08-5071-cr

To Be Argued By:
WILLIAM J. NARDINI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-5071-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

RONALD MARTINEZ, BRIAN FORBES, ANTONIO DOVE, also known as Dontell Dove, also known as Tone,

(For continuation of Caption, See Inside Cover)

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants,

DENNIS PARIS, also known as Rahmyti,

Defendant-Appellant.

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Statement of Jurisdiction

The district court (Droney, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on October 17, 2008. JA22. On October 14, 2008, Paris filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA22. This Court has appellate jurisdiction over Paris's challenges to his conviction and sentence pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues
Presented for Review

1. Did the district court err in denying Paris's request to use his peremptory challenges to remove women from the jury based solely on their gender?

2. Did the district court correctly find that the defense failed to establish a prima facie case that the government had exercised its peremptory challenges based on gender discrimination?

3. Did the district court abuse its discretion when it precluded Paris from introducing inadmissible hearsay, by testifying about a conversation he had with another person?

4. Did the district court abuse its discretion in declining to define the term "sex act" in the jury instructions on the elements of 18 U.S.C. § 1591?

5. Did the district court err in defining "fraud" when instructing the jury on the elements of 18 U.S.C. § 1591?

6. Viewed in the light most favorable to the guilty verdict, was there sufficient evidence to support Counts 9 and 10, which charged Paris with sex trafficking by force, fraud, or coercion?

7. Did the district court plainly err by imposing sentence on Counts 9 and 10, on Paris's theory that the penalty provisions of 18 U.S.C. § 1591(b) provide no punishment

for violations for § 1591(a) absent supplemental jury findings?

8. Did the district court abuse its discretion in sentencing Paris to pay $46,116.80 in restitution, where Paris cites no law or portions of the record to support his claim?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-5071-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

DENNIS PARIS, also known as Rahmyti,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Defendant Dennis Paris ran a prostitution business in central Connecticut in which girls and young women engaged in sex for money. He recruited two minors, who were 14 and 16 years old, to work for him as prostitutes. He also used force, fraud, and coercion to compel two 18-year-olds to engage in commercial sex for his enrichment.

Following an eight-day trial, a jury convicted Paris of conspiring to use interstate facilities to promote

prostitution, sex trafficking of minors, sex trafficking by force, fraud, and coercion, and using interstate facilities to operate his business. The court sentenced Paris to an aggregate of 360 months of imprisonment.

Paris now appeals his conviction and sentence. He challenges the court's denial of his request to dismiss women from the jury based solely on their gender, an evidentiary ruling barring him from introducing hearsay evidence, jury instructions about the terms "sex act" and "fraud," the sufficiency of the evidence on Counts 9 and 10, and the restitution order. He also asks that no sentences be imposed on Counts 9 and 10 in light of a recent Ninth Circuit decision. All these arguments lack merit.

Statement of the Case

On December 13, 2006, a grand jury in Hartford returned a second superseding indictment charging Paris, and two others, with twenty-nine counts related to sex-trafficking. Paris was charged with:

Count 1	conspiracy to use an interstate facility to promote prostitution, 18 U.S.C. § 371
Counts 2, 4	sex trafficking of a minor, 18 U.S.C. § 1591
Counts 9-10	sex trafficking by force, fraud, or coercion, 18 U.S.C. § 1591

Counts 11-24	use of an interstate facility to promote prostitution, 18 U.S.C. § 1952(a)(3)

JA26-40. On June 14, 2007, after seven days of evidence and one day of deliberations, a jury convicted Paris on all charges. JA18.[1]

On October 14, 2007, the district court (Droney, J.) sentenced Paris to concurrent sentences of 30 years on Counts 9 and 10; 20 years on Counts 2 and 4; and 5 years on the remaining counts, plus three years of supervised release, and $46,116.80 in restitution. JA153. Paris is currently serving this sentence.

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[1] The government moved to dismiss additional money laundering counts after the Supreme Court's decision in *United States v. Santos*, 128 S. Ct. 2020 (2008). JA21. The government also moved to dismiss Count 13. JA18.

Statement of Facts and Proceedings Relevant to this Appeal

Dennis Paris (aka Rahmyti) operated a prostitution business in the Hartford, Connecticut area in which he controlled and marketed girls and young women ("girls") to perform sexual acts with men ("johns") in exchange for money. Among others, Paris used two minors, Marianne and Eileen. He also used force, fraud, and coercion against two eighteen-year-olds, Jennifer and Melissa, to force them to work as prostitutes. Co-conspirators Ronald Martinez and Brian Forbes operated their own prostitution businesses but shared girls and promoted each other's business.

A. Paris recruits 14-year-old Marianne as a prostitute

In the winter of 1999, Marianne was a 14-year-old ninth-grader when she met Paris. She had run away from home and was staying in Hartford with a friend. T97-99, 102.[2] In need of money, she was introduced to Paris as someone who could give her a job in a motel. Marianne believed the work would be in housekeeping. T98. Paris drove to the friend's house and Marianne met him in his car. T100. After talking for a half-hour, he took her to the Days Inn in Hartford. T101.

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[2] Because Paris's appendix contains only a fraction of the record, the government cites the trial transcript ("T") or jury selection transcript ("JS") directly for consistency. *See* Second Circuit Local Rule 30.1(e)(1)(A) (authorizing appeal on original record in proceedings conducted in forma pauperis).

Paris took her to a room where he told her she would be just spending time with men, like "dates." T102. He said she would need to dance for them and asked her to take off her clothes. T103. She danced for him as instructed, and he then had sexual intercourse with her. T103. Paris told her she would be paid for doing these "dates," and she realized that he was going to have her engage in prostitution. T104.

A few days later, Marianne called Paris and began working for him as a prostitute. T105. As a 14-year-old, she had no other source of income, and the money he said she could make sounded significant. *Id.* Paris again picked her up and took her to the Days Inn. He started having her do half-hour or hourlong "calls" (selling sex for money). T106. These calls were done in the motel ("in-calls") or at customers' homes ("out-calls") and included sexual intercourse. T107, 114. Paris paid her $80 per call and provided condoms. T107, 110-11. Paris advertised Marianne as "Sasha" in the Hartford Advocate.

Marianne worked for Paris "off and on" whenever she ran away from home. T108. This went on for about a year and a half, with her typically doing two or three calls per night. T107. She did a total of approximately 100 calls for Paris. T109. On one occasion, she and another girl were sent to the home of a man who was rough with them. When she told Paris about it, "he laughed." T110-11.

After working for Paris, Marianne met Brian Forbes and worked for him until April 2002, at which point she stopped working as a prostitute. T125-26.

B. Paris recruits 16-year-old Eileen as a prostitute

Eileen met Paris in March 2002 when she was 16 years old and still in high school. T144-45. She had run away from home and was living with friends. T145. She was introduced to Paris by her friend, Marianne, who explained she would be paid for having sexual intercourse with men. T146. Paris picked her up and took her to a hotel where he was staying. He never asked her age and never asked for identification. T149. She waited in his room until he had a call for her. T146-47. When a john arrived at Paris's direction, she went with the man to another room in the hotel. In the room, Eileen had intercourse with this man in exchange for $125. She gave Paris the money, and Paris gave her $90 for the call. T148-49.

Eileen then started working regularly for Paris as a prostitute and did up to three calls per day. T150. Shortly after she started working for him, she told Paris she was 16 years old. He replied that if asked, she should say she was 19. T155. She worked for him for about two weeks, doing both in-calls and out-calls. T153. Since she was only 16 years old and had no car, she was taken to out-calls by one of Paris's "drivers." T154. Eileen would turn over her money to Paris when she returned, and he paid her a portion. T154. On one occasion, a man was abusive and degrading. When she told Paris about it, he simply laughed. T150-51. Paris provided her with condoms. T153.

Eileen stopped working for Paris after just two weeks because of an argument. When he told her to do a call, she said she was tired and had to get up early in the morning for school. He ordered her to do more calls, and when she refused he told her to leave. T155-56.

After leaving Paris, Marianne worked as a prostitute for Brian Forbes and his girlfriend Shanaya Hicks for about two weeks before she was located by police in response to a missing person report filed by her mother. T158-59.

C. Paris uses 18-year-old Jennifer and 18-year-old Melissa as prostitutes and uses force, fraud, and coercion against them

In the fall of 2003, Jennifer was 18 years old and a resident of Vermont. She had dropped out of school, was addicted to heroin, and her life was spiraling out of control. Her mother, with whom she lived, was in an abusive relationship with a boyfriend, making her home life unbearable. Therefore, she moved to Connecticut to live with her aunt. T174-75. Unfortunately, her aunt had serious problems of her own, being a heroin addict who was working as a prostitute to support her habit. T176. Shortly after arriving in Hartford, Jennifer's aunt introduced her to Forbes. Forbes offered to have Jennifer live with him, and since she had no place to stay, a few days later she accepted. T178.

Forbes, who lived in an apartment in East Hartford with Hicks (aka "Toni"), gave Jennifer a room to stay in

and initially treated her well. He did not ask her to work as a prostitute. T182. After a short time, Forbes asked if she had a friend who would like to come and live with her. Jennifer thought of Melissa, a long-time friend from New Hampshire. T182-83. Forbes and Jennifer drove to New Hampshire, where they found Melissa in front of a movie theater. Jennifer approached her and convinced her to come to Connecticut. T183.

In the fall of 2003, Melissa's life was fraught with problems. She was 18 years old, had dropped out of high school, was addicted to heroin, and had been kicked out of her house. T326-329, 331, 408. When her friend Jennifer showed up in New Hampshire with a proposal that she join her in Hartford with Forbes, she agreed. T328. Immediately upon their arrival, Forbes told her she would have to perform sexual acts for money. T329. He brought them to a motel room, took cash from a man, and left the girls, who each had intercourse with the man. T329. This was the first time the girls had done this. T186, 330-31. Melissa felt nervous, disgusted, and confused. T330-31. Before leaving New Hampshire, Forbes had assured her if she wanted to return home after two days, he would bring her back. After being required to do several calls, Melissa asked Forbes to take her home, but he refused. T333.

Over the next several weeks, Melissa and Jennifer were held against their will by Forbes and Hicks. On one occasion, they left the apartment without permission and went to a park across the street. When Forbes found them, he forcibly took them back to the apartment and locked them in their room. T335. From that time on they were

often locked in their bedroom and when Forbes left the apartment, Hicks served as their jailor. T187.

During this time, Forbes regularly made them work as prostitutes, exchanging sex for money two or three times per day. T188, 333, 336. If they refused to comply, he would withhold heroin, causing them to become drug sick, or physically assault them by slapping or choking them. T186-87, 334, 336. All of the money received for this prostitution was retained by Forbes; Melissa got nothing. T188, 336. In this coercive environment, they felt they could not leave, nor could they refuse his orders. T185-87, 337.

Around late November 2003, Forbes took Jennifer and Melissa to a condominium where they met Paris. Paris made them strip, photographed them, and recorded their body measurements. T189, 337. This was done so Forbes could share them with Paris. T191. For a short time they did calls for both Forbes and Paris. T338. On one occasion Melissa saw Paris giving money to Forbes. T340.

In early December 2003, Paris and Forbes let Jennifer and Melissa choose which of the two pimps they wanted to stay with. T343. Paris convinced them to go with him, assuring them that he would not abuse them and would give them the money they earned from prostitution. T343. Believing Paris would treat them better, they went with him. T192. Paris was to pay Forbes for the girls but later refused to do so. T212. (Paris later complained they were not worth what he paid for them. T343.)

Paris took them to the Motel 6 in Wethersfield and immediately had them doing calls. T196, 203. Paris would provide condoms and tell Melissa or Jennifer what they were required to do with each man – that is, oral sex, intercourse, or both. T204, 350. Oral sex was $75, a half-hour with intercourse was $125, and a full hour was $250. T350. Paris accepted credit cards, and he was supposed to give them a portion of the payment in cash, but never did. T197, 344-45, 348. They were required to do six or seven calls per day, seven days a week. T197, 349.

During the time Melissa and Jennifer were controlled by Paris, he had them also do calls for Ronald Martinez, who operated his own prostitution ring. T351. When they did calls for Martinez, Paris and Martinez shared the money. T352. Martinez also operated a bail bond company, which was used to bail Melissa out one time when she was arrested. T351.

When they first started working for Paris, he paid them and their situation improved. However, after a couple of weeks, right after Christmas 2003, his attitude changed and he stopped paying them. T197, 354, 368. He made them pay for their motel rooms, food, and heroin out of the money they received from the johns and then kept the rest. T361. In short order they again found themselves held against their will, afraid to leave or refuse to work as he demanded. T200. Paris exploited their heroin addiction to coerce them into obeying his orders to have sex with customers by withholding heroin if they refused. This made them extremely sick and miserable, and made them comply with his orders in order to get heroin. T198. On

one occasion, when Jennifer argued with Paris and refused to do a call, he struck her in the face and broke her tooth. T204. Paris also imposed his dominance on Jennifer by making her have sex with him whenever he desired. T203. Jennifer testified that her fear for her family's safety was also a factor in her feeling she could not escape Paris's control. She was concerned that if she escaped, Paris would harm her mother. T200-01. This fear was confirmed on one occasion when she went back to Vermont without his permission, only to have Paris and his friend come to her home and intimidate her into returning to Hartford with them. T201.

Adding to this feeling of helplessness was the fact that Paris forced Jennifer to have sex with men who were "mean to her," despite her complaints. T205. He also forced her to do degrading things to control her. On one occasion, he put a dog collar and leash on her while she was nude, had intercourse with her in a room full of friends, and then allowed his friends to have sex with her. T207.

Paris likewise coerced Melissa into doing calls she did not want to do. This included requiring her to have anal sex with a man, despite her objections and fears. T363-64. On another occasion Paris struck her after a man complained she was too white and then took her to a tanning salon. T366. Shortly after leaving, the man from the tanning salon called Paris and told her he wanted to have sex with Melissa. T367. Because of the size of the man, Melissa called Paris crying and said she could not handle the intercourse with him. He ordered her to do it

anyway, which resulted in her “ripping and bleeding.” T367. When done there, Paris took her immediately to another call despite her upset and injured condition. T367. This experience cemented in her mind there was no way to leave Paris. T367.

On another occasion Melissa was working at a stag party and saw Paris get angry with another girl and grab her by the neck. She went down limp, and he dragged her outside. This reinforced Melissa’s fear of him. T369-70. Paris also made veiled threats about involving Melissa’s younger sister in prostitution if Melissa did not obey him. T371. On three occasions Melissa attempted to escape Paris’s control. The first two times Paris found her quickly and forced her to come back. The second time, he found the room she was hiding in, took her money, and slapped her. T373-4. After these escape attempts, Paris did not allow her to leave the motel and had her do only in-calls. T374.

In her most violent episode with Paris, in early summer 2004, Paris summoned Melissa to his room. He locked the door, had her remove her clothing, and raped her. He then handcuffed Melissa and rolled her nude in a blanket on the bed. Paris told two friends of Melissa (Perez and Walito) to get as much heroin as they could, stating he was “going to get rid of [her],” apparently with an overdose. T376, 378. Paris then played an audio tape and accused her of “snitching” on his prostitution operation to the New Hampshire police. T377. Finally, after an hour or so, Paris took her ID and social security card and left the room with Perez. T379. Left alone with Walito, still handcuffed and

rolled in the blanket, she pleaded with him to help her, but he was confused and did not respond. T380. Finally, she gave up and made herself "deal with the fact that [she] was going to die. There was no way out." T380.

After what "felt like an eternity," Paris returned with food from McDonald's. T380. Paris was laughing, uncuffed her, and told her to get out and said she was free to go. T380. Once dressed, Perez and Walito walked her from the room and Paris said nothing. T381. She went back to her own room and called her mother, and told her: "I got myself in way too deep. That I got myself mixed up with someone that I wasn't safe with. That I didn't know if I was going to be around too much longer and that I loved her." T389.

Perez, who testified under a grant of immunity, confirmed the assault, stating that Paris hit her repeatedly and that she was crying. T451-2, 457. Perez further stated that Paris told Walito and him, in Melissa's presence, to get shovels because he was going to kill her and bury her. T458. Perez said that Paris assured them, however, he was just trying to scare her to get information from her. T457.

The same day, Melissa escaped Paris when guys in a neighboring motel room gave her a ride to the Motel 6 in Hartford. T393. There, she worked on her own for two months until Paris found her and had her arrested by Martinez for violating her bond. T394-97.

Jennifer's ordeal ended in June 2004 when Paris was arrested by the Hartford Police for violating his probation.

When Paris was arrested, Jennifer left the motel and with no money tried to make some money by working "on the street" as a prostitute. She was promptly arrested by a Hartford police officer, leading to the revelation of her and Melissa's experience. T210.

Summary of Argument

1. The district court properly precluded Paris from exercising his peremptory challenges to strike female jurors based on their gender. The Supreme Court has held that a defendant, like a prosecutor, is barred from exercising peremptory strikes based on a juror's race. *Georgia v. McCollum*, 505 U.S. 42, 55 (1992). Moreover, the Supreme Court has held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality." *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994). There is no basis for accepting Paris's theory that a criminal defendant should be permitted to exercise peremptory strikes based on gender. To accept such a rule would injure the very same public interests against gender discrimination that *J.E.B.* sought to protect, and which *McCollum* held outweighed a defendant's ability to freely exercise his peremptory challenges.

2. The district court properly concluded that, based solely on the government's exercise of its first four strikes against men (who composed a majority of the venire panel), Paris had not made out a prima facie case of gender discrimination. Unlike Paris, the government expressed no intention to strike members of one gender or another, or even to achieve a gender balance on the jury.

3. The district court did not abuse its discretion by precluding Paris from testifying about a conversation he had with another person. Contrary to Paris's claim, the third party's statements were clearly inadmissible hearsay that were offered to prove that Forbes expected Paris to pay him for Jennifer and Melissa. And although Paris argued that his proffered response – "get lost" – was a verbal act, it was irrelevant because it was made to a third party, not to Forbes.

4. The district court did not abuse its discretion in declining in the jury instructions for Counts 2, 4, 9, and 10 to define the term "sex act," and this failure to define the term did not render it unconstitutionally vague. The statute at issue – 18 U.S.C. § 1591 – prohibits conduct that is designed to cause victims to engage in "commercial sex acts." All four of the victims in this case testified that Paris arranged for them to engage in sexual intercourse with customers in exchange for money. Whatever the outer contours of the term "sex act," it clearly includes sexual intercourse.

5. The district court properly defined the term "fraud" in the jury instructions for Counts 9 and 10 according to a standard dictionary definition, as "any deliberate act of deception, trickery or misrepresentation." T1332. The court correctly declined to instruct the jury that the term should be defined according the elements of the common-law tort of fraud, which has not been uniformly imported into other criminal statutes that involve fraud. In any event, some of the concepts that Paris urges to be folded into the concept of "fraud" – such as Paris's knowledge of

the fraudulent nature of misrepresentations – were otherwise incorporated into the judge's instructions on the elements of § 1591.

6. There was sufficient evidence to support Paris's convictions on Counts 9 and 10, which charged him with sex trafficking of Jennifer and Melissa knowing that force, fraud, and coercion would be used to cause them to engage in commercial sex acts. Paris complains that the jury was wrongly instructed to consider whether he *actually* used those means, whereas the real question was whether he *knew* at the time he recruited Jennifer and Melissa that such means would be used. But Paris invited this claimed error by proposing limiting instructions along these lines, and so he cannot now contest that issue. In any event, the jury could rationally infer from the consistent testimony by Jennifer and Melissa of Paris's violent and coercive conduct that this was his *modus operandi*, and accordingly that he knew at the time of recruitment that he would use force, fraud, and coercion. Finally, the jury was entitled to conclude, based on the testimony of Jennifer and Melissa, that the force, fraud, and coercion applied by Paris was designed to cause them to continue working as prostitutes under his control – or in the words of § 1591, to cause them to engage in commercial sex acts.

7. The district court did not plainly err by imposing sentence on Counts 9 and 10. For the first time on appeal, and without any analysis, Paris urges this Court to follow a recent Ninth Circuit case holding that, absent additional jury findings, no sentence may be imposed for a violation of 18 U.S.C. § 1591(a). *United States v. Todd*, 584 F.3d

788 (9th Cir. 2009), *pet'n for rehearing en banc pending*. This claim should be rejected because Paris's two-sentence argument fails to develop the claim on appeal; because it is untenable to interpret a statute in a way that would leave some violations completely unpunished; and because *Todd* misapplies plain-error analysis, by failing to consider whether the failure to instruct the jury on a supposed element of an offense can be harmless.

8. Paris cites no legal authority or record material to support his claim that the district court miscalculated the amount of his restitution order. Indeed, it does not appear that Paris even ordered the sentencing transcript. Because he has failed to articulate his claim in any meaningful way, the Court should reject it out of hand.

Argument

I. The district court properly determined that the Due Process Clause prohibits a defendant from exercising peremptory challenges based solely on a juror's gender

A. Relevant facts

Before jury selection, defense counsel informed the district court that he intended to exercise all of his peremptory challenges to strike women from the jury:

> I intend to make gender one of the primary – one of my primary reasons for striking jurors . . . . I would doubt that I will exercise a peremptory against a male juror. My objective here is to get as many male jurors on the jury as I can, because I think that they will be fairer to Mr. Paris than female jurors will be.

JS13. Counsel claimed that his position was not "based on stereotypes," but rather on the view that "women react differently to this case than men do." JS17. The judge offered to rule on the validity of gender-based peremptory challenges prior to voir dire, but both parties requested that he wait until counsel exercised their challenges. JS17-18.

Before exercising his peremptory challenges, defense counsel requested that five women be excused for cause. JS152-60. The judge granted one of the five requests. JS155. The judge also granted defense counsel's request

that one man be excused for cause. JS159. The government raised no challenges for cause. JS152. The court then selected twenty-eight of the remaining venire members for the peremptory challenge phase: fifteen men and thirteen women. JS171-75.

Defense counsel used his first four peremptory challenges to strike women. JS182. The government raised a *Batson* challenge, arguing that defense counsel's openly expressed intention to strike women from the jury established a prima facie case of gender discrimination. The court ruled that "based on the precedent of *Batson v. Kentucky*, *Georgia v. McCollum*, and *J.E.B. v. Alabama*, the Court finds that Mr. Paris may not exercise peremptory challenges based on gender." JS187. Defense counsel then articulated non-gender-based reasons for exercising peremptory challenges against these four women, all of which the court accepted. JS188-201. Nevertheless, defense counsel conceded that gender was one of the reasons for each of the challenges. JS184.

Defense counsel challenged two more women, and then asked the court to reconsider its earlier ruling forbidding gender-based challenges. JS202-03. The court again ruled against Paris. JS203. The defense exercised its next two peremptories – its seventh and eighth overall – against one man and one woman. JS204. Defense counsel stated that "if your Honor had not ordered me otherwise, I would have exercised these challenges against" two women; "however, since I've been ordered not to take gender into account, I'll exercise these challenges against" a man and woman respectively. JS204.

The government then exercised its fourth peremptory challenge. JS205. The government's first four challenges were against men. JS206. Defense counsel raised a *Batson* objection, stating "in a case like this where gender is such an important issue, I think that issuing four straight challenges against the male demonstrates . . . that the Government is issuing its peremptories based on gender and I'd ask your Honor to inquire." JS206. The government replied:

> [T]he Government would note that we don't believe the defense has made out a prima facie. The jury pool is made up of about half women and half men, and we've only gone through four challenges and we've struck four men. If the Court is saying there's a prima facie case that's been made out by the defense, I'd certainly be happy to articulate our reasons, our justifiable reasons for striking each of these jurors, but we have never stated, as counsel has, that we have any intention of striking men from this jury just for the sole purpose of striking men from this jury.

JS206-07.

The court ruled that a prima facie case of gender discrimination had not been established. JS207. The court stated that defense counsel "has not shown that the circumstances raised an inference of sex discrimination by simply striking four men at this time." JS207.

Defense counsel exercised his two final peremptory challenges against women. JS208. Defense counsel further clarified his position regarding his seventh strike, which was the only male juror he struck:

> Judge, for the purpose of my making my record, could I say if I had not been required to try to put out of my mind the gender of the jurors, I would not have exercised a peremptory against [that man] and would have exercised it against a woman solely because she's a woman.

JS211. The jury ultimately consisted of eight men and four women. JS212-13.

B. Governing law and standard of review

In *Batson v. Kentucky*, the Supreme Court held that a prosecutor's racially discriminatory peremptory challenges violated the defendant's constitutional right to equal protection. 476 U.S. 79, 85-89 (1986). The Court reasoned that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community . . . undermining public confidence in the fairness of our system of justice." *Id.* at 87.

The Supreme Court has extended *Batson* to discriminatory challenges based on gender. In *J.E.B. v. Alabama*, the Court held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality." 511 U.S. 127, 129 (1994). *Batson*'s

reasoning has also been extended to peremptory challenges offered by defense counsel. *Georgia v. McCollum*, 505 U.S. 42, 55 (1992) (holding that "a defendant's discriminatory exercise of a peremptory challenge is a violation of equal protection"). "This rule of law does not fluctuate according to the nature of the case at trial . . . ." *United States v. Taylor*, 92 F.3d 1313, 1329 (2d Cir. 1996).

Under *Batson* and its progeny, a three-part test determines whether a peremptory challenge violates equal protection guarantees. *See Batson*, 476 U.S. at 93-98. First, the objecting party must make a prima facie case that opposing counsel exercised peremptory challenges on the basis of a protected class, such as gender. *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991). Second, once a prima facie case has been established, the challenging party bears the burden of articulating a gender-neutral explanation for challenging the jurors in question. *Id.* Third, the court determines whether the objecting party has met its burden of proving purposeful discrimination. *Id.*

To establish a prima facie case of purposeful discrimination, the objecting party must demonstrate that the opposing party challenged members of a cognizable group and that the totality of the circumstances raises an inference that the challenge was exercised on account of race or gender. *See Batson*, 476 U.S. at 96-97. In *Batson* step two, proffered explanations are deemed valid unless discriminatory intent is inherent in the challenging party's explanation. *Purkett v. Elam*, 514 U.S. 765, 768 (1995) (per curiam). Finally, to determine whether objecting

counsel has carried his burden of proving purposeful discrimination, the trial court may consider the totality of the circumstances. *Hernandez*, 500 U.S. at 363-64. Discriminatory purpose implies action, "at least in part, 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 360.

Two standards of review are relevant here. First, "trial judges [have] broad latitude to consider the totality of the circumstances when determining whether a defendant has raised an inference of discrimination." *United States v. Stavroulakis*, 952 F.2d 686, 696 (2d Cir. 1992) (citing *Batson*, 476 U.S. at 97). Accordingly, a judge's ruling as to whether the defendant harbored discriminatory intent "must be sustained unless it is clearly erroneous." *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). Second, to the extent that the question is whether, as a general matter, the Due Process Clause permits a defendant to exercise peremptory strikes based openly on gender bias, the Court faces a legal issue that is reviewable *de novo*. *See United States v. Hester*, 589 F.3d 86, 90 (2d Cir. 2009) ("[W]e review questions of constitutional interpretation *de novo*."), *cert. denied*, 2010 WL 1181130 (Apr. 19, 2010); *United States v. De Gross*, 960 F.2d 1433, 1436 (9th Cir. 1992) (en banc).

C. Discussion

Paris argues that the district court erred when it held that he could not exercise peremptory challenges based solely on the gender of the venire members. He argues that "the Supreme Court has not decided a case in which a criminal defendant sought to exercise gender-based peremptories, nor have we been able to find a case in which this Court has been required to consider the issue." Def. Br. 31. This argument does not account for the Supreme Court's professed intent to extend its *Batson* jurisprudence to challenges by criminal defendants.

1. The *Batson* doctrine applies to criminal defendants who exercise gender-based peremptory challenges

The fact that the Supreme Court has not considered a fact pattern precisely like the one at issue here does not immunize Paris's challenges from equal protection rules. During jury selection, the district court correctly ruled that *Batson*, *McCollum*, and *J.E.B.* are dispositive. As the district court held:

> In *J.E.B.*, the Court rejected the argument that women and men may have different attitudes about certain issues justifying the use of gender as a proxy for bias and refused to accept as a defense to gender-based peremptory challenges the very stereotype the law condemns . . . . Mr. Paris' argument that he should be permitted to exclude jurors on the basis of gender relies on the same

> stereotype reflected in *J.E.B.* Accordingly, he may not exclude women from the jury on this basis.

JS187-88.

Nothing in the Supreme Court's holdings suggest that a defendant's gender-based peremptory challenges are exempt from *Batson* scrutiny. *Batson* and its progeny protect against unconstitutional discrimination in jury selection on account of race, gender, or ethnicity. *Batson* applies to all civil-criminal and plaintiff-defendant formulations because "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U.S. at 1718. The *Batson* Court's focus on the rights of potential jurors and the public defeats Paris's contention that criminal defendants should be exempt from the rules of *Batson*. Given the Court's holdings in *McCollum* and *J.E.B.*, Paris does not explain how discrimination in criminal cases is more respectful of the judicial system – and the public's rights to participate in it – than discrimination in civil matters.

Indeed, Paris's argument squarely contradicts the Supreme Court's reasoning and purpose in the *Batson* line of cases. When the Court applied *Batson* to instances of gender discrimination, it explained:

> Since *Batson*, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory. We have recognized that *whether the trial is criminal or civil*, potential

> jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.

J.E.B., 511 U.S. at 128 (emphasis added). Nowhere in *J.E.B.* does the Court distinguish between gender discrimination in civil versus criminal trials. To the contrary, the Court reaffirms its equation of civil and criminal trials: "The American tradition of trial by jury, *considered in connection with either criminal or civil proceedings*, necessarily contemplates an impartial jury drawn from a cross-section of the community . . . ." *Id.* at 146 n.19 (internal quotation marks omitted). Paris's analysis is further suspect in light of dicta in *United States v. Martinez-Salazar*: "Under the Equal Protection Clause, a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race." 528 U.S. 304, 315 (2000) (citing *J.E.B.*, *Hernandez*, and *Batson*).

Although neither the Supreme Court nor this Court has directly addressed the question of gender-based peremptory challenges by criminal defendants, other Circuits have found such challenges unconstitutional. For instance, the Eighth Circuit applied *Batson* to bar three gender-based peremptory challenges by a criminal defendant. *United States v. Grant*, 563 F.3d 385, 389 (8th Cir. 2009) ("[T]he government made a prima facie showing of a *J.E.B.* gender violation when the government offered its objection to the pattern of Grant's strikes and told the district court Grant exercised ten of her eleven

strikes on females."), *cert. denied*, 130 S. Ct. 1504 (2010); *see also United States v. Kimbrel*, 532 F.3d 461, 466 (6th Cir. 2008) ("*Batson* applies to peremptory challenges based on race or gender. And it applies to peremptory challenges by the government and by criminal defendants.") (citations omitted). Likewise, in *De Gross*, the Ninth Circuit held that criminal defendants may not exercise peremptory strikes on the basis of gender. 960 F.2d 1433 (9th Cir. 1992) (en banc) (holding that "equal protection principles prohibit striking venirepersons on the basis of their gender. . . . We hold that because the evils of discriminatory peremptory strikes result from the misuse of peremptory challenges, regardless of which party strikes the venireperson, the Fifth Amendment similarly limits a federal criminal defendant's peremptory strikes.").

Paris's argument relies heavily on Justice O'Connor's separate opinion in *J.E.B.*, which did not carry a majority. Justice O'Connor expressed her "belief that today's holding should be limited to the *government's* use of gender-based peremptory strikes." *Id.* at 147. Paris, however, mischaracterizes the import of the concurring opinion. Justice O'Connor did not focus on the distinction between gender-based peremptory challenges by civil defendants versus criminal defendants. Her concurrence argued instead that equal protection burdens should be lifted from the shoulders of defendants in both criminal and civil matters – a position contradicted by the Court's holding in *McCollum*, an opinion from which Justice O'Connor dissented. *See id.* at 151 (O'Connor, J., concurring) ("I adhere to my position that the Equal Protection Clause does not limit the exercise of

peremptory challenges by private civil litigants and criminal defendants.”).

Paris’s discussion of the history and importance of peremptory challenges in the American legal system, Def. Br. 34-36, does not provide a basis for this Court to violate the Supreme Court’s reasoning in *Batson* and its progeny. A criminal or civil defendant’s right to exercise peremptory challenges to “secur[e] an unbiased jury” is undoubtedly an important interest. Def. Br. 36. But the Supreme Court has held that this interest is counterbalanced by the public’s interest in avoiding discrimination based on impermissible stereotypes. The only question remaining, therefore, is whether the district court property applied the *Batson* standard to the facts of this case.

2. The trial court correctly applied the *Batson* test to defense counsel’s peremptory challenges

First, defense counsel’s candid admission that he wanted to strike all women from the jury provided an ample basis for a prima facie showing of a *Batson* violation after he exercised his first four peremptory challenges against women. *See, e.g., De Gross*, 960 F.2d at 1443 (finding *Batson* violation where prosecutor sought to exclude woman “because she is a woman and he desired more men on the jury”).

Second, because the court accepted defense counsel’s proffered non-discriminatory reasons for those four

peremptory challenges, Paris did not lose on any of the government's *Batson* objections with respect to specific venire members.

On appeal, Paris's argument focuses on the alleged chilling effect of the district court's ruling that "Mr. Paris may not exercise peremptory challenges based on gender." JS187. Defense counsel struck male venire members for his seventh and ninth peremptory challenges. After each challenge, defense counsel stated that had the judge not previously banned gender-based peremptory challenges, Paris would have exercised his seventh challenge against a woman, not a man. Because no subsequent *Batson* objections had been raised by the government, the district court did not engage in any further three-step *Batson* analyses.

II. Paris did not establish that the government's first four peremptory challenges were prima facie evidence of discriminatory prosecutorial intent

A. Relevant facts

The government used its first four peremptory challenges to strike men. JS206. After the government's fourth peremptory challenge, defense counsel argued that these strikes were sufficient to establish a prima facie case. JS206, 207. The government responded:

> The jury pool is made up of about half women and half men, and we've only gone through four challenges and we've struck four men. If the Court

> is saying there's a prima facie case that's been made out by the defense, I'd certainly be happy to articulate our reasons, our justifiable reasons for striking each of these jurors, but we have never stated, as counsel has, that we have any intention of striking men from this jury just for the sole purpose of striking men from this jury.

JS206-07.

The court ruled in favor of the government, stating that Paris "has not shown that the circumstances raised an inference of sex discrimination by simply striking four men at this time." JS207.

B. Governing law and standard of review

The law generally governing *Batson* challenges is set forth in Part I.B.

This Court has not identified the standard of review over a district court's determination that a party has failed to make out a prima facie *Batson* challenge. Contrary to Paris's suggestion, Def. Br. 39-40, this Court did not characterize the standard of review in *United States v. Alvarado*, 923 F.2d 253, 255 (2d Cir. 1991), where it reversed a finding that no prima facie case had been shown. In an earlier panel opinion in *Alvarado*, 891 F.2d 439, 442 (2d Cir. 1989), the Court said only that the question of a prima facie showing was a mixed question of law and fact; it did not explain which standard of review flowed from that observation. *See generally United States*

v. Vasquez, 389 F.3d 65, 75 (2d Cir. 2004) (Newman, J.) (explaining, in context of reviewing sentencing guidelines decisions, that choice between de novo and clear-error review will depend on whether the particular question "primarily (or essentially) involves an isse of fact or law"); *see also Overton v. Newton*, 295 F.3d 270, 276-77 (2d Cir. 2002) (characterizing prima facie inquiry as mixed question of fact and law, but then applying § 2254(d)(1) standard unique to state habeas cases).

Nearly all other courts of appeal to reach the issue "review preserved *Batson* claims for clear error, including cases in which the trial court finds no prima facie case of discrimination." *United States v. Charlton*, 600 F.3d 43, 50 (1st Cir. 2010); *see also Tolbert v. Page*, 182 F.3d 677, 681-85 (9th Cir. 1999) (en banc) (holding that a district court's prima facie determination should be reviewed deferentially under clear-error standard, and thereby "join[ing] the majority of our sister circuits" and collecting cases). *But see Mahaffey v. Page*, 162 F.3d 481, 484 (7th Cir. 1998) (reviewing de novo whether prima facie showing has been made). This accords with the general rule laid out by the Supreme Court that findings regarding discriminatory intent (or lack thereof) are reversible only if clearly erroneous. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008).

C. Discussion

Paris contends that the district court erred when it found that the government's first four peremptory challenges did not establish a prima facie case of prosecutorial discrimination. Def. Br. 40-42. To establish a prima facie case under *Batson*, the objecting party must demonstrate that the challenging party used its peremptory challenges against members of a cognizable group and that the totality of the circumstances raises an inference that the challenge was exercised on account of gender. *Batson*, 476 U.S. at 96-97.

Here, the court properly rejected defense counsel's objection. The venire was comprised of 54% men (15 men and 13 women), making it slightly more likely as a statistical matter that the government would want to strike a male. Because a defendant has 10 strikes compared to the prosecution's 6 strikes, each of the first four rounds involved two strikes for the defense but only one for the government. The defense struck two women in each of the first three rounds, with the result that it continually increased the ratio of men to women in the pool at the time of the government's strikes – from 15:11 (58% men) before the government's first strike, to 14:9 (61%) in the second round, to 13:7 (65%) in the third round, and to 11:6 (65%) before the fourth strike that prompted a *Batson* challenge. In short, Paris's repeated strikes of women continually increased the statistical likelihood that the government would strike a man. (The government passed on its fifth strike, and struck a male in the sixth round – at which point Paris's strikes of women had boosted the ratio

to 10:4, or 71% male.). In every case, "an assessment of the sufficiency of a prima facie showing in the *Batson* analysis should take into consideration all relevant circumstances including, but not restricted to, the pattern of strikes." *Brown v. Alexander*, 543 F.3d 94, 101-02 (2d Cir. 2008) (internal quotation marks omitted). The district court reasonably held that a prima facie case had not yet been established by defense counsel, particularly given that Paris's many strikes of women tilted the venire panel to nearly two-thirds male.

One cannot compare the fact that the district court found a prima facie showing with respect to Paris's peremptory challenges but not the government's. Defense counsel had boldly announced his intent to strike venire women based soley on gender, whereas the government made no such pronouncement. The district court did not err in declining to ask the government to articulate the grounds on which it was challenging the four male venire members – even though the government offered to do so at the time. JS206-07.[3]

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[3] In Point 3 of his brief, Paris cites no cases that support an additional claim, that he should have been permitted to strike female jurors based solely on gender in an effort to obtain a "gender-balanced" jury. He does not cite *De Gross*, in which the en banc Ninth Circuit held that a prosecutor could not strike a female "to balance the gender composition of the jury." 960 F.2d at 1443 & n.14. *Batson*, *J.E.B.*, and *McCollum* flatly ban race-based and gender-based strikes by a party who seeks to reduce the number of jurors from the group he disfavors. Under Paris's logic, the public's interest in race- and gender-neutral (continued...)

III. The district court did not abuse its discretion when it precluded Paris from introducing inadmissible hearsay, by testifying about statements he claimed to have made to another person

A. Relevant facts

One of the victims, Jennifer, testified about how Forbes introduced her to Paris. T189. Forbes brought her and Melissa to Paris's home, where Paris made them take off their clothes, looked them over, wrote down their measurements and hair color, and took photographs. T189-91. She understood that she was to start doing calls for Paris. T191. Some time later, Forbes brought Jennifer and Melissa to a hotel to meet Paris, and they were asked whether they wanted to be with Forbes or Paris. T192. They opted for Paris, because he seemed nice and it was so bad with Forbes. T192. Jennifer testified that Paris talked about money being paid to Forbes for her and Melissa:

> Q. What did he say to you?
>
> A. We're in the room and Brian was really mad, and then Rahmyti threw out like the number 1200 bucks, and I'm guessing Brian was taking it, because we left with him then. We left there.

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[3] (...continued)
strikes could be freely ignored so long as a party strikes members of his disfavored group until they are reduced to half of the venire panel.

T212.

Melissa similarly testified that at a certain point, Forbes and Paris met in a motel parking lot, and Paris said that he was going to take Jenn. T342-43. Jennifer said that she wanted Melissa to come as well, and Paris said to Forbes that she could do so. T343. On direct, Melissa was asked whether Paris ever said anything to her about a financial transaction between him and Forbes. *Id.* According to Melissa, Paris said Jennifer and Melissa "weren't worth the money he paid." T343.

On the third day of trial, Kathleen Celotti testified about how she worked as a prostitute for Paris, and later how she and her boyfriend Dan ran their own prostitution business which sometimes shared prostitutes with Paris. She recalled that in 2003, Paris introduced her to two girls named Jenn and Melissa who were working for him, and he said that they could use them if they needed somebody to do a call. T642-43. A day or two later, Celotti asked Paris why Melissa was pulling up in a car with Forbes. T643-44. Paris replied, "well, I got them from him and I'm supposed to give him $1500 for them. I'm not paying him shit." T644.

Paris later took the stand. During direct examination, the following exchange occurred:

> Q. And just to put to rest one thing. Did you ever have any conversation with Brian Forbes about purchasing Melissa or Jennifer?

A. No.

Q. Did Kathleen Celotti tell you something about that?

A. Yes.

Q. What did she say?

A. This is after she --

MR. GENCO: Your Honor, objection. This is hearsay.

THE COURT: Mr. Donovan.

MR. DONOVAN: Again, it's not offered for the truth of the matter asserted. In fact, she's already testified about this.

THE COURT: What's the purpose of the offer then?

MR. DONOVAN: This is to establish that Forbes expected to be paid $600 by Dennis for the amounts that Melissa and Jennifer owed and he told them just get lost – he told Celotti.

THE COURT: Objection sustained.

MR. DONOVAN: Thank you.

> Q. In any case, did you ever make – did you ever directly or indirectly indicate to Mr. Forbes that you were going to give him any money with respect to Jennifer and Melissa coming to work for you?
>
> A. No.

T994-95.

B. Governing law and standard of review

Rule 801(c) of the Federal Rules of Evidence defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." This Court has explained that "[w]hen the defendant seeks to introduce his own prior statement for the truth of the matter asserted, it is hearsay, and it is not admissible. When the defendant offers his own statement simply to show that it was made, rather than to establish the truth of the matter asserted, the fact that the statement was made must be relevant to the issues in the lawsuit." *United States v. Marin*, 669 F.2d 73, 84 (2d Cir. 1982).

A court has broad discretion to admit or exclude evidence, so evidentiary rulings are reversible only if manifestly erroneous or wholly arbitrary and irrational. *See United States v. Pepin*, 514 F.3d 193, 202 (2d Cir. 2008) (evidentiary rulings reviewed for abuse of discretion); *United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) (manifestly erroneous); *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (arbitrary and irrational).

Even if a court makes an erroneous evidentiary ruling, a conviction will not be reversed unless the error had a substantial and injurious effect upon the outcome of the trial. *See Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) (harmless error standard for non-constitutional violations); *Dhinsa*, 243 F.3d at 649.

C. Discussion

On direct examination, Paris answered “yes” when asked whether Celotti told him something about purchasing Melissa or Jennifer. Defense counsel then asked, “What did she say?” T994. The court sustained the government’s hearsay objection to that question. *Id.* On appeal, Paris argues that the court abused its discretion by precluding him from answering that question. The claim is meritless, and any hypothetical error would be harmless.

First, notwithstanding the defense’s claims, the proffered exchange between Celotti and Paris was clearly offered, at least in part, for the truth of the matter asserted by Celotti. When the court asked for the purpose of the proffered testimony, defense counsel responded that, in part, it would be “to establish that Forbes expected to be paid $600 by [Paris] for the amounts that Melissa and Jennifer owed . . . .” T944-95. Because Celotti’s statement was offered to prove what Forbes expected, it was offered for the truth of the matter asserted, and therefore constituted hearsay under Rule 801(c).

Second, even if Paris’s proffered response to Celotti to “get lost” is viewed as a verbal act, it was irrelevant to the

jury's determination. Because Paris proffered that he made this statement in response to Celotti – who was not involved in the sale of the prostitutes – it could not have tended to disprove any agreement he had with Forbes. A response of "get lost" might have been relevant as a verbal act if, for example, Forbes had asked for money in exchange for the girls, and Paris had told *him* to get lost. But that is not what defense counsel proffered. Indeed, Celotti testified that this conversation occurred in a car among Paris, herself, and her boyfriend Dan; Forbes was not present. T643-44.

Fourth, the district court did *not* preclude Paris from contradicting Celotti's testimony about the conversation in question. Defense counsel was free to pose any number of questions that would not have elicited hearsay. For example, counsel could have asked Paris whether, in fact, he ever said to Celotti that he was "supposed to give [Forbes] $1500 for [Jenn and Melissa]." Paris could have denied making such a statement without running afoul of hearsay rules. But counsel chose not to ask that question, and for good reason. Counsel had earlier been permitted to answer this question: "Did you ever have any conversation with Brian Forbes about purchasing Melissa or Jennifer?" "No." T994. After the colloquy excerpted above, he followed up with an even broader question: "[D]id you ever directly or indirectly indicate to Mr. Forbes that you were going to give him any money with respect to Jennifer and Melissa coming to work for you?" T995. Absent objection, Paris replied, "No." T995.

Any hypothetical error in the court's evidentiary ruling cannot possibly have "had a substantial and injurious effect upon the outcome of the trial." *Kotteakos*, 328 U.S. at 764-65. For one thing, as defense counsel pointed out below, the jury had already heard Celotti testify about essentially the same conversation that Paris was precluded from discussing – though in her testimony, it was Paris who explained that he had a deal with Forbes to pay him for the girls, and that Paris did not intend to pay. T664. (This testimony, of course, was admissible as the statement of a party-opponent. Fed. R. Evid. 801(d)(2).) And as just noted, defense counsel was permitted to ask – both before and after this exchange – whether Paris ever offered Forbes money for Jennifer and Melissa. T994, 995. Because Paris testified twice that he never had an arrangement with Forbes to pay for Melissa and Jennifer, any theoretical error in precluding him from recounting his conversation with Celotti was harmless. *See, e.g., United States v. Weiss*, 930 F.2d 185, 198-99 (2d Cir. 1991) (exclusion of cumulative documents was harmless).

IV. The district court did not err in declining to define the term "sex act" in its jury instructions on Counts 2, 4, 9, and 10, which charged violations of 18 U.S.C. § 1591

A. Relevant facts

Paris was charged in Counts 2 and 4 with sex trafficking of a minor, and Counts 9 and 10 with sex trafficking by force, fraud, and coercion, in violation of 18 U.S.C. § 1591. Section 1591(a) bars certain conduct that

causes a person "to engage in a commercial sex act." During the charge conference, the defense argued that the term "sex act" is void for vagueness, and asked the court to define a "commercial sex act" as "intercourse for which or of which anything of value is given to or received by any person." JA268-69. The court declined to do so, and instead instructed the jury that "[t]he term 'commercial sex act' means 'any sex act, on account of which anything of value is given to or received by any person.'" T1332.[4] *See also* T1377-78 (defense exception after charge given).

In his new trial motion, Paris renewed his argument that § 1591's reference to "sex act" was void for vagueness. The court rejected this argument. JA150-51. It reviewed the extensive trial testimony from four of the victims, "that the service they provided on behalf of Paris was sexual intercourse, and that he knew that." *Id.* The court noted that "Paris admitted that women working for him would have sexual intercourse with customers," and that his defense was that such intercourse was not part of

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[4] Elsewhere in the instructions, the court explained the elements of Counts 11, 12, 14, and 24, charging Paris with using interstate facilities to carry on prostitution, 18 U.S.C. § 1952(a)(3). One element is that Paris intended to promote an unlawful activity – here, the promotion of prostitution under Connecticut General Statute § 53a-87. T1345-46. The court explained that under state law, prostitution involves "sexual conduct," defined as "oral, anal, or vaginal intercourse." T1347. The court reminded the jurors: "Please keep in mind that this definition is different than the definition of 'commercial sex act' which applies to the sex trafficking counts that we've already covered." T1347.

the service that he provided. JA151. The court concluded that "[t]his case involves overwhelming evidence of sexual intercourse," and so "the conduct at issue in this case is within the heartland of the term 'sex act' . . . ." *Id.*

B. Governing law and standard of review

1. Standard of review

This Court reviews a preserved challenge to jury instructions de novo, and will reverse only if, viewing the jury charge as a whole, the defendant demonstrates both error and prejudice. *United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010). With respect to first question – whether the challenged instruction was erroneous – this Court must determine whether it "fails to adequately inform the jury of the law, or misleads the jury as to the correct legal standard." *Id.* (internal quotation marks omitted).

2. Vagueness challenges

Although Paris attempts to mount a facial challenge to the statute, "when, as in the case before us, the interpretation of a statute does not implicate First Amendment rights, it is assessed for vagueness only 'as applied,' i.e., in light of the specific facts of the case at hand and not with regard to the statute's facial validity." *United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003) (en banc) (internal quotation marks omitted)).

Vagueness challenges are evaluated under the Due Process Clause of the Fifth Amendment. Two principles govern here. First, a statute must give defendants notice of what conduct is prohibited. "[B]ecause we assume that [people are] free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also United States v. Handakas*, 286 F.3d 92, 104 (2d Cir. 2002). Second, a statute may be unconstitutionally vague if it fails to "'establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

"[S]ome ambiguity in a statute's meaning is constitutionally tolerable." *United States v. Chestaro*, 197 F.3d 600, 605 (2d Cir. 1999). "Because we are condemned to the use of words, we can never expect mathematical certainty from our language." *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (internal quotations, citations, and brackets omitted).

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Colten v. Kentucky, 407 U.S. 104, 110 (1972).

C. Discussion

Paris argues that the district court erred by failing to instruct the jury that a "sex act" for purposes of 18 U.S.C. § 1591 must be limited to intercourse, and that the court's failure to narrow the statute renders § 1591 void for vagueness. This argument fails for several reasons.

There is no basis for limiting the broad term "sex act" only to intercourse, but in any event this case was entirely about sexual intercourse – conduct that unambiguously falls within the core of "sex acts." The jury heard consistent testimony from Marianne, Eileen, Jennifer, and Melissa that Paris paid them to have sexual intercourse with customers. *See, e.g.*, T102-04, 107, 146-50, 203-05, 344, 350-51. Whatever the outer contours of the term "sex act," there is no doubt that Paris was on notice that § 1591 sweeps in intercourse. Likewise, the statute provides adequate standards for law enforcement in cases like the present one, because intercourse undoubtedly falls within the scope of "sex acts" proscribed by § 1591.

The defense speculates that the jury might have credited Paris's testimony that he intended only to provide customers with women "who would chat, keep company, dance, role play, and model," and convicted him based on the notion that these innocent activities constituted "sex acts." Def. Br. 49. Putting aside the sheer improbability of such a proposition, the jury's verdict on other counts made it clear that they believed Paris was, in fact, arranging for

his employees to have sexual intercourse with customers. The jury convicted Paris on Counts 11-12 and 14-24, all of which required a finding that Paris was using telephones and credit cards for a prostitution business that involved violations of Conn. Gen. Stat. § 53a-87 in which prostitutes were having intercourse with customers, not just "[d]ancing a sultry tango." Def. Br. 49. In short, the defense's effort to manufacture a vagueness claim completely ignores what the district court characterized as the "overwhelming evidence of sexual intercourse" in this case. JA151.

V. The district court did not err in defining fraud as "any deliberate act of deception, trickery or misrepresentation"

A. Relevant facts

Counts 9 and 10 charged Paris with sex trafficking of Jennifer and Melissa, respectively, by fraud, force, or coercion in violation of 18 U.S.C. § 1591. The district court instructed the jury that "the term 'fraud' means any deliberate act of deception, trickery or misrepresentation." T1332. During the charge conference, the defense did not object to this language. Nevertheless, the defense took an exception to the court's definition of fraud before the jury retired, asking the court "to define fraud more like the common law definition of fraud, that is, a knowing misrepresentation of a material fact relied upon by the hearer to the hearer's detriment." T1380. The government pointed out that the definition in the charge "came directly

from Webster's Dictionary," and the court overruled the exception. T1381.

The defense renewed this objection in its motion for new trial, arguing that the term was unconstitutionally vague. JA99. The district court rejected this argument, noting at the outset that the government's evidence was focused on Paris's use of force and coercion against Jennifer and Melissa. JA151. The court went on to observe that "the Government also presented evidence that Paris initially induced Jennifer and Melissa to work for him by promising to treat them well, pay them and supply them with drugs. This evidence of false promises falls within the ordinary understanding of fraud." JA151-52. Because the jury was entitled to consider this evidence alongside the proof of force and coercion, the court found a new trial was unwarranted. JA152.

B. Governing law and standard of review

The law governing vagueness challenges and jury instructions is set forth in Part IV.B.

C. Discussion

Paris argues that the court improperly used the dictionary definition of "fraud" when instructing the jury about the elements of § 1591. He claims that the court should have instructed the jury using "the common-law meaning of the term," as "a knowing misrepresentation of a material fact, relied upon by the hearer to the hearer's detriment." Def. Br. 50-51. Paris relies on the general rule

of statutory construction that when Congress uses terms that have settled meaning under the common law, a court must interpret the statute according to that meaning.

The problem with Paris's theory is that the term "fraud" has traditionally been employed far more broadly in federal criminal statutes than in the context of common-law torts. For example, this Court has never defined the elements of mail or wire fraud by reference to the common-law tort of fraud. For example, criminal fraud does not require proof of reliance by a victim, because "the government need not prove that the scheme successfully defrauded the intended victim." *United States v. Dinome*, 86 F.3d 277, 283 (2d Cir. 1996). And there certainly is no requirement of reasonable reliance by the victim, given that "the wire-fraud statute protects the naive as well as the worldly-wise, and the former are more in need of protection than the latter." *United States v. Ciccone*, 219 F.3d 1078, 1083 (9th Cir. 2000) (internal quotation marks omitted).

As with the mail and wire fraud statutes, it is clear that Congress formulated § 1591 in a way that is distinct from the common-law tort of fraud, even if they share some common themes. For example, Paris complains that the district court should have defined "fraud" to mean "a knowing misrepresentation." Def. Br. 50. But the requirement of knowledge was covered by the instruction requiring the jury to find that Paris acted "*knowing* that force, *fraud*, and coercion . . . *would be used* . . . ." T1327-28 (emphasis added); *see also* T1322 (requiring "deliberate" conduct). Likewise, although the court

properly declined to fold the concept of reliance by the victim into the definition of "fraud," a similar (though not identical) concept is incorporated into § 1591's requirement that the fraud have "cause[d]" the victims to engage in commercial sex acts. And similar to the common-law requirement that a plaintiff have been injured in some way by the fraud, § 1591 required proof in this case that the victims were induced to engage in sex acts with Paris's customers.

Finally, any error in this regard would be harmless by any measure. As the district court observed, "the Government *primarily* presented evidence that Paris used force and coercion to cause Jennifer and Melissa to perform commercial sex acts." JA151. As noted below in Part VI, both victims testified that Paris seriously abused them so that they would earn him money as prostitutes. There can be no doubt that, even if the jury had not been instructed at all on a fraud theory, they still would have returned a guilty verdict. *See Hedgpeth v. Pulido*, 129 S. Ct. 530, 532 (2008) (per curiam) (harmless-error analysis applies where jury has been instructed on multiple theories of guilt, one of which is invalid).

Nor is there any merit to the defense's novel theory that where the government successfully opposes a defendant's request for a special verdict form, the government on appeal may not rely on the presumption that the verdict will stand if the evidence was sufficient with respect to any one of the conjunctive acts charged. Def. Br. 54. Such a rule would run contrary to "the historical preference for general verdicts, and traditional distaste for special

interrogatories, in criminal cases." *United States v. Bell*, 584 F.3d 478, 484 (2d Cir. 2009) (per curiam) (internal quotation marks omitted). Indeed, "defendants may not demand special interrogatories as of right, let alone demand a specific form of special interrogatory." *United States v. Ogando*, 968 F.2d 146, 149 (2d Cir. 1992).

VI. There was more than sufficient evidence supporting Counts 9 and 10, which charged Paris with sex trafficking by force, fraud, and coercion

A. Relevant facts

The facts relevant to Counts 9 and 10 are set forth in Part C of the Statement of Facts above.

B. Governing law and standard of review

A defendant challenging the sufficiency of the evidence bears a "very heavy burden." *United States v. Stewart*, 590 F.3d 93, 109 (2d Cir. 2009) (internal quotation marks omitted). This Court will affirm "if 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Ionia Management S.A.*, 555 F.3d 303, 309 (2d Cir. 2009) (per curiam) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). All permissible inferences must be drawn in the government's favor. *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999). Because there is rarely direct evidence of a person's

state of mind, "the *mens rea* elements of knowledge and intent can often be proved through circumstantial evidence and the reasonable inferences drawn therefrom." *United States v. MacPherson*, 424 F.3d 183,189 (2d Cir. 2005).

Questions of witness credibility are reserved for the jury. *United States v. Kinney*, 211 F.3d 13, 18 (2d Cir. 2000). Not only is the jury "entitled to disbelieve the defendant's attempts at exculpatory explanation" during his testimony, but this disbelief can add "weight to the government's case" and become "a relevant factor" in determining the defendant's guilt. *United States v. Tran*, 519 F.3d 98, 105-06 (2d Cir. 2008).

A district court's ruling on a motion for acquittal is reviewed de novo. *MacPherson*, 424 F.3d at 187.

C. Discussion

Paris first argues that in order to prove a violation of § 1591, the government was required to prove that he knew "at the time of recruitment" that force, fraud, or coercion would be used. Def. Br. 55. He relies on dicta in a footnote from this Court's decision in *United States v. Marcus*, 538 F.3d 97, 102 n.7 (2d Cir. 2008), *cert. granted*, 130 S. Ct. 393 (2009):

> [A] serious question exists as to whether 18 U.S.C. § 1591 could constitute a continuing offense. The statute's plain language appears to require knowledge of "force, fraud, or coercion" at the time of the knowing recruitment . . . . We caution

> the government that, on remand, it may be well served by ensuring that the jury's instructions make clear that these elements are temporally aligned.

Paris then complains that "the proceedings below in this case were rife with what this brief shall call '*Marcus-footnote error*.'" Def. Br. 55. There are two problems with this argument. First, Paris concedes that he invited this claimed error – for example, requesting a limiting instruction that certain evidence could be considered only to determine whether Paris "knowingly used force, fraud, or coercion to cause Jennifer D. or Melissa P. to engage in commercial sex acts." JA244-45; Def. Br. 56. Because Paris asked for such instructions, he has irrevocably waived any objection on this score. *See United States v. Giovanelli*, 464 F.3d 346, 351 (2d Cir. 2006). Second, the jury was entitled to infer from Paris's use of force, fraud, and coercion against separate victims in this case that such conduct was far from aberrational, and was indeed his modus operandi. Based on that finding, the jury could have rationally inferred that Paris knew at the time of recruitment that he would use force, fraud, and coercion against Jennifer and Melissa.

Paris's second, and somewhat contradictory, argument simply renews his sufficiency claims below, namely, that the force he used against Jennifer and Melissa was not "aimed at causing [them] to engage in commercial sex acts." Def. Br. 57. He relies on his own testimony that he "slapped" Jennifer only because she had borrowed his car to buy drugs and then called him a name. Def. Br. 57-58.

This argument relies, however, on a one-sided view of the evidence. For example, as the district court pointed out, Jennifer testified that "during the period when she worked exclusively for Paris, if she refused to do a call, Paris would withhold heroin from her, and cause her to become 'drug sick,'" to the point where she would get chills, every bone and joint in her body would ache, her skin would crawl, and she couldn't hold her bowel movements. JA144; T198-99, 203. He did this "a lot of times." T198. Paris once struck Jennifer so hard that he broke her tooth, after she didn't want to do a call and called him a name. T204; JA144 (court observing that "[o]n cross-examination, Jennifer did not explicitly deny that Paris hit her for reasons other than her refusal to work"); T304-05. The jury was entitled to credit Jennifer's version on direct examination over that of Paris. As the district court observed, Jennifer testified that overall, "she felt that she could not leave Paris because she was afraid of him." JA144. Given this evidence, the jury was entitled to convict on Count 9.

Similarly, the jury was entitled to convict on Count 10, based on Melissa's testimony that Paris used force, fraud, and coercion to cause her to engage in commercial sex acts. For example, Melissa testified that when a customer complained that she was "too white" and refused to see her, Paris hit her and made her go to a tanning salon. T366. After they left, Paris made her engage in a session with a client over her objections, and she "ended up ripped and bleeding," and Paris took her immediately to another call. T367. After this escalation into violence, Melissa "knew that it had reached a different level. Like if I did

leave, then what would he do if he caught me trying to leave." *Id.* On another occasion, Melissa saw Paris grab a girl by the throat after she "started getting mouthy" at a stag party, to the point where she "went down," at which point Paris "walked her out of the hotel room and she didn't come back." T369. At this point, Melissa realized that "[i]f he can do it to her, he can do it to any of us." T370. As the district court pointed out, "Melissa also testified that Paris threatened to cause Melissa's younger sister to work for him if she left." JA145; T371. Melissa twice tried to leave Paris, but he found her and brought her back to do more calls. T371-72. She also testified that on one occasion when she incurred Paris's displeasure, he raped her, handcuffed her, put her face down on the bed wrapped in a blanket, and indicated that he was going to kill her by injecting her with an overdose of heroin. T376-78. Paris returned an hour later, and released Melissa as though nothing had happened. T380-81. Given this evidence of dramatic violence, the jury was certainly entitled to find that the force, fraud, and coercion used by Paris was designed to cause Melissa to engage in commercial sex acts. There was more than sufficient evidence to support conviction on Count 10.

VII. The jury verdict on Counts 9 and 10 adequately supported the sentences imposed on those counts

A. Relevant facts

The jury convicted Paris of Counts 9 and 10, charging him with sex trafficking of Jennifer and Melissa "knowing that force, fraud, and coercion . . . would be used . . . ."

JA34-35. Judge Droney imposed concurrent 30-year sentences on those counts.

B. Governing law and standard of review

Fed. R. Crim. P. 52(b) provides that unpreserved claims are reviewed only for plain error. To succeed under Rule 52(b), a defendant must show (1) error, (2) that is clear or obvious, and (3) that affects substantial rights. Even then, the court has discretion whether to recognize such an error, if it affects the fairness, integrity, or public reputation of judicial proceedings. *See, e.g., See Johnson v. United States*, 520 U.S. 461, 466 (1997).

C. Discussion

Paris tersely states that *United States v. Todd*, 584 F.3d 788 (9th Cir. 2009), "seems to be on all fours with Mr. Paris' case." Def. Br. 58. Paris's analysis is limited to one sentence: "In *Todd*, the Ninth Circuit vacated a sentence imposed under § 1591, holding that the jury findings did not support the sentence imposed." *Id.* The government and the Court are presumably expected to read *Todd* on their own; to discern *Todd*'s reasoning and decide whether it is persuasive; and figure out which aspects of Paris's case are "on all fours." This passing reference to a case falls short of the requirement of Fed. R. App. P. 28(a)(9)(A) that an appellant's brief contain his "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." The Court should decline to address such an undeveloped claim. *See Seetransport Wiking Trader*

Schiffarhtsgesellschaft MBH v. Navimpex Centrala Navala, 989 F.2d 572, 583 (2d Cir. 1993).

Even based on the government's best guess as to the nature of this claim, it would appear to be meritless. In *Todd*, the defendant was convicted of sex trafficking involving force, fraud, and coercion under 18 U.S.C. § 1591(a). Without briefing from the parties, the Ninth Circuit decided that the jury's findings – although sufficient to find violations of § 1591(a) – nevertheless were insufficient to support any sentences on those counts. This novel reading of the statute would yield absolutely no sentence for violations of § 1591(a), absent additional jury findings.

Specifically, the *Todd* court misinterpreted the interplay between § 1591(a), which defines offense conduct, and § 1591(b), which defines penalties for that conduct. Section 1591(a) punishes those who engage in sex trafficking "*knowing* . . . that means of force, threats of force, fraud, [or] coercion . . . *will be used* to cause [a] person to engage in a commercial sex act" or that a minor "*will be caused*" to do so. (Emphasis added.) Section 1591(b) says that "[t]he punishment for an offense under subsection (a)" is 15 years to life "if the offense *was effected* by means of force, threats of force, fraud, or coercion," or if the victim was under 14; or 10 years to life if the victim was between 14 and 18 years old. (Emphasis added.) Subsection (b) is clearly designed to cover the entire range of violations outlined in subsection (a). Yet the *Todd* panel seemed to think that the phrase "was effected" in subsection (b) designates an additional

element that the jury must find before imposing a sentence of 15 years to life. This yields the untenable holding that, if the jury does not make such a supplemental finding, then the § 1591(a) violation simply goes unpunished. It is hard to imagine that Congress intended such a result. *See SEC v. DiBella*, 587 F.3d 553 (2d Cir. 2009) (courts should avoid statutory interpretations that lead to absurd results). Assuming this is the argument that Paris wants to raise, it should be rejected.[5]

Moreover, even indulging the notion that the *Todd* court read § 1591(b) correctly, and that a jury must find actual use of force, fraud, or coercion in addition to the elements of § 1591(a), that would do Paris no good. First, as Paris concedes elsewhere in his brief, the court "provide[d] three pages of instructions concerning whether force, fraud, or coercion *was actually used* . . . ." Def. Br. 56 (emphasis added); *see* T1332-34. Second, the *Todd* court skipped over the four-factor test that the Supreme Court has outlined for the plain-error doctrine. *See Johnson,* 520 U.S. at 466. Under the second prong of plain-error, it is far from clear that the *Todd* court's reading of § 1591(b) is correct; to the contrary, it is both novel and almost certainly wrong. Moreover, given the jury's finding that Paris knew that force/fraud/coercion would be used, they must have credited the overwhelming

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[5] The government has petitioned for rehearing en banc in *Todd*. The Ninth Circuit has held the petition in abeyance pending the Supreme Court's decision in *Marcus*, 130 S. Ct. 393, which involves the application of plain-error review to an ex post facto claim in a § 1591 case.

evidence that it was in fact used. Thus, Paris's substantial rights could not have been affected (the third prong of plain error), and letting these sentences stand would not affect the fairness, integrity, or public reputation of judicial proceedings (the fourth prong).

VIII. Paris cites nothing in the record showing that the restitution order was excessive

Paris makes a one-sentence argument that the restitution order was "based upon gross mathematical calculations" that did not account for periods when the victims worked for pimps other than Paris, for periods when they were in Vermont or New Hampshire, and for amounts they earned as prostitutes. Def. Br. 59. Paris cites nothing in the record to support his claim. Indeed, it does not appear that Paris has even ordered the sentencing transcript. The Court should decline to reach such a completely undeveloped claim.

Conclusion

For these reasons, the judgment of the district court should be affirmed.

Dated: May 7, 2010

Respectfully submitted,

NORA R. DANNEHY
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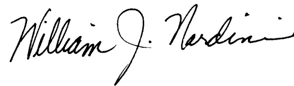

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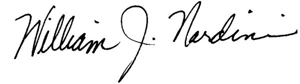
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,865 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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ADDENDUM

18 U.S.C. § 1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly--

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

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

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

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

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

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

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

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.

(e) In this section:

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

(2) The term “coercion” means--

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

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

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

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

(4) The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

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

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if--

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own

statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

CERTIFICATE OF SERVICE

08-5071-cr USA v. Martinez

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May 5, 2010

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ANTI-VIRUS CERTIFICATION

Case Name: United States v. Paris

Docket Number: 08-5071-cr

I, Karen Wrightson, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 5/5/2010) and found to be VIRUS FREE.

/s/Karen Wrightson

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