No. 23-3022

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TONY DANIEL KLEIN,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

The United States agrees with appellant's jurisdictional statement.

STATEMENT OF THE ISSUES

After a three-week trial, a jury convicted defendant-appellant Tony Klein, a former nurse at the Coffee Creek Correctional Facility, of depriving female inmates of their constitutional right not to be subjected to cruel and unusual punishment under color of law—specifically, by sexual assault and other sexual abuse. The jury also convicted Klein of lying about this conduct while under oath in related civil suits. On appeal, Klein seeks reversal of these convictions and raises three issues:

1. Whether the district court abused its discretion or violated Klein's constitutional right to present a defense by excluding either of the following pieces of evidence: (a) testimony about a non-witness's statements that were not made to any of the testifying victims and did not involve the charged conduct; and (b) testimony by medical staff stating that, during the instances when they were on duty with Klein, they did not personally see him engage in sexual misconduct.

2. Whether the district court abused its discretion by limiting the extent of defense counsel's cross-examination of victims regarding work as confidential government informants, pending criminal charges, and court-ordered supervision.

3. Whether the district court abused its discretion in denying Klein's multiple requests for a continuance of trial.

STATEMENT OF THE CASE

A. Factual Background

1. Coffee Creek is the only women's prison in Oregon. 2-ER-111. To protect both correctional staff and inmates, employees are trained to maintain proper "boundaries" with inmates. 3-ER-305, 330. This includes avoiding "intimate, personal involvement" with an inmate and being alone with an inmate "[i]n areas of limited visibility or when conducting a[] [medical] exam of a personal nature." 3-ER-306-307, 508-510. Employees are also told that it is never "appropriate or acceptable" to engage in "sexual contact with inmates." 3-ER-304, 508.

Coffee Creek has units dedicated to providing medical care. 3-ER-282. Typically, those units are staffed by at least two nurses. 3-ER-494, 500. A unit may be staffed by only one nurse, however, when the

facility is "short-staffed," during evenings, or on weekends and holidays. 3-ER-500. Even when two nurses are scheduled to work in a unit, there may be times when only one nurse is physically present—for example, when one of the nurses leaves to obtain supplies from another prison unit. 5-ER-863-864; 7-ER-1618; 8-ER-1706-1707. This can leave the medical unit staffed by a single nurse for up to 20 or 30 minutes at a time. 5-ER-864; *see also* 8-ER-1707.

2. Klein worked at Coffee Creek as a corrections nurse. 2-ER-111. Despite the training on maintaining appropriate boundaries, some staff members observed Klein being "very casual and flirty with the female inmates." 4-ER-704; *see also* 4-ER-732 (inmate recalling Klein being "flirty" with "younger, cute" inmates); 5-ER-884 (inmate recounting Klein's "flamboyant and flirty" conduct when he was the only staff member in a medical unit). This included getting "too close" to inmates and invading "their personal space." 4-ER-705; *see also* 3-ER-443 (inmate describing Klein's "[c]lose proximity" and how he "brush[ed] up against people"); 4-ER-706, 721 (nurse recalling an "upset[ting]" incident when Klein "whispered into [an] inmate's ear" where "[i]t was

almost like his lips were touching her ears," and also describing how Klein would "lean[] over" and "stand[] too close" to others).

For many women in Coffee Creek, Klein's behavior escalated further into unwelcome sexual contact, sexual assault, and rape. For example, among other conduct, Klein groped AV10's breasts during an appointment to clean and dress a wound, and he groped AV6's breasts, including while he was visibly aroused, during at least three of her medical exams.[1] 3-ER-382-387; 6-ER-1231-1234; *see also* 6-ER-1359-1361 (AV5 recounting how Klein groped her buttocks during an appointment to treat lower back sciatica). Klein subjected AV7 and AV11 to unwelcome digital vaginal penetration when they sought medical and other treatment. 5-ER-884-887; 6-ER-1140-1144. And he engaged in nonconsensual vaginal intercourse with AV1, AV2, AV3, and AV4 in medical units when the women were there for medical treatment or other reasons. 4-ER-673-676; 6-ER-1276-1279; 7-ER-1394-

[1] This brief uses AV designations when referring to the victims in this case, just as the district court (*see* 2-ER-117 n.1) and Klein (*see, e.g.*, Br. 7) did.

1397, 1476-1479; *see also* 7-ER-1473-1475, 1483-1484 (AV3 describing two instances when Klein forced her to perform oral sex).

3. In January 2019, Klein was named as a defendant in related civil suits alleging that he had raped and sexually assaulted female inmates while working at Coffee Creek. *See, e.g.*, Compl. at 1, *Suarez v. Peters*, No. 3:19-cv-95-IM (D. Or. Jan. 18, 2019). Before the litigation settled, *see* Notice of Settlement & Stipulation of Dismissal, *Suarez*, *supra*, Klein testified under oath in a deposition. 8-ER-1866; 9-ER-2010-2016. During that deposition, Klein denied that he had ever (1) "had sexual vaginal intercourse with any incarcerated adult while [he] w[as] employed with the Oregon Department of Corrections" (DOC); (2) "penetrated the vagina or anus of any adult incarcerated female with [his] penis, fingers, or tongue while" so employed; (3) "kissed any adult incarcerated female"; or (4) "had any sexual contact with any adult female incarcerated person with the intent to abuse, arouse, or gratify [his] sexual desire." 9-ER-2015-2016.

B. Procedural Background

1. In March 2022, a federal grand jury in the District of Oregon returned a twenty-five-count indictment against Klein. 10-ER-2499-

2513. Counts 1 through 21 charged Klein with willfully depriving twelve inmates at Coffee Creek of their constitutional right not to be subjected to cruel and unusual punishment under color of law, in violation of 18 U.S.C. 242. 10-ER-2500-2509. Counts 22 through 25 charged Klein with knowingly making false and material declarations at a deposition ancillary to a judicial proceeding—specifically, his deposition in the consolidated *Suarez* litigation—after having taken an oath to testify truthfully, in violation of 18 U.S.C. 1623. 10-ER-2510-2512.[2]

The district court initially scheduled Klein's trial to begin on May 17, 2022. R.6. At a telephonic status conference and at Klein's request, the court rescheduled trial to begin 14 months later, on July 10, 2023. 10-ER-2490-2492, 2526; *see also* R.18 (Klein waiving his speedy trial rights and consenting to excludable delay). Defense counsel told the court that such a date was "realistic" and confirmed they would be "fully prepared" for trial. 10-ER-2491. Defense counsel also agreed that

[2] Counts 16, 17, 20, and 21 are not at issue on appeal. The jury acquitted Klein on Counts 16 and 17 (2-ER-183), which concerned AV8 and AV9, respectively. And the government dismissed Counts 20 and 21, which concerned AV12, before trial. 9-ER-2213-2215.

further postponement would be "[un]likely . . . absent truly good cause." 10-ER-2491.

2. Ten months later, in March 2023, Klein made a "second request for a continuance." 1-ER-28.[3] Defense counsel cited the amount of discovery ("nearly 96,000 pages") and the timing of recent productions ("1335 pages" in December 2022 and "967 pages" in March 2023). 10-ER-2484. Defense counsel described efforts to obtain information about changes to the parts of the prison in which Klein's sexual assaults had occurred; "3-4 large groups of records from various agencies" that had not yet been received; and new warrants issued for, and recent arrests of, victims in the case. 10-ER-2481; 11-ER-2601-2617. Klein did not specify a length of time for the continuance, instead suggesting that a new date could be "set by the parties at a status conference to be scheduled." 10-ER-2486.

The district court denied Klein's request. Understanding Klein to be seeking a "substantial" continuance, the court explained that because the trial date was already scheduled for "16 months from

[3] Klein incorrectly describes this as his "first motion to continue." Br. 9.

indictment," any "additional delay w[ould] only cause additional prejudice to the government"—specifically, because certain witnesses were "suffer[ing] from serious medical conditions" and "battling addiction." 1-ER-25, 27. Indeed, one corroborating witness had recently died. 1-ER-27. The court also emphasized that it had originally acted based on defense counsel's "confirm[ation] that an additional period of about 14 months would be sufficient." 1-ER-28; *see also* 10-ER-2472-2473 (government explaining that more than 92,000 of the 96,000 pages Klein referenced had been produced a year ago and summarizing information previously given to Klein regarding changes to the facility). Finally, the court pointed out that much of the evidence that defense counsel sought to obtain during the requested continuance was of "speculative [evidentiary] value" and "could have been requested quite a while ago." 1-ER-28-29.

3. On May 30, 2023, about six weeks before trial, prosecutors learned that one of the named victims may have been working as a confidential government informant. 13-ER-2918. Days later, after confirming details about such cooperation and securing a protective order, the government provided to defense counsel 22 pages of reports

about the victim's work as a confidential source for the Drug Enforcement Agency (DEA). 13-ER-2919.

Klein again moved (13-ER-2938, 2941) for a trial continuance of indeterminate length, arguing that the government had failed to comply with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose all evidence favorable to the defendant and material to either guilt or punishment. Klein cited his recent receipt of documents relating to the victim's cooperation, as well as the government's alleged failure to provide police reports and other state and local documents relating to new arrests of, and criminal charges brought against, other victims. 13-ER-2924-2927, 2940. Klein also referenced "new discovery received" from the government. 13-ER-2942.

The district court denied Klein's continuance request. Rejecting Klein's *Brady* arguments, the court explained that federal prosecutors must disclose material evidence that is favorable to the defense if it is "in the possession of the federal prosecutor" or "other federal agencies" that have been "involved in the investigation." 12-ER-2637. But as the government had argued (9-ER-2244-2247), the documents at issue were either state and local records not "in the possession of the relevant

prosecuting authority or their agents," or federal records that had not been in the "possession of the prosecution in this case" (12-ER-2636, 2639, 2642 (emphasis omitted)). The court also emphasized that the government had produced information relating to the cooperating victim's work for the DEA "within a reasonable time." 12-ER-2645; *see also* 13-ER-2919 (government recounting its efforts).[4]

The district court also explained that because the start of trial was "even closer" than when Klein filed his prior continuance motion, there was "more potential for inconvenience and negative effects from a delay at this late date." 12-ER-2647. The court already had sent "325 lengthy, case-specific juror questionnaires to potential jurors who ha[d] been summoned for th[e] case," and 95 of those questionnaires had been returned and reviewed by the court and its staff. 12-ER-2647. Rescheduling trial and repeating this process would have been inefficient and "inconvenient." 12-ER-2647-2648. Other preparations similarly underway would need to be halted and repeated: two States had transferred custody of witnesses to federal authorities based on the

[4] Klein does not challenge the district court's *Brady* ruling.

current trial date, victims were preparing to testify, many non-custodial witnesses were under subpoena, and other witnesses had made travel plans. 12-ER-2647-2648.

The district court also refuted Klein's argument that there had been, and there would continue to be, insufficient time for his counsel to pursue impeachment evidence and prepare a constitutionally adequate defense. *See* 13-ER-2901, 2903 (arguments in reply). The court explained that the case was "not overly complex," but rather involved "relatively straightforward allegations of sexual misconduct by a state corrections employee." 12-ER-2656. And sixteen months was "a reasonable time to prepare a defense" because defense counsel had "known the identities of the [victims] to assist counsel in preparing for cross-examination" and had "months to review much of the disputed materials." 12-ER-2656. The court also observed that the additional documents defense counsel sought to obtain during the continuance were "likely irrelevant to impeachment, making further delay unnecessary." 12-ER-2651.

The district court further explained that contrary to Klein's assertions (13-ER-2882, 2896), the case was not proceeding towards

trial unusually quickly compared to other cases in the district, and that the statistics on which Klein relied were "skewed" because of pandemic-related procedural difficulties. 12-ER-2649 n.7. Additionally, the court pointed out that the circumstances precipitating Klein's request were likely to recur. Klein had alleged a "continued need for delay with each new recent [discovery] production" based on "new recent encounters between [victims] and state and local law enforcement." 12-ER-2655 n.10. But because the victims had all previously been convicted of crimes and incarcerated, "statistically there [was] a likelihood that some of them may have future encounters with law enforcement that will continue to trigger supplemental production[s]." 12-ER-2655 n.10. This meant that, "[u]nder [Klein's] theory, he w[ould] never be ready for trial and w[ould] continually be entitled to postpone his trial." 12-ER-2655 n.10.

Finally, the court rejected Klein's argument that his counsel required additional time to investigate a second victim who allegedly had been working as a confidential informant for a county sheriff's office. *See* 12-ER-2867-2870. The court found that Klein had "fail[ed] to present any argument or authority for how the status of an alleged

victim in this case as a cooperating witness in a *separate criminal investigation* in a *different jurisdiction* is material, absent any evidence that a prosecutor offered a benefit to [the victim] for testifying here." 12-ER-2652 (emphasis added). The court also concluded that such evidence was "likely [in]admissible" under Federal Rule of Evidence 403. 12-ER-2654.

4. Around this time, the parties filed omnibus motions in limine. 10-ER-2353-2413.

a. As relevant here, the government asked the district court to prohibit Klein under Federal Rule of Evidence 403 from eliciting testimony that he acted lawfully or appropriately during medical exams involving other inmates because "[a] defendant cannot establish his innocence of crime by showing that he did not commit similar crimes on other occasions." 10-ER-2379 (citation omitted). Klein objected, expressing his intent to introduce evidence about medical examinations he conducted when no "claims of sexual assault were reported." 10-ER-2305. Such evidence was admissible and constitutionally necessary, Klein suggested, to rebut anticipated evidence by the government about uncharged sexual assaults and to bolster his argument at trial that "the

sudden[] exponential outpouring of [sexual assault] complaints all at once" suggested that inmates were "jump[ing] on [a] bandwagon" and "falsely accus[ing]" him. 10-ER-2305-2307.

The district court ruled for the government in part. It explained that "a defendant may not seek to establish his innocence through proof of the absence of criminal acts on specific occasions." 11-ER-2579 (quoting *United States v. Dawkins*, 999 F.3d 767, 792 (2d Cir. 2021)). Consequently, it held that, under Federal Rules of Evidence 403, 404(b), and 405(a) and despite Klein's constitutional arguments to the contrary, Klein could not introduce evidence of medical exams conducted by him where no claims of sexual assault followed. 11-ER-2580-2581. The court reserved judgment on whether Klein would be permitted to elicit testimony from nurses stating that they "never saw [him] act inappropriately" during exams. 11-ER-2581.

b. The parties also disputed whether defense counsel should be permitted to examine victims about their own pending criminal charges that had not resulted in a conviction. Explaining that "[a]rrest without more does not . . . impeach the integrity or impair the credibility of a witness" (10-ER-2382 (quoting *Michelson v. United States*, 335 U.S. 469,

482 (1948) (second alteration in original))), the government asked the district court to limit cross-examination to questioning involving "bias" and "whether the witness expect[ed] (or hope[d]) to receive a benefit in exchange for testimony" in this case. 10-ER-2384; *see also* 10-ER-2345-2349. For his part, Klein stated his intent to "vigorously cross examine all of the [g]overnment's witnesses about their pending charges," the potential criminal penalties that the charges could carry, and any instances when witnesses had "attempted to seek out favorable results for those charges based on their cooperation with this case." 10-ER-2301. Such cross-examination would be proper, Klein argued, to "prove their motive to testify falsely" against him and "mold[]" their testimony "to whatever the [g]overnment wants it to be." 10-ER-2363-2364; *see also* 10-ER-2309-2311.

The district court rejected Klein's premise that "pending charges *necessarily* give[] a witness a motive to lie regardless of whether the government has promised them any benefit"—such a proposition was foreclosed "by the Supreme Court in *Michelson*, which concluded that pending charges generally are not probative of truthfulness." 11-ER-2584. The court agreed, however, that pending charges may "be

relevant to bias." 11-ER-2586. Accordingly, it ruled that "[t]he fact that a witness has pending charges may be inquired about on cross-examination, and [Klein] may explore whether the witness expects or hopes to receive a benefit relating to those charges from testifying in this trial." 11-ER-2586. In questioning witnesses about charges that could give rise to potential bias, the court advised that asking about "[t]he jurisdiction of the charges and whether the witness faces felony or misdemeanor charges" would be sufficient because "[a]dditional details" about the charges would be inadmissible under Federal Rules of Evidence 403 and 608. 11-ER-2586.

5. The district court clarified these rulings via email. Defense counsel inquired whether they would be permitted to elicit testimony from medical staff stating that, while working with Klein, they "never noticed him behave inappropriately or had concerns about his behavior, and if they did have such [concerns], they would have reported them." 12-ER-2837. The court reiterated that it had "not yet made a final ruling" on that portion of the government's motion and advised that, if Klein intended to elicit such testimony, he should first make an offer of

proof, outside the presence of the jury, at which point the court would rule. 12-ER-2837.

The district court also clarified that defense counsel would be given "appropriate leeway to inquire about [any] bias" arising from pending criminal charges. 12-ER-2835. Emphasizing that the mere existence of pending charges, "viewed in isolation, simply are not probative of bias," the court stated that defense counsel could ask, "[a]re there any criminal charges, from any jurisdiction, currently pending against you about which you have been told or you believe you may receive some benefit because you are testifying in this trial?" 12-ER-2839. If the witness answered, "no," that would "end[]" the inquiry. 12-ER-2839. If the witness answered "yes," defense counsel could then ask, "[d]id someone tell you that you would receive a benefit for testifying?" 12-ER-2839. If the answer was "no," further questioning on the topic would have to occur "as an offer of proof outside the presence of the jury." 12-ER-2839. But if the answer was "yes," defense counsel could ask, "[w]ho told you that?" 12-ER-2839.

If the witness identified another inmate, a non-law enforcement officer, or a non-government agent, that would "end" the inquiry

because "a witness['s] subjective hope based on" a statement from an "unauthorized" individual "would not appear to be significantly probative of bias and the danger of misleading or confusing the jury likely would substantially outweigh any probative value." 12-ER-2839. However, if the witness identified a prosecutor or law enforcement officer, then defense counsel would be permitted "reasonable follow-up." 12-ER-2839. Additionally, the court stated that defense counsel could ask witnesses "whether they have requested any assistance in any form from the federal [g]overnment in exchange for testifying at this trial and, if so . . . what was the [g]overnment's response." 12-ER-2836.

6. While those email communications were ongoing, Klein filed a new motion in limine. Without addressing the district court's prior orders, Klein sought a ruling permitting defense counsel to admit evidence regarding the two victims working as confidential informants. Specifically, Klein sought to "inquire into the nature of the cooperating source witnesses' relationship" with the DEA and the county sheriff's office "to expose any potential bias or improper motive." 12-ER-2859. This included any "subjective belief" harbored by either witness "regarding what benefit they m[ight] receive from the government" for

testifying. 12-ER-2861. Additionally, Klein argued that defense counsel should be permitted to examine witnesses about their probation status because such status could cause a witness to "conform" their testimony to "what the government wants to hear." 12-ER-2862-2863.

The district court ruled that such inquiry should be limited, as the government had argued (*see* 12-ER-2828-2830). The court reiterated its prior ruling that Klein could "inquire with all [victims] about whether they expect to receive any benefit relating to their testimony." 12-ER-2622. Yet the court emphasized that, under relevant case law, "a cooperation deal with a different law enforcement agency in a different jurisdiction" has "no (or at least minimal) relevance to showing bias" in the absence of a "benefit expected or offered to the witness for testifying in" this case. 12-ER-2622-2623. The court advised, however, that defense counsel could make an offer of proof if it believed that certain testimony should be admitted. 12-ER-2624, 2626.

7. During the parties' pretrial conference, defense counsel "re-rais[ed]" their motion for a continuance, citing the government's recent production of "three additional volumes of discovery," which totaled between 300 and 400 pages. 11-ER-2553-2554. This consisted of

updated criminal histories for witnesses and "new or contradictory information" prosecutors had learned during witness-preparation sessions. 11-ER-2553-2554. Defense counsel described the productions as containing "information that [they] would need time to go investigate" and pledged to "file declarations in support of [their] re-raised [continuance] motion." 11-ER-2555. Accordingly, the court did not rule on the continuance request at that time. *See* 11-ER-2555.[5]

C. Trial Proceedings

1. Klein's Renewed Continuance Requests

a. Defense counsel renewed their continuance motion on the first day of trial, arguing that their receipt of additional discovery over the weekend required postponement. 1-ER-19. As defense counsel described, the discovery included evidence that two government witnesses had been "aware of women at Coffee Creek making false accusations against" Klein. 1-ER-20.

The government countered (1-ER-21) that the discovery included a victim's medical records, which the government did not intend to use at

[5] Defense counsel did not ultimately file new declarations in support of their motion. *See* 10-ER-2539-2543.

trial, and "302" reports—meaning, "witness interview notes taken by FBI agents," *United States v. Miller*, 771 F.2d 1219, 1231 (9th Cir. 1985); *see also United States v. Rewald*, 889 F.2d 836, 866 (9th Cir. 1989), *amended by* 902 F.2d 18 (9th Cir. 1990)—which had been generated during trial-preparation sessions. As for the witnesses' alleged awareness of false reports of sexual assault against Klein, the government pointed out that defense counsel could cross-examine the witnesses about whether a "scheme" existed to fabricate allegations against Klein. 1-ER-22-23. After hearing the government's explanation, the district court denied Klein's extension request. 1-ER-23.

b. On the third day of trial, defense counsel again raised their "continuing motion" for a continuance. 4-ER-542, 547. They cited their receipt of additional discovery "at 12:01 in the morning" regarding AV4, whom the government intended to call later that day. 4-ER-542. The district court explained that a continuance was not warranted simply because the government had "interview[ed] a witness during trial just before that witness is scheduled to testify," "learn[ed] something new," and then provided the information to defense counsel. 4-ER-546; *see* 4-

ER-542-545 (government explaining circumstances of a single-page 302 report). The court thus permitted trial to proceed. 4-ER-547.

2. Klein's Theories And Evidence At Trial

a. During trial, defense counsel sought to convince the jury that there had been a scheme by inmates to fabricate sexual-assault allegations against Klein. They cross-examined five victims about their knowledge of whether other inmates had ever made false allegations of sexual assault against Klein, and whether they themselves had contributed to such efforts. *See* 4-ER-811; 5-ER-911-912; 6-ER-1159, 1294-1295, 1299; 7-ER-1426, 1428.

Pursuing this line of argument, defense counsel sought to question their witness, Deborah Beaver, about out-of-court statements allegedly made by Kameron Baszler and AV15. 7-ER-1659-1663. Beaver, Baszler, and AV15 had all been inmates at Coffee Creek. 4-ER-770; 7-ER-1669; 9-ER-2205. Baszler did not testify at trial, nor did the defense seek to call her as a witness. 7-ER-1659. AV15 testified about Klein's uncharged sexual assaults of her and AV4 (4-ER-769-788), which were offered as evidence for, among other things, the perjury charge in Count 25 (10-ER-2512; *see also* 11-ER-2569).

Consistent with its earlier ruling, the district court held a hearing outside the presence of the jury to determine the admissibility of Beaver's proffered testimony. 7-ER-1667-1678. In the hearing, Beaver described a conversation with Baszler in the prison infirmary where Baszler said that she had retrieved from the garbage a Kleenex that Klein had used, rubbed the Kleenex on a pair of underwear, and then "mailed [the underwear] out in a manila envelope." 7-ER-1671, 1674-1675. Beaver also recounted a conversation with AV15 and Baszler in a "day room" at the prison; in that conversation, AV15 allegedly said that she would "ma[ke] up" allegations that Klein had sexually assaulted her, and both AV15 and Baszler asked Beaver if she would "get involved in making an allegation against" Klein. 7-ER-1674-1677.

The district court held that Beaver's testimony about Baszler's out-of-court statements, which the government had argued were hearsay (7-ER-1663), was inadmissible under Federal Rules of Evidence 401 and 403 (7-ER-1679-1670). The court reasoned that testimony about whether "Baszler wanted to or intended to make false charges against" Klein was irrelevant because "Baszler did not testify in this case." 7-ER-1679. The court further found that any probative value of

the testimony was "substantially outweighed by the risk of confusing the jury[] [or] misleading the jury," and that the testimony could cause "unfair prejudice" to the government because "Baszler's credibility [was] not at issue" and there was no evidence that Baszler had in fact "accused Mr. Klein of doing anything." 7-ER-1679-1680.

The district court ruled, however, that Beaver could testify "about things that were said in her presence or that she heard that were said by [AV15], because [AV15] was a witness in this case." 7-ER-1679. Accordingly, during direct examination before the jury, Beaver testified that AV15 had indicated she would falsely claim that "Klein touched her inappropriately" in order to file a lawsuit and "get a substantial amount of money." 8-ER-1686-1687.

b. Defense counsel also sought to show that it would not have been possible for Klein to have sexually assaulted so many inmates without, at some point, being caught or detected. *See also* 1-ER-15-17 (permitting admission of such evidence). Defense counsel elicited significant testimony about the prison's layout and surveillance, including in and around the medical units. *See, e.g.*, 3-ER-309-323, 325; 4-ER-575-579; 7-ER-1629-1631. Defense counsel also questioned

medical staff about their procedures and protocols. *See, e.g.*, 8-ER-1696-1701, 1782-1785. For example, medical staff were trained to follow a "chaperone" rule, which required that at least three individuals (typically two staff members and the patient) be present in a room during exams of "a more personal nature." 4-ER-567; *see also, e.g.*, 4-ER-566-569, 710; 7-ER-1611-1612. Employees also had to report any suspicions about staff sexual misconduct with inmates. *See, e.g.*, 3-ER-324; 4-ER-580-582.

Defense counsel also cross-examined medical staff on whether they had ever witnessed, reported, or received reports about sexual misconduct by Klein. *See* 3-ER-327-328, 518-519; 5-ER-875-876, 981-982, 1089-1090; 6-ER-1185, 1187. The government did not object to such questioning, and the court permitted it, because those inquiries constituted permissible impeachment. During direct examination, the witnesses had described their training and reporting obligations (3-ER-304-305, 510-511; 5-ER-859-860, 1081-1082, 1181-1182) and recollections of unusual behavior by Klein—for example, encountering Klein with his pants unbuttoned while a patient was lying on an exam table (5-ER-972-973). Defense counsel permissibly cross-examined

those witnesses about the fact that they had not filed reports about suspected sexual misconduct, "even though they [were] mandatory reporters under Oregon law." 1-ER-10, 16.

The district court ruled, however, that under Federal Rules of Evidence 403, 404, and 405, defense counsel could not elicit such testimony from their own witnesses on direct examination.[6] 1-ER-12. Defense counsel did not seek to admit testimony that would have *contradicted* government witnesses' descriptions of Klein's conduct on specific occasions. *See* 1-ER-11 (summarizing Klein's argument that the testimony "[was] not being offered to show that [he] acted properly in some instances"). Rather, Klein's proffered staff testimony was intended to impermissibly suggest that because Klein's coworkers "did not see improper behavior . . . on the occasions they worked with him," Klein "must not have engaged in the specific improper behavior alleged in this case." 1-ER-12; *see also* 1-ER-16. The court acknowledged that similar testimony had been permitted during cross-examination of the government's witnesses, but it explained that this involved "a different

[6] The court had deferred ruling on this issue prior to trial. *See* p. 14, *supra*.

situation" in which Klein was "entitled to impeach [the government witnesses'] credibility by asking whether they [had] reported" any suspicions of sexual misconduct. 1-ER-11 n.1, 16. Later, the court allowed defense counsel to make an offer of proof documenting the staff testimony they had sought to admit. *See* 8-ER-1711-1712 (Klein's offer of proof).

c. Defense counsel also attacked the victims' truthfulness. Defense counsel cross-examined them about settlements they had obtained through litigation against the Oregon DOC involving claims of sexual assault and abuse they suffered while at Coffee Creek. *See* 3-ER-417; 4-ER-678; 5-ER-854-855; 6-ER-1173, 1245; 7-ER-1406, 1424. Defense counsel also asked victims about their convictions for crimes involving dishonest acts or false statements. *See* 3-ER-418, 475; 4-ER-749; 6-ER-1284-1285. And consistent with the district court's prior rulings, defense counsel pressed seven victims on whether they had asked FBI agents for any aid or assistance prior to testifying. *See* 4-ER-788-789; 5-ER-854; 6-ER-1175, 1211-1213, 1247-1249, 1300-1302; 7-ER-1407-1408.

Defense counsel also sought to question the victim who had been serving as a confidential informant for the DEA about her work with the agency. Pre-trial, the district court restricted the scope of such questioning absent an admission that the victim expected to obtain a benefit from testifying. *See* p. 19, *supra*. Defense counsel sought reconsideration of that ruling and made an offer of proof to demonstrate the relevance of such cross-examination by conducting an on-the-record, in-chambers questioning of the victim regarding her cooperation agreement and activities. 12-ER-2675-2682, 2690-2691. Defense counsel focused on the victim's possible loss of that cooperation work if she were found to have been "untruthful in any sort of testimony." 12-ER-2679.[7]

After hearing the offer of proof, the district court deemed "th[e] entire area of questioning . . . irrelevant." 12-ER-2682. The court also found that "to the extent there is anything probative—and I don't think there is—it would be substantially outweighed by Rule 403, by unfair prejudice and confusion of issues." 12-ER-2683.

[7] Defense counsel made no offer of proof regarding the victim who had been working as a confidential informant for a sheriff's office.

d. In their closing argument, defense counsel argued that the jury should not find the victims credible because "the value of the[ir] accusations absolutely [was] zero." 8-ER-1925. Defense counsel contended that Coffee Creek had "a culture of false accusations" made "directly against" Klein. 8-ER-1963. As evidence of that culture, they described AV1 and AV7 as having acknowledged that other inmates—who neither testified nor represented any charged conduct—were going to "falsely accuse Tony Klein for money." 8-ER-1963; *see also* 5-ER-911-912 (AV7's testimony); 7-ER-1426, 1428 (AV1's testimony). Defense counsel reminded the jury of Beaver's testimony that AV15 had said "she was going to make things up against Mr. Tony Klein." 8-ER-1694; *see also* 8-ER-1685-1687 (Beaver's testimony). Defense counsel also referenced the civil settlements that certain victims obtained and their requests of assistance from FBI agents as further evidence of the allegedly "transactional" nature of the victims' allegations. 8-ER-1928-1929, 1954-1957.

Additionally, defense counsel questioned the "plausib[ility]" of the victims' accounts. 8-ER-1947. They suggested that Klein could not have been "so perfectly sneaky that over the course of approximately a

couple of years nobody on his staff ever noticed anything." 8-ER-1939; *see also* 8-ER-1966-1967. Citing government witnesses' testimony on cross-examination stating that they had not observed or reported any sexual misconduct by Klein (*see* pp. 15-16, *supra*), defense counsel asserted that the witnesses "got up there and told you they didn't notice anything, because there wasn't anything to notice" (8-ER-1939).

3. The Jury's Verdict

After two days of deliberation, the jury convicted Klein on 17 of the 19 deprivation-of-rights counts under 18 U.S.C. 242 and all four of the perjury counts under 18 U.S.C. 1623. 2-ER-177-185; *see also* Addendum. The district court sentenced Klein to 30 years' imprisonment (1-ER-3), and Klein timely appealed from the entry of final judgment (10-ER-2514-2515).

SUMMARY OF ARGUMENT

1. The district court did not abuse its discretion or violate Klein's constitutional rights by excluding testimony either about Baszler's out-of-court statements regarding an alleged scheme to frame Klein, or from medical staff stating that they never observed Klein engage in sexual misconduct.

a. The district court correctly excluded Beaver's testimony as irrelevant under Federal Rule of Evidence 401 because Baszler had not testified at trial, and because there was no evidence that Baszler had ever attempted to recruit any of the victims named in the indictment—adult victims 1 through 11—to fabricate allegations of sexual assault against Klein. Accordingly, the testimony was not probative on the veracity of any witness account at trial, and it bore no relevance to whether Klein committed the sexual assaults alleged in the indictment.

For these and additional reasons, the district court did not violate Klein's right under the Fifth and Sixth Amendments to present a defense. Beaver's testimony was not the only evidence at Klein's disposal to argue that a "scheme" existed among inmates to lodge false sexual-assault claims against him. Br. 43. Indeed, defense counsel cross-examined multiple government witnesses, including victims, on this topic. Moreover, Beaver's testimony was far from essential to Klein's defense given its lack of relevance and other testimony defense counsel successfully elicited to argue that inmates were engaged in such a "scheme."

However, even if the district court abused its discretion or violated Klein's right to present a defense, that error was harmless. The jury heard and rejected substantial evidence from Klein intended to show that the victims' accounts reflected a scheme to falsely brand him as a sexual predator, and the addition of Beaver's testimony about Baszler's statements would not have affected that outcome.

b. The district court appropriately excluded defense counsel from calling staff members to testify that they never witnessed Klein engage in sexual misconduct with inmates on dates not in question. Admission of the testimony would have asked the jury to assume that because staff members never saw Klein engage in such conduct when they worked with him, he must not have done so during the *other* occasions that government witnesses had described. Rules 403, 404, and 405 preclude the admission of evidence intended to support such an improper inference.

Contrary to Klein's suggestion, this testimony was not admissible to impeach government witnesses who had testified about Klein's flirty and overly friendly behavior because the witnesses' descriptions did not conflict with his proffered staff-member testimony. Moreover, unlike

testimony about Klein's "grooming" behavior (Br. 52), the excluded testimony was not admissible under Rule 404(b)(2) to show Klein's intent or planning.

As above, Klein's sparse arguments for why this exclusion violated his right to present a defense fail because the testimony would not have shed light on whether the victims testified truthfully about their encounters with Klein, and because Klein had other evidence on which to argue that if the sexual assaults had occurred as victims described, other staff members would have noticed. Moreover, defense counsel had already presented, and the jury considered and rejected, evidence that such sexual assaults would not have gone unnoticed. Accordingly, any abuse of discretion or violation of Klein's right to present a defense in excluding the staff-member testimony was nonetheless harmless.

2. The district court's rulings limiting cross-examination of victims about their respective cooperator status, pending criminal charges, and court-ordered supervision represented no abuse of discretion. These rulings excluded no relevant evidence, and legitimate countervailing interests, like ensuring the safety of confidential government informants, supported the court's approach. Klein also had

ample other evidence by which to attempt to assail the victims' credibility.

Klein's categorical arguments that testimony about cooperator status is per se relevant because informants are purportedly "self-interest[ed] in testifying favorably to the government" and "skill[ed]" at deceit (Br. 59, 62) lack support in case law. Nor does Klein provide any case-specific arguments for why such testimony was relevant here. Klein also overlooks the fact that the district court *permitted* cross-examination on some of the topics that he raises on appeal. Even if the court abused its discretion, that error was harmless in light of the questions the court permitted Klein to ask and the substantial record evidence that the jury was able to use to assess the victims' truthfulness.

3. The district court did not abuse its discretion in denying Klein's continuance motions. Adhering to the agreed-upon trial date caused Klein no prejudice where the case involved "relatively straightforward allegations of sexual misconduct by a state corrections employee" and thus was "not overly complex." 12-ER-2656. Conversely, an additional continuance would have greatly inconvenienced the victims, the

government, and the court. Klein proffers only speculative arguments about what defense counsel might have unearthed had they been given more time to investigate certain topics. In any event, he cannot show any impact on the jury's verdict that would warrant a new trial.

ARGUMENT

I. The district court did not abuse its discretion or violate Klein's constitutional rights by excluding two categories of disputed evidence.

A. Standard of review

This Court reviews an exclusion of evidence under the Federal Rules of Evidence for abuse of discretion. *United States v. Pineda-Doval*, 614 F.3d 1019, 1031-1032 (9th Cir. 2010). Reversal on this basis is warranted "only if the error more likely than not affected the verdict." *Ibid.* (citation omitted).

Where a defendant contends that an evidentiary ruling violated their Fifth or Sixth Amendment right to present a defense, this Court reviews the issue de novo if the defendant raised this constitutional argument before the district court. *See Pineda-Doval*, 614 F.3d at 1032. If this constitutional argument was not raised below, plain-error review applies. *See United States v. Rodriguez-Verdugo*, 756 F. App'x 748, 749 (9th Cir. 2019); *United States v. Harris*, 107 F.3d 878 (9th Cir. 1997)

(Tbl.) (unpublished). As above, reversal based on a violation of a defendant's right to present a defense is unwarranted if the error was harmless beyond a reasonable doubt. *See United States v. Stever*, 603 F.3d 747, 757 (9th Cir. 2010).

B. The district court correctly excluded Beaver's testimony about Baszler's out-of-court statements.

The district court did not abuse its discretion under Federal Rules of Evidence 401 and 403, or plainly violate Klein's constitutional rights, in permitting Beaver to testify about out-of-court statements that AV15 allegedly made regarding a scheme to fabricate allegations against Klein, but *not* about those that Baszler supposedly made. AV15 "was a witness in this case," whereas Baszler was not, and the district court appropriately weighed that difference in its treatment of the proffered testimony. 7-ER-1679.

1. The district court did not abuse its discretion under Rules 401 and 403.

a. The district court did not abuse its discretion in excluding testimony about what Baszler said to Beaver. Such statements by a non-witness in the case to a non-victim shed no light on whether the government's witnesses had testified truthfully about having been

sexually assaulted by Klein. Indeed, Baszler's statements did not concern any person whose credibility was at issue and did not involve the charged conduct. *See United States v. Kallin*, 50 F.3d 689, 696 (9th Cir.), *as amended* June 6, 1995 (testimony was irrelevant where it "was not probative of any matter at issue in the case" and the witness's "credibility was not in issue"); *see also United States v. Ariza-Ibarra*, 605 F.2d 1216, 1222 (1st Cir. 1979) ("[T]he reliability of non-witnesses is usually wholly irrelevant."). Accordingly, Beaver's testimony regarding Baszler's out-of-court statements was properly excluded under Federal Rule of Evidence 401. *See* Fed. R. Evid. 401 (explaining that relevant evidence makes "more or less probable" a fact that "is of consequence in determining the action").

Such evidence was also properly excluded under Rule 403 because its minimal probative value was substantially outweighed by the danger of "confusing the issues, misleading the jury," and "unfair prejudice." Fed. R. Evid. 403. Testimony about Baszler's statements to Beaver would have diverted the jury's attention away from the allegations at issue and invited the jury to speculate, without any evidence in the record, about what outreach Baszler might have had

with the victims. *See United States v. Espinoza-Baza*, 647 F.3d 1182, 1190 (9th Cir. 2011) (finding no abuse of discretion under Rule 403 where the trial court excluded evidence that "might have caused the jury to base its verdict on highly speculative evidence rather than [the defendant's] guilt or innocence"). The district court did not abuse its discretion in excluding this evidence to avert that risk. *See id.* at 1189 ("[G]iven the substantial deference owed to a district court's Rule 403 rulings, we generally will not disturb such a ruling unless it 'lies beyond the pale of reasonable justification under the circumstances.'" (citation omitted)).[8]

b. Klein suggests that the district court's ruling was an abuse of discretion because Beaver's testimony about Baszler's statements was "highly relevant." Br. 42. In his view, Baszler's statements showed

[8] Beaver's testimony also constituted inadmissible hearsay. *See United States v. Lopez*, 913 F.3d 807, 826 (9th Cir. 2019); *see also* 7-ER-1659-1663 (considering but not ruling on the issue). Defense counsel offered the testimony for the truth of the matter asserted—that Baszler *was* going to fabricate allegations against Klein, and that she wanted others to join her in such a "scheme"—and identified no applicable exception to the general bar on hearsay. 7-ER-1661 (questioning why "Baszler's state of mind [was] at all relevant" and how the testimony illuminated any "effect on [AV15 as] the listener").

that she was the "ringleader of [a] scheme . . . to fabricate evidence of sexual assault" that had taken "root and spread through the connected inmates." Br. 43.

These arguments fail at their premise because the excluded testimony provides no evidence of any "scheme" connecting the victims—rather, it recounts only statements by Baszler to Beaver, who was not a victim in the case, and by AV15, whose statements the district court permitted to be introduced. At trial, the district court held a Rule 104 hearing to "let[] the defense elicit the substance of the testimony they want to bring out" before ruling on its admissibility. 7-ER-1668; *see also* Fed. R. Evid. 104(a) and (c)(3). At the hearing, Beaver recounted two conversations about purported efforts to falsely accuse Klein and secure monetary payouts. The first conversation involved Baszler and took place in Beaver's room in the prison infirmary. 7-ER-1671, 1674-1675; *see* p. 23, *supra*. The second conversation involved Baszler and AV15 and occurred in a "day room" at the prison. 7-ER-1670-1677; *see* p. 23, *supra*. Admittedly, Beaver alluded to the possibility that "other girls" might have been present during the day-room conversation. 7-ER-1672. But Beaver fails to

identify those girls, and regardless, her description frames *AV15* as the driver of the conversation. *See* 7-ER-1672 ("This is when I spoke with [AV15]."); 7-ER-1673 (Beaver recounting what "[AV15] said to [her]" and "several other girls" about Klein having prohibited them from bringing contraband into the prison).

Based on this proffer, the district court permitted Beaver to testify about AV15's out-of-court statements and properly excluded Baszler's statements. As the court explained, Baszler's statements to Beaver were irrelevant because, at most, they suggested that a non-witness had attempted to enlist a non-victim to fabricate sexual-assault allegations against Klein. Baszler's statements would have neither undermined the credibility of any witness at trial, nor offered any reason for disbelieving the victims' accounts of Klein's sexual assaults.

Klein admits as much in his brief, acknowledging that "Beaver did not specifically hear Baszler make similar overtures toward any other complainant." Br. 44. Nonetheless, he suggests that the jury could have reasonably "infer[red]" that Baszler's "scheme extended to other inmates" because many victims "knew Baszler," "knew someone who [knew Baszler]," "had lived in the same *100-inmate unit*" as Baszler, or

had heard about Baszler's litigation against the Oregon DOC. Br. 44-45 (emphasis added). This is rank speculation. The fact that an inmate might have known Baszler, or have known someone who knew Baszler, says nothing about whether Baszler ever spoke to that inmate, and if so, whether Baszler discussed a plan to falsely accuse Klein of sexual assault. *See also* 6-ER-1159 (AV11 denying any "coordinat[ion]" with Baszler to "make up allegations" against Klein), 1299 (AV2 denying having talked with Baszler about Klein).

Put differently, Baszler's supposed notoriety within the prison establishes no connection between the victims and any "scheme" that might have existed. It was therefore not an abuse of discretion to exclude testimony about Baszler's statements absent some indication—in Beaver's proffered testimony or elsewhere—that they were made to inmates whose accounts of sexual abuse were at issue. Nor did Klein ever seek to call Baszler directly as a witness. *See United States v. Lloyd*, 990 F.2d 1263, at *2 (9th Cir. 1993) (Tbl.) (unpublished) (holding that the district court properly excluded prior testimony by a non-witness that was "not relevant to an issue before the court").

c. Klein argues that the excluded testimony about Baszler's statements was "relevant as impeachment of AV15 because it supported the conclusion that Baszler and AV15 were colluding." Br. 46. However, the district court *permitted* Beaver to testify about AV15's statements. 7-ER-1679-1680; *see also* 8-ER-1685-1686 (Beaver's testimony regarding AV15). Given that the jury heard this testimony, it was not an abuse of discretion to exclude *additional* testimony that Baszler—a non-victim and non-testifying witness—might have said similar things to Beaver in that same conversation. Moreover, if testimony about AV15's alleged "collu[sion]" with Baszler (Br. 46) had indeed been crucial to Klein's defense, defense counsel could have questioned AV15 about her conversations and activities with Baszler during cross-examination in the government's case-in-chief. Defense counsel did not do so. *See* 4-ER-801-802 (defense counsel asking AV15 if she knew Baszler and had heard about Baszler's case against the Oregon DOC).

d. Klein errs in faulting the district court's further exclusion of this testimony under Rule 403. He argues that, in conducting the Rule 403 analysis, the court failed to recognize that Baszler's statements to

Beaver were "central to the defense that *other* inmates at [Coffee Creek] were colluding to fabricate accusations against Klein." Br. 49. However, as explained above, Beaver's proffered testimony carried no such probative value—Beaver only recounted statements by Baszler and AV15, providing no basis on which to find that any other inmates (much less any victims identified in the indictment) were "colluding." Br. 49. As for concerns that defense counsel might have been "missing" evidence of "concerted collusion" among inmates (Br. 49), they had already cross-examined multiple victims about this topic. *See* p. 22, *supra*.

Klein asserts in conclusory fashion that, contrary to the district court's finding, there was "little risk that the jury would be confused or misled" by Beaver's testimony about Baszler's statements. Br. 49. Not so. As Klein describes, the defense sought to use Beaver's testimony as "substantive evidence" that the testifying witnesses' accounts of Klein's sexual assaults were untrue and reflected "a fraudulent effort to inculpate Klein." Br. 43. This effort would have distracted the jury from the question of *Klein's* conduct during his interactions with each victim and focused instead on speculative actions between Baszler and

the victims, even though there was *no* evidence in the record suggesting that they been subject to the type of entreaties that Beaver described. The potential for jury confusion and prejudice to the government far outweighed any minimal probative value that Beaver's proffered testimony might have had. *See Espinoza-Baza*, 647 F.3d at 1190.

2. The district court's ruling did not plainly violate Klein's constitutional right to present a defense.

For similar reasons, the district court's ruling did not plainly violate Klein's right under the Fifth and Sixth Amendments to present a defense.[9]

a. The Fifth and Sixth Amendments "guarantee[] a criminal defendant a meaningful opportunity to introduce relevant evidence on his behalf." *Menendez v. Terhune*, 422 F.3d 1012, 1033 (9th Cir. 2005); *see also United States v. Leal-Del Carmen*, 697 F.3d 964, 969 (9th Cir. 2012). This right, however, is not "unfettered." *Lunbery v. Hornbeak*, 605 F.3d 754, 762 (9th Cir. 2010) (citation omitted). Rather, it "is subject to reasonable restrictions 'to accommodate other legitimate

[9] Klein fails to show that he raised this constitutional argument before the district court, and therefore plain-error review applies. *See* p. 35, *supra*. But regardless, his arguments fail even under de novo review.

interests in the criminal trial process.'" *Menendez*, 422 F.3d at 1033 (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)). Trial courts retain "broad latitude" to "exclude or limit evidence to prevent excessive consumption of time, undue prejudice, confusion of the issues, or misleading the jury." *Ibid.*; *see also United States v. Spangler*, 810 F.3d 702, 708 (9th Cir. 2016) (explaining that "a criminal defendant 'must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence'" (citation omitted)).

In recognition of the need to balance a defendant's right to defend against criminal charges with orderly and efficient adjudication of such charges, "the question [under the Fifth and Sixth Amendments] is whether the defense had a fair chance to argue the evidence in the first place." *United States v. Brown*, 859 F.3d 730, 736 (9th Cir. 2017). Where a defendant "[i]s able 'to present the substance' of his defense to the jury," this Court "find[s] no constitutional error." *Spangler*, 810 F.3d at 708 (citation omitted).

This Court applies "the so-called *Miller* factors," originally identified in *Miller v. Stagner*, 757 F.2d 988 (9th Cir.), *amended by* 768

F.2d 1090 (9th Cir. 1985), to evaluate whether a defendant was able to present the substance of his defense, even without certain evidence. *United States v. Jackson*, No. 20-50057, 2024 WL 1070278, at *2 (9th Cir. Mar. 12, 2024), *cert. denied*, No. 24-5530, 2024 WL 4486501 (Oct. 15, 2024). Those factors include "the probative value of the evidence on the central issue" in the case; the "reliability" of the evidence; whether the evidence "is capable of evaluation by the trier of fact"; "whether it is the sole evidence on the issue or merely cumulative"; and whether the evidence "constitutes a major part of the attempted defense." *Id.* at *3 (citation omitted); *see also Stever*, 603 F.3d at 756.

b. None of these factors supports Klein's argument that he lacked a fair chance to marshal evidence in support of his defense that the victims fabricated their allegations for financial gain. First, as explained above, Beaver's testimony about Baszler's statements had minimal, if any, probative value on the central issue in the case: whether Klein sexually assaulted the victims. The one exception was Beaver's testimony about AV15's alleged statements, and the district court *permitted* Beaver to testify about those statements. Second, the testimony would not have reliably established that there was a broader

scheme to concoct allegations against Klein, much less one that involved the victims. Third, while the jury certainly was capable of evaluating Beaver's testimony, the excluded testimony about what a non-witness intended to do would *not* have informed the jury's evaluation of the victims' accounts.

Fourth, Beaver's excluded testimony was not the sole evidence about whether inmates fraudulently sought to inculpate Klein. As Klein recounts, "witnesses during the government's case-in-chief admitted that some women were making false claims against Klein." Br. 49. And as discussed, the district court permitted defense counsel to elicit testimony from Beaver about AV15's alleged recruitment efforts. Defense counsel also could have asked AV15 during cross-examination whether she had fabricated her allegations of sexual assault instead of obliquely inquiring about "inmates jumping on a bandwagon" to sue the Oregon DOC. *See* 4-ER-811. Failing all else, defense counsel could have called Baszler as a witness and questioned her directly. In short, defense counsel had multiple ways to introduce—and did introduce—evidence on this topic.

Fifth, the testimony at issue was not a major part of Klein's defense. This factor typically requires a defendant to show that the excluded evidence was "necessary for the defendant to refute a critical element of the prosecution's case" or "essential to the defendant's alternative theory of the case." *Pineda-Doval*, 614 F.3d at 1033; *see also United States v. Evans*, 728 F.3d 953, 966-967 (9th Cir. 2013) (exclusion involved "(1) the main piece of evidence, (2) for the defendant's main defense, to (3) a critical element of the government's case"); *Leal-Del Carmen*, 697 F.3d at 969 (ruling "prevented the jury from hearing anything at all about the testimony of Leal-Del Carmen's sole favorable witness"); *DePetris v. Kuykendall*, 239 F.3d 1057, 1062-1063 (9th Cir. 2001) (exclusion "went to the heart of the defense" because the evidence was "critical to [the defendant's] ability to defend against the charge"). For the reasons discussed, including the absence of any connection between Beaver's testimony and the specific victims and charged conduct, Klein cannot make this showing.

c. Klein offers no arguments under the first four *Miller* factors, even though he cites *Stever* (Br. 48), an opinion that expressly applies the factors in its analysis, *see* 603 F.3d at 756. He therefore has waived

any arguments about their applicability here. *See United States v. Wahchumwah*, 710 F.3d 862, 865 (9th Cir. 2013).

Regarding the fifth factor, Klein relies on the same Rule 403 arguments discussed above and contends that the excluded testimony was "central" to his defense that other Coffee Creek inmates were colluding to fabricate accusations. Br. 49. But again, Beaver's testimony identified only a single inmate (Beaver herself) whom Baszler allegedly sought to recruit. And even assuming that AV15 or other victims actually had colluded with Baszler, defense counsel could have asked them about it during cross-examination. Because numerous other opportunities existed to pursue this "missing" evidence of "concerted collusion" (Br. 49), this case bears no resemblance to those in which this Court found a violation of a defendant's constitutional right (*see* p. 48, *supra*).

3. Any error was harmless.

Even if the district court's ruling constituted an abuse of discretion or plain error, the error was nonetheless harmless beyond a reasonable doubt. Inclusion of Beaver's testimony about Baszler's statements would not have affected the verdict because it did not

connect Baszler in any way to any of the victims. Consequently, the testimony would not have provided any reason for the jury to disbelieve the victims' accounts.

Moreover, even without Baszler's statements, the jury heard multiple witnesses testify about alleged fabrication. Defense counsel cross-examined government witnesses about their awareness of other inmates having falsely accused Klein of sexual assault, and whether the witnesses themselves had participated in such efforts. *See* p. 22, *supra*. Beaver also told the jury directly that AV15 had said "she was going to make up" accusations that Klein had sexually assaulted her. 8-ER-1686. This testimony was far more central to Klein's defense than Beaver's description of Baszler's alleged statements because AV15's statements could have undermined her own account of sexual assault by Klein. *See* 4-ER-778-786 (AV15 describing "[t]hree times" when Klein made her engage in oral sex). Indeed, defense counsel specifically pointed to Beaver's testimony about AV15's statements during closing argument. *See* p. 29, *supra*. And yet, the jury still convicted. There is no basis to conclude that testimony about Baszler's statements would

have changed the outcome on the 17 deprivation-of-rights and four other charges on which the jury found Klein guilty.

C. The district court correctly excluded testimony by staff members stating that they did not see Klein engage in sexual misconduct with inmates.

Klein fares no better in challenging the district court's exclusion under Federal Rules of Evidence 403, 404, and 405 of testimony by medical staff stating that they "did not see any concerning behavior by" Klein when on shifts with him at times not in dispute. 1-ER-10. Klein does not contest this Court's admonition that "[a] defendant cannot establish his innocence of crime by showing that he did not commit similar crimes on other occasions." *See* Br. 50 (quoting *Herzog v. United States*, 226 F.2d 561, 565 (9th Cir. 1955)); *see also* 1-ER-10 (district court quoting *Herzog*). But he fails to recognize that many of his arguments rest on this impermissible logic. Consequently, Klein cannot show any abuse of discretion or violation of any constitutional right.

1. The district court did not abuse its discretion under Rules 404 and 405, or alternatively, under Rule 403.

a. The district court excluded the staff-member testimony because Klein could not identify "any probative value" other than the

impermissible inference that because "nurses did not see improper behavior or report any improper behavior" by Klein, he "must not have engaged in the specific improper behavior alleged in this case." 1-ER-12. Federal Rule of Evidence 404(b)(1) bars such evidence "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Even when this character evidence is admissible, Rule 405(a) requires that it be proved "by testimony about the person's reputation or by testimony in the form of an opinion," and Klein had not proposed to proffer this evidence in such a way. Accordingly, the court properly excluded this evidence.

Exclusion also was warranted under Rule 403 because the testimony risked substantial confusion for the jury, requiring them to delve into what each staff member would have seen and when, and whether those observations conflicted at all with the observations and instances of sexual assault described by government witnesses.

b. None of Klein's arguments shows that exclusion was an abuse of discretion.

i. First, Klein argues that the excluded testimony was necessary to impeach or rebut government witnesses' descriptions of him having

acted in an "overly friendly" and "flirt[y]" manner with inmates. Br. 51-54 (citation omitted). The problem, however, is that Klein cannot identify any specific instance of such behavior, described by a government witness, that a staff member would have testified did not occur. Put differently, Klein establishes no conflict regarding whether he acted flirtatiously on a particular day or during a particular shift for impeachment or rebuttal purposes. *See Bemis v. Edwards*, 45 F.3d 1369, 1372 (9th Cir. 1995) (noting that "an *inconsistent* account by another source" can substantiate "an alternative view of the truth" (emphasis added)).

Instead, Klein's argument appears to be that because staff members did not personally observe him acting in an overly friendly or flirtatious way, he must not have acted that way during other instances that government witnesses recalled. As this Court and the district court explained, *see* pp. 14, 26-27, 51, *supra*, this is not a proper inference: simply because staff members did not themselves see Klein conducting himself in such a manner does not call into question government witnesses' recollections of Klein's behavior on other occasions. Thus, because the staff-member testimony was offered as

impermissible propensity evidence, it was properly excluded under Rule 404(b)(1) and this Court's reasoning in *Herzog*.

Klein also contends that the testimony should have been admitted under Rule 404(b), pointing to the government's elicitation of testimony about Klein's "grooming" behavior. Br. 52 (citation omitted). The basis on which evidence of Klein's grooming was admitted, however, does not apply to the excluded testimony. Accounts of Klein's overly friendly and flirty conduct with inmates was admissible to show preparatory action by Klein—specifically, intent and planning—designed to endear himself to inmates, encourage them to lower their defenses around him, and make it less likely that they would report any assault. *See* 11-ER-2576. By contrast, testimony that staff members did not observe improper behavior while working with Klein would not have evinced "intent, preparation, [or] plan[ning]" under Rule 404(b)(2). Rather, it would have been offered to prove that, on other occasions, Klein "acted in accordance with th[at] character," a usage that Rule 404(b)(1) precludes. Fed. R. Evid. 404(b)(1).

The Third Circuit's nonprecedential decision in *United States v. Hayes*, 219 F. App'x 114 (3d Cir. 2007), on which Klein relies (Br. 52-

53), does not counsel otherwise. *Hayes* concerned an alleged "company-wide" conspiracy to falsify test results that had "originated with 'top' officials" like the defendant. 219 F. App'x at 117. The district court excluded testimony that the defendant had "never asked [managers] to falsify tests" and "never suggested that data falsification was acceptable." *Id.* at 115-116. The Third Circuit concluded, however, that evidence of conduct "inconsistent with conspiring to fabricate test results" was relevant to whether the defendant had, in fact, been "part of the charged conspiracy" during the time period at issue. *Id.* at 117. Specifically, the excluded evidence could have established the defendant's "intent during the conspiracy period" to "ensure the integrity of test results," contrary to the "atmosphere of coerced fabrication the government's conspiracy rested upon." *Id.* at 117-118.

Even setting aside the very different factual circumstances presented in *Hayes*, *see United States v. Collazo*, 984 F.3d 1308, 1319 (9th Cir. 2021) (explaining that, in a conspiracy, the agreement to commit an unlawful act is "itself . . . the offense"), none of the Third Circuit's rationales applies here. The excluded staff-member testimony shed no light on Klein's intent. Nor did the testimony describe actions

that conflicted with the criminal conduct charged in the indictment. *Contra Hayes*, 219 F. App'x at 117 (deeming the excluded evidence relevant to whether the defendant "was a co-conspirator" in the charged conspiracy). Given the purpose for which the staff-member testimony was offered, this Court's decision in *Herzog*, and not the Third Circuit's nonbinding opinion in *Hayes*, is the relevant precedent.

ii. Next, Klein argues that the excluded testimony should have been admitted to bolster his argument that "the omnipresent surveillance at [Coffee Creek] made it implausible that Klein could have engaged in the extensive misconduct the government witnesses described without being noticed." Br. 54. This argument fails for two reasons. First, as a factual matter, Klein's record citations do not support his assertion that staff members necessarily would have noticed the exploitative and sexually assaultive conduct that government witnesses described. For example, Klein cites testimony describing instances when he groped a victim under a desk while another nurse had "his back turned," and when he fondled a different victim after a nurse "walked out of the room." Br. 55; *see also* 3-ER-390-391 (AV6

describing how Klein managed to pull his pants over his exposed penis before a staff member entered the room); Br. 55 (citing this incident).

Second, as a legal matter, the government had not objected to "[g]eneral testimony that a nurse or other staff member would not have had the opportunity to commit sexual misconduct given how the medical unit is staffed, monitored, or for some other reason." 1-ER-11. Defense counsel thus elicited substantial testimony supporting this argument and contended during closing arguments that Klein could not have been "so perfectly sneaky that over the course of approximately a couple of years nobody on his staff ever noticed anything." 8-ER-1939; *see also* pp. 24-26, 29-30, *supra*; Br. 54-55.

c. Klein also contests the district court's exclusion of staff-member testimony under Rule 403. Br. 56. However, his challenge rests on the same arguments summarized above regarding the testimony's supposedly "high" probative value. Br. 56. Those arguments are meritless for the reasons discussed.

2. Klein waived any argument that the district court violated his constitutional right to present a defense.

Klein offers no explanation—under the *Miller* factors or otherwise—for how the exclusion of staff-member testimony violated his constitutional right to present a defense. Consequently, any such argument is waived.

Even if Klein had raised such an argument, it fails on its merits. Although the excluded testimony could have been reliable evidence of what staff members themselves observed while on duty with Klein, and the jury would have been capable of evaluating the testimony as such, it nonetheless would not have been probative on the central issue in this case: whether Klein committed the sexual assaults that the victims described.

Moreover, the excluded testimony was not the sole evidence at defense counsel's disposal for arguing that other staff would have noticed if Klein had sexually assaulted inmates in the ways that victims recounted. Defense counsel introduced evidence about surveillance in and around the medical units, elicited testimony about staffing procedures and protocols for medical staff, and cross-examined staff

about whether they had ever witnessed, reported, or received reports about sexual misconduct by Klein. *See* pp. 24-26, *supra*.

Finally, the excluded testimony did not constitute a major part of Klein's defense, given other evidence that defense counsel was able to use to try and undermine the plausibility of the victims' accounts.

3. Any error was harmless.

Even if the district court abused its discretion or deprived Klein of his right to present a defense, that error was harmless beyond a reasonable doubt. As summarized above, the jury saw and heard substantial evidence intended to show that the sexual assaults could not have occurred as the victims testified without other staff realizing, at some point along the way, what was happening. *See* pp. 24-26, *supra*. Armed with this evidence, defense counsel's closing argument cast as incredible the idea Klein could have "repeatedly, brazenly sexually assault[ed]" 17 women, and yet, "[n]obody ever walk[ed] in on anything." 8-ER-1947. The jury rejected this argument. The admission of *additional* statements by staff members stating that they never personally witnessed any sexual misconduct by Klein on undisputed occasions would not have affected this outcome.

II. The district court's reasonable limitations on cross-examination did not violate the Confrontation Clause.

A. Standard of review

Where, as here, the district court did not exclude cross-examination on an entire area of inquiry, but rather, "allow[ed] some inquiry into 'the biases and motivations to lie of the [g]overnment's cooperating witnesses' [and] limit[ed] the scope of that inquiry," this Court reviews a Confrontation Clause challenge for abuse of discretion. *United States v. Nickle*, 816 F.3d 1230, 1235 (9th Cir. 2016); *see also United States v. Larson*, 495 F.3d 1094, 1101 (9th Cir. 2007) (en banc); *United States v. Collins*, 551 F.3d 914, 925 (9th Cir. 2009). This Court will not reverse a conviction on Confrontation Clause grounds if the error was harmless beyond a reasonable doubt. *See Nickle*, 816 F.3d at 1237.

B. The district court's limits on defense counsel's cross-examination of witnesses regarding cooperator status, pending criminal charges, and court-ordered supervision were not an abuse of discretion.

The district court's reasonable limits on defense counsel's cross-examination of (1) two victims regarding their work as confidential government informants, and (2) all victims regarding pending criminal charges and court-ordered supervision represented no abuse of

discretion. "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits" on cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). In determining whether limits on cross-examination violated the Confrontation Clause as an abuse of discretion, this Court considers whether "the district court excluded relevant evidence," "there were other legitimate interests outweighing the defendant's interest in presenting the evidence," and "the jury had 'sufficient information to assess the credibility of [each] witness.'" *Nickle*, 816 F.3d at 1235 (alteration in original; citations omitted).

1. No factor in the applicable analysis suggests the district court abused its discretion.

None of these factors suggests that the district court abused its discretion. First, the district court did not bar Klein from eliciting relevant testimony. As the court explained, "[t]he main impeachment value from the status of a witness as a cooperating witness or confidential informant comes from receiving a benefit, such as immunity, reduced charges, or payment, for testifying in the pending case." 12-ER-2652-2653; *see also United States v. Schardien*, 499 F. App'x 717, 719 (9th Cir. 2012); *Larson*, 495 F.3d at 1107. The court

thus reasonably required defense counsel to preface any examination on this topic by first asking whether a victim hoped or expected to obtain a benefit from testifying. *See* pp. 17-19, *supra*. Only if the victim harbored such a hope or expectation based on a communication with law enforcement would further inquiry have been relevant.

The district court reasonably required defense counsel to take a similar approach when questioning victims about pending criminal charges and court-ordered supervision. As the court explained, criminal "[c]harges, without a conviction, generally are not probative of truthfulness." 11-ER-2585 (citing *Michelson v. United States*, 335 U.S. 469, 482 (1948)). Rather, such charges are potentially relevant for showing bias. 11-ER-2586; *see also* 12-ER-2626 n.3 (same conclusion regarding probation violations). Thus, to probe whether a victim might harbor such bias, the court required defense counsel to ask about the victim's expectation of obtaining a benefit before inquiring further. *See* pp. 17-18, *supra*; *see also United States v. Bryan*, No. 21-10372, 2023 WL 5628628, at *1 (9th Cir. Aug. 31, 2023) ("L.M.'s DUI arrest was not relevant or probative of potential bias, given there is no evidence the [g]overnment promised L.M. anything in exchange for her testimony.").

These reasonable limitations represented no abuse of discretion. But as a failsafe, the district court advised defense counsel that they could always make an offer of proof outside the presence of the jury to show why testimony about a victim's cooperator status, pending charges, or court-ordered supervision should be admitted. *See* pp. 17-19, *supra*; 12-ER-2626. Defense counsel exercised this right only as to the victim who had been working as a confidential informant for the DEA; upon hearing the offer of proof, the court confirmed that "th[e] entire area of questioning [was] irrelevant." 12-ER-2682.

Second, legitimate interests outweighed Klein's desire to question victims about topics that offered such minimal probative value. Regarding cooperator status, the district court emphasized the need to avoid "jeopardiz[ing] the life or safety of a confidential informant" (12-ER-2694) with unnecessary interrogations into the informant's work. *See also United States v. Napier*, 436 F.3d 1133, 1136 (9th Cir. 2006) (discussing the government's interest in "ensuring the safety of [an] informant"). As for pending criminal charges and court-ordered supervision, the court's rulings reflected both Federal Rule of Evidence 608(b)'s constraints, which permit cross-examination about non-

conviction-related conduct when probative of a witness's truthfulness, and the Supreme Court's admonition that criminal "[c]harges, without a conviction, generally are not probative of truthfulness." 11-ER-2585 (citing *Michelson*, 335 U.S. at 482); *see also* 12-ER-2626 n.3 (same conclusion regarding court-ordered supervision).

Third, the jury heard plenty of other testimony bearing on the victims' credibility. Defense counsel discussed the victims' convictions for crimes involving dishonest acts or false statements. *See* p. 27, *supra*. Defense counsel raised their settlements of civil claims alleging sexual assault and abuse while at Coffee Creek. *See* p. 27, *supra*. And as Klein acknowledges (Br. 63), defense counsel cross-examined victims about whether they solicited aid or assistance from FBI agents prior to testifying, *see* p. 27, *supra*. The jury did not require testimony beyond that which the district court allowed regarding any victim's cooperator status, pending charges, or supervision to decide whether they found the victim credible.

2. Klein's arguments to the contrary are unpersuasive.

i. Addressing the first factor, Klein argues that testimony about cooperator status was relevant to show bias because if the victims had

admitted that their reports of sexual assault to FBI agents were false, they would have lost the ability to work as confidential informants. Br. 59-61. This assertion is speculative as to the victim who worked as a confidential informant for a county sheriff's office: defense counsel declined to make an offer of proof as to this victim, and thus, she did not testify about the nature of her cooperation agreement.

Setting that aside, Klein offers no authority to support this theory of relevance, which applies broadly to cooperation agreements writ large. On his view, a defendant may delve into the nature of a confidential informant's cooperation purely on the theory that their trial testimony might be driven by "self-interest" in retaining the "income" they derive from such cooperation. Br. 60-61. Klein cites no case law supporting this expansive proposition, much less any reason why such an approach was specifically appropriate in this case. To the contrary, any risk that a victim in this case might have felt pressure to "conform their testimony to fit the government's case" lest they "los[e] their cooperator status" (Br. 56-57, 60) was particularly remote because the victims' cooperation agreements involved "different law enforcement agenc[ies]" in "different jurisdiction[s] that ha[d] nothing to do with the

case at bar" (12-ER-2623; *see also* 12-ER-2622 (distinguishing Klein's authority because, unlike here, "the witnesses in those case[s] were cooperating for the prosecution or law enforcement agencies *in the same case*")).[10]

Next, Klein makes the equally categorical argument that a witness's cooperator status is de facto relevant to truthfulness because confidential informants have "dubious credibility" and must be "skilled liars." Br. 61-62. But again, Klein proffers no case law adopting such a presumption. Indeed, the sole case he cites (Br. 61), *United States v. Bernal-Obeso*, 989 F.2d 331 (9th Cir. 1993), does not go so far. Although the decision urges vigilance for any "lying under oath in the courtroom"

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[10] Klein cites *United States v. Edwardo-Franco*, 885 F.2d 1002 (2d Cir. 1989), for the proposition that the earnings of an "informant-witness" are relevant to bias. Br. 60. But *Edwardo-Franco* concerned an exclusion of testimony about payments to the government's *expert witness*, not an informant-witness. 885 F.2d at 1009. To the extent Klein intended to reference *United States v. Leja*, 568 F.2d 493 (6th Cir. 1977), which *Edwardo-Franco* cites, that case, too, is inapposite. There, the Sixth Circuit held that evidence about the total amount of money a confidential informant received over a three-year period in which he acted as an informant was relevant to show bias on the theory that the informant's "livelihood depended entirely upon government compensation for his work as an informer." *Leja*, 568 F.2d at 495, 499. Klein does not argue that either victim here was in such a situation.

by an informant-witness, it also cautions that "*relevant evidence* bearing on the credibility of an informant-witness" should be put before the jury. *Id.* at 333, 335 (emphasis added).

The district court adhered to that approach here, requiring defense counsel first to establish whether a victim expected or hoped to obtain a benefit from testifying, and then permitting defense counsel to make an offer of proof if they believed any other relevant testimony should be admitted. Here, Klein identifies no testimony in his offer of proof, or any fact specific to the two witnesses, showing that their mere status as confidential informants called their credibility into question.

Klein's challenge to the district court's ruling on pending criminal charges and court-ordered supervision fares no better. Klein argues that testimony on these topics was relevant because it would have established a victim's "vulnerability to punishment." Br. 62. But the court *permitted* defense counsel to cross-examine victims about pending criminal charges, including "[t]he jurisdiction of the charges and whether the witness faces felony or misdemeanor charges." 11-ER-2586. Klein also argues that "common sense supports the conclusion that witnesses with pending charges and ongoing supervision believed

testifying for the federal government would be in their best interest." Br. 63. But for that reason, the court *allowed* defense counsel to question inmates about whether they "expect[ed] or hope[d] to receive a benefit relating to those charges [or their supervisory status] from testifying in this trial." 11-ER-2586; *see also* 12-ER-2626.

ii. Klein offers similarly meritless arguments disputing the legitimate interests that outweighed admitting this testimony. He invokes the same relevance arguments addressed above and asserts that the district court bound him to a "severely curtailed script." Br. 64-65. But again, Klein fails to show that the court excluded any relevant evidence, and as described in the preceding paragraph, the court's "script" accommodated Klein's concerns about potential bias. Klein also faults the court for not elucidating why the excluded testimony could have "confuse[d] or misle[d] the jury." Br. 64. But the risk of side-tracking the jury with issues of minimal probative value—like victims' cooperation agreements with law enforcement entities not involved in the case and supervision orders from other jurisdictions—was obvious. *Cf. United States v. Mikhel*, 889 F.3d 1003, 1048-1049 (9th Cir. 2018)

(recognizing that "preventing a trial-within-a-trial on unrelated events" is a legitimate interest).

The Supreme Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974), does not help Klein. *See* Br. 65-66 (citing *Davis*). *Davis* found a Confrontation Clause violation where defense counsel was not permitted to question a "crucial" government witness about his probationary status and thereby show that bias had infected his identification of the defendant as a burglary suspect. 15 U.S. at 310-312, 318. Specifically, defense counsel's theory was that the witness "might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation." *Id.* at 311.

As this Court has explained, however, *Davis* does not hold that "exclusion of interrogation regarding a witness's probationary status *per se* violates the confrontation clause." *United States v. Beardslee*, 197 F.3d 378, 383 n.1 (9th Cir. 1999), *opinion amended on denial of reh'g*, 204 F.3d 983 (9th Cir. 2000). Rather, probationary status was relevant in *Davis* because the witness "was *himself* on probation for burglary, and thus had reason to believe that he might be a suspect in the crime

for which the defendant had been charged." *Ibid.* (emphasis added); *see also Davis*, 415 U.S. at 310-311; 12-ER-2624 ("The witness in *Davis*, thus, did receive or expect to receive a benefit—avoiding suspicion of having committed the crime."). Here, however, Klein fails to show that any victim's "probationary status involved an offense that was similar or relevant to those charged against [Klein]" or "rendered [her] *particularly subject* to undue pressure from the authorities or the Government." *Beardslee*, 197 F.3d at 383 n.1 (emphasis added).

iii. Referencing the third factor, Klein provides only the conclusory statement that the district court's ruling "left the jury without sufficient information to assess the complainants' credibility." Br. 65-66. This assertion, however, ignores defense counsel's cross-examination of victims on multiple topics that bore on truthfulness. *See* p. 27, *supra*.

3. Any error was harmless.

For similar reasons, even if the district court abused its discretion, that error was harmless beyond a reasonable doubt. The jury heard significant testimony pertaining to the victims' veracity, including their convictions for certain types of crimes, monetary settlements they had

obtained, and any solicitations of assistance from FBI agents before testifying. *See* p. 27, *supra*; *see also* Br. 63. Defense counsel also argued these points during closing. *See* p. 29, *supra*. The jury nonetheless credited the victims' accounts and convicted Klein on all but two charges. Klein provides no reason to believe, in light of his other accumulated evidence, that the excluded testimony would have changed this result. *See Sully v. Ayers*, 725 F.3d 1057, 1075 (9th Cir. 2013) (considering, as part of the Court's harmlessness analysis, the extent of defense counsel's cross-examination and whether the excluded line of questioning was cumulative).

III. The district court did not abuse its discretion by denying Klein's continuance requests.

A. Standard of review

"A district court's decision to deny a motion for a continuance is reviewed for abuse of discretion." *United States v. Walter-Eze*, 869 F.3d 891, 907 (9th Cir. 2017).

B. The district court provided Klein a reasonable amount of time to put on a constitutionally sufficient defense.

1. None of the relevant factors shows that the district court abused its discretion.

As the Supreme Court has emphasized, "broad discretion must be granted [to] trial courts on matters of continuances." *Walter-Eze*, 869 F.3d at 907 (quoting *Morris v. Slappy*, 461 U.S. 1, 11 (1983)). This Court considers five factors when determining whether a district court abused its discretion in denying a continuance. They include (1) "whether the parties, the court, or counsel would be inconvenienced" by the continuance; (2) "whether previous continuances ha[d] been granted"; (3) whether there existed "legitimate reasons for the delay"; (4) "whether the delay [was] the defendant's fault"; and (5) "whether the denial would prejudice the defendant." *Williams v. Stewart*, 441 F.3d 1030, 1056 (9th Cir.), *amended by* No. 01-99015, 2006 WL 997605 (9th Cir. Apr. 18, 2006); *see also* 12-ER-2632 (district court applying these factors); 13-ER-2936-2943 (same for Klein). The last factor, prejudice, is the "most critical," *United States v. Mejia*, 69 F.3d 309, 316 (9th Cir. 1995), and "must be established," *United States v. Wilkes*, 662 F.3d 524, 543 (9th Cir. 2011).

None of these factors suggests any abuse of discretion by the district court in denying a continuance. This is most clear in the denial of Klein's third continuance request, which was made a mere month before trial. *See* 13-ER-2934-2944. As the court explained, a continuance would have imposed significant inconvenience on the court, which had mailed hundreds of juror summonses and questionnaires, and on the government, which had arranged for the transport of incarcerated witnesses and had begun preparing them for trial. *See* pp. 10-11, *supra*.

Moreover, Klein had previously been granted a continuance to a date that defense counsel had agreed would be "realistic" for trial. 10-ER-2491. There were thus no legitimate reasons for further delay because the prior continuance had provided defense counsel "a reasonable time to prepare a defense" in a "relatively straightforward" case. 12-ER-2656. Finally, because defense counsel had already been given "months to review" much of the discovery at issue, and the additional documents defense counsel sought to obtain were "likely irrelevant," Klein suffered no prejudice. 12-ER-2651, 2656.

2. Klein's arguments fail to show any abuse of discretion.

Klein argues only that the district court abused its discretion in denying his second and third continuance requests in March and June 2023, respectively, though without addressing all five of the relevant factors. *See* Br. 69-81. Regardless, his arguments fail on their merits.

a. As to whether a continuance would have caused inconvenience, Klein asserts that the district court "overvalued" the harm that a continuance would have caused the government. Br. 74. This argument ignores, however, the likelihood of significant inconvenience to the witnesses themselves, many of whom were "suffer[ing] from . . . serious medical conditions" and "battling addiction," as the court explained when denying Klein's March 2023 request. 1-ER-25, 27. It also ignores the significant inconvenience to the court, which, by the time of Klein's next request in June 2023, had sent "325 lengthy, case-specific juror questionnaires to potential jurors who ha[d] been summoned for th[e] case" and had reviewed the 95 questionnaires that had been returned. 12-ER-2647.

Regardless, nothing in the district court's analyses "overvalued" the government's interest in maintaining the previously-agreed-upon

trial date, especially where one corroborating witness had *died* during the prior continuance granted by the court. *See* 1-ER-27. Klein faults the government for not identifying any "specific" witness who would have been unavailable if a "limited set over" had been granted. Br. 76. But witness availability was impossible to determine because Klein sought continuances of indeterminate lengths. *See* pp. 7, 9, *supra*.

Moreover, because victims were likely to have additional encounters with law enforcement, thus triggering the types of supplemental productions that had motivated Klein's requests in the first place, additional extension motions were likely, even if the court postponed trial. *See* p. 12, *supra*. Klein suggests that it would have sufficed simply to read into the trial record deposition testimony from any unavailable victim. Br. 76. Yet as Klein elsewhere notes, defense counsel had sought to turn the trial into "a credibility contest" (Br. 56), and in such a situation, "observing critical witnesses [and] hearing them testify in person" is crucial, *Mejia*, 69 F.3d at 314.

Klein's remaining two arguments also falter. He contends that his case proceeded to trial "'on a highly accelerated timeline' as compared to standard District of Oregon practice." Br. 75 (citation omitted). As the

district court explained, that characterization relies on statistics that were "skewed by the COVID-19 pandemic" and cases that were "not relevant comparators." 12-ER-2649 n.7. Klein offers no rebuttal to this explanation. Klein further argues that by citing "the closeness of the trial date" when rejecting his June 2023 continuance request after having denied his March 2023 request, the court imposed "an unfair 'heads I win, tails you lose' scenario." Br. 76. But the court did not rely on the mere *proximity* of trial. Rather, the court pointed to ongoing preparations that would need to be repeated if trial were continued—for example, mailing new juror summonses and questionnaires, re-transferring custody of incarcerated witnesses, and issuing new subpoenas for non-custodial witnesses. 12-ER-2647-2648. There was no abuse of discretion in denying Klein's request under such circumstances.

b. As to legitimate reasons for delay, Klein argues that "changed circumstances"—specifically, defense counsel's identification of new "areas of potential impeachment"—warranted a continuance. Br. 69-71. As he acknowledges, the district court held that these "investigative leads were not likely to produce relevant evidence." Br. 71-72 (citation

omitted). Klein's attempts to undermine this conclusion rely on pure conjecture and thus fail to show any abuse of discretion.

The only investigative leads Klein alleges he could not pursue following denial of his March 2023 continuance request pertained to district attorney records involving individuals who had faced "similar charges as Mr. Klein," and Oregon DOC records showing "post-allegation facilities changes" at Coffee Creek. Br. 71. The likelihood that pursuing such leads would unearth relevant evidence, however, is entirely speculative. Regarding the district attorney records, the government had previously obtained that office's "full investigative files" about the allegations made against Klein and produced them to defense counsel in discovery. 10-ER-2405. Having received these files, Klein fails to explain why investigation into the records of "*other* individuals" (Br. 71 (emphasis added)) was necessary or what those records might have contained. He suggests that a prosecutor's memorandum discussed a "culture" of false accusations at Coffee Creek. Br. 72. But Klein offers no basis on which to conclude that the district attorney records would have contained *evidence* of such a culture, much less one that connected back to Klein and the victims named in the

indictment. Moreover, defense counsel already had sufficient evidence to cross-examine victims about this alleged "culture." *See* pp. 22, 27, *supra*.

As for the Oregon DOC records, Klein admits that he received ample discovery documenting past changes to the Coffee Creek facility (Br. 72; *see also* 10-ER-2474-2476), and that there was "significant" testimony at trial about Coffee Creek's layout (Br. 72). Still, he argues that a continuance was necessary to investigate "what specific changes were made to specific rooms." Br. 72. What such an investigation would have found, and what assistance it would have lent to his argument that "the alleged abuse was unlikely to have remained undetected" (Br. 72), is again entirely speculative.[11]

As for his June 2023 request, Klein argues that the district court erroneously discounted his need to investigate victims' "new pending [criminal] charges." Br. 71-72. As discussed, the government provided

[11] Klein mentions the possibility of obtaining Oregon DOC records to illuminate "connections" between victims and witnesses, and to provide information on staff training. Br. 72. However, he provides no idea of what investigation into this evidence would have found, and regardless, significant testimony on these topics came in at trial, as he elsewhere acknowledges. *See* Br. 17-18, 24-25, 44-45.

defense counsel with updated criminal history reports for victims as the reports were generated. *See* pp. 19-20, *supra*. However, Klein asserts that he needed more time to investigate the "facts underlying" those charges, which could have revealed criminal conduct indicative of "dishonesty," attempts to "trade on witness status for special favors," or the existence of "undisclosed benefit[s]" where a victim's criminal conduct "d[id] not align with the charges filed." Br. 73-74.

Klein fails to explain, however, why the government's reports were insufficient for determining whether pending criminal charges involved conduct that was "probative of truthfulness." Br. 74 (citation omitted). He also offers no reason to conclude that further investigation into any of the reports *actually would have* uncovered evidence of dishonest conduct, solicitations of favors, or undisclosed benefits—or that such evidence would have been admissible. For example, the question of whether there was a "discrepancy" between a victim's conduct and the criminal charge filed (Br. 73) could have devolved into a confusing mini-trial on a collateral issue.

c. Finally, Klein attempts, but fails, to show prejudice—that "his verdict would have been different had the district court granted his

request for continuance." *Wilkes*, 662 F.3d at 543.[12] Klein points to the "complex[ity]" of this case, which involved multiple victims and many "charged and uncharged allegations of sexual misconduct." Br. 78; *but see* 12-ER-2656 (district court explaining that the case was "not overly complex" and involved "relatively straightforward allegations of sexual misconduct by a state corrections employee"). This purported complexity, in and of itself, does not establish prejudice because Klein does not identify what defense counsel, if given additional time, would have done *in light of that complexity* that would have resulted in a different verdict.

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[12] Klein quotes this Court's decision in *Mejia* for the proposition that, to show prejudice, "a defendant need only be able 'to explain how the denial of a continuance affected his ability to present his case.'" Br. 77 (quoting 69 F.3d at 317). This fundamentally misrepresents what *Mejia* said. The full quote from *Mejia* reads: "[r]eversal is not required, however, where the complaining party is unable to explain how the denial of a continuance affected his ability to present his case." 69 F.3d at 317. Even though prejudice will *not* be found where a defendant cannot provide such an explanation, it does not follow that prejudice *will* be found where a defendant provides such an explanation, as Klein suggests. That is fallacious reasoning. Indeed, the other cases in Klein's string cite show that prejudice demands far more than a mere explanation of how the defendant's ability to present his case was affected. *See* Br. 77-78 (citing cases where defendants were deprived of the only testimony that could have helped them or prevented from introducing any affirmative evidence).

The same is true about Klein's arguments about issues defense counsel would have investigated—Coffee Creek's "unique environment," Oregon DOC records, and "newly-revealed grounds for impeachment"—and unidentified "trial preparation tasks" they would have completed. Br. 78-79. The potential results of such investigations are entirely speculative. Klein identifies no specific areas of follow up or analysis involving any of the victims in which defense counsel would have engaged had a continuance been granted. *See* Br. 78 (acknowledging that it is "unknown" what further "investigation" would have uncovered). Nor does defense counsel explain how any fruits of such investigation would have changed the jury's verdict, especially given the evidence already in the record illuminating Coffee Creek's "environment" and challenging the victims' credibility. *See* pp. 22, 27, *supra*. As for trial preparation tasks, Klein provides no idea of what they were and how they related to any changes he would have made to his defense.

Klein's reliance on post-trial evidence obtained from ViaPath, "a communications company that operated various platforms [Coffee Creek] inmates used to interact with individuals outside the prison"

(Br. 38), is similarly unavailing.[13] Despite having possessed these records for more than a year, defense counsel still has analyzed only "small portions" of the data. Br. 38, 81. Out of those small portions, Klein cites a few sets of conversations to substantiate his claim of prejudice, but those conversations offered vanishingly low evidentiary value. For example, Klein references communications that he says would have impeached AV4's statement that AV1 was "an 'acquaintance,' but not a 'friend.'" Br. 80 (citation omitted). There is no likelihood that impeachment on such an inconsequential distinction would have caused the jury to disbelieve AV4's account of sexual assault. *See Wilkes*, 662 F.3d at 543 (explaining that where a defendant contends that "the denial of a continuance prevent[ed] the introduction of specific evidence, the prejudice inquiry focuses on the significance of that evidence" (citation omitted)).

The same conclusion applies to communications that, as Klein describes them, conflict with AV5's and AV7's descriptions at trial of

[13] Klein does not challenge the district court's denial of his motion for a new trial based on post-trial acquisition of this ViaPath evidence. 2-ER-126-133.

their interest in pursuing civil litigation against the Oregon DOC. Br. 80-81. Nothing about those communications undermines or contradicts those victims' testimony about the sexual assaults Klein committed. Klein's argument to the contrary rests on the assumption that AV5 and AV7 would have proffered "*false claims*" of sexual assault in such litigation. Br. 80 (emphasis added). But Klein cites nothing in the communications suggesting that the victims' accounts of sexual assault were or would have been false.

Lastly, Klein states that certain ViaPath records indicate that AV3, AV4, and AV7 are "related by marriage." Br. 80 & n.10. But he offers no explanation for how this possibility would have "fundamentally re-shaped the defense's questioning of" those victims (Br. 80), especially where defense counsel had *already* elicited testimony that the three victims all knew each other (*see* 7-ER-1498-1499 (AV3 testifying that she knew AV4 and was a friend of AV7)). Nor does Klein show how "his verdict would have been different" had the jury heard this ViaPath evidence, which bears no relevance to whether the three victims testified truthfully about having been sexually assaulted by Klein. *Wilkes*, 662 F.3d at 543.

CONCLUSION

For the foregoing reasons, this Court should affirm Klein's convictions.

Respectfully submitted,

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ADDENDUM

ADDENDUM: CHARGES IN THE INDICTMENT

Offense	Count	Victim	Testimony	Verdict
18 U.S.C. 242 *Deprivation of rights under color of law*	Count 1	AV1	7-ER-1385-1443	Guilty
	Count 2	AV2	6-ER-1257-1304	Guilty
	Count 3	AV2		Guilty
	Count 4	AV2		Guilty
	Count 5	AV3	7-ER-1447-1539	Guilty
	Count 6	AV3		Guilty
	Count 7	AV3		Guilty
	Count 8	AV3		Guilty
	Count 9	AV3		Guilty
	Count 10	AV4	4-ER-634-699	Guilty
	Count 11	AV5	6-ER-1354-1378	Guilty
	Count 12	AV6	3-ER-336-426	Guilty
	Count 13	AV6		Guilty
	Count 14	AV6		Guilty
	Count 15	AV7	5-ER-880-919	Guilty
	Count 16	AV8	5-ER-819-858	Not guilty
	Count 17	AV9	4-ER-729-755	Not guilty
	Count 18	AV10	6-ER-1224-1254	Guilty
	Count 19	AV11	6-ER-1137-1179	Guilty
	Count 20	AV12	Dismissed prior to trial	
	Count 21	AV12	Dismissed prior to trial	
18 U.S.C. 1623 *False declarations before grand jury or court*	Count 22	n/a		Guilty
	Count 23	n/a		Guilty
	Count 24	n/a		Guilty
	Count 25	n/a		Guilty

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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