No. 10-4806

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

UNITED STATES OF AMERICA,

Appellee

v.

LLOYD MACK ROYAL, III,

Defendant-Appellant

---

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

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# BRIEF FOR THE UNITED STATES AS APPELLEE

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## TABLE OF CONTENTS

**PAGE**

**TABLE OF CONTENTS (continued):** **PAGE**

## TABLE OF AUTHORITIES

**CASES:** **PAGE**

**CASES (continued):** **PAGE**

**CASES (continued):** **PAGE**

**CASES (continued):** **PAGE**



**STATUTES:**

**STATUTES (continued):** **PAGE**



**SENTENCING GUIDELINES:**

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## STATEMENT OF JURISDICTION

Defendant appeals his sentence imposed under the laws of the United States. The district court had jurisdiction under 18 U.S.C. 3231. It sentenced defendant on July 19, 2010, and entered final judgment the next day. Defendant filed a timely notice of appeal on July 23, 2010. This Court has jurisdiction under 28 U.S.C. 1291.

## STATEMENT OF THE ISSUE

Whether the district court correctly applied adjustments to defendant's sentencing guideline range for vulnerable victim, use of a computer, obstruction of justice, and leadership role in a drug distribution conspiracy.

## STATEMENT OF THE CASE

*A. Procedural History*

On June 24, 2009, a federal grand jury sitting in the District of Maryland returned an eight-count second superseding indictment charging defendant, Lloyd Mack Royal, III, with: (1) conspiracy to commit sex trafficking in violation of 18 U.S.C. 371 (Count One); (2) sex trafficking as to victims Melissa, Stephanie, and Ilana in violation of 18 U.S.C. 1591(a) (Counts Two, Three, and Four)[1]; (3) possession of a firearm in furtherance of crimes of violence in violation of 18 U.S.C. 924(c) (Count Five); (4) conspiracy to distribute controlled substances in violation of 21 U.S.C. 846 (Count Six); and (5) distribution of controlled substances, cocaine and phencyclidine (PCP), respectively, to persons under the

[1] Because the named victims were minors at the time of the offenses, we refer to them, as we did in the district court, by first name only.

age of 21 in violation of 21 U.S.C. 841(a)(1) & (b) and 21 U.S.C. 859 (Counts Seven and Eight). J.A. 10-23.[2]

Following a six-day trial, a jury found defendant guilty on all counts. J.A. 348-351. Using a special verdict form, the jury found that as to Counts Two, Three, and Four, defendant knew that each of his victims was under the age of 18 and that force, fraud, and/or coercion would be used to cause them to engage in commercial sex acts. J.A. 348-349. As to Count Five, the jury found that defendant brandished a firearm in furtherance of a crime of violence. J.A. 350. As to Count Six, the jury found that defendant conspired to distribute marijuana and cocaine, but not PCP. J.A. 350.

On July 19, 2010, the district court held a sentencing hearing. J.A. 352-388. It sentenced defendant to a total of 37 years' imprisonment, or 60 months for conspiracy to commit sex trafficking (Count One), 360 months for each substantive sex trafficking offense (Counts Two, Three, and Four), 240 months for conspiracy to distribute controlled substances (Count Six), 360 months for each substantive distribution offense (Counts Seven and Eight), all to run concurrently,

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[2] "Br. __" refers to the page number of appellant's opening brief filed with this Court. "J.A. ___" refers to the page number of the Joint Appendix filed by appellant with this Court along with his brief. "S.J.A.___" refers to the page number of the Supplemental Joint Appendix filed by the United States with this Court along with this brief.

and an additional seven-year consecutive term for brandishing a firearm in furtherance of a crime of violence (Count Five). J.A. 390.

*B. Facts*

*1. Sex Trafficking Conspiracy And Underlying Substantive Offenses*

During the spring of 2007, Melissa was a 17-year-old homeless, high school dropout, who abused marijuana and alcohol and lived on the streets in Germantown, Maryland. J.A. 205-206, 214-215, 230, 279, 424.[3] Her mother was recently divorced and lived in a shelter and Melissa had no contact with her family or adult supervision. J.A. 107, 206-207, 278, 424. With no place to go, and with nothing other than the clothes she was wearing, Melissa stole her food, spent hours sitting in fast food restaurants, and slept in storage bins and closets in the basement of apartment buildings. J.A. 107, 206, 213-214, 278-279, 424.

In April 2007, Melissa met defendant in a grocery store and told him "almost everything" about her circumstances. J.A. 215. A few hours later, after defendant gave her alcohol and marijuana, Melissa had sex with defendant and his cousin because she needed a place to sleep. J.A. 219.

[3] Because defendant has not challenged his convictions, we summarize only the evidence relevant to his sentencing claims.

The next day, defendant arranged to have Melissa stay with coconspirator Shantia Tibbs for two nights and then live with coconspirator Angela Bentolila. J.A. 107, 233, 260, 306.[4] That night, after inviting Melissa to a "hotel party," defendant drove her, her best friend Stephanie, and Tibbs to a Motel 6 in Gaithersburg, Maryland and rented a room. J.A. 225. See J.A. 155-159, 196, 224-225, 242-247, 307. Defendant gave Melissa and Stephanie alcohol and marijuana and later forced them to undress, dance naked on the bed, and repeatedly engage in oral and vaginal sex to test their aptitude for prostitution. J.A. 166-167, 225-226, 231-232, 312-313, 424.

While living with Bentolila, Melissa was "terrified" of defendant and "under his control." J.A. 208, 211, 260. Bentolila heard Melissa scream when defendant anally raped her. J.A. 110-111, 263-264. In the presence of Bentolila and/or others, defendant repeatedly assaulted Melissa, threatened to kill her, and to harm her baby sister. J.A. 107, 110-111, 208, 260-264, 275-277. Bentolila also abused, controlled, and hit Melissa and made up stories so that defendant punished Melissa. J.A. 109-110, 141-142, 260.

[4] Bentolila and coconspirator Paul Green were charged and pled guilty to conspiracy to commit sex trafficking. J.A. 86.

In April and May, defendant went to Bentolila's house almost every day and continually supplied Melissa and Stephanie with alcohol, marijuana, cocaine, PCP, and/or ecstasy. See J.A. 102, 104-105, 133, 158-159, 171, 196, 198, 219, 226, 236-237, 243-244, 260, 262, 268, 316, 325-326, 329-330. On or about April 21, 2007, defendant gave Melissa and Stephanie alcohol, marijuana, and cocaine and told Tibbs and Bentolila to dress and make them up to look like "porn stars." J.A. 113. See J.A. 115, 173, 176, 315-316, 318. At defendant's direction, Tibbs contacted a potential customer in Washington, D.C. J.A. 316-317. Once the customer received photographs of Melissa and Stephanie, which were taken and transmitted via a Nextel smart phone, he agreed to a price for having sex with them. J.A. 120, 245, 317-318, 337; S.J.A. 8-10. Coconspirator Michael Anderson, along with defendant and Tibbs, drove Stephanie and Melissa to the customer's house, where the girls, in the presence and at the direction of Tibbs, performed sex acts for money, which was given to defendant. J.A. 176, 179, 246, 249-250, 338; S.J.A. 7, 11.

Towards the end of April, defendant became angry when he called Melissa on a cell phone and learned that she, Stephanie, and Stephanie's boyfriend were at a party. J.A. 197-198, 252-253. Defendant demanded that they leave and ultimately chased and forced Stephanie into his car. J.A. 252-259. Melissa and Anderson were also in the car. J.A. 186. Defendant drove to a lake, ordered

Stephanie out of the car and, in a dark secluded area, struck Stephanie in the face, pointed a loaded gun at her, and declared that he "was like God and chooses who lives and dies." J.A. 189. See J.A. 187-188, 257-258. Later, defendant demanded that Stephanie fire the gun out the car window so that she "would have gun powder on her hands" "just in case she tried to go to the police" and report his crimes. J.A. 330. See J.A. 259-260.

Sometime thereafter, defendant saw a photograph of Melissa's friend Ilana on the computer, as Melissa communicated with her using MySpace. J.A. 266-267. "Need[ing] another girl and believing Ilana was gorgeous," defendant said he "wanted her" and directed Melissa to contact her. J.A. 267. Melissa complied and while defendant stood behind her, "typed" Ilana. J.A. 267.

Shortly thereafter, Melissa introduced Ilana to defendant at a barbecue, where he provided marijuana. J.A. 29-30, 35, 267. On May 8, 2007, defendant along with coconspirator Paul Green drove Ilana and Melissa to Canterbury Apartments where defendant gave them PCP, cocaine, and ecstasy. J.A. 40-41. Subsequently, they drove to a Holiday Inn in Gaithersburg, Maryland, where Melissa and Ilana engaged in sex acts with a paying customer. J.A. 48-50. The following day, defendant drove Melissa along with Green and Tibbs to a Courtyard Marriott. J.A. 326-328. He gave Melissa PCP and she along with Tibbs performed various sex acts for money. J.A. 326-328.

Towards the end of May, law enforcement officials received a tip about defendant's sex trafficking activities and questioned Melissa, who denied knowing anything. J.A. 208. Melissa told defendant, who demanded that if she were re-interviewed by the police "to lie * * *[and say he] had no idea [about her] age," say that "he had nothing to do with anything they were asking," and that the evening she went "to D.C. [and engaged in prostitution] that he was at a strip club * * * and it was all Honey [Tibbs'] fault." J.A. 210-211. Melissa followed defendant's instructions "precisely" during several subsequent interviews with law enforcement officials because she was "terrified" of defendant. J.A. 211.

*2. Drug Distribution Conspiracy And Underlying Substantive Offenses*

In September 2006, Crystal Brown purchased marijuana from defendant. S.J.A. 16. Within a couple of months, they became girlfriend and boyfriend. Defendant moved into Brown's house and lived with her through May 2007. S.J.A. 17-18, 41. Sometime thereafter, coconspirator Brown bought defendant a car, drove him to Queens, New York, and lent him $2500 to purchase cocaine from her cousin Chris. S.J.A. 19-20, 42-45. She also allowed defendant to store large freezer bags of cocaine and marijuana, along with scales in her house. J.A. 96-98; S.J.A. 28-30, 67.

From November 2006 through May 2007, Bentolila used cocaine on nearly a daily basis and bought it from defendant dozens of times. J.A. 93-94, 132-133.

Defendant often brought cocaine and other drugs to Bentolila's house, which Bentolila shared with her boyfriend, coconspirator Thomas C. King, roommates John Riffle and Jimmy Williams, as well as Melissa and Stephanie. J.A. 98, 112-113; S.J.A. 52, 60-62. In the spring of 2007, King bought minutes for defendant on a Nextel phone so that defendant could receive and make calls to sell drugs. J.A. 153; S.J.A. 57-59.

In April 2007, defendant repeatedly forced Melissa to use cocaine, which she had never tried. J.A. 237, 243-244, 279. The first time defendant offered Melissa cocaine, she refused. J.A. 236-237. After defendant said, "Bitch, fucking do it," she did. J.A. 237. Later, when Melissa was outside and walked away, defendant screamed and hit her in the chest. J.A. 237-238. On April 21, 2007, before Melissa and Stephanie had a sexual encounter with a paying customer in Washington, D.C., Melissa used cocaine when defendant said, "Bitch, do it" because she did not want him to hit her. J.A. 244.

The first time Stephanie and Ilana met defendant, Tibbs rolled marijuana that defendant had provided, which they smoked. J.A. 35, 226, 231, 308. On May 8, 2007, while at the Cantebury Apartments with Melissa and Ilana, coconspirator Paul Green helped defendant cook powder cocaine into crack. J.A. 42-43.

When Melissa and Stephanie overdosed on drugs or became ill, defendant refused to allow them to get medical treatment. One night after Stephanie lost

consciousness and had a seizure from alcohol and cocaine defendant provided, he told Bentolila that Stephanie could not go to the hospital because she was a minor and had drugs in her system. J.A. 105-106, 171-172. Another night, defendant ordered Tibbs to "shut the fuck up and mind your own business" after she told him to stop giving Melissa PCP because her face was turning green. J.A. 328. Another time, when Melissa had a headache and did not know what medicine to take, defendant got mad and smacked her so hard that she fell to the ground. J.A. 329.

Bentolila testified that she was "controlled" by defendant during the pendency of the conspiracies and described numerous instances when he threatened and/or assaulted people because they did not obey his orders. J.A. 142, 150. See J.A. 103-105, 107, 110-111, 113, 121-122, 126, 159. In 2007 and 2009, when interviewed by law enforcement authorities, Bentolila "lie[d]" and said that she had no knowledge of defendant's sex trafficking activities. J.A.137. See J.A. 148-149, 151. On February 3, 2009, Bentolila was in an adjoining holding cell to defendant in the federal courthouse waiting to make an appearance in this case. J.A. 130, 134-135. He ordered her to "Do the right thing and not snitch." J.A. 130. Bentolila explained that she understood defendant's directive "not to snitch" to mean that she should "not * * * talk, * * * open [her] mouth, [or] say anything at all." J.A. 130.

*C. Defendant's Sentencing*

The Probation Department prepared a Presentence Report and Addendum in which it separately grouped the sex trafficking conspiracy (Count One) with each of the substantive sex trafficking offenses (Counts Two, Three, and Four) under U.S.S.G. § 3D1.1(a)(1). It also grouped the drug distribution conspiracy together with each of the substantive distribution offenses (Counts Six, Seven, and Eight) J.A. 405 ¶ 24.[5] The Probation Department recommended, *inter alia*: (1) a two-level increase for vulnerable victim under U.S.S.G. § 3A1.1 to each of the four groupings (see J.A. 406 ¶ 31, 407 ¶ 38, 408 ¶ 46, 408-409 ¶ 52); (2) a two-level increase for use of a computer under § 2G1.3(b)(3) to the grouping that included the substantive sex trafficking offense involving Ilana (Counts One and Four) (see J.A. 408 ¶ 44); (3) a two-level increase for obstruction of justice under U.S.S.G. § 3C1.1 to each of the four groupings (see J.A. 406 ¶ 33, 407 ¶ 40, 408 ¶ 49, 409 ¶ 54); and (4) a two-level increase for defendant's leadership role in the sex trafficking and drug distribution conspiracies under § 3B1.1(a). See J.A. 406 ¶ 32, 407 ¶ 39, 408 ¶ 47, 409 ¶ 53.[6] Using the grouping to which it applied all four

[5] Because possession of a firearm in furtherance of a crime of violence (Count Five) requires a mandatory consecutive sentence, it was not grouped with any of the other offenses. J.A. 405 ¶ 25.

[6] The Probation Department used the 2006 version of the sentencing guidelines, which the government at defendant's sentencing hearing agreed (J.A.

(continued…)

adjustments and had the highest adjusted offense level, or the group that included conspiracy to commit sex trafficking and the substantive sex trafficking offense involving Ilana (Counts One and Four), compare (J.A. 408 ¶ 49 with J.A. 406 ¶ 34, 407 ¶ 41, 409 ¶ 55), the Probation Department added adjustments for multiple counts under U.S.S.G. § 3D1.4, to reach a total combined adjusted offense level of 42. See J.A. 409 ¶¶ 56-64. Using a criminal history category of II, the Probation Department calculated a guideline range of 360 months to life imprisonment. J.A. 411 ¶ 73, 413 ¶ 88.

Defense counsel filed objections, *inter alia*, to adjustments for vulnerable victim, use of a computer, obstruction of justice, and leadership role in a conspiracy. J.A. 435-438. The government responded and also filed victim-impact statements from Melissa and Stephanie. J.A. 424-431, 439-442.

At defendant's sentencing hearing, defense counsel objected (J.A. 355-359), *inter alia*, to adjustments for victim vulnerability, obstruction of justice, and use of a computer. He explained (J.A. 356) that "it would be improper to give [defendant] two additional levels for an unusually vulnerable victim * * * based on age" since the guideline provisions for both the substantive sex trafficking and

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354) was proper due to this Court's decision in *United States* v. *Lewis*, 606 F.3d 193 (2010).

drug distribution offenses, (U.S.S.G. § 2G1.3(b)(2)(B) and § 2D1.2(a)(3) specifically punish defendant for the victims' youth. Defense counsel also maintained (J.A. 357) that defendant's directive to Bentolila in the lockup "does not rise to the level of obstruction of justice [to warrant] * * * an additional two level increase and that's the extent of [our] argument on that." In addition, counsel argued (J.A. 357) that an adjustment for use of a computer was inappropriate because there was "no testimony * * * that [defendant] * * * actually used a computer" and even though "one of the victims contacted another of the young ladies and arranged for her to meet" defendant, his conduct did not "rise[] to the level of orchestrating."

In response, the United States repeatedly advised (J.A. 360) that it was not seeking and the district court should not apply the vulnerable victim adjustment "based upon [the] age" of the victims. See J.A. 361. The government maintained (J.A. 360) that the adjustment was appropriate, however, because defendant "took advantage" of Melissa's circumstances -- "knowing [her]" "family situation[]," "that she was homeless and sleeping in storage sheds" -- and "then * * * placed her with co-conspirators to enhance control over her." The government also maintained (J.A. 360-361) that the enhancement was justified because defendant "knowing[ly] * * * t[oo]k advantage of the[] [victims'] drug situation[s]" and

"pl[ied]" all three victims with "marijuana, cocaine, PCP, and alcohol to reduce their ability to say no, * * * make them more pliable, and easier to coerce."

In addition, the government argued that there was ample evidence to support enhancements for obstruction of justice and use of a computer. The government explained (J.A. 361) that defendant's directive to Bentolila "not to snitch" was "clearly an attempt to prevent * * * and to have * * * influence over her testimony" and "qualifies as obstruction of justice" particularly since she "expressed fear as far as [defendant's] threats of bodily harm." The government also maintained (J.A. 361-362) that the adjustment for use of computer was proper since defendant instructed Melissa to use the computer to recruit and contact Ilana.

The district court overruled (J.A. 366) defendant's objections and applied the adjustments for vulnerable victim, obstruction of justice, and use of a computer because it was "in agreement with the government on these * * * issues." The district court also enhanced defendant's sentence for defendant's leadership role in the drug distribution conspiracy, to which defense counsel did not object at defendant's sentencing.

As to the vulnerable victim adjustment, the district court explained that one victim "roam[ed] * * * the streets, * * * was living essentially in a dumpster almost," and like the other two girls came from a "dysfunctional famil[y]." J.A. 366-367. The district court also stressed that the adjustment was proper because

defendant "was able to take advantage of [the victims'] vulnerabilities" because "he gave them drugs." J.A. 367.

The district court also ruled that based on "all of the evidence," the obstruction of justice adjustment was justified since defendant sought to "influence" Bentolila. J.A. 367. The district court emphasized that because "everyone here agrees that [defendant while] * * * in [the] lockup", ordered coconspirator Bentolila "'Do the right thing and don't snitch'" and "I heard * * * clearly" how "she was afraid and nervous," I believe defendant intended "to obstruct the processes of the court and to influence [Bentolila's] testimony," and thus "clearly obstruct[ed] * * * justice." J.A. 367. The district court concluded (J.A. 367) that an adjustment for use of a computer was correct since defendant "directed and caused it[s]" use and "asked that * * * Elana [sic] * * * be recruited."

Prior to imposing sentence, the district court heard from defendant (J.A. 372-376), and noted (J.A. 380) that this was "a very, very serious case involving minors," who were "psychologically and physically coerced[,] * * * threatened," and "used for whatever purposes that [defendant] had." It nonetheless concluded (J.A. 382) that a sentence at the "low end of the guideline" range was appropriate.

## SUMMARY OF ARGUMENT

The district court correctly calculated the guideline range for defendant's sentence. The district court did not impermissibly double count on the basis of age

when it applied U.S.S.G. § 3A1.1 since it imposed the adjustment for victim vulnerability expressly for the reasons articulated by the government, all of which were unrelated to the victims' youth. The district court made findings based on ample evidence that defendant knowingly exploited Melissa, Stephanie, and Ilana's alcohol and drug habits and supplied them with alcohol and narcotics to facilitate his sex trafficking crimes. Melissa was also a vulnerable victim because she was destitute when she met defendant and he dominated and controlled her during the commission of his crimes. The district court did not err in applying § 3A1.1 to defendant's drug distribution offenses, which were grouped together, since defendant forced Melissa to use cocaine. Even if that were not the case, defendant is not entitled to relief since the guideline range for his drug offenses did not dictate his sentence on any count.

There are also sufficient findings based on the evidence to support the adjustments for use of a computer, obstruction of justice, and leadership role in a drug distribution conspiracy. The district court correctly enhanced defendant's sentence for use of a computer since defendant saw Ilana's photograph on the computer, directed Melissa to contact her about working for him as a prostitute, which she did. The adjustment for obstruction of justice was proper based on all the evidence in the case, which included multiple instances in which defendant sought to intimidate and threaten a prospective witness. The district court correctly

concluded that defendant willfully obstructed justice because he intended to prevent coconspirator Bentolila from disclosing information about his crimes to law enforcement authorities when he ordered her "not to snitch" while they were in adjoining holding cells in the federal courthouse. The district court correctly applied an adjustment for leadership role in a drug distribution conspiracy since defendant does not dispute that he was an organizer of a criminal endeavor that involved five or more participants. Even if that were not the case, defendant is not entitled to relief since that adjustment did not affect his overall guideline range or sentence on any count.

## ARGUMENT

### THE DISTRICT COURT CORRECTLY APPLIED VARIOUS ADJUSTMENTS TO DEFENDANT'S SENTENCING GUIDELINE RANGE

Defendant contends that the district court miscalculated his guideline range because it erroneously applied adjustments for vulnerable victim, use of a computer, obstruction of justice, and leadership role in a drug distribution conspiracy.[7] When assessing whether a sentencing court has properly applied the

[7] Defendant also alleges (Br. 20, 41-48) that the district court violated his Fifth and Sixth Amendment rights in applying enhancements and calculating a guideline range based on conduct that he neither admitted nor a jury found beyond a reasonable doubt. Since defendant repeatedly concedes (Br. 20-21, 46-48) that this Court, in *United States* v. *Grubbs*, 585 F.3d 793, 799 (4th Cir. 2009), cert.

(continued…)

guidelines, this Court generally reviews "factual findings for clear error and legal conclusions de novo." *United States* v. *Llamas*, 599 F.3d 381, 387 (4th Cir. 2010).

*A. The District Court Did Not Impermissibly Double Count On The Basis Of Age, Or Commit Plain Error When It Applied The Vulnerable Victim Adjustment Under U.S.S.G. § 3A1.1*

Defendant contends (Br. 21-29) that the district court should not have applied the vulnerable victim adjustment under U.S.S.G. § 3A1.1 because: (1) the adjustment constitutes double counting on the basis of age; (2) the named victims were not all unusually vulnerable; (3) the court did not adequately explain why each victim was vulnerable; (4) the district court relied on factors that are insufficient as a matter of law; and (5) drug users are not victims of drug offenses and their drug addiction cannot be a basis for their vulnerability to such crimes. Because defendant objected to the vulnerable victim enhancement in the district court only on the ground that it amounted to impermissible double counting, his newly raised claims must be reviewed by this Court for plain error only. See *United States* v. *Hughes*, 401 F.3d 540, 547 (4th Cir. 2005); *United States* v. *Hammoud*, 381 F.3d 316, 354 (4th Cir. 2004). To satisfy that standard, a defendant must show that: (1) there was error; (2) the error was plain; and (3) the

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(…continued)
denied, 130 S. Ct. 1923 (2010), rejected his claim and raises it merely to preserve it for *en banc* and Supreme Court review, we do not address it here.

error affected his substantial rights. See *United States* v. *Olano*, 507 U.S. 725, 732-734 (1993). Even if those conditions are met, this Court may decide to notice the error only if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 732 (internal quotation marks and citation omitted).

Sentencing Guideline § 3A1.l(b)(1) requires a two-level increase to an offense level "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim." The commentary to the Guideline defines a vulnerable victim as a person who "is unusually vulnerable due to age, physical, or mental condition, or who is otherwise particularly susceptible to criminal conduct." U.S.S.G. § 3A1.1, cmt.2. The adjustment "thus creates a two-prong," "fact-based" test that requires a sentencing court to assess whether "a victim was unusually vulnerable * * * [and] defendant knew or should have known of such unusual vulnerability." *Llamas*, 599 F.3d at 388. See *United States* v. *Bolden*, 325 F.3d 471, 500 (4th Cir. 2003) (outlining "two-part test").[8] Because a trial court is "uniquely well-positioned" to gauge those issues, particularly when it observes a

[8] Relying on *United States* v. *Hawes*, 523 F.3d 245, 255 (3d Cir. 2008), defendant maintains (Br. 22) that § 3A1.1(b)(1) mandates a three-part test that also requires proof that the victim's "susceptibility or vulnerability facilitated the defendant's crime in some manner." While this Court has explicitly held otherwise, see *Llamas*, 599 F.3d at 388; *Bolden*, 325 F.3d at 500, the evidence in this case easily satisfies that standard. See, pp. 25-28, *infra*.

victim testify, its findings should not be disturbed unless this Court is "left with the definite and firm conviction that a mistake has been committed." *United States* v. *Christiansen*, 594 F.3d 571, 574 (7th Cir. 2010); *United States* v. *Jenkins*, 566 F.3d 160, 163 (4th Cir.) (quoting *United States* v. *Dugger*, 485 F.3d 236, 239 (4th Cir. 2007)), cert. denied, 130 S. Ct. 330 (2009).

To apply § 3A1.1(b)(1), a sentencing court should consider "all relevant conduct." *Bolden*, 325 F.3d at 500. It may rely on a "variety of factors," including: (1) a defendant's giving a victim drugs or alcohol[9]; (2) a defendant's knowingly exploiting a victim's abuse of alcohol or narcotics[10]; (3) a victim's

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[9] See, *e.g.*, *United States* v. *Altman*, 901 F.2d 1161, 1165 (2d Cir. 1990) (17-year-old victim vulnerable to sexual exploitation because defendant gave her an amphetamine diet pill that made her "physically and mentally more vulnerable," or less able to resist); *United States* v. *Kapordelis*, 569 F.3d 1291, 1315-1316 (11th Cir. 2009) (minor sex crime victims vulnerable since defendant gave them alcoholic drinks that put them to sleep); *United States* v. *Kahn*, 175 F.3d 518, 520, 522 (7th Cir. 1999) (15-year-old victim vulnerable to distribution of a controlled substance when defendant gave her alcohol, locked his bedroom door, and insisted that she smoke marijuana). *Cf. ibid.* ("multiple vulnerable victims" under U.S.S.G. § 5K2.0 since defendant offered liquor and marijuana to ten teenagers attending party at his home).

[10] See, *e.g.*, *United States* v. *Amedeo*, 370 F.3d 1305, 1317-1318 (11th Cir. 2004) (18-year-old victim vulnerable to lawyer, who represented him, knew he was drug-addicted, and supplied him with cocaine); *United States* v. (*Monroe*) *Evans*, 272 F.3d 1069, 1091 (8th Cir. 2001) (minor victim vulnerable to prostitution when defendant knew she was drug-addicted and gave her alcohol and drugs), cert. denied, 535 U.S. 1029 (2002); *United States* v. *Pavao*, 948 F.2d 74, 78 (lst Cir. 1991) (20-year-old, who defendant knew was a drug user vulnerable to defendant's impersonating a federal drug agent).

relationship *vis a vis* the defendant[11]; and (4) a victim's personal circumstances, along with the particulars of the crime. *Humphries* v. *Ozmint*, 397 F.3d 205, 245 (4th Cir.), cert. denied, 546 U.S. 856 (2005). See generally U.S.S.G. § 3A1.1, cmt.2(B) (providing non-exhaustive list of characteristics that can cause a victim to be "particularly susceptible to criminal conduct"). See also *United States* v. *Pavao*, 948 F.2d 74, 78 (1st Cir. 1991) (victim's characteristics "combined with [the facts] of the crime" are determinative of whether that person is "unusual[ly] vulnerab[le]"). Thus, a victim's personal characteristics, such as homelessness, use of drugs, and/or family problems can cause a particular individual, depending

[11] See, *e.g.*, *United States* v. *Johnson*, 132 F.3d 1279, 1285-1286 (9th Cir. 1997) (17-year-old foreign exchange student vulnerable victim to sexual exploitation by parent of a host family with whom she lived); *United States* v. *Janis*, 71 F.3d 308, 310-311 (8th Cir. 1995) (minor, who was a foster child, lived in defendant's home, and was subject to removal, vulnerable victim to sexual exploitation); *United States* v. *Hershkowitz*, 968 F.2d 1503, 1505 (2d Cir. 1992) (prisoner in custody and surrounded by guards vulnerable victim to officer's assault); *United States* v. *Newman*, 965 F.2d 206, 212 (7th Cir.) (21-year-old, who was "completely under [defendant's] domination," vulnerable victim to fraud), cert. denied, 506 U.S. 976 (1992). *Cf. United States* v. *Dock*, 426 F.3d 269, 273 (5th Cir. 2005) (illegal aliens vulnerable victims to illegal transport once defendant locked them in truck), cert. denied, 546 U.S. 1144 (2006); *United States* v. *Tapia*, 59 F.3d 1137, 1143 (11th Cir.) (government informant who was incarcerated with defendant vulnerable victim to jail cell beating), cert. denied, 516 U.S. 953 (1995).

on the circumstances, to be unusually vulnerable to a defendant's sexually exploitive crimes.[12]

While a sentencing court impermissibly double counts if it bases an adjustment on a factor that is specifically "incorporated in the offense guideline," it correctly applies § 3A1.1 when it finds a victim vulnerable for reasons not included in the guideline provision. *United States* v. *Grubbs*, 585 F.3d 793, 805 (4th Cir. 2009) (quoting U.S.S.G. § 3A1.1, cmt.2), cert. denied, 130 S. Ct. 1923

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[12] See, *e.g.*, *United States* v. *Irving*, 554 F.3d 64, 75 (2d Cir. 2009) (homeless children without parental or other adult guidance vulnerable victims to defendant's sexual offenses); *United States* v. *Starr*, 533 F.3d 985, 1002 (8th Cir.) (minor with psychological and family problems vulnerable victim to defendant's sex offenses), cert. denied, 129 S. Ct. 746 (2008); *United States* v. *Julian*, 427 F.3d 471, 490 (7th Cir. 2005) ("street children without housing and food" to whom defendant gave food and shelter are vulnerable victims to his sexual exploitation), cert. denied, 546 U.S. 1220 (2006); *United States* v. *Monsalve*, 342 F. App'x 451, 457-458 (11th Cir. 2009) (illegal aliens with no jobs, income, place to live, or family nearby vulnerable victims to prostitution scheme), cert. denied, 130 S. Ct. 2119 (2010); *United States* v. *Williams*, 291 F.3d 1180, 1195-1196 (9th Cir. 2002) (runaway minor, who had been raped and whose mother was drug dependent, vulnerable victim to defendant's sexual exploitation); *United States* v. *(Levorn) Evans*, 285 F.3d 664, 672 (8th Cir. 2002) (runaway minor, who lacked parental guidance and had lived in a juvenile facility, vulnerable victim to Mann Act violations), cert. denied, 537 U.S. 1196 (2003); (*Monroe*) *Evans*, 272 F.3d at 1089-1090 (minor, whose father had died, mother had been incarcerated, and who had previously worked as a prostitute vulnerable victim to prostitution); *United States* v. *Somner*, 127 F.3d 405, 408 (5th Cir. 1997) (13-year-old neighbor, who had family problems vulnerable victim to interstate transport for illegal sexual activities with defendant); *United States* v. *White*, 979 F.2d 539, 544 (7th Cir. 1992) (minor, who lived in a group home, had troubled childhood and history of sexual abuse was vulnerable victim to being transported for prostitution).

(2010). Thus, it is well settled that a sentencing court does not impermissibly double count on the basis of age when the offense guideline specifically penalizes a defendant specifically for the victims' youth, but the adjustment is imposed "for reasons unrelated to age." U.S.S.G. § 3A1.1, cmt.2.[13]

Moreover, when an offense has multiple victims, the government need only prove that one victim was unusually vulnerable. *Llamas*, 599 F.3d at 388 (adjustment applies when "one or more victims unusually vulnerable to the offense conduct"). See *Christiansen*, 594 F.3d at 575; *United States* v. *Zats*, 298 F.3d 182, 190 (3d Cir. 2002); *United States* v. *Smith*, 133 F.3d 737, 749 (10th Cir. 1997), cert. denied, 524 U.S. 920 (1998). For purposes of § 3A1.1, "the victims of the offense [are] based not only on the offense of conviction, but on all relevant conduct." *Bolden*, 325 F.3d at 500. See *United States* v. *Blake*, 81 F.3d 498, 503-504 (4th Cir. 1996). See also U.S.S.G. § 3A1.1, cmt.2(A) (vulnerable victim includes "a person who is a victim of * * * any conduct for which the defendant is accountable under § 1B1.3"). Consequently, so long as a defendant, during or in preparation for an offense, victimizes a person "particularly susceptible to [his] criminal conduct," the adjustment applies regardless of whether that individual "is

[13] See, *e.g.*, *Grubbs*, 585 F.3d at 805-806; *Julian*, 427 F.3d at 489; *United States* v. *Wright*, 373 F.3d 935, 944 (9th Cir. 2004); *United States* v. *Gawthrop*, 310 F.3d 405, 412 (6th Cir. 2002); *(Monroe) Evans*, 272 F.3d at 1089-1090; *Somner*, 127 F.3d at 406; *Altman*, 901 F.2d at 1165.

* * * considered a victim of the specific offense of conviction." *Blake*, 81 F.3d at 503-504. See *Bolden*, 325 F.3d at 500.

*1. The District Court Did Not Impermissibly Double Count*

The district court did not impermissibly double count on the basis of age when it applied § 3A1.1(b)(1). At defendant's sentencing, the government several times stated that the vulnerable victim adjustment should *not* be applied because of the victims' youth. See J.A. 360 (explaining that "[t]he vulnerable victim enhancement * * * is not based upon age,* * * [but] other factors"); J.A. 361 (emphasizing that "the vulnerable victim enhancement is not [sought] or based upon the age of the victim[s]"). Indeed, the district court applied the adjustment expressly for the reasons articulated by the government, none of which related to the victims' ages. The government explained that the adjustment was proper because defendant "t[oo]k advantage of [the victims'] drug situation[s], "pl[ied all three victims] with drugs * * * to reduce their ability to say no and * * * to make them * * * easier to coerce," "took advantage" of [Melissa's] situation," and "placed [Melissa] with co-conspirators to enhance [his] control over her." J.A. 360-361. Consequently, the district court did not impermissibly double count based on the victims' youth when it applied the vulnerable victim adjustment.

Defendant nonetheless argues (Br. 24-25) that the district court must have impermissibly double counted since it remarked (J.A. 366) that "the evidence * * *

suggests that [the adjustment] is not based on age *so much*" (emphasis added). That comment on its face does not suggest that there is an insufficient basis, unassociated with age, to sustain the enhancement. Nor does it transform multiple factors unrelated to age into age-based criteria. In addition, given the deference afforded a sentencing court's findings regarding victim vulnerability, there is no clear error when, as here, there is a "plausible" basis unrelated to age to support the adjustment. *Pavao*, 948 F.2d. at 78. See *United States* v. *Haines*, 32 F.3d 290, 293-294 (7th Cir. 1994) (no double counting when there is overlap between adjustments "so long as there is a sufficient factual basis for each" enhancement). See, *e.g.*, *United States* v. *(Levorn) Evans*, 285 F.3d 664, 672 (8th Cir. 2002), cert. denied, 537 U.S. 1196 (2003).

*2. Ample Evidence Supports The Adjustment*

The district court did not err, much less commit plain error when it applied § 3A1.1(b)(1) because "overwhelming and essentially uncontroverted" evidence establishes that all three named victims were unusually susceptible to defendant's crimes. See *United States* v. *Cotton*, 535 U.S. 625, 635 (2002). Melissa, Stephanie, and Ilana were all vulnerable victims because defendant knowingly exploited their alcohol and drug habits to facilitate his sex trafficking crimes. Within hours of separately meeting them, he supplied each with alcohol, marijuana, cocaine, PCP, and/or ecstasy. J.A. 35, 158, 217-219, 226. For days

and/or weeks on end, and throughout the pendency of the conspiracy, defendant provided the girls with an endless supply of alcohol and narcotics so long as they prostituted themselves for his benefit. J.A. 102, 104-105, 133, 158-159, 171, 196, 198, 219, 226, 236-237, 243-244, 260, 262, 268, 316, 325-326, 329-330. On one occasion, defendant provided Stephanie with so much alcohol and cocaine that she overdosed and had a seizure. J.A. 105-106. Accordingly, because defendant knowingly took advantage of all three girls' dependence on alcohol and drugs to induce them to become prostitutes and participate in his sex trafficking activities, they were vulnerable victims within the meaning of § 3A1.1(b)(1). See, *e.g.*, *United States* v. *Amedeo*, 370 F.3d 1305, 1317-1318 (11th Cir. 2004) (18-year-old's "drug addiction rendered him unusually vulnerable" to his lawyer's supplying him with cocaine); *United States* v. (*Monroe*) *Evans*, 272 F.3d 1069, 1091 (8th Cir. 2001) (drug-addicted victim, whom defendant "picked up upon her release from prison and furnished with alcohol and drugs" was "atypically vulnerable" to defendant's sexual exploitation), cert. denied, 535 U.S. 1029 (2002).

All three young women were also vulnerable victims because defendant insisted that they use alcohol and drugs prior to engaging in a commercial sex act. Before meeting with customers, defendant made certain that Melissa, Stephanie, and Ilana used a combination of alcohol and narcotics so they would be compliant and perform sex on demand. J.A. 31-32, 64, 113, 316, 326-328. Accordingly,

because defendant plied all three victims with alcohol and drugs to induce them to accede to his customers' sexual demands, each was a vulnerable victim under § 3A1.1(b)(1). See, *e.g.*, *United States* v. *Kahn*, 175 F.3d 518, 522 (7th Cir. 1999) (adolescents vulnerable victims because they were offered alcohol and marijuana at party at defendant's home); *United States* v. *Altman*, 901 F.2d 1161, 1162 (2d Cir. 1990) (minors vulnerable victims to sexual exploitation because defendant "plied [them] with * * * amphetamine diet pill[s]").

The district court was also entitled to apply § 3A1.1(b)(1) because Melissa was a "vulnerable victim" for two additional reasons. During the spring of 2007, Melissa was a homeless, high-school dropout, who had no contact with her family, including her mother, who was recently divorced and who lived in a shelter. J.A. 205-206, 214-215, 230, 279, 424. When Melissa met defendant, she was hungry, had nothing other than the clothes she was wearing, and spent hours sitting in restaurants because she had no place to go. J.A. 107, 206, 213-214, 278-279, 424. Within hours of meeting defendant, who gave her alcohol and marijuana, Melissa had sex with him and his cousin because she needed a place to sleep. J.A. 217-219. Accordingly, because Melissa was destitute and desperate for the necessities to survive when she met defendant, she was a vulnerable victim. See, *e.g.*, *United States* v. *Irving*, 554 F.3d 64, 75 (2d Cir. 2009) ("children who were homeless and were without parental or other appropriate guidance" were vulnerable victims to

defendant's sexually exploitive crimes); *United States* v. *Dock*, 426 F.3d 269, 273 (5th Cir. 2005) (illegal aliens in "desperate circumstances" and "desperate for transport" vulnerable victims to defendant's conspiring to transport illegal aliens); *Zats*, 298 F.3d at 185 (person who is "facing personal emergencies * * * qualif[ies]" as a vulnerable victim).

Melissa was also a vulnerable victim because she was "completely under [defendant's] domination" during the overlapping conspiracies. *United States* v. *Newman*, 965 F.2d 206, 212 (7th Cir.), cert. denied, 506 U.S. 976 (1992). The day after meeting Melissa, defendant took advantage of her precarious situation and arranged for her to live with Tibbs and Bentolila. See, *e.g.*, *United States* v. *Julian*, 427 F.3d 471, 490 (7th Cir. 2005) ("desperate street children without housing and food," whom defendant "t[oo]k advantage of by * * * offering [them] shelter, housing and food" were vulnerable victims to his sexual exploitation), cert. denied, 546 U.S. 1220 (2006). While living with Bentolila, Melissa was terrified and did what she was told because defendant raped and repeatedly assaulted her, threatened to kill her, and harm her baby sister. J.A. 107, 110-111, 208-209, 261-264, 275-277. He forced her to use cocaine, take pills, which kept her "awake" or "knock[ed] [her] out," and to be a prostitute for his financial gain. J.A. 266. Accordingly, because Melissa was a vulnerable victim due to defendant's control, the district court was entitled to apply § 3A1.1(b)(1) to all four guideline

groupings. See, *e.g.*, *Kahn*, 175 F.3d at 522 (15-year-old vulnerable victim to distribution of a controlled substance when defendant gave her alcohol, locked his bedroom door, and insisted she smoke marijuana).[14]

*3. The District Court Adequately Explained The Basis For The Adjustment*

Contrary to defendant's contention (Br. 23), the district court did not plainly err in "set[ting] forth its rationale" for imposing the adjustment. First, the district court stated that it was applying § 3A1.1(b)(1) expressly because it was "in agreement with the government" that it was warranted. That statement, in and of itself, is sufficient to sustain the adjustment. See *United States* v. *Singh*, 54 F.3d 1182, 1192 (4th Cir. 1995) ("government's ojections" sufficient to sustain

[14] Defendant contends (Br. 23) that "because the sex trafficking offenses were separately grouped based upon the individual victim, the vulnerable victim adjustment for each group must be based on the particular victim involved." Precedent establishes otherwise since this Court has repeatedly held that the offense, along with defendant's relevant conduct – not the vulnerability of a particular victim – determines whether the adjustment applies. See *Bolden*, 325 F.3d at 500 (Because "the vulnerable victim adjustment [is] based not only on the offense of conviction, but on all relevant conduct, '[w]e * * * reject (the defendant's) argument that, for the purpose of § 3A1.1 a victim of the offense is only an individual considered a victim of the specific offense of conviction.'") (quoting *Blake*, 81 F.3d at 503-504). Since each of defendant's substantive sex trafficking offenses (Counts Two, Three, and Four) was separately grouped with conspiracy to commit sex trafficking (Count One), the enhancement applies to each group because Melissa was a vulnerable victim.

§ 3A1.1(b)(1) so long as they "clearly expound specific facts" supporting enhancement).

The district court also highlighted the evidence that established that the named victims, and Melissa individually, were vulnerable victims. It explained defendant "gave [all three girls] drugs" and "t[oo]k advantage" of Melissa who "roam[ed] * * * the streets, * * * was living essentially in a dumpster," and came from a "dysfunctional famil[y]." J.A. 366-367. Consequently, the government's representations coupled with the district court's comments are more than adequate to explain the basis for the adjustment.[15]

[15] Contrary to defendant's suggestion (Br. 22), *Llamas*, 599 F.3d at 389, does not dictate a contrary conclusion. In *Llamas*, this Court held that a "conclusory assertion" that defendant "should have known" that 2 of 500 "randomly" chosen victims were vulnerable was insufficient to establish why that was the case when the district court offered "*no* explanation" and the government "produced *no* evidence concerning [defendant's] knowledge of the victims' vulnerabilities." *Ibid.* (emphasis added).

Here, unlike in *Llamas*, not only is there no dispute that defendant knew that his victims abused alcohol and drugs and that Melissa was destitute, but the evidence is overwhelming and uncontradicted as to both. See discussion, pp. 23-26, *supra*. In addition, since the district court, here, expressly adopted the government's rationale for the adjustment and highlighted the relevant evidence, *Llamas* does not suggest that its findings are inadequate, much less amount to plain error.

*4. The District Court Did Not Err In Concluding That Melissa Was A Vulnerable Victim Due To Her Dire Circumstances*

Relying on *United States* v. *Scott*, 529 F.3d 1290, 1302 (10th Cir. 2008), *United States* v. *Williams*, 291 F.3d 1180, 1195-1196 (9th Cir. 2002), *United States* v. *Castaneda*, 239 F.3d 978, 981-982 (9th Cir. 2001), and *United States* v. S*abatino*, 943 F.2d 94, 103 (lst Cir. 1991), defendant claims (Br. 25-29) that the district court erred "as a matter of law" when it relied on certain personal characteristics of the victims' to apply the adjustment. First, defendant's reliance is misplaced since an error is plain only "when the settled law of the Supreme Court or this [C]ircuit establishes that an error has occurred." *United States* v. *Reid*, 523 F.3d 310, 316 (4th Cir.) (quoting *United States* v. *Promise*, 255 F.3d 150, 160 (4th Cir.) (*en banc*), cert. denied, 535 U.S. 1098 (2001)), cert. denied, 129 S. Ct. 663 (2008).

In addition, the precedent upon which defendant relies does not establish that the district court erred. In *Sabatino*, *Williams*, *Castaneda*, and *Scott*, the First, Ninth, and Tenth Circuits ruled that a district court cannot apply § 3A1.1 merely on the basis of generalized factors that reflect a person's status or membership in a class typical of victims of defendant's offense, but must make an "individualized" determination that a particular victim was unusually susceptible in the context of the case. *Scott*, 529 F.3d at 1300; *Castaneda*, 239 F.3d at 982 n.5. See *Williams*, 291 F.3d at 1196 (holding that "the enhancement for victim vulnerability still is

appropriate if the district court makes a finding of unique vulnerability in the circumstances" of the case).[16]

Those cases do not control, here, since Melissa's extreme level of desperation can hardly be typical among victims of sex trafficking offenses. See, *e.g.*, *Julian*, 427 F.3d at 490 (recognizing that victims of sexual exploitation are not "invariably vulnerable because they are homeless or without financial support"); *Dock*, 426 F.3d at 273 (explaining that illegal aliens were vulnerable victims because "not every illegal alien who enters this country finds themselves in the desperate circumstances these people faced").[17] Nor do they establish that the

[16] See, *e.g.*, *Scott*, 529 F.3d at 1300, 1302 (affirming vulnerability adjustment for victim of sexual exploitation because district court made "an individualized determination" that victim was vulnerable due to size, immaturity, and runaway status); *Williams*, 291 F.3d at 1196 (reversing vulnerability adjustment based on minor prostitute's "status" as "a drug-addicted teenage runaway" because "the district court did not make any findings as to [victim's] relationship with * * * [d]efendant and his potential exploitation of that vulnerability"); *Castaneda*, 239 F.3d at 983 (vacating vulnerability adjustment based on low income, indebtedness, and lack of financial resources since such characteristics are "typical" of victims of Mann Act violations); *Sabatino*, 943 F.2d at 103 (vacating adjustment based on two victims being mothers of small children and many being out of work since those traits do not distinguish them "from the typical individuals who would fall prey to a Mann Act violator").

[17] Because the United States does not dispute that Stephanie and Ilana were vulnerable victims merely because defendant exploited their alcohol and drug habits and insisted they use alcohol and narcotics prior to each sexual encounter with a paying customer, see discussion, pp. 25-26, *supra*, we address defendant's claim only as it relates to Melissa's personal characteristics.

district court impermissibly relied on Melissa's dire circumstances to conclude that she was a vulnerable victim. The district court did not conclude that Melissa was particularly susceptible to defendant's crimes based on broad, unsupported generalizations relating to her status. Nor did it find that Melissa was vulnerable "per se" because of any particular trait or combination of circumstances. See *Scott*, 529 F.3d at 1302. Rather, the district court made an individualized assessment and correctly found that Melissa was a vulnerable victim because of her specific circumstances – or because she was so destitute that she was "roam[ing] * * * the streets and * * * was living essentially in a dumpster." Thus, the district court did not err much less commit plain error in applying § 3A1.1 due to Melissa's particularly devastating and desperate circumstances. Even if that were not the case, however, defendant is not entitled to relief since this Court can easily affirm the application of the adjustment for multiple reasons unrelated to Melissa's dire situation. See discussion, pp. 25-28, *supra*.

*5. The Adjustment Was Properly Applied To Defendant's Drug Offenses*

The district court did not plainly err in applying the adjustment to defendant's drug offenses (Counts Six, Seven, and Eight), which were grouped together. To the extent that defendant contends (Br. 30) that a sentencing court can never rely on a victim's use of, or addiction to alcohol or drugs to apply § 3A1.1 when as here, a defendant is convicted of drug offenses, he is wrong. See *Amedeo*,

370 F.3d at 1317 (victim's "drug addiction rendered him unusually vulnerable to [defendant's] supplying him cocaine"); *Kahn*, 175 F.3d at 522 (teenagers who were offered liquor and marijuana vulnerable victims to defendant's distributing a substance to another person who was under 21 years of age). See also *United States* v. *Gonzalez*, 183 F.3d 1316, 1326 (11th Cir. 1999) (rejecting defendants' argument that victim vulnerability enhancement is improper in a drug-conspiracy case), cert. denied, 528 U.S. 1144 (2000). Defendant also ignores that Melissa was a vulnerable victim to his drug distribution because he repeatedly forced her to use cocaine while she was living with coconspirator Bentolila and subject to his control. See, *e.g.*, *Kahn*, 175 F.3d at 520, 522 (15-year-old vulnerable victim to distribution of controlled substance when defendant gave her alcohol and forced her to smoke marijuana). In any event, application of § 3A1.1 to defendant's drug distribution offenses does not entitle defendant to relief since it did not affect his overall guideline range or sentence on any count. See *Grubbs*, 585 F.3d at 806.

*B. The District Court Did Not Clearly Err When It Applied An Adjustment For Use Of A Computer Under U.S.S.G. § 2G1.3(b)(3)*

Defendant contends (Br. 31-33) that the district court erred in enhancing the guideline level for use of a computer under U.S.S.G. § 2G1.3(b)(3) for conspiracy to commit sex trafficking and the substantive sex trafficking offense involving Ilana (Counts One and Four) because: (1) he did not personally use the computer;

and (2) the evidence does not support the inference that Melissa used the computer to contact Ilana.

Sentencing Guideline § 2G1.3(b)(3) provides for a two-level increase to an offense level if a "computer or interactive computer service" is used to "persuade, induce, entice, coerce, or facilitate * * * a minor to engage in prohibited sexual conduct." It does not require a defendant to personally use a computer, but merely that a computer be used. See *United States* v. *Vance*, 494 F.3d 985, 993 (11th Cir. 2007) (enhancement applies when defendant directs another, but does not actually use computer). See also *United States* v. *Dotson*, 324 F.3d 256, 259 (4th Cir. 2003) (enhancement for use of a computer under U.S.S.G. § 2G2.2(b)(5) applies even if a defendant did not personally use the computer since enhancement "makes no mention of the defendant, but focuses on the mechanism involved in the offense"). The adjustment likewise does not require that a message soliciting sexual conduct be transmitted via computer, but merely that a computer "facilitate * * * [a] minor['s] engage[ing] in a prohibited sexual act." U.S.S.G. § 2G1.3(b)(3). See *United States* v. *Lay*, 583 F.3d 436, 447 (6th Cir. 2009) (enhancement applies regardless of whether computer is used to make sexual request). See also U.S.S.G. § 2G2.2(b)(6) (requiring a two level increase "[i]f the offense involved the use of a computer or an interactive computer service" for specific functions, including "the *possession, transmission, receipt, or*

*distribution*") (emphasis added). Consequently, defendant's claims do not indicate that the application of § 2G1.3(b)(3) was error.

In any event, the evidence does not suggest that Melissa failed to use the computer to contact Ilana. Melissa testified that once defendant saw Ilana's photo on MySpace and said "he wanted her," she "typed" her. J.A. 267. Consequently, the district court did not plainly err in concluding that Melissa communicated with Ilana via computer about working as a prostitute.

Even if that were not the case, there is ample evidence to support the adjustment. Defendant does not dispute (Br. 32) that he viewed Ilana's photograph on Melissa's MySpace page, that he directed Melissa to contact Ilana about working as prostitute, and as a result Ilana worked for him in that capacity. Since Ilana would not have worked for defendant as a prostitute without his seeing her picture on the computer, the computer clearly "facilitated" Ilana's engaging in a prohibited sex act. Thus, the district court did not err in applying § 2G1.3(b)(3). See *Lay*, 583 F.3d at 447 ("When a predator uses a computer to make friends with a potential victim, [§ 2G1.3(b)(3)] * * * appl[ies] because the predator is using a computer to entice the minor to engage in prohibited sexual conduct.").

Moreover, contrary to defendant's claim (Br. 31) that "[t]he only testimony [that] even remotely involved use of a computer was Melissa's," the record reveals several instances of use of a cell phone, which can be considered a computer. The

commentary to Guideline § 2G1.3(b)(3) provides that a computer has "the [same] meaning [as] in 18 U.S.C. 1030(e)(1)," or includes "an electronic * * * or other high speed data processing device performing * * * storage function and includes any data storage facility or communications facility directly related to or operating in conjunction with such device." § 2G1.3(b)(3), cmt.1. See *United States* v. *Kramer*, 631 F.3d 900, 902 (8th Cir. 2011) (computer under § 2G1.3(b)(3) includes a "basic cell phone" regardless of whether the device is used to access the internet).

The record reflects that on the night Melissa and Stephanie engaged in a commercial sex act in Washington, D.C., Bentolila photographed them and transmitted their pictures via a Nextel smart phone to the customer for his approval. J.A. 120; S.J.A. 8-10. Tibbs also repeatedly used a cell phone to contact prospective customers and Melissa spoke to defendant via cell phone the night he drove to a lake and threatened Stephanie with a gun. J.A. 252, 317, 321. Accordingly, the district court did not clearly err in increasing defendant's guideline level by two levels for use of a computer under § 2G1.3(b)(3).[18]

[18] Although it had no impact on the overall adjusted offense level or defendant's sentence on any count, § 2G1.3(b)(3) could have been applied to all three sex-trafficking groupings, rather than merely the grouping that included the substantive sex trafficking offense involving Ilana (Counts One and Four) since each substantive sex trafficking offense was grouped with conspiracy to commit

(continued…)

*C. The District Court Did Not Clearly Err When It Imposed An Adjustment For Obstruction Of Justice Under U.S.S.G. § 3C1.1*

Defendant contends (Br. 34-38) that his sentence was improperly enhanced two levels under U.S.S.G. § 3C1.1 for obstructing justice because the evidence is insufficient to demonstrate and the district court did not find that he acted willfully.

Sentencing Guideline § 3C1.1 requires a two-level increase to an offense level "[i]f * * * the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice [during] the investigation, prosecution, or sentencing of the instant offense[s] of conviction." The commentary to the Guideline, which provides "a non-exhaustive list of examples" of covered conduct, states that "threatening, intimidating, *or otherwise unlawfully influencing* a co-defendant [or] witness * * * directly or indirectly, *or attempting to do so*" constitutes willful obstruction of justice. U.S.S.G. § 3C1.1, cmt.4(a) (emphasis added). Thus, the adjustment applies when a defendant intends to unlawfully interfere with a witness, regardless of whether he threatens or intimidates that person, or attempts to do so.

To apply the enhancement, a sentencing court must conclude that a

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(…continued)
sex trafficking, which necessarily encompassed defendant's viewing Ilana's photograph on the computer.

defendant "willfully obstructed justice." To satisfy that requirement, a court need not make a "specific finding" as to a defendant's intent, or specifically mention "willfulness." *United States* v. *Castner*, 50 F.3d 1267, 1279 (4th Cir. 1995); *United States* v. *Cook*, 76 F.3d 596, 605 (4th Cir.), cert. denied, 519 U.S. 939 (1996). See, *e.g.*, *United States* v. *Akinkoye*, 185 F.3d 192, 205 (4th Cir. 1999), cert. denied, 528 U.S. 1177 (2000); *United States* v. *Murray*, 65 F.3d 1161, 1165 (4th Cir. 1995). Rather, as long as a sentencing court's comments encompass "the factual predicate for a finding" that a defendant acted with the requisite intent, this Court may infer that the sentencing court found that a defendant "willfully obstructed * * * justice." *Castner*, 50 F.3d at 1279 (internal quotation marks and citation omitted); *Cook*, 76 F.3d at 605.

The government satisfies its burden if it establishes a defendant "willfully obstructed justice" by a preponderance of the evidence. See *United States* v. *Kiulin*, 360 F.3d 456, 460 (4th Cir. 2004); *United States* v. *Puckett*, 61 F.3d 1092, 1095 (4th Cir. 1995). Under that standard, the relevant facts must be shown to be more likely than not and a sentencing court, "is entitled to rely on circumstantial evidence and on all reasonable inferences that may be drawn from all of the evidence." See *United States* v. *Khedr*, 343 F.3d 96, 102 (2d Cir. 2003); *United States* v. *Montano*, 250 F.3d 709, 713 (9th Cir. 2001). "Because the question of willfulness is essentially a finding of fact * * * subject to clearly erroneous

review", this Court must accept a sentencing court's interpretation of the evidence so long as it plausible. *United States* v. *Gormley*, 201 F.3d 290, 294 (4th Cir. 2000) (internal quotation marks and citation omitted). See *United States* v. *Hughes*, 401 F.3d 540, 546 (4th Cir. 2005).

Taking the record as a whole, there is ample evidence to establish that defendant "willfully obstructed justice." It is undisputed that on February 3, 2009, while in the lockup in the federal courthouse, defendant told Bentolila "[t]o do the right thing and not snitch." J.A. 130. Bentolila, who at that time had not seen defendant for nearly two years, testified that she understood defendant's comment to mean that she was "not to talk, not to open [her] mouth, not to say anything at all." J.A. 130. She also related that during the pendency of the conspiracies, she was under defendant's control and repeatedly observed him assault, threaten, and abuse various persons who disobeyed his orders. J.A. 103-105, 107, 110-111, 113, 121-122, 126, 142, 150, 159. The district court had the opportunity to observe Bentolila testify and heard other evidence that defendant sought to intimidate or threaten prospective witnesses.[19] Accordingly, the district court did not clearly err

[19] When defendant learned that Stephanie was no longer going to work as a prostitute, he had her fire a gun out a car window so that she would have "gunpowder of her hands," or be deterred-from reporting his sex trafficking activities to the police. J.A. 330. In May 2007, after Melissa told defendant that she had been questioned by the police, he ordered that if she were re-interviewed

(continued…)

in concluding that defendant's directive "not to snitch" was a threat intended to interfere with and/or prevent Bentolila from disclosing information about defendant's crimes to law enforcement authorities.[20]

The district court's findings are also sufficient to sustain the adjustment. The district court explained that the enhancement was justified because it was "in agreement with the government" that defendant intended "to obstruct the processes

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(…continued)
by law enforcement authorities to "lie about her age" and claim that he had "no idea as to her actual age," "nothing to do with anything they were asking, and that "the [night] [she] had gone * * * to D.C.,* * * he was at a strip club * * * and it was all [Tibbs'] fault." J.A. 210-211. Melissa followed defendant's directive during several subsequent meetings with the police because she "was terrified "of him. J.A. 211. Because each of these episodes individually and coupled with defendant's directive to Bentolila in the holding cell amounts to obstruction of justice, this Court should affirm the adjustment under § 3C1.1. See *United States* v. *Garnett*, 243 F.3d 824, 830 (4th Cir. 2001) (sentence enhancement may be affirmed on the basis of '"any conduct [in the record] that independently and properly should result in an increase in the offense level' by virtue of the enhancement") (quoting *United States* v. *Ashers*, 968 F.2d 411, 414 (4th Cir.), cert. denied, 506 U.S. 1027 (1992)).

[20] See, *e.g.*, *United States* v. *Stewart*, 256 F.3d 231, 253-254 (4th Cir.) (affirming enhancement due to defendant's gun-like gesture in the presence of jurors because question of whether it was "intended as intimidation was a factual finding" that was not clearly erroneous), cert. denied, 534 U.S. 1049 (2001); *Murray*, 65 F.3d at 1165 (affirming enhancement because sentencing court's determination that defendant "willful[ly] * * * provid[ed] false testimony," or "committed perjury" is a "factual determination reviewed for clear error") (internal quotation marks omitted); *United States* v. *Lowder*, 148 F.3d 548, 552-553 (5th Cir. 1998) (affirming enhancement because district court's conclusion that defendant counseled or induced attorney to call perjurious witness was not "implausible").

of the court and to influence [Bentolila's] testimony." J.A. 366-367. See J.A. 361. The district court emphasized that it observed Bentolila "testify," evaluated "all the evidence associated [with] the case," and "heard * * * clearly" that "she was afraid and nervous" due to her encounter with defendant. J.A. 367. Consequently, because the district court's comments clearly reflect that it concluded that defendant intended to influence Bentolila, the record is "sufficient to show that the court f[ou]nd that [defendant] willfully obstructed justice." *Cook*, 76 F.3d at 605.

*D. The District Court Did Not Clearly Err When It Imposed An Adjustment For Defendant's Leadership Role In The Drug Distribution Conspiracy Under U.S.S.G. § 3B1.1(a)*

Defendant contends (Br. 39) that the district court should not have increased the guideline range for his drug offenses (Counts Six, Seven, and Eight), which were grouped together, for his role as an "organizer or leader" under U.S.S.G. § 3B1.1(a). According to defendant (Br. 39) that is because "the [d]istrict court did not distinguish between the sex trafficking * * * and * * * drug distribution conspiracy" and the government "identif[ied] the five persons * * * involved in the sex trafficking," but not the drug distribution conspiracy at his sentencing hearing.

Sentencing Guideline § 3B1.1(a) provides for an increase of four levels "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants." The evidence establishes and defendant does not dispute that there were at least seven persons involved in the drug distribution conspiracy, or

that in addition to himself, Crystal Brown, her cousin Chris, Angela Bentolila, Shantia Tibbs, Thomas C. King, and Paul Green were participants. Consequently, the district court did not err in applying the adjustment. In any event, since the adjustment did not impact defendant's overall guideline range or sentence on any count, defendant is not entitled to relief. See *Grubbs*, 585 F.3d at 806.

## CONCLUSION

WHEREFORE, defendant's sentence should be affirmed.

Respectfully submitted,

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## STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to oral argument if the Court believes it would be helpful.

RESET FORM

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

**No.** 10-4806 **Caption:** United States of America v. Lloyd Mack Royal, III

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(s) Lisa J. Stark

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Dated: 04/14/2011

## CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2011, eight copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE were delivered by first-class, certified mail to the Clerk of the Court. I also certify that the foregoing brief was filed with the Clerk of the Court and served on the following counsel of record through the CM/ECF system:

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