

11-2488(L)

To Be Argued By:
DAVID E. NOVICK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 11-2488(L)
11-2608(CON)
12-321(CON)

UNITED STATES OF AMERICA,

Appellee,

-vs-

JARELL SANDERSON, aka Jarrell Sanderson,
HASSANAH DELIA,

Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Mark R. Kravitz, J.) had subject matter jurisdiction over these federal criminal prosecutions under 18 U.S.C. § 3231.

On December 7, 2010, defendant-appellant Hassanah Delia (“Delia”) pleaded guilty to Counts Three and Five of the Indictment, which charged her with Sex Trafficking by Force, Fraud, and Coercion, in violation of 18 U.S.C. §§ 1591(a)(1) and (b)(1). Delia’s First Appendix (“DFA”) 7, DFA17-DFA18. On June 23, 2011, the district court sentenced Delia principally to a term of 110 months’ imprisonment. DFA11, DFA104, DFA112-DFA113. Judgment entered on June 24, 2011. DFA11, DFA112-DFA114. On June 27, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). DFA11, DFA115. On January 13, 2012, the district court entered an order of restitution against Delia for \$25,608.80. Delia’s Second Appendix (“DSA”) 9. Delia filed a second timely notice of appeal pursuant to Fed. R. App. P. 4(b) on January 24, 2012. DSA9, DSA14. This Court has appellate jurisdiction over Delia’s appeals under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

On January 20, 2011, defendant-appellant Jarell Sanderson, also known as Jarrell Sanderson (“Sanderson”), pleaded guilty to Count One of the Indictment, charging him with Conspiracy to Commit Sex Trafficking of a Minor, in violation of 18 U.S.C. § 1594(c), and to Counts Two

and Four of the Indictment, charging him with Sex Trafficking of a Minor, in violation of 18 U.S.C. §§ 1591(a)(1) and (b)(2). Sanderson's Appendix ("SA") 1-2, SA12, SA41, SA117. On June 7, 2011, the district court sentenced Sanderson principally to a term of 310 months' imprisonment. SA1-SA2, SA96, SA121-SA122. Judgment entered on June 7, 2011. SA1-SA2, SA122. Sanderson filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on June 20, 2011. SA106, SA122. This Court has appellate jurisdiction over Sanderson's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

**Statement of Issues
Presented for Review**

1. Whether the district court committed plain error in finding that defendant-appellant Jarell Sanderson's Sentencing Guidelines offense level should be increased by two levels because a participant in his offense "unduly influenced a minor to engage in prohibited sexual conduct."
2. Whether the district court abused its discretion in ordering defendant-appellant Hassanah Delia to pay restitution of \$25,608.80 to the minor victims of her sex trafficking offenses.

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ON APPEAL FROM THE UNITED STATES DISTRICT
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In July 2009, defendants-appellants Jarell Sanderson (“Sanderson”) and Hassanah Delia (“Delia”) recruited and arranged for the prostitution of two 14-year-old runaways from the custody of the Connecticut Department of Children and Families. Among other things, Sanderson

advertised the minor victims on the Internet, drove them to hotels in Hartford and East Hartford, Connecticut, and bought them alcohol to dull their fears; while Delia answered phone calls from prospective customers, set up prostitution appointments for the minor victims, and supervised the minor victims when they met with customers.

Sanderson pleaded guilty, without a plea agreement, to Conspiracy to Commit Sex Trafficking of a Minor, in violation of 18 U.S.C. § 1594(c), and two counts of Sex Trafficking of a Minor, in violation of 18 U.S.C. §§ 1591(a)(1) and (b)(2). Sanderson was sentenced principally to 310 months' imprisonment.

On appeal, Sanderson claims for the first time that the district court erred in enhancing his Sentencing Guidelines offense level by two points because a participant in the crime "unduly influenced a minor to engage in prohibited sexual conduct." U.S.S.G. § 2G1.3(b)(2)(B). Sanderson alleges that the enhancement was inapplicable in this case and that the district court did not make sufficient factual findings in support. Sanderson's arguments are unavailing. The district court both made explicit reference to this enhancement during the sentencing hearing, and adopted the factual findings of Sanderson's Presentence Report, which contained a sufficient factual basis for the enhancement. Moreover, even were the district court mistaken in apply-

ing the enhancement, Sanderson cannot meet the requirements for plain error review. As a result, this Court should affirm Sanderson's sentence.

Delia pleaded guilty to two counts of Sex Trafficking by Force, Fraud, or Coercion, in violation of 18 U.S.C. §§ 1591(a)(1) and (b)(1), and waived her right to appeal a sentence of 262 months' imprisonment or less. She was sentenced principally to 110 months' imprisonment. Subsequent to the sentencing hearing, the district court ordered Delia to pay \$25,608.80 in restitution, in large part for the costs of future medical and psychiatric treatment of one of the minor victims.¹

On appeal, Delia claims that the restitution order was not supported by adequate proof, and

¹ Prior to issuance of the restitution order, Delia's counsel filed an *Anders* brief on December 30, 2011, because Delia's sentence was within her valid appellate waiver. However, before counsel's motion to withdraw as counsel could be acted upon, the district court issued its ruling on restitution, and Delia filed a timely notice of appeal. The restitution order was not covered by the appellate waiver. Although counsel has not formally withdrawn his *Anders* brief, the government assumes from counsel's submission of a brief on behalf of Delia that counsel no longer wishes to withdraw from representation, and will treat this as a one-issue sentencing appeal by Delia concerning the district court's restitution order.

that the district court thereby abused its discretion in issuing the order. Contrary to Delia's argument, however, the district court appropriately relied on a letter from the minor victim's primary therapist, a licensed clinician experienced with victims of sex trafficking and complex traumas. The therapist's letter provided a sound basis for the district court's ruling, and therefore this Court should affirm the district court's restitution order.

Statement of the Case

On February 25, 2010, a federal grand jury sitting in Hartford, Connecticut, returned an indictment against defendants-appellants Jarell Sanderson and Hassanah Delia charging them each with one count of Conspiracy to Commit Sex Trafficking of a Minor, in violation of 18 U.S.C. § 1594(c); two counts of Sex Trafficking of a Minor, in violation of 18 U.S.C. §§ 1591(a)(1) and (b)(2); and two counts of Sex Trafficking by Force, Fraud, or Coercion, in violation of 18 U.S.C. §§ 1591(a)(1) and (b)(1). DFA3, DFA13-DFA16, SA109-SA110.

On December 7, 2010, Delia pleaded guilty to Counts Three and Five of the Indictment, charging her with Sex Trafficking by Force, Fraud, or Coercion. DFA7, DFA17-DFA18, DFA73. On June 23, 2011, the district court (Mark R. Kravitz, J.) sentenced Delia principally to a term of 110 months' imprisonment. DFA11, DFA104,

DFA112-113. Judgment entered on June 24, 2011. DFA11, DFA112-DFA113. On June 27, 2011, Delia filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). DFA11, DFA115. On January 13, 2012, the district court (Mark R. Kravitz, J.) entered an order of restitution against Sanderson and Delia, jointly and severally, for \$25,608.80. DSA9. Delia filed a second timely notice of appeal pursuant to Fed. R. App. P. 4(b) on January 24, 2012. DSA9, DSA14.

On January 20, 2011, Sanderson, pleaded guilty to Count One of the Indictment, charging him with Conspiracy to Commit Sex Trafficking of a Minor, and to Counts Two and Four of the Indictment, charging him with Sex Trafficking of a Minor. SA1-2, SA12, SA41, SA117. On June 7, 2011, the district court (Mark R. Kravitz, J.) sentenced Sanderson principally to a term of 310 months' imprisonment. SA1-SA2, SA96, SA121-SA122. Judgment entered on June 7, 2011. SA1-SA2, SA122. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on June 20, 2011. SA106, SA122.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. The offense conduct²

On or about July 14, 2009, two then 14-year-old girls, K.H. and E.A., collectively the “minor victims,” ran away from a residential shelter for girls, where they had been placed by the Connecticut Department of Children and Families (“DCF”). The minor victims were taken by an acquaintance to a Hartford apartment building, where they first encountered Delia among a group of other people standing outside the building. The minor victims told the group that they were runaways, and one gave her age as 17. *See* Sanderson’s Presentence Report (“SPSR”) ¶ 7, Delia’s Presentence Report (“DPSR”) ¶ 9.

The group, including the minor victims and Delia, moved up to an apartment inside the building, where K.H. was offered and smoked marijuana. At some point, Sanderson entered the room and began kissing Delia. Delia took K.H. in the bathroom and told her that she and

² The following recitation is based upon the statements of the minor victims as recounted in both Delia’s and Sanderson’s PSR’s. SPSR ¶¶ 6-16, DPSR ¶¶ 8-18. Additional information from the government’s file was included in Sanderson’s PSR only, at ¶¶ 17-37. Relevant portions of that file material are included in the Argument section.

Sanderson could take care of K.H. if K.H. came with them. *See* SPSR ¶ 8, DPSR ¶ 10.

Later in the evening, Delia took K.H. and E.A. in her car and explained the “escort business” to them, *i.e.*, having sex with men for money. K.H. agreed to participate, while E.A. remained silent. At some point in the evening, K.H. engaged in consensual sex with an 18-year-old resident of the same building; afterwards, Delia complained loudly that K.H. had several “hickeys” on her neck, and that it was “bad for business.” *See* SPSR ¶ 9, DPSR ¶ 11.

Following the events at the apartment house, Sanderson and Delia took the minor victims to Delia’s apartment. While there, Sanderson and Delia continued to explain the escort business to the minor victims. In substance, Sanderson would post advertisements on the Internet for men to call Delia’s phone and then set up appointments to have sex with the minor victims for money. One of the victims recalled being instructed to refer to Delia as “Ma” and Sanderson as “Pa.” *See* SPSR ¶ 10, DPSR ¶ 12.

The next day, July 15, 2009, Sanderson and Delia drove the minor victims to the Days Inn on Brainard Road in Hartford. One minor victim recalls first being taken to a store to purchase underwear and hygiene items. On the way to the hotel, a prospective customer called Delia’s phone; it was determined that K.H. would see the first customer. The minor victims were given

some alcohol on the way to the hotel. Sanderson then rented a room, and K.H. went to the hotel room with Delia. As a result of having sex the night before, K.H. was in pain and bleeding from her vagina, but Delia still pressed K.H. to take the customer. The customer arrived and gave money to Delia, and Delia left; the customer then had sex with K.H. *See* SPSR ¶ 11, DPSR ¶ 13.

Meanwhile, Sanderson had returned to the car with E.A., who was extremely reluctant to participate in commercial sex. Sanderson told E.A. about himself, that he had a sister, and that he understood what it was like not to have money. Sanderson took E.A. to a liquor store, where he bought alcohol for E.A. to help calm her down and allow her to participate in the prostitution business. Sanderson then drove E.A. to the hotel. At the hotel, he got out of the car, and Delia got in. Delia mixed alcoholic drinks for E.A. *See* SPSR ¶ 12, DPSR ¶ 14.

After a short time, K.H. emerged from the hotel. Delia became upset, scolding K.H. for leaving the room. Delia took both E.A. and K.H. back to the room and left them there. E.A. passed out due to her over-consumption of alcohol. Delia returned to inform them that there was another customer, who would be for E.A. E.A. did not want to see the customer, but Delia insisted, saying in substance that K.H. would not be doing all the work. Delia had also told the minor

victims earlier that Sanderson had a gun and had been to jail for shooting someone. When the customer came, Delia left the room and K.H. went to the bathroom. The customer requested that K.H. watch, and she came out of the bathroom briefly. At that point, the customer and E.A. began to undress, the customer touched E.A. and attempted to have sexual intercourse with her. E.A. resisted, and instead manually stimulated the customer until he ejaculated. The customer then dressed and left. Delia was upset at E.A. and K.H., insisting that the minors should have known to charge more money for K.H. watching. At some point, Sanderson told K.H. that she was doing very well and making them a lot of money. *See* SPSR ¶ 13, DPSR ¶ 15.

At night, after customers were gone, Delia joined K.H. and E.A. in the hotel room, where they slept. In the morning, Delia screamed at E.A. for turning the phone off overnight, because they had missed potential customers. After breakfast, Sanderson and Delia dropped the minor victims off at Eblen's, an East Hartford clothing store, and told them to wait there. The minor victims were given a small amount of money. Too scared to leave, the minor victims waited at the store for several hours. Sanderson returned in a taxi, and took the minor victims to the Madison Motor Inn in East Hartford, where he had rented a room for them. Sanderson left, and Delia arrived to inform the minor victims

that there was a customer. K.H., who was still bleeding, was soaking in the bathtub. The customer was to be for E.A., but when the customer came he wanted to have sex with K.H. The customer asked Delia if the girls were really 18, and Delia said the girls were in their early twenties. The customer proceeded to have sex with K.H. See SPSR ¶ 14, DPSR ¶ 16.

Afterwards, Delia made K.H. and E.A. watch lesbian pornography, telling them that they would be required to perform some of the things they were seeing. At some point, K.H. left the room to purchase food for herself and E.A. from a nearby Subway. Later, Delia brought K.H. to Delia's mother's apartment, which was directly behind the hotel on King Court in East Hartford. At King Court, Delia's mother confronted K.H. about her age, and K.H. admitted she was fourteen years old. K.H. remained at King Court, while Delia returned to the hotel to tell E.A. to leave. At the hotel, E.A. was reluctant to leave until she had spoken to K.H. A phone call between K.H. and E.A. was then arranged, and K.H. told E.A. to call E.A.'s boyfriend and have him return her to the shelter. See SPSR ¶ 15, DPSR ¶ 17.

Back at King Court, K.H. witnessed Delia call Sanderson and tell him about K.H.'s age. Sanderson nonetheless wanted K.H. to continue to participate in his business. Sanderson informed Delia that there was a new call for several hun-

dred dollars for anal sex. Delia escorted K.H. back to the hotel, where Delia left K.H. with Sanderson. Sanderson promised to give K.H. half of the money from this encounter, but K.H. did not want to participate. Sanderson continued to press K.H. to be ready for the customer, telling her that she had to do it. The customer arrived and attempted to have anal sex with K.H., but K.H. resisted. The customer was unsuccessful in getting his money back. Sanderson gave K.H. much less than half of what he took from the customer. K.H. then returned to King Court, where she stayed with another resident until her adoptive mother could retrieve her the following day. *See* SPSR ¶ 16, DPSR ¶ 18.

B. The guilty plea and sentencing proceedings

The relevant details of each defendant-appellant's plea and sentencing are discussed below.

Summary of Argument

I. Sanderson's claim, for the first time on appeal, that the district court failed to make sufficient factual findings to support the undue influence enhancement, is unsupported by the record. The district court specifically adopted the factual findings of the PSR. Those findings, which include Sanderson's facilitation of the prostitution of two 14-year-old girls; his posting of adver-

tisements for their sale into commercial sex; his transportation of them to hotels; his plying them with alcohol to decrease their inhibitions; and the fact that he was significantly older than those victims, all augur for the application of this enhancement. The district court made clear reference to facts in support of this enhancement and Sanderson, while arguing against other enhancements, did not object to the undue influence enhancement. Applying plain error review, this Court should affirm the district court's application of the undue influence enhancement.

II. Delia's claim, that the district court abused its discretion in issuing a restitution order for \$25,608.80, is equally unpersuasive. In ordering Delia and Sanderson to pay restitution for the future medical and psychiatric care of minor victim K.H., the district court appropriately relied on a letter presented by K.H.'s primary therapist, a licensed clinician experienced with victims of sex trafficking and complex traumas. The therapist's letter detailed the ways in which Sanderson and Delia victimized K.H., the various symptoms of psychiatric illness that resulted, and the therapist's professional opinion regarding the need for future care. As it was reasonable for the district court to rely on the estimates of K.H.'s therapist, this Court should not disturb the district court's restitution order.

Argument

I. The district court did not commit plain error in applying the “undue influence” enhancement to increase Sanderson’s offense level by two levels.

A. Relevant facts

1. Additional offense conduct information³

On or about July 14, 2009, Sanderson brought Delia to Delia’s brother Hassan’s building on Huntington Street in Hartford, Connecticut. Delia met the minor victims outside the building. Delia recalled that one of the victims said she was 16 or 17 years old and the other said she was 17-18 years old, and that they were runaways from the DCF system. Delia left to procure a bottle of alcohol, and when she returned the group had migrated to Hassan’s apartment inside the building. Delia recalls that most of the occupants were smoking marijuana. *See* SPSR ¶ 25.

³ This section supplements the offense conduct described in the Statement of Facts section above, and is based upon relevant portions of the government’s file summarized in Sanderson’s PSR, at ¶¶ 17-37. As it is not part of the factual record for Delia’s case, the government requests that it not be considered in her appeal.

At some point, Delia's phone rang, Sanderson told everyone to be quiet, and he instructed Delia to answer it. The call was from a prostitution customer, who was interested in a sexual fetish that would cost \$250. Sanderson and Hassan called Delia over to them, and Sanderson told her, in reference to K.H. and E.A., "I see dollar signs." "Run,"⁴ who met the minor victims earlier that day, told Delia and Sanderson that the girls were runaways and had nowhere to sleep that night. Sanderson told Delia to go talk to the girls about taking dates; he told her to approach K.H. first because he thought E.A. would follow. *See* SPSR ¶¶ 7, 26.

Delia then approached K.H. and asked her where she was staying that night; K.H. stated that someone would come pick her and E.A. up. Delia received another phone call from a potential customer, which led to a discussion between Delia and K.H. about what Delia did. Delia told K.H. that she was an escort. According to Delia, K.H. asked if she could try it. *See* SPSR ¶ 27.

Later, Delia took the victims to pick up a pizza. In the car, the victims talked about being in DCF custody. They said they had been in foster care with E.A.'s aunt, but that they got kicked out for fighting. They also discussed Delia's es-

⁴ The same individual was referred to by the victims as "Ron," and as "Run" elsewhere in the government's evidence.

corting. E.A. asked if it was prostitution, and Delia claimed that it was not prostitution, and that she made more money doing it than prostitutes make. Delia recalls that K.H. was willing to try it, but E.A. absolutely did not want to. *See* SPSR ¶ 28.

Later in the evening, Sanderson told Delia to take the victims to her apartment on Olmstead Street in East Hartford. Sanderson drove Delia, E.A., and K.H. to Delia's apartment. On the way, Delia recalls Sanderson discussing a "murder rap" he had beaten, and that he did not want to go back to jail. He told the victims that he had a gun and he would kill them if they told anyone about what he did. The victims talked about being 17 years old. Delia argued about the victims staying with her, but Sanderson wanted them to stay with Delia so that they did not run away. *See* SPSR ¶ 30.

The next morning, Sanderson picked Delia and the victims up from Olmstead Street. Sanderson needed to use the Internet to post advertisements, so Delia dropped him at a building on Laurel Street, where Sanderson had a friend with an Internet connection. Sanderson gave Delia money to buy hygiene products for the victims, which they did at the Family Dollar. Delia and the victims also went back to Hassan's apartment to shower. *See* SPSR ¶ 31.

Sanderson called Delia and told her to pick him up. Sanderson told Delia and the victims

that he had already posted an ad, and that he was going to take them to a Days Inn in the south end of Hartford. Delia began receiving calls from prospective customers while in the car. At the Days Inn, Sanderson went into the hotel and rented the room. Delia went to the room, and then Sanderson sent the victims in. Sanderson then left, purportedly to run errands. At some point, Sanderson returned and picked up Delia. Delia told the victims to stay in the room because she did not want the motel staff to learn how many people were in the room. Sanderson and Delia went to a package store to purchase alcohol. *See* SPSR ¶ 32.

On the way back to the Days Inn, Delia received a call from a customer who was already near the hotel. Sanderson insisted that since he had paid for the hotel room, someone was going to handle the call so he could get paid. Delia went outside to meet the customer and bring him back to the room. Sanderson, meanwhile, snuck out of the room so the customer would not be concerned he would be robbed. Sanderson called Delia, and told her to take the money from the customer and then send him to the room with the key. The customer would then send the victim he would not be having sex with down with the key. *See* SPSR ¶33.

At some point after K.H. had engaged in some of the prostitution set out in the Statement of Facts, K.H. had occasion to meet Delia's mother

at King Court in East Hartford, a housing development adjacent to the Madison Motor Inn. When Delia's mother saw K.H., she confronted her immediately about her age. K.H. initially said she was 16, but then admitted she was only 14. Delia called Sanderson to tell him K.H.'s true age, but Sanderson did not care. Delia told K.H. to call her mother and go home. Delia told K.H. that she would kill her if she lost her children because of this. Delia and her mother then went to the Madison Motor Inn to tell E.A. to leave. *See* SPSR ¶ 36.

Delia kept calling Sanderson, as calls were still coming in on the phone he had posted. A call came in for \$400 for anal sex. Sanderson took the phone number for the call, and told Delia he would come by to get the phone later. Delia went back to her apartment on Olmstead Street, where she saw a report for a missing child (K.H.) on television. Sanderson later picked up Delia and returned her to King Court. Delia told Sanderson she did not want to work for him anymore, and that he should take the phone with him. Sanderson finally took the phone, and then gave her \$50 to get a new one. Sanderson called her later and threatened her family if she ever told on him. *See* SPSR ¶ 37.

2. The guilty plea hearing

On January 20, 2011, Sanderson, pleaded guilty to Count One of the Indictment, charging him with Conspiracy to Commit Sex Trafficking of Children, in violation of 18 U.S.C. § 1594(c), and to Counts Two and Four of the Indictment, charging him with Sex Trafficking of a Minor, in violation of 18 U.S.C. §§ 1591(a)(1) and (b)(2). SA12, SA41, SA117. Sanderson's guilty pleas occurred seven days following jury selection, and six days prior to the scheduled start of evidence in his trial. SA117. Sanderson pleaded guilty without benefit of a plea agreement, a factual stipulation, or a stipulation concerning the advisory Sentencing Guidelines range.

During the plea hearing, the government recited a summary of the evidence that would have been presented at a trial against Sanderson as to Count One. SA30. The district court then canvassed Sanderson regarding the factual basis for his plea to Count One. SA31-SA34. Sanderson admitted to showing Delia how to post internet advertisements for prostitution of the minor victims, SA31, and to transporting the minor victims to hotels for prostitution, SA33.

Similarly, as to Counts Two and Four, the government offered a summary of the anticipated trial evidence. SA38-SA40. Included in that recitation was that “[Sanderson] and Ms. Delia recruited two 14-year-old girls to work as prosti-

tutes,” and that “[Sanderson] and Ms. Delia transported the girls to [hotels] where the girls had sex with men in exchange for money.” SA38-SA39. The government also referred to evidence showing that Sanderson rented the hotel rooms in which the girls worked as prostitutes. SA39-SA40. The district court then asked Sanderson if he “disagree[d] with anything Mr. Novick just said,” and Sanderson responded “no.” SA40.

3. The sentencing proceedings

A draft of Sanderson’s PSR was disclosed on March 4, 2011 by the United States Probation Office (“USPO”). SA118. In its calculation of the applicable Guidelines offense level, the USPO assessed a two-level enhancement, under U.S.S.G. § 2G1.3(b)(2)(B), because “a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct” (the “undue influence enhancement”). Sanderson Draft PSR ¶ 51. In a letter dated March 24, 2011, Sanderson identified several objections to the PSR. Government Appendix (“GA”)1-GA2. Among those objections, Sanderson noted, “[i]n Paragraph 51, I am objecting to the undue influence part and therefore the whole part as it has to be found to be applied.” GA2. Sanderson did not, in that letter, set forth the basis for that objection or any other information in support thereof.

On April 14, 2011, the USPO issued a revised PSR and an addendum, which specifically ad-

dressed Sanderson's objections. SA120, SPSR Addendum at 2-3. The USPO continued to assess the two-level undue influence enhancement, noting that there was a presumption of undue influence where the defendant was more than ten years older than the victim. SPSR Addendum at 3. The USPO also specifically rejected the government's argument that two other enhancements applied, specifically (1) where a minor victim was otherwise in the custody, care or supervisory control of the defendant (the "custody, care and control enhancement"); and (2) where the offense involved the use of a computer or interactive computer service to entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct ("the computer enhancement"). SPSR Addendum at 1-2.

On May 27, 2011, Sanderson filed a memorandum in aid of sentencing. GA3-GA33.⁵ In his memorandum, Sanderson echoed the USPO's position that the custody, care and control enhancement and the computer enhancement did not apply to Sanderson's case. GA17-GA22. However, Sanderson did not restate or expand upon his PSR objection to the application of the undue influence enhancement, and in fact did not mention that enhancement at all. GA3-GA33. On June 3, 2011, the government filed its

⁵ Where memoranda in aid of sentencing are attached in the Government Appendix, exhibits thereto have not been included.

own memorandum in aid of sentencing. GA34-GA73. There, the government argued for the application of the undue influence enhancement, among several other enhancements. GA54-GA56. Sanderson replied with an additional memorandum in aid of sentencing on June 6, 2011. GA75-GA83. Again, Sanderson did not object to the application of the undue influence enhancement. GA75-GA81.

Sanderson's sentencing hearing was held on June 6, 2011. SA46-SA105. Though noting Sanderson's objections to certain factual statements in the PSR, the district court nonetheless adopted the factual statements in the PSR as its findings of fact. SA51. After reviewing the minimum and maximum statutory penalties, SA51-SA52, the district court then proceeded to calculate the applicable advisory range under the Sentencing Guidelines, SA52-SA70. The district court started with the PSR's calculation, which included a two-level enhancement under U.S.S.G. § 2G1.3(b)(2)(B) (the "undue influence enhancement"). SA54-SA55. The court then stated that "that's the base level that we start on," and invited argument from the parties as to whether there were particular enhancements that should have been added to or excluded from the PSR's calculation. SA55.

Of the enhancements applied by the USPO, Sanderson objected only to the two-level increase for a leadership role; he did not argue against

the application of the undue influence enhancement. SA55-SA56. The government argued extensively for both the computer enhancement and an enhancement for exercise of “custody, care and control” over the victims, both of which the district court rejected. SA57-SA67. During that colloquy, the government argued that Sanderson’s custody, care and control over the minor victims were in part demonstrated by the fact that “he took two girls who he knew were runaways from the DCF system, who he knew had no other place to go.” SA60. The district court, though rejecting those facts as a basis for custody, care, and control, observed that “[t]hat’s why I think the . . . adjustment for . . . undue influence[] is correct.” SA60. Sanderson did not respond to the district court’s observation regarding the undue influence enhancement, but reiterated his objection to the computer and custody, care, and control enhancements. SA61-SA62.

Ultimately, after hearing the arguments of counsel, the district court decided to “stay where probation calculates.” SA67. The district court thus affirmed the accuracy of the PSR’s advisory guideline range, which was 262 to 327 months’ imprisonment. SA67. After considering arguments from Sanderson and the government, and considering the remaining sentencing factors, the district court sentenced Sanderson principally to 310 months’ imprisonment on each count of conviction, to run concurrently. SA96.

B. Governing law and standard of review

1. The undue influence enhancement

U.S.S.G. § 2G1.3(b)(2)(B) requires a two-level guideline enhancement “[i]f . . . a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct” The commentary provides a cross reference to U.S.S.G. § 2A3.1 cmt. n.1, which defines “prohibited sexual conduct” to include “any sexual activity for which a person can be charged with a criminal offense.”

The commentary further provides that the enhancement applies even if another participant in the crime exercised the undue influence, as opposed to the defendant being sentenced. Specifically, the enhancement applies when a “participant” exercises undue influence over a minor victim, and “participant” is defined as “a person who is criminally responsible for the commission of the offense, but need not have been convicted.” U.S.S.G. §§ 3B1.1 cmt. n.1 and 2G1.3(b)(2)(B) cmt. n.1 (“Participant’ has the meaning given that term in Application Note 1 of the Commentary to § 3B1.1 (Aggravating Role).”); *see also United States v. Brooks*, 610 F.3d 1186, 1199 (9th Cir. 2010) (“[E]ven if Brooks, who has been found criminally responsible for the crime, did not personally unduly influence the girls, he can be subject to the enhancement if another crimi-

nally responsible individual, such as Fields, exercised the requisite undue influence.”).

The commentary also provides guidance on defining “undue influence”:

In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of the case to determine whether a participant’s influence over the minor compromised the voluntariness of the minor’s behavior. The voluntariness of the minor’s behavior may be compromised without prohibited sexual conduct occurring. . . . In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption that subsection (b)(2)(B) applies. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

U.S.S.G. § 2G1.3 cmt. n.3.

The presumption of undue influence where a participant is at least 10 years older than a minor victim is sufficient by itself, if not rebutted by the defendant, to support application of this enhancement. *United States v. Watkins*, 667 F.3d 254, 264-65 (2d Cir. 2012) (“District Court was free to make its finding of ‘undue influence,’ without further explanation, on the basis of the un rebutted presumption alone”). Evidence of a

victim's eagerness to participate in the crime is not sufficient to rebut this presumption. *Id.*

Even though the presumption was sufficient by itself in *Watkins*, this Court went on to note several examples of “manipulative behavior” by the defendant that also supported the undue influence enhancement, including gifts and free meals given to the victim, as well as misrepresentations about personal information made to the victim. 667 F.3d at 265.

While *Watkins* concerned a case of online enticement, other circuits have applied the undue influence enhancement to instances of sex trafficking. Those courts identified sex trafficking-specific factors—similar to those considered by the *Watkins* Court—that may bear on whether undue influence was employed, to include the age difference between defendant and victim, whether the victim had engaged in prostitution before, and the economic and social vulnerability of the victim. *See United States v. Patterson*, 576 F.3d 431, 443 (7th Cir. 2009) (upholding application of enhancement where pimp was forty-two and victim was fourteen, the victim had never worked in prostitution, the defendant encouraged the victim to begin in prostitution, and the victim was “destitute and penniless”); *Brooks*, 610 F.3d at 1199-1200 (upholding enhancement where the victims “had no money, no job and, as runaways, nowhere to live,” the defendant of-

ferred a good life, and the victims had not worked in prostitution before).

It is irrelevant that a minor victim voluntarily agreed to work for a pimp, or that she engaged in sexual activity prior to prostituting for a pimp. *Brooks*, 610 F.3d at 1199-1200. In *Brooks*, the court found it irrelevant that “the [minor victims] willingly had engaged in sexual relations with other men just before and after meeting Brooks and Fields, under circumstances suggesting that the girls had received a benefit, such as a place to stay.” *Id.* at 1199. Rather, the court held that “[t]he victim’s willingness to engage in sexual activity is irrelevant, in much the same way that a minor’s consent to sexual activity does not mitigate the offense of statutory rape or child molestation.” *Id.* (internal quotations omitted). The court also observed that there was no evidence that the victims were inclined towards *commercial sex*. *Id.*

Finally, where a district court adopts the factual findings of the PSR, it may rule on the undue influence enhancement “without further comment.” *Watkins*, 667 F.3d at 266. “While a district court must make findings with sufficient clarity to permit meaningful appellate review, this obligation may be satisfied by explicitly adopting the factual findings set forth in a defendant’s presentence report.” *Id.* at 261 (internal citations and quotations omitted).

2. Standard of review

Normally, a sentencing court's legal application of the Guidelines is reviewed *de novo*, while the court's underlying factual findings are reviewed for clear error, acknowledging the lesser standard of proof at sentencing of preponderance of the evidence. *United States v. Cossey*, 632 F.3d 82, 86 (2d Cir. 2011) (per curiam). Where, however, the applicability and sufficiency of factual findings in support of a Guidelines enhancement are raised for the first time on appeal, this Court reviews only for plain error. See *United States v. Villafuerte*, 502 F.3d 204, 207-08 (2d Cir. 2007) (holding that "rigorous plain error analysis is appropriate for" unpreserved claims of sentencing errors, including failure to make required findings); see also *United States v. Wagner-Dano*, 679 F.3d 83, 89 (2d Cir. 2012) ("[W]here a defendant does not object to a district court's alleged failure to properly consider all of the § 3553(a) factors, our review on appeal is restricted to plain error"); *id.* at 90 (reviewing for plain error a district court's alleged failure to resolve factual disputes in PSR).

Under plain error review, "an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case

means’ it ‘affected the outcome of the district court proceedings’; and (4) ‘the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)); see also *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *Wagner-Dano*, 679 F.3d at 94. “[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it” *Wagner-Dano*, 679 F.3d at 94 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)).

C. Discussion

Here, the district court made sufficient factual findings to support the application of the undue influence enhancement, through both the age-related presumption and the factual record. Though noting Sanderson’s objections to the facts contained in the PSR, the district court nonetheless adopted the PSR’s factual findings as its own. SA51. Those findings included a number of factors demonstrating that both participants in this crime, Sanderson and Delia, exercised undue influence over the minor victims to engage in prostitution.

First, Sanderson and Delia were wholly responsible for introducing the minor victims into prostitution, and then facilitating the entire op-

eration. *See Patterson*, 576 F.3d at 443 (“[T]he defining characteristic of undue influence is that it involves a situation where the ‘influencer’ has succeeded in altering the behavior of the target.” (internal quotations omitted)). The evidence showed that Sanderson encouraged Delia to recruit the minor victims into prostitution, SPSR ¶ 26; that Delia explained “escorting” to the minor victims and encouraged them to participate, SPSR ¶¶ 9, 27, 28; that Sanderson posted advertisements for prostitution for the minor victims, SPSR ¶¶ 31-32; that he transported the minor victims to two different hotels for prostitution, SPSR ¶¶ 11, 14, 31-32; SA33, SA38-SA40; and that he rented the hotel rooms in which the minor victims “worked,” SPSR ¶¶ 11, 14. There was no evidence that either victim had ever participated in prostitution previously. In short, Sanderson and Delia were responsible for taking two 14-year-old runaways and turning them to prostitution.

In doing so, Sanderson and Delia preyed upon the minor victims’ vulnerabilities as runaways. *See Brooks*, 610 F.3d at 1199-1200 (victims were “runaways” and had “nowhere to live”). Both Delia and Sanderson were told that the victims were minors and had absconded from the DCF system. SPSR ¶¶ 7, 25-26. Sanderson considered that information, and that the victims had nowhere to sleep, when encouraging Delia to recruit the minor victims into prostitution. SPSR

¶ 26. Sanderson and Delia manipulated the victims into participating through providing them with a place to stay and taking them shopping for basic items such as underwear. SPSR ¶¶ 10, 11, 27, 30, 31. Sanderson and Delia told at least one minor victim to refer to them as “Pa” and “Ma,” further reinforcing the idea that they would take care of the minor victims. SPSR ¶ 10.

Nowhere was Sanderson’s undue influence more apparent than in his dealings with E.A., who was extremely reluctant to participate in prostitution. He bought E.A. alcohol “to help calm her down and allow her to participate.” SPSR ¶ 12. Sanderson “told E.A. about himself, that he had a sister, and that he understood what it was like not to have money.” SPSR ¶ 12; *see Patterson*, 576 F.3d at 443 (“[The victim] had never worked in prostitution before the defendant encouraged her to try it.”). Similarly, even though K.H. had initially agreed to participate, she was made false promises by Sanderson in order to push her into taking a prostitution call for anal sex. SPSR ¶ 16.

Finally, in the course of turning the minor victims to prostitution, both Sanderson and Delia utilized threatening behavior. For example, in the car on the way to Delia’s house, on the night they first met the minor victims, Sanderson discussed a “murder rap” he had beaten, and that he did not want to go back to jail. He told the victims that he had a gun and he would kill

them if they told anyone about what he did. SPSR ¶ 30. The minor victims also recalled Delia telling them that Sanderson had a gun and had been to jail for shooting someone. SPSR ¶ 13. This behavior provided context for the willingness of both minor victims, and especially E.A., to participate in the prostitution. SPSR ¶13 (“E.A. did not want to see the customer, but Delia insisted, saying in substance that K.H. would not be doing all the work.”). It also explains why the minor victims were “[t]oo scared to leave” when they were dropped off for several hours at a clothing store. SPSR ¶ 14.

In sum, there is a more than adequate factual basis, even without the rebuttable presumption, for the district court’s application of the undue influence enhancement.

Furthermore, Sanderson’s claim that “[t]he trial court failed to make any findings of fact” before imposing the undue influence enhancement is simply unsupported by the record. *See* Sanderson’s Br. at 6. It was enough, by itself, that the district court adopted the PSR’s factual findings, and that those findings supported application of the enhancement. *See Watkins*, 667 F.3d at 266. Moreover, even though the district court did not spend significant time on this uncontested enhancement at the sentencing hearing, it was not ignored. In a separate application, the government argued that Sanderson’s custody, care and control over the minor victims were

in part demonstrated by the fact that “he took two girls who he knew were runaways from the DCF system, who he knew had no other place to go.” SA60. The district court, though rejecting those facts as a basis for the custody, care, and control enhancement, observed that “that’s why I think the . . . adjustment for . . . undue influence is correct.” SA60.

Even were these factual findings absent, however, the district court still correctly applied the undue influence enhancement because of the rebuttable presumption of undue influence where “a participant is at least 10 years older than the minor.” U.S.S.G. § 2G1.3 cmt. n.3. Here, there was a fifteen-year age difference between Sanderson and the minor victims. SPSR “Identifying Data” Page (showing Sanderson was 29 at the time of the offense). This presumption was un rebutted by Sanderson, and thus supports, by itself, the undue influence enhancement. *See Watkins*, 667 F.3d at 264-65.

Sanderson’s claim that he effectively rebutted the presumption is not supported by the record. The thrust of Sanderson’s factual arguments, both at his plea and sentencing hearings and in his written submissions, was that Delia bore greater responsibility for the offense than he did. *See* SA34 (“I knew what they was (sic) going to do with Ms. Delia and I did drop them off at the hotel.”); SA79 (“I don’t agree with [what] my co-defendant said happened”); GA75 (“Mr.

Sanderson does not contest that he is fully guilty of sex trafficking and deeply apologizes for his conduct but he would like to simply point out that it was not him alone that embarked on this ill journey.”); GA77 (“From the victims’ perspective, Delia undoubtedly controlled them with threats and managed the commercial sex acts.”). None of these statements, however, call for the conclusion suggested by Sanderson, for the first time on appeal, that he did not unduly influence the minor victims. Sanderson’s Br. at 8. Rather, they suggest at most that the PSR did not apportion responsibility for the offense correctly. They do not rebut the presumption of undue influence under circumstances where Sanderson still admitted to having driven two 14-year old girls to hotels to be prostituted. Moreover, to the extent that Sanderson complains that the district court accepted Delia’s version of events over his own, the district court did consider that objection to the PSR, and nonetheless adopted the factual findings of the PSR. SA51.

Even were it true that the PSR incorrectly assigned greater culpability to Sanderson than Delia, it not a defense to the application of the undue influence enhancement, which requires only that “a participant” exercised undue influence. U.S.S.G. § 2G1.3(b)(2)(B). Thus, it is inapposite whether Sanderson exercised undue influence or Delia did so, so long as at least one of them did. Even Sanderson, in his brief, concedes

that Delia exercised undue influence over the minor victims. Sanderson’s Br. at 8.

Sanderson inaptly relies on *United States v. Myers*, 481 F.3d 1107, 1112 (8th Cir. 2007), as an example of a successful rebuttal of the presumption. In *Myers*, the Eighth Circuit applied a clear error standard to a government appeal of a district court’s decision not to apply the undue influence enhancement in an online enticement case, where there was evidence that the victim had demonstrated an interest in running away with other men before she met Myers. *Id.* The court ruled that the district court did not err in finding that such evidence rebutted the presumption, and because the government had presented no other evidence in support of the enhancement, the enhancement was inapplicable in that case. *Id.* In this case, the analogous point cannot be made—Sanderson did not present rebuttal evidence to show that the victims would have otherwise participated in prostitution; indeed, the record shows that it was Sanderson and Delia who introduced the victims to prostitution. SPSR ¶¶ 9-10, 26-28.

Finally, unlike in *Myers*, in this case, the applicability of the enhancement and the adequacy of the court’s findings in support of the enhancement are reviewed for plain error because Sanderson did not preserve his objections below. Thus, even if the district court erred by applying the undue influence enhancement, or by failing

to make specific findings, as Sanderson now claims, such errors were not “clear or obvious, rather than subject to reasonable dispute,” *Marcus*, 130 S. Ct. at 2164. In truth, Sanderson’s ultimate complaint is not that the district court lacked a factual basis for the enhancement, but rather that the district court should not have credited Delia’s version of events, and should have more explicitly linked the facts in the PSR to the enhancement. The former complaint was addressed and rejected by the district court when it adopted the factual findings of the PSR; the latter was never raised by Sanderson, who neither objected to the undue influence enhancement nor asked the court to further explain which facts from the PSR supported its application. Under those circumstances, where Sanderson had a full and fair opportunity to contest the district court’s ruling but chose not to, he cannot meet his burden to show that the district court made an error that “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” *Id.* As such, Sanderson’s sentence should be affirmed.

II. The district court did not abuse its discretion in ordering Delia to pay restitution.

A. Relevant facts

1. The guilty plea hearing

On December 7, 2010, Delia pleaded guilty to Counts Three and Five of the Indictment, charging her with Sex Trafficking by Force, Fraud, or Coercion, in violation of 18 U.S.C. §§ 1591(a)(1) and (b)(1). DFA7, DFA17-DFA18, DFA73. Delia entered into a plea agreement with the United States in which she waived her right to appeal if her sentence did not exceed 262 months' imprisonment, a life term of supervised release, and a fine of \$200,000. DFA21, DFA58. In the plea agreement, Delia acknowledged that restitution was mandatory, DFA18-DFA19, and could include such things as "medical services relating to physical, psychiatric, or psychological care" for the minor victims, DFA25. No specific amount of restitution was set at the time of the plea. DFA45-DFA46.

2. The sentencing hearing

Delia's sentencing hearing was held on June 23, 2011. DFA78-DFA111. The district court considered the arguments of counsel, Delia's own statement, and the oral and written statements of victim K.H., her therapist, and her mother. DFA89-DFA103. K.H.'s therapist, Melissa Pelle-

tier (“Pelletier”) had, by the time of sentencing, been treating K.H. for over a year at a residential treatment facility. DFA98-DFA99. Pelletier discussed at length the impact that Delia’s victimization had on K.H., including, hypervigilance, post-traumatic nightmares and flashbacks, self-blame, guilt, and trust issues. DFA99-DFA100. Pelletier recounted how K.H. had run away from her facility in an attempt to find Delia’s children to apologize for taking their mother away. DFA99. Pelletier also explained how Delia’s insistence that she be called “mom” by K.H. exacerbated prior trust issues. DFA100. Pelletier’s written submission to the district court further expanded on the effects of K.H.’s victimization, and concluded as follows: “Her self-image, her future sexual relationships, her perception of the world, and even her interactions with her own children someday, will all likely be impacted by the exploitation and trauma that [K.H.] endured at the hands of Jarell Sanderson and Hassonah Delia.” Government Sealed Appendix (“GSA”) 3.

Ultimately, the district court sentenced Delia principally to 110 months’ imprisonment. DFA104. The district court ordered that “the defendant shall make restitution in accordance with 18 United States Code, Section 1593, 2248, 2259, 2264, 2327, 3663, 3663(a), and 3664.” DFA105. However, the court did not set a specific amount of restitution, as the government re-

served its right to submit that amount within 90 days of sentencing. DFA94, DFA106.

3. The restitution order

On September 2, 2011, the government filed a motion for restitution in the total amount of \$25,608.80, with \$25,433.80 to be paid to K.H. and \$175 to E.A. Delia's Second Appendix ("DSA") 9. Delia's Sealed Appendix ("DSLDA") 1-DSLDA12. The government's application requested that the amount be owed jointly and severally by both Delia and Sanderson. DSLDA8. The requested amount included in small part the income of Delia and Sanderson from the minor victims' prostitution, but was primarily comprised of estimated future treatment costs for K.H. DSLDA3-DSLDA6. In support of the latter amount, the government attached a letter from Pelletier, which included the basis for the government's estimates. DSLDA9-DSLDA12.

In arriving at an estimate of future treatment costs, Pelletier drew upon her experience working with K.H. as her primary therapist for approximately 16 months; her own training and experience as a licensed clinical social worker; her experience working with victims of commercial sex trafficking and survivors of complex trauma; and consultations with colleagues in the health care field. DSLDA9, DSLDA11. Pelletier projected costs for K.H.'s treatment until age 50,

which she wrote “in my professional opinion, is a conservative estimate of when we could expect [K.H.] to no longer require these services.” DSLDA11. Pelletier broke up her estimate of future treatment costs into three categories: individual therapy; psychiatric consultation; and psychiatric hospitalization and aftercare. DSLDA11-DSLDA12. She then discounted those estimates to between 15% and 25% of the total, to reflect (in her professional opinion) the share of that treatment ascribed to K.H.’s victimization by Sanderson and Delia. DSLDA12. The government, in arriving at a restitution request, took the most conservative end of that range, 15%. DSLA6.

On November 21, 2011, Delia filed an objection to the government’s motion for restitution. DSA9, DSLDA13-DSLA28. In short, and in relevant part, Delia argued that the government’s restitution request improperly compensated K.H. for unrelated prior trauma; that it failed to distinguish between Sanderson and Delia’s culpability, and that Pelletier’s estimates were unjustifiably speculative. DSLDA19-DSLDA22. Delia incorrectly claimed that the government “seeks to maximize K.H.’s recovery by utilizing 25%, the top of the therapist’s range.” DSLDA19. Delia ultimately requested not that the restitution be denied, but that it be limited to a nominal restitution amount of \$5 per month. DSLDA25.

On January 13, 2012, the district court granted the government’s motion for restitution “insofar as it f[ound] that Defendants Hassanah Delia and Jarell Sanderson are joint and severably liable for \$175 to E.A. and \$25,433.80 to K.H., for a total of \$25,608.80.” DSA9.

B. Governing law and standard of review

1. Restitution law

Title 18, United States Code, Section 1593, states:

(a) Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this chapter.

(b)

(1) The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim’s losses, as determined by the court under paragraph (3) of this subsection.

(2) An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) As used in this subsection, the term “full amount of the victim’s losses” has the same meaning as provided in section 2259 (b)(3) and shall in addition include the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. § 201 et seq.).

Moreover, under 18 U.S.C. § 2259(b)(3), the “full amount of the victim’s losses” includes any costs incurred by the victim for the following:

- (A) medical services relating to physical, psychiatric, or psychological care;
- (B) physical and occupational therapy or rehabilitation;
- (C) necessary transportation, temporary housing, and child care expenses;
- (D) lost income;
- (E) attorneys’ fees, as well as other costs incurred; and
- (F) any other losses suffered by the victim as a proximate result of the offense.

In certain cases, this definition may include the anticipated costs of psychiatric treatment and counseling that are a proximate result of the defendant’s exploitation. Although there do not appear to be reported decisions in this Court re-

garding restitution for future medical costs under 18 U.S.C. § 1593, this Court has considered the issue under 18 U.S.C. § 2259 as it applies to Chapter 110 of Title 18, which includes child abuse and exploitation violations. In *United States v. Pearson*, 570 F.3d 480, 486 (2d Cir. 2009) (per curiam), which involved the production of child pornography through the abuse of two minor victims, this Court concluded that “a restitution order pursuant to 18 U.S.C. § 2259 may include restitution for future medical expenses.” However, the Court continued, “an order of restitution for future losses may be inappropriate where the amount of loss is too difficult to confirm or calculate.” *Id.* (internal quotation omitted).

In *Pearson*, the government based its application for restitution primarily on a report by a company that provided “vocational, rehabilitation, and economic consulting services,” which opined that the expected costs of future treatment for the two victims would be a total of approximately \$3 million. *Id.* at 484. In setting a much lower figure for restitution, the district court discounted considerably the requested amount, based both upon the lack of qualifications of the report writer, who was (according to the district court) principally an economist, as well as the significant prior events that also impacted upon the victims’ need for counseling, which were not taken into account in the report’s

calculation of future treatment amounts. *Id.* In vacating the restitution order, the Second Circuit did not question the victims' need for future counseling, but rather called upon the district court to explain the process by which it discounted the report's findings and reached a final restitution amount. *Id.* at 487 (“[W]e remand the case simply to secure a more thorough explanation from the district court as to the basis for its restitution determination.”).

In *Pearson*, this Court referenced several other circuits that have held that future medical and psychiatric costs were appropriate for restitution under 18 U.S.C. § 2259, including *United States v. Doe*, 488 F.3d 1154, 1159-60 (9th Cir. 2007); *United States v. Danser*, 270 F.3d 451, 455 (7th Cir. 2001); *United States v. Julian*, 242 F.3d 1245, 1246-48 (10th Cir. 2001); and *United States v. Laney*, 189 F.3d 954, 966-67 (9th Cir. 1999). *See* 570 F.3d at 486. In *Danser*, for example, the Tenth Circuit held that the district court did not commit plain error by relying on the figures proffered by a victim's treating psychologist in determining the costs of future counseling of the victim, which included a lifetime of counseling sessions. *See* 270 F.3d at 455-56.

Likewise, the Eighth Circuit and other district courts have extended restitution for future counseling and medical costs to cases under 18 U.S.C. § 1593, especially where the government offers individualized assessments of victims' fu-

ture needs. In *United States v. Palmer*, 643 F.3d 1060, 1068 (8th Cir. 2011), the court upheld a restitution award of \$200,000 for the future psychological treatment costs of a victim of sex trafficking. There, the government expert, a clinical child psychologist who had not actually interviewed the victim, opined that the victim would need \$200,000 in future psychological treatment, and \$800,000 in future psychiatric treatment and medication. *Id.* at 1063. The district court found the \$200,000 for counseling to be reasonable, but ruled that the \$800,000 was too speculative. *Id.* at 1064. Specifically, the district court found fault with the expert’s failure to interview directly the particular victim, observing that “he did not, in fact, talk to this particular individual, and victims vary widely as to . . . what resiliency they have. And . . . that’s something that precludes me from accepting as true everything that the expert has said in terms of the amount of services that would be required.” *Id.* at 1064.

In *United States v. Lewis*, 791 F. Supp. 2d 81 (D.D.C. 2011), the district court upheld a significant restitution award for four minors who were victims of sex trafficking. That finding was based in large part on reports from a guardian *ad litem* as well as a licensed psychologist, who opined as to the diagnoses and appropriate courses of treatment for each victim. *Id.* at 86-92. In *United States v. Jennings*, 2010 WL 4236643 (W.D. Mo. Oct. 14, 2010), the district

court agreed that future medical costs may be included in restitution for victims of sex trafficking, but found that the government had not carried its burden of proof. In *Jennings*, the district court noted that the government's expert failed to consider a myriad of factors in the victims' background, and was unable to make an individualized assessment of the victims' need for counseling, in particular because most of the victims had expressed no desire for treatment. *Id.* at *2. Without that individualized assessment, the district court held that it was unable to "accurately determine a victim's future mental health needs." *Id.*

2. Standard of review

Under 18 U.S.C. § 3664(e), "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government."

This Court reviews a district court's order of restitution for abuse of discretion. *See United States v. Qurashi*, 634 F.3d 699, 701 (2d Cir. 2011); *United States v. Boccagna*, 450 F.3d 107, 113 (2d Cir. 2006); *United States v. Lucien*, 347 F.3d 45, 52 (2d Cir. 2003); *United States v. Jacques*, 321 F.3d 255, 259 (2d Cir. 2003). "We have explained that, because a restitution order

requires a balancing of what may be incompatible factors, ‘the sentencing court is in the best position to engage in such balancing, and its restitution order will not be disturbed absent abuse of discretion.’” *Jacques*, 321 F.3d at 259 (quoting *United States v. Ismail*, 219 F.3d 76, 78 (2d Cir. 2000) (per curiam)). To the extent this Court’s review involves an interpretation of law, it reviews the question *de novo*, whereas if the district court’s findings of fact are at issue, this Court reviews those questions for clear error. See *Lucien*, 347 F.3d at 53.

C. Discussion

The district court did not abuse its discretion in ordering restitution of \$25,608.80, which in large part represented restitution to K.H. for future medical and psychiatric care. The letter of therapist Melissa Pelletier, who was K.H.’s primary therapist for over a year and worked with K.H. through her recovery and her preparation for trial, was more than sufficient to carry the government’s burden of proof by a preponderance of the evidence.

Pelletier’s letter, and the district court’s adoption of Pelletier’s restitution recommendation, pose none of the problems identified by either the district court or this Court in *Pearson*. In *Pearson*, the district court had reduced the restitution award proposed by the government expert by one-third, because the district court did not

believe that the expert there had the qualifications to make the judgments that formed the basis of his restitution figures. *See Pearson*, 570 F.3d at 484 (“[T]he court ‘discount[ed] substantially what Dr. [Reagles] has put before us because he’s not competent to make all these judgments.’”).

Unlike the report writer in *Pearson*, however, Pelletier was uniquely qualified to opine on the future needs of the minor victim K.H. Pelletier treated the victim for approximately fifteen months. *See* DSLDSA9. Whereas the writer in *Pearson* was (according to the district court) primarily an economist, Pelletier was a licensed practicing therapist who was trained and experienced in dealing with victims of commercial sex trafficking and survivors of complex trauma. *See* DSLDA9, DSLDA11; *Pearson*, 570 F.3d at 484. In setting the proposed restitution figures, Pelletier also drew on her own experience as a licensed clinical therapist and discussions with colleagues in the health care field. DSLDA11. Thus, when the district court here adopted the restitution figures proposed by Pelletier, it was doing so based on estimates provided by arguably the most qualified person available.

It is not surprising, then, that the district court here did not attempt to recalculate Pelletier’s restitution estimates, as the district court had in *Pearson*, and thereby avoided the error identified there. In *Pearson*, not only was the re-

port writer comparatively unqualified to make restitution estimates, but, as this Court pointed out, the district court's remedy, simply to reduce the award by a third, was equally unsatisfying. *See Pearson*, 570 F.3d at 487 (“[W]ithout more information as to how the district court reached the lower figure, we are unable to conduct even deferential review of whether the final restitution order reflects a reasonable estimate of the cost of future counseling.”). If the underlying report was ruled deficient, it is not clear how the district court, which did not conduct its own examination, could cure the deficiency by simply reducing that report's estimate by two-thirds, absent some explanation regarding how the reduction was arrived at. Here, because the court was presented with the opinion of a more qualified individual, it did not have to engage in such a recalculation. Thus this Court is left with a much clearer record; the district court ordered restitution solely based on the estimates provided by Pelletier's letter.

Delia's arguments to the contrary are unavailing here. Delia complains first that the district court erred by ordering restitution through a docket entry rather than a written order and, second, that the district court's order lacked adequate factual support. Plainly, there is no requirement for a district court to explain its analysis of mandatory restitution factors. *See United States v. Walker*, 353 F.3d 130, 134 (2d Cir.

2003) (“We conclude that, in considering restitution sentences imposed under MVRA, we will not vacate and remand, as we did under the prior statute, solely by reason of the sentencing judge’s failure to indicate consideration of the mandatory factors.”). Surely if the district court had reached some other figure than that arrived at by Pelletier, an explanation would be required to explain how that figure was reached. Here, where the district court used the exact figure proposed by the government and Pelletier, there should be no mystery as to its basis.

Indeed, the lack of a written order did not prevent Delia from appealing the basis for the restitution order. Delia singles out three areas of Pelletier’s report that she believes lack sufficient support, specifically that: (1) K.H. will require weekly counseling until age fifty; (2) K.H. will require two hospitalizations and two partial hospitalizations until age fifty; and (3) 15-25% of the costs for K.H. care will be a result of K.H.’s trauma caused by Sanderson and Delia. *See Delia’s Br.* at 10-12. These complaints are not persuasive.

First, it is clear that each estimate is a professional opinion offered by Pelletier based upon her experience as a licensed clinician, her experience working directly with K.H., and her discussions with others in her field. DSLDA10-DSLDA12. Given Pelletier’s qualifications, the district court was certainly within its discretion

to accept these professional opinions. See *Danser*, 270 F.3d at 456 (“Furthermore, the district court also used the figures proffered by Karen Doe’s treating psychologist to determine the costs of future counseling.”). Moreover, this was not the first exposure the district court had to Pelletier, who spoke and wrote in connection with Delia’s sentencing. At Delia’s sentencing hearing, Pelletier discussed at length the impact that Delia’s victimization had on K.H., including, hyper-vigilance, post-traumatic nightmares and flashbacks, self-blame, guilt, and trust issues. DFA99-DFA100. The district court’s direct exposure to Pelletier adds to the reasonableness of its acceptance of her restitution estimates.

Second, Pelletier did provide a basis for her opinion that, although not to Delia’s satisfaction, was evidently sufficient to convince the district court. Pelletier readily conceded that “it is not possible to quantify the extent of K.H.’s psychological damage.” DSLDA10. Indeed, the district court may have had reason to be skeptical of a therapist who believed otherwise. Rather, Pelletier explained that her analysis was in part based upon inferences she could draw from K.H.’s “traumatic symptomatology.” DSLDA10. Pelletier made references to these various symptoms both in her restitution letter as well as in her sentencing comments and correspondence, where she described Posttraumatic Stress Disorder-related daytime flashbacks and night-

mares that resulted from K.H.'s victimization by Delia and Sanderson. *See* DSLDA10, DFA99-DFA100. Pelletier's assessment of the impact of Delia and Sanderson's conduct on K.H. was not limited to the current day, but also included an assessment of what the future would likely hold for K.H. *See* GSA3 ("Her self-image, her future sexual relationships, her perception of the world, and even her interactions with her own children someday, will all likely be impacted by the exploitation and trauma that [K.H.] endured at the hands of Jarell Sanderson and Hassonah Delia.").

Third, Pelletier made clear that her estimates were conservative, and thus the total restitution figure was likely much less than that to which K.H. is entitled. Explains Pelletier:

I have projected costs until age 50, which, in my professional opinion, is a conservative estimate of when we could expect [K.H.] to no longer require these services. . . . It is safe to project that [K.H.] may conservatively have two week long psychiatric hospitalizations over the next 33 years and at least two week long stays in partial hospitalization programs or as determined by provider at that time. . . . It is my professional opinion, based upon my training and experience as a therapist, as well as my many hours of work with [K.H.], that approximately 15% to 25% of

[K.H.]’s future mental health services will be related to overcoming her commercial sexual exploitation by Sanderson and Delia.

DSLDA11. In selecting the discount factor to be applied in order to account for the effect of preexisting conditions, the government proposed, and the district court accepted, the most conservative end of Pelletier’s range, 15%. *See* DSLDA6. Nor did Pelletier attempt to account for inflation, *i.e.*, the increase over time in costs of treatment, DSLDA11, which would have increased the amount of restitution due to K.H.

Finally, although Delia, both in her objection to restitution at the district court level and in her brief to this Court, contests the basis for the district court’s restitution order, she has presented no evidence of her own that undermines Pelletier’s estimates. Nor did she request a hearing at which Pelletier could be examined as a witness. Although the government acknowledges its burden to prove the restitution amount by a preponderance of the evidence, *see* 18 U.S.C. § 3664(e), the dearth of countervailing evidence is certainly a factor that supports the reasonableness of the district court’s order.

In sum, the district court did not abuse its discretion in adopting the reasonable restitution estimates of a trained, experienced therapist who spent over a year treating K.H.

Conclusion

For the foregoing reasons, the judgments of the district court should be affirmed.

Dated: December 11, 2012

Respectfully submitted,

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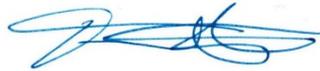


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**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,642 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.



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Addendum

U.S.S.G. § 2G1.3(b)(2)(B):

If ... a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase [the offense level] by 2 levels.

18 U.S.C. § 1593:

(a) Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this chapter.

(b)

(1) The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses, as determined by the court under paragraph (3) of this subsection.

(2) An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) As used in this subsection, the term "full amount of the victim's losses" has the same meaning as provided in section 2259(b)(3) and shall in addition include the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.).

(4) The forfeiture of property under this subsection shall be governed by the provisions of section 413 (other than subsection

(d) of such section) of the Controlled Substances Act (21 U.S.C. § 853).

(c) As used in this section, the term “victim” means the individual harmed as a result of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or a representative of the victim’s estate, or another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named such representative or guardian.

18 U.S.C. § 2259:

(a) In General. Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter.

(b) Scope and Nature of Order.

(1) Directions. The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses as determined by the court pursuant to paragraph (2).

(2) Enforcement. An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) Definition.— For purposes of this subsection, the term “full amount of the victim's losses” includes any costs incurred by the victim for—

(A) medical services relating to physical, psychiatric, or psychological care;

(B) physical and occupational therapy or rehabilitation;

(C) necessary transportation, temporary housing, and child care expenses;

(D) lost income;

(E) attorneys' fees, as well as other costs incurred; and

(F) any other losses suffered by the victim as a proximate result of the offense.

(4) Order mandatory.—

(A) The issuance of a restitution order under this section is mandatory.

(B) A court may not decline to issue an order under this section because of—

(i) the economic circumstances of the defendant; or

(ii) the fact that a victim has, or is entitled to, receive compensation for his or her injuries from the proceeds of insurance or any other source.

(c) Definition.— For purposes of this section, the term “victim” means the individual harmed as a result of a commission of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named as such representative or guardian.