No. 19-_____

IN THE
SUPREME COURT OF THE UNITED STATES

Yuzef Abramov,

Applicant,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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Attorneys for Defendant and Appellant
YUZEF ABRAMOV

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

TO: Hon. Elena Kagan, Circuit Justice for the Ninth Circuit:

Under this Court's rules 13.5 and 22, Applicant Yuzef Abramov respectfully requests a 60-day extension to file his Petition for Writ of Certiorari. In support of this application, Applicant states:

1. Applicant intends to seek review of the decision of the United States Court of Appeals for the Ninth Circuit in *United States of America v. Yuzef Yunosovich Abramov,* Case No.: 16-50104 (9th Cir. 2019), a copy of which is annexed hereto as Exhibit A. The Ninth Circuit's decision denying Applicant's petition for panel rehearing was issued on March 29, 2019. Absent the requested extension of time, a petition for certiorari would be due on June 27, 2019. Applicant requests that the time for filing be extended by 60 days, to and including Monday, August 26, 2019.

2. The Ninth Circuit decision affirmed all five of Applicant's convictions under the PROTECT Act, 18 U.S.C. § 2423(c) (Exhibit A), and the court summarily denied Applicant's petition for panel rehearing (Exhibit B). In doing so, the court rejected Applicant's contentions that the applicable pre-2013 version of 18 U.S.C. § 2423(c) could not properly be applied to him where he was a resident of Russia and the conduct occurred in Russia, and that the district court failed to properly apply the Sixth Amendment standard for substitution of *retained*, rather than appointed, counsel, in light of *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006).

See Appellant's Petition for Panel Rehearing, No. 16-50104 (9th Cir. Mar. 26, 2019) (annexed hereto as Exhibit C).

3. The Ninth Circuit's decision – as a petition for writ of certiorari will develop more fully – is a serious candidate for this Court's review because:

a. The permissible constitutional reach of § 2423(c), particularly the application of its pre-2013 version to dual citizens like Mr. Abramov who *reside* in a foreign country, has never been addressed by this Court. The statute's constitutionality with respect to foreign residents (and in general) is dubious and has been seriously questioned by numerous federal courts and prominent legal scholars. *See, e.g., United States v. Pepe,* 895 F.3d 679, 689 (9th Cir. 2018) (noting potential constitutional problems but deciding on independent statutory-interpretation grounds that pre-2013 version of § 2423(c) did not apply to foreign residents); *United States v. Al-Maliki*, 787 F.3d 784, 792-94 (6th Cir. 2015) (expressing "doubt" and "skeptic[ism]" that § 2423(c) could constitutionally be applied to foreign residents but deciding case on other grounds); *United States v. Park,* 297 F. Supp. 3d 170, 183 (D.D.C. 2018) (application of § 2423(c) to foreign resident exceeded Congress's powers under Foreign Commerce Clause); *United States v. Clark*, 435 F.3d 1100, 1121 (9th Cir. 2006) (Ferguson, J., dissenting) ("it is clear that § 2423(c) does not relate to 'Commerce with Foreign Nations' . . . [n]or is [it] a valid constitutional exercise of Congress's authority to regulate the channels of

commerce"), *overruled by Pepe,* 895 F.3d 679; Anthony Colangelo, *The Foreign Commerce Clause,* 96 Va. L. Rev. 949, 956, 999-1003, 1034 (2010) (concluding pre-2013 version of § 2423(c) unconstitutional regardless of defendant's residence). The Ninth Circuit's affirmance of Mr. Abramov's convictions ignored the district court's determination, in invalidating his conviction under 18 U.S.C. § 2423(b) pursuant to Fed. R. Crim. P. 29, that the evidence indisputably established Mr. Abramov's residence in Russia at the time of the charged conduct and ignored the grave constitutional questions presented thereby.

b. This Court has never clarified the circumstances under which a defendant may substitute one retained attorney for another (as opposed to substituting appointed counsel), nor has any consensus emerged among the Courts of Appeals. In rejecting Mr. Abramov's claim that he was denied his Sixth Amendment right to counsel of choice, the Ninth Circuit improperly applied the standard for substitution of *appointed*, rather than *retained*, counsel. The right to counsel of choice is broader in the latter context than the former. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) (erroneous denial of defendant's retained counsel of choice created structural error requiring reversal); *see also Wheat v. United States*, 486 U.S. 153, 159 (1988) (right to counsel of choice circumscribed in various respects when defendant requires appointed counsel); *United States v. Brown,* 785 F.3d 1337, 1348 (9th Cir. 2015) (defendant has

> nearly absolute right to discharge retained counsel that may only be overcome upon showing that request would result in "affirmative interference" with "fair, orderly, and efficient administration of justice" (citation omitted)). Here, weeks before trial, Mr. Abramov had already located substitute counsel whose services he could afford and who was ready and willing to take on the case. Yet – incredibly – the district court denied Mr. Abramov's request for substitution of counsel and forced him to proceed to trial with an attorney who was not his counsel of choice and who indeed did not wish to continue with the representation. The Ninth Circuit's refusal to disturb that decision is in tension with this Court's holding in *Gonzalez-Lopez* and its own holding in *Brown,* and it presents a prima facie case that Mr. Abramov was deprived of his Sixth Amendment right to retain counsel of his own choosing.

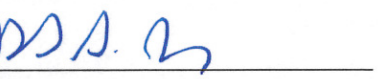
4. Appellant's counsel of record, who operates a small firm with only herself and two associates, has been completely occupied with a protracted five-week jury trial that began on May 6, 2019 and ended on June 17, 2019, as well as a Ninth Circuit oral argument on June 17, 2019, and has, among other urgent upcoming professional commitments, opening briefs due in the state court of appeal on June 21 and July 1, an opening brief due in the Ninth Circuit on July 10, and petitions for writs of certiorari due in this Court on July 22 and 29. Further, Applicant is incarcerated, thus making it difficult to communicate promptly, fully and adequately with him about his claims. The extension requested would allow

Applicant and his counsel the necessary additional time to review and analyze his claims, and to bring counsel and her firm up to speed in this matter.

Appellant's is mindful of the Court's rule that extension motions be filed at least 10 days before the due date. However, counsel was unable to meet this deadline due to being in trial and then out of town for oral argument in the Ninth Circuit at the time the motion was due. Appellant's counsel asks that the Court excuse the short delay in filing and grant the requested extension because without the requested extension, counsel will be unable to provide effective assistance to her client.

For these reasons, Applicant requests that the date for his filing a petition for a writ of certiorari be extended by 60 days, to and including August 26, 2019.

Respectfully submitted,



Becky S. James
JAMES & ASSOCIATES
Counsel for Applicant Yuzef Abramov

CERTIFICATE OF SERVICE

Yuzef Abramov v. United States of America

I hereby certify that on this 18th day of June, 2019, I caused one copy of this Application for Extension of Time to File a Petition for Writ of Certiorari to be served on each of the following by first-class mail:

Noel Francisco
Solicitor General of the United States
950 Pennsylvania Avenue
Room 5616
NW Washington DC 20530-0001
(202) 514-2203

Lisa Nesbitt
U.S. Supreme Court
1 First St. NE
Washington DC, 20543

I hereby certify that all parties required to be served have been served. I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 18, 2019

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EXHIBIT A

FILED

NOV 07 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. YUZEF YUNOSOVICH ABRAMOV, aka Yuzef Abramov, Defendant-Appellant.	No. 16-50104 D.C. No. 2:14-cr-00241-ODW-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

Argued March 6, 2018; Resubmitted October 31, 2018
Pasadena, California

Before: GRABER, W. FLETCHER, and OWENS, Circuit Judges.

Defendant Yuzef Abramov appeals his conviction on five counts of engaging in illicit sexual conduct in foreign places, in violation of 18 U.S.C. § 2423(c) (2009). We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. Defendant first argues that the district court erred by denying his motion to dismiss the indictment. We review that ruling de novo. United States v. Ubaldo, 859 F.3d 690, 699 (9th Cir. 2017), cert. denied, 138 S. Ct. 704 (2018). Defendant argues that the statute does not apply to his conduct because, even though he is a United States citizen, he resided and was domiciled in Russia and thus did not "travel[]" to Russia, 18 U.S.C. § 2423(c) (2009). See United States v. Pepe, 895 F.3d 675, 687–90 (9th Cir. 2018) (describing the correct interpretation of the statute). When we view the facts in the light most favorable to the government, Ubaldo, 859 F.3d at 701, the record does not bear out that characterization.[1] Defendant resided in Los Angeles, where he had a driver's license and where his children and ex-wife lived. Indeed, Defendant asserted in a 2013 letter to his member of Congress that, though he has "visited" Russia several times, he has been a permanent resident of Los Angeles since 2000, and the charged conduct took place several years after that. Defendant traveled to Russia

[1] Defendant argues that, when granting a post-verdict acquittal on his conviction under 18 U.S.C. § 2423(b), which criminalizes a citizen's travel in foreign commerce for the purpose of engaging in illicit sexual conduct, the district court "found" that Defendant lived in Russia. We disagree. The district court, in this jury trial, made no factual findings. Rather, the court came to a legal conclusion that there was insufficient evidence for a jury to find in the government's favor on the dismissed count. And the reason why the court came to that conclusion appears to be that having sex with children was not the predominant reason for Defendant's trips to Russia.

from California before each of the charged acts, which took place soon after his arrival in Russia, and then returned to California after each of the charged acts.[2]

2. We review for abuse of discretion the district court's denial of Defendant's motion to substitute counsel, United States v. Reyes-Bosque, 596 F.3d 1017, 1033 (9th Cir. 2010), and find none. The court conducted an evidentiary hearing concerning Defendant's request and permissibly concluded that the discord between Defendant and his counsel did not amount to a complete breakdown of communications but, rather, arose from Defendant's desire for delay and his disagreement with counsel's chosen trial strategy. The court permissibly concluded that counsel could provide an adequate defense.

3. Because we affirm the convictions, we need not consider the remaining issue.

AFFIRMED.

[2] Unlike the defendant in Pepe, Defendant does not challenge on appeal the jury instructions at his trial. Accordingly, Defendant has waived or forfeited any claim of erroneous jury instructions. United States v. Perez-Silvan, 861 F.3d 935, 938 (9th Cir. 2017).

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

EXHIBIT B

FILED

MAR 29 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. YUZEF YUNOSOVICH ABRAMOV, aka Yuzef Abramov, Defendant-Appellant.	No. 16-50104 D.C. No. 2:14-cr-00241-ODW-1 Central District of California, Los Angeles ORDER

Before: GRABER, W. FLETCHER, and OWENS, Circuit Judges.

Appellant's Motion to File Oversize Petition for Panel Rehearing is GRANTED. The petition for panel rehearing tendered March 26, 2019, is ordered filed.

Appellant's Petition for Panel Rehearing is DENIED.

EXHIBIT C

CA NO. 16-50104

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. YUZEF ABRAMOV, Defendant-Appellant.	D.C. Case No. 2:14-cr-241-ODW Memorandum Disposition Filed November 7, 2018 Graber, W. Fletcher, and Owens, Circuit Judges

Appellant's Petition for Panel Rehearing

Appeal from the United States District Court
for the Central District of California

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Federal Cases

Federal Statutes

Introduction and Rule 40 Statement

In *United States v. Pepe*, 895 F.3d 679, 688 (9th Cir. 2018), this Court interpreted the pre-2013 version of 18 U.S.C. § 2423(c) to cover only those U.S. citizens who engaged in illicit sexual conduct *while traveling* in a foreign country. Before 2013, the statute "did not target *all* U.S. citizens who traveled overseas and committed sex crimes with minors—only those who resided in the United States." *Id.* Nevertheless, Yuzef Abramov was convicted and sentenced to 150 years' imprisonment for pre-2013 conduct alleged to have occurred in Russia—even though the district court concluded that the evidence at trial established unequivocally that he resided in Russia, and his jury likely would not have convicted if it had been correctly instructed on the elements of the offense.

The panel should rehear this case because appellate counsel's failure to raise a fully-preserved, clearly-meritorious claim of instructional error was not the result of a tactical decision, but rather inadvertence. Mr. Abramov presented substantial evidence he resided in Russia during all times relevant to the charges, and he requested but was denied a jury instruction that would have required the jury to determine that the conduct occurred while he was engaged in foreign travel—not after he returned to his foreign home. In the unusual circumstance of this case—where a recent decision of this court makes plain the error here—this Court can and should forgive counsel's inadvertent failures and reach the issues, which require reversal. *See Silber v. United States*, 370 U.S. 717, 717-18 (1962).

This panel should rehear this case also because Mr. Abramov was forced to proceed to trial with a privately-retained attorney who was not his counsel of choice and who failed to perform even minimal investigation and lied about it. In holding that the district court permissibly concluded that the discord between defendant and counsel

did not amount to a complete breakdown and that counsel could provide an adequate defense, the panel overlooked or misapprehended the legal standard that applies to Sixth Amendment choice-of-counsel claims where a criminal defendant is attempting replace his *retained* attorney. As this Court explained in *United States v. Brown*, 785 F.3d 1337, 1343-44 (9th Cir. 2015), whether the client's complaints established a conflict and whether the retained attorney would provide an adequate defense are not pertinent considerations in this context. Under the proper standard, set forth in *Brown*, and further informed by this Court's decision in *Burton v. Davis*, 816 F.3d 1132 (9th Cir. 2016), the district court abused its discretion in forcing Mr. Abramov to proceed to trial with retained counsel who was not prepared to try this complex, international case. *Brown*, 785 F.3d at 1347.

Relevant Facts, Appeal, and Panel Decision

Mr. Abramov was indicted on five counts of traveling in foreign commerce and engaging in illicit sexual conduct, in violation of 18 U.S.C. § 2423(c), and one count of traveling in foreign commerce for the purpose of engaging in illicit sexual conduct, in violation of 18 U.S.C. § 2423(b).

At the time of Mr. Abramov's alleged conduct, 2009-2011, § 2423(c) applied to a U.S. citizen "who travels in foreign commerce and engages in any illicit sexual conduct with another person." 18 U.S.C. § 2423(c) (2011). After Mr. Abramov's trial, this Court held that a 2013 amendment to the statute makes clear that the pre-amendment version applied only to U.S. citizens who resided in the U.S. and engaged in illicit sexual conduct while traveling in a foreign country. *Pepe*, 895 F.3d at 687.

Mr. Abramov, a dual Russian-U.S. national, anticipated this ruling when he moved pretrial to dismiss his indictment on the ground that, as a Russian citizen residing and domiciled in Russia, the conduct alleged did not occur while he was

traveling in foreign commerce. (ER 85-97.) At the hearing on the motion, the court inquired of the government, "What say you to the argument that if he is merely returning home, that he is not traveling in foreign commerce?" (ER 24.) Ultimately, in denying the motion, the court acknowledged Mr. Abramov was a Russian citizen living and domiciled in Russia, but felt bound by this Court's interpretation of § 2423(c), which at the time required only that a U.S. citizen travel in foreign commerce and sometime thereafter engage in illicit sexual conduct. *Pepe*, 895 F.3d at 684-85 (describing interpretation in *United States v. Clark*, 435 F.3d 1100 1107 (9th Cir. 2006)). As to Mr. Abramov's argument that the 2013 amendment to the statute overruled *Clark*, the court explained, "I think it's an interesting argument, but if it has merit, then the Ninth Circuit's going to have to tell me so at the conclusion of this case." (ER 29.)

Mr. Abramov raised the issue again in proposing jury instructions that would explain, "[t]o 'travel in foreign commerce and engage in an illicit sexual act' means to be on a trip from the United States to a foreign country and to engage in an illicit sexual act while on this trip." (Ex. B (CR 85), attached).) At the final jury instruction conference, Mr. Abramov again objected and asked the court to instruct the jury as proposed by the defense. (ER 905-906.) The court responded, "I'm not going to do that. I know you spent a great deal of time talking about the fact that your client has been domiciled in Russia for a long period of time, but I don't believe the statute requires or even considers domicile." (ER 906.) Ultimately, the court instructed the jury that it need find only that Mr. Abramov was a U.S, citizen, that he traveled in foreign commerce from the United States to Russia, and that "while the defendant was in Russia, he engaged in illicit sexual conduct . . . " (ER 922.) The jury convicted on the five counts charging § 2423(c).

The jury also convicted Mr. Abramov of traveling in foreign commerce *for the purpose of* engaging in any illicit sexual conduct, in violation of 18 U.S.C. § 2423(b). But the district court granted a Rule 29 motion on this count "on th[e] basis" of its finding that Mr. Abramov resided in Russia (ER 971-972), and thus was not traveling for the purpose of engaging in illicit sexual conduct, but rather, "he was going home" (ER 973.) When the government moved the court to reconsider this ruling, the court reiterated again, "The man was going home." (ER 1122.)

The district court's determination that Mr. Abramov resided in Russia, his home, was based on the evidence presented at trial (ER 807-811, 829-832) and was further supported by substantial documentary evidence submitted in support of Mr. Abramov's pretrial motion to dismiss (ER 91-95, 105-201, 248-249). Mr. Abramov owned homes and a car, voted, paid utilities, ran a business, belonged to a trade union, and had bank accounts, a driver's license, a pension and medical insurance—all in Russia. (ER 92-97, 105-201.)[1] His common-law wife and her children in Russia and his biological son in the U.S. all swore Mr. Abramov lived in Russia—not the U.S. (ER 108, 113, 249.) At trial, the government's lead investigator testified that from 2009-2011, Mr. Abramov lived most of his time in Russia, where he owned real property and a car and had a common-law wife. (ER 807-808.) Travel documents reflected he spent 85% of his time in Russia, both during the indictment period (June 2009-2011), and since 2004. (ER 831.)[2]

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[1]These are well-established factors in determining a person's place of permanent residence, or domicile. *See, e.g., Lew v. Moss*, 797 F.2d 747, 750 (9th Cir. 1986).

[2] Black's Law Dictionary defines "residence" as "[t]he act or fact of living in a given place for some time," "[t]he place where one actually lives," and "bodily presence as an inhabitant in a given place." Black's Law Dictionary (10th ed. 2014).

On appeal, Mr. Abramov argued that his convictions should be reversed because, at the time of his alleged conduct, § 2423(c) did not apply to U.S. citizens who resided abroad. He also argued that the district court erred in denying his pre-trial motion to substitute his retained counsel.

In an unpublished memorandum, this Court affirmed. (Ex. A.) The Court recognized that it had recently held, in *United States v. Pepe*, that § 2423(c) did not apply to U.S. citizens who resided abroad. (Ex. A at 2.) But it held the district court did not err in denying Mr. Abramov's pretrial motion to dismiss because, viewing the evidence in the light most favorable to the government, the record could support a finding that Mr. Abramov resided in Los Angeles and therefore *was* traveling when he engaged in the conduct. (Ex. A at 2-3.)[3] Because Mr. Abramov did not challenge on appeal the jury instructions at his trial, the Court held he waived or forfeited any claim of erroneous jury instructions. (Ex. A at 3 n. 2.)

On Mr. Abramov's motion to substitute retained counsel, the Court held the district court had permissibly concluded that the discord between Mr. Abramov and his lawyer did not amount to a complete breakdown of communications, and that counsel could provide an adequate defense. (Ex. A at 3.) Therefore, the Court concluded, the district court did not abuse its discretion in denying the motion. (*Id.*)

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[3]In reaching this conclusion, the Court relied primarily on a 2013 letter written to Mr. Abramov's member of Congress. (ER 219-222.) But the factual assertion contained therein that Mr. Abramov had lived in Los Angeles since 2000 was obviously mistaken since he did not even enter the United States before 2001 (ER 238), and the government's own travel records and the government's lead investigator's testimony at trial established that Mr. Abramov in fact continued to reside in Russia until 2011. (ER807-808, 831.) Indeed, in granting the Rule 29 motion as to Count Six, the district court concluded that no reasonable jury could have found that Mr. Abramov was anything other than a resident of Russia whose purpose in traveling was to go home. (ER 971, 1122.)

Argument

I. This Court Should Rehear This Case to Correct Plain Instructional Error in the Interests of Fairness and Judicial Economy.

This Court should rehear this case to reach instructional error plain on the face of the record in light of this Court's decision in *United States v. Pepe*, 895 F.3d 679 (9th Cir. 2018). Although the issue was fully preserved in district court, it was not briefed on appeal out of inadvertence. The interests of fairness and judicial economy militate in favor of this Court reaching the issue and require a remand.

A. The *Pepe* Decision Plainly Controls This Case

In *Pepe*, this Court reversed its earlier precedent—the precedent by which the district court felt bound— and held that the 2013 amendments to § 2423(c) made clear that the pre-amendment version of the statute did not apply to U.S. citizens residing abroad. *Id.* at 685-87. Because Mr. Pepe's jury was not properly instructed on the travel element, this Court vacated Mr. Pepe's convictions. *Id*. at 691-92. "On remand, should the government elect to retry [Pepe], it will need to prove that he was still traveling when he committed illicit sexual conduct." *Id.* at 692.

Pepe is on all-fours with this case. Mr. Abramov, like Mr. Pepe, defended, *inter alia*, on the ground that he resided in Russia. Mr. Abramov, like Mr. Pepe, filed a pretrial motion to dismiss arguing the statute did not reach his conduct. Mr. Abramov, like Mr. Pepe, proposed jury instructions that would have required the jury to find that he was still traveling (and was not a foreign resident) when he committed illicit sexual conduct. (Ex. B.) Mr. Abramov, like Mr. Pepe, was convicted by a jury that was not properly instructed on the crucial, contested travel element of the offense. (*Compare* ER 922 *with* Ex. C (Pepe ER 1960, *United States v. Pepe*, CA No. 14-50095, ECF No.

10-2 (May 28, 2015)), attached.)

On appeal, appellate counsel Anthony Solis intended to challenge the application of § 2423(c) to defendants who—like Mr. Abramov and Mr. Pepe—were not traveling but rather were foreign residents when they engaged in illicit sexual conduct. (*See* Declaration of Anthony Solis.) Unfortunately, he neglected to brief the claim, fully preserved below, that the district court had erred in instructing the jury.

As set forth in the attached declaration, this was not a tactical decision. It was inadvertent and based on a misunderstanding of how properly to raise a claim involving statutory interpretation. Reasonably competent appellate counsel would have recognized the necessity of raising the claim as instructional error as in *Pepe*, and counsel's failure to do so likely constituted constitutionally ineffective assistance of counsel. *Turner v. Duncan*, 158 F.3d 449, 459 (9th Cir. 1998) (noting strong argument that appellate counsel provided ineffective assistance of counsel in failing to identify and brief instructional error).

B. The Court Should Address This Plain Error Notwithstanding Counsel's Failure to Brief It

Notwithstanding defense counsel's failure to brief the instruction error issue, this Court can and should reach the issue and reverse. It is well-established that an appellate court may sua sponte notice critical issues affecting substantial rights. *Silber v. United States*, 370 U.S. 717, 718 (1962); *United States v. McKinney*, 707 F.2d 381, 383 (9th Cir. 1983). The Supreme Court has long recognized that FRAP 52(b) permits appellate courts to notice plain error, even if that error was not presented to the appellate court: "While ordinarily we do not take note of errors not called to the attention of the Court of Appeals nor properly raised here, that rule is not without exception." *Silber*, 370 U.S. at 717-18. "In exceptional circumstances, especially in

criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 718 (internal quotation marks and citations omitted); *see also Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1906-07 (2018) ("The Court repeatedly has reversed judgments for plain error on the basis of inadvertent or unintentional errors of the court or the parties below"); *Rogers v. United States*, 422 U.S. 35, 41 (1975) (noticing error not raised in the Court of Appeals or Supreme Court); *accord United States v. Walker*, 840 F.3d 477, 490 (8th Cir. 2016) (noticing ACCA sentencing error sua sponte); *United States v. Sum of $185,336.07 U.S. Currency*, 731 F.3d 189, 195 (2d Cir. 2013) (noticing restitution error sua sponte); *United States v. Meza*, 701 F.3d 411, 433-34 (5th Cir. 2012) (noticing double jeopardy error sua sponte); *United States v. Broussard*, 669 F.3d 537, 552 n. 10 (5th Cir. 2012) (noticing sentencing error sua sponte); *United States v. Whitfield*, 590 F.3d 325, 346-47 (5th Cir. 2009) (noticing evidentiary insufficiency sua sponte); *United States v. Granados*, 168 F.3d 343, 346 (8th Cir. 1999) (noticing sentencing error sua sponte).

The error here is obvious and seriously affects the fairness, integrity, or public reputation of judicial proceedings. Because *Pepe* was decided while this case was pending on appeal, the instructional error is clear and obvious. *Henderson v. United States*, 568 U.S. 266, 269 (2013).

The instructional error also affected Mr. Abramov's substantial rights. Although this Court felt that, when viewed in the light most favorable to the government, the pretrial record could support a finding that Mr. Abramov resided in the U.S., this was ultimately a factual question for the jury to decide based on proper instructions. *Pepe,* 895 F.3d at 691-92. Given the substantial evidence Mr. Abramov resided in Russia

during the period of the alleged conduct, a properly-instructed jury may well have acquitted. Indeed, had the district court applied *Pepe*'s subsequent interpretation of the statute, the court necessarily would have had to grant a judgment of acquittal on all counts because the court expressly premised its judgment of acquittal on Count Six on the fact that Mr. Abramov "resided in Russia" and "was going home." (ER 971-73, 1122).

Instructional error affects the fairness, integrity or public reputation of judicial proceedings where the error goes to the heart of the defense or a properly instructed jury may not have convicted. *See, e.g., United States v. Ornelas*, 906 F.3d 1138, 1145-46 (9th Cir. 2018); *United States v. Murphy*, 824 F.3d 1197, 1205 (9th Cir. 2016); *United States v. Bear*, 439 F.3d 565, 570-71 (9th Cir. 2006); *United States v. Alferahin*, 433 F.3d 1148, 1159 (9th Cir. 2006); *United States v. Paul*, 37 F.3d 496, 500-01 (9th Cir. 1994). The error here qualifies in both respects.

Moreover, the effect of the error on the fairness, integrity and public reputation of judicial proceedings is all the more serious here because it raises the constitutional question of Congress's power to regulate foreign conduct. As the Court noted in *Pepe,* this question is not "trivial." 895 F.3d at 689. The Court was able to avoid this constitutional question in *Pepe* by interpreting the pre-2013 version of § 2423(c) to exclude U.S. citizens residing abroad, noting that "[w]hile the current version of § 2423(c) will inevitably force us to grapple with the outer limits of Congress's power to regulate the conduct of U.S. citizens residing abroad, we leave that question for another day." *Id.* at 690; *see also United States v. Park,* 297 F.Supp.3d 170 (D.D.C. 2018) (holding current version of § 2423(c), as applied to foreign residents, exceeds Congress's powers under Foreign Commerce and Necessary and Proper Clauses and Congress's plenary powers); *United States v. Reed*, No. 15-cr-0188, 2017 WL

3208458, *1 (D.D.C. July 27, 2017) (Section 2423(c) unconstitutional as applied to noncommercial sex acts by foreign resident). Here, allowing Mr. Abramov's conviction to stand notwithstanding the absence of a jury instruction limiting the statute's application to only those U.S. citizens who "travel" rather than those who "reside" in a foreign country brings to the fore the constitutional question the Court avoided in *Pepe*. This case certainly tests the "outer limits" of Congress's power, as the evidence established (unequivocally, according to the district court) that Mr. Abramov was a resident of Russia charged with conduct that occurred entirely within Russia's borders. The Court should not ignore the weighty concern regarding the reach of Congress's power into foreign territory simply because the relevant issues were not properly briefed by defense counsel.

Finally, reaching the claim is especially appropriate where, as here, the same issue will doubtless otherwise arise in post-conviction proceedings. *See Meza*, 701 F.3d at 433-34. "Fairness as well as judicial economy dictate we address now the issue that would doubtless otherwise be raised in a subsequent *habeas* proceeding." *United States v. Pineda-Ortuno*, 952 F.2d 98, 105 (5th Cir. 1992); *cf. United States v. Yepiz*, 718 Fed. Appx. 456, 467 (9th Cir. 2017) (noting that interests of justice and judicial economy militate in favor of remand where claim will arise in §2255 motion). Whatever prejudice is caused to the government in seeking to retry its case now, that prejudice would be multiplied after a § 2255 motion were resolved.

C. The Court Should Also Consider Whether Mr. Abramov May Be Retried

The necessity of reversing Mr. Abramov's convictions for instructional error raises the question of whether Mr. Abramov can be retried on the invalidated counts. Because the Court did not reach the issue of the instructional error due to counsel's

inadvertent error, the Court had no occasion to consider this issue and should address this issue on rehearing.

Even where trial error alone warrants reversal, the appellate court must also evaluate the sufficiency of the evidence because a reversal based on insufficient evidence bars retrial under the Double Jeopardy Clause. *See Burks v. United States,* 437 U.S. 1 (1978); *United States v. Bibbero,* 749 F.2d 581, 586 (9th Cir.1984). This Court has recognized a limited exception to this rule where the insufficiency has only come about due to a change in the law. *United States v. Weems*, 49 F.3d 528, 530-31 (9th Cir. 1995). The rationale for this exception is that, where the law has changed subsequent to trial, the government may not have had reason to present evidence required under the new law and a retrial therefore would not give the government "a second opportunity to prove what it should have proved earlier." *Id.* at 531.

Here, while *Pepe* did change the interpretation of the pre-2013 version of § 2423(c) to limit its application to those who are traveling rather than residing in a foreign country, the issue of Mr. Abramov's Russian residency was litigated at trial because it was relevant to establishing his intent in traveling to Russia as required to prove the § 2423(b) charge. Thus, unlike in *Weems,* the government did have reason to present evidence regarding residency even before *Pepe* changed the law.

The evidence presented at trial indisputably established that Mr. Abramov was a Russian resident, as the government's own lead investigator admitted that Mr. Abramov spent most of his time in Russia, where he owned real property and a car and had a common-law wife, and the government's own travel records confirmed that he spent 85 percent of his time in Russia. (ER 807-08, 831.) Indeed, the evidence of Mr. Abramov's Russian residency was so clear that the district court granted a Rule 29 motion as to the § 2423(b) count, on the sole basis that Mr. Abramov could not have

traveled with the requisite intent to engage in illicit sex acts because he was a resident of Russia and was "going home." (ER 971-72 ("given the fact that the gentleman resides in Russia, I don't believe a case can be made that he traveled to Russia for the purpose of engaging in this activity"); ER 1122 ("The man was going home. And I'm never going to say that, no, while he's going home, one of the predominant purposes for him going home was to have sex with these children.").) The government elected not to pursue an appeal of this ruling.

While this Court concluded that the evidence presented in connection with the pretrial motion to dismiss could support a conclusion of U.S. residency (a conclusion with which Mr. Abramov respectfully disagrees), the Court appears to have overlooked that the evidence *at trial* irrefutably established that Mr. Abramov was a resident of Russia.[4] Further, the Court appears to have misapprehended the significance of the district court's Rule 29 ruling. (Ex. A at 2 n.1.) While the Court correctly observed that the trial judge did not make a "factual finding" that Mr. Abramov was a Russian resident (as that was for the jury), the Court ignored that the trial judge actually went one step further. In granting relief under Rule 29, the judge necessarily concluded that no reasonable jury could have found otherwise. While the judge, in theory, could have had some other basis for finding insufficient evidence of intent under § 2423(b), this Court appears to have overlooked that the *only* basis for the judge's ruling was that Mr. Abramov was "going home" to Russia. (ER 971-72, 1122.)

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[4] In reaching its decision regarding the applicability of § 2423(c), this Court framed the issue solely as whether the district court should have granted Mr. Abramov's pretrial motion to dismiss. While defense counsel was admittedly less than clear, he did not intentionally limit his arguments to the denial of the pretrial motion to dismiss and asks that the Court consider whether the evidence presented at trial was sufficient to sustain Mr. Abramov's convictions. (*See* Declaration of Anthony Solis at ¶ 4.)

Because the issue of Mr. Abramov's residency was litigated at trial, and the evidence presented was insufficient to support the conclusion that he was traveling rather than residing in Russia as required under *Pepe*, the Court should vacate Mr. Abramov's convictions and not order a retrial.[5]

II. This Court Should Rehear This Case Also Because It Overlooked the Law That Applies Where the Sixth Amendment Right to Choice of *Retained* Counsel Is Implicated.

This Court should also rehear this case because both this Court and the district court overlooked or misapprehended the legal standard that applies to Sixth Amendment choice-of-counsel claims where a criminal defendant is attempting to replace his *retained* attorney. A district court necessarily abuses its discretion when it applies the wrong legal standard. *United States v. Sellers*, 906 F.3d 848, 852 (9th Cir. 2018).

The Court held the district court did not abuse its discretion in denying Mr. Abramov's motion to substitute counsel, filed September 29, 2015, one month before trial (ER 266-270), because the district court (1) held an evidentiary hearing, (2) permissibly concluded that the discord between defendant and counsel did not amount

[5] Alternatively, the district court's unappealed Rule 29 ruling on the § 2423(b) count may bar retrial on the § 2423(b) count based on principles of collateral estoppel. *See, e.g., United States v. Castille-Basa,* 483 F.3d 890, 903 (9th Cir. 2007) ("An acquittal based on a finding that the government failed to prove its case beyond a reasonable doubt is sufficient to bar retrial on any material issue that was litigated and necessarily decided in the trial."); *see also United States v. Ogles*, 440 F.3d 1095 (9th Cir. 2006) (en banc) (judgment of acquittal pursuant to Rule 29 based on legally insufficient evidence presents double jeopardy bar). At a minimum, the Court should remand to permit the district court to consider in the first instance whether its Rule 29 ruling on the § 2423(b) count bars retrial of the § 2423(c) counts.

to a complete breakdown in communication, and (3) permissibly concluded that counsel could provide an adequate defense. (Ex. A at 3.)

But, whether there is a breakdown in communication sufficient to establish a conflict and whether counsel would provide an adequate defense are not the pertinent considerations when a criminal defendant seeks to discharge *retained* counsel. *Brown*, 785 F.3d at1348-49. "To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). The district court and this Court addressed the latter, whereas the right at issue was the former.

"The right to select counsel of one's choice" is "the root meaning" of the Sixth Amendment right to counsel. *Gonzalez-Lopez*, 548 U.S. at 147-48. "Accordingly, the denial of this right does not depend on the quality of representation . . . received." *Brown*, 785 F.3d at 1344 (internal quotations omitted). Like the right to represent oneself recognized in *Faretta v. California*, 422 U.S. 806 (1975), the right to select retained counsel of one's choice precedes the well-known right to effective assistance of counsel. In each instance, the right is fundamental and does not turn on the effectiveness of the representation. Thus, any error in denying a criminal defendant his right to choice of retained counsel is structural error. *Gonzalez-Lopez*, 548 U.S. at 150.

The Supreme Court has explained that the Sixth Amendment right to counsel of choice "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." *Gonzalez-Lopez*, 548 U.S. at 146. The Supreme Court has recently reiterated the difference between rights designed to protect the defendant from erroneous

convictions, on the one hand, and those designed to protect "some other interest, such as the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *McCoy v. Louisiana*, 138 S.Ct. 1500, 1511 (2018); *see also Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017) (describing both *Faretta* and *Gonzalez-Lopez* as involving fundamental legal principles other than the right to be free from erroneous conviction).

Thus, "[w]hile the right to counsel of one's choice is not absolute, in general, a defendant who can afford to hire counsel may have the counsel of his choice unless a contrary result is compelled by purposes inherent in the fair, efficient and orderly administration of justice." *Brown*, 785 F.3d at 1344 (internal quotation marks and citation omitted). Here, Mr. Abramov had already located substitute retained counsel, who were prepared to commence representation immediately. Unless *compelled* by purposes inherent in the fair, efficient and orderly administration of justice, he had an absolute right to substitute retained counsel. *Id.*

This Court has not previously considered how to balance the fundamental right to choice of retained counsel against the need for the fair, efficient orderly administration of justice in a case like this—where a criminal defendant moves to substitute one retained lawyer for another because the currently-retained lawyer has simply not prepared for trial.

But in the analogous *Faretta* context, this Court has held that a motion is timely if made before the jury is empaneled, unless it is shown to be a tactic to secure delay. *Burton v. Davis*, 816 F.3d 1132, 1142 (9th Cir. 2016); *Fritz v. Spalding*, 682 F.2d 782, 784 (9th Cir. 1985). "Delay per se is not a sufficient ground for denying a defendant's constitutional right of self-representation[.]" *Burton*, 816 F.3d at 1142 (citing *Fritz*, 682 F.2d at 784). "A defendant may not be deprived of that right absent an affirmative

showing of *purpose* to secure delay." *Burton*, 816 F.3d at 1142 (citing *Fritz*, 682 F.2d at 784). Especially relevant here, "[t]here is a very important distinction between wanting to delay the trial for legitimate reasons and wanting to delay trial for the purpose of securing delay." *Burton*, 816 F.3d at 1151. "The question is *why* he wanted to delay trial—did he have legitimate, good faith reasons, or was this a bad-faith attempt on his part to delay trial for the mere purpose of delaying trial." *Id.* at 1151-52 (original emphasis). In *Burton*, this Court affirmed the district court's determination that a state defendant who sought a continuance to represent himself did not do so for the *purpose* of delaying trial, where he did so because his trial attorney was not prepared for trial. *Id.* at 1159-62. The record demonstrated "that Burton wanted to be free from having Mr. Slick as his attorney, and that he had a compelling basis for that desire." *Id.* at 1162.

Applied here, Mr. Abramov had a compelling basis for seeking to be free from his first retained counsel. He filed his motion to substitute counsel on September 29, 2015, a month before trial was set to commence. And, although new counsel would require a continuance, Mr. Abramov did not seek the substitution for the mere purpose of delaying trial. To the contrary, Mr. Abramov sought to substitute counsel because, despite seeking repeated continuances to conduct investigation, conduct foreign depositions, and secure percipient and expert witnesses for trial, his first lawyer never did any of those things and was unprepared for trial.

Five weeks before trial (September 14, 2015), Mr. Abramov wrote to the court and explained that the defense was not prepared, that counsel had not attempted to take depositions in Russia, or even hired experts. (ER 1178-1179.) More than a year earlier, in June 2014, a continuance had been sought and obtained to permit both parties to travel to Russia to interview and/or depose witnesses there. (ER 77.) All acts alleged in

the indictment, nearly the entire government investigation, and all percipient witnesses were located in Russia. (ER 60-66.) But, despite his pleas for time to conduct an investigation in Russia, counsel by his own admission never did any investigation in Russia. (ER 326.) Indeed, the district court itself recognized and chastised defense counsel for his failure to prepare the case. (ER 329 ("All of the things you had requested repeated continuances for in order to prepare the case for trial, you haven't done those things."); *see also* ER 641-42 (finding defense counsel's claim that he had witnesses lined up to testify to be false given the year-long failure to conduct investigation, noting "This isn't a real witness list. This is a joke. I'm not going to say any more about the preparation for this case.").

Under these circumstances, the district court's denial of Mr. Abramov's motion to substitute counsel violated his Sixth Amendment right to choice of counsel and constituted structural error. The Court erred in affirming the denial on the ground that there was no breakdown in communication and counsel could present an adequate defense (Ex. A at 3), considerations not pertinent to the fundamental Sixth Amendment right to retain counsel of one's choice. *Brown*, 785 F.3d at 1348-49.

Conclusion

For the foregoing reasons, this Court should grant the petition for panel rehearing, and reverse Mr. Abramov's convictions.

Respectfully submitted,

DATED: March 26, 2019

s/ *Anthony Solis*
Anthony Solis

CERTIFICATE OF COMPLIANCE
United States v. Abramov, 16-50104

Pursuant to Fed. R. App. P. 32(g), the undersigned counsel hereby certifies that the attached Appellant's Petition for Panel Rehearing is proportionately spaced, has a typeface of 14 points or more and contains 5,475 words.

DATED: March 26, 2019

s/ *Anthony Solis*
Anthony Solis

Declaration of Anthony Solis

I, Anthony Solis, hereby declare and state as follows:

1. I was and am counsel to Yuzef Abramov in this appeal. Mr. Abramov additionally retained attorney Becky S. James to assist in this petition for rehearing. This declaration is prepared in support of Mr. Abramov's petition for panel rehearing.

2. At all times in this appeal, I intended to challenge the application of the pre-2013 version of 18 U.S.C. § 2423(c) to Mr. Abramov's conduct on the basis that the statute did not apply to U.S. citizens residing abroad.

3. My thinking on this issue was informed by the briefs filed in *United States v. Pepe*, CA No. 14-50095, which was fully briefed, argued, and submitted prior to my preparation of Appellant's Opening Brief.

4. I recognize that I did not make clear in either the Appellant's Opening Brief or the Appellant's Supplemental Brief re Ruling in *United States v. Pepe* (14-50095), whether I was challenging the district court's denial of the pretrial motion to dismiss or the sufficiency of the evidence at trial or both. I did not understand that arguing the evidence was insufficient or that there was instructional error was required fully to present the issue.

5. Specifically, I did not understand that, to prevail on the argument that the motion to dismiss was improperly denied, the appellate court would determine either whether the issue could be resolved without trial on the merits or would view the evidence in the light most favorable to the government. Nor did I understand that, if I had presented a claim of instructional error, the government would have been required to show that the error in instructing on an essential element of the offense was harmless beyond a reasonable doubt.

6. I did not make a tactical decision not to raise an instructional claim. I had

no strategic reason for omitting this claim. My failure to raise a claim of instructional error was based entirely on my misunderstanding of the law.

7. I also did not make a tactical decision not to include a discussion of the evidence supporting the district court's explanation that Mr. Abramov resided in Russia in Appellant's Opening Brief, Reply Brief or Supplemental Brief. My failure to discuss the substantial documentary evidence submitted in support of the pretrial motion and the further evidence adduced at trial were a direct result of my misunderstanding of the various legal standards that would apply to an appeal of the denial of a motion to dismiss, an appeal based on insufficient evidence, and an appeal based on instructional error.

8. In both my opening and my supplemental brief, I referred to the district court as having "found" that Mr. Abramov was a resident of Russia. In making that assertion, I misunderstood the district court's role in granting a judgment of acquittal under Rule 29. I recognize now that the district court in fact determined as a matter of law that, viewing the evidence at trial in the light most favorable to the government, the evidence was insufficient to support Mr. Abramov's conviction on Count Six. Because I mistakenly analyzed the court's ruling as a factual finding, I failed to address adequately the legal insufficiency of the evidence as to the § 2423(c) counts following *Pepe,* or the collateral estoppel effect of the court's Rule 29 ruling as a bar to a retrial on the § 2423(c) counts.

9. In these respects, I believe my representation was constitutionally deficient, and I do not want my client to suffer the consequences of my deficient performance.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 26, 2019, at Los Angeles, California.

s/ *Anthony Solis*
Anthony Solis

EXHIBIT A

FILED

NOV 07 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. YUZEF YUNOSOVICH ABRAMOV, aka Yuzef Abramov, Defendant-Appellant.	No. 16-50104 D.C. No. 2:14-cr-00241-ODW-1 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

Argued March 6, 2018; Resubmitted October 31, 2018
Pasadena, California

Before: GRABER, W. FLETCHER, and OWENS, Circuit Judges.

Defendant Yuzef Abramov appeals his conviction on five counts of engaging in illicit sexual conduct in foreign places, in violation of 18 U.S.C. § 2423(c) (2009). We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. Defendant first argues that the district court erred by denying his motion to dismiss the indictment. We review that ruling de novo. United States v. Ubaldo, 859 F.3d 690, 699 (9th Cir. 2017), cert. denied, 138 S. Ct. 704 (2018). Defendant argues that the statute does not apply to his conduct because, even though he is a United States citizen, he resided and was domiciled in Russia and thus did not "travel[]" to Russia, 18 U.S.C. § 2423(c) (2009). See United States v. Pepe, 895 F.3d 675, 687–90 (9th Cir. 2018) (describing the correct interpretation of the statute). When we view the facts in the light most favorable to the government, Ubaldo, 859 F.3d at 701, the record does not bear out that characterization.[1] Defendant resided in Los Angeles, where he had a driver's license and where his children and ex-wife lived. Indeed, Defendant asserted in a 2013 letter to his member of Congress that, though he has "visited" Russia several times, he has been a permanent resident of Los Angeles since 2000, and the charged conduct took place several years after that. Defendant traveled to Russia

[1] Defendant argues that, when granting a post-verdict acquittal on his conviction under 18 U.S.C. § 2423(b), which criminalizes a citizen's travel in foreign commerce for the purpose of engaging in illicit sexual conduct, the district court "found" that Defendant lived in Russia. We disagree. The district court, in this jury trial, made no factual findings. Rather, the court came to a legal conclusion that there was insufficient evidence for a jury to find in the government's favor on the dismissed count. And the reason why the court came to that conclusion appears to be that having sex with children was not the predominant reason for Defendant's trips to Russia.

from California before each of the charged acts, which took place soon after his arrival in Russia, and then returned to California after each of the charged acts.[2]

2. We review for abuse of discretion the district court's denial of Defendant's motion to substitute counsel, United States v. Reyes-Bosque, 596 F.3d 1017, 1033 (9th Cir. 2010), and find none. The court conducted an evidentiary hearing concerning Defendant's request and permissibly concluded that the discord between Defendant and his counsel did not amount to a complete breakdown of communications but, rather, arose from Defendant's desire for delay and his disagreement with counsel's chosen trial strategy. The court permissibly concluded that counsel could provide an adequate defense.

3. Because we affirm the convictions, we need not consider the remaining issue.

AFFIRMED.

[2] Unlike the defendant in Pepe, Defendant does not challenge on appeal the jury instructions at his trial. Accordingly, Defendant has waived or forfeited any claim of erroneous jury instructions. United States v. Perez-Silvan, 861 F.3d 935, 938 (9th Cir. 2017).

EXHIBIT B

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES, Plaintiff, vs. YUZEF ABRAMOV, Defendant	Case No.: 14 cr 241 DEFENDANT YUZEF ABRAMOV'S PROPOSED AMENDED JURY INSTRUCTIONS

TO THIS HONORABLE COURT AND TO THE UNITED STATES ATTORNEY:

DEFENDANT, YUZEF ABRAMOV, HEREBY PRESENTS HIS PROPOSED AMENDED JURY INSTRUCTIONS:

No.	Title	Source	Page No.
	18 U.S.C. 2423(c) elements	See 18 U.S.C. § 2423(c) (elements); 18 U.S.C. § 2423(f) (defining illicit sexual conduct); United States v. Jackson, 480 F.3d 1014, 1022 (2007) (defining travel in foreign commerce)	3
	18 U.S.C. 2423(b) elements	See 18 U.S.C. § 2423(c) (elements); 18 U.S.C. § 2423(f) (defining illicit sexual conduct); United States v. Jackson, 480 F.3d 1014, 1022 (2007) (defining travel in foreign commerce); United States v. McGuire, 627 F.3d 622, 625 (7th Cir. 2010) (discussing evolution of "dominant purpose instruction"); US v. Schneider, 817 F. Supp. 2d at 595 (adopting Judge Posner's formulation)	5

DEFENSE PROPOSED INSTRUCTION NO.
Instruction No. ___

The defendant is charged in Counts One through Five of the indictment with engaging in illicit sexual conduct in foreign places in violation of Section 2423(c) of Title 18 of the United States Code. In order for the defendant to be found guilty of these charges, the government must prove all of the following facts beyond a reasonable doubt for each charge:

Counts One and Two:

First, the defendant was a United States citizen at the time in question,

Second, that Defendant traveled in foreign commerce, and

Third, engaged in illicit sexual conduct with "Victim 1" (Aleksandra).

Count Three:

First, the defendant was a United States citizen at the time in question,

Second, that Defendant traveled in foreign commerce, and

Third, engaged in illicit sexual conduct with "Victim 2" (Tatiana).

Counts Four and Five:

First, the defendant was a United States citizen at the time in question,

Second, that Defendant traveled in foreign commerce, and

Third, engaged in illicit sexual conduct with "Victim 3" (Yaftali).

To "travel in foreign commerce and engage in an illicit sexual act" means to be on a trip from the United States to a foreign country and to engage in an illicit sexual act while on this trip.

The term "illicit sexual conduct" means:

a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States;

any commercial sex act (as defined in section 1591) with a person under 18 years of age; or

production of child pornography (as defined in section 2256(8)).

DEFENSE PROPOSED INSTRUCTION NO._____
Instruction No. ___

The defendant is charged in Count 6 of the indictment with traveling in foreign commerce for the purpose of engaging in any illicit sexual conduct with a person under 18 years of age in violation of Section 2423(b) of Title 18 of the United States Code.

In order for the defendant to be found guilty of that charge, the government must prove all of the following facts beyond a reasonable doubt:

First, the defendant was a United States citizen at the time in question,

Second, that Defendant traveled in foreign commerce, and

Third, that Defendant traveled in foreign commerce for the purpose of engaging in illicit sexual conduct

To "travel in foreign commerce and engage in an illicit sexual act" means to be on a trip from the United States to a foreign country and to engage in an illicit sexual act while on this trip.

"travel…for the purpose of engaging in illicit sexual conduct" means that engaging in illicit sexual conduct must have been the dominant reason for the travel. In other words, had a sex motive not been present, the trip would not have taken place or would have differed substantially.

The term "illicit sexual conduct" means:

a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States;

any commercial sex act (as defined in section 1591) with a person under 18 years of age; or

production of child pornography (as defined in section 2256(8)).

Dated: October 25, 2015

/s/ *DMITRY Y. GUROVICH*
DMITRY Y. GUROVICH
Counsel for Defendant
Yuzef Yunosovich Abramov

EXHIBIT C

INSTRUCTION NO. 21

The defendant is charged in seven counts with traveling in foreign commerce and engaging in illicit sexual conduct with seven minor girls. In order for defendant to be found guilty of these charges, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant is a United States citizen;

Second, the defendant traveled in foreign commerce; and

Third, while in Cambodia, the defendant engaged in illicit sexual conduct during the time and with the person alleged in the particular count.