19-4110

To Be Argued By:
ALEXANDRA A.E. SHAPIRO

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

LANDONG WANG,

Defendant,

DAN ZHONG,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

ALEXANDRA A.E. SHAPIRO
DANIEL J. O'NEILL
JULIAN S. BROD
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Attorneys for Defendant-Appellant

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INTRODUCTION

Appellant Dan Zhong, a Chinese citizen, was convicted of forced labor and related offenses. The charges arose from his company's employment of Chinese workers on private construction projects in the New York area between 2010 and 2016. The workers came to the U.S. on work visas, voluntarily signed employment contracts, and earned significantly more money than they would have in China, doing construction at both Chinese diplomatic facilities and private sites. There was no hint of violence or threats of violence. The employees worked and travelled openly: They wore jackets emblazoned with the company's logo; worked alongside U.S. construction firms and under college-educated U.S. project managers; received training on OSHA regulations; unloaded materials on Fifth Avenue in midtown Manhattan; and engaged in normal leisure activities like sightseeing and barbecues. The government called no witnesses alleged to be "victim" workers during or close to the indictment period. The defense, by contrast, presented stipulated testimony from three Chinese employees, all of whom described positive experiences working for the company during the charged timeframe.

Nonetheless, the prosecution argued that certain provisions in the employment contracts were economically coercive. Its case on the actual charges was a dry, plodding exegesis of whether contractual terms (such as deferring

payment of wages until after the workers returned to China) were so coercive as to demonstrate forced labor, irrespective of the workers' actual experiences. To sensationalize its presentation and overcome critical gaps in its proof, the government resorted to two forms of inadmissible evidence, which together formed the backbone of its case.

First, the government presented disturbing testimony that nearly a decade earlier, in 2001 and 2002, *others* at the company (Rilin) kept workers confined at the Chinese Consulate and engaged in egregious threats and acts of violence against workers who attempted to "escape." For instance, one worker testified that, after leaving, he was pursued by Rilin employees, abducted off the streets of New York, and brought back to the Consulate, where he was placed under guard. Rilin's owner—Zhong's uncle—threatened to break the worker's legs and threatened his family in China. Another worker testified that a group of Rilin employees—which the government repeatedly referred to as a "rendition squad"—captured and injured him with a weapon. Photos of his injury were shown to the jury. There was no evidence of comparable conduct after 2002.

The government obtained a pretrial ruling admitting this evidence by promising that its witnesses would directly implicate Zhong in these barbaric events. At trial, however, the government presented no evidence of Zhong's involvement. Nonetheless, the government used this emotionally charged and

erroneously admitted evidence to tar Zhong by association and stimulate the jury's moral outrage. The result was a fundamentally unfair trial.

Second, the government presented a former prosecutor and diplomat as an expert on forced labor. His testimony—over repeated defense objection—invaded the province of the judge in charging the jury on the law and that of the jury in deciding the facts. Although this Court has repeatedly condemned expert testimony that instructs jurors on the typical features of a particular crime, the former prosecutor testified at length about common features of forced labor schemes involving Chinese construction businesses and migrant workers. And he repeatedly delved into irrelevant and highly inflammatory subjects, telling the jury about China's "prison"-type "labor camps" for religious minorities and about "mentally" and "physically challenged" Chinese being "scooped up in railway stations" and "taken out to brick kilns." His testimony was extraordinarily improper and should have been excluded in its entirety.

Additional errors permeated the proceedings. The district court barred three proper avenues of impeachment of the government's most important cooperating witness. It refused to give a crucial and legally supported instruction requested by the defense on the forced labor charges and failed to dismiss those charges even though there was no proof of any compulsion during or near the charged period. The court also declined to acquit Zhong on an alien smuggling charge despite the

government's failure to prove that the workers were transported "in furtherance of" their illegal presence in the U.S. And a procedurally flawed sentencing proceeding resulted in a draconian and unwarranted 190-month sentence.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. §3231. The judgment of conviction was entered on December 10, 2019. (SPA-27). Zhong filed a notice of appeal the same day. (A-1520). This court has jurisdiction under 28 U.S.C. §1291.

ISSUES PRESENTED

1. Whether the following evidentiary and instructional errors individually and cumulatively deprived Zhong of a fair trial:

a. admitting irrelevant and inflammatory uncharged crimes involving violence and threats by others, which occurred nearly a decade before the indictment period;

b. admitting "expert" testimony from a former prosecutor about the meaning of statutory and other legal terms, the typical and "effective" methods of forced labor schemes, the prevalence of forced labor using migrant Chinese construction workers, and certain atrocities in China;

c. barring Zhong from effectively impeaching the government's most important cooperating witness;

d. refusing to instruct the jury to distinguish between legitimate consequences of breaching an employment agreement and threats of serious harm sufficient to satisfy the forced labor statute.

2. Whether the forced labor convictions must be reversed for insufficient evidence.

3. Whether the alien smuggling conspiracy conviction must be reversed because mere transportation of illegal alien workers to and from construction sites within a single metropolitan area is not alien smuggling.

4. Whether Zhong's 190-month sentence was procedurally and substantively unreasonable.

STATEMENT OF THE CASE

Zhong appeals from a judgment of conviction and sentence entered by the United States District Court for the Eastern District of New York (Donnelly, J.). The five-count indictment charged Zhong with forced labor conspiracy (18 U.S.C. §1594), forced labor (18 U.S.C. §1589), concealing passports in connection with forced labor ("document servitude") (18 U.S.C. §1592(a)), alien smuggling conspiracy (8 U.S.C. §1324), and visa fraud conspiracy (18 U.S.C. §371). (A-47-56). Following a 12-day jury trial, Zhong was convicted on all counts. The district court denied his Rule 29 motions. (A-660, A-751). The relevant rulings are unreported.

A. Overview

Zhong came to the U.S. in 2000 to work on Chinese diplomatic sites for China Rilin, a construction company based in Dandong, China. (A-1389, A-221-22). An internal Rilin personnel document showed that as of 2005, he worked in "materials" in New York. (A-1469-70). In around 2010, Zhong became president of U.S. Rilin, an affiliated company focusing on real estate development in New York. (A-183). The indictment alleged conduct between January 2010 and November 2016 relating to Rilin's employment of Chinese nationals on U.S. construction projects.

Rilin brought Chinese construction workers to work at the Chinese Consulate and Mission to the U.N. in New York and the Chinese Embassy in Washington, D.C., pursuant to bilateral treaties permitting each country to employ its own citizens at its diplomatic sites. (A-180-82, A-187, A-1408-34). Although their visas only permitted them to work at Chinese diplomatic sites (A-653), some of the workers also worked at private construction projects in and around New York City, including a 14-story tower on Fifth Avenue and a large residence on Long Island, or served as drivers and performed domestic tasks for executives, including Zhong. (*E.g.*, A-187-211). The government alleged that the employment of the workers on the private projects established a visa fraud conspiracy, and that the daily transportation of the workers from the places they

lived to the job sites proved an alien smuggling conspiracy. As to the forced labor charges, the government argued that employment contracts the workers signed before they left China created economic coercion, and that the company's practice of holding the workers' passports while they were in the U.S. was also coercive.

B. Evidence Relating To Indictment Period (2010–2016)

There was no evidence that Zhong *ever* made threats or committed acts of violence, or that anyone at Rilin did so during the indictment period. Instead, the government argued that the workers' employment contracts were economically coercive because they did not receive substantial portions of their salaries until after returning to China, and the agreements authorized forfeiture of workers' security deposits and unpaid salary if the workers breached the contracts. (*E.g.*, A-777-78, A-791). However, while the workers were in the U.S. their families in China received regular payments, and the employees made far more money than they could have made for comparable work in China. (A-626-28, A-647, A-662).

For instance, the sole employment agreement from the indictment period in evidence required Rilin to pay a base monthly salary of 8,000 RMB (approximately $1,268). (A-991, A-1463). The worker's family in China could draw 1,500 RMB ($238) of this salary every two months, with the balance paid after he returned to China. (A-991). The contract also required the worker to post a security deposit of 150,000 RMB ($23,775), which would be repaid upon his

return to China. The worker was responsible for expenses stemming from any return to China for "personal reasons (*e.g.*, sick, disgruntled, etc.)" or arising from certain enumerated violations. (*Id.*). These violations, which could also lead to forfeiture of the security deposit and unpaid wages, included conduct "detrimental to national prestige" or Rilin's reputation, "[c]ommunicating with overseas relations (or organizations) without permission," "slacking at work," "[w]orking for a third party without permission," "[l]eaving the consulates or the worksites and living quarters without permission," "[r]unning away to the U.S. or a third country," or "[d]ivulging state secrets[.]" (A-991-92).

Although some of these provisions seem harsh and inconsistent with U.S. norms, Rilin (and the Chinese government, which was requesting the visas for work at its diplomatic facilities) had an obvious, legitimate interest in deterring its workers from defecting to the U.S., breaching confidentiality, or succumbing to espionage. That purpose was identified in a document Rilin used to bid for work on Chinese diplomatic facilities. It explains that due to the importance of "confidentiality and security" arising from work at diplomatic facilities, Rilin selects reliable workers without overseas connections and uses contracts incorporating a "family guarantee system," deposit of collateral, and "heavy economic penalties for violators." (A-565-70, A-1447-54).

These security concerns were not idle: Rilin employee Ken Wang, for example, secretly operated as an FBI mole for six years and pilfered confidential Rilin documents, contact lists of embassy staff, personnel documents, flash drives, and accounting software. (A-464-68). Wang even furnished the FBI with a floor plan identifying where Rilin stored architectural plans for the Chinese Consulate and with information about how to access Rilin's office computer network. (A-461-63).

The government did not call any witnesses who worked for Rilin in the U.S. between 2010 and 2016. The only direct evidence of how U.S.-based Rilin employees were treated during the relevant period was the stipulated testimony of three workers, which the *defense* introduced. Each of these workers completed multiple tours for Rilin in the U.S. (A-662-81). Each had positive experiences and earned multiples of what they would have earned in China. (A-662, A-668, A-670-71, A-675, A-677). Their movements were not restricted, and they went fishing and on sightseeing trips. (A-665-66, A-671-733, A-678, A-1472, A-1474). They had access to cellphones and the internet. (A-665-66, A-672, A-670-80). Their families in China received a portion of their salary while they were in the U.S., and the balance was paid at the conclusion of each tour. (A-664, A-670-71, A-677-78). Before departing China, the workers voluntarily signed employment

contracts with Rilin and posted security deposits that were refunded in full, with interest, after they returned. (A-663, A-669-670, A-676).

This defense testimony was consistent with other evidence concerning the workers' living and working conditions during the indictment period. When agents executed search warrants at Rilin dormitories in New Jersey in November 2016, they found that workers did not appear mistreated, there was no evidence of overcrowding, and the premises were clean. (A-417). There were no physical restraints, workers had access to computers and cell phones, and there were bicycles and fishing equipment in the living spaces. (A-418-25, A-571, A-573-75, A-1000-1329). Photographs extracted from digital devices showed employees visiting landmarks in New York, including the U.S.S. Intrepid, Grand Central Terminal, and Coney Island, and at various other locations throughout the U.S. (A-576-79, A-1472-74, A-1479-81, A-1498-1511). A neighbor who lived three doors down from one of the dormitories testified that workers appeared free to come and go and spent weekends relaxing on a rear deck. (A-735-36). They mingled with their neighbors at a July Fourth barbecue and helped shovel snow in the winter. (A-739-42, A-749).[1]

[1] During housing inspections in 2011, New Jersey officials issued civil violations relating to overcrowding, inoperative smoke alarms, wiring, and similar conditions. (A-168-77). Although doors were equipped with "double cylinder locks" that required a key to be opened from either side, there was no evidence that workers

Construction site conditions were also inconsistent with an illegal coerced labor scheme. At the Fifth Avenue project, for example, Rilin employees worked alongside a U.S.-based general contractor, a U.S.-based safety services manager, and under U.S.-hired managers (including recent U.S. college graduates hired through online job boards). (A-427-29, A-432, A-515-18, A-520-21, A-556-57, A-704-05, A-713, A-718). They received OSHA training. (A-431, A-561-62, A-1339-78, A-1455-56). They unloaded materials on Fifth Avenue, travelled openly to and from the site, and wore jackets with Rilin logos. (A-519, A-1335-37, A-1443). Both parties' witnesses testified that the workers were not guarded or prevented from leaving the site. (A-525-26, A-709).

The government did call Xiaohhui Lyu, the wife of a worker named Kang Kai, who testified about the consequences of breaching a Rilin employment agreement. Lyu testified that her husband did two tours in the U.S. for Rilin. During the first, in about 2006–08, the company paid her family 1,000 RMB per month, and paid more than 100,000 RMB to her husband after he returned to China, along with their security deposit. (A-627-29). He continued working for Rilin and was asked to return to the U.S. in 2010. (A-631). Before he left China, he posted a 150,000 RMB security deposit. (*Id.*). The couple was also photographed at the Rilin office in front of a pile of money and told that if Kai

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were ever locked in. (A-164-67). And the inspectors found numerous computers. (A-162-63, A-167, A-178-79).

disappeared they would owe one million RMB. (A-632-33). Eventually, Kai left Rilin and remained in the U.S. In 2010, Rilin obtained a judgment in a Chinese court. (A-637-40). Lyu was told that she owed Rilin one million RMB, but the judgment does not identify that amount, and there was no evidence that Rilin tried to collect it. (A-640, A-986). Nor was there any evidence that Zhong had any involvement in Kai's contract, the photograph, or the legal proceeding in China.

The government also pointed to Rilin's practice of holding the workers' passports while they were in the U.S. But Rilin obtained passports for the workers, distributed them at the airport in China, and collected them once the workers cleared customs in the U.S. (A-480, A-507, A-588-89, A-612-13, A-663, A-668-69). There was no evidence that this practice had a coercive effect on any alleged victim. Moreover, the three workers who testified by stipulation each confirmed that they were able to retrieve their passports upon request, when they needed them for purposes such as traveling within the U.S. (A-666, A-672, A-678).

Finally, the government contended that the workers lived in a "climate of fear" (*e.g.*, A-775-77) but offered only limited evidence from a single source—Rilin manager Ken Wang, the paid FBI informant, whose credibility was highly suspect. Although he worked at Rilin for six years and worked closely with the Chinese employees, Wang did not testify about any violence or threats involving workers, nor did he testify that workers spoke among themselves about the

possibility of violence. Instead, he testified about a single conversation he claimed to have overheard during a visit by a "high-level delegation from China." (A-435). According to Wang, one of the delegation members asked Zhong whether "workers [had] escaped," and Zhong allegedly replied, "yes, but you know, we found him, and we punish[ed] him." (A-435). "We want to set up a good example to the rest of [the] workers [and] if they are to escape, or try to follow that guy's steps, we will beat [them] up badly." (*Id.*).

The government presented no evidence that any worker in 2010–16 was aware of this supposed "example." And Wang's uncorroborated snippet provided the only hint that Zhong knew anything about any threats or violence in the early 2000s. The prosecution therefore focused on this testimony in its jury arguments. (A-777, A-896). Yet the district court precluded the defense from presenting powerful evidence impeaching Wang's credibility, as discussed *infra* Point I.C.

C. Uncharged Acts Evidence (2001-2002)

Lacking testimony from any of the alleged victims who worked for Rilin in the indictment period, the government called three workers who left Rilin in 2001 and 2002. They told disturbing tales of grim living conditions, sequestration inside the Chinese Consulate, threats, and violent responses to escape attempts.

There was extensive pretrial litigation over the admissibility of this evidence, to which the defense objected on multiple grounds. (Dkts.115, 116, 119,

121, 123, 124, 130, 133, 135, 176[2]; A-59-87). In arguing for admissibility, the government expressly represented that the evidence would establish Zhong's direct involvement in this heinous conduct—representations that ultimately proved untrue.[3]

At a hearing on cross-motions in limine, the district court expressed skepticism that the government could connect the 2001–02 conduct to the charged conduct beginning eight years later:

> The problem that I have is that there is this huge gap between 2001 and 2002, and then the acts that are alleged in the indictment for 2010. So, it is not like the government has described a continuum of activity, that went from 2001 [and] 2002 [and] continued on through 2003, 2004, 2005, 2006, 2007, 2009… There is a gap of eight years. I just don't see how you make a connection between, okay, this happened way back then, and now all of a sudden, we are jumping to…2010.

(A-72-73). The government acknowledged that it had no evidence of "escapees" between 2002 and 2009 but asserted that it would offer "testimonial evidence

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[2] "Dkt." refers to the district court docket.

[3] For instance, the government said Kevin Liu would testify that "[Zhong] and other Rilin principals located him in a boarding house in Queens" and that "[Zhong] persuaded [him] not to contact the police" and "warn[ed] him that he would lose the collateral and that Rilin would seize his and his mother's houses." (Dkt.115 at 3). Another witness, the government claimed, would testify that Zhong had admitted to "participat[ing] in a search party to locate and abduct Rilin workers." (*Id.* at 4). The government also said the 2001–02 evidence would show that "[Zhong] arranged these contracts" and help the jury "understand how he negotiated for these debt bondage contracts." (A-84-85). None of this evidence materialized at trial.

regarding the continuous nature of this debt bondage practice between 2001 and 2016." (A-74).

Based on these representations, the district court found that the uncharged crimes were "inextricably intertwined" with and "arose out of the same transactions" as the crimes charged in the indictment. (SPA-12).[4] In a similarly perfunctory Rule 403 analysis, the court held that the probative value of the "conduct, which provides necessary background to the alleged conspiracy, including the kidnapping and abduction of victim laborers…is not outweighed by the danger of any potential prejudicial effect such evidence may have." (SPA-12-13).

Despite its pretrial representations, the government offered *no proof* at trial that Zhong was involved in mistreating workers in 2001–02, or at any other time. Nevertheless, the government centered its case on the emotionally riveting testimony of three workers who "escaped" from a Rilin project at the Chinese Consulate in 2001–02 and subsequently sought asylum in the U.S. The very first words of the prosecutor's opening statement concerned not the charged crimes, but the experience of Kevin Liu, a worker who left Rilin in 2002:

> A construction worker is hiding in a guest house in Flushing, Queens.…This is the second time this man has tried to escape. He hasn't left the house in several days because he is afraid

[4] The district court did not address whether the evidence was admissible under Rule 404(b).

> someone is looking for him and he is right. When he finally goes outside, a squad of workers sent by the defendant's company grabs the man and tries to throw him into a van. When they get the man back to the work site, he is placed under lock and key and the defendant's uncle…threatens to have the man's legs broken if he runs away again.

(A-124; *see also* A-752 (beginning summation by telling jury that "if workers dared to escape, the punishment was harsh and swift")).

Liu testified that he lived and worked at the Chinese Consulate and had "no freedom," and that he tried to escape, but was caught and brought back. (A-255-56, A-268-69). When he attempted to escape again, four Rilin employees "mobbed" him and injured his face; there was "blood everywhere." (A-271-73). Returned to the Consulate, he was locked in a guarded room and Wenliang Wang (Rilin's owner) threatened to break his leg and put his family "in danger." (A-274-75). Liu "felt that [his] life was in danger"; a month later, he escaped again, and ultimately obtained asylum and became a U.S. citizen. (A-275-76, A-279-80). His family was evicted from its home in China. (A-279).

Another government witness, Zhaoyou Li, described living at the Chinese Consulate in "dirty and messy" conditions and sleeping on "wooden planks" with no mattress. (A-483-84). He was not permitted to leave, and guards were posted at the exits. (A-487). Li was one of the workers Rilin sent to find Kevin Liu when he escaped. (A-489-94). In early 2002, Li fled from the Consulate but was confronted by Rilin workers who tried to drag him into a van and struck Li with a

"tool." (A-498-500). The government showed photographs of the resulting four-inch scar to the jury. (A-499-500, A-998-99). Li escaped his assailants and later sought asylum in the U.S. (A-499, A-503-05). In emotional testimony, Li's wife, Kaiying Gao, testified that Rilin obtained a judgment in a Chinese court and evicted the family from their home. (A-532-55).

A third worker, Yuansheng Chu, testified that he lived and worked at the Chinese Consulate beginning in 2000. (A-588). In November 2002, Chu decided to escape. (A-604). Subsequently, a Rilin employee identified as Zhong's brother encountered Chu in Flushing, but Chu threatened to call the police. (A-605-06). In China, properties that Chu had pledged as collateral were seized and his family "forcibly" evicted. (A-606-07). Chu later obtained asylum in the U.S. and has applied for citizenship. (A-607-08).

The government repeatedly invoked these witnesses' testimony in its closing arguments (*e.g.*, A-752-53, A-755, A-775-76, A-790, A-885-86), and asserted—without evidence—that Zhong was responsible for sending "rendition squads" to abduct the workers. (A-755, A-775).

D. The Expert Testimony

Shortly before trial, the government disclosed its plan to call a former prosecutor and diplomat, Luis C. DeBaca, to describe "the complex nature of forced labor and human trafficking operations" and "particular aspects of human

trafficking and forced labor that are prevalent in, or unique to, the People's Republic of China." (A-113.1-2). DeBaca is a lawyer with no expertise or formal education in psychology or victimology. (A-316). His resume did not mention China, and he had never been to Dandong. (A-324-25).

Zhong objected to DeBaca's testimony on substantive and procedural grounds. (Dkts.201, 206; A-289-97, A-325). The district court overruled Zhong's objections and, after forcing Zhong to conduct *voir dire* in front of the jury, qualified DeBaca as an expert "in the particular areas that the [prosecutor] mention[ed]." (A-116, A-295-99, A-325). Thereafter Zhong lodged several additional specific objections during his testimony (*e.g.*, A-327, A-342), and asserted "a continuing objection," which the district court expressly acknowledged. (A-355).

DeBaca offered numerous opinions. He instructed the jury on the law, defining legal terms such as forced labor, document servitude, alien smuggling, and debt bondage. (A-326-27, A-330-31, A-341-42, A-345-46). He interpreted employment contracts already in evidence, identifying aspects he labeled "red flags" or "troubling." (A-375-76, A-384). He testified about why organizations engage in forced labor, the typical methods used to perpetrate forced labor, and reasons why workers may remain in servitude. (A-328-61). He told the jury that forced labor schemes involving migrant Chinese labor and among Chinese

businesses operating abroad are common, especially in the construction industry, and described "typical" features of these schemes, and "effective" means of carrying them out. (A-348-49, 360-69). And he testified about the prevalence of forced labor in China, including appalling elements such as labor camps for the physically disabled and reeducation camps for religious minorities. (A-362-69).

The government made DeBaca's testimony a central theme throughout its closing arguments. Time and again, it urged the jury to remember what DeBaca had said about the typical patterns of forced labor and invited the jury to convict because, it claimed, the evidence here bore those same hallmarks. (A-769-70, A-883-84, A-886, A-891, A-898-99, A-908).

E. Sentencing

On November 25, 2019, the district court imposed concurrent sentences of 190 months' imprisonment (forced labor), 108 months' (alien smuggling conspiracy), and 60 months' (remaining counts). (A-928-81). Zhong has been incarcerated since his 2016 arrest and is serving his sentence.

SUMMARY OF ARGUMENT

The government's forced labor case against Zhong was thin to nonexistent: It had no victim witnesses, whereas the defense presented testimony from three workers who had positive experiences working for Rilin in the U.S. The government argued that employee agreements were so harsh as to be coercive, but

the workers chose to sign them and agreed to work in the U.S. so they could make multiples of what they could have made in China. The government overcame these weaknesses in its proof and converted a dry, tedious case about contracts into a dramatic tale of threats and violence, locked quarters, and "rendition squads," by procuring a series of erroneous rulings that individually and collectively deprived Zhong of a fair trial. The district court compounded these errors by denying Zhong's motion for acquittal and imposing a procedurally and substantively unreasonable—indeed, draconian—16-year sentence that vastly exceeds sentences for other forced labor cases involving far more egregious conduct.

First, the district court erroneously admitted evidence of sensational uncharged crimes committed 8–9 years before the charged conduct. It did so based upon false promises that the government's witnesses would testify that Zhong was personally involved in the uncharged conduct; in fact, none of the witnesses (who told harrowing tales of being kept under lock and key, tracked down, and threatened or beaten after escaping) implicated Zhong at all. This testimony was far outside the bounds of what this Court has permitted as background or other acts evidence, given its remoteness in time and the government's inability to link it to Zhong. And whatever minimal probative value it had was substantially outweighed by its clear unfair prejudice.

Second, the district court permitted the government to disguise an additional prosecutor—Luis DeBaca, a longtime champion in the fight against modern slavery—as an expert witness. DeBaca interpreted key legal terms, usurping the judge's exclusive role in charging the jury on the law; offered personal opinions of the evidence, which the lay jury was perfectly capable of understanding on its own; described "typical" forced labor schemes involving China, Chinese migrants, and the construction industry, improperly inviting the jury to assume that Zhong was guilty based on the conduct of other unrelated people; and impermissibly telegraphed his own ultimate conclusions on guilt. This testimony was nothing more than an additional prosecution closing masquerading as "expert testimony," and the government invoked it time and again in its jury arguments. Its admission unfairly stacked the deck against Zhong.

Third, the district court unconstitutionally stripped the defense of three potent avenues of impeachment of the government's principal cooperator—the sole witness who offered *any* testimony suggesting that Zhong was aware of Rilin's allegedly violent past. These lines of inquiry (regarding his reputation for dishonesty, a witness's opinion that he was untruthful, and a recent adverse credibility finding by a judge) were plainly admissible under the Rules of Evidence and this Court's precedents.

Fourth, the district court refused the defense's request to instruct the jury that "adverse but legitimate consequences" incident to an employment agreement are not the type of "serious harm" that permits a finding of coerced labor. The proposed instruction was amply supported by caselaw and was critical to the defense to the forced labor charges. Without it, the defense was deprived of a powerful argument against the economic coercion argument, which took on particular force in light of DeBaca's improper testimony.

Fifth, the government failed to prove its case on the forced labor charges. No witness testified to having been coerced to work on the Rilin projects during the charged timeframe, whether through force, threats, or economic compulsion. And the government failed to prove the alien smuggling charge, because mere transportation of aliens to and from their place of work is not "in furtherance of" their illegal presence in the U.S. under the statute.

Finally, the 190-month sentence should be vacated. The district court committed procedural error by imposing a 4-point "vulnerable victim" enhancement, which increased Zhong's Guidelines range by 50% and ultimately resulted in a sentence 55 months higher than the maximum of the proper Guidelines range. To justify the enhancement, the court erroneously relied on generalizations, rather than the necessary individualized determinations of victim vulnerability. It compounded this procedural error by failing to take into account

the egregious, inhuman conditions Zhong had endured during three years at MDC-Brooklyn, and by failing to explain the sentence. And the nearly 16-year prison term was vastly disproportionate, particularly when compared to sentences in other forced labor cases where defendants personally committed far more egregious conduct, including violence and torture. The sentence was shockingly high and substantively unreasonable.

STANDARDS OF REVIEW

Statutory interpretation, sufficiency of the evidence, and challenges to jury instructions are reviewed *de novo*. *United States v. Gayle*, 342 F.3d 89, 91 (2d Cir. 2003); *United States v. Novak*, 443 F.3d 150, 157 (2d Cir. 2006); *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006). Evidentiary rulings and the reasonableness of a sentence are reviewed for abuse of discretion. *See United States v. Scully*, 877 F.3d 464, 473 (2d Cir. 2017); *United States v. Singh*, 877 F.3d 107, 115 (2d Cir. 2017). However, the Court reviews *de novo* whether the district court applied the correct legal standard in its evidentiary and sentencing rulings, and a district court necessarily "abuses its discretion" if it applies an incorrect standard. *Koon v. United States*, 518 U.S. 81, 100 (1996); *United States v. Figueroa*, 548 F.3d 222, 226 (2d Cir. 2008).

ARGUMENT

I. MULTIPLE EVIDENTIARY ERRORS INDIVIDUALLY AND CUMULATIVELY DEPRIVED ZHONG OF A FAIR TRIAL

A. The Uncharged Crimes Evidence Should Have Been Excluded

The government's forced labor case was paper-thin at best. It called no witnesses employed by Rilin in 2010–2016. It presented no evidence that Zhong ever used violence or threats of violence against the workers, or that anyone else at Rilin did so in or within eight years of the indictment period. Instead, its principal evidence from the relevant timeframe was the employment agreement terms. But the defense presented a strong counternarrative to this economic coercion argument, including the stipulated testimony of the three Rilin workers and evidence that the terms responded to the Chinese government's need for confidentiality and security at its overseas facilities.

To augment its feeble case, the government persuaded the district court to admit highly prejudicial and inflammatory testimony that was unconnected to Zhong himself and remote in time. Three workers testified to shocking episodes of violence and intimidation in 2001 and 2002: abductions, the use of a weapon, moblike threats, and confinement inside the Chinese Consulate. But these inflammatory episodes had no parallel in the charged conduct and no probative value. Worse, the government secured the admission of this evidence by

representing that its witnesses would implicate Zhong in the misconduct, but at trial it presented *no* evidence linking Zhong to the uncharged crimes.

The admission of this evidence was reversible error.

1. The Evidence Lacked Probative Value.

Despite the government's repeated pretrial representations, *see supra* n.3, *no* witness implicated Zhong in the 2001–2002 abductions. This extraordinary failure to make good on its offers of proof eviscerated the evidentiary basis on which the court admitted the evidence and itself presents grounds for reversal. *See United States v. Gilan*, 967 F.2d 776, 780-82 (2d Cir. 1992) (reversing conviction where other act evidence was introduced despite absence of evidence linking other act to defendant); *see also United States v. Peterson*, 808 F.2d 969, 974-75 (2d Cir. 1987) (probative value must be assessed based on evidence actually introduced, not proffer that led to admission).

The district court's basis for admitting the uncharged crimes evidence cannot be reconciled with this Court's precedents. To be sure, uncharged conduct is not "other crimes" evidence subject to Rule 404(b) *if* it is "inextricably intertwined" with or "arose out of the same transaction" as charged conduct. *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000). But the uncharged conduct must have a clear link to the charged conduct, and courts have interpreted the formula "narrowly." *United States v. Martoma*, 13 Cr. 973, 2014 WL 31191,

at *3 (S.D.N.Y. Jan. 6, 2014) (Gardephe, J.); *see also United States v. Bowie*, 232 F.3d 923, 928 (D.C. Cir. 2000) (cautioning that "[t]he 'complete the story' definition of 'inextricably intertwined' threatens to override Rule 404(b)"). The cases in which this Court has found uncharged conduct "inextricably intertwined" with the charged conduct are far afield from this case, and readily demonstrate why that formulation *does not* apply here. Unlike this case, they involve conduct by the defendant *and* close in time to the charged offenses.

In *United States v. Gonzalez*, for example, the defendant was arrested escaping from the scene of an attempted burglary and charged with being a felon in possession of a firearm. 110 F.3d 936, 939-40 (2d Cir. 1997). This Court held that evidence of the uncharged burglary moments before the defendant's arrest, presumably the reason for possessing a firearm, was not "other crimes" evidence under Rule 404(b) because it was "inextricably intertwined with" and "necessary to complete the story of the crime on trial." *Id.* at 942. Similarly, in *United States v. Towne*, the other evidence showed that the defendant possessed the same gun on multiple days and thus proved a single continuous offense, not other crimes. 870 F.2d 880, 886 (2d Cir. 1989).

Carboni involved charges of making false statements to secure advances on a line of credit. 204 F.3d at 41. This Court held that the evidence of uncharged fictional additions to the defendant's company's inventory was "inextricably

intertwined" with the charged offense because the additions occurred "*at about the same time*" the loan was extended and suggested an intent to create an optimistic picture of the company's finances. *Id.* at 44 (emphasis added).

By contrast, the evidence here concerned events in which Zhong was not involved that occurred long before the charged crimes. These episodes concerned workers who had no contact with Rilin in the indictment period and behavior with no parallel in that period. Far from an ongoing course of conduct, or an integral part of the narrative, the 2001–02 incidents represented an island of evidence eight years adrift from the charged conduct.

Nor was this evidence admissible as background elucidating the defendant's role in the conspiracy or the developing relationship of trust between the conspirators. *See United States v. Baez*, 349 F.3d 90, 93-94 (2d Cir. 2003); *United States v. Rosa*, 11 F.3d 315, 334 (2d Cir. 1993). Despite the government's pretrial representations, none of the witnesses implicated Zhong in their mistreatment.

Nor was the evidence admissible to show how a "climate of fear" within Rilin supposedly developed. In fact, there was no evidence corroborating the claim that any "climate of fear" existed at all during the relevant period. The government did not present evidence that any worker within the indictment period discussed the workers who had escaped in 2001 or 2002. The *only* evidence that any worker discussed the 2001–02 events was the testimony of cooperator Ray

Tan, who testified about a *single* conversation in 2008 or 2009—prior to the charged timeframe. According to Tan, a worker told him about "one time" that he saw a Rilin employee at a store in Flushing and spontaneously attempted to "bring him back" by "pulling" him. (A-213). This was not evidence of a "climate of fear," and certainly not evidence that the workers in 2010–16 lived in fear based on stories about "rendition squads" and abductions eight years earlier.

Nor were the uncharged crimes admissible under Rule 404(b). "When 'other act' evidence is offered to show knowledge or intent…such evidence must be 'sufficiently similar to the conduct at issue' to permit the jury to draw a reasonable inference of knowledge or intent from the other act." *United States v. Cadet*, 664 F.3d 27, 32 (2d Cir. 2011); *United States v. Aminy*, 15 F.3d 258, 260 (2d Cir. 1994); *see also Peterson*, 808 F.2d at 974 ("We would consider it an abuse of discretion to admit [other bad act] evidence if the other act were not sufficiently similar to the conduct at issue…or if the 'chain of inferences necessary to connect evidence with the ultimate fact to be proved' were unduly long."). The uncharged crimes evidence involved violence and physical threats against workers confined to the Chinese Consulate. The charged crimes, in contrast, involved economic coercion against workers living in dormitories in New Jersey. Even if there had been evidence of Zhong's involvement in the uncharged crimes, the conduct at issue was insufficiently similar to be probative of intent or knowledge.

2. The Evidence Was Inadmissible Under Rule 403.

Even if this evidence had some minimal probative value, it was "substantially outweighed by the danger of…unfair prejudice, confusing the issues, [or] misleading the jury[.]" Fed. R. Evid. 403. The prejudice was particularly acute because the uncharged crimes evidence "involve[d] conduct more inflammatory than the charged crime[s]." *United States v. Paulino*, 445 F.3d 211, 223 (2d Cir. 2006); *United States v. Curley*, 639 F.3d 50, 62 (2d Cir. 2011); *cf. Baez*, 349 F.3d at 94 (prior act evidence properly admitted to prove racketeering enterprise and conspiracy where it "involved criminal conduct less inflammatory than the murder charged in the indictment"); *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990) (prior act evidence properly admitted where it did "did not involve conduct any more sensational or disturbing than the crimes… charged").

The uncharged crimes involved violent kidnappings, weapon use, imprisonment of workers in Chinese diplomatic facilities, and threats to break a worker's legs and harm his family. By contrast, the alleged coercion in the indictment period centered on harsh employment contracts and holding passports. The uncharged crimes evidence came in through live testimony from three workers and one worker's wife, whereas the charged crimes were largely proven through documents and the hardly riveting testimony of low-level managers and law

enforcement agents. This fundamentally unbalanced the entire trial in the direction of the uncharged crimes. The district court abused its discretion by admitting such "highly charged and emotional" evidence with "minimal evidentiary value." *United States v. Al-Moayad*, 545 F.3d 139, 160 (2d Cir. 2008).

3. The Government Cannot Establish Harmless Error.

The erroneous admission of evidence is harmless only "if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury." *Al-Moayad*, 545 F.3d at 164. The government bears the burden of proving harmless error. *United States v. Kaiser*, 609 F.3d 556, 573 (2d Cir. 2010). This Court considers "(1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted evidence; and (4) whether such evidence was cumulative of other properly admitted evidence." *Al-Moayad*, 545 F.3d at 164.

All four factors favor Zhong. First, the government's forced labor case was based almost entirely on employment agreements drafted and signed in China without Zhong's involvement. There was evidence that the contracts were drafted to satisfy the Chinese government's security concerns, not to compel labor. Lacking victim testimony, a jury could easily have found that Zhong lacked intent, or that workers labored to earn salaries multiple times their wages in China, not because of criminal coercion.

Second, even the government acknowledged—long after the court ruled the evidence admissible as mere background—that this proof actually formed the "heart" of its case. (A-123.2). The story of "[a] construction worker…hiding in a guest house" (A-124) was "quite literally the first thing mentioned in the government's opening statement," *United States v. Stewart*, 907 F.3d 677, 689 (2d Cir. 2018), and the government returned repeatedly to the extraordinary experiences of the workers in 2001 and 2002. (A-130 ("When a few workers took the only way out they saw and escaped from the defendant's work, the response was swift and it was vicious. Squads of workers…were forced to act as muscle for the defendant and his co-conspirators were sent out to find the escapees [and] physically assault them and drag them back[.]"), A-132 ("[V]ictims of the defendant's criminal scheme…will tell you about how at times they were locked in rooms and watched by security guards like prisoners. They will tell you how they were tracked down, threatened, and assaulted when they tried to escape."). The government also made heavy use of the uncharged conduct in its closing arguments. (A-752-53, A-755, A-775-76, A-790, A-885-86).

Worse, the government improperly tarred Zhong with the most violent of the uncharged crimes, despite the lack of *any* evidence that he had anything to do with these incidents. (*See* A-755 (falsely asserting that "[t[hese rendition squads were sent by *defendant* and his cronies"), A-775 (falsely asserting that "*the defendant*

and his criminal associates" made workers "chase after" escapees), A-790 (falsely asserting that climate of fear was "perpetrated by *the defendant* and his criminal associates" because "*they* set an example by punishing [Kevin] Lui" and "chasing after" others). *Cf. United States v. Afjehei*, 869 F.2d 670, 674-75 (2d Cir. 1989) (reversing conviction where prosecutor falsely argued that uncharged acts were criminal).

Third, the government used the uncharged crimes evidence to convert an unexciting story about workers who signed harsh employment agreements, with no victim witnesses, into a harrowing tale of violent abductions and workers held prisoner told by live witnesses.

Finally, far from being cumulative, the uncharged crimes evidence was utterly unlike any of the properly admitted proof of the charged crimes.

B. The Forced Labor Expert's Testimony Was Inadmissible

However qualified a lawyer may be to prosecute forced labor cases or teach a seminar on the history of slavery, he should not be permitted to instruct the jury in a criminal forced labor trial on the definitions of the crimes charged, or opine on which methods of holding individuals in servitude are particularly effective, or on whether particular contractual terms suggest forced labor. Nor should he be permitted to testify that particular conduct is "typical" of forced labor in the defendant's home country or industry. And he should not be permitted to lecture

the jury about the appalling forced labor record of the defendant's country, or about the U.S. government's official condemnation of that record.

All of this is barred by Rules 702 and 403. Simply put, a jury does not need expert testimony to determine whether the alleged victims were actually coerced—a determination jurors can readily make from the facts. "Expert" testimony of this nature usurps the roles of the judge and of the jury and invites the jury to convict on an improper and racially tinged guilt-by-association theory. It is categorically improper.

Consider a political corruption case. The government proposes to call a former Chief of the Department of Justice's Public Integrity Section as an expert on corruption. She would testify that bribery involves a *quid pro quo*; that corrupt politicians are motivated by greed; that they generally disguise bribes as income from a legitimate source, such as a legal fee; that even powerful businesses may accede to a demand for a bribe when faced with legislative retaliation; and that corruption is endemic in a particular legislative body and among politicians from a particular ethnic community. The expert would not opine on guilt or innocence, but she would say that the politician's failure to disclose a relationship with a lobbyist raises "red flags" and is "troubling."

This testimony would not be admitted in any courtroom in this country. The expert testimony admitted in this case was substantially similar, and deprived Zhong of a fair trial.

1. Background.

DeBaca was a lifelong crusader against modern slavery. Formerly chief counsel of the Justice Department's Human Trafficking Prosecutions Unit, he had been coordinator of the Involuntary Servitude and Slavery unit in the Civil Rights Division, ambassador-at-large in the State Department where he directed the Office to Monitor and Combat Trafficking in Persons, and counsel to the House Judiciary Committee. (A-302-03). At the time of trial, he was a fellow in modern slavery at Yale University. (A-302).

Typical Forced Labor Scheme. The heart of DeBaca's testimony was his description of the typical "ways or methods in which a person can be compelled to engage in forced labor[.]" (A-340). Much of this was common sense repackaged as expertise. For example, asked how "payment or the lack thereof…can be used to coerce labor[,]" he explained that "[o]ne of the most perverse ways to create this kind of dependency is to withhold pay or to have the pay set in relation to… security deposits[.]" (A-349-50). Similarly, discussing how employers create an "overarching climate of fear," he told jurors that "the effective way to do that is to invocate the fear not by running around using force or threats against 50 or a

hundred" workers "but instead making an example of a few of them[.]" (A-348-49). As to identity documents, DeBaca explained that "knowing that you don't have a passport takes away your ability to get home on your own[.]" (A-343).

And these methods, DeBaca testified, generally work. "[O]nce there is a climate of fear established," he opined, "you feel that there is no reasonable alternative but to remain in service or there would be serious harm to yourself or somebody you care about…[T]rying to escape ends up being a very irrational choice." (A-360). "The rational[] choice in that circumstance is to stay, it's the only reasonable thing to do, and so that's typically the choice people make." (A-360).

Turning to the "types of people that are commonly victims of forced labor," DeBaca testified that vulnerabilities occur "[i]f you have somebody who is in the United States…who is not speaking English, who's newly arrived, who's dependent upon their employer for a place to live, place to work, transportation, kind of cut off[.]" (A-331-32). DeBaca also testified that forced labor problems "keep coming up…repeatedly" in certain industries, including construction, and that "migrant labor" is especially vulnerable. (A-333).

DeBaca also held forth about the motives of "businesses [that] get involved in forced labor," telling jurors that "there's a combination of profit maximization on the one hand, and almost pleasure that is taken in being able to have this type of

control over other people." (A-328-29). "[I]t is kind of a very twisted, rational economic decision[.]" (A-329).

Forced Labor in China. DeBaca also painted a grim picture of China as a hotbed of forced labor that invited the jury to presume the worst about Zhong and Rilin. DeBaca told the jury that the U.S. officially rated China as one of the worst countries in the world for forced labor and people trafficking. (A-367-69). He stressed that a culture of impunity surrounds forced labor in China so that "the idea of a boss being punished for forced labor in China is something that wasn't really something that they can be afraid of[.]" (A-362). He recounted appalling cases involving "people who are mentally challenged or…physically challenged almost getting scooped up in railway stations where they were begging and taken out to brick kilns[.]" (A-363).[5] DeBaca also told the jury about "reeducation through labor camps, large prison systems set up…[with] specific ones of the Muslim community from the Uighur subgroup." (A-366-67).

Framing his argument by invoking U.S. foreign policy concerns, DeBaca testified that his office and others at "high levels within the U.S. government" had continually raised the plight of "exported Chinese labor" working on "construction projects" that are "not government projects" but may be "funded by the Chinese government." (A-363-64). This was a "routine problem cropping up during that

[5] Here, the district court told DeBaca that he had gone a "little too far." (A-363).

time period" "all over the world" and was noted by "international observers." (*Id.*).

Asked whether there were "common issues" involving "migrant Chinese workers in construction," DeBaca testified regarding several "typical" features. For example, workers would leave China "with the debt and financial hardships built into the relationship[,] [t]ypically through a contract" and contractual "punishment clauses." (A-364-65). Other typical features of forced labor schemes involving migrant Chinese workers were "holding people's salary in arrears" (A-365) and "document servitude." (A-366).

Legal Definitions and Opinions. DeBaca defined numerous legal concepts for the jury, including statutory terms at issue in the case. (*See* A-326-27 (defining "forced labor"), A-330-31 (defining "alien smuggling"), A-341-42 (defining "document servitude"), A-345-46 (defining "debt bondage")). Some of DeBaca's definitions were unremarkable. For example, DeBaca told the jury that forced labor is "defined by the use of some type of coercive means to hold someone…in a condition of compelled service" and occurs when the individual "feel[s] that there's no reasonable alternative but to remain in service or serious harm would occur." (A-327). But others were inaccurate. "Alien smuggling," DeBaca said, is "bringing someone into th[e] destination country without authorization," whether by "crossing the border" illegally, "overstaying [a] visa," or may occur where an

individual has legal status but then "something happens that keeps them in the United States with no longer having status[.]" (A-330-31). Omitted was the crucial element of transportation "in furtherance of" the alien's illegal presence, discussed *infra*, pp. 62-67.

DeBaca also urged the jury to discount valid defense arguments. Regarding the voluntariness of the employment relationship, DeBaca presented the jury with both his view of the law and his supposed knowledge of how schemes work in "reality." The initial voluntariness of a relationship, DeBaca testified, "is something that modern anti-trafficking regimes immediately discount." (A-351). "That is about as basic a concept within, not just American law, but in international law as anything." (*Id.*). Moreover, workers cannot enter "arm's-length relationships" because "*[t]he reality*…[is that] those are not necessarily people who are at the same level as the recruiting companies or the employing companies." (A-352 (emphasis added)). Similarly, discussing document servitude, DeBaca testified that he had "personal experience" of employers "who may end up saying, well, I was keeping their passports for safekeeping." (A-344). Such statements, he said, should be carefully scrutinized. (A-344-45).

Finally, DeBaca offered his personal spin on Rilin employment contracts. He testified that provisions enumerating possible violations were "penalty clause[s]" and described the prohibition on communication with overseas relations

or organizations as "troubling" and as tending to "isolate[]" the workers. (A-379, A-384). And he opined that "the open-ended nature of the contract…send[s] up some major red flags[.]" (A-375-76).

2. DeBaca's Testimony Was Inadmissible Under Rule 702.

Expert testimony is only admissible if the expert's "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue." Fed. R. Evid. 702. It is not admissible if "the untrained layman would be qualified to determine intelligently…the particular issue without enlightenment from those having a specialized understanding of the subject." *Id.*, advisory comm. note (1972) (quoting Ladd, *Expert Testimony*, 5 Vand. L. Rev. 414, 418 (1952)); *see Andrews v. Metro North Commuter R.R. Co.*, 882 F.2d 705, 707-08 (2d Cir. 1989). A district court commits "manifest error by admitting expert testimony where the evidence impermissibly mirrors the testimony offered by fact witnesses, or the subject matter of the expert's testimony is not beyond the ken of the average juror." *United States v. Amuso*, 21 F.3d 1251, 1263 (2d Cir. 1994); *United States v. Castillo*, 924 F.2d 1227, 1232 (2d Cir. 1991). Moreover, expert testimony is improper where it "instruct[s] the jury as to applicable principles of law," *United States v. Scop*, 846 F.2d 135, 140 (2d Cir. 1988), or "merely [tells] the jury what result to reach," *Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir. 1992) (quoting Fed. R. Evid. 704, advisory comm. note (1972)).

In addition, this Court has repeatedly warned of the dangers of law enforcement experts whose testimony strays from "translat[ing] esoteric terminology" or "explicat[ing] an organization's hierarchical structure," and instead instructs the jury on "precisely those facts that the Government must prove to secure a guilty verdict." *United States v. Mejia*, 545 F.3d 179, 190-91 (2d Cir. 2008). "Unless closely monitored by the district court," such testimony "may unfairly 'provide the government with an additional summation…and 'may come dangerously close to usurping the jury's function.'" *United States v. Dukagjini*, 326 F.3d 45, 54 (2d Cir. 2003) (quoting *United States v. Nersesian*, 824 F.2d 1294, 1308 (2d Cir. 1987)).

Here, the questions for the jury on the forced labor charges were simple: Were the supposed threats sufficient to overcome a person's will, and were they in fact used to obtain the workers' labor? In the normal case, a worker testifies that he was coerced, explains how, and the jury decides whether to believe him. No expert testimony, certainly no expert testimony from a former prosecutor and diplomat, is necessary.

The lack of victim witnesses in this case did not make expert testimony any more appropriate. Jurors needed no help from DeBaca to determine whether the withholding of salary may create "dependency" that keeps workers in servitude. (A-349). Nor did they need his help to assess the impact of a worker's relatives

having pledged collateral on his behalf (A-361), or to understand that rumors of workers being punished might create a "climate of fear." (A-348-49, A-360). These are all inferences that a prosecutor could argue in summation. But the district court let the government weaponize "the added aura of reliability that necessarily surrounds expert testimony," and telegraph these inferences to the jury from the witness stand. *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1998). The admission of DeBaca's testimony "usurp[ed] the jury's function," and "unfairly provid[ed] the government with an additional summation." *Dukagjini*, 326 F.3d at 54.

Even worse was DeBaca's personal vouching for the effectiveness of particular methods of forced labor. Withholding pay, he said, "seems to work very effectively." (A-350). Similarly, punishing individual workers is "the effective way" to create a "climate of fear" (A-349) such that escaping "ends up being a very irrational choice." (A-360). The government didn't even need to repackage these comments in its summation, reminding the jurors that "Ambassador DeBaca" had "explained" that "the more effective way" of establishing control is to make examples of individual workers. (A-886). This was naked assertion masquerading as expert testimony.

DeBaca's testimony about the "typical" patterns of criminal behavior was also improper. In *Castillo* the government argued that its fact witnesses were

credible because their testimony matched an expert's description of "the typical operating methods of Washington Heights drug dealers." 924 F.2d at 1231, 1234. This Court vacated the conviction, finding this testimony inadmissible under Rule 702 because "the jury was capable of understanding the evidence and determining the facts in issue" without expert assistance. *Id.* at 1233. This Court also condemned "the Government's use of an expert witness to propound the impermissible theory that appellants' guilt could be inferred from the behavior of unrelated persons." *Id.* at 1234.

Similarly, in *United States v. Cruz*, the government argued that evidence concerning a drug transaction was corroborated by an expert's description of the "typical drug trafficking operations in the Washington Heights area and the function of a broker in drug trafficking." 981 F.2d 659, 660-62 (2d Cir. 1992). This Court vacated the conviction and reaffirmed that "guilt may not be inferred from the conduct of unrelated persons." *Id.* at 663.

Again and again, DeBaca told the jury what patterns and practices he would expect to see in forced labor schemes generally, and in those using migrant Chinese labor or in construction organizations specifically. DeBaca testified, for instance, that forced labor schemes involving Chinese workers often involve "document servitude," and that workers often leave China "with the debt and financial hardships built into the relationship" through salary withholding and

contractual "punishment clauses." (A-364-66). As in *Castillo* and *Cruz*, the government repeatedly invoked DeBaca's testimony in its summation to argue that the evidence presented at trial added up to forced labor because it matched DeBaca's description of the "typical" forced labor scheme. (*See* A-769 ("As you heard from Ambassador De Baca, most forced labor cases involve victims who initially sign a contract."), A-770 ("As Ambassador De Baca instructed you…[o]ften, certain victims are treated better than others."), A-886 ("This is exactly what Ambassador De Baca was talking about when he talked about the climate of fear."), A-891 ("It is also consistent with what Ambassador De Baca told you about how these schemes are run.")). Not only was this theme express in the government's summations, it was the implicit premise of DeBaca's testimony as a whole: take it from me, this is what forced labor looks like.

Finally, DeBaca's legal instructions and conclusions were palpably improper. DeBaca instructed the jury about his own definitions of legal terms with specific statutory meanings. (A-326-27, A-330-31, A-341, A-345-46). Even when accurate, this type of testimony impermissibly invades the province of the court in charging the jury on the law, and is liable to confuse the jury, implying that a prosecution witness, not the judge, is the custodian of the law. It is barred under Rule 702. *See Hygh*, 961 F.2d at 364. Similarly, DeBaca's opinions that certain contractual clauses "trouble[ed]" him or raised "red flags" improperly placed his

own legal conclusions before the jury. *See Marx & Co., Inc. v. Diners' Club Inc.*, 550 F.2d 505, 508-10 (2d Cir. 1977) (impermissible for expert to construe contract and give "his conclusions as to the legal significance of various facts adduced at trial" and "documents…equally before the judge and jury").

3. DeBaca's Testimony Was Inadmissible Under Rule 403.

DeBaca's lecture on forced labor should also have been excluded under Rule 403, which has a "uniquely important role" in a district court's scrutiny of expert testimony "given the unique weight such evidence may have in a jury's deliberations." *Nimely v. City of N.Y.*, 414 F.3d 381, 397 (2d Cir. 2005).

DeBaca repeatedly and in outrageously prejudicial ways invited the jury to presume the worst about Zhong because of his nationality. The use of "exported Chinese labor" in construction projects, DeBaca said, was a "routine problem cropping up during that time period" "all over the world." (A-363-64). DeBaca also gave wildly improper testimony about human rights abuses in China, including "labor camps" for religious minorities (A-366-67) and the suggestion that "mentally" and "physically challenged" Chinese were "scooped up in railway stations where they were begging and taken out to brick kilns…or to other very dangerous and dirty jobs." (A-363). And he applied the weight of the U.S. government to the cause, telling the jury that the U.S. government regarded China as a problem-country for forced labor and people trafficking. (A-367-68).

DeBaca's "injection" of Zhong's "ethnicity into a trial as evidence of criminal behavior [was] self-evidently improper and prejudicial for reasons that need no elaboration." *Cruz*, 981 F.2d at 664. Furthermore, the question for the jury was whether Zhong committed forced labor, not whether others of his nationality or in his industry have done so. DeBaca's testimony encouraged the jury to convict on an improper guilt-by-association theory—implying that forced labor is "just how they do it in China."

In addition to his testimony about China, DeBaca's testimony included other extended discussions of highly inflammatory and improper topics. "Musings as to defendants' motivations…[are not] admissible if given by any witness—lay or expert." *In re Rezulin Prods. Liability Litig.*, 309 F. Supp. 2d 531, 546 (S.D.N.Y. 2004) (Kaplan, J.). But DeBaca was permitted to describe why businesses "get involved in forced labor," describing not only "greed" and "profit maximization," but also about "almost a pleasure that is taken in being able to have this type of control over other people." (A-328-29). He also repeatedly digressed about the history of slavery and sharecropping in the United States, powerfully linking the evidence at trial with one of the most emotionally charged and shameful aspects of this nation's history. (A-311-12, A-337, A-346). This might be relevant in a seminar room; it had no place in Zhong's criminal trial.

This Court has "condemned" the use of law enforcement experts whose testimony "logically adds nothing" but whose presence "strongly suggests to the jury that a law enforcement specialist…believes the government's witness[] to be credible and the defendant to be guilty[.]" *Cruz*, 981 F.2d at 663. That is exactly what occurred here.

4. The Error Was Not Harmless.

The government's case was meager, and DeBaca's testimony became "the hub of the case, displacing the jury by connecting and combining all other testimony and physical evidence into a coherent, discernible, internally consistent picture." *Mejia*, 545 F.3d at 190-91. Indeed, DeBaca's testimony was so important that his name became a chorus in the government's summations, anchoring almost every point. (A-769 ("As you heard from the expert witness Ambassador De Baca…"), A-770 ("As Ambassador De Baca instructed you…"), A-883-84 ("Ambassador De Baca told you the significance of that term…"), A-886 ("As Ambassador De Baca explained…The more effective way, Ambassador De Baca explained…"), A-891 ("It is also consistent with what Ambassador De Baca told you about how these schemes are run."), A-898-99 ("Ambassador De Baca told you…"), A-908 ("[A]s Ambassador De Baca explained…")). "Such 'heavy reliance…expose[s]' its central role in persuading the jury to convict,' as the government 'clearly understood that [DeBaca's testimony] was a powerful

weapon' in its arsenal." *Stewart*, 907 F.3d at 689 (quoting *Wood v. Ercole*, 644 F.3d 83, 96-97 (2d Cir. 2011)).

DeBaca's fundamentally improper testimony infected the entire trial, and requires a new trial on all counts.

C. The District Court Violated Zhong's Confrontation Rights

The district court also committed reversible error by barring Zhong's successive attempts to impeach the government's most important cooperating witness, Ken Wang, the Rilin manager who served as an FBI informant for six years. His testimony provided the only connection between Zhong and the alleged use of violence against workers in 2001–02. Wang also gave crucial testimony linking Zhong to the visa fraud and alien smuggling charges. But the district court shut down three separate avenues of impeachment that were entirely proper under the Federal Rules of Evidence, in violation of Zhong's rights under the Confrontation Clause of the Sixth Amendment. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678-80 (1986).

1. The District Court Erroneously Barred Impeachment With Reputation And Opinion Testimony Concerning Wang's Character For Untruthfulness.

Federal Rule of Evidence 608(a) provides that a "witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an

opinion about that character." Such testimony may be offered "by a member of the community in which the witness lives, works or spends a substantial portion of his time[.]" *United States v. Augello*, 452 F.2d 1135, 1139-40 (2d Cir. 1971). The relevant community may be the workplace. *United States v. Mandel*, 591 F.2d 1347, 1370 (4th Cir. 1979); *see also* 2 McCormick on Evidence §322 (8th ed.). A long acquaintance is not required for a witness to offer reputation or opinion testimony under Rule 608(a). *United States v. Oliver*, 492 F.2d 943, 945-48 (8th Cir. 1974) (two months' acquaintance with witness sufficient to offer reputation evidence); *Wilson v. City of Chicago*, 6 F.3d 1233, 1239 (7th Cir. 1993) (error to exclude journalist's opinion that witness with whom he had spent "fair amount of time" was "a consummate liar").

Wang plainly had a reputation as a person who could not be trusted, but the district court repeatedly stymied the defense's efforts to demonstrate that to the jury. For example, during cross-examination of immunized government witness Ray Tan, defense counsel asked whether Wang "[h]ad a reputation in the company as someone who was dishonest and not to be trusted[.]" (A-225). Tan—who knew Wang well having worked for him for six years—answered in the affirmative, but the district court sustained a government hearsay objection. (*Id.*). Similarly, Joseph DiPeri, a defense witness, also worked at Rilin with Wang as his "direct supervisor." (A-694). During DiPeri's testimony, defense counsel asked whether

Wang had "a reputation amongst the assistant managers as being dishonest." (A-698). The district court once again sustained an objection. (*Id.*).

These rulings were errors of law and clear abuses of discretion. *See Figueroa*, 548 F.3d at 226. The testimony was plainly permissible under Rule 608(a). It is well-settled that evidence of "[a] reputation among a person's associates or in the community concerning [a] person's character" is *not* excludable as hearsay. Fed. R. Evid. 803(21). Indeed, reputation evidence concerning character, including a witness's character for truthfulness, "must be based on hearsay." *United States v. Lynch*, 366 F.2d 829, 832 (3d Cir. 1966) (citing *Michelson v. Unites States*, 335 U.S. 469, 477-78 (1948)); *see also* 2 McCormick on Evidence §322 (8th ed.). The district court thus improperly shut down counsel's efforts to elicit reputation testimony.

The district court also erred by preventing Zhong from eliciting opinion testimony from DiPeri regarding Wang's character for untruthfulness. Having established that Wang had been DiPeri's "direct supervisor," defense counsel asked DiPeri a simple question: "In your opinion, is he an honest man?" (A-697). The district court sustained an objection. (*Id.*). Defense counsel then elicited further information about Wang's role as DiPeri's supervisor and asked: "Mr. DiPeri, do you have any opinion as to Ken Wang's character [f]or truthfulness, or

untruthfulness?" (A-699-700). The district court again sustained an objection. (A-700). For similar reasons, this ruling was also unquestionably erroneous.

2. The District Court Erroneously Barred Cross-Examination About A Prior Adverse Credibility Finding Against Wang.

The district court also precluded Zhong from impeaching Wang with a 2018 adverse credibility finding by Judge Christopher Kazlau of the New Jersey Superior Court following a hearing on Wang's application for a firearms permit. At the hearing, a former colleague of Wang's testified to workplace incidents in which Wang demonstrated a dangerously volatile character. Wang attempted to minimize those incidents. At the conclusion of a 20-page decision, Judge Kazlau made an outcome-determinative credibility finding: [redacted] (A-1543).

Despite recognizing that Judge Kazlau "said [he] didn't believe [Wang]," the district court held that the New Jersey decision "doesn't go to credibility" because it focused on Wang's "bad temperament." (A-120-21). The district court also explained that "typically these things are in the context of either a criminal or a disciplinary case, and this just was not that." (*Id.* at 123). This ruling was both factually and legally baseless.

First, the factual premise of the district court's ruling was clearly erroneous. Judge Kazlau made clear that he carefully considered Wang's testimony and that

of his former colleague and found Wang's attempts to explain away his incidents of workplace volatility incredible. This was a classic credibility finding—not a judgment of Wang's temperament.

Second, the district court's ruling contravened this Court's cases holding that a prior judicial credibility finding is not inadmissible solely because the two cases have different subject matter. *See United States v. White*, 692 F.3d 235, 248-51 (2d Cir. 2012); *United States v. Cedeño*, 644 F.3d 79, 82-83 (2d Cir. 2008). Instead, courts must consider seven other factors. *See White*, 692 F.3d at 249 (listing factors first articulated in *Cedeño*).

The district court ignored the *White/Cedeño* factors and erroneously placed undue weight on the non-criminal context of Judge Kazlau's credibility finding. At the same time, the court ignored the facts that made Judge Kazlau's adverse credibility finding especially probative under the *White/Cedeño* test: Wang's testimony before Judge Kazlau was recent; occurred under oath in New Jersey's Superior Court; the hearing concerned a matter important to Wang;[6] he was represented by counsel; and the adverse credibility finding was outcome determinative. Had the district court considered these facts, it would have been compelled to find Judge Kazlau's adverse credibility finding admissible to impeach Wang's crucial testimony.

[6] This was Wang's third effort to obtain a firearms permit. (A-1526-28).

3. The Errors Were Not Harmless.

Wang's testimony was central to the government's forced labor case because he was the only witness who connected Zhong to the alleged coercive "climate of fear" and use of "rendition squads" to pursue escaped workers. Despite working for Rilin for six years, Wang had no personal knowledge of such activities. But he purported to have overheard Zhong talking about "punish[ing]" an escaped worker to set "a good example" for the others. (A-435). "If they dare to escape," Wang claimed Zhong had said, "we will beat him up badly." (*Id.*).

The government had no evidence on this crucial point other than Wang's wholly uncorroborated testimony. Unsurprisingly, it emphasized in its summation that Wang overheard Zhong say he wanted "to set up a good example for the rest of the workers" and "[i]f they dare to escape or try to follow that guy's steps, we will beat him up badly." (A-777). The government amplified the testimony even further in rebuttal, dramatically reenacting the supposed colloquy between the dignitary and Zhong. (A-896).

Wang similarly provided crucial testimony on the alien smuggling and visa fraud charges. The government was required to prove that Zhong knew the workers were not permitted to work at private work sites. Wang supplied the government with precisely the testimony that it needed, telling the jury about conversations in which Zhong purportedly acknowledged that workers were not

permitted to work at unofficial job sites. (A-433-34). The government also leaned heavily on this testimony in its summation. (A-796).

Deprived of strong paths to impeachment, Zhong was left to challenge Wang's testimony based on his status as a paid FBI informant and the fact that certain details of his testimony were not included in reports he periodically wrote for the FBI. Standing alone, these lines of impeachment did not move the needle. Armed with reputation and opinion testimony from two separate witnesses and the adverse credibility finding, however, Zhong might have persuaded the jury that Wang was fundamentally dishonest. Accordingly, the district court's errors with regard to this critical witness were plainly not harmless. *See, e.g.*, *White*, 692 F.3d at 251-52 (exclusion of prior adverse credibility finding not harmless); *United States v. Strother*, 49 F.3d 869, 876 (2d Cir. 1995) (exclusion of prior inconsistent statement not harmless); *United States v. Harvey*, 547 F.2d 720, 723-24 (2d Cir. 1976) (exclusion of bias evidence not harmless).

D. The District Court Erroneously Refused To Give A Crucial Instruction On The Forced Labor Charges

As noted, the government's primary theory on the forced labor charges was that employment agreements with harsh economic terms threatened "serious harm" if the workers were not compliant. The district court, however, refused to instruct the jury on the need to distinguish between illegal threats and permissible warnings of "adverse but legitimate consequences" incident to an employment relationship.

This instruction was necessary to avoid an overbroad interpretation of "serious harm," and its omission deprived the defense of a critical argument as to why the contracts were insufficient to prove forced labor.

1. Courts Have Recognized The Need For An "Adverse But Legitimate Consequences" Instruction In Forced Labor Cases.

The forced labor statute penalizes any person who "knowingly provides or obtains the labor or services of a person" by, among other things, "serious harm or threats of serious harm to that person or another person." 18 U.S.C. §1589(a)(2). The statutory definition of "serious harm" encompasses "any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm." *Id.* §1589(c)(2).

In *United States v. Bradley*, construing a prior version of the statute, the First Circuit expressed concerns that an overbroad interpretation of "serious harm" could lead to "jury misunderstanding as to the *nature* of the pressure that is proscribed." 390 F.3d 145, 151 (1st Cir. 2004), *vacated on other grounds*, 545 U.S. 1101 (2005). The court observed that, "[t]aken literally, Congress' 'threats' and 'scheme' language could be read to encompass" leverage that employers rightfully exert over their employees, such as an "employer's 'threat' not to pay for

passage home if an employee [leaves work] early." *Id.* "Thus," the court wrote, "in an appropriate case we think that the court in instructing the jury would be required to draw a line between improper threats or coercion and permissible warnings of adverse but legitimate consequences." *Id.*; *see also United States v. Calimlim*, 538 F.3d 706, 714 (7th Cir. 2008) (instruction on "warnings of legitimate but adverse consequences…effectively alerted the jury to the *scienter* that the Government had to prove").

In deciding civil cases under the present version of §1589, both the Fourth and Ninth Circuits have adopted the *Bradley* formula and held that factfinders must distinguish between "improper threats or coercion and permissible warnings of adverse but legitimate consequences." *Muchira v. Al-Rawaf*, 850 F.3d 605, 624 (4th Cir. 2017); *Headley v. Church of Scientology*, 687 F.3d 1173, 1180 (9th Cir. 2012). District courts within this circuit have similarly recognized this key distinction, in both civil and criminal cases. For instance, in *United States v. Sabhnani*, 07–cr–429 (E.D.N.Y.), Judge Spatt instructed the jury, which was considering horrifying allegations of abuse, that "[i]t is not a threat of serious harm…to warn someone of adverse consequences such as denial of future employment, withholding of wages or other monetary compensation." (A-113.254). *See also Walia v. Veritas Healthcare Solutions, LLC*, 13 Civ. 6935, 2015 WL 4743542, at *4 (S.D.N.Y. Aug. 11, 2015) ("Of course, courts 'must

distinguish between improper threats or coercion and permissible warnings of adverse but legitimate consequences.'"); *DeSilva v. N. Shore-Long Island Jewish Health Sys., Inc.*, 10 Civ. 1341, 2012 WL 748760, at *7 (E.D.N.Y. Mar. 7, 2012) (same) (Bianco, J.).

Recognizing the developing caselaw on this point, Sand's Modern Federal Jury Instructions also advises that, in appropriate cases, the jury should be instructed that "[s]ome warnings by an employer to an employee can be legitimate." 2 Modern Federal Jury Instructions-Criminal P47A.12. "Warnings of legitimate but adverse consequences of an employee's actions, standing alone, are not sufficient to violate the forced labor statute." *Id.* "It is for [the jury] to determine whether the statements made by defendant to [the alleged victim] were legitimate warnings, or threats[.]" *Id.*

2. The Instruction Was Critical.

The district court instructed the jury that "serious harm" included "both physical and nonphysical types of harm" and could "include psychological, financial, or reputational harm." (A-915). "Therefore, a threat of serious harm does not have to involve any threat of physical [violence]." (*Id.*). "However, the threats must have [been] serious enough that, considering all of the surrounding circumstances, a reasonable person of the same background and in the same circumstances as the alleged victim would perform or continue performing labor

that the victim would otherwise not have willing[ly] performed in order to avoid the harm." (*Id.*). The court then instructed the jury that it could consider "other surrounding circumstances, such as verbal abuse and insults, isolation, poor working and living conditions, denial of adequate rest, food and medical care, pay withholding, or any combination of these conditions and any other techniques that you find the defendant might have used to intimidate victims and compel them to work." (A-916).

To balance this instruction, Zhong asked for an instruction that "[i]t is not a legitimate threat of serious harm under the statute…to warn someone of adverse but legitimate consequences, for instance, the consequence for breach of a voluntarily entered into employment agreement." (A-113.58, A-720-28). The district court refused to give the instruction. (A-724, A-728). While suggesting, ironically, that the instruction might be appropriate in cases involving "extreme" circumstances, such as "enslave[ment]" and "torture" (A-724), the court ruled that it was not appropriate here because the adverse consequences embedded in the employment agreements were plainly illegitimate. (A-727).

The district court had it backwards. The "adverse but legitimate" instruction was necessary in this case because the government's evidence as to the indicted conduct was based on the consequences triggered by a breach of employment agreements. In such a case, the jury must be instructed that not all warnings of

adverse consequences embedded in the employment agreement are necessarily threats of "serious harm." This instruction focuses the jury on the crucial task of distinguishing between those warnings capable of improperly coercing labor and those that are adverse but legitimate incidents of an employment relationship. *See Calimlim*, 538 F.3d at 714. The district court's refusal to give the instruction, whether because the case was not sufficiently extreme, or because it was too extreme, made no sense, and simply assumed that the employment agreements were so clearly illegitimate that the jury would be required to convict.

The failure to provide the instruction rendered the "serious harm" charge unfairly unbalanced. It also violated the well-established principle that "a criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in the proof, no matter how tenuous that defense may appear to the trial court." *United States v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990) (collecting cases). This error requires vacatur of the forced labor convictions. *See, e.g.*, *id.* at 45-47 (reversing because charge was insufficiently balanced and failed to convey defense theory).

E. The District Court's Cumulative Errors Deprived Zhong Of A Fair Trial

"[T]he cumulative effect of a trial court's errors, even if they are harmless when considered singly, may amount to a violation of due process requiring reversal of a conviction." *Al-Moayad*, 545 F.3d at 178; *see also United States v.*

Guglielmini, 384 F.2d 602, 607 (2d Cir. 1967) ("[T]he total effect of the errors …was to cast such a serious doubt on the fairness of the trial that the convictions must be reversed.").

Here, each of the evidentiary and legal errors prejudiced Zhong's defense and warrants a new trial. At a minimum, however, this Court should vacate all the convictions because the cumulative effect of the district court's erroneous admission of disquieting uncharged conduct and improper expert testimony, its failure to permit Zhong to fully and thoroughly impeach the government's most important cooperating witness, and its failure to give the "adverse but legitimate consequences" instruction on the forced labor charges deprived Zhong of a fair trial on every count.

II. THE FORCED LABOR CONVICTIONS SHOULD BE REVERSED FOR INSUFFICIENT EVIDENCE

On the forced labor charges, the government was required to prove that Zhong "*obtain[ed]*" the "labor or services" of the workers through one or more of the methods prohibited by the statute. 18 U.S.C. §1589(a) (emphasis added). "The harm or threat of harm, 'considered from the vantage point of a reasonable person in the place of the victim, must be 'sufficiently serious' to *compel* that person to *remain*' in her condition of servitude when she otherwise would have left." *Muchira*, 850 F.3d at 620 (emphasis added). Not only must the threat of serious harm be sufficient in itself, it must *actually* "compel" the victim to perform labor

that the victim would otherwise have declined to perform. *See United States v. Kalu*, 791 F.3d 1194, 1211 (10th Cir. 2015) (jury properly instructed to consider whether "if [defendant] had not resorted to [the] unlawful means, *the person would have declined to perform additional labor or services*" (emphasis added)).

Without testimony from the supposed victims, the government faced a steep challenge in establishing beyond a reasonable doubt that the workers labored under coercion and not because they wanted to earn lump-sum payouts that dwarfed their earnings in China. *See United States v. Pauling*, 924 F.3d 649, 656 (2d Cir. 2019) (speculation may not "do duty for probative facts"). The government did not come close to proving its case.

For starters, the evidence showed that the workers during the charged period were paid their full salaries on returning to China, and there was no evidence suggesting otherwise. (A-664, A-670-71, A-677-78). And these salaries were multiple times what the workers earned in China. One apparently typical worker, for example, earned less than 1,500 RMB per month in China, but earned over 100,000 RMB in approximately two years' work in the U.S (over 4,000 RM per month). (A-626-28; *see also* A-647, A-662). Another earned between 2,200 and 2,600 RMB a month in China but 9,300 RMB a month in the U.S. (A-670-71). And their families received stipends roughly similar to the workers' Chinese wages while the workers were in the U.S. (A-627, A-664, A-671, A-677-78, A-991).

Other evidence was also not probative of forced labor. There was no proof that the workers were prevented from communicating with their friends and families in China. To the contrary, the evidence showed that the workers had access to computers, cell phones, fishing equipment, and bicycles in their dormitories. (A-162-63, A-167, A-178, A-418-25, A-571, A-573-75, A-1000, A-1097). Internal Rilin emails showed that workers who had been in the U.S. longer than they wished freely requested a return to China, and these requests were granted. (A-1457). And the document Rilin used to bid for work severely undermined the government's theory that Rilin implemented harsh contractual provisions to force workers to labor, pointing instead to Rilin's motive to satisfy the Chinese government's legitimate concern with "confidentiality and security." (A-1447). The workers at 304 Fifth Avenue worked alongside American contractors, under American managers, including recent college graduates hired through online advertising, received OSHA training, and wore uniforms bearing Rilin logos. (A-427-29, A-431-32, A-515-18, A-520-21, A-556-57, A-561-62, A-704-05, A-713, A-718, A-1339-78, A-1455-56). Both government and defense witnesses testified that there was nothing to prevent them walking off the job site. (A-525-26, A-709).

Even the government's most supposedly damning evidence of Zhong's participation in forced labor—Wang's testimony about Zhong's conversation with

the visiting delegate—concerned a conversation that likely referred to events outside the indictment period. There was no evidence of any violence or threats of violence during the indictment period.

The government also failed to prove Zhong's intent to commit forced labor. Indeed, there was no evidence that anyone within Rilin saw the need to coerce workers to labor. In contrast, there was clear evidence that the employment agreements were intended to meet the Chinese government's security concerns. (A-565-70, A-1447-54).

There was thus insufficient evidence to show that Zhong intended to or did compel the workers' labor. Accordingly, Zhong's convictions on Counts One, Two, and Three must be reversed.

III. THE ALIEN SMUGGLING CONSPIRACY CONVICTION SHOULD BE REVERSED FOR INSUFFICIENT EVIDENCE

The government's theory on the alien smuggling count was that Zhong conspired to "smuggle" Rilin workers by transporting them to and from construction sites in and around New York City. (A-796). But "[w]illful transportation of illegal aliens is not, per se, a violation of the [alien smuggling] statute." *United States v. Merkt*, 764 F.2d 266, 272 (5th Cir. 1985). Instead, the government must prove that the transportation was actually "in furtherance of" the alien's illegal presence in the U.S. 8 U.S.C. §1324(a)(1)(A)(ii); *United States v. Khalil*, 857 F.3d 137, 140 (2d Cir. 2017). It failed to do so and, likewise, failed to

establish that Zhong "had the specific intent to violate the substantive statute" required to establish his knowing participation in a conspiracy. *United States v. Newman*, 773 F.3d 438, 455 (2d Cir. 2014) (citing *United States v. Gaviria*, 740 F.2d 174, 183 (2d Cir. 1984)); *see also United States v. Kelly*, ---S. Ct.---, 2020 WL 2200833, at *3 n.1 (U.S. May 7, 2020). Accordingly, his conviction on Count Four must be reversed.

The statute makes it a crime, "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, [to] transport[], or move[] or attempt[] to transport or move such alien within the United States by means of transportation or otherwise, *in furtherance of such violation of law*." 8 U.S.C. §1324(a)(1)(A)(ii) (emphasis added). This Court has yet to articulate the outer boundaries of the "in furtherance" element. Applying the statute to the mere transportation of the Rilin workers from their dormitories to the jobsite, however, would expand it far beyond what the text will reasonably bear, and far beyond existing caselaw. It would effectively eviscerate the "in furtherance" element, rendering *any* mere transportation of an illegal alien within the U.S. a violation.[7]

[7] Other circuits disagree about whether there must be specific intent to assist an alien in maintaining her presence in the U.S., as opposed to mere knowledge that the transportation would have this effect. *Compare United States v. Silveus*, 542 F.3d 993, 1002 (3d Cir. 2008) (requiring intent), *United States v. Stonefish*, 402 F.3d 691, 695 (6th Cir. 2005) (same), *United States v. Hernandez-Guardado*, 228

As an initial matter, the plain meaning of "in furtherance" suggests that the transportation must directly, and not incidentally, assist in the alien's illegal presence in the U.S. The word connotes active assistance. *See*, *e.g.*, merriam-webster.com (defining "furtherance" as "the act of furthering: Advancement"); Black's Law Dictionary (11th ed., 2019) (defining "furtherance" as "[t]he act or process of facilitating the progress of something or of making it more likely to occur; promotion or advancement").

Consistent with that interpretation, most alien smuggling cases involve conduct designed to inhibit law enforcement from discovering the illegal aliens—transportation that is clandestine and/or involves moving large distances, or away from the border or port of entry. *See*, *e.g.*, *United States v. Hernandez-Sanchez*, 315 F. App'x 308, 309-10 (2d Cir. 2008) (defendant picked up illegal aliens on Canadian border); *United States v. Stonefish*, 402 F.3d 691, 695-96 (6th Cir. 2005) (defendant picked up illegal aliens "at night in an isolated location across from the Canadian border"); *United States v. Barajas-Chavez*, 162 F.3d 1285, 1289-90 (10th Cir. 1999) (defendants transported illegal aliens over 750 miles inland from

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F.3d 1017, 1022 (9th Cir. 2000) (same), and *Merkt*, 764 F.2d at 272 (same), *with United States v. Barajas-Chavez*, 162 F.3d 1285, 1288 (10th Cir. 1999) (en banc) (requiring knowledge), and *United States v. Parmelee*, 42 F.3d 387, 391 (7th Cir. 1994) (same). However, this Court need not resolve these disputes, because the alleged transportation here would not violate the alien smuggling statute under any circuit's analysis. And, in any event, this case charged a conspiracy, which necessarily requires specific intent, as noted above.

border state); *United States v. Williams*, 132 F.3d 1055, 1057-58 (9th Cir. 1998) (defendant flew illegal aliens from Rio Grande to Houston); *United States v. Parmelee*, 42 F.3d 387, 388-89 (7th Cir. 1994) (defendant transported from Canada to Chicago); *United States v. Shaddix*, 693 F.2d 1135, 1136-38 (5th Cir. 1982) (defendants recruited illegal aliens, told them to hide in bushes, and drove them 30 miles before Border Patrol intercepted them).

Indeed, several courts have held that mere local employment-related transportation, without more, is not alien smuggling. In *United States v. Moreno*, 561 F.2d 1321 (9th Cir. 1977), for example, the Ninth Circuit reversed the alien smuggling conviction of the foreman of a logging company who knowingly transported undocumented aliens to and from job sites. *Id.* at 1323. These facts presented no "direct or substantial relationship" between the transportation and "furtherance of the alien's presence in the United States." *Id.* The court thus rejected a "broader interpretation" of the statute that "would potentially have tragic consequences for many American citizens who come into daily contact with undocumented aliens." *Id.*; *see also United States v. One 1984 Ford Van*, 826 F.2d 918, 919-20 (9th Cir. 1987) (reaffirming *Moreno*); *United States v. Fierros*, 692 F.2d 1291, 1295 (9th Cir. 1982) ("[M]ere transportation of illegal aliens to and from the fields on the ranch or farm where they are working does not fall within a fair reading of [the alien smuggling statute]."). The Sixth and Seventh Circuits

have similarly held that in determining whether particular transportation constitutes alien smuggling, courts must distinguish between cases in which "the illegal aliens were friends, co-workers, or companions of the defendant," and those in which the aliens were "merely human cargo." *Stonefish*, 402 F.3d at 696; *Parmelee*, 42 F.3d at 391.

Several district courts have reached similar conclusions. For instance, in *United States v. Moreno-Duque*, the owner of a construction business was charged with transporting workers he knew to be illegal aliens between work sites. 718 F. Supp. 254, 255 (D. Vt. 1989). Granting the defendant's motion for an acquittal, the court held that the government was required to prove that "the *purpose* of the transportation was in whole or in part to further the aliens' violation of law." *Id.* at 259. The government's proof that the defendant "knowingly transported…illegal aliens, as their employer and for the purpose of employment, was insufficient as a matter of law to satisfy this burden." *Id.* at 259-60; *see also United States v. One 1984 Chevrolet Truck*, 701 F. Supp. 213, 216 (N.D. Ga. 1988) (distinguishing "between acts geared towards surreptitious or furtive transportation—which inhibits government enforcement of immigration laws—and incidents…involving minimal employment related transportation"; employer does not violate statute merely by giving illegal alien a "ride to work"); *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 305 (D.N.J. 2005) ("Furthering an illegal presence…involves

more than transporting the undocumented worker to his or her place of employment."); *Sys. Mgmt., Inc. v. Loiselle*, 91 F. Supp. 2d 401, 410 (D. Mass. 2000) ("transportation that is entirely incidental to an existing employment relationship seems not to fit into the statutory scheme").

Here, the government relied exclusively on the mere fact that Rilin transported the workers to and from the work sites in New York City and on Long Island. The government told the jury, "every time you move [the workers] further[s] their illegal status here in the United States." (A-796). The government presented no evidence that the transportation of Rilin workers was intended to help the workers evade law enforcement or maintain their illegal presence in the U.S. There was nothing clandestine about the transportation or about the alien's living or working conditions. To the contrary, the workers wore Rilin uniforms and lived openly among their neighbors in New Jersey. (A-519, A-735, A-741-42, A-1335-37, A-1443). The government even elicited testimony that on one occasion the van transporting the workers stopped "in the middle of Fifth Avenue," "three lanes" away from the curb, and the workers "parad[ed] into the building." (A-563).

All the government proved is that Zhong's alleged co-conspirators openly transported illegal aliens to and from work sites within the greater New York metropolitan area. This was not alien smuggling, nor was any agreement to provide such transportation an alien smuggling conspiracy.

IV. ZHONG'S SENTENCE WAS PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE

Zhong's 190-month prison term appears to be the longest non-sex trafficking forced labor sentence ever imposed in this Circuit and is procedurally and substantively unreasonable.

A. Background

The district court applied a 4-level Guidelines enhancement reserved for offenses involving a "large number of vulnerable victims." U.S.S.G. §3A1.1(b); *see* A-939-41. That single enhancement increased Zhong's Guidelines range by over 50%, from 108–135 to 168–210 months.

The Probation Department did not initially recommend this enhancement; the government lobbied for it later. (Dkt.258). Zhong objected because the enhancement may not be imposed unless the sentencing court makes "individualized findings as to the vulnerability of particular victims," whereas the government's theory rested entirely on generalizations about the alleged victims. (Dkt.260 at 11 (quoting *United States v. McCall*, 174 F.3d 47, 50 (2d Cir. 1998))). But the district court applied the enhancement anyway, relying on two broad generalizations about Rilin's workers: (1) they all "spoke no English" and were "largely uneducated"; and (2) the offense conduct itself made the workers—as a group—vulnerable because Rilin "pressure[d]" workers through "debt bondage contracts that threatened them and their families," "isolated" workers "from the

Chinese neighborhoods and communities," and took away their identification documents. (A-940). The court made no individualized finding about the vulnerability of particular victims. Indeed, such findings would have been impossible because the court had limited information about the alleged victims, none of whom testified.

Zhong also sought a lower sentence based on his three-year confinement at the MDC, a facility Judge Pollack has compared to jail in a "Third World Country." The MDC has been plagued by "longstanding unaddressed temperature regulation issues," among other things. (Dkt.256 at 3). These deplorable conditions were greatly exacerbated when, on January 27, 2019 as outside temperatures fell to near zero degrees, an electrical fire caused a massive power outage. (*Id.* at 6). Zhong spent the ensuing days locked in his cell in total darkness, deprived of adequate heat or hot water, clean clothes, clean drinking water, toiletries, social or legal visitation, or warm meals. (*Id.* at 6-8). A site visit pursuant to an administrative order registered dreadful conditions at the stricken jail: "cold wind [blowing] through the cracks in the doors," inmates "covered head to toe with blankets and towels," and lights "not functioning in any individual cells." (*Id.* at 6-7). One district judge who toured the facility observed "copious amounts of paint peeling and hanging from the ceiling" and "abundant water damage." (*Id.* at 7-8).

The subhuman conditions of Zhong's pretrial confinement were compounded by his lack of English, which made it virtually impossible to have social interaction with other inmates or communicate with guards or medical personnel. (*Id.* at 8-10). Moreover, during his three years at the MDC, Zhong suffered from a series of medical conditions, including severe abdominal pain and a skin rash caused by the facility's unsanitary conditions. (*Id.* at 9-10). In 2017, Zhong experienced intense pain and was hospitalized for four days, during which he was handcuffed to a bed and subjected to invasive and painful tests and procedures without an interpreter to explain their nature or purpose. (*Id.* at 10). Also in 2017, Zhong suffered a serious injury when a guard closed a door on his head, causing profuse bleeding, but received no treatment for days until his counsel intervened. (*Id.* at 10). The injury left a permanent mark, and Zhong continued to suffer dizziness, confusion, and severe headaches long afterwards. (*Id.*).

Zhong made his oppressive pretrial confinement a central feature of his sentencing submission. (Dkt.256 at 5-11, 34-35). But the district court made only a passing reference to it at sentencing, saying she was "struck as I listened to counsel list the conditions of Mr. Zhong's confinement—unsafe, unhealthy, isolated, not speaking the language[—]how easily those arguments could be applied to the victims in this case." (A-962). The court gave no substantive reason for (apparently) rejecting Zhong's argument.

Indeed, the district court failed to articulate any justification whatsoever for imposing a nearly *sixteen-year* sentence. Instead, the court utilized Zhong's sentencing primarily to itemize the reasons it believed he was, in fact, guilty. (A-961-66). Although the court stated in conclusory fashion that it had "considered" the §3553 factors, it made no effort to explain how any of those factors supported the enormous sentence it imposed.

B. The District Court Failed To Make The Individualized Findings The Four-Level Enhancement Requires

The vulnerable-victim enhancement applies only where a defendant "knew or should have known that a victim of the offense" was "unusually vulnerable due to age, physical or mental condition, or [was] otherwise particularly susceptible to the criminal conduct." U.S.S.G. §3A1.1(b) & comt. app. n.2. The enhancement is intended to penalize the targeting of "a particular victim [who] was less likely to thwart the crime." *McCall*, 174 F.3d at 50; *see also United States v. Dupre*, 462 F.3d 131, 146 (2d Cir. 2006) (enhancement punishes defendants whose "target[ing]" of those "in need of greater societal protection" makes "the defendant's conduct more criminally depraved"). The enhancement cannot be applied absent "*individualized* findings as to the vulnerability of *particular victims*." *McCall*, 174 F.3d at 50 (emphasis added). A sentencing court cannot simply assume vulnerability based on "generalizations about victims[']… membership in a class…where a very substantial portion of the class is not in fact

particularly vulnerable to the crime in question." *Id.*; *see also United States v. Crispo*, 306 F.3d 71, 83 (2d Cir. 2002) ("Because the inquiry explores individual attributes, broad generalizations about victims based on their membership in a class are discouraged.").

In *McCall*, for example, the district court applied the enhancement to a bank employee who embezzled from customer accounts. The court reasoned that many of the accountholders were elderly and/or held passbook accounts, suggesting they were less likely to detect the defendant's unauthorized transactions. 174 F.3d at 49. This Court remanded for resentencing, holding that the district court improperly employed a "generalized analysis" "without further particularized inquiry" about specific individual victims. *Id.* at 52. It faulted the district court for relying on general characteristics that do not necessarily "demonstrate[] a particular vulnerability to embezzlement," in particular victims. *Id.* The Court noted, for example, that "elderly people can be meticulous about their finances" and passbook accountholders "may in fact keep track of the account[s]." *Id.*

The district court's approach here was similarly flawed. The court had little information about any individual victims, and instead resorted to generalizations about the victims' lack of English and supposed lack of education. But many New Yorkers are immigrants who speak no English and lack college degrees. Those qualities do not necessarily make them vulnerable to forced labor—indeed, many

uneducated immigrants are strong willed, ambitious, and more than capable of resisting a forced labor scheme. *Cf. United States v. Kerley*, 544 F.3d 172, 180 (2d Cir. 2008) (in failure-to-pay-child-support case, mother's status as "a recent immigrant without financial resources or family support" did not justify enhancement).

United States v. Sabhnani, 599 F.3d 215 (2d Cir. 2010), provides an illustrative contrast. The victims' lack of English, lack of money, and complete dependence on the defendants supported a finding of victim vulnerability because both victims testified, providing the requisite basis for individualized findings. *Id.* at 253-54. Such findings were not only absent here, but impossible to make on this record.

The district court also focused extensively on the methods of the alleged forced labor scheme: the "pressure," "debt bondage contracts," "isolat[ion]," and deprivation of identifying documents that Zhong and his alleged coconspirators supposedly effected. (A-940). But the "nature of the crime" is relevant only because there must be some nexus to the vulnerability; "the focus must remain on the victim's individual vulnerability." *United States v. Hershkowitz*, 968 F.2d 1503, 1506 (2d Cir. 1992); *see also Dupre*, 462 F.3d at 145-46 (fact that defendants chose not to target investors "likely to cause trouble and…ask questions" did not establish that actual victims were "unusually vulnerable" to

fraud). The facts on which the court relied were features of the crime, not victim characteristics, and thus could not justify the vulnerable-victim enhancement.

Because the district court improperly inflated Zhong's Guidelines range by over 50%, Zhong's sentence was procedurally flawed and must be vacated. *See Gall v. United States*, 552 U.S. 38, 51 (2007) (erroneous Guidelines range calculation is a "significant procedural error").

C. The District Court's Failure To Explain The Basis For Its Sentence Was Procedurally Unreasonable

The district court also erred by failing to adequately explain its chosen sentence, including its basis for refusing to accord the oppressive conditions of Zhong's pretrial confinement any mitigating value.

A sentencing court must "state in open court the reasons for its imposition of the particular sentence" and, where the Guidelines range exceeds 24 months, "the reason for imposing a sentence at a particular point within the range." 18 U.S.C. §3553(c)(1). "[I]n its explanation, the district court must satisfy [this Court] that it has 'considered the parties' arguments' and that it has a 'reasoned basis for exercising its own legal decisionmaking authority.'" *United States v. Cavera*, 550 F.3d 180, 193 (2d Cir. 2008) (quoting *Rita v. United States*, 551 U.S. 338, 356 (2007)).

"Greater particularity in the reasons given for a sentence is necessary…when the sentence reflects a more fulsome exercise of discretion." *United States v.*

Pugh, 945 F.3d 9, 26 (2d Cir. 2019). Thus, "[w]hen a judge exercises discretion within a broader sentencing range…he must do so 'with a degree of care appropriate to the severity of the punishment ultimately selected.'" *Id.* (quoting *United States v. Chartier*, 933 F.2d 111, 117 (2d Cir. 1991)). And "where the appellant…presents nonfrivolous reasons for imposing a different sentence…the judge will normally…explain why he has rejected those arguments." *United States v. Corsey*, 723 F.3d 366, 377 (2d Cir. 2013) (quoting *Rita*, 551 U.S. at 357); *Pugh*, 945 F.3d at 26. A court's failure "to adequately explain the chosen sentence" is a "significant procedural error." *Gall*, 552 U.S. at 51; *Pugh*, 945 F.3 at 27.

Here, the district court failed to explain why it rejected Zhong's argument that the horrific conditions of his pre-trial confinement, exacerbated by his medical problems and total lack of English, merited a lower sentence. As this Court has recognized, the "severity of the conditions of confinement" is a reasonable basis for a court to impose a shorter term of imprisonment than might otherwise be warranted. *See United States v. Stewart*, 590 F.3d 93, 144 (2d Cir. 2009). Indeed, as Zhong emphasized, at least one district court has granted downward variances based on the same MDC ordeals. (Dkt.256-3 at 6-8 (Sentencing Tr., *United States v. De La Rosa*, 18-CR-667 (E.D.N.Y))). Yet the district court brushed Zhong's argument aside, apparently viewing it as ironic in light of the crimes of conviction. But "irony" is not a proper basis to dismiss a nonfrivolous sentencing argument.

The court's failure to address Zhong's reasoned argument in itself requires resentencing. *See Corsey*, 723 F.3d at 377 (vacating sentence because of district court's failure, *inter alia*, to resolve defendants' argument that loss calculation led to an overly harsh sentence).

The district court compounded this error by entirely failing to explain why it chose a 190-month sentence. Its conclusory reference to the §3553(a) factors (A-960-61) did not suffice, because "just as we do not insist upon 'robotic incantations,' we require more than a few magic words." *Corsey*, 723 F.3d at 376; *see also United States v. Jenkins*, 854 F.3d 181, 187, 196 (2d Cir. 2017) (vacating where court gave "only formulaic reasoning" for its sentence). That Zhong's sentence fell within the mis-calculated Guidelines range does not obviate the court's obligation to explain the particular sentence it chose. Indeed, "[a] district court may not presume that a Guidelines sentence is reasonable," *Cavera*, 550 F.3d at 189, and a Guidelines sentence may be substantively unreasonable, *see, e.g.*, *Jenkins*, 854 F.3d at 196; *United States v. Dorvee*, 616 F.3d 174, 187 (2d Cir. 2010). And even if this Court may "discern from the record…good reasons for the sentence imposed," this "does not eliminate the district court's independent obligation to explain its reasoning in open court." *United States v. Rosa*, 957 F.3d 113 (2d Cir. 2020).

The district court was faced with a vast range of options: the statutory range of time-served to life, and a broad Guidelines range with a much higher minimum point, 168–210 months. The district court sentenced Zhong near the midpoint of that broad Guidelines range. It was incumbent on the court to explain why, "limited by §3553(a)'s 'parsimony clause,'" *Jenkins*, 854 F.3d at 190, it chose a 190-month sentence from among the other options available to it. *See United States v. Brooks*, 889 F.3d 95, 102 (2d Cir. 2018) ("[T]here had to be a significant justification to support the severity of that sentence[.]"). But the court did not explain the sentence, instead focusing its comments on Zhong's guilt. (A-961-66). Such remarks "relat[ing] to [the defendant's] guilt rather than to an appropriate sentence…do not provide a basis for understanding why the particular sentence was imposed." *Pugh*, 945 F.3d at 27.

This additional procedural error also requires resentencing. *Id.* at 28; *Rosa*, 957 F.3d 113.

D. Zhong's Sentence Was Substantively Unreasonable

A district court is required to impose a sentence that is "sufficient, but not greater than necessary," to fulfill the purposes of sentencing. *Cavera*, 550 F.3d at 189. "Though the standard for finding substantive unreasonableness is high, this Court has not shied away from doing so when appropriate." *Singh*, 877 F.3d at 115; *see also United States v. Rattoballi*, 452 F.3d 127, 132 (2d Cir. 2006)

("[R]eview for reasonableness, though deferential, [does] not equate to a 'rubber stamp[.]'"). It should do so here.

It is a statutory imperative that sentencing courts strive to "avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. §3553(a)(6). Yet Zhong's sentence dwarfs those of other forced labor defendants whose conduct was far more heinous. In *Sabhnani*, for example, the lead defendant enslaved and sadistically tortured two domestic servants over five years. 599 F.3d at 225-30 (defendant beat victims, forced them to eat from the trash, repeatedly scolded one with hot water, mutilated her face, forced her to eat raw hot chilies until she vomited, and threatened to have her children murdered). Yet the court sentenced her to prison for 132 months—below the Guidelines range and almost five years less than Zhong. *Id.* at 250. In *United States v. Marcus*, the defendant subjected his victim to "physical and psychological torture…result[ing] in lasting physical and mental injury." 517 F. App'x 8, 10-11 (2d Cir. 2013). The sentence was 96 months, approximately half of Zhong's. *Id.* at 10-11. The defendants in *Bradley* used not only economic coercion to compel labor, as Zhong was alleged to have done, but also actual violence and threats of violence. 390 F.3d at 148-50. The court determined that a 70-month sentence was sufficient. *Id.* at 150; *cf. United States v. Garcia*, 164 F. App'x 176, 177 (2d Cir. 2006) (defendant who recruited migrant

farm workers near Mexico border and forced them to work until they had paid off debts sentenced to 46 months' incarceration).

Against these precedents involving significantly more reprehensible conduct, Zhong's 190-month stands apart as a clear outlier. Indeed, it is telling that the district court did not even attempt to reconcile his sentence with that of any other forced labor defendant. Nor can Zhong's disproportionately long sentence be justified by §3553(a) goals of punishment or societal protection. Zhong has already endured far more onerous conditions of confinement than many defendants experience in their entire terms of imprisonment, and he will in all likelihood be deported to China immediately upon his release.

Under any measure, Zhong's 190-month sentence is substantively unreasonable.

CONCLUSION

For the foregoing reasons, the judgment should be reversed with instructions to enter a judgment of acquittal on Counts One–Four and a new trial on Count Five, or vacated and remanded for a new trial on all counts. At a minimum, Zhong's sentence should be vacated and the case remanded for resentencing.

Dated: New York, New York
May 14, 2020

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro
Daniel J. O'Neill
Julian S. Brod
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Attorneys for Defendant-Appellant Dan Zhong

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. The undersigned counsel of record for Defendant-Appellant Dan Zhong certifies pursuant to Federal Rules of Appellate Procedure 32(g) that the foregoing brief contains 17,962 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the Word Count feature of Microsoft Word 2016, and is therefore in compliance with this Court's Order dated May 4, 2020, permitting Zhong to file a principal brief of up to 18,000 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of Times New Roman.

Dated: May 14, 2020

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
	:	
-against-	:	
	:	**OPINION & ORDER**
DAN ZHONG,	:	16-cr-614 (DLI)
Defendant.	:	

DORA L. IRIZARRY, Chief United States District Judge:

Defendant Dan Zhong ("Defendant") currently awaits trial on charges arising out of his alleged involvement in a forced labor conspiracy. On April 27, 2018, Defendant filed two separate briefs containing four motions *in limine* (collectively, "Defendant's Motions *in Limine*"). Mot. *in Limine* ("Def.'s Visa Mot."), Dkt. Entry No. 116; Supplemental Mot. *in Limine*, ("Def.'s Warrant Mot."), Dkt. Entry No. 117. The same day, the government filed a single brief containing eight motions in limine (collectively, the "Government's Motions *in Limine*"). First Mot. *in Limine* ("Gov't Mot."), Dkt. Entry No. 115. The government opposed each of Defendant's Motions *in Limine* on May 11, 2018. Mem. in Opp. ("Gov't Opp. to Visa Mot."), Dkt. Entry No. 121; Mem. in Opp. ("Gov't Opp. to Warrant Mot."), Dkt. Entry 122. Defendant opposed the Government's Motions *in Limine* on the same day. Mem. in Opp. ("Def.'s Opp."), Dkt. Entry No. 119. Defendant filed his replies to Defendant's Motions *in Limine* on May 18, 2018. Reply to Resp. ("Def.'s Visa Mot. Reply"), Dkt. Entry No. 123; Reply to Resp. ("Def.'s Warrant Mot. Reply"), Dkt. Entry No. 125. The government filed its reply to the Government's Motions *in Limine* the same day. Reply to Resp. ("Gov't Reply"), Dkt. Entry No. 124. The Court heard oral argument on June 20, 2018 (the "Oral Argument") on the Defendant's Motions *in Limine* and the Government's Motions *in*

Limine. Dkt. Entry No. 129. The Court addresses each of Defendant's Motions *in Limine* and the Government's Motions *in Limine* as follows.

Defendant moves, *in limine*, to preclude the government from offering: (1) evidence or making any argument relating to any alleged conduct by Defendant from 2001 to 2009, while he allegedly enjoyed diplomatic immunity; (2) evidence relating to allegedly false or fraudulently obtained visas that are not A2 or G2 visas; (3) evidence or making any argument relating to any and all allegations referenced in the redacted portions of the search warrant affidavit for Defendant's email account; and (4) evidence or making any argument suggesting that U.S.-based affiliates of China Rilin do not engage in legitimate business. *See generally*, Def.'s Visa Mot. and Def.'s Warrant Mot.

The government moves, *in limine* to: (1) admit evidence of Defendant's participation in the alleged forced labor scheme while he was an accredited diplomat of the People's Republic of China ("PRC"); (2) admit PRC legal documents as verbal acts or business records; (3) preclude the introduction of evidence regarding the legality in the PRC of forced labor or debt bondage contracts; (4) permit victims of the alleged forced labor conspiracy to testify using pseudonyms;[1] (5) admit into evidence copies of documents that were in the possession of victim workers when were evacuated from the United States; (6) admit evidence of obstructive conduct to show Defendant's consciousness of wrongdoing; (7) permit government witness Mark Redfield to testify about the role and statements of Defendant's prior counsel in drafting an affidavit signed by Redfield; and (8) provisionally preclude Defendant's introduction of documents or other

[1] This motion *in limine* was decided previously by the Court. *See* Summary Order, Dkt. Entry No. 168. Accordingly, this Opinion does not address the government's motion *in limine* to permit victims of the alleged forced labor conspiracy to testify using pseudonyms.

exhibits that have not been provided to the government as reciprocal discovery from Defendant. *See generally*, Gov't Mot.

BACKGROUND[2]

On November 9, 2016, the government filed a criminal complaint (the "Complaint") against Defendant and codefendant Landong Wang ("Wang") that alleges Defendant and participated in a forced labor conspiracy and visa fraud scheme, among other illegal activities. *See* Compl. ("Compl."), Dkt Entry No. 1.[3] The Complaint describes a construction business based in the PRC ("Rilin") that performs construction work on PRC governmental facilities in the United States, including work for the Permanent Mission of the PRC to the United Nations ("PRC Mission"), the Embassy of the PRC to the United States, and PRC consulates in the United States. *Id.* ¶ 2. By agreement between the United States and the PRC, PRC nationals enter the United States pursuant to A2 or G2 visas issued by the U.S. Department of State to perform construction work on PRC diplomatic facilities. *Id.* ¶ 3. The construction workers who enter the United States pursuant to A2 or G2 visas to perform construction work on PRC diplomatic facilities are restricted to work only on project-related construction work and are not permitted to work independently on non-PRC facilities. *Id.* ¶¶ 4-5.

At the time the government filed the Complaint against him, Defendant was in charge of Rilin's U.S. operations. *Id.* at 8. Between 2001 and 2006, Defendant was an accredited diplomat to the PRC consulate in New York City. *Id.* Between 2006 and November 2009, Defendant was an accredited diplomat to the PRC Embassy in Washington D.C. *Id.* Defendant became a United States permanent resident in May 2010 after he signed an I-508 form, which waived all rights,

[2] Familiarity with the facts and circumstances of this case is assumed and is based on various documents filed with the Court as described below.
[3] The Complaint and the case were unsealed by Court order on November 12, 2016.

privileges, exemptions, and immunities that would otherwise accrue to him because of his prior occupational status. *Id.*; *See also*, Gov't Opp. to Visa Mot. at Ex. B. Wang was the manager of Rilin's U.S. operations and was responsible for Rilin workers' deployment to the United States. Compl. ¶¶ 9-10.

According to the Complaint, Rilin construction workers who were admitted to the United States pursuant to A2 or G2 visas to work at the PRC Mission or other PRC diplomatic facilities instead performed private contracting work at other sites not owned by the PRC. *Id.* ¶ 6. The Rilin workers were compelled to perform construction work on private construction projects "by means of physical restraint, serious harm and threat of serious harm, and abuse and threatened abuse of law and legal process . . . In particular, . . . [Rilin] maintains a policy of forcing workers it brings to the United States to work as directed by threatening them with loss of their houses in the PRC as well as the loss of large cash deposits, both of which are pledged as collateral as a condition of their employment in the United States." *Id.* ¶ 7. The government's investigation into Defendant's alleged criminal activities uncovered multiple A2 or G2 workers who escaped from the custody of the forced labor conspiracy. *Id.* ¶ 10. With the exception of one worker who escaped in 2010, most of the escapees fled from the labor conspiracy's custody in 2001 and 2002, while Defendant was an accredited PRC diplomat. Gov't Visa Opp. at 2. The government alleges that, during the period Defendant was an accredited diplomat, Defendant helped orchestrate the forced labor scheme. Gov't Mot. at 2. The government further alleges that Defendant continued to act as a principal of the forced labor scheme after he was no longer an accredited diplomat. *Id.*

According to the government, victims have informed the government that Rilin personnel, including Wang, seized the victims' passports after they arrived in the United States. *Id.* at 3. The government further submits that Rilin obtained judicial rulings from the PRC government holding

that the victims breached their contracts with Rilin, resulting in judgments against the victims and seizure of the victims' posted collateral. *Id.*

On December 1, 2016, a federal grand jury returned an indictment (the "Indictment") charging defendant with: (1) forced labor conspiracy in violation of 18 U.S.C. §§ 1589(d) and 1594(b); (2) forced labor in violation of 18 U.S.C. § 1589(a), (b), and (d); (3) concealing passports and immigration documents in connection with forced labor in violation of 18 U.S.C. §§ 1592(a); (4) alien smuggling conspiracy in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I); and (5) visa fraud conspiracy in violation of 18 U.S.C. § 1546(a). Indictment, Dkt. Entry No. 20.

DISCUSSION

I. Legal Standard

The purpose of a motion *in limine* is to allow the trial court to rule in advance of trial on the admissibility of certain forecasted evidence. *See Luce v. United States*, 469 U.S. 38, 40 n.2 (1984); see also *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996); *Nat'l Union Fire Ins. Co. v. L.E. Myers Co. Grp.*, 937 F. Supp. 276, 283 (S.D.N.Y. 1996). Evidence generally should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *See Baxter Diagnostics, Inc. v. Novatek Med., Inc.*, 1998 WL 665138, at *3 (S.D.N.Y. Sept. 25, 1998); *Nat'l Union Fire Ins. Co.*, 937 F. Supp. at 287. Courts considering a *motion in limine* may reserve judgment until trial so that the motion is placed in the appropriate factual context. *See Nat'l Union Fire Ins. Co.*, 937 F. Supp. at 287. Alternatively, a judge is "free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling," particularly in the event that, "when the case unfolds . . . the actual testimony differs from what was contained in the [movant's] proffer." *Luce*, 469 U.S. at 41-42.

II. Motions *in Limine*

A. Defendant's Diplomatic Immunity

Defendant moves to preclude the government from offering evidence or making any argument to any of Defendant's alleged conduct from the period in which Defendant enjoyed diplomatic immunity as an accredited diplomat. *See* Def.'s Visa Mot. at 1-5. The government conversely moves to admit evidence of Defendant's participation in the alleged forced labor scheme while he was an accredited diplomat. *See* Gov't Mot. at 13-18.

1. Applicable Law

Former diplomats retain limited immunity for their official acts as diplomats, pursuant to the Vienna Convention on Diplomatic Relations ("VCDR") article 39, which provides in pertinent part:

> When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

VCDR, art. 39(2). Thus, article 39 of the VCDR:

> provides for so-called 'residual' immunity, which is a less expansive immunity that remains with the former diplomats for certain acts committed during their occupation of the diplomatic station. Specifically, once a diplomat becomes a 'former' diplomat, he or she is not immune from suit for prior acts unless those acts were performed 'in the exercise of [the former diplomat's] functions as a member of the mission.'

Swarna v. Al-Awadi, 622 F.3d 123, 134 (2d Cir. 2010) (quoting VCDR art. 39(2)) (alteration in original). The prior acts protected by residual immunity include "only such acts as are directly imputable to the state or inextricably tied to a diplomat's professional activities." *Id.* at 135. Residual immunity does not extend to "acts that are peripheral to official acts." *Id.* at 136-37.

Both diplomatic immunity case law and the VCDR suggest that a diplomatic officer cannot waive diplomatic immunity because the ability to waive diplomatic immunity is the prerogative of the foreign state, not the individual. *See, e.g.*, *Aquamar, S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1296 n.41 (11th Cir. 1999) ("Diplomatic immunity, like sovereign immunity, belongs to the foreign state and may only be waived by the state itself."); *Logan v. Dupuis*, 990 F. Supp. 26, 31 (D.D.C. 1997) ("[Defendant] thus has no authority to waive his immunity from civil jurisdiction; that is the prerogative of the government of Canada . . ."); *See also*, VCDR art. 32 ("The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State."). Although these examples do not address residual immunity under article 39, but rather diplomatic immunity under articles 31 and 37 of the VCDR, the same policy considerations apply for former diplomats' immunity for official acts performed by the diplomats in the exercise of their functions as members of the mission, because those official acts are attributable to the foreign state. *See United States v. Al Sharaf*, 183 F. Supp.3d 45, 50-51 (D.D.C. 2016) (quoting *Boanan v. Baja*, 627 F. Supp.2d 155, 165 (S.D.N.Y. 2009) ("These prior official functions constitute 'in law the acts of the sending State.'").

The VCDR defines the functions of a diplomatic mission as, *inter alia*:

(a) Representing the sending State in the receiving State;
(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
(c) Negotiating with the Government of the receiving State;
(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

VCDR art. 3(1).

2. The Parties' Arguments

Defendant argues that, by setting the indictment period to begin in 2010, the government

has acknowledged implicitly that pre-2010 evidence should be excluded. *See* Def.'s Visa Mot. at 1; *See also,* Def.'s Opp. at 4-5. In seeking to preclude the government's introduction of evidence before the indictment period, Defendant argues that he is entitled to residual diplomatic immunity, and the acts the government seeks to introduce fall within the scope of his official duties as a diplomat. *See* Def.'s Visa Mot. at 3. Defendant contests the government's position that Defendant's alleged pre-2010 conduct is direct evidence of the charged forced labor scheme. Def.'s Opp. at 5-7. Finally, Defendant argues that evidence related to the pre-2010 acts should be excluded under Federal Rules of Evidence 401, 403, and 404 because such evidence would be irrelevant and unduly prejudicial. Def.'s Visa Mot. at 4-5; Def.'s Opp. at 7-10.

The government seeks to introduce evidence of Defendant's conduct before the indictment period, arguing that those uncharged acts are direct evidence of the charged forced labor conspiracy. *See* Gov't. Mot. at 15-17. In the alternative, the government maintains that the pre-2010 acts should be admitted under Federal Rule of Evidence 404(b) to prove Defendant's intent, planning, and knowledge of the charged criminal conduct. *Id.* at 17. In opposing Defendant's motion to preclude this evidence, the government argues that Defendant waived any claim of immunity when he applied successfully for permanent residence in the United States. Gov't. Opp. to Visa Mot. at 3-4. The government contends that Defendant is estopped from claiming immunity because in his signed Form I-508 Waiver of Rights, Privileges, Exemptions and Immunities, Defendant attested:

> I seek to acquire or retain the status of an alien lawfully admitted for permanent residence and hereby waive all rights privileges, exemptions, and immunities that would otherwise accrue to me under any law or executive order by reason of such occupational status.

Id. at Ex. B.

The government also further maintains that neither the VCDR nor any bilateral treaty

between the United States and the PRC affords an evidentiary privilege to preclude the introduction of evidence of Defendant's acts from the time period in which Defendant was an accredited diplomat when the government does not seek to prosecute Defendant for those acts. *Id.* at 1-2. In support of its argument, the government refers to an unpublished case from the Eastern District of Wisconsin, *United States v. Ning Wen*¸ No. 04-CR-24, slip op. (E.D. Wis. Sept. 12, 2005). In *Wen*, the court held that evidence of a former diplomat's prior bad acts while he was a diplomat was admissible to prove the former diplomat's knowledge of an alleged crime. *Id.*, slip op. at 2-3. The government argues that, as in *Wen*, the Court should permit the government to introduce evidence of Defendant's prior acts to demonstrate Defendant's knowledge of the goals of the alleged forced labor conspiracy pursuant to Federal Rule of Evidence 404(b). Gov't Opp. to Visa Mot. at 2-3.

At the oral argument on the motion, the government raised arguments regarding Defendant's diplomatic status based on official notice to the United States Department of State (the "DOS"). The Court directed the parties to file letter briefs to supplement the parties' positions in the Government's Motions *in Limine* and the Defendant's Motions *in Limine* as to Defendant's diplomatic status from 2001 until he became a permanent U.S. resident in May 2010. The government filed its supplemental letter brief on July 18, 2018. *See* Letter Br. Regarding Diplomatic Immunity ("Gov't. Letter"), Dkt. Entry No. 130. The government attached a certification from the Office of Foreign Missions, DOS, dated July 17, 2018 (the "Certification") to its letter brief. *See* Certification of the Office of Foreign Missions ("Certification"), attached as Ex. 1 to Gov't Letter.

The Certification verifies that the DOS was notified of Defendant's status as a consular employee at the PRC Consulate General in New York, New York entering his duties on April 3,

2002. *Id.* On February 15, 2006, the DOS was notified that Defendant's functions as a member of the consular post ended on January 15, 2006. *Id.* On February 21, 2006, the DOS was notified that Defendant was an administrative and technical staff member of the PRC Embassy in Washington, D.C. *Id.* The DOS subsequently was notified that Defendant's functions as a member of the administrative and technical staff of the Embassy ended on November 27, 2009. *Id.* The Certification further provides that the DOS customarily affords privileges and immunities to a member of a diplomatic or consular mission for thirty days after termination. *Id.* After termination, "the former member of the diplomatic mission enjoys solely residual immunity as to any acts performed in the exercise of his functions during the relevant periods." *Id.*

In its letter, the government recognizes that Defendant is entitled to residual immunity for any of his "official conduct" occurring between April 3, 2002 and November 27, 2009. Gov't Letter at 1. However, the government contends that the evidence it seeks to introduce is not evidence of Defendant's official conduct, but instead is evidence of Defendant's "repeated participation in kidnapping and abducting unwilling victims—as opposed to any crimes he may have committed while performing ministerial duties as a diplomatic or consular officer on behalf of the [PRC]." *Id.* The government again argues in its letter that residual immunity does not confer an "evidentiary privilege" to bar the government from introducing evidence of Defendant's acts because the government is not prosecuting Defendant for those acts. *Id.* at 5-6.

Defendant replied to the government's letter on July 25, 2018. *See* Letter Br. in Opp. to Gov't Letter ("Opp. Letter"), Dkt. Entry No. 133. Defendant counters that, contrary to the position the government originally took in its opposition to Defendant's motion to preclude evidence of Defendant's acts while he was an accredited diplomat, the government now concedes that Defendant is entitled to residual diplomatic immunity. *Id.* at 1. Defendant further emphasizes

that, in the government's letter, the government concedes that, at least some of the acts at issue, such as Defendant's ministerial decisions, constitutes Defendant's professional responsibilities as an accredited diplomat. *Id.* at 2. Defendant maintains that all of the conduct the government seeks to introduce falls within Defendant's professional responsibility, and Defendant's attempts to find Rilin workers who absconded from their duties did not exceed his official duties. *Id.*

Defendant further opposes the government's argument that evidence of Defendant's pre-2010 acts are necessary background to the charged forced labor conspiracy and maintains that *Wen* does not apply in this case. *Id.* at 3-4. Specifically, Defendant argues that *Wen* contains "virtually no analysis" and neither is controlling nor on point. *Id.* at 4. Contrary to the facts here, the government in *Wen* sought to introduce evidence directly preceding the indictment period and that pre-indictment evidence has no prejudicial impact under Federal Rule of Evidence 403. Defendant contends it instead "represented a classic example of demonstrating background and showing a defendant's knowledge under Rule 404(b)." *Id.* The government replied to Defendant's letter on August 1, 2016, opposing each of Defendant's arguments. Letter Reply Br., Dkt. Entry No. 135.

3. Analysis

There is no dispute that Defendant was an accredited diplomat from April 3, 2002 until January 15, 2006 and February 21, 2006 until November 27, 2009. *See* Certification. Thus, Defendant is entitled to residual diplomatic immunity for his official acts as an accredited diplomat during those periods. *See* VCDR art. 309(2); *See also*, *Swarna* 622 F.3d at 134. The Court finds the government's argument that Defendant waived any claim of residual immunity when he applied to become a permanent resident of the United States unpersuasive. Instead, as diplomatic immunity case law and the VCDR suggest, a diplomatic officer cannot waive diplomatic immunity because the ability to waive diplomatic immunity is the prerogative of the foreign state, not the

individual. *See supra*, Part II.A.1. Accordingly, Defendant did not waive residual immunity when he applied successfully for permanent residence in the United States. The government does not contend that the PRC waived Defendant's residual immunity at any time.

Although Defendant is entitled to residual immunity from prosecution, the government may admit evidence of Defendant's acts while he was an accredited diplomat as direct evidence, and to prove Defendant's intent, planning, and knowledge of the alleged forced labor conspiracy. As the government argues, and *Wen* supports, neither the VCDR nor any bilateral treaty between the United States and the PRC provides a privilege to former diplomats to preclude the introduction of evidence of former diplomats' acts for which they are not prosecuted. Thus, the government may introduce evidence that is "inextricably intertwined" and "arose out of the same transactions" as the conspiracy charged in the indictment, *See United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000), even if such evidence is of Defendant's acts while he was an accredited diplomat. Evidence that is "inextricably intertwined" and "arose out of the same transactions" as the conspiracy charged in the indictment is direct evidence of the charged conspiracy. *Id.* ("[E]vidence of uncharged criminal activity is not considered other crimes evidence under Fed. R. Evid. 404(b) if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial." (citations and internal quotation marks omitted)); *See also, United States v. Escalera*, 536 Fed. App'x 27, 32 (2d Cir. 2013) (summary order) ("Even if the sales were not inextricably intertwined, the district court would have had the discretion to admit them as background to the conspiracy, helping the jury understand how the illegal relationship among the participants developed, and how [the defendant's] role in the conspiracy evolved.").

Here, Defendants actions, including the alleged kidnapping and abduction of victim

laborers, as an accredited diplomat, provide necessary background information to the conspiracy.

The Court does not find compelling Defendant's argument that Defendant's participation in the alleged forced labor scheme as an accredited diplomat and employee of China Rilin is irrelevant to Defendant's charged participation in the alleged forced labor scheme as an employee of U.S. Rilin. *See* Def.'s Opp. at 5-6. The government indicates that it intends to prove that Defendant's coercive techniques and practices as a China Rilin employee were the same as those Defendant used as president of U.S. Rilin during the charged conspiracy. Gov't Reply at 2-3. The Court need not address the government's alternative theory of relevance, *i.e.*, evidence of "other acts" under Rule 404(b). *See United States v. Miller*, 116 F.3d 641, 682 (2d Cir. 1987) (distinguishing between uncharged conduct that is intertwined with charged conduct and uncharged conduct that is admissible under Rule 404(b)).

Evidence of Defendant's acts while he was an accredited diplomat is not unduly prejudicial under Federal Rule of Evidence 403. Under Rule 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Here, the probative value of Defendant's conduct, which provides the necessary background to the alleged conspiracy, including the kidnapping and abduction of victim laborers as a China Rilin employee, is not outweighed by the danger of any potential prejudicial effect such evidence may have.

Accordingly, Defendant's motion to preclude the admission of evidence from the time period in which Defendant enjoyed diplomatic immunity is denied. The government's motion to admit evidence of Defendant's participation in the alleged forced labor conspiracy while he was an accredited PRC diplomat is granted.

B. Fraudulently Obtained Visas

Defendant moves to preclude the government from offering evidence of allegedly fraudulent visa applications other than the A-2 and G-2 visa applications at issue in this case. *See* Def.'s Visa Mot. at 5-6. The government responds that it will not introduce evidence or make any argument in its case-in-chief at trial concerning visas other than A-2 and G-2 visas. Gov't Opp. to Visa Mot. at 5. The government does seek to introduce evidence of false statements made by Defendant in allegedly fraudulent visa applications, if Defendant testifies at trial. *Id.* at 5-6. The government seeks permission to introduce such evidence pursuant to pursuant to Federal Rule of Evidence 608(b). In Defendant's Visa Motion Reply, Defendant argues that Rule 608(b) permits cross-examination concerning only specific instances of a witness's own conduct.

Federal Rule of Evidence 608(b) provides: "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of . . . the witness." Fed. R. Evid. 608(b). False statements may be the basis for questioning under Rule 608(b). *See Hynes v. Coughlin*, 79 F.3d 285, 293-94 (2d Cir. 1996) (determining that cross-examination regarding witness filing a false workmen's compensation claim properly related to witness's character for truthfulness); *United States v. Jones*, 900 F.2d 512, 520-21 (2d Cir. 1990) (approving cross-examination regarding false statements made on applications for employment, an apartment, a driver's license, a loan and membership in an association under Rule 608); *United States v. Triumph Capital Group, Inc.*, 237 Fed. App'x 625, 629 (2d Cir. 2007) (summary order) ("This Court has held that it can be appropriate to introduce false statements, especially false sworn statements, under Rule 608(b)(1) to shed light on a witness' credibility.").

The allegedly fraudulent visa applications that the government seeks to introduce, signed by Defendant under penalty of perjury, are admissible on cross-examination as Defendant's false statements relevant to Defendant's character for truthfulness if the Defendant testifies at trial. Furthermore, the Court will give a limiting instruction to the jury that it only may consider the evidence of Defendant's false statements in relation to Defendant's character for truthfulness in order to avoid any unfair prejudice should the government introduce such evidence. *See United States v. Dupree*, 870 F.3d 62, 77 (2d Cir. 2017) (affirming a district court's finding that, with a contemporaneous limiting instruction, the probative value of admitted testimony was not unduly prejudicial under Rule 403); *see also*, Fed. R. Evid. 403.

Accordingly, Defendant's motion to preclude evidence of allegedly fraudulent applications other than the A-2 and G-2 visa applications at issue in this case is denied.

C. Email Search Warrant Affidavit

Defendant moves to exclude any evidence or argument relating to allegations referenced in the redacted portions of a search warrant affidavit to search Defendant's email address (the "Email Warrant Affidavit"). *See* Def.'s Warrant Mot. at 1-3. The government does not object to Defendant's motion to the extent it seeks to preclude evidence of the allegations referenced in paragraphs 12 and 51-62 of the Email Warrant Affidavit. *See* Gov't Opp. to Warrant Mot. at 2. Accordingly, that portion of Defendant's motion is granted.

The government opposes Defendant's motion to the extent that it seeks to preclude the government from offering evidence or making any argument relating to Defendant's alleged obstructive conduct. *See* Gov't Opp. to Warrant Mot. at 2-5. In its own Motions *in Limine*, the government moves to admit evidence of Defendant's alleged obstructive conduct to show his consciousness of guilt. Gov't Mot. at 28-29. The government seeks to admit evidence that Wang

arranged for Rilin workers to depart the United States to prevent their testimony in this case. *Id.* at 28. The government submits that its witnesses will testify that codefendant Wang could not take such action without Defendant's approval. *Id.* The government also seeks to admit evidence that Defendant hid potentially incriminating material and directed family members to hide evidence and possibly assets. *Id.*

Defendant argues that the Court should preclude the introduction of evidence regarding Defendant's obstructive conduct because such evidence might result in unfair prejudice, the presentation of cumulative evidence, and jury confusion. *See* Def.'s Warrant Mot. at 2 (citing Fed. R. Evid. 403). Defendant also argues that the evidence the government seeks to admit is irrelevant and prejudicial because the proposed evidence consists mostly of acts attributable to Wang. *See* Def.'s Opp. at 21-22.

The Second Circuit has held that evidence of obstructive conduct is admissible to show a Defendant's consciousness of guilt. *United States v. Triumph Capital Group, Inc.*, 544 F.3d 149, 160 (2d Cir. 2008) ("[Defendant]'s efforts to obstruct the investigation evidence a consciousness of guilt . . ."); *See also, United States v. Malpiedi*, 62 F.3d 465, 467 (2d Cir. 1995) ("This testimony was direct evidence of [defendant's] obstruction of justice and of his consciousness of guilt of the other charges."); *United States v. Robinson*, 635 F.2d 981, 986 (2d Cir. 1980) (finding evidence of a conspiracy's obstruction of the government's investigation admissible to show consciousness of guilt). Here, Defendant's own obstructive conduct, is probative of the Defendant's consciousness of guilt. With a limiting instruction to the jury, the probative value of the evidence of Defendant's obstructive conduct outweighs any potential risk of prejudice or jury confusion. *See Dupree*, 870 F.3d at 77.

Similarly, as Wang is aco-conspirator and the government has proferred that its witnesses

are expected to testify that Wang would not have engaged in obstructionist behavior without Defendant's approval, the probative value outweighs any potential prejudice to Defendant. *See* Fed. R. Evid. 403. Thus, such evidence is admissible. Again, a limiting instruction to the jury would be appropriate under these circumstances.

Accordingly, Defendant's motion to preclude evidence relating of allegations referenced in paragraphs 12 and 51-62 of the Email Warrant Affidavit is granted. To the extent that Defendant seeks to preclude evidence relating to Defendant's own and Wang's obstructive conduct, Defendant's motion is denied. The government's motion to admit evidence of Defendant's and Wang's obstructive conduct to show Defendant's consciousness of guilt is granted.

D. China Rilin Affiliates

In his final motion in limine, Defendant moves to exclude any evidence or argument that U.S.-based affiliates of China Rilin do not engage in legitimate business. Def.'s Warrant Mot. at 3-5. Defendant argues that such evidence is irrelevant to the charges against him. *Id.* at 3 (citing Fed. R. Evid. 401 and 402). Defendant also contends that evidence regarding the legitimacy of the U.S.-based affiliates may invite the jury to consider uncharged crimes or other bad acts. *Id.* at 4 (citing Fed. R. Evid. 404). The government opposes Defendant's motion, arguing that evidence that China Rilin's U.S.-based affiliates moved large amounts of cash between and among the affiliate companies and China Rilin is relevant to Defendant's knowledge that China Rilin's affiliate, U.S. Rilin, was an alter ego of China Rilin. *See* Gov't Opp. at 6-7. The government alleges that the U.S. affiliate of China Rilin "functioned in relevant part for the purpose of providing a cover for China Rilin's activities in the United States, including providing China Rilin construction workers to work on construction projects ostensibly under the banner of U.S. Rilin." *Id.* The government further contends that, "evidence that U.S. Rilin was merely an alter ego of

China Rilin tends to prove that the defendant continued to exercise control over the workers through his continued control and influence over the affairs of China Rilin in the United States." *Id.* at 7.

"Irrelevant evidence is not admissible." Fed. R. Evid. 402. "Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Fed. R. Evid. 401. Here, evidence that China Rilin's U.S.-based affiliates, of which Defendant was president, were alter egos of China Rilin, is relevant to the allegations of Defendant's involvement in the alleged visa fraud conspiracy. If, as the government suggests, the U.S.-based affiliate employees were admitted to the United States pursuant to A-2 and G-2 visas to conceal that the workers were in fact China Rilin employees, such evidence tends to prove the government's allegations. *See* Gov't Opp. to Warrant Mot. at 7. Evidence that the U.S.-based affiliates were alter egos of China Rilin also is relevant to Defendant's knowledge of the forced labor conspiracy because of his role as president of those alleged alter ego affiliates.

"Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). "This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). The government does not seek to introduce the evidence to question Defendant's character, but instead to support its allegations against Defendant and to demonstrate Defendant's knowledge.

Accordingly, Defendant's motion to preclude evidence or argument that U.S.-based affiliates of China Rilin do not engage in legitimate business is denied.

E. PRC Legal Documents

The government moves to admit PRC legal documents as verbal acts pursuant to Federal Rule of Evidence 801(c). Gov't Mot. at 18-19. Specifically, the government seeks to admit PRC forfeiture judgments and underlying employment contracts between Rilin and Rilin employees. *Id.* at 18. Defendant opposes the government's motion and requests that the Court defer its ruling until Defendant has had the opportunity to review the legal documents in order to decide whether Defendant will make any authenticity challenges. *See* Def.'s Opp. at 10-11. The government has not yet produced the documents to Defendant pursuant to a protective order that permits the government to delay certain discovery. *See* Protective Order, Dkt. Entry No. 39; *See also*, Gov't Mot. at 3, n.2. The Court defers its ruling on the government's motion to admit PRC legal documents until Defendant has had the opportunity to raise authenticity challenges to those documents.

F. PRC Law

The government moves to preclude Defendant from introducing evidence or argument relating to the legality of forced labor or debt bondage in the PRC. Gov't Mot. at 19-22. Specifically, the government argues that the PRC law is irrelevant and potentially confusing to a jury. *Id.* Defendant opposes the government motion, arguing that evidence of PRC law is probative of the forced labor charges against Defendant. Def.'s Opp. at 12-15. Specifically, Defendant argues that evidence of PRC law is probative of allegations that Defendant abused or threatened to abuse PRC law. *Id.* at 13-14. Defendant also argues that evidence of PRC law is probative of Defendant's knowledge and intent to participate in the forced labor conspiracy. *Id.* at 14. Defendant submits that evidence of PRC law, accompanied by limiting instructions, will neither confuse nor mislead the jury. *Id.* at 14-15. The Court finds Defendant's arguments

unpersuasive.

To support its argument, the government relies on Federal Rules of Evidence 401, 402, and 403. Rule 402 provides: "Irrelevant evidence is not admissible." Fed. R. Evid. 402. Rule 401 states: "Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." Fed. R. Evid. 401. Finally, Rule 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. "Application of this Rule requires a balancing analysis, and the trial judge has broad discretion to weigh the probative value of the evidence against the negative factors." *See Haynes v. Acquino*, 692 Fed.App'x. 670, 671 (2d Cir. 2017) (summary order) (quoting *Li v. Canarozzi*, 142 F.3d 83, 88 (2d Cir. 1998)).

The Court finds that the contested evidence of PRC law is inadmissible as irrelevant. *See* Fed. R. of Evid. 402. The requirements of PRC law and Defendant's belief about PRC law is highly attenuated from any element of any charge in the Indictment. *See United States v. Napout*, 2017 WL 6375729, at *12 (E.D.N.Y. Dec. 12, 2017) (holding that evidence regarding foreign law is "highly attenuated from any question of material fact in the case."). Moreover, to the extent Defendant suggests that the forced labor or debt bondage allegations underlying the charges against Defendant were legal in the PRC, there is serious risk of confusing the issues or misleading the jury leading to improper jury nullification. *See* Fed. R. Evid. 403; *See Id.*, 2017 WL 6375729, at *13 ("This genuine risk of jury nullification weighs heavily against allowing defense counsel to elicit evidence or make argument about foreign law.") (citations omitted). Additionally, if Defendant were to introduce evidence of PRC law, the government may respond, creating a

diversionary "trial within a trial" as to whether Defendant violated PRC law, leading to possible confusion and undue delay. *See United States v. Pepin*, 514 F.3d 193, 206 (citations omitted). The danger evidence of PRC law has of confusing or misleading a jury and creating undue delay outweighs the potential probative value of such evidence. Accordingly, the government's motion to preclude evidence of PRC law is granted.

G. Victim Documents

The government moves to admit copies of documents in the possession of alleged victims of the forced labor conspiracy as coconspirator statements or as business records. Gov't Mot. at 27-28. Specifically, the government seeks to admit copies of time sheets that were in victim workers' possession when they fled from the United States as either coconspirator statements of Wang or under the business records exception to the hearsay rule. *Id.* at 27. Defendant opposes the government's motion, arguing that the government offers no basis on which it can authenticate the documents. *See* Def.'s Opp. at 20.

Out of court statements made by a party's coconspirator "during and in furtherance of the conspiracy" are admissible against that party for the truth of those statements. Fed. R. Evid. 801(d)(2)(E). Under Federal Rule of Evidence 801(d)(2)(E), a court may admit an out-of-court declaration that otherwise would be hearsay, if it finds "by a preponderance of the evidence (a) that there was a conspiracy, (b) that its members included the declarant and the party against whom the statement is offered, and (c) that the statement was made during the course of and in furtherance of the conspiracy." *United States v. Coppola*, 671 F.3d 220, 246 (2d Cir. 2012) (citation omitted). Here, the government has not yet provided a sufficient basis for the Court to determine that the statements it seeks to admit were "made during the course of and in furtherance of" the alleged conspiracy. *Id.* Without such a basis, the Court cannot find that the victim documents are

coconspirator statements.

Under Federal Rule of Evidence 803(6), business records may be admitted as a hearsay exception if:

> (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a regular practice of that activity;
>
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
>
> (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803(6). The government has not yet provided sufficient information for the Court to determine that the documents it seeks to admit are business records that are exceptions to the rule against hearsay.

Because the government has not yet provided a sufficient basis for the Court to determine that the victim documents it seeks to admit are coconspirator statements or business records, the Court defers ruling on the government's motion to admit those documents until trial.

H. Mark Redfield Affidavit

The government seeks permission for government witness Mark Redfield to testify about the circumstances surrounding the creation of an affidavit by Redfield (the "Redfield Affidavit") if Defendant cross-examines him about the statements made therein. Gov't Mot. at 29. Defendant argues that the Court should deny the government's motion as premature. *See* Def.'s Opp. at 23. The Court agrees that the motion is premature.

The Complaint alleges that, on February 9, 2011, members of the Jersey City Mayor's Task

Force responded to a complaint about potential alien trafficking involving a white van that picked up and dropped off Asian males from a row house located at Pavonia Avenue in Jersey City, New Jersey (the "Pavonia Avenue Premises"). Compl. ¶ 18. An inspector surveilled the Pavonia Avenue Premises and observed that it was locked from the outside by a deadbolt, trapping the males inside. *Id.* During inspection of the Pavonia Avenue Premises, inspectors observed that it was divided into sleep quarters to accommodate twenty-eight boarders in violation of housing codes. *Id.* ¶ 19. The Pavonia Avenue Premises' basement was converted into twelve work stations with apparently homemade wiring in violation of fire codes. *Id.* Inspectors observed that the means of egress in the Pavonia Avenue Premises were locked from the outside. *Id.* During the inspection, inspectors encountered Asian males who claimed not to speak English or possess any form of identification at the time of the encounter. *Id.* After the inspectors contacted the PRC Consulate General in New York, Wang and other Rilin employees arrived with passports belonging to the Asian males. *Id.* The bearer of the passports indicated that Defendant had sent him to the Pavonia Avenue Premises. *Id.* Due to the hazardous condition of electrical wiring and outlets, inspectors deemed the Pavonia Avenue Premises uninhabitable. *Id.* ¶ 20.

On February 10, 2011, Jersey City Mayor's Task force inspectors executed a warrant authorizing the search of a residence on Wayne Street in Jersey City, New Jersey (the "Wayne Street Premises"). *Id.* at n.4. During the search, members of law enforcement encountered Asian males who were in possession of Chinese passports indicating that they were A2 or G2 visa holders employed by Rilin. *Id.* The inspectors deemed the Wayne Street Premises uninhabitable due to the hazardous conditions. *Id.*

After Defendant's arrest in November 2016, Defendant repeatedly sought pretrial release from custody. In anticipation of this Court's January 9, 2017 hearing on Defendant's motion for

bond, Defendant's prior defense counsel provided the government with the Redfield Affidavit, dated January 6, 2017. *See* Gov't Mot. at 10. Redfield served on the Jersey City Mayor's Task Force before he retired. *Id.* at Ex. A ¶ 1. Redfield witnessed the Jersey City Mayor's Task Force inspections and searches of the Pavonia Avenue Premises and the Wayne Street Premises. *Id.* at Ex. A ¶ 2. According to the Redfield Affidavit, Redfield did not "observe any indicia of individuals being locked into the [Pavonia Avenue Premises] (such as a deadbolt or a double-key cylinder locks [sic] that were locked from the outside) or being held in custody against their will." *Id.* at 10-11.

After the government received the Redfield Affidavit, it interviewed Redfield. *Id.* at 11. According to the government, Redfield told the government that, shortly before Christmas of 2016, Defendant's former counsel and a defense investigator arranged to meet with Redfield. *Id.* During the meeting, the defense team asked Redfield to sign an affidavit for use in a bail hearing. *Id.* Redfield asked for compensation in return for the affidavit, and he was told to generate an invoice for his time expenditures. *Id.* Redfield and Defendant's prior counsel exchanged emails and telephone calls whereby Defendant's prior counsel drafted a proposed affidavit for Redfield to sign. *Id.*

According to the government's account of Redfield's statements, the initial draft of the affidavit indicated incorrectly that there was no evidence indicating that occupants could be locked inside either the Pavonia Avenue Premises or the Wayne Street Premises. *Id.* Redfield explained to Defendant's prior counsel that he distinctly recalled an illegal hasp on the exterior entrance to the Wayne Street Premises that would prevent occupants from exiting the premises. *Id.* Defendant's prior counsel then removed any reference to the Wayne Street Premises. *Id.* Although the Redfield Affidavit claimed that Redfield did not observe any evidence that occupants were

locked inside the Pavonia Avenue Premises, Redfield believed that the potential existed for occupants to be locked inside, in light of the offsite sequestration of identification and travel documents for fourteen adult males, as well as the "shantytown" appearance of the living space. *Id.* at 12. The Redfield Affidavit additionally stated that Redfield did not observe double-cylinder locks at the Pavonia Avenue Premises, but Redfield did not have a precise recollection at the time he executed the Redfield Affidavit. *Id.* Redfield also did not have an opportunity to review his notes of the inspections before he executed the Redfield Affidavit. *Id.*

The government seeks to admit testimony regarding the circumstances surrounding the creation of the Redfield Affidavit on redirect examination if Defendant cross-examines Redfield concerning the statements in the Redfield Affidavit. *Id.* at 29. Defendant indicated that he did not know, at the time of briefing, whether he would cross-examine Redfield about the contents of the Redfield Affidavit. Def.'s Opp. at 23. Because Defendant does not, at this time, intend to cross-examine Redfield about the contents of the Redfield Affidavit, the Court need not make its determination about the government's proposed testimonial evidence at this time.

Accordingly, the government's motion to permit Redfield to testify about the circumstances surrounding the creation of the Redfield Affidavit is denied as premature with leave to renew at trial.

I. Defendant's Reciprocal Discovery

In its final motion, the government moves to preclude defense exhibits that Defendant has not produced to the government as reciprocal discovery. Gov't Mot. at 29. On the date of the Court's Oral Argument on the parties' motions *in limine*, Defendant had not yet produced any reciprocal discovery to the government. The Court defers its ruling on the government's motion

until trial, but cautions that, if there should have been reciprocal discovery made prior to trial, Defendant may be precluded from using that evidence at trial or otherwise sanctioned.

CONCLUSION

For the foregoing reasons, both the government's and Defendant's motions *in limine* are granted in part and denied in part as set forth above, or deferred.

SO ORDERED.

Dated: Brooklyn, New York
November 26, 2018

/s/
DORA L. IRIZARRY
Chief Judge

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of New York

UNITED STATES OF AMERICA
v.
DAN ZHONG

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:16-cr-00614-AMD-1

USM Number: 81258-053

Robert J. Cleary, Retained
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) 1-5 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1589(d), 18 U.S.C § 1594(b)	Forced Labor Conspiracy	11/30/2016	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

11/25/2019
Date of Imposition of Judgment

s/Ann M. Donnelly
Signature of Judge

Ann M. Donnelly, United States District Judge
Name and Title of Judge

12/9/19
Date

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 1A

DEFENDANT: DAN ZHONG
CASE NUMBER: 1:16-cr-00614-AMD-1

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1589(a), 18 U.S.C. § 1589(b), and 18 U.S.C. § 1589(d)	Forced Labor	11/30/2016	2
18 U.S.C. § 1592(a)	Concealing Passports and Immigration Documents in Connection with Forced Labor	11/30/2016	3
8 U.S.C. § 1324(a)(1)(A)(v)(I)	Alien Smuggling Conspiracy	11/30/2016	4
18 U.S.C. § 371	Visa Fraud Conspiracy	11/30/2016	5

AO 245B (Rev. 09/17) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: DAN ZHONG
CASE NUMBER: 1:16-cr-00614-AMD-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

One hundred and ninety (190) months on counts 1 and 2. Sixty (60) months on counts 3 and 5. One hundred and eight (108) months on count 4. The sentences are to run concurrently with each other.

☑ The court makes the following recommendations to the Bureau of Prisons:

that the defendant be designated to Fort Dix in order to facilitate family visits.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: DAN ZHONG
CASE NUMBER: 1:16-cr-00614-AMD-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

two years on counts 1, 2, 3, 4 and 5, to run concurrently with each other.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 3A — Supervised Release

DEFENDANT: DAN ZHONG
CASE NUMBER: 1:16-cr-00614-AMD-1

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

AO 245B(Rev. 09/17) Judgment in a Criminal Case
Sheet 3D — Supervised Release

DEFENDANT: DAN ZHONG
CASE NUMBER: 1:16-cr-00614-AMD-1

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall comply with the fine and/or forfeiture orders.

2. Upon request, the defendant must provide the U.S. Probation Office with full disclosure of his financial records, including co-mingled income, expenses, assets and liabilities, to include yearly income tax returns. With the exception of the financial accounts reported and noted within the presentence report, the defendant is prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge and approval of the U.S. Probation Office. The defendant must cooperate with the Probation Officer in the investigation of his financial dealings and must provide truthful monthly statements of his income and expenses. The defendant must cooperate in the signing of any necessary authorization to release information forms permitting the U.S. Probation Office access to his financial information and records.

3. The defendant must cooperate with and abide by all instructions of immigration authorities.

4, If deported, the defendant may not re-enter the United States illegally.

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: DAN ZHONG
CASE NUMBER: 1:16-cr-00614-AMD-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 500.00	$	$ 50,000.00	$ 23,809.52

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
XIUHUI LYU	$23,809.52		

TOTALS	$ 23,809.52	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: DAN ZHONG
CASE NUMBER: 1:16-cr-00614-AMD-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 500.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

United States Code Annotated
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights

U.S.C.A. Const. Amend. VI, REFS & ANNOS
Currentness

U.S.C.A. Const. Amend. VI, REFS & ANNOS, USCA CONST Amend. VI, REFS & ANNOS
Current through P.L. 116-135. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural rights

Currentness

<Notes of Decisions for this amendment are displayed in multiple documents.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Notes of Decisions (5736)

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials
Current through P.L. 116-135. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural rights

Currentness

<Notes of Decisions for this amendment are displayed in multiple documents. For text, historical notes, and references, see first document for Amendment VI.>

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for this amendment.>

Notes of Decisions (5911)

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials
Current through P.L. 116-135. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural rights

Currentness

<Notes of Decisions for this amendment are displayed in multiple documents. For text, historical notes, and references, see first document for Amendment VI.>

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for this amendment.>

Notes of Decisions (7283)

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials
Current through P.L. 116-135. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article IV. Relevance and Its Limits

Federal Rules of Evidence Rule 403, 28 U.S.C.A.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

Currentness

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

CREDIT(S)
(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1932; Apr. 26, 2011, eff. Dec. 1, 2011.)

Fed. Rules Evid. Rule 403, 28 U.S.C.A., FRE Rule 403
Including Amendments Received Through 5-1-20

End of Document

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article IV. Relevance and Its Limits

Federal Rules of Evidence Rule 404, 28 U.S.C.A.

Rule 404. Character Evidence; Crimes or Other Acts

Currentness

<[Rule 404 name line above effective until December 1, 2020, and Rule 404 name line below effective December 1, 2020, absent contrary Congressional action.]>

Rule 404. Character Evidence; Other Crimes, Wrongs or Acts

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

<[Text of subdivision (b) effective until December 1, 2020, absent contrary Congressional action.]>

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

<[Text of subdivision (b) effective December 1, 2020, absent contrary Congressional action.]>

(b) Other Crimes, Wrongs, or Acts.

(1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial--or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat.1932; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 27, 2020, eff. Dec. 1, 2020, absent contrary Congressional action.)

Fed. Rules Evid. Rule 404, 28 U.S.C.A., FRE Rule 404
Including Amendments Received Through 5-1-20

End of Document

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article VI. Witnesses

Federal Rules of Evidence Rule 608, 28 U.S.C.A.

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

Currentness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat.1935; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 25, 1988, eff. Nov. 1, 1988; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 26, 2011, eff. Dec. 1, 2011.)

Fed. Rules Evid. Rule 608, 28 U.S.C.A., FRE Rule 608
Including Amendments Received Through 5-1-20

End of Document

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article VII. Opinions and Expert Testimony

Federal Rules of Evidence Rule 702, 28 U.S.C.A.

Rule 702. Testimony by Expert Witnesses

Currentness

<Notes of Decisions for Rule 702 are displayed in two separate documents. Notes of Decisions for subdivisions I and II are contained in this document. For Notes of Decisions for subdivisions III to end, see second document for Rule 702.>

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

CREDIT(S)
(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

Fed. Rules Evid. Rule 702, 28 U.S.C.A., FRE Rule 702
Including Amendments Received Through 5-1-20

End of Document

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article VII. Opinions and Expert Testimony

Federal Rules of Evidence Rule 704, 28 U.S.C.A.

Rule 704. Opinion on an Ultimate Issue

Currentness

(a) In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937; Pub.L. 98-473, Title II, § 406, Oct. 12, 1984, 98 Stat. 2067; Apr. 26, 2011, eff. Dec. 1, 2011.)

Fed. Rules Evid. Rule 704, 28 U.S.C.A., FRE Rule 704
Including Amendments Received Through 5-1-20

End of Document

United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article VIII. Hearsay (Refs & Annos)

Federal Rules of Evidence Rule 803, 28 U.S.C.A.

Rule 803. Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness

Currentness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for--and is reasonably pertinent to--medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

(9) Public Records of Vital Statistics. A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) Absence of a Public Record. Testimony--or a certification under Rule 902--that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice--unless the court sets a different time for the notice or the objection.

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose--unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage--or among a person's associates or in the community--concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) Reputation Concerning Boundaries or General History. A reputation in a community--arising before the controversy--concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgments Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) [Other Exceptions.] [Transferred to Rule 807.]

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1939; Pub.L. 94-149, § 1(11), Dec. 12, 1975, 89 Stat. 805; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 13, 2013, eff. Dec. 1, 2013; Apr. 25, 2014, eff. Dec. 1, 2014; Apr. 27, 2017, eff. Dec. 1, 2017.)

Fed. Rules Evid. Rule 803, 28 U.S.C.A., FRE Rule 803
Including Amendments Received Through 5-1-20

End of Document

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Three. Adjustments (Refs & Annos)
Part A. Victim-Related Adjustments (Refs & Annos)

USSG, § 3A1.1, 18 U.S.C.A.

§ 3A1.1. Hate Crime Motivation or Vulnerable Victim

Currentness

(a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person, increase by 3 levels.

(b)(1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.

(2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by 2 additional levels.

(c) Special Instruction

(1) Subsection (a) shall not apply if an adjustment from § 2H1.1(b)(1) applies.

CREDIT(S)

(Effective November 1, 1987; amended effective November 1, 1989; November 1, 1990; November 1, 1992; November 1, 1995; November 1, 1997; November 1, 1998; November 1, 2000; November 1, 2010.)

Federal Sentencing Guidelines, § 3A1.1, 18 U.S.C.A., FSG § 3A1.1
As amended to 3-16-20.

End of Document

United States Code Annotated
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part VIII. General Penalty Provisions

8 U.S.C.A. § 1324

§ 1324. Bringing in and harboring certain aliens

Effective: November 10, 2005
Currentness

(a) Criminal penalties

(1)(A) Any person who--

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs--

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under Title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under Title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of Title 18) to, or places in jeopardy the life of, any person, be fined under Title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under Title 18, or both.

(C) It is not a violation of clauses [1] (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs--

(A) be fined in accordance with Title 18 or imprisoned not more than one year, or both; or

(B) in the case of--

(i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry,

be fined under Title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.

(3)(A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under Title 18 or imprisoned for not more than 5 years, or both.

(B) An alien described in this subparagraph is an alien who--

(i) is an unauthorized alien (as defined in section 1324a(h)(3) of this title), and

(ii) has been brought into the United States in violation of this subsection.

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if--

(A) the offense was part of an ongoing commercial organization or enterprise;

(B) aliens were transported in groups of 10 or more; and

(C)(i) aliens were transported in a manner that endangered their lives; or

(ii) the aliens presented a life-threatening health risk to people in the United States.

(b) Seizure and forfeiture

(1) In general

Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a), the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

(2) Applicable procedures

Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of Title 18 relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Attorney General.

(3) Prima facie evidence in determinations of violations

In determining whether a violation of subsection (a) has occurred, any of the following shall be prima facie evidence that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(B) Official records of the Service or of the Department of State showing that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(c) Authority to arrest

No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

(d) Admissibility of videotaped witness testimony

Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.

(e) Outreach program

The Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State, as appropriate, shall develop and implement an outreach program to educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section.

CREDIT(S)

(June 27, 1952, c. 477, Title II, ch. 8, § 274, 66 Stat. 228; Pub.L. 95-582, § 2, Nov. 2, 1978, 92 Stat. 2479; Pub.L. 97-116, § 12, Dec. 29, 1981, 95 Stat. 1617; Pub.L. 99-603, Title I, § 112, Nov. 6, 1986, 100 Stat. 3381; Pub.L. 100-525, § 2(d), Oct. 24, 1988, 102 Stat. 2610; Pub.L. 103-322, Title VI, § 60024, Sept. 13, 1994, 108 Stat. 1981; Pub.L. 104-208, Div. C, Title II, §§ 203(a) to (d), 219, Title VI, § 671(a)(1), Sept. 30, 1996, 110 Stat. 3009-565, 3009-566, 3009-574, 3009-721; Pub.L. 106-185,

§ 18(a), Apr. 25, 2000, 114 Stat. 222; Pub.L. 108-458, Title V, § 5401, Dec. 17, 2004, 118 Stat. 3737; Pub.L. 109-97, Title VII, § 796, Nov. 10, 2005, 119 Stat. 2165.)

Footnotes

1 So in original. Probably should be "clause".

8 U.S.C.A. § 1324, 8 USCA § 1324

Current through P.L. 116-140.

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 77. Peonage, Slavery, and Trafficking in Persons (Refs & Annos)

18 U.S.C.A. § 1589

§ 1589. Forced labor

Effective: December 23, 2008
Currentness

(a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means--

(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;

(2) by means of serious harm or threats of serious harm to that person or another person;

(3) by means of the abuse or threatened abuse of law or legal process; or

(4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint,

shall be punished as provided under subsection (d).

(b) Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).

(c) In this section:

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

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

(d) Whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both. If death results from a violation of this section, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title, imprisoned for any term of years or life, or both.

CREDIT(S)

(Added Pub.L. 106-386, Div. A, § 112(a)(2), Oct. 28, 2000, 114 Stat. 1486; amended Pub.L. 110-457, Title II, § 222(b)(3), Dec. 23, 2008, 122 Stat. 5068.)

18 U.S.C.A. § 1589, 18 USCA § 1589
Current through P.L. 116-140.

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 77. Peonage, Slavery, and Trafficking in Persons (Refs & Annos)

18 U.S.C.A. § 1592

§ 1592. Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor

Effective: December 23, 2008
Currentness

(a) Whoever knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person--

(1) in the course of a violation of section 1581, 1583, 1584, 1589, 1590, 1591, or 1594(a);

(2) with intent to violate section 1581, 1583, 1584, 1589, 1590, or 1591; or

(3) to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel, in order to maintain the labor or services of that person, when the person is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000,

shall be fined under this title or imprisoned for not more than 5 years, or both.

(b) Subsection (a) does not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000, if that conduct is caused by, or incident to, that trafficking.

(c) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be subject to the penalties described in subsection (a).

CREDIT(S)

(Added Pub.L. 106-386, Div. A, § 112(a)(2), Oct. 28, 2000, 114 Stat. 1488; amended Pub.L. 110-457, Title II, § 222(b)(6), Dec. 23, 2008, 122 Stat. 5070.)

18 U.S.C.A. § 1592, 18 USCA § 1592
Current through P.L. 116-140.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 77. Peonage, Slavery, and Trafficking in Persons (Refs & Annos)

18 U.S.C.A. § 1594

§ 1594. General provisions

Effective: May 29, 2015
Currentness

(a) Whoever attempts to violate section 1581, 1583, 1584, 1589, 1590, or 1591 shall be punishable in the same manner as a completed violation of that section.

(b) Whoever conspires with another to violate section 1581, 1583, 1589, 1590, or 1592 shall be punished in the same manner as a completed violation of such section.

(c) Whoever conspires with another to violate section 1591 shall be fined under this title, imprisoned for any term of years or for life, or both.

(d) The court, in imposing sentence on any person convicted of a violation of this chapter, shall order, in addition to any other sentence imposed and irrespective of any provision of State law, that such person shall forfeit to the United States--

(1) such person's interest in any property, real or personal, that was involved in, used, or intended to be used to commit or to facilitate the commission of such violation, and any property traceable to such property; and

(2) any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation, or any property traceable to such property.

(e)(1) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(A) Any property, real or personal, involved in, used, or intended to be used to commit or to facilitate the commission of any violation of this chapter, and any property traceable to such property.

(B) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this chapter.

(2) The provisions of chapter 46 of this title relating to civil forfeitures shall extend to any seizure or civil forfeiture under this subsection.

(f) Transfer of forfeited assets.--

(1) In general.--Notwithstanding any other provision of law, the Attorney General shall transfer assets forfeited pursuant to this section, or the proceeds derived from the sale thereof, to satisfy victim restitution orders arising from violations of this chapter.

(2) Priority.--Transfers pursuant to paragraph (1) shall have priority over any other claims to the assets or their proceeds.

(3) Use of nonforfeited assets.--Transfers pursuant to paragraph (1) shall not reduce or otherwise mitigate the obligation of a person convicted of a violation of this chapter to satisfy the full amount of a restitution order through the use of non-forfeited assets or to reimburse the Attorney General for the value of assets or proceeds transferred under this subsection through the use of nonforfeited assets.

(g) Witness protection.--Any violation of this chapter shall be considered an organized criminal activity or other serious offense for the purposes of application of chapter 224 (relating to witness protection).

CREDIT(S)

(Added Pub.L. 106-386, Div. A, § 112(a)(2), Oct. 28, 2000, 114 Stat. 1489; amended Pub.L. 110-457, Title II, § 222(c), Dec. 23, 2008, 122 Stat. 5070; Pub.L. 114-22, Title I, § 105(a), May 29, 2015, 129 Stat. 236.)

18 U.S.C.A. § 1594, 18 USCA § 1594
Current through P.L. 116-140.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)

18 U.S.C.A. § 3553

§ 3553. Imposition of a sentence

Effective: December 21, 2018
Currentness

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. [1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) [2] **Sentencing.**--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the

order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have--

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) Definition of violent offense.--As used in this section, the term "violent offense" means a crime of violence, as defined in section 16, that is punishable by imprisonment.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended Pub.L. 99-570, Title I, § 1007(a), Oct. 27, 1986, 100 Stat. 3207-7; Pub.L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub.L. 100-182, §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub.L. 100-690, Title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416; Pub.L. 103-322, Title VIII, § 80001(a), Title XXVIII, § 280001, Sept. 13, 1994, 108 Stat. 1985, 2095; Pub.L. 104-294, Title VI, § 601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; Pub.L. 108-21, Title IV, § 401(a), (c), (j)(5), Apr. 30, 2003, 117 Stat. 667, 669, 673; Pub.L. 111-174, § 4, May 27, 2010, 124 Stat. 1216; Pub.L. 115-391, Title IV, § 402(a), Dec. 21, 2018, 132 Stat. 5221.)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. No subpar. (B) has been enacted.

3 So in original. The second comma probably should not appear.

18 U.S.C.A. § 3553, 18 USCA § 3553

Current through P.L. 116-140.