavior or sexual predisposition," and is prohibited under Federal Rule of Evidence 412) (citation and internal quotation marks omitted); *United States* v. *Valenzuela*, 495 F. App'x 817, 820 (9th Cir. 2012) ("evidence of prior prostitution is irrelevant to whether the victims consented to working as prostitutes"), cert. denied, 568 U.S. 1241 (2013).

3. Appellate court decisions support the conclusion that Lin and his associates threatened or placed the victims in the kind of fear that triggers Section 2G1.1(c)(1)'s cross reference. A defendant's exploitation of psychological power, authority, and his victims' unique vulnerabilities can establish the threats and fear

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[13] One of these statements is a summary of Li's interview with an FBI agent. E.R. 169-170. Many of Lin's allegations and claims of ignorance about the sex trafficking operation in this summary conflict with Li's admissions in pleading guilty subsequent to the FBI interview. Additionally, Lin's summary of the victims' statements in his opening brief misconstrue and omit key allegations the victims made.

necessary to support application of the cross reference. See, *e.g.*, *Guidry*, 817 F.3d at 1008 (upholding application of cross reference where victims feared what the defendant, their drug supplier, would do to them if they did not comply with his demand that they engage in commercial sex); *Fish*, 295 F. App'x at 305 (adult male's threat to leave a teenager on the side of the road, thousands of miles from home, if he did not comply with demands for sex was sufficient to support application of cross reference); cf. *Lucas*, 157 F.3d at 1002-1003 (warden's exploitation of power over inmate was analogous to conduct in violation of 18 U.S.C. 2242(1)); *Johns*, 15 F.3d at 742-743 (evidence supported 18 U.S.C. 2242(1) conviction where defendant cultivated fear and compliance with sexual abuse through his role as a spiritual leader and controlling head of household whom the victim feared). Thus, there can be no question that the conduct here was of the sort that Section 2242(1) proscribes, even though Lin's victims did not face immediate bodily injury.[14]

[14] There is no requirement that a defendant's threats or intimidation immediately cause a victim to perform a sex act in order for the cross reference to apply. A defendant's use of threats or fear to cause a person to engage in commercial sex for the defendant's benefit—as opposed to engaging in "particular sex acts on specific occasions"—is conduct that violates 18 U.S.C. 2242(1). *United States* v. *Williams*, 428 F. App'x 134, 141 (3d Cir.) (citing *United States* v. *Madison*, 477 F.3d 1312, 1317 (11th Cir.), cert. denied, 551 U.S. 1109 (2007) (in sex trafficking of a minor case, affirming application of Section 2G1.3(c)(3), which cross references to Section 2A3.1 when the offense involves conduct described in 18 U.S.C. 2241 or 2242)), cert. denied, 565 U.S. 1043 (2011).

The Eleventh Circuit's decision in *United States* v. *Monsalve* is particularly instructive. 342 F. App'x 451 (11th Cir. 2009), cert. denied, 559 U.S. 1080 (2010). Monsalve engaged in sex trafficking conduct quite like Lin's: his victims believed they were coming to the United States to waitress but were told on arrival that they must perform commercial sex acts to pay off thousands of dollars in debt; the victims' identification documents were taken from them; the victims did not speak English or know people in the United States; the victims were told they would be found and deported if they tried to escape; and the victims cried and succumbed to Monsalve's demands after speaking with him. See *id.* at 457. The Eleventh Circuit held that these facts were sufficient to meet the "very broad" definition of fear in the cross reference and 18 U.S.C. 2242(1). *Ibid.* (quoting *Castillo*, 140 F.3d at 885). There are few factual distinctions between this case and *Monsalve*. Indeed, Lin's conduct was arguably more egregious, as he not only manipulated his victims' debt and immigration status but also threatened H.Z., P.C., and E.W. with physical harm and death, as well as false claims of government influence.

For all of these reasons, the court did not abuse its discretion in applying the cross reference to calculate Lin's base offense level as 30.

II

THE DISTRICT COURT PROPERLY DENIED LIN'S MOTION TO WITHDRAW HIS GUILTY PLEA

A. Standard Of Review

Because the "decision whether to permit the withdrawal of a plea 'is solely within the discretion of the district court,'" this Court reviews the denial of such motions for abuse of discretion. *United States* v. *Yamashiro*, 788 F.3d 1231, 1236 (9th Cir. 2015) (quoting *United States* v. *Showalter*, 569 F.3d 1150, 1154 (9th Cir. 2009)). "A court abuses its discretion when it rests its decision on an inaccurate view of the law . . . or on a clearly erroneous finding of fact." *United States* v. *Garcia-Lopez*, 903 F.3d 887, 890-891 (9th Cir. 2018) (quoting *United States* v. *Ensminger*, 567 F.3d 587, 590 (9th Cir. 2009)).

B. The District Court Was Well Within Its Discretion To Deny Lin's Motion To Withdraw His Guilty Plea

Lin argues that the district court should have granted the motion to withdraw his guilty plea because his counsel incorrectly informed him about his possible sentence. Br. 32-41. But the court properly denied the motion because Lin was aware of his true sentencing exposure when he pleaded guilty and thus could not establish fair and just reasons for withdrawing his plea.

1. A defendant may withdraw a guilty plea prior to sentencing upon showing "a fair and just reason for requesting the withdrawal." Fed. R. Crim. P.

11(d)(2)(B). The defendant bears the burden of establishing a fair and just reason. *Yamashiro,* 788 F.3d at 1237. "'Fair and just' reasons for withdrawal include inadequate Rule 11 plea colloquies, newly discovered evidence, intervening circumstances, or any other reason for withdrawing the plea that did not exist when the defendant entered his plea." *Id.* at 1237 (quoting *United States* v. *McTiernan*, 546 F.3d 1160, 1167 (9th Cir. 2008)).

Erroneous or inadequate legal advice can be a fair and just basis for withdrawing a guilty plea if a defendant actually lacked correct information when he pleaded guilty. *Yamashiro*, 788 F.3d. at 1237. A defendant seeking to withdraw a guilty plea because of deficient sentencing advice must show that the "proper advice 'could have at least plausibly motivated a reasonable person in [the defendant's] position not to have pled guilty had he known about the [grounds for withdrawal] prior to pleading.'" *United States* v. *Mayweather*, 634 F.3d 498, 504 (9th Cir. 2010) (brackets in original) (quoting *United States* v. *Garcia*, 401 F.3d 1008, 1011-1012 (9th Cir. 2005)); see also *Yamashiro*, 788 F.3d at 1237; *McTiernan*, 546 F.3d at 1167. Underestimation of the severity of a defendant's sentence alone is insufficient to support withdrawal absent "exceptional circumstances." *United States* v. *Briggs*, 623 F.3d 724, 728-729 (9th Cir. 2010) (citing *United States* v. *Davis*, 428 F.3d 802, 805-808 (9th Cir. 2005)); see also *United States* v. *Garcia*, 909 F.2d 1346, 1348 (9th Cir. 1990) ("[I]t is well

established that an erroneous prediction by a defense attorney concerning sentencing does not entitle a defendant to challenge his guilty plea.") (citing *Shah* v. *United States*, 878 F.2d 1156, 1162 (9th Cir. 1989)).

Although the fair and just standard is applied liberally, a defendant may not withdraw a guilty plea "simply on a lark." *Garcia-Lopez*, 903 F.3d at 891 (quoting *Ensminger*, 567 F.3d at 590); *Mayweather*, 634 F.3d at 504. Entering a guilty plea is a "'grave and solemn act,' which is 'accepted only with care and discernment,'" and permitting withdrawal after acceptance "is, as it ought to be, the exception." *Ensminger*, 567 F.3d at 593 (quoting *United States* v. *Hyde*, 520 U.S. 670, 677 (1997)).

2. The district court did not abuse its discretion in finding both that Lin was amply informed of the potential severity of his sentence when he pleaded guilty and that Lin was unjustified in claiming reliance on his second legal team's allegedly incorrect sentencing advice.

The record contains at least four instances at which Lin was apprised of his true sentencing risk.[15] The first is prior to the superseding indictment, when the

[15] Lin incorrectly implies that the second district court's ruling on his renewed motion relied on a finding that the first district judge's plea colloquy corrected his attorneys' erroneous legal advice. Br. 38. In fact, in ruling on Lin's renewed motion the court considered all the events leading up to Lin's decision to plead guilty and found that he was informed adequately of his sentencing exposure. E.R. 8-10, 80-82.

government sent Lin's first counsel, Camacho, correspondence detailing Lin's possible sentencing exposure. The letters advised that the sex trafficking charges might have an adjusted offense level of 38 and an advisory guideline range of 235-293 months, and that the specific sex trafficking conspiracy charge to which Lin ultimately pleaded guilty (18 U.S.C. 1594(c)) had a high advisory guideline range. See S.E.R. 22, 28. Camacho shared and discussed these letters with Lin, and Lin understood the seriousness of the charges and the guidelines ranges. S.E.R. 24.

Next, the evidence shows that during the final stages of plea negotiations, Lin and his second legal team were aware of and discussed the possibility of a very serious sentence exceeding the guideline range for a base offense level of 14. According to the affidavits Lin submitted, Banes and Dotts told him that his likely advisory guideline range was three to six years and that the district judge usually followed the Guidelines. E.R. 337, 341. But the affidavits also show that Lin knew the judge did not have to follow the Guidelines and that he understood he could be sentenced to a life term.[16] E.R. 337, 341. Dotts' acknowledgment during

[16] Lin claims that he pleaded guilty because he believed he would receive a three-to-six year sentence and that he would avoid the mandatory minimum sentence of 15 years for a sex trafficking charge under 18 U.S.C. 1591(a)(1) and (b)(1). Br. 36-37. While the former belief was incorrect, the latter was accurate: Section 1591(b)(1)'s mandatory minimum sentence did not constrain the district court's authority in sentencing Lin for violating 18 U.S.C. 1594(c), whether his base offense level was 14, 30, or 34. Indeed, even with an adjusted offense level of 31, the court sentenced Lin to ten years in prison—five years less than the

(continued…)

the plea hearing that the parties did not agree on Lin's base offense level (E.R. 280) further undercuts any claim that Lin's defense counsel did not realize the possibility of a higher base offense level until after Lin pleaded guilty.

Then there is the plea agreement itself, which Lin signed. The agreement, which contains no language specifying Lin's applicable base offense level, explains that Lin's sentence could be as severe as life imprisonment and that his attorneys' sentencing predictions were not binding on the court. E.R. 329-331. The agreement also contains an acknowledgment that any discrepancies between the U.S. Probation Office's recommended guidelines range and his attorneys' predictions was not a basis for withdrawing his plea. E.R. 331.

Finally, the court's thorough colloquy at Lin's change-of-plea hearing would have disabused any reasonable person of the belief that he would not receive a lengthy sentence. Lin's affirmations throughout the hearing that he understood the court's admonitions are powerful evidence that Lin knowingly accepted the risk of a severe sentence. "Statements made by a defendant during a guilty plea hearing carry a strong presumption of veracity in subsequent proceedings attacking the plea." *Yamashiro*, 788 F.3d at 1237 (quoting *United States* v. *Ross*, 511 F.3d 1233,

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(…continued)
mandatory minimum he sought to avoid. Lin unquestionably received the benefit of the bargain as he understood it in this regard.

1236 (9th Cir. 2008)); see also, *e.g.*, *Briggs*, 623 F.3d at 728; *United States* v. *Castello*, 724 F.2d 813, 815 (9th Cir.), cert. denied, 467 U.S. 1254 (1984).

The court explained, and Lin said he understood, the terms of the plea agreement and that Lin might receive a serious sentence of up to life imprisonment—a possibility the judge mentioned four times. E.R. 277-291, 296-297. The court also confirmed that the parties had not agreed on a base offense level. E.R. 280. The judge explained, and Lin said he understood, that the parties' views on sentencing, and even the Guidelines themselves, were not binding on the court. E.R. 289-290, 297-299. And the court explained that depending on how the Guidelines were interpreted, the base offense level could be 14, or it could be "high," such as "31 or 34." E.R. 298. Crucially, Lin said he understood this admonition. E.R. 298. Satisfied at the close of the 90-minute hearing that Lin knew the consequences of pleading guilty, the court accepted his plea. Br. 7; E.R. 320-321.

All this evidence, taken together, amply supported the district court's conclusion in denying Lin's renewed motion to withdraw his guilty plea because Lin was aware of his sentencing exposure and knowingly chose to plead guilty.

3. Having found that Lin was aware of his true sentencing exposure when he pleaded guilty, the district court properly concluded that Lin had not established a "fair and just" basis for withdrawing his guilty plea based on inadequate legal

advice. E.R. 8-10, 80-82. A defendant may withdraw a guilty plea pursuant to Rule 11(d)(2)(B) for reasons "that did not exist when the defendant entered his plea." *Mayweather*, 634 F.3d at 506 (emphasis omitted) (quoting *McTiernan*, 546 F.3d at 1167). But the rule does not "embrace[] circumstances known to a defendant at the time of the guilty plea." *Ibid.* Because Lin had been apprised of his true sentencing risk before he pleaded guilty, his case does not present "exceptional circumstances" that support vacating his plea based on a plausible claim that counsel's "gross mischaracterization" of his sentence likely caused him to plead guilty. See *Briggs*, 623 F.3d at 728-729; *McTiernan*, 546 F.3d at 1167.

Lin seeks to distinguish his case from this Court's decision in *Mayweather* (Br. 38-41), but that case confirms that the district court properly denied Lin's motion. In *Mayweather*, the defendant argued in part that the district court should have allowed him to withdraw his guilty plea because counsel incorrectly advised him that his maximum, and not his minimum sentence, sentence was five years. 634 F.3d at 502-503. This Court agreed with the district court that Mayweather's claim of mistaken belief was "demonstrably false"—and could not support withdrawal of his plea—when the statutory minimum sentence of five years and maximum of life appeared in his plea agreement and were announced during his change of plea hearing. *Id.* at 506-507. Here, too, the court was within its discretion to find that the substance of Lin's plea agreement and plea colloquy—on

top of the advice Lin received from counsel during plea negotiations—rendered Lin's allegations of misunderstanding incredible and insufficient to form a fair and just basis for plea withdrawal. See also, *e.g.*, *Yamashiro*, 788 F.3d at 1237 (defendant's statements during plea colloquy undercut subsequent claims that he did not enter plea knowingly and voluntarily); *Briggs*, 623 F.3d at 728 (defendant's discussion of plea consequences with psychologist and plea colloquy transcript defeated claims that he lacked understanding of plea); *Ross*, 511 F.3d at 1236 (plea agreement and plea colloquy contradicted defendant's claims that his guilty plea prevented him from further litigating certain issues).

The cases Lin invokes to support vacating his conviction (Br. 33-34) provide little support. In *United States* v. *Bonilla*, 637 F.3d 980 (9th Cir. 2011), this Court found that the district court abused its discretion in denying Bonilla's motion to withdraw his guilty plea because his counsel failed to answer his questions about whether a guilty plea might lead to his deportation. *Id.* at 986. Distinguishing the decision in *Mayweather*, this Court relied on two factors: (1) there was "no evidence" that, at the time Bonilla pleaded guilty, he knew of the basis on which he would later seek to withdraw his plea; and (2) the court never addressed the plea's deportation consequences at the plea hearing. *Id.* at 985-986. Here, unlike in *Bonilla*, the evidence shows that Lin knew he could face a lengthy sentence when

he pleaded guilty and the court confirmed this possibility (and Lin's understanding of it) multiple times at his change-of-plea hearing.

Lin's reliance on *United States* v. *Davis*, 428 F.3d 802 (9th Cir. 2005), is also misplaced. First, unlike in this case, counsel in *Davis* made a "gross mischaracterization" of Davis' sentencing prospects by allegedly claiming Davis would not receive a custodial sentence if he pleaded guilty, rendering counsel's performance deficient. *Id.* at 805-806. Here, Lin alleges that counsel misrepresented the length of his sentence, not whether he would be imprisoned at all. Second, the *Davis* Court did not opine on whether fair and just reasons supported granting the motion to withdraw, but instead remanded to the district court for reconsideration of the motion under the correct legal standard, which the district court had failed to apply. *Id.* at 808.

Finally, the post-sentencing and post-conviction cases Lin highlights do not help him. In both *Riggs* v. *Fairman*, 399 F.3d 1179 (9th Cir.), reh'g en banc granted, 430 F.3d 1222 (2005), appeal dismissed, No. 02-55185, 2006 WL 6903784 (9th Cir. Apr. 14, 2006), and *Iaea* v. *Sunn*, 800 F.2d 861 (9th Cir. 1986), defendants filed habeas corpus petitions claiming that they were denied effective assistance of counsel during plea negotiations. In those cases, unlike here, this Court found defense counsels' performance to be deficient because they misapprehended the law that controlled their clients' convictions and sentences,

leading them to provide egregiously incorrect advice about the implications of their clients' plea decisions. *Riggs*, 399 F.3d at 1183 (client was not advised that he was subject to California's three strikes law when discouraged from accepting favorable plea deal); *Iaea*, 800 F.2d at 864-865 (client was advised that he could avoid an inapplicable mandatory minimum and receive probationary sentence by pleading guilty, but was sentenced to life). Here, although Lin's second legal team claims to have underestimated his sentencing exposure, his counsel was not incorrect about the law. And Lin does not expressly claim ineffective assistance of counsel.[17]

Accordingly, the district court properly denied Lin's motion to withdraw his guilty plea.

[17] The other two post-conviction cases Lin cites (Br. 35) also do not support his argument. In both cases, this Court held that counsel's incorrect sentencing predictions were not sufficient to support ineffective assistance of counsel claims. *Doganiere* v. *United States*, 914 F.2d 165, 168 (9th Cir. 1990) (affirming denial of such claim in part because there was no "gross mischaracterization" where counsel advised his client that he would receive no more than a 12-year sentence and he received a 15-year sentence), cert. denied, 499 U.S. 940 (1991); *United States* v. *Turner*, 881 F.2d 684, 687 (9th Cir.) (rejecting such claim where counsel predicted a maximum sentence of 46 months and the district court imposed a 57-month sentence), cert. denied, 493 U.S. 871 (1989).

CONCLUSION

The Court should affirm Lin's conviction and sentence.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The United States is not aware of any related cases as defined in Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that the foregoing Brief For The United States As Appellee:

(1) complies with Circuit Rules 32-1(a) and (c) because it contains 12,642 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Circuit Rule 32-1(d), Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2016, in 14-point Times New Roman font.

s/ Katherine E. Lamm
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Dated: September 3, 2019

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2019, I filed the foregoing Brief For The United States As Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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