19-4110

To Be Argued By:
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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

REPLY BRIEF FOR DEFENDANT-APPELLANT [REDACTED]

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INTRODUCTION

Dan Zhong's trial and sentence were tainted by a series of errors that undermined the fundamental fairness of the proceedings below. The government's case focused on irrelevant evidence of inflammatory uncharged crimes that occurred eight years before the charged conduct and a former forced labor prosecutor's "expert" testimony that effectively instructed the jury to convict. To defend the admission of the uncharged crimes evidence—which the government featured prominently in its jury arguments—the government distorts the record and asserts facts unsupported by the evidence. Nothing in the trial connected Zhong to the uncharged crimes or supplied a basis for admitting that evidence.

In like manner, the government attempts to rewrite its expert's testimony and minimize its significance. The testimony included extended discourses on the "typical" and "effective" methods of forced labor organizations and atrocities *others* committed in Zhong's home country (*e.g.*, brainwashing Muslim Uighurs in "reeducation" camps), and was patently unfair. The government ignores its own repeated reliance on this testimony in closing arguments and is unable to overcome this Court's precedents that expressly prohibit such testimony.

The government's responses to the district court's other errors tainting the conviction are similarly flawed. And it cannot justify the procedural and substantive reasonableness of the longest non-sex trafficking forced labor sentence

ever imposed in this Circuit—a sentence greatly exceeding forced labor sentences of defendants who engaged in far more egregious conduct, including violence and torture.

Zhong's convictions should be reversed, and at a minimum, the draconian sentence should be vacated.

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

A. The Uncharged Crimes Evidence Should Have Been Excluded

As Zhong's opening brief explains, the government transformed its dry, technical case about allegedly coercive contractual provisions into a tale of false imprisonment and violence using the sensational conduct of *other* Rilin[1] personnel who confined workers to the Consulate and brutally abducted, threatened and/or punished escapees 8-9 years before the indictment period. (Br.13-17, 24-32). The government secured the admission of this evidence by promising to directly implicate Zhong in those events, show they gave rise to a "climate of fear" years later, and prove similar misconduct during the indictment period. Yet its trial evidence failed to support any of those representations, and the parade of emotional testimony was perfectly calculated to "lure the factfinder into declaring

[1] Several distinct Chinese and U.S. corporate entities were discussed at trial. Because the distinctions between these entities are irrelevant to this appeal, we refer simply to "Rilin."

guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997).

The government does not dispute that the failure to substantiate such a pretrial proffer is reversible error. (*See* Br.25 (citing *United States v. Gilan*, 967 F.2d 776, 780-82 (2d Cir. 1992); *United States v. Peterson*, 808 F.2d 969, 974-75 (2d Cir. 1987))). The government instead doubles down on its pretrial representations. But its arguments contradict the trial record.

First, the government's assertion that Zhong was "intimate[ly] involve[d] in the abduction of escaped workers beginning in at least 2001" (G.Br.34) is completely unsupported. It cites no evidence—*none*—suggesting that Zhong was in any way involved in, or even knew about, the events involving Li and Chu, two of the three workers who described their escapes from the Chinese Consulate in 2001-02.

As to the third worker, the government falsely asserts that "Ken Wang testified about Zhong's specific knowledge of and responsibility over the abduction of Kevin Liu." (G.Br.17-18, 34 (citing A-435)). In fact, Wang did not link Zhong to Liu's abduction and punishment; he merely claimed Zhong had discussed the punishment of an unnamed worker at an unspecified time. (A-435). Had there been evidence that this statement concerned Liu, the government surely would have argued the connection to the jury. But it did not do so. The

government also claims Liu's testimony established Zhong's "supervisory role over [his] abduction and punishment" (G.Br.25), but Liu simply testified that Zhong was a relative of Rilin owner Wenliang Wang and one of several company managers. (A-266-67). He never claimed that Zhong played any role in his abduction.

Nor does the government's claim that Zhong was a "principal" of Rilin's U.S. operations (G.Br.34) advance the ball. The record is bereft of proof as to the specific nature of Zhong's role at Rilin in 2001-02. With respect to the visas (*id.*), the evidence shows that Zhong merely served as the U.S. "point of contact" on visa applications, and only "[b]eginning in 2006" (G.Br.11; GX.708-1)—four years after the uncharged crimes. And in any event, alleged visa fraud provides no ground for admitting evidence of the qualitatively different threats and violent abductions from years earlier.

The government concedes that Zhong "was not physically present" for the 2001-02 events but claims they were "jointly undertaken criminal activity by Zhong and his coconspirators." (G.Br.37-38). But conspiracy law does not save the government here. The government's failure to connect the 2001-02 evidence to Zhong goes beyond Zhong's physical absence from the scene: It failed to prove any connection with Zhong at all. This failure eviscerates the basis for the evidence's admission.

Second, the government's claim that the 2001-02 evidence was admissible because the events "were passed orally through the workforce" creating a "climate of fear" that "extended into the charging period" (G.Br.15-18, 34-35) is also belied by the record. The government cites a snippet of testimony from immunized Rilin manager Ray Tan about a conversation he had with a Rilin worker, Guoliang Yan. (GA-149-50). But that conversation occurred *prior* to the indictment period, not during it. Moreover, Yan only knew about the attempted abduction because he was the *perpetrator*, not because it was discussed among the workers. (*Id.* (Yan told Tan that years earlier he "saw a former employee of Rilin" and attempted "to bring him back")).

The only other evidence the government cites is a single sentence in the stipulated testimony of defense witness Wei Guo Zheng, who worked for Rilin in the U.S. from 2000 to 2003 and, like many other workers, returned for further tours of employment. (A-674). But Zheng merely stated that workers escaped "during his first tour." (A-681). That is, Zheng knew of escapees *first-hand* because he worked with them in 2000-03. He did not suggest that those events were being discussed by workers years later, post-2010.

In short, there was *no* evidence that any worker discussed the 2001-02 abductions during the indictment period and no evidence of a "climate of fear" based on these events.

Third, the government cannot show that the 2001-02 events were "inextricably intertwined" with or necessary to give "coherence to the basic sequence of charged events." (G.Br.36-37). The cases the government cites on this point all involved conduct close in time to the charged conduct and directly connected to the defendant. (*See* Br.25-27). This case does not.

Fourth, the government fails to show that the inflammatory violent acts in 2001-02 had any equivalent in the indictment period. (*See* Br.28-30). The government repeatedly claims "Zhong was involved in efforts to *abduct* Kang [Kai] after his escape in 2010." (G.Br.35-36; *see also id.* at 16, 18, 38). But this has *no* support in the record. The only evidence the government cites was Tan's testimony that Zhong asked him if he knew where Kai was and Tan's speculation that "if somebody were looking for" Kai it would have been Landong Wang. (A-213-15, A-219-20).

The government's other attempts to point to "comparably serious" conduct in the indictment period also fail. The government notes that workers were housed in "overcrowded and dangerous facilities" and that Rilin held their passports. (G.Br.35). But none of that compares to the violent abduction and attempted abductions, solitary confinement, and threats of physical injury described by the 2001-02 witnesses—evidence "significantly more sensational and disturbing than the charged crimes" and "certain to arouse the jury's emotions." *United States v.*

Curley, 639 F.3d 50, 62 (2d Cir. 2011) (reversible error to admit evidence of uncharged firearms possession in stalking case); *United States v. Al-Moayad*, 545 F.3d 139, 161-62 (2d Cir. 2008) (reversible error to admit evidence of "fatal suicide bombing" in case charging support of terrorist organization).[2]

Fifth, the government's reliance on the district court's "limiting instructions" (G.Br.36 (citing *United States v. Mercado*, 573 F.3d 138, 141-42 (2d Cir. 2009))) is unavailing. This Court has held that limiting instructions are not "a guaranty against prejudice." *Curley*, 639 F.3d at 60 (quoting *United States v. Figueroa*, 618 F.2d 934, 946 (2d Cir. 1980)). Moreover, in *Mercado*, the limiting instruction made clear that the uncharged crimes evidence was to be used for limited "Rule 404 grounds" and not as propensity evidence. 573 F.3d at 141. Here, the instruction permitted the jury to use the evidence "as evidence of the defendant's intent, planning, and knowledge of the alleged forced labor conspiracy," "as relevant background information about the conspiracy," *and* as "direct evidence of the forced labor conspiracy. (T-499-500). No jury could reasonably understand this instruction as placing any limits on its use of the uncharged crimes evidence.

[2] The government's assertion that Zhong's "claimed lack of knowledge as to the pre-indictment conduct" rendered the evidence admissible to show "intent, knowledge, and planning" (G.Br.36) ignores the government's failure to connect *any* of the pre-indictment conduct to Zhong. Moreover, as this Court's cases make clear (*see* Br.28), "other act" evidence offered to show knowledge or intent must be "similar to the conduct at issue," and the uncharged crimes evidence was not.

Finally, the government's harmless error argument is a conclusory claim of "[o]verwhelming evidence of Zhong's guilt dating from the charging period." (G.Br.38-39). But the testimony of the three victim workers from 2001-02 was the heart and soul of the government's case. Absent this testimony, the government's presentation was a paper-thin case told by documents and cooperators, with no victim workers. The uncharged crimes were "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 repeatedly tarred Zhong with these crimes, despite having no evidence that Zhong was actually involved. (*See* Br.31-32). Nor did the government prove any comparable conduct in the indictment period. The admission of the uncharged crimes evidence was plainly not harmless.

B. The Forced Labor Expert's Testimony Was Inadmissible

The expert testimony admitted in this case represents a remarkable and unprecedented departure from the norms of criminal trials in this country. The government's efforts to downplay its forced labor expert, Luis C. DeBaca, misconstrue the law and grossly distort DeBaca's highly prejudicial testimony. The erroneous admission of DeBaca's testimony alone requires reversal.

1. The government's primary argument is that "none of the subjects of DeBaca's testimony were matters of which an average juror already would have

been aware." (G.Br.46). But expert testimony is not permitted merely because the subject matter of the case is unfamiliar. The question is whether the case "concerns matters that the average juror is not capable of *understanding* on his or her own." *United States v. Mejia*, 545 F.3d 179, 194 (2d Cir. 2008); *see also* Fed. R. Evid. 702 (expert testimony "help[s] trier of fact *understand* the evidence"). Put differently, the question is whether, upon being informed of the facts, jurors are able "to determine intelligently…the particular issue without enlightenment from" an expert. *United States v. Castillo*, 924 F.2d 1227, 1232-33 (2d Cir. 1991) (quoting Fed. R. Evid. 702, advisory comm. note (1972)).

In *Mejia*, for example, an expert testified about crimes committed by MS-13. Even though jurors were doubtless unfamiliar with those crimes, this Court held that the testimony was improper because "[n]o expertise is required to understand any of the[] facts." 545 F.3d at 195. "Had the government introduced lay witness testimony, arrest records, death certificates, and other competent evidence…the jury could have 'intelligently' interpreted and understood it." *Id.*

Here, too, jurors were capable of understanding the facts and drawing their own conclusions. The government does not dispute that the issues for the jury on the forced labor charges boiled down to two simple questions: Were the supposed threats sufficient to overcome a person's will? Were the threats actually used to

obtain the workers' labor? (*See* Br.40). Jurors did not require expert assistance to understand and judge the evidence on these points.

The government claims that only "small portions" of DeBaca's testimony concerned "'common sense' matters such as payment practices." (G.Br.52). That is an absurd reimagining of DeBaca's testimony. In fact, he testified extensively about how withholding pay or identification documents or threatening a worker's family can coerce a worker's labor; about how making an example of individual workers is more effective than punishing the whole group; and about how individuals newly arrived in the U.S. and dependent on an employer are vulnerable to coercion. (A-333-34, A-340-50, A-359-61, A-375-76). And the government repeatedly returned to these points in its summations. (*E.g.*, A-776, A-777, A-794, A-886).

The government characterizes this testimony as "part of broader testimony about the complexity and sophistication of forced labor practices." (G.Br.52). That is irrelevant. No doubt forced labor practices can be complex and sophisticated. The issues before the jury, however, were simple.

2. The government also cannot defend DeBaca's patently improper instructions on the "typical" methods of forced labor organizations—testimony that began with the typical methods used in forced labor genereally, and then honed in on the typical forced labor methods of Chinese construction companies operating

abroad. (*See* Br.34-36, 37, 41-43). As this Court had held, the government may not use expert testimony regarding typical patterns of criminal conduct to bolster its case—in essence, providing an extra-judicial guide to the legal instructions. *See Castillo*, 924 F.2d at 1234; *United States v. Cruz*, 981 F.2d 659, 662-63 (2d Cir. 1992). But that is precisely what the government did here.

The government pretends the only problem in *Cruz* was that the expert testified about an issue which was undisputed. (G.Br.50). Not so. *Cruz* expressly condemned the expert's testimony about typical drug operations and the government's "impermissible" use of that testimony to have the jury infer the defendant's guilt "from the conduct of unrelated persons." 981 F.2d at 662-63. The government also paints *Castillo* as inapt because the expert testimony there "mirrored" the fact evidence. (G.Br.49-50). But the same is true here. DeBaca's testimony mirrored the fact pattern presented by the witnesses and documentary evidence.

Just as in *Castillo* and *Cruz*, the government used an expert to describe the typical pattern of a crime and argued that, because the facts fit that pattern, a crime therefore took place. This is patently improper.

The out-of-circuit forced labor cases the government cites (G.Br.47-48) are non-binding and, in any event, inapposite. *United States v. Alzanki*, 54 F.3d 994 (1st Cir. 1995), involved a victimologist who testified from clinical experience

about her "empirical findings on the behavioral reactions of abuse victims," specifically, the phenomenon of abuse victims, who, "overwhelmed with fear…remain with their abusers." *Id.* at 1005-06. This targeted use of an expert to educate the jury on a scientific theory is not comparable to DeBaca's wide-ranging testimony about the typical and effective methods of forced labor. In *United States v. Farrell*, 563 F.3d 364 (8th Cir. 2009), the court rejected the defendant's unpreserved argument that a forced labor expert should not have been permitted to testify about "warning signs in employer-employee relationships," but found "plain error" in the admission of a forced labor expert's opinions telegraphing conclusions about the presence of forced labor in the case. *Id.* at 377-78. *Farrell*'s blessing (on plain error review) of testimony about "warning signs" is contrary to this Court's controlling precedents and, in any event, does not support the admission of DeBaca's sweeping prosecutorial closing argument from the witness stand.

The government also cites decisions approving expert testimony admitted in sex trafficking and mob cases regarding underworld lingo and the roles played by different participants in such schemes. (G.Br.48-51). But the government did not use DeBaca to translate Chinese or explain Rilin's hierarchy. Instead, he testified about the "typical" and "effective" means of coercing forced labor victims. The government's cases offer no support for admitting that testimony.

3. The government also fails to justify the admission of DeBaca's irrelevant and inflammatory testimony about rampant forced labor in China and Chinese construction projects abroad. (*See* Br.36-37, 44-45). The government mischaracterizes the testimony as concerning "the economic and political factors that can influence PRC workers and business." (G.Br.57). But DeBaca's testimony included descriptions of disabled people "getting scooped up in railway stations…and taken out to brick kilns" and of the "reeducation through labor camps" used against the Uighur population. (A-363, A-366-67). This was hardly targeted testimony about economic and political factors that might influence the workers at issue in this case. Nor is it likely that jurors were unfamiliar with the general concept of political repression in China.

But even taken at face value, the government's argument cannot justify DeBaca's testimony about the U.S. government's official condemnation of China's forced labor record. DeBaca testified, for example, that "Chinese labor trafficking" was a "routine problem cropping up" "all over the world," and that his office and "others at high levels within the U.S. government" had "continually" raised the "plight" of "exported Chinese labor" on overseas quasi-governmental projects. (A-363-64). The government also specifically elicited that the U.S. government's annual people trafficking reports rated China among the world's

most problematic countries. (A-367-69). The government does not even try to defend this testimony.

The government argues generally that "[c]ourts have permitted expert testimony about a foreign country that is relevant to the facts of the case." (G.Br.56). But the government fails to identify *any* case in which similar testimony has been admitted. *Niam v. Ashcroft* was an appeal from the denial of an asylum application in which the Seventh Circuit held that the immigration judge improperly excluded expert testimony regarding political repression in the putative asylee's home country. 354 F.3d 652, 659-60 (7th Cir. 2004). In *McDonnell Douglas Corp. v. Islamic Republic of Iran*, a court analyzing a forum selection clause in a contractual dispute relied on an expert affidavit opining that the post-1979 Iranian judicial system was incapable of granting due process to an American company. 591 F. Supp. 293, 303-08 (E.D. Mo. 1984). And *Gill v. Arab Bank, PLC* was a civil case in which the district court admitted expert evidence concerning the methods used by terrorist organizations to claim credit for attacks. 893 F. Supp. 2d 523, 532 (E.D.N.Y. 2012). None of these cases provides any support for the admission of DeBaca's wide-ranging testimony about forced labor and other human rights abuses in Zhong's home country.

4. The government insists DeBaca "did not opine as to whether Zhong or his coconspirators were engaged in forced labor." (G.Br.43, 53-54). But even

though DeBaca did not render an express legal conclusion, his presence on the witness stand, his references to "red flags" and "troubling" provisions in the employment agreements (A-375-76, A-384), and his testimony about instances of forced labor that mirrored the facts of this case, all pointed to a clear unstated conclusion: The facts here are consistent with forced labor.

Given the government's heavy reliance on DeBaca's testimony in its summations (*see* Br.46-47), the government does not seriously argue that the admission of the testimony was harmless. (G.Br.58). The erroneous admission of DeBaca's expert testimony alone entitles Zhong to a new trial.

C. The District Court Violated Zhong's Confrontation Rights

Zhong's opening brief demonstrated that the district court violated Zhong's Sixth Amendment confrontation rights by barring three legitimate avenues of impeachment of key cooperating witness Ken Wang. The government fails to rehabilitate the district court's legally and factually erroneous rulings.

1. The government does not even address the district court's ruling precluding Zhong from eliciting opinion and reputation testimony concerning Wang's character for untruthfulness from defense witness Joseph DiPeri. (*See* Br.48-50). Accordingly, the government concedes that these rulings were wrong, and the only question is harmless error, addressed *infra*, pp.19-20.

2. The government also does not defend the district court's exclusion on hearsay grounds of testimony from immunized government witness Ray Tan regarding Wang's workplace reputation for dishonesty. (A-225 (sustaining hearsay objection because "it is hearsay")). The ruling on these grounds was legal error, because reputation evidence "must be based on hearsay." *United States v. Lynch*, 366 F.2d 829, 832 (3d Cir. 1966) (citing *Michelson v. United States*, 335 U.S. 469, 477-78 (1948)).

Instead of defending the ruling the district court actually made, the government shifts ground and argues that counsel's question "lacked sufficient foundation" and that the district judge "was within her discretion to exclude such questions as cumulative." (G.Br.67-68). But it is clear that the objection and the ruling were based on hearsay alone. (A-225-26). The reviewing court must therefore determine whether the district court abused its discretion in excluding the evidence on hearsay grounds, not other potential grounds the district court did not consider. *See United States v. Litvak*, 808 F.3d 160, 189 (2d Cir. 2015) (limiting review of whether district court abused its discretion to sole basis for district court's ruling—Rule 401—not whether evidence was also excludable under Rule 403); *see also Stewart*, 907 F.3d at 691.

In any event, the government's arguments are meritless. The government claims that Tan "conceded he did not have an adequate grasp of Wang's reputation

at the workplace, stating 'I'm not all that sure.'" (G.Br.68). This misrepresents the actual testimony. Responding to a question about Wang doing "dishonest things" in the workplace, Tan stated: "I'm not all that sure. I only heard about during his time working at the U.S. Rilin Company, yes, he has done some dishonest things. *I have heard about that*." (A-225).

Tan and Wang worked together for six years, so Tan had sufficient foundation to testify about Wang's workplace reputation for dishonesty. And as an immunized government witness, with every incentive to toe the government line, his testimony on this point would have been probative and non-cumulative.

The government's reliance on *United States v. Augello*, 452 F.2d 1135 (2d Cir. 1971), is misplaced. In contrast to this case, the reputation testimony held inadmissible in *Augello* was offered by an officer who was "not [himself] a member of the communities in which [the testifying defendant] lived or worked." *Id.* at 1140.

United States v. Watson, 669 F.2d 1374 (11th Cir. 1982), is even less helpful to the government. There the court held that the exclusion of opinion testimony regarding a cooperating witness's character for untruthfulness was constitutional error requiring the reversal of the defendant's convictions. *Id.* at 1382-83.

3. The government fares no better in its attempt to prop up the district court's erroneous exclusion of a New Jersey judge's probative adverse credibility finding regarding Wang.

Although the government claims the New Jersey case involved "no adverse credibility determination" (G.Br.65), the district court itself acknowledged that the New Jersey judge "[redacted]" (A-120). This was not surprising, as the New Jersey judge clearly assessed Wang's "[redacted]" (A-1527, A-1543).

Relying on *United States v. Cruz*, 894 F.2d 41, 43 (2d Cir. 1990), the government also argues that the testimony was properly excluded because "the conduct at issue…was irrelevant to the facts of this case and therefore had limited …probative value." (G.Br.66). But this Court has all but overruled *Cruz*, clarifying that district courts cannot exclude prior adverse credibility findings merely because the subject matter of the prior testimony was unconnected to the subject matter about which the witness testified at trial. *See United States v. White*, 692 F.3d 235, 249-50 (2d Cir. 2012) (vacating conviction where district court relied on *Cruz* to exclude prior credibility finding); *United States v. Cedeno*, 644 F.3d 79, 82-83 (2d Cir. 2011). Instead, district courts must consider, among other

things, whether the "lie was under oath in a judicial proceeding," "whether the lie was about a matter that was significant," and "how much time had elapsed since the lie was told." *White*, 692 F.3d at 249. As explained in the opening brief (Br.50-51), the *White/Cedeno* factors strongly favor admission here.

Finally, the government's argument that admission of the prior credibility finding "would have needlessly embarrassed Wang without improving the jury's understanding of his credibility" borders on the ridiculous. (G.Br.67). Zhong was on trial for crimes exposing him to a life sentence, and Wang was the only witness to connect Zhong to the most heinous of the government's allegations. "Nothing could be more probative of a witness's character for untruthfulness than evidence that the witness has previously lied under oath." *Cedeno*, 644 F.3d at 82 (quoting *United States v. Whitmore*, 359 F.3d 609, 619 (D.C. Cir. 2004)). The district court should have allowed Zhong to present the jury with the New Jersey judge's recent and probative adverse credibility finding.

4. The government does not dispute that the substantial restrictions on Zhong's ability to show Wang up as a proven liar implicate Zhong's constitutional confrontation rights. (*See* Br.47). And the government does not deny Wang's crucial role in the trial. (*See* Br.52-53). Instead, the government focuses on other ways in which Zhong sought to impeach Wang. (G.Br.67). But as the government concedes, Zhong was largely relegated to questioning Wang about his betrayal of

his Rilin colleagues while working for the FBI and pointing out omissions in Wang's FBI reports—not exactly tools for a blistering assault on a witness's credibility. The district court precluded Zhong from showing the jury that no one trusted Wang in the workplace and that Wang's sworn testimony had been found non-credible by a judge just 13 months prior to his testimony in this case. All of this was standard cross-examination and would have left the jury with a very different picture of Wang's credibility. Given Wang's central importance in the trial, the government cannot show that the district court's erroneous restrictions on impeachment were harmless beyond a reasonable doubt.

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

The government acknowledges that factfinders considering allegations of forced labor must distinguish between illegal threats and warnings of "adverse but legitimate consequences." (G.Br.75-76). Nonetheless, the government defends the district court's refusal to give an instruction focusing the jury on this distinction, arguing (i) that the instruction as formulated was misleading, and (ii) that it was unwarranted on the facts of this case. (G.Br.73-77). Neither argument has merit.

First, Zhong's proposed instruction did not misstate the law. The instruction correctly informed the jury that it must distinguish "threat[s] of serious harm" from warnings of "adverse but legitimate consequences." Using the phrase "for instance," the instruction then gave the example of a warning about the

consequence of breaching a "voluntarily entered into employment agreement." (A-113.58). This example was relevant to the facts of this case, which required the jury to determine whether the terms of Rilin's employment agreements were legitimate or coercive.

Second, the instruction was warranted precisely because the case focused on the harsh terms of those agreements. The government claims the district court "asked Zhong's counsel to cite trial evidence supporting…the 'legitimate consequences' language" and that "Zhong's counsel argued that voluntary entry into labor contracts…meant that any consequences embodied in the contract would be 'legitimate.'" (G.Br.72, 76 (citing A-727-28)). That is not true. Defense counsel clarified that he was not asking the judge to instruct "hey, too bad you signed the contract, that's it." (A-728). Rather, the proposed instruction focused the jury on the need "to consider all of the circumstances." (*Id.*). Moreover, "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) (emphasis added).

The government's contention that the instruction was inappropriate because Rilin "engaged in threats of harm and physical violence to escapees" (G.Br.77) ignores the absence of any such threats during the indictment period. The forced

labor charge included a list of examples of non-physical coercion that might rise to the level of "serious harm." (A-916). The "adverse but legitimate" instruction was necessary to balance this otherwise one-sided direction on how to interpret the evidence.

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

The government does not deny that the cumulative effect of the district court's multiple errors requires a new trial. (*See* Br.58-59).

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

Zhong's sufficiency argument on the forced labor charges is simple: There was undisputed evidence from which the jury plausibly could infer that the workers labored voluntarily; the government failed to put on any victim testimony or other evidence sufficient to eliminate the possibility that the workers labored voluntarily; therefore the government failed to prove its case. The government barely grapples with these points, and its concessions demonstrate why Zhong's forced labor convictions must be reversed.

1. The government's argument that Zhong failed to preserve his sufficiency challenges on the forced labor (and alien smuggling) counts (G.Br.79-80) is frivolous. It is well-settled that a general Rule 29 motion preserves sufficiency claims on appeal. *United States v. Hoy*, 137 F.3d 726, 729 (2d Cir.

1998); *see also United States v. Allen*, 127 F.3d 260, 264 (2d Cir. 1997). Here, counsel moved at the close of the government's case "under Rule 29 for a judgment of acquittal on all counts based on a failure to prove." (A-654). Counsel then informed the court that he "would like to explain my [position] as it relates to Count 5," the visa fraud conspiracy. (*Id.*). Zhong renewed his general motion at the close of the defense case. (A-751). Zhong therefore fully preserved his sufficiency argument.[3]

2. As to the merits, the government's concessions mandate reversal. *First*, the government does not dispute that it had to prove Rilin in fact compelled the workers to perform labor they would otherwise have declined. (Br.59-60). In other words, it is not sufficient that Rilin created conditions that plausibly could have compelled labor; the government had to prove that the labor actually performed resulted from those illicit conditions, not from legitimate incentives.

Second, the government concedes that the workers' employment agreements promised them salaries multiple times their earnings in China and that these salaries were paid when workers returned to China. (G.Br.81). The government also does not dispute that while the workers were in the U.S. their families

[3] *United States v. Johnson*, 816 F. App'x 604 (2d Cir. 2020), and *United States v. Tagliaferri*, 648 F. App'x 99 (2d Cir. 2016) (G.Br.79-80), are not to the contrary. In both cases, the defendant made specific sufficiency arguments regarding particular counts in the district court, then reversed course, making different sufficiency arguments as to the same counts on appeal.

received stipends roughly equivalent to the wages the workers would have received in China. (*See* Br.60). The workers thus had unquestionably plausible reasons to work for Rilin in the U.S. voluntarily. On these facts, only the workers' own testimony could be sufficient to prove beyond a reasonable doubt that the workers were, in fact, coerced. *Cf. United States v. Pauling*, 924 F.3d 649, 657 (2d Cir. 2019) ("It would not satisfy the Constitution to have a jury determine that the defendant is *probably* guilty.").

The government does not identify any forced labor case in which a conviction has been upheld without testimony of the alleged victim. Instead, the government argues that this case *did* feature victim testimony, but cites only the 2001-02 witnesses. (G.Br.81). But testimony by witnesses who worked for Rilin in 2001-02 (while living and working in the Chinese Consulate) is insufficient to show that workers who worked for Rilin eight years later (while living in dormitories in New Jersey) were compelled to labor.[4]

The government acknowledges only in passing its burden of demonstrating that Rilin *actually* compelled the workers' labor, writing that "[t]he *effectiveness* of [Rilin's] coercive labor practices was demonstrated by the time sheets admitted

[4] Straining to amplify its thin case, the government asserts that "the PRC legal system was weaponized to result in the seizures of [workers'] homes and property." (G.Br.82). But there was *no evidence* that Rilin seized the home or property of any worker during the indictment period.

into evidence" which showed that workers often spent several years in the U.S. and "seldom enjoyed vacation." (G.Br.84) (emphasis added). The government also points to testimony from an American contractor on the Fifth Avenue project who witnessed a Rilin worker apparently fall asleep while descending a flight of stairs. (*Id.*). But Zhong did not dispute that the workers worked hard. What was in dispute is *why* they worked: Was it because they were coerced, or was it because they took advantage of an opportunity to earn multiples of their earnings as laborers in China? Without victim testimony, no reasonable jury could answer this question without reasonable doubt.

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

Without any legal support, the government argues for an illogically overbroad interpretation of the statute that would make a criminal alien smuggler out of any employer who knowingly transports an illegal alien to a work site. Since the law does not reach such employers, Zhong's conviction must be reversed.[5]

As explained (Br.62-67), the alien smuggling statute only criminalizes transportation *in furtherance of an alien's unlawful presence* in the U.S. And the government does not quibble with the numerous cases cited in Zhong's brief

[5] The government's claim that Zhong forfeited this argument fails for the same reason it fails as to the forced labor charges, *see supra*, Point II.1.

holding that mere employment-related transportation of known illegal aliens does not violate the statute, or that 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." (Br.65-67).

Here, it is undisputed that Rilin transported its workers from dormitories to their work sites so that they could work, not as "human cargo." This was not alien smuggling.

The government argues that Rilin's daily transportation of the workers to and from work was different from other employment-related transportation of illegal aliens because it formed "part of the bubble that Zhong and his coconspirators constructed" to prevent their alleged criminal scheme from being discovered. (G.Br.87). This claim is contradicted by the trial record and relies on an overbroad construction of the statute.

First, there was no evidence of special steps taken to prevent detection during transportation, and the government's attempt to paint the workers' living and working conditions as veiled in secrecy is belied by the record: Workers mingled with and were observed coming and going by their neighbors; disembarked from the van in the middle of Fifth Avenue; loaded and unloaded materials in the street; wore Rilin uniforms; attended OSHA training; worked

under U.S. managers recruited through online job boards; and visited landmarks in New York and other locations throughout the U.S. (*See* Br.10-11).

Second, the government's argument is essentially that by arranging private transportation for its workers, Rilin stopped them from using public transportation, and so marginally decreased the likelihood of contact with law enforcement. But alien smuggling requires, at a minimum, a "direct or substantial relationship" between transportation and "furtherance of the alien's presence in the United States." (Br.65). If accepted, the government's tenuous theory of criminal liability would make felons out of any employer who provided transportation to and from work to a known illegal alien. This Court should make clear that the alien smuggling statute does not reach these facts.

IV. ZHONG'S SENTENCE WAS PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE

The government is unable to defend Zhong's draconian 190-month prison term—the longest non-sex trafficking forced labor sentence ever imposed in this Circuit.

1. The government doubles down on the district court's flawed approach to the crucial vulnerable-victim enhancement, which boosted Zhong's sentencing range by over 50%. The enhancement applies where a defendant targets a "particular victim [who] was less likely to thwart the crime" because of characteristics such as "age, physical or mental condition." *United States v.*

McCall, 174 F.3d 47, 50 (2d Cir. 1998) (quoting U.S.S.G. §3A1.1(b) & comt. app. n.2). But while paying lip service to the notion that Rilin "carefully selected" vulnerable victims, the government focuses (as did the district court) on the things that Rilin allegedly did to the workers *in committing the alleged crimes*, not in selecting the alleged victims. (G.Br.95 (workers "were isolated from Chinese neighborhoods…and further isolated by virtue of the practice of document servitude"); *cf.* A-940 (holding that victims were vulnerable because of "pressure," "debt bondage contracts," "isolat[ion]," and document servitude)).[6]

The government cites two out-of-circuit cases, *United States v. Calimlim*, 538 F.3d 706, 717 (7th Cir. 2008), and *United States v. Backman*, 817 F.3d 662, 671 (9th Cir. 2016), for the proposition that the enhancement is properly applied generally to "crimes victimizing aliens." (G.Br.93). Both cases, however, embrace an approach this Circuit has rejected. In *Calimlim*, the Seventh Circuit held that an illegal alien victim was vulnerable because illegal aliens are "among the most vulnerable of the broader group who are forced into labor." *Id.* at 717. *Backman* similarly held that an "unusually vulnerable victim is one who is less

[6] The government misleadingly claims that Rilin "carefully selected only those employees for work in the United States who were sufficiently encumbered by debt." (G.Br.95). But the evidence actually showed (and the government argued) that Rilin selected workers who agreed to post property as collateral, not workers *previously* "encumbered by debt." (*See* A-785 (arguing that referenced exhibits showed that Rilin considered "how much [the workers] *can post* as collateral")).

able to resist than the typical victim of the offense of conviction." 817 F.3d at 670-71. But this Court has held that analysis of whether the victim is "more-vulnerable-than-most" typical victims of the crime is the "incorrect legal test." *McCall*, 174 F.3d at 51. Instead, "the correct test calls for an examination of the individual victims' ability to avoid the crime rather than their vulnerability relative to other potential victims of the same crime." *Id.* The district court's generalizations about the workers' lack of English and supposed lack of education were not enough under *this Court's* standard.

The district court's failure to examine whether the individual victims were particularly vulnerable to forced labor constitutes procedural error. Accordingly, Zhong's sentence should be vacated.

2. The government also fails to rehabilitate the district court's inadequate record of the reasons for Zhong's sentence, particularly its failure to consider the appalling conditions of Zhong's pre-trial confinement. As the government concedes, the district court rejected this argument because "the same conditions of confinement applied to Zhong's victims." (G.Br.97). Even if this were true, "an eye for an eye" has no place in federal sentencing, and the allegations in this case do not excuse the government's inability to house pretrial detainees in humane conditions. If this were otherwise, courts would be indifferent if rapists were raped in prison, or murderers murdered.

The government also fails to show that the district court fulfilled its "obligation to explain its reasoning in open court." *United States v. Rosa*, 957 F.3d 113, 120 (2d Cir. 2020). The government claims that the district judge "indicated that she was imposing the sentence for reasons of deterrence and protecting the public from Zhong's future crimes, and…because of Zhong's history and characteristics." (G.Br.96-97 (citing A-960-61)). But the court merely stated it had "considered" the §3553(a) factors. As this Court has held, "[t]he fact that the court *considered* the §3553(a) factors and arguments *does not* satisfy the separate obligation under §3553(c) to explain in open court how its consideration led to the sentence imposed." *Id.* at 118. The government also emphasizes the district court's "findings of Zhong's role" in the crimes. (G.Br.96). But remarks "relat[ing] to [the defendant's] guilt rather than to an appropriate sentence" do not suffice. *United States v. Pugh*, 945 F.3d 9, 27 (2d Cir. 2019). The district court's failure to explain Zhong's sentence was especially egregious here, where the sentencing range was time-served to life, and the sentence imposed was, given Zhong's age—49 at the time of sentence—and medical conditions (*see* Dkt.256 at 9), little short of a life sentence. *Id.* at 26.

3. Zhong's 190-month sentence shocks the conscience. Zhong's sentence is twice that of the defendant in *United States v. Marcus* who 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), and five years longer than that imposed on the lead defendant in *United States v. Sabhnani*, 599 F.3d 215 (2d Cir. 2010), who enslaved and sadistically tortured two domestics servants over five years. The government argues that the sentence was justified because Zhong was "a principal of a multinational organization that compelled hundreds of victims to work." (G.Br.99). But the economic coercion allegedly used to compel labor in this case brooks no comparison with the methods seen in *Marcus*, *Sabhnani*, and other cases. (*See* Br.77-79). The closest comparator, *United States v. Garcia*, 164 F. App'x 176, 177 (2d Cir. 2006), involved the recruitment of dozens of farm workers near the Mexican border who were forced to work until they had paid off debts. The lead defendant there was sentenced to 46 months' incarceration—four times less than Zhong.

The government identifies no comparable sentence, because there is none. At a minimum, Zhong's sentence should be vacated, and the case remanded for resentencing.

CONCLUSION

The judgment should be reversed with instructions to enter a judgment of acquittal on Counts One through 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
September 24, 2020

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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 7,000 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.

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Dated: September 24, 2020

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