No. 18-

IN THE

Supreme Court of the United States

JENNIFER CARDENAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an indictment charging visa fraud under 18 U.S.C. § 1546(a) or other crimes involving "false statements" must specify the allegedly false statements at issue and include factual allegations sufficient to establish the falsity of those statements.

2. Whether a jury instruction that allows for a conviction of a crime involving "false statements" on the basis of alleged statements other than those described in the indictment amounts to a "constructive amendment" of the indictment or a harmless "variance."

PARTIES TO THE PROCEEDING

The parties to the proceedings before the Court of Appeals for the Second Circuit were Jennifer Cardenas and Mario Cardenas as defendants-appellants and the United States of America as appellee.

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PETITION FOR WRIT OF CERTIORARI

Jennifer Cardenas respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's "summary order" affirming Ms. Cardenas's conviction is published at *United States v. Cardenas*, 761 Fed. App'x 34 (2d Cir. 2019) and is included in the appendix hereto. The Second Circuit's order denying Ms. Cardenas's petition for a panel rehearing or rehearing *en banc*, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, is also included in the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Second Circuit affirmed the judgment of the district court on January 31, 2019 and denied Ms. Cardenas's timely petition for rehearing on March 18, 2019.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The federal visa fraud statute, 18 U.S.C. § 1546(a) provides, in relevant part, that:

> Whoever knowingly makes under oath, or as permitted under penalty of perjury . . . knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact . . . [s]hall be fined under this title or imprisoned not more than 25 years[.]

STATEMENT OF THE CASE

This case presents an opportunity for the Court to determine whether the Fifth and Sixth Amendments and Rule 7(c) of the Federal Rules of Criminal Procedure require that an indictment charging crimes involving "false statements" must specify the statements at issue and provide sufficient factual allegations to establish the alleged falsity of those statements. This case also presents an opportunity for the Court to provide the lower courts with much-needed guidance as to the difference between a "constructive amendment" and a harmless "variance" in cases where the jury instructions allow for a conviction based on purportedly false statements other than those charged in an indictment.

I. Proceedings Before the District Court

Through an indictment filed in the United States District Court for the Northern District of New York on September 24, 2015, the government charged petitioner Jennifer Cardenas and her brother Mario Cardenas each with six counts of visa fraud, in violation of 18 U.S.C. § 1546(a). All of the visa fraud counts charged against Ms. Cardenas specifically alleged that she "knowingly subscribe[d] as true[] false statements with respect to material facts in an application" for Temporary Protected Status ("TPS") immigration relief, "in which the defendant affirmed that she was a citizen of El Salvador born in Metapan, El Salvador, when as she then well knew she was a citizen of Guatemala[.]" After a one-week jury trial in the Northern District of New York (Scullin, J., presiding), Ms. Cardenas was found guilty on all counts.

During his opening statement, Ms. Cardenas's trial counsel stated that Ms. Cardenas was "born in Guatemala" and that her father subsequently "registered her birth in San Salvador," the capital of El Salvador, "which many of the folks in the border town that she lived in were allowed to do." Tr.39. Subsequently, Department of Homeland Security Foreign Service National Investigator Rafael Parraga, one of the government's chief law enforcement witnesses, testified that the laws of El Salvador allow for dual citizenship, and he answered in the affirmative when he was asked, "if a person went to the Salvadoran authorities and brought their birth certificate and said I'm a Salvadorian and I would like to register the birth of my [child] who was born in Guatemala, would he be able to do that?" Tr.270.

The government did not present any evidence to indicate that Ms. Cardenas's birth was not registered in El Salvador and that she was not in fact a dual citizen of Guatemala and El Salvador, as she claimed. Tr.419-20; 441. However, because the indictment did not appear to charge her with misrepresenting her country of birth on her TPS application forms, Ms. Cardenas did not contest the fact that she was born in Guatemala and that the TPS forms filed on her behalf erroneously stated that she was born in El Salvador.[1] Tr.441.

[1] The evidence presented at trial established that all of the TPS application forms that were submitted on Ms. Cardenas's behalf since her mother brought her to the United States as a 16-year-old girl in 2001 were prepared by someone else. Tr.91-93; 101; 187; 192-93. In fact, the government stipulated that all of Ms. Cardenas's TPS application forms, including those described in the indictment, were prepared by other people. Tr.193.

During the first charge conference held near the end of trial, the government noted that their evidence about Ms. Cardenas's citizenship status in El Salvador was "very murky" and that "[t]here's been questions about citizenship raised without real answers[.]" Tr.331. However, instead of dismissing the case and obtaining a new indictment to conform to their evidence, the government requested a jury instruction that would allow for a conviction based on the alternative theory that the defendants misrepresented their place of birth on their TPS applications. The district court initially *denied* the government's request and stated that the jury instructions would *not* allow the jury to convict the defendants based on uncharged birthplace misstatements. Tr.345-46. When the government argued that false statements regarding birthplace and citizenship could both qualify as material false statements under § 1546(a) the district court noted that "[the] mistake is the government's here in screwing up this indictment and not asking for a variance before now." Tr.346-48. The district court further stated that it would be unfair to subject the defendants to a new basis for conviction at the end of trial. Tr.348.

After the first charge conference, in reliance on the district court's finding that citizenship misstatements were "what the government has alleged in the indictment," Tr.346, Ms. Cardenas testified on her own behalf and confirmed that she was born in Guatemala and that she was a dual citizen of Guatemala and El Salvador. Tr.407; 441. Later that afternoon, the district court *reversed its prior decision* and determined that it would instruct the jury that for each charged count it could convict the defendants on the basis of citizenship-related misstatements *or*

birthplace-related misstatements. Tr.475. At the conclusion of trial, the district court specifically instructed the jury that:

> [E]ach count of the indictment alleges that the defendant in that count made two false statements. One with regard to his or her citizenship and one with regard to his or her place of birth.
>
> To prove the defendant guilty of the crime charged in a particular count, the government need only prove that the defendant charged in that count made one of those false statements.

Tr.535.

During their deliberations, the jury asked one substantive question: "If the defendant possesses a 'valid' birth certificate from a country other than []her 'actual' birthplace, can [she] claim [the] other country as a 'birthplace'? Or is that considered an 'omission' by not listing both on legal documents?" Court Ex. 2. The district court responded that it was "reluctant to be more specific in indentifying what would constitute an omission," Court Ex. 3, and soon thereafter the jury returned a verdict of guilty on all counts.[2]

On October 10, 2017, the district court sentenced Ms. Cardenas to time served, 20 hours of community service, and a period of two years' supervised release. As the district court predicted during the sentencing hearing, Ms. Cardenas is currently contesting immigration removal proceedings, but because she has spent more than half of her life living and working in the United States, and because she

[2] The verdict form did not contain special interrogatories allowing the jury to indicate, as to each count, which of the two purported visa fraud crimes—false statements regarding citizenship or false statements regarding place of birth—Ms. Cardenas was found guilty of.

has a three-year old son who was born in the U.S., she would otherwise have a good basis for cancellation of removal if it was not for her conviction in this case.

II. Proceedings Before the Court of Appeals

On appeal, Ms. Cardenas argued that the indictment failed to sufficiently charge her with a visa fraud crime under § 1546(a) because the allegation that she "affirmed that she was a citizen of El Salvador born in Metapan, El Salvador, when she then well knew she was a citizen of Guatemala" does not, as a matter of simple logic, describe a false statement. In the alternative, Ms. Cardenas argued that even if each count of the indictment had sufficiently alleged a false statement regarding her country of citizenship the district court's jury instructions constructively amended the indictment by adding a second, uncharged grounds for conviction based on false statements regarding her place of birth.

Through a "summary order" issued on January 31, 2019, the Court of Appeals for the Second Circuit affirmed Ms. Cardenas's conviction. With respect to Ms. Cardenas's argument that the indictment failed to sufficiently allege *any* false statement, the Second Circuit held that, "the indictment clearly alleges that she made '*false statements* with respect to material facts in an application,'" in which "the defendant *affirmed that she was a citizen of El Salvador born in Metapan, El Salvador*, when as she then well knew she was a citizen of Guatemala.'" Summary Order, at 6 (emphasis in the original). According to the Second Circuit, the mere inclusion of the term "false statements" was sufficient to allege that Ms. Cardenas made multiple "false statements" in connection with her TPS applications.

With respect to Ms. Cardenas's alternative "constructive amendment" argument, the Second Circuit found that the indictment charged the defendants "with making 'false statements' (plural) and listed two allegedly false statements: that they were 'citizen[s] of El Salvador' and 'born in Metapan, El Salvador[.]'" Summary Order, at 3. Thus, according to the Second Circuit, the district court's final jury instructions "did not provide any *additional* basis not considered by the grand jury, upon which the petit jury may have convicted the defendant." *Id.* (internal quotation omitted).

On February 13, 2019, Ms. Cardenas filed a petition for panel rehearing or for rehearing *en banc*, pursuant to Rules 35 and 40, Fed. R. App. P. Among other things, Ms. Cardenas argued that the Second Circuit's reading of the indictment was foreclosed by this Court's prior decision in *Russell v. United States*, 369 U.S. 749 (1962), and that the inclusion of the words "false statements," followed by an allegation that the defendant was born in one place and was a citizen of that place when "she then well knew" that she was a citizen of another place did not sufficiently allege a false statement. Moreover, Ms. Cardenas argued that a simple comparison of the indictment and the jury instructions revealed that she was subject to conviction on the basis of an alleged criminal act (misrepresenting her place of birth) that was not charged by the grand jury. Finally, Ms. Cardenas argued that the Second Circuit's legal conclusions rested on the assumption that the indictment was improperly duplicitous—in that each of the six counts charged

against her charged two separate visa fraud crimes, either one of which would be sufficient for conviction.

On March 18, 2019 the Second Circuit denied Ms. Cardenas's petition for rehearing.

REASON FOR GRANTING THE PETITION FOR CERTIORARI

I. This Court should decide whether an indictment charging false statements must specify the statements at issue and include factual allegations sufficient to establish the falsity of those statements.

The Grand Jury Clause of the Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The Sixth Amendment, for its part, provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]" These constitutional protections are advanced through adherence to Rule 7(c)(1) of the Federal Rules of Criminal Procedure, which requires that indictments must provide a "definite written statement of the essential facts constituting the offense charged[.]" The instant petition should be granted because this case provides the Court with an opportunity to determine whether the Fifth and Sixth Amendments and Rule 7(c) specifically require that an indictment charging crimes involving "false statements" must include factual allegations that: (1) identify the statements at issue; and (2) establish the falsity of those statements.

In *United States v. Cruikshank*, 92 U.S. 542, 544 (1875), this Court noted that, "where the definition of an offence, whether it be at common law or by statute,

includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition[.]" Rather, in such cases, the indictment "must state the species—it must descend to particulars." *Id.* Subsequently, in *United States v. Hess*, 124 U.S. 483, 487 (1888) this Court noted that "the language of [a] statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which [s]he is charged."

More recently, this Court confirmed that "an indictment parroting the language of a federal criminal statute is often sufficient" to charge an offense, but "there are crimes that must be charged with greater sufficiency." *United States v. Resendiz-Ponce*, 549 U.S. 102, 109 (2007). For example, in *Russell* this Court determined that a series of indictments charging multiple defendants with refusing to answer questions pertinent to subjects under inquiry before a congressional subcommittee were insufficient because they did not specify the alleged subjects under inquiry. 369 U.S. 749. In so finding, this Court noted that:

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

Id., at 770. In order to avoid this situation, the Court held that, "[w]here guilt depends so crucially upon such a specific identification of fact, . . . an indictment must do more than simply repeat the language of the criminal statute." *Id.*, at 764.

The instant petition should be granted and the Court should provide guidance as to the degree of factual specificity required where an indictment charges a defendant with visa fraud under § 1546(a) or another crime involving "false statements." As of now, the sufficiency of an indictment like the one charged herein—which did *not* contain factual allegations to indicate that Ms. Cardenas's alleged statements about her country of citizenship or her birthplace were definitively false—will likely depend on the federal circuit in which the case is tried. For example, in *United States v. Vesaas*, 586 F.2d 101, 104 (8th Cir. 1978) the Court of Appeals for the Eighth Circuit held that "an indictment premised on a statement which on its face is not false cannot survive," and that "a prosecution for a false statement under [18 U.S.C. §] 1001 or under the perjury statutes cannot be based on an ambiguous question where the response [m]ay be literally and factually correct." *Id.*, at 104. Thus, if Ms. Cardenas had been tried in the Eighth Circuit, the *Vesaas* precedent would have required the indictment to allege facts that, if true, would mean that her alleged statements regarding her citizenship and/or birthplace were false.[3]

[3] It has been necessary throughout the pendency of this case to emphasize the fact that the phrase "affirmed that she was a citizen of El Salvador born in Metapan, El Salvador, when as she then well knew she was a citizen of Guatemala" does *not* describe two false statements, let alone one. Even a "creative" reading of this charging language in the government's favor fails to reveal anything more than an alleged statement (citizen of

II. This Court should clarify whether a jury instruction that permits a guilty verdict for a crime involving "false statements" based on purportedly false statements other than those described in the indictment amounts to a "constructive amendment" or a harmless "variance."

In *Stirone v. United States*, 361 U.S. 212, 218 (1960), this Court found that jury instructions which allowed a defendant to be convicted under the Hobbs Act, 18 U.S.C. § 1951, based on one factual theory of interference with interstate commerce amounted to an improper amendment of an indictment that charged an entirely different factual theory of interference with interstate commerce. In so finding, this Court held that "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Id.*, at 215-16 (citing *Ex parte Bain*, 121 U.S. 1, 6 (1887)). Subsequently, in *United States v. Miller*, 471 U.S. 130, 136 (1985), this Court held that, "[a]s long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime."

Over the last several decades, there has been "considerable confusion as to what constitutes a constructive amendment of an indictment," which requires automatic reversal of a conviction without the need for a showing of prejudice, "as opposed to a variance of an indictment," which is often treated as a harmless error. *United States v. Weiss*, 752 F.2d 777, 787 (2d Cir. 1985). *See also Haines v. Risley*, 412 F.3d 285, 291 (1st Cir. 2005) ("Save at either end of the spectrum, it is far from

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El Salvador born in Metapan) and an alleged fact that does not necessarily contradict that statement (knowledge of citizenship in Guatemala).

clear what distinguishes a permissible variance . . . from an impermissible constructive amendment."); *Hunter v. New Mexico*, 916 F.2d 595, 599 (10th Cir. 1990) (describing "the difference between the two types of variance" as "'shadowy' at best"). The instant petition should be granted because this case is an appropriate vehicle for the Court to provide much-needed guidance as to the difference between a constructive amendment and a variance in cases where the district court's jury instructions permit a defendant to be convicted of a crime involving "false statements" based on purportedly false statements other than those charged in the indictment.

Most of the federal courts of appeals that have addressed the issue have found that defendants may *not* be subject to conviction based on false statements other than those specified in an indictment. For example the petitioner in *United States v. Adams*, 778 F.2d 1117 (5th Cir. 1985) was charged with making false statements in connection with a firearms purchase, in violation of 18 U.S.C. §§ 922(a)(6) and 924(a). The indictment specifically charged the petitioner with furnishing a false identification card that "was likely to deceive the firearms dealer with respect to a fact material to the lawfulness of the acquisition of the firearm . . . in that Ernest Adams represented that he was Ernest Cole, whereas, in truth and in fact, as he then well knew, he was Ernest Adams[.]" *Id.*, at 1118-19. However, at trial the government presented evidence that Adams had *also* deceived the firearms dealer with respect to his residence address, and the jury was instructed that it could convict Adams on the basis of that uncharged misstatement. *Id.*, at 1119. On

appeal, the Fifth Circuit determined that the district court's jury instruction amounted to a constructive amendment under *Stirone* and that an "automatic" reversal was required because Adams "may have been convicted on a ground not charged in the indictment." *Id.*, at 1123-25. *See also United States v. Hoover*, 467 F.3d 496, 502 (5th Cir. 2006) ("In accordance with" *Stirone*, "when the government chooses to specifically charge the manner in which the defendant's statement is false, the government should be required to prove that it is untruthful for that reason.").

In *United States v. Miller*, 891 F.3d 1220, 1232 (10th Cir. 2018), the petitioner was charged with filing an application with the Drug Enforcement Administration (DEA) in which he falsely claimed that his state professional license was never revoked, and the government's evidence at trial established that he had also falsely represented to the DEA that he had not previously surrendered a federal controlled-substance registration. The Tenth Circuit found that "[t]his evidence of a different, unindicted false statement was not corrected by the jury instructions, which failed to narrow the basis for the false-statement count back down to the specific false statement charged in the indictment." *Id.*, at 1232. Thus, the Tenth Circuit determined that it had "no assurance that the jury convicted the defendant based solely on the conduct actually charged" and held that the constructive amendment of the indictment amounted to a plain error. *Id.*, at 1236-38 (internal quotations and alterations omitted). *See also United States v. Farr*, 536 F.3d 1174, 1181 (10th Cir. 2008) ("the language employed by the government in its

indictments becomes an essential and delimiting part of the charge itself, such that if an indictment charges particulars, the jury instructions and evidence introduced at trial must comport with those particulars.") (internal quotation omitted).

In *United States v. Crocker*, the Court of Appeals for the Third Circuit similarly held that, in the context of charged perjury crimes under 18 U.S.C. §§ 1621 and 1623, "when a grand jury has specifically charged the manner in which testimony is untruthful, permitting the government to prove that it was untruthful in an entirely different manner amounts to a constructive amendment of the indictment rather than a mere variance." 568 F.2d 1049, 1060 (3d Cir. 1977), *rev'd on other grounds United States v. Miller*, 527 F.3d 54, 79 n.21 (3d Cir. 2008).

Unlike the Third, Seventh, and Tenth Circuits, the Second Circuit has (at least occasionally) permitted defendants to be convicted on the basis of facts other than those charged in an indictment. *See, e.g., United States v. Knuckles*, 581 F.2d 305, 311-12 (2d Cir. 1978) (where defendant was charged with distributing heroin a jury instruction permitting conviction for distributing either heroin or cocaine was not a prejudicial variance). In this case, the indictment failed to provide Ms. Cardenas with sufficient notice that she would be required to defend against a duplicitous indictment charging her with making "false statements" about her citizenship *and* her place of birth. Rather, until the final charge conference was held at the end of trial, Ms. Cardenas relied on the well-founded expectation that, based on the language of the indictment and the prohibition against duplicitous charges, the grand jury had intended to charge her with one false statement under each

count. Furthermore, because the indictment alleged that Ms. Cardenas "knew she was a citizen of Guatemala" when she claimed to be a citizen of El Salvador, and because the indictment did not contain *any* factual allegations regarding her actual place of birth, Ms. Cardenas also relied on the well-founded expectation that the one crime the grand jury had attempted to charge her with under each count related to statements about her country of citizenship.

The Second Circuit's "summary order" affirming Ms. Cardenas's conviction would have been foreclosed under the established law of the Third, Fifth, and Tenth Circuits. Therefore, this case presents an appropriate vehicle for the Court to resolve an existing conflict among the federal courts of appeals and to determine whether facts other than those charged in an indictment may form the basis of a conviction for a crime involving "false statements," or whether the Fifth and Sixth Amendments forbid the last-minute addition of new criminal charges to conform to the government's trial evidence.

CONCLUSION

The instant petition for a writ of *certiorari* should be granted.

Dated: June 17, 2019
New York, New York

Respectfully submitted,

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APPENDIX

17-3428 (L)
United States v. Cardenas

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of January, two thousand nineteen.

Present:

AMALYA L. KEARSE,
ROBERT D. SACK,
DEBRA ANN LIVINGSTON,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 17-3428 (L)
17-3450 (Con)

MARIO CARDENAS, JENNIFER CARDENAS,

Defendants-Appellants.*

For Appellant Mario Cardenas: JAMES EDWARD GROSS, Albany, NY.

For Appellant Jennifer Cardenas: LUCAS ANDERSON, Rothman, Schneider, Soloway & Stern, LLP, New York, NY.

For Appellee: PAUL D. SILVER, Assistant U.S. Attorney, *for* Grant C.

* The Clerk of Court is respectfully requested to amend the official caption as set forth above.

Jacquith, U.S. Attorney for the Northern District of New York, Albany, NY.

Appeal from a judgment of the United States District Court for the Northern District of New York (Scullin, *S.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Mario Cardenas ("Mario") and Jennifer Cardenas ("Jennifer") appeal from October 11, 2017 judgments of the Northern District of New York (Scullin, *S.J.*) convicting each of them, after jury trial, of six counts of visa fraud in violation of 18 U.S.C. § 1546(a). On appeal, Mario and Jennifer both argue that (1) the district court's jury instructions constructively amended their indictment; (2) there was a prejudicial variance between the indictment and the evidence presented at trial; and (3) the evidence presented at trial was not sufficient to support the jury's verdict. Jennifer also argues that the indictment failed to allege the "false statement" element of visa fraud. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review claims that there was a constructive amendment of, or prejudicial variance from, an indictment *de novo*. *See United States v. Dove*, 884 F.3d 138, 146, 149 (2d Cir. 2018). To prevail on a constructive-amendment claim and obtain reversal, a defendant must "demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *United States v. Salmonese*, 352 F.3d 608, 620 (2d Cir. 2003) (internal quotation marks omitted). To prevail on a prejudicial-variance claim and obtain reversal, a defendant must (1) "establish that the evidence offered at trial differs materially from

the evidence alleged in the indictment"; and (2) show that "substantial prejudice occurred at trial as a result." *Dove*, 884 F.3d at 149 (internal quotation marks omitted).

An element of visa fraud is the making of "any false statement." 18 U.S.C. § 1546(a). Mario and Jennifer's indictment charged them with committing six counts of visa fraud by, in relevant part, making "false statements with respect to material facts in an application," *i.e.*, three "I-821 Application[s] for Temporary Protected Status" and three "I-765 Application[s] for Employment Authorization," in each of which "the defendant affirmed that [he or she] was a citizen of El Salvador born in Metapan, El Salvador, when as [he or she] then well knew [he or she] was a citizen of Guatemala." *See* A-32–36. Mario and Jennifer first argue that the district court constructively amended that indictment by instructing the jury as to each count that "the indictment alleges that the defendant . . . made two false statements. One with regard to his or her citizenship and one with regard to his or her place of birth. . . . [T]he government need only prove that the defendant charged in that count made one of those false statements." A-574. Mario and Jennifer contend that the indictment "cannot be said to have sufficiently alleged" that the defendants "made false statements about [their] country of birth." Jennifer Br. 27; *see* Mario Reply Br. 2. We disagree.

The indictment returned by the grand jury charged both Mario and Jennifer in each count with making "false statements" (plural) and listed two allegedly false statements: that they were "citizen[s] of El Salvador" and "born in Metapan, El Salvador." A-32–36. The court's instructions did not provide any *additional* basis "not considered by the grand jury, upon which the petit jury may have convicted the defendant." *Dove*, 884 F.3d at 146; *see id.* (noting that the "archetypal example of a constructive amendment" is where an "additional element sufficient for conviction" is introduced at trial). Accordingly, there was no constructive amendment of the indictment.

Mario and Jennifer next argue that the evidence adduced at trial resulted in a prejudicial variance from the indictment because the evidence showed that they had claimed to have been born in San Salvador, El Salvador, while the indictment alleged that they had claimed to have been born in Metapan, El Salvador. But even if we accepted their view that the difference between the two towns constituted a *variance*, Mario and Jennifer would still have to show that it was *prejudicial*—that is, that it affected their substantial rights. *See United States v. Lee*, 833 F.3d 56, 71 (2d Cir. 2016). In general, so long as an indictment provides a defendant with "notice of the core of criminality to be proven at trial, we have permitted significant flexibility in proof without finding prejudice." *United States v. Kaplan*, 490 F.3d 110, 129 (2d Cir. 2007) (internal quotation marks omitted). The core of criminality "involves the essence of a crime, in general terms; the particulars of how a defendant effected the crime falls outside that purview." *United States v. D'Amelio*, 683 F.3d 412, 418 (2d Cir. 2012). Here, the indictment put Mario and Jennifer on notice of the core of criminality with which they were accused—committing visa fraud by falsely claiming to be citizens of El Salvador and falsely claiming to have been born in El Salvador. *Cf. id.* at 416, 421–22 (finding no prejudicial variance where indictment specified the use of only one means of interstate commerce, the Internet, but jury instructions allowed jury to convict defendant based on the use of either the Internet *or* the telephone); *cf. also Dove*, 884 F.3d at 149–50 (finding no prejudicial variance where evidence at trial permitted jury to find multiple conspiracies, but indictment described only one conspiracy). Given the notice provided to them by the indictment, we do not think that Mario and Jennifer "could have been surprised by the evidence upon which the government relied at trial." *Dove*, 884 F.3d at 150. We conclude that even if there was a variance, it was not prejudicial.

Next, Mario and Jennifer both argue that the trial evidence was insufficient to establish that they knowingly made any false statements. Mario Br. 15–16; Jennifer Br. 31–35. We review claims of insufficient evidence *de novo*, but a "defendant challenging the sufficiency of the evidence bears a heavy burden," as we "draw all permissible inferences in favor of the government and resolve all issues of credibility in favor of the jury verdict." *United States v. Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011). Viewed in that light, we must uphold a jury verdict if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Here, evidence introduced at trial showed, *inter alia*, that (1) Mario and Jennifer were born in Guatemala, *see, e.g.*, A-324–25; (2) Mario and Jennifer were fluent in both spoken and written English, *see, e.g.*, A-323–24; (3) Mario and Jennifer certified, under penalty of perjury, that everything on their temporary protected status ("TPS") applications was true and correct, *see, e.g.*, A-182–83, 196, 206; (4) Mario's and Jennifer's TPS applications stated that they were born in, and citizens of, El Salvador, *see, e.g.*, A-172–78, 210–15; (5) Mario submitted an application to "register permanent residence or adjust [immigration] status" in 2015, in which he listed his country of birth as Guatemala and again certified, under penalty of perjury, that everything on the application was true and correct, *see* A-215–18; (6) the city clerk of Schenectady, New York, had records of Mario's 2008 marriage, which included a signed statement by Mario affirming that he was born in Guatemala, A-417–19; (7) Jennifer personally testified that she was born in Guatemala, A-446, 450–51; and (8) Mario's and Jennifer's El Salvadoran birth certificates were fraudulent, A-284–87. The jury was entitled to credit this (and other) evidence and conclude that Mario and Jennifer knowingly made false statements on their TPS applications. Their sufficiency claim thus fails.

Finally, Jennifer argues that the indictment fails to allege a false statement. However, the indictment clearly alleges that she made "*false statements* with respect to material facts in an application," *i.e.*, three "I-821 Application[s] for Temporary Protected Status" and three "I-765 Application[s] for Employment Authorization," in each of which "the defendant *affirmed that she was a citizen of El Salvador born in Metapan, El Salvador*, when as she then well knew she was a citizen of Guatemala." A-32–34 (emphases added). The indictment thus *does* allege that Jennifer made false statements: that she was a citizen of El Salvador and that she was born in El Salvador. Jennifer's argument that it is possible for someone to be a citizen of both Guatemala and El Salvador is irrelevant—the indictment alleges that she made a *false statement* when she stated that she was a citizen of El Salvador (dual or otherwise).

* * *

We have considered Mario's and Jennifer's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT

Northern District of New York

UNITED STATES OF AMERICA

v.

Jennifer Cardenas

JUDGMENT IN A CRIMINAL CASE

Case Number: DNYN115CR000271-002

USM Number: 22150-052

Michael D. Jurena
311 State Street
Albany, NY 12110
518-463-2280
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) of the on.
☐ pleaded nolo contendere to count(s) which was accepted by the court.
☒ was found guilty on count(s) 13 through 18 of the Indictment on June 12, 2017 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. § 1546(a)	Visa Fraud	12/19/2014	13-18

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed in accordance with 18 U.S.C. § 3553 and the Sentencing Guidelines.

☐ 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.

October 10, 2017
Date of Imposition of Judgment

Frederick J. Scullin, Jr.
Senior United States District Judge

October 11, 2017
Date

DEFENDANT: Jennifer Cardenas
CASE NUMBER: DNYN115CR000271-002

IMPRISONMENT

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

Time Served on each of Counts 13 through 18, counts to run concurrently, for a total term of imprisonment of Time Served.

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

☒ 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

DEFENDANT: Jennifer Cardenas
CASE NUMBER: DNYN115CR000271-002

SUPERVISED RELEASE

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

2 years on each of Counts 13 through 18, terms to run concurrently.

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 cooperate in the collection of DNA as directed by the probation officer. (deselect if inapplicable)
5. ☐ 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)
6. ☐ You must participate in an approved program for domestic violence. (check if applicable)

If this judgment imposes a fine or restitution, it is a condition of supervised release that you pay in accordance with the Schedule of Payments sheet of this judgment.

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

DEFENDANT: Jennifer Cardenas
CASE NUMBER: DNYN115CR000271-002

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.

14. You must provide the probation officer with access to any requested financial information.

15. You must submit your person, and any property, house, residence, vehicle, papers, effects, computer, electronic communications devices, and any data storage devices or media, to search at any time, with or without a warrant, by any federal probation officer, or any other law enforcement officer from whom the Probation Office has requested assistance, with reasonable suspicion concerning a violation of a condition of probation or supervised release or unlawful conduct by you. Any items seized may be removed to the Probation Office or to the office of their designee for a more thorough examination.

AO 245B NNY (Rev. 11/16) Judgment in a Criminal Case
Sheet 3D – Supervised Release

DEFENDANT: Jennifer Cardenas
CASE NUMBER: DNYN115CR000271-002

SPECIAL CONDITIONS OF SUPERVISION

1. If you are deported or otherwise leave the United States, you must not enter or attempt to enter the United States without the permission of the Secretary of the Department of Homeland Security. If you re-enter the United States, you must report to the probation office in the Northern District of New York within 72 hours.

2. You must report to and remain in contact and cooperate with the Bureau of Immigration and Customs Enforcement and you must fulfill any requirements of U.S. Immigration Law.

3. You must perform 20 hours of community service. The site, schedule, and conditions shall be approved by the probation officer.

DEFENDANT'S ACKNOWLEDGMENT OF APPLICABLE CONDITIONS OF SUPERVISION

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

The conditions of supervision have been read to me. I fully understand the conditions and have been provided a copy of them. For further information regarding these conditions, see Overview of Probation and Supervised Release Conditions, available at: www.uscourts.gov.

Defendant — Date

U.S. Probation Officer/Designated Witness — Date

AO 245B NNY (Rev. 11/16) Judgment in a Criminal Case
Sheet 5 – Criminal Monetary Penalties

DEFENDANT: Jennifer Cardenas
CASE NUMBER: DNYN115CR000271-002

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	$ 600	$ 0	$ 0	$ 0

☐ 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
	$	$	
Totals	$	$	

☐ 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 NNY (Rev. 11/16) Judgment in a Criminal Case
Sheet 6 – Schedule of Payments

DEFENDANT: Jennifer Cardenas
CASE NUMBER: DNYN115CR000271-002

SCHEDULE OF PAYMENTS

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

A ☒ In full immediately; or

B ☐ Lump sum payment of $ due immediately; balance due

☐ not later than, or

☐ in accordance with ☐ D, ☐ E, ☐ F, or ☐ G below; or

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

D ☐ Payment in equal installments of $ over a period of, to commence after the date of this judgment; or

E ☐ Payment in equal installments of $ over a period of, to commence after release from imprisonment to a term of supervision; or

F ☐ Payment during the term of supervised release will commence within 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

G ☐ 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 imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to **Clerk, U.S. District Court, Federal Bldg., 100 S. Clinton Street, P.O. Box 7367, Syracuse, N.Y. 13261-7367,** unless otherwise directed by the court, the probation officer, or the United States attorney. If a victim cannot be located, the restitution paid to the Clerk of the Court for that victim shall be sent to the Treasury, to be retrieved when the victim is located.

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 Court gives notice that this case involves other defendants who may be held jointly and severally liable for payment of all or part of the restitution ordered herein and may order such payment in the future.

☐ 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 DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v. **1:15-CR-271 (FJS)**

JENNIFER CARDENAS and MARIO CARDENAS,

Defendants.

APPEARANCES	**OF COUNSEL**
OFFICE OF THE UNITED STATES ATTORNEY James T. Foley U.S. Courthouse 445 Broadway, Room 218 Albany, New York 12207-2924 Attorneys for the United States	**JEFFREY C. COFFMAN, AUSA** **JOSEPH A. GIOVANNETTI, AUSA**
OFFICE OF MICHAEL D. JURENA 311 State Street Albany, New York 12210 Attorneys for Defendant Jennifer Cardenas	**MICHAEL D. JURENA, ESQ.**
OFFICE OF JAMES E. GROSS 90 State Street, Suite 700 Albany, New York 12207 Attorneys for Defendant Mario Cardenas	**JAMES E. GROSS, ESQ.**

SCULLIN, Senior Judge

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On September 24, 2015, a federal Grand Jury returned an Indictment that charged Defendant Jennifer Cardenas with six counts of visa fraud, *see* Dkt. No. 1 at Counts 13-18, and charged Defendant Mario Cardenas with six counts of visa fraud, *see id.* at Counts 19-24. On June 15, 2017,

after a three-day trial, a jury convicted both Defendants on all counts. *See* Dkt. No. 99.

Thereafter, Defendants filed substantially identical motions, in which they sought a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or, in the alternative, a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. *See* Dkt. Nos. 106, 107. The Government filed a response in opposition to both motions. *See* Dkt. No. 111.

II. DISCUSSION

A. Defendants' Rule 29 motions for a judgment of acquittal

In reviewing a Rule 29 motion for a judgment of acquittal, the court must deny such a motion if, "'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Espaillet*, 380 F.3d 713, 718 (2d Cir. 2004) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Thus, the court must "'credit[] every inference that the jury might have drawn in favor of the government,'" *United States v. Temple*, 447 F.3d 130, 136-37 (2d Cir. 2006) (quotation omitted), and must "'resolve all issues of credibility in favor of the jury's verdict,'" *United States v. Desena*, 260 F.3d 150, 154 (2d Cir. 2001) (quotation omitted). In other words, "the court must be careful to avoid usurping the role of the jury." *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999).

Furthermore, in reviewing the sufficiency of the evidence, the court must view the individual pieces of evidence, not in isolation, but in conjunction, *see United States v. Matthews*, 20 F.3d 538, 548 (2d Cir. 1994) (citations omitted), and must look at "the totality of the government's case and not each element, as each fact may gain color from others[,]" *Guadagna*, 183 F.3d at 130 (citation

omitted). In doing so, the court must keep in mind "that the jury's verdict may rest entirely on circumstantial evidence." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003) (citing *Martinez*, 54 F.3d at 1043). Finally, "it is the task of the jury, not the court, to choose among competing inferences that can be drawn from the evidence," *id.* (citing *United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995)), if the court "'concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, [the court] must let the jury decide the matter.'" *Guadagna*, 183 F.3d at 129 (quoting *Curley*, 160 F.2d at 233).

In this case, to prevail on their claims that the Court's instructions to the jury resulted in a constructive amendment of the Indictment, Defendants "must demonstrate that 'the terms of the indictment [were] in effect altered by the presentation of evidence and jury instructions which so modif[ied] *essential elements* of the offense charged that there [was] a substantial likelihood that the defendant m[ight] have been convicted of an offense other than that charged in the indictment.'" *United States v. D'Amelio*, 683 F.3d 412, 416 (2d Cir. 2012) (quoting *United States v. Mollica*, 849 F.2d 723, 729 (2d Cir. 1988)). Thus, as the Supreme Court made clear in *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), "the 'two constitutional requirements for an indictment [are]: "first, [that it] contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, [that it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense."'" *Id.* at 108 (quoting *Hamling v. United States*, 418 U.S. 87, 117, 4 S. Ct. 2887, 41 L. Ed. 2d 590 (1974)). Furthermore, as the Second Circuit noted in *D'Amelio*, although it "views constructive amendment as a *per se* violation of the Grand Jury Clause requiring reversal, . . . it has "'consistently permitted significant flexibility in proof, provided that the defendant was given *notice* of the *core of criminality* to be proven at trial.'" *D'Amelio*, 683

F.3d at 417 (quoting *United States v. Rigas*, 490 F.3d 208, 228 (2d Cir. 2007) (quoting *United States v. Patino*, 962 F.2d 263, 266 (2d Cir. 1992)) (internal footnote omitted).

Similarly, "'[a] variance occurs when the charging terms of the indictment are left unaltered, but the evidence at trial proves facts materially different from those alleged in the indictment.'" *Id.* at 417 (quoting *United States v. Salmonese*, 352 F.3d 608, 621 (2d Cir. 2003)). However, "[a] variance in proof rises to a constitutional violation only if it infringes on the notice and double jeopardy protections of an indictment." *Id.* (citing *United States v. D'Anna*, 450 F.2d 1201, 1204 (2d Cir. 1971)).

For purposes of analyzing constructive amendment claims, "[t]he 'core of criminality' of an offense involves the essence of a crime, in general terms; the particulars of how a defendant effected the crime falls outside that purview." *D'Amelio*, 683 F.3d at 418 (citing *Martin v. Kassulke*, 970 F.2d 1539, 1543 (6th Cir. 1992) (identifying the relevant question in distinguishing constructive amendment from a mere variance in proof as whether the jury was presented with "two alternative crimes or merely two alternative methods by which the one [charged] crime . . . could have been committed")).

In *D'Amelio*, the court noted that the term "core of criminality" is usually defined in relation to the crime at issue. *See id.* As an example, the court pointed to *United States v. Danielson*, 199 F.3d 666 (2d Cir. 1999), in which the government had charged the defendant, a convicted felon, with knowing possession of ammunition, in violation of 18 U.S.C. § 922(g). The indictment in *Danielson* provided "that the defendant 'unlawfully, willfully, and knowingly did possess ammunition in and affecting commerce, and did receive ammunition which had been shipped and transported in interstate and foreign commerce, *to wit, 7 rounds of .45 calibre ammunition*.'"

D'Amelio, 683 F.3d at 418 (quoting [*Danielson*, 199 F.3d] at 668). In addition, the *Danielson* court charged the jury "that in determining whether the defendant possessed ammunition that traveled in interstate commerce, it could consider the statutory definition of 'ammunition,' which included component parts of a round." *Id.* Danielson's attorney "objected that the jury charge impermissibly broadened the indictment from its more limited 'to wit' clause." *Id.* On appeal, the Second Circuit "rejected the defendant's constructive amendment argument, holding that '[t]he essential element of the offense charged was that [the defendant] possessed ammunition that had traveled in interstate commerce, not the precise nature of that ammunition.'" *Id.* (quoting [*Danielson*, 199 F.3d] at 670). The Second Circuit reasoned that "'[w]hether the government proved that shells or entire rounds had so traveled, there is no doubt that [the defendant] had notice of the "core of criminality" to be proven at trial and that he was convicted of the offense charged in the indictment.'" *Id.* (quoting [*Danielson*, 199 F.3d at 670]).

In *D'Amelio*, the defendant "argue[d] that if the government define[d] the 'core of criminality' narrowly in the indictment when it could otherwise [have] defined it generally, a constructive amendment occur[red] when the proof at trial [was] different from the narrower allegations in the indictment." *D'Amelio*, 683 F.3d at 418. The Second Circuit summarized the defendant's argument as follows:

> As related to this case, the argument goes, the indictment could have stated merely that D'Amelio used facilities of interstate commerce to entice a minor, period; instead, the indictment included the "to wit" clause, and the grand jury chose to identify only the Internet as the facility of interstate commerce by which D'Amelio communicated with the minor.

Id.

The Second Circuit ultimately found this argument unavailing. *See id.* In doing so, the Second Circuit noted that D'Amelio's argument rested heavily on the Supreme Court's decision in *Stirone v. United States*, 361 U.S. 212 (1960), in which the defendant was indicted for, and convicted of, unlawfully interfering with interstate commerce in violation of the Hobbs Act. *See D'Amelio*, 683 F.3d at 418. The indictment in *Stirone* "charged the defendant with obstructing -- by extortion and threats of labor unrest -- shipments of sand that traveled in interstate commerce into Pennsylvania where the sand was being used in making concrete that was then going to be used to construct a steel mill." *Id.* (citing [*Stirone*, 361 U.S.] at 213-14, 80 S. Ct. 270). At trial, the government had "introduced evidence related to the shipments of sand and the movement of those shipments in interstate commerce." *Id.* The court also permitted the government "to introduce evidence that [the] defendant's actions in hindering sand shipments had affected prospective steel shipments from the not-yet-constructed steel mill in Pennsylvania to other states, including Michigan and Kentucky." *Id.* (citing [*Stirone*, 361 U.S.] at 214, 80 S. Ct. 270).

"Consistent with the indictment, the court instructed the jury that defendant's 'guilt could be rested . . . on a finding that . . . sand used to make the concrete had been shipped from another state into Pennsylvania.'" *Id.* at 418-19 (quoting [*Stirone*, 361 U.S. at 214, 80 S. Ct. 270]). However, the court also "instructed the jury that a finding of guilt could rest on the jury's determination that 'concrete was used for constructing a mill which would manufacture articles of steel to be shipped in interstate commerce from Pennsylvania into other States.'" *Id.* at 419 (quoting [*Stirone*, 361 U.S. at 214, 80 S. Ct. 270]). In reviewing these instructions on appeal, "[t]he Supreme Court noted that nothing in the indictment could be read 'as charging interference with movements of steel from Pennsylvania to other States.'" *Id.* (quoting [*Stirone*, 361 U.S.] at 217, 80 S. Ct. 270]).

Furthermore, the Supreme Court found that "[t]his new factual basis for conviction was neither 'trivial, useless, nor innocuous.'" *Id.* (quoting [*Stirone*, 361 U.S. at 217, 80 S. Ct. 270]). Therefore, the Supreme Court "reversed [the] defendant's conviction, concluding that he [might] have been 'convicted on a charge the grand jury never made against him.'" *Id.* (quoting [*Stirone*, 361 U.S.] at 219, 80 S. Ct. 270).

In *D'Amelio*, the Second Circuit concluded that "[t]he [Supreme] Court's analysis of what was in essence a constructive amendment issue in *Stirone* . . . [did] not control the outcome" in the case before it because "[t]here [was] a critical difference between the procedural and substantive facts in *Stirone* and those presented" in *D'Amelio*. *D'Amelio*, 683 F.3d at 419. The Second Circuit explained that "[t]he distinction lies in whether the jury convicted based 'on a complex of facts distinctly different from that which the grand jury set forth in the indictment,' *Jackson v. United States*, 359 F.2d 260, 263 (D.C. Cir. 1966) (describing *Stirone*), or whether the indictment charged a single set of discrete facts from which the government's proof was at most a non-prejudicial variance, *United States v. Knuckles*, 581 F.2d 305, 312 (2d Cir. 1978)." *Id.* The Second Circuit went on to state that, if it were the latter of these two situations, it had, in previous cases, "generally concluded that the indictment provides sufficient notice to defendants of the charge(s) lodged against them." *Id.* (citations omitted).

To determine whether it should apply *Stirone* or *Knuckles* to the defendant's situation in *D'Amelio*, the court reviewed the reasoning underlying its decisions in *United States v. Knuckles*, 581 F.2d 305 (2d Cir. 1978), and *United States v. Wozniak*, 126 F.3d 105 (2d Cir. 1997). In *Knuckles*, the government had charged the defendants "with distribution of heroin, but at trial, the evidence [had] show[n] that the substance distributed was cocaine. *See id.* (citing [*Knuckles*,] 581

F.2d at 308-09). The trial court in *Knuckles* "charged the jury that it could convict if it found either distribution of heroin or cocaine. In affirming the conviction, [the Second Circuit had] held that the defendants were 'sufficiently apprised of the charges laid against them in . . . the indictment.'" *Id.* (quoting [*Knuckles*, 581 F.2d] at 311). In reaching this conclusion, the Second Circuit found it significant "that a 'single set of facts' was involved – the 'tabling operation for a controlled substance at a particular time and place. The operative facts were the same whether the controlled substance was heroin or cocaine.'" *Id.* (quoting [*Knuckles*, 581 F.2d] at 312). "Since 'the time, place, people, and object proved at trial [were] in all respects those alleged in . . . the indictment,' [the Second Circuit] held that the defendants had notice, they could defend against the charge, and they would not be subject to double jeopardy." *Id.* at 419-20 (quoting [*Knuckles*, 581 F.2d] at 311-12). Finally, the court noted that, in *Knuckles*, it had specifically found that *Stirone*'s holding was not controlling because "in *Stirone* the Court was troubled by the fact the conviction was based 'on a set of facts wholly unrelated to the facts charged,' *id.* at 312, which was a marked distinction from what [the Second Circuit] characterized as the 'single set of facts' present in Knuckles's case, *id.*" *Id.* at 420 (footnote omitted).

On the other hand, the Second Circuit reached the opposite result in *Wozniak*, where the government had charged the defendant "with conspiracy to possess with intent to distribute cocaine and methamphetamines as part of a seventy-six-count superseding indictment involving eight individuals." *Id.* (citing [*Wozniak*,] 126 F.3d at 106). "The evidence at trial connecting the defendant to the drug ring[, however, had shown] only his *use* of cocaine and marijuana and his possession with intent to distribute marijuana, but [it had not shown] possession with intent to distribute cocaine and methamphetamines as charged in the indictment." *Id.* (citing [*Wozniak*, 126

F.3d at 107-08). Moreover, in *Wozniak*, the district court had "instructed the jury that it did 'not matter that a specific count of the indictment charges that a specific controlled substance was involved in that count, and the evidence indicates that, in fact, a different controlled substance was involved,' and that as long as the jury found that some controlled substance was involved, that fact would be sufficient to convict." *Id.* (quoting [*Wozniak*, 126 F.3d] at 108-09). On appeal in *Wozniak*, the Second Circuit, after limiting its holding "'to the specific circumstances in this case,' *id.* at 109, agreed with the defendant that he 'well [might] have been surprised by the introduction of evidence of narcotics other than what [had been] alleged in the indictment,' *id.* at 111, and had he known that evidence of the non-charged substance would satisfactorily prove the charges, he might have 'chosen a different trial strategy,' *id.* at 110." *Id.* For this reason, the Second Circuit held that the indictment in *Wozniak* "had been constructively amended." *Id.*

In analyzing the facts in *Wozniak*, the Second Circuit took great pains to distinguish *Knuckles*. In doing so, the Second Circuit "concluded that *Knuckles* 'dealt with a specific transaction occurring on a specific date. Therefore, the defendants were aware of the "core of criminality" which was to be proven at trial. The exact controlled substance did not affect the government's evidence or the ability to defend.' [*Wozniak*, 126 F.3d] at 111." *Id.* To the contrary, the Second Circuit noted that *Wozniak* "did not involve a 'single set of operative facts that would alert Wozniak that at trial he would face marijuana evidence as well as whatever cocaine evidence the government possessed.'" *Id.* (quotation omitted). "Rather, Wozniak's codefendants were charged in a separate grand jury indictment with conspiracy to possess with intent to distribute marijuana, a charge that the government [had] opted not to pursue against Wozniak." *Id.* (quoting [*Wozniak*, 126 F.3d] at 109, 111). Based on these differences, the Second Circuit held that *Knuckles*

was inapposite and that, unlike *Knuckles*, the jury instructions in *Wozniak* had "constructively amended the indictment in violation of the defendant's Fifth Amendment rights." *Id.* at 420-21 (citing [*Wozniak*, 126 F.3d] at 111).

Based on its analysis of the Supreme Court's decision in *Stirone*, as well as its own prior decisions in *Wozniak* and *Knuckles*, the Second Circuit concluded that *Stirone* did not control the outcome in *D'Amelio* because, unlike the situation in *Stirone*, the defendant in *D'Amelio* had engaged in a single course of conduct within a discrete period of time and "[t]he course of conduct had a single ultimate purpose (its "core of criminality,") -- to entice 'Mary,' whom D'Amelio believed was 12 years old, 'into a position where she could become the victim of a sexual predator.'" *Id.* at 421 (quotation omitted). Furthermore, the Second Circuit agreed with the district court that "the 'core of criminality' for this crime did not encompass a specific facility and a specific means of interstate commerce employed by D'Amelio in connection with the crime," *id.*, and "all of the communications relied upon by the government, 'whether e-mails or telephone calls, took place as part of a single course of conduct – one designed, under the [g]overnment's theory of the case, to gain the trust of [Mary] and convince her to meet [D'Amelio] in person, so he could lure her into a secluded place for the purpose of engaging in sexual conduct.'" *Id.* at 421-22 (quotation omitted).

Finally, having concluded "that the indictment gave D'Amelio sufficient notice of the core criminal conduct for which he was charged," the Second Circuit addressed the issue of "whether the variance in proof 'altered . . . [or] modif[ied] essential elements of the offense charged' to the point there is a 'substantial likelihood that [D'Amelio] may have been convicted of an offense other than that charged in the indictment.' *Mollica*, 849 F.2d at 729 . . . ." *Id.* at 422. Applying this standard, the Second Circuit concluded that "[t]he government's proof at trial did not modify an 'essential

element' of the alleged crime. The essential element at issue is D'Amelio's use of a 'facility or means of interstate . . . commerce,' 18 U.S.C. § 2422(b), not the particular means that were used." *Id.* The Second Circuit explained further that "[n]either the indictment nor proof at trial showed that D'Amelio committed this crime by means of, for example, use of force, which would have modified an 'essential element' of the crime. . . . Whether D'Amelio used the Internet or a telephone makes no difference under the relevant statute, . . ., and 'affect[ed] neither the [g]overnment's case nor the sentence imposed.'" *Id.* (quoting *Knuckles*, 581 F.2d at 311) (internal citation and footnote omitted).

In sum, the Second Circuit held that the government had provided the defendant "with notice of the 'core of criminality' of the charge to be proven at trial – attempted enticement of a minor – and that the district court's instructions to the jury that both the telephone and Internet were facilities of interstate commerce did not 'so alter[] an essential element of the charge' as to amount to a constructive amendment." *Id.* at 424 (citing *Salmonese*, 352 F.3d at 620). In addition, the Second Circuit held "that the allegations in the indictment and the proof and jury instructions 'substantially correspond[ed]' with each other, as they involve[d] a single course of conduct." *Id.* (quoting *Danielson*, 199 F.3d at 670). Therefore, the Second Circuit concluded that the defendant "was convicted of conduct that was the subject of the grand jury's indictment, and there was no constructive amendment of the indictment." *Id.* (citing *Salmonese*, 352 F.3d at 620-21).

In this case, as in *D'Amelio*, the Government provided Defendants Jennifer Cardenas and Mario Cardenas with notice of the "core of criminality" of the charges to be proven at trial, *i.e.,* that they made false statements in documents required by the immigration law, specifically that they were citizens of El Salvador, born in El Salvador, when, in fact, they knew that they were citizens of Guatemala. Furthermore, the Court's instructions to the jury that Defendants made two false

statements – one with regard to citizenship and one with regard to place of birth -- did not "'so alter[] an essential element of the charge' as to amount to a constructive amendment." *D'Amelio*, 683 F.3d at 424 (quotation omitted). Moreover, there was no variance in proof because the evidence at trial did not prove facts that were materially different from the facts alleged in the Indictment.

In sum, viewing all of the evidence adduced at trial in the light most favorable to the Government and applying the "sufficiency of the evidence" test to the totality of the Government's case, the Court concludes that a reasonable jury could have found the essential elements of the crimes with which Defendants were charged beyond a reasonable doubt. Therefore, the Court denies Defendants' motions for a judgment of acquittal. *See Espaillet*, 380 F.3d at 424; *Guadagna*, 183 F.3d at 130.[1]

B. Defendants' Rule 33 motions for a new trial

Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). In this Circuit, motions for a new trial are disfavored; and, therefore, courts grant them sparingly. *See United States v. Gambino*, 59 F.3d 353, 364 (2d Cir. 1995). "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001) (citing *Sanchez*, 969 F.2d at 1414). "[B]efore ordering a new trial pursuant to Rule 33, a district court must find that

[1] The Court notes that this problem could have been avoided had the Government been more careful in wording the Indictment and had the Government brought this issue to the Court's attention prior to the last day of the trial.

there is "'a real concern that an innocent person may have been convicted.'" *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir. 2009) (quotation omitted). Thus, if the court is "satisfied that 'competent, satisfactory, and sufficient evidence' in the record supports the jury verdict," the court should not grant a motion for a new trial. *Ferguson*, 246 F.3d at 133 (quotation omitted). Moreover, "[b]ecause the courts generally must defer to the jury's resolution of conflicting evidence and assessment of witness credibility, '[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment.'" *McCourty*, 562 F.3d at 475-76 (quoting *Sanchez*, 969 F.2d at 1414).

In this case, in addition to the arguments that they made to support their motions for a judgment of acquittal, Defendants' motions rely primarily on credibility issues. For example, they assert that, because Mr. Portillo, the California tax preparer who prepared the applications that Defendants submitted, admitted that he had falsely signed the certifications on those applications and, in fact, had not read and translated the questions and answers that Defendants allegedly propounded, the certifications were completely unreliable and the jury should not have relied on them to convict Defendants of making false statements. Furthermore, Defendants appear to argue that, in light of the fact that the Government of El Salvador had issued them birth certificates and unique identity cards and had provided them with passports, no reasonable jury could have found that they were not citizens of El Salvador.

In effect, Defendants are asking the Court to overrule the jury's resolution of conflicting evidence and its assessment of the credibility of the witnesses. Admittedly, there was conflicting evidence and testimony at trial; but it was within the jury's province to decide which documentary evidence to accept and to determine which witnesses' testimony it found credible. Viewing the

evidence, both testimonial and documentary, introduced during the trial in its totality, the Court is convinced that the record contains competent, satisfactory and sufficient evidence to support the jury's verdict that Defendants were guilty of the crimes with which they were charged. Moreover, the Court finds that, based on the record, there is no basis to conclude that upholding the jury's decision would result in manifest injustice. Therefore, the Court denies Defendants' motions for a new trial.

III. CONCLUSION

Having reviewed the entire file in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that Defendant Jennifer Cardenas' motion for a judgment of acquittal or, in the alternative, for a new trial, *see* Dkt. No. 106, is **DENIED**; and the Court further

ORDERS that Defendant Mario Cardenas' motion for a judgment of acquittal or, in the alternative, for a new trial, *see* Dkt. No. 107, is **DENIED**.

IT IS SO ORDERED.

Dated: September 28, 2017
Syracuse, New York

Frederick J. Scullin, Jr.
Senior United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v. **1:15-CR-271 (FJS)**

JENNIFER CARDENAS and MARIO CARDENAS,

Defendants.

VERDICT FORM

We, the jury, unanimously find as follows:

Count 13 - Visa Fraud - I-821 Application for Temporary Protected Status (on or about February 10, 2012) - Defendant Jennifer Cardenas

Guilty X Not Guilty _____

Count 14 - Visa Fraud - I-821 Application for Temporary Protected Status (on or about June 25, 2013) - Defendant Jennifer Cardenas

Guilty X Not Guilty _____

Count 15 - Visa Fraud - I-821 Application for Temporary Protected Status (on or about December 19, 2014) - Defendant Jennifer Cardenas

Guilty X Not Guilty _____

Count 16 - Visa Fraud - I-765 Application for Employment Authorization (on or about February 10, 2012) - Defendant Jennifer Cardenas

Guilty X Not Guilty _____

Count 17 - Visa Fraud - I-765 Application for Employment Authorization (on or about June 25, 2013) - Defendant Jennifer Cardenas

Guilty X Not Guilty _____

Count 18 - Visa Fraud - I-765 Application for Employment Authorization (on or about December 19, 2014) - Defendant Jennifer Cardenas

Guilty X Not Guilty _____

Count 19 - Visa Fraud - I-821 Application for Temporary Protected Status (on or about February 10, 2012) - Defendant Mario Cardenas

Guilty X Not Guilty _____

Count 20 - Visa Fraud - I-821 Application for Temporary Protected Status (on or about June 25, 2013) - Defendant Mario Cardenas

Guilty X Not Guilty _____

Count 21 - Visa Fraud - I-821 Application for Temporary Protected Status (on or about December 19, 2014) - Mario Cardenas

Guilty X Not Guilty _____

Count 22 - Visa Fraud - I-765 Application for Employment Authorization (on or about February 10, 2012) - Mario Cardenas

Guilty X Not Guilty _____

Count 23 - Visa Fraud - I-765 Application for Employment Authorization (on or about June 25, 2013) - Mario Cardenas

Guilty X Not Guilty _____

Count 24 - Visa Fraud - I-765 Application for Employment Authorization (on or about December 19, 2014) - Mario Cardenas

Guilty X Not Guilty _____

Have the foreperson date and sign this verdict form and inform the marshal that you have reached a verdict.

Dated: 6/15/17

**NAME REDACTED
Foreperson's Signature

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of March, two thousand nineteen.

United States of America,

Appellee,

v.

Mario Cardenas, Jennifer Cardenas,

Defendants- Appellants.

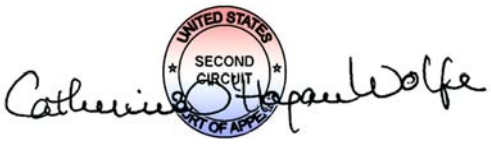
ORDER

Docket Nos: 17-3428 (L),
17-3450 (Con)

Appellant, Jennifer Cardenas, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Case Number: 1:15-CR-271

NOTE FROM THE JURY

YOUR HONOR,

If the defendant possesses ~~(illegible)~~ his/her a "Valid" Birth Certificate, from a country other than his/her "actual" Birth place, Can they claim other Country as a "Birthplace"? or is that considered an "omission" by not listing both on legal documents?

DATE: 6/15/17

TIME: 10:40 AM

**NAME REDACTED

Signature of Foreperson

FOR COURT USE ONLY

Jury Note Number: 1

Court Exhibit Number: 2

Courtroom Deputy Clerk: NME

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

LAWRENCE K. BAERMAN
Clerk

JOHN M. DOMURAD
Chief Deputy

DAN MCALLISTER
Chief Deputy

James M. Hanley Federal Building
P.O. Box 7367, 100 S. Clinton St.
Syracuse, New York 13261-7367
(315) 234-8500

June 15, 2017

Court Exhibit #3

11:20 a.m.

Re: USA v. Jennifer Cardenas and Mario Cardenas 1:15-CR-271 (FJS)

Dear Jurors,

The Court is reluctant to be any more specific in identifying what would constitute an omission. That is a decision within the province of the jury to decide whether or not there is an omission based on all the facts and circumstances. I refer you to the 5 elements set forth in the instructions.

Sincerely,

Frederick J. Scullin, Jr.
Senior United States District Judge

prepared by other people, correct? By other people, I mean Jennifer Cardenas. Right?
A As I recall going through the applications, most of them had an associated authorized representative. I would have to thumb back to say if that was all.
Q Why don't you take a look at the documents and tell us which petition was filled out by Jennifer Cardenas without any person preparing it for her.
THE COURT: Do we have a stipulation? Was there any at all that were not filled out by somebody else?
MR. COFFMAN: We will stipulate that they all have a preparer or somebody assisting her with the form.
THE COURT: All right.
BY MR. JURENA:
Q In 2001, two and three -- Government Exhibits 2-A, 2-C, 2-E were all prepared by the International Center; is that correct?
A Correct.
Q And those would be the TPS applications that I'm referencing. Correct?
A Yes.
Q And there were accompanying work authorization applications or employment authorization document applications as well. Correct?

I think I could change the instructions I give the jury just to refer to false statements made in application, let you argue those false statements may not be. Take out the other specific language.

What's your reaction?

MR. GROSS: It's a little hard to absorb this in the last two minutes, Judge, the government's submission but, you know, we're prepared to defend the allegations as they're stated in the indictment. If those allegations are going to change substantially, so that now we have to defend separate questions as to --

THE COURT: No separate questions. Only change is -- stays the same, that I can put in that she -- or he and she both claimed to be citizens of El Salvador when in fact they were citizens of Guatemala.

MR. JURENA: That's all you are going to put in that, I have no objection to that.

THE COURT: I will do that.

MR. JURENA: So not born in anyway. Right.

MR. GROSS: Not born in either.

MR. JURENA: Not born in either place.

THE COURT: Right. That's the basic false statement that they're alleging anyway but the issue for the jury is whether or not there were false statements

made in the applications and that's specifically what the government has alleged in the indictment, that they claim to be citizens of El Salvador when in fact they were citizens of Guatemala.

I think that's what the jury should decide. Any other?

MR. GROSS: Without -- so they're not going to have to decide whether they lied about where they were born. They are going to have to decide --

THE COURT: They can argue it because it's all part of the res gestae about what went on but that's not the allegation I think to put in the -- what the jury has to focus on.

MR. GROSS: Very well.

THE COURT: What does the government think about that?

MR. COFFMAN: So -- I apologize for getting this all to you late. I -- frankly, I didn't sleep the night before and I couldn't have written anything coherent last night.

I think the indictment alleges two false statements -- citizenship and the place of birth -- and, you know, I would like to argue to the jury that either one of those, if the jury agrees unanimously, is a sufficient basis to find the false statement in the

application. I think, you know, the indictment sets the country of birth out in it as a -- as one of the statements and it has that error in the location, which is why I think the variance or the modifications to the instructions that I requested is appropriate.

It would not be a violation of the Fifth Amendment because it doesn't change the essential elements of the crime. It's still visa fraud, it's still false statements and obviously the same false statements that have always been on the applications that have always been the offense that we have been focused on.

If we limited it just to the country of birth, I think we're losing part of the -- the false statements that we charged and the proof is a little bit different.

THE COURT: Limit it to the country of birth. Limited to their false statements with respect to citizenship.

MR. COFFMAN: Right.

THE COURT: That's what I'm talking about.

MR. COFFMAN: Yes. I meant to say, your Honor, if we limited it to their false statements with respect to citizenship, we're then dropping off their false statements that the country that they were born in, and I think either of those were material. They're

both alleged in the indictment and I think a jury could convict them based on their false statement of being born in El Salvador.

THE COURT: And not lied about the citizenship.

MR. COFFMAN: If the jury concluded or couldn't unanimously conclude about --

THE COURT: Here's the problem I have about that. I think -- first of all, mistake is the government's here in screwing up this indictment and not asking for a variance before now. Okay?

It's unfair to the defense preparing for this case all the way through up until this point in time in the dropping on an argument, which is a pretty good argument, to throw this inconsistency and so forth and so on with your proof.

You know, just to throw some questions out there in the jury's mind is what I think they are trying to do, as to whether or not you're proving your case.

So, at this late date, I'm going to give them the benefit of the doubt on it. That's my ruling right now. I'll hear more during the lunch hour but this late hour, I don't think I'm going to give you an opportunity to argue more than that. So go with what you've got.

MR. COFFMAN: Understood. So are you

right? Thank you.

(Discussion held in chambers, on the record)

THE COURT: What I propose is, now, that we leave the indictment language as it is on page 11 and 12. Okay? And in my instructions I explain the elements, starting on 13, that the defendant made a false statement as a first element. Each count of the indictment alleged that the defendant charged in that count made two false statements, one with regard to his or her citizenship and one with regard to his or her place of birth.

To prove the defendant guilty on the crime charged on a particular count, government need only prove that the defendant charged in a count made one of those false statements. However, you may not find defendant guilty of the crime charged on a particular count unless you unanimously agree as to the statement that was false.

Now, the government -- given that, the government can argue that there were two false statements. Obviously the defendant can argue whatever they want to in that regard but if I get a request by the jury to explain that any more, I would have to say this element is satisfied if you find that the defendant you're considering lied about this place of birth in --

that would be satisfying that element it's a false statement. That's what -- I don't need to say that upfront but I think I've got to respond that way if I'm asked.

MR. JURENA: Jury is being asked to consider whether or not the false statement to the birth is -- per the indictment -- was that the defendant said that they were born in Metapan. You're opening up is to say they said anything.

THE COURT: If they come back with a request to explain it further and they say, do we have to find that the person lied about being born in the city or just lied about where the person was -- he or she was born, I say you have to find that the person lied about where he or she was born.

MR. JURENA: I guess my preference would be that if they do get a request on that, that you read the language of the indictment. The government must prove that they said this, this, this, this and this, just like it's listed in the indictment.

THE COURT: I think the element is satisfied, they find that the person lied about where they were born.

MR. JURENA: Even though the indictment charges the specific place where they were born.

THE COURT: Yes.

MR. JURENA: We don't pay attention to the indictment, just if they lied.

THE COURT: Well, I'm just saying if they come back with a question, I think that's where I'm going to go with it. I want you to know, be prepared to argue that point. For the time being, I will let this go like this. All right? All right.

Any other questions or any other requests?

MR. COFFMAN: You talked about timing limitation. I want to make sure we understand we have -- is it ten minutes for our closing?

THE COURT: Well, what did you -- you said --

MR. COFFMAN: I think that's what we said, 10 or 15.

MR. COFFMAN: And is that -- and then a couple -- one or for two minutes for rebuttal?

THE COURT: Up to five rebuttal if you want. Yes. It's reasonable.

MR. COFFMAN: It's more than enough.

THE COURT: All right. And 10 or 15 minutes for your summations, right?

MR. GROSS: Yes, your Honor.

THE COURT: All right. So that's about it. But, anyway, that's where I propose -- unless I hear --

put your objection on the record anyway, if you want. You asked for a variance.

MR. COFFMAN: I have no objections to what Your Honor has proposed.

THE COURT: No objections? Obviously --

MR. GROSS: Yeah, I mean, I am going to object. I think this is an impermissible variance of what the indictment charges.

THE COURT: What is?

MR. GROSS: Allowing them to convict based on a lie about their birthplace. That's not what the indictment says. It says --

THE COURT: What is it? The instructions you're objecting to, though?

MR. GROSS: I guess maybe it's not in the instructions yet but based on what Your Honor has indicated.

MR. JURENA: Well, it's --

MR. GROSS: Where --

MR. JURENA: False statements?

MR. GROSS: Yes. Right. Page 13, second paragraph under first.

THE COURT: One I just read?

MR. GROSS: To prove the defendant guilty of the crime charged, particular count, the government need

only prove that the defendant charged in that count made one of those false statements.

THE COURT: Yes.

MR. JURENA: Not specifying which one. The government's indictment said Metapan. Born in Metapan.

THE COURT: You're confusing -- completing two things here. They have to agree upon -- are the statements they believe to be false. They have to agree that's a false statement. They can't split. In other words, some may agree this is false, they agree this was false. They have to agree upon a false statement, whichever one it is, unanimously as a jury, to convict. That's to your favor. We talked about this. It's an element that the government must establish. Whatever the jury believes is false, you have to agree unanimously that it was false.

MR. JURENA: So we can argue, then, they have to prove, like in the indictment, we can argue they have to prove that the -- they put Metapan in their applications or Metapan.

THE COURT: You're talking about that one -- the false statement with respect to place of birth?

MR. JURENA: Correct.

THE COURT: You can argue that and government argues no, all we have to show is that the -- that she

was a -- put a false statement as to her place of --

MR. JURENA: Well, if that's the case, then why charge a specific location, then?

THE COURT: I'm saying they can argue that but the jury agrees on a false statement, they must agree unanimously as to what statement was false.

MR. JURENA: I guess what I'm saying is that with regard to the false statement, relative to the place of birth, my objection would be that the Court doesn't direct them to focus on the issue of Metapan but, rather, any other place.

THE COURT: No. Why would I do that?

MR. JURENA: Because that's what's in the indictment.

THE COURT: It's two -- it's two allegations in the indictment as to false statements; one is the place of birth, one is a citizenship. The specific language and a place of birth does represent or does refer to the city of Metapan. I understand that you may argue they didn't prove it was Metapan. I will let you argue that.

MR. GROSS: My problem is, I don't think that the indictment charges two separate false statements. What the indictment says is that she affirmed she was a citizen of El Salvador, born in Metapan, and then the

next clause says -- modifies that by saying, when, as she then well knew, she was a citizen of Guatemala. Well, the fact that she wasn't born in Guatemala doesn't mean she's not a citizen of Guatemala.

THE COURT: You can argue that all you wish but they find she intentionally falsified the document by lying about it, that's their prerogative to do that and that's what the charge is all about.

MR. GROSS: But doesn't it have to be read together? She lied about where she was born when she knew she's a citizen of Guatemala. It's inconsistent. She may have lied about where she was born but she didn't do it when she well knew she was a citizen Guatemala. She did it when she well knew she was a citizen of Guatemala and El Salvador.

THE COURT: I don't know what point you're trying to make there but it makes no sense to me whatsoever.

MR. GROSS: Well, I don't know --

THE COURT: What is your request? Articulate your request. How do you want that changed?

MR. GROSS: Well, my concern is with the second paragraph --

THE COURT: What's your request? What are you requesting?

MR. GROSS: I don't want the government need only prove that the defendant charged in the count made one of those false statements. I think, in essence, the whole thing has to be read together as a false statement.

THE COURT: I see. You're claiming there's only one false statement.

MR. GROSS: Yes.

THE COURT: No.

MR. JURENA: I would be in favor of going back to what you had initially -- on page 13, where it says first, the defendant made a false statement as alleged in the indictment. As to this element, the statement is false if -- if it was untrue at the time the defendant made it, concealment or admission of material fact also constitutes false statements under the statutes. That, to me, is fine.

To further go on to say to prove the crime -- crime charged in the particular count, the government need only prove that, that's marshaling the evidence.

THE COURT: That's not marshaling the evidence, that's directing that they have to agree unanimously on a false statement. If they find more than one false statement and they agree -- some agree on this false statement and some on agree this statement is

false, it isn't sufficient. They haven't met their burden of proof.

To meet their burden of proof to satisfy the element, the jury must find that a given statement -- unanimously, a given statement was false. That's what that is saying.

MR. JURENA: So false in what respect?

THE COURT: What respect? You got the rest of the elements. We're wasting time now. Any other specific requests you can articulate?

MR. JURENA: Just so the record is clear, I object to that last paragraph on page 13.

THE COURT: In that --

MR. JURENA: In your --

THE COURT: You want it struck entirely?

MR. JURENA: I want it struck entirely.

THE COURT: Anything else?

MR. GROSS: I will join in that, Judge, and just make my point of record that I think that the -- by separating out into two statements, you're -- fatal variance.

THE COURT: You want the Court to request there was only one false statement alleged? Is that right?

MR. GROSS: Yes.

THE COURT: Denied.
MR. GROSS: Thank you.
THE COURT: Anything else?
MR. COFFMAN: Not from the government.
THE COURT: Okay. We will give it about ten minutes. You've got time.
MR. GROSS: Yes, your Honor.
THE COURT: We will start.
(Held in open court)
THE COURT: All right. Thank you. Counsel ready to proceed?
MR. JURENA: Yes, your Honor.
MR. GROSS: Yes, your Honor.
MR. COFFMAN: We are, your Honor, with your permission -- may we use the podium again in the same spot?
THE COURT: You may use that, yes. Certainly.
MR. COFFMAN: And also, in case you mention it to the jury, I think I'll be giving our closing.
THE COURT: All right. Both of the closing and rebuttal?
MR. COFFMAN: Yes. Both.
THE COURT: All right. Okay. Thank you.
(Jurors enter courtroom, 1:32 P.M.)
THE COURT: Okay. Thank you, ladies and

knew that those false statements were false at the time they made them and now, having given you the framework, you know what the five elements are.

Let's go talk about them a little bit. So, first, what are the charges? Well, the defendants are charged with making false statements about their citizenship and where they were born and you saw these on every single TPS application in 2001, all the way through to December of 2014. Uniformly. Born in El Salvador. Citizens of El Salvador.

The facts show otherwise and, to a certain extent, at least Defendant Jennifer Cardenas has admitted some of this, she -- if there was any doubt from the birth certificate for both defendants from Guatemala and proof that the ones from El Salvador were not legitimate, she cleared that up, at least with respect to her because she told you she -- she's from Guatemala, she's always known that.

Now we get into some other things she said about what she claims is her understanding of her citizenship but I submit to you there's no doubt she was born in Guatemala, not El Salvador.

The Defendant Mario Cardenas, he did not -- he submitted an application in 2008 to Schenectady in which he certified, under penalty of perjury, that he was born

in Guatemala and I submit to you, ladies and gentlemen, that that's proof that he knew it in 2008. There's also evidence that he was born in Guatemala because you have his Guatemalan birth certificate, too.

So I submit to the falsity of the statement about where they were born has been proven. They were not born anywhere in El Salvador.

Ladies and gentlemen, citizenship -- and that's one that I suspect you're going to hear a little bit about from the defense. You heard a little bit about it from Jennifer Cardenas and I would ask you to consider a few things.

First, citizenship is something that is determined by law of the country and you were not presented a whole lot of evidence about what the laws of Guatemala and El Salvador are. You heard some questions about them and you heard maybe a little bit about what they provide but I think you can start from the proposition that if you're born in a country, it's perfectly appropriate for someone to assume they're a citizenship of that country and had they believed they were born in El Salvador, I wouldn't be standing here telling you that they made a false statement about their citizenship because they could have been citizens of El Salvador.

knowingly presents any such application, affidavit or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact, et cetera.

In order to prove the defendant guilty of making a false statement in a document required by the immigration laws, the government must prove each of the following elements beyond a reasonable doubt.

Here's what you have to follow, these five elements, to be established beyond a reasonable doubt: First, that the defendant made a false statement. Now, each count of the indictment alleges that the defendant charged in that count made two false statements. One with regard to his or her citizenship and one with regard to his or her place of birth.

To prove the defendant guilty of the crime charged in a particular count, the government need only prove that the defendant charged in that count made one of those false statements. However, you may not find the defendant guilty of the crime charged in a particular count unless you unanimously agree as to the statement that was false. In other words, you have to agree upon the false statement, all of you have to agree it was a false statement to find the person guilty -- either defendant guilty of that count. Any questions