No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANDREW HALEY MORCOMBE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Whether the failure of 18 U.S.C. § 1204, the International Parental Kidnapping statute, to define the term "domestic violence" for purposes of an affirmative defense set forth in the statute violates due process and deprives defendants of a fair trial when defendants assert the affirmative defense of fleeing an incidence or pattern of domestic violence because the statute's failure to define domestic violence forces district courts to rely on varying state court definitions of that term when instructing a jury?

LIST OF PARTIES

The parties to the judgment from which review is sought are the Petitioner and Appellant in the lower court, Andrew Haley Morcombe, and the Respondent and Appellee in the lower court, the United States of America.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

TABLE OF CITED AUTHORITIES (Cont.)

Constitutional Provisions **Page(s)**

Statutes and Rules

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed the judgment of the District Court in an unpublished opinion, *United States v. Morcombe*, --- Fed.Appx. ---, 18-13237 (11th Cir. Sep. 13, 2019), which is attached hereto as Appendix A.

GROUNDS FOR JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its panel opinion on September 13, 2019. *See* Appendix A. Petitioner, thereby, seeks the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) through the filing of the instant petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. CONST. amend. VI

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

18 U.S.C. § 1204

> (a) Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.
>
> (b) As used in this section--
>
> (1) the term "child" means a person who has not attained the age of 16 years; and
> (2) the term "parental rights", with respect to a child, means the right to physical custody of the child—
>
> (A) whether joint or sole (and includes visiting rights); and
> (B) whether arising by operation of law, court order, or legally binding agreement of the parties.
>
> (c) It shall be an affirmative defense under this section that--

(1) the defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction and Enforcement Act and was in effect at the time of the offense;

(2) the defendant was fleeing an incidence or pattern of domestic violence; or

(3) the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant's control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances within 24 hours after the visitation period had expired and returned the child as soon as possible.

(d) This section does not detract from The Hague Convention on the Civil Aspects of International Parental Child Abduction, done at The Hague on October 25, 1980.

STATEMENT OF THE CASE

On June 30, 2017, Andrew Morcombe was charged by indictment in the United States District Court for the Middle District of Florida, Tampa Division, with one count of international parental kidnapping pursuant to 18 U.S.C. § 1204. (Doc. 3.)

Andrew Morcombe served nearly 29 years in the United States Air Force, reaching the rank of Major. (PSR ¶ 69.) He received numerous awards and commendations during his service and was deployed in combat on several occasions in Iraq and Afghanistan. (PSR ¶ 69.) He was honorably discharged in 2013. (PSR ¶ 69.)

During the years leading up to charge being brought, Mr. Morcombe and his ex-wife were embroiled in litigation over the custody and care of their daughter, V.M. (Doc. 1, 3.) During that time, Mr. Morcombe was a commercial airline pilot who lived in and worked in Dubai for Emirates Airline. (PSR ¶ 67-68.) He frequently travelled internationally in support of his duties as an Airbus 380 Instructor Pilot with Emirates Airline. (PSR ¶ 67-68.)

While family law proceedings continued on in Florida, Mr. Morcombe's ex-wife began dating a man who resided in Illinois. (Doc. 257 at 49.) In June 2013, Mr. Morcombe had begun expressing to his ex-wife and others that he was concerned as to the boyfriend's behavior towards V.M. (Doc. 257 at 40.) Specifically, Mr. Morcombe had told the ex-wife that he was concerned that the boyfriend was exhibiting improper sexual conduct around V.M., including exposing his genitals and bathing nude with V.M. (Doc. 257 at 41.)

In November 2013, Mr. Morcombe filed in Florida state court a petition for protection from the boyfriend on behalf of V.M. in which he set out specific instances of abuse. (Doc. 258 at 97-99.) On one such occasion, Mr. Morcombe had witnessed the boyfriend slap V.M. in the face, verbally abuse V.M., and expose his genitals to V.M. (Doc. 258 at 98.) Mr. Morcombe would later submit at trial in the instant case other evidence of suspected abuse from the boyfriend.

The charge at issue in this case stemmed from Mr. Morcombe and V.M. having later travelled to Dubai for an extended period. (Doc. 1, 3.) After leaving the Unites States, Mr. Morcombe informed his ex-wife that he had taken V.M. to Dubai and that he had done so out of concern for her safety. (Doc. 257 at 60.) He stated that V.M. had told him that the boyfriend was continuing to abuse her sexually. (Doc. 258 at 47.) He went on to say that he had no other option to ensure her safety from sexual abuse. (Doc. 257 at 60-61.)

The case proceeded to a jury trial beginning on April 16, 2018. The Government called as witnesses Mr. Morcombe's ex-wife, Jane Lempera (f/k/a Morcombe), Jane Lempura's family law attorney, and the case agent. Mr. Morcombe set forth at trial that he brought V.M. to his home in Dubai to protect her from being abused physically, emotionally, psychologically and sexually by her mother's boyfriend. He, correspondingly, asserted the affirmative defense that he removed V.M. from the United States to flee an incidence or pattern of domestic violence, as set forth in 18 U.S.C. § 1204(c)(2). (Doc. 259 at 5-6.) In support of the affirmative defense, Mr. Morcombe relied on the testimony presented during the Government's

case, as well as on the numerous sworn petitions and other filings from the state court proceedings that had been admitted into evidence. (Doc. 259 at 5-6.)

With respect to the jury's instruction on the affirmative defense, the District Court reasoned that because there exists no federal law of domestic violence, it must rely on state law in the state where the domestic violence was alleged to have occurred. (Doc. 258 at 191-95.) The court opted to instruct the jury on both Florida and Illinois law, finding that domestic violence could have occurred in either state since V.M., her mother and her mother's boyfriend have resided in both states during the relevant time. (Doc. 258 at 191-95.) The court recognized, however, that Illinois' domestic violence statute was broader than its Florida counterpart. (Doc. 258 at 191-200.) With respect to the Florida definition of "domestic violence," the court restricted the Florida domestic violence instruction to only the acts of assault, battery or sexual assault. (Doc. 258 at 194-98.)

In the end, the instruction the District Court gave was as follows:

> I instruct you that it is a defense to the charge in the indictment that the defendant was fleeing an incidence or pattern of domestic violence. The defendant bears the burden of proof on this defense. To prevail on the defense, the defendant must prove by a preponderance of the evidence that at the time he removed the child from the United States he was fleeing an incidence or pattern of domestic violence.
>
> Incidence means the occurrence of. Pattern means an event that occurred more than once.
>
> To prove something by a preponderance of the evidence means to prove only that it is more likely true than not true.
>
> In determining whether the defendant has proven this defense, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant evidence received in evidence,

> regardless of who may have produced them. If the evidence appears to be equally balanced or you cannot say upon which side it weighs heavier, you must resolve this question against the defendant. However, it is important to remember that the fact that the defendant has raised this defense does not relieve the Government of the burden of proving all of the elements of the crime as I have defined them, that the child was previously in the United States, that the defendant removed the child from the United States to a place outside the United States or retained the child outside of the United States, and that the defendant acted with the intent to obstruct the legal exercise of parental rights of Jane Morcombe. These are things that the Government must still prove beyond a reasonable doubt.
>
> For purposes of this case, under Florida law, domestic violence is defined as any assault, battery or sexual assault. An assault is an intentional unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent. The offense of battery occurs when a person actually and intentionally touches or strikes another person against the will of the other, or intentionally causes bodily harm to another person. A sexual assault is an intentional unlawful threat by word or act to do sexual violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.
>
> For purposes of this case, under Illinois law, domestic violence is defined as physical abuse or harassment. Physical abuse means knowing or reckless use of physical force. Harassment means knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances, would cause a reasonable person emotional distress, and does cause emotional distress. Harassment includes threatening physical force.

(Doc. 259 at 138:24-141:5.)

The jury ultimately found Mr. Morcombe guilty as charged in the indictment. (Doc. 259 at 152.)

On July 26, 2018, the case proceeded to sentencing. (Doc. 252.) The District Court sentenced Mr. Morcombe to the statutory maximum sentence of 36 months

imprisonment. (Doc. 252 at 45.) It further sentenced Mr. Morcombe to a term of one year of supervised release, imposed a maximum permitted fine of $95,000.00, and imposed restitution of $90,000.00. (Doc. 252 at 45-46.)

Mr. Morcombe then took a direct appeal to the United States Court of Appeals for the Eleventh Circuit, raising four issues, including: Whether the District Court gave an erroneous and unduly restrictive jury instruction on the definition of "domestic violence" as it relates to the affirmative defense of fleeing an incidence or pattern of domestic violence? The Eleventh Circuit entered an unpublished opinion affirming the District Court's judgement on September 13, 2019. *United States v. Morcombe*, ··· Fed.Appx. ···, 18-13237 (11th Cir. Sep. 13, 2019). In denying relief on the jury instruction issue, the Eleventh Circuit applied the doctrine of invited error, but also affirmed the District Court's jury instructions:

> Not only did Morcombe fail to object when the district court concluded that state-law definitions of "domestic violence" were appropriate for the jury instructions, he agreed that domestic violence was defined by the applicable state laws. And even if we were to credit Morcombe's argument that he acceded to the state-law definitions only after the district court had made its inclinations clear, Morcombe has not demonstrated that the district court plainly erred in using state-law definitions. To establish that an error is "plain," Morcombe must show, among other things, that the district court's error was contrary to controlling precedent or the clear words of a statute or rule. *United States v. Humphrey*, 164 F.3d 585, 588 (11th Cir. 1999). But Morcombe has expressly acknowledged that § 1204 does not define "domestic violence," and points us toward only non-binding case law in arguing that the definitions used here were erroneous. We therefore affirm the district court's jury instructions as well.

Id. at *2.

This petition follows.

REASONS FOR GRANTING THE PETITION

I.

THE QUESTION OF WHETHER 18 U.S.C. § 1204's FAILURE TO DEFINE "DOMESTIC VIOLENCE" DEPRIVES DEFENDANT'S OF DUE PROCESS AND A RIGHT TO A FAIR TRIAL WHEN DISTRICT COURTS ARE FORCED TO CRAFT JURY INSTRUCTIONS BASED ON VARYING STATE LAW DEFINITIONS WHENEVER A DEFENDANT RAISES THE AFFIRMATIVE DEFENSE OF FLEEING AN INCIDENCE OR PATTERN OF DOMESTIC VIOLENCE

The failure of the International Parental Kidnapping statute to define the term domestic violence with respect to the statutorily-provided affirmative defense deprives defendants of their rights to due process and to a fair trial because it requires district courts to craft their own instructions by relying on varying state court definitions. In the instant case, the District Court relied on the overly restrictive definitions for "domestic violence" that were provided for under the laws of the states of Florida and Illinois. The two states provided vastly different definitions for the term domestic violence, with Florida giving a much narrower definition of the term. Florida's definition for the term domestic violence, as given by the court, limited domestic violence to assault, battery, or sexual assault, as defined under Florida law, and failed to account for emotional, economic, or psychological actions or threats of actions as means of committing domestic violence. Illinois' domestic violence definition, on the other hand, failed to account for sexual abuse or other sexual

misconduct as means of domestic violence. Furthermore, while the Illinois definition addressed emotional distress brought on by harassment, it otherwise failed to account for emotional, economic, or psychological actions or threats of actions. In the end, the definitions given to the jury for the term domestic violence were overly narrow and inconsistent with one another. The instruction, likewise, failed to adequately apprise the jury of the elements of the statutory affirmative defense of fleeing an incidence of domestic violence. Because 18 U.S.C. § 1204 fails to provide any definitions pertaining to the affirmative defense set forth therein, the jury instruction issue that arose in the instant case is likely to arise in many other future case. Moreover, given the great discrepancies in definitions of the domestic violence among the states, the grant of certiorari to address the question presented herein would ensure uniformity among the lower Circuits.

A. Applicable Law

"In a criminal trial, the [prosecution] must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement." *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S.Ct. 1830, 1832, 158 L.Ed.2d 701 (2004) *citing Sandstrom v. Montana*, 442 U.S. 510, 520-521, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). This Court has, however, found that "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." *Id.* "The question is 'whether the ailing instruction ... so infected the entire trial that the resulting conviction violates due process.' *Id. quoting Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141,

147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)). "'[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" *Id. quoting Boyde v. California*, 494 U.S. 370, 378, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (quoting *Cupp, supra*, at 146-147, 94 S.Ct. 396). "If the charge as a whole is ambiguous, the question is whether there is a 'reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Id. quoting Estelle, supra*, at 72, 112 S.Ct. 475 (quoting *Boyde, supra*, at 380, 110 S.Ct. 1190).

The International Parental Kidnapping statute provides, in relevant part:

> (a) Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.
> ...
> (c) It shall be an affirmative defense under this section that··
> ...
> (2) the defendant was fleeing an incidence or pattern of domestic violence...

18 U.S.C. § 1204. The statute does not, however, provide definitions with respect to "an incidence or pattern of domestic violence." As one district court recently found, "Congress failed to define the term "domestic violence" in the statute, the legislative history is silent, and no case law discusses the scope of domestic violence in IPKCA context." *United States v. Huong Thi Kim Ly*, 798 F.Supp.2d 467, 480 (E.D. N.Y. 2011) *aff'd United States v. Huong Thi Kim Ly*, 507 Fed. Appx. 12 (2d Cir. Jan 3, 2013).

In the case referenced above, *Huong Thi Kim Ly*, the defendant was charged

under the International Parental Kidnapping statute and raised an affirmative defense of having fled an incidence or pattern of domestic violence. The court instructed the jury on the defense but did not define the term "domestic violence." During the deliberations, the jury sent a question to the court asking for a definition of the term. The court instructed the jury, in response to the question, that "[t]here is no case law on what is domestic violence so you have to use your common sense, what you think domestic violence is. Okay?" *Id.* After the defendant was convicted, she filed a motion for judgment of acquittal or for a new trial, raising, among other issues, the deficiency of the jury instructions on the fleeing domestic violence defense. In addressing the issue, the district court ruled that "[w]hen Congress fails to define a statutory term, the Court interprets the statutory subsection by "giving the words used their ordinary meaning." *Id. citing United States v. Johnson*, 968 F.2d 208, 212 (2d Cir. 1992). It went on to reason that domestic violence includes more than just the infliction of physical violence, but also includes "verbal threats, nonphysical gestures, or psychological means." In reaching that conclusion, the court relied in part on the Department of Justice's "similarly broad definition of domestic violence:

> We define domestic violence as a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner. *Domestic violence can be physical, sexual, emotional, economic, or psychological actions or threats of actions that influence another person.* This includes *any behaviors* that intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound someone.

Id. at 480 n.8 *quoting* U.S. Dep't of Justice, Office on Violence Against Women, About Domestic Violence, http://www.ovw.usdoj.gov/domviolence.htm (last visited July 22,

2011) (emphasis added in quotation). The court thereby found that the jury should have been instructed that domestic violence included emotional and sexual violence, as well as physical violence. *Id.* at 480. The court went on to grant the motion for a new trial, concluding that "Congress's failure to define 'domestic violence,' an essential term in the IPKCA affirmative defense, was the same as depriving Defendant of the defense altogether." *Id.*

B. The Erroneous Instructions Given in the Instant Case

The instruction that the District Court read in the instant case was not broad enough to encompass emotional, economic, or psychological actions or threats of actions. The definition of "domestic violence" under Florida law did not account for such acts or threats in any way whatsoever. *See* FLA. STAT. § 741.28. The District Court, furthermore, narrowed Florida's already narrow definition for domestic violence when it chose to list assault, battery, and sexual battery as the only examples of domestic violence pursuant to Florida. Given that many of the alleged acts of domestic violence against V.M. included such as acts as the mother's boyfriend exposing himself to V.M., the overly restrictive definition from the Florida law failed to account for any such acts, even though such acts can clearly create emotional and psychological distress. Consistent with the Department of Justice definition, as well as the reasoning set forth in *Huong Thi Kim Ly*, the colloquial term "domestic violence" would encompass such acts. The definition taken from Florida law was, consequently, insufficient to instruct the jury on the acts or threats that can qualify as domestic violence.

While the Illinois definition of domestic violence was broader than that of the Florida law, it too failed to fully account for emotional, economic, or psychological actions or threats of actions as potential means of domestic violence. *See* 750 ILCS 60/103. Though Illinois' definition did provide for domestic violence by harassment causing emotional distress, it made no mention of psychological or economic impact, either of which could have resulted from the mother's boyfriend's behavior towards V.M. *Id.* Likewise, with respect to emotional injury, the Illinois' definition required a finding that the emotional injury rose to the level of causing "distress" in the victim. *Id.* The DOJ's definition, on the other hand, which was relied on *Huong Thi Kim Ly*, recognized that domestic violence can be as a little as a threat that influences another person. Perhaps most critically, Illinois' definition did not specifically mention sexual abuse or other sexual misconduct as means of domestic violence. That omission was critical as it relates to the instant case given that the majority of the acts comprising the pattern of domestic violence were acts of sexual misconduct from V.M.'s mother's boyfriend.

Finally, while both the Illinois and Florida definitions were flawed, the two domestic violence definitions were inconsistent with one another. Based on the competing instructions, an act or threat that qualified as domestic violence under Florida law might not qualify as domestic violence under Illinois law. The same result could occur in the inverse as well. The statutory affirmative defense of fleeing a pattern or incidence of domestic violence does not, however, restrict the domestic violence to only acts that would be crimes under the laws of the state in which they

occur. The court's instruction to the jury, thereby, placed an undue burden on Mr. Morcombe to prove the location in which the alleged acts of domestic violence would have occurred. Congress certainly could not have intended such a result when it created the International Parental Kidnapping statute. To be sure, the jury may have found that some of the acts of indecent exposure occurred in Florida, but may have then erroneously reasoned that those acts were not threats to commit "violence" because the acts only would have caused emotional and psychological injury. They may have conversely reasoned, however, that those acts would have been domestic violence in Illinois because the acts would have created "emotional distress." Just the same, the jury may have found that such acts occurred in Illinois but then may have reasoned that they did not constitute domestic violence in Illinois because the Illinois definition did not encompass sexual misconduct. It may have then reasoned that those acts would have qualified as domestic violence had they occurred in Florida because they could qualify as sexual assault. In the end, the jury was likely left thoroughly confused by the two competing and overly restrictive definitions for the term domestic violence.

A comparison of the definitions for domestic violence under some other state's law further compounds the problem brought on by 18 U.S.C. § 1204's failure to define "domestic violence." California, for instance, broadly defines "domestic violence" as abuse perpetrated against certain classes of individuals and cross-references a statute that gives a similarly broad definition for the term "abuse." CAL. FAM. CODE §§ 6203, 6211. Alabama, in contrast, sets forth three different degrees of domestic

violence offenses and more narrowly sets out specific underlying offenses that can qualify under the various degrees of domestic violence offenses. ALA. CODE §§ 13A-6-130, 13A-6-131, 13A-6-132. Texas law, on the other hand, poses an altogether different problem because it generally uses the terms "family violence" and "dating violence" when codifying what would be considered domestic violence offenses. TEX. FAM. CODE §§ 71.001 *et. seq.* Given the great discrepancies in the definitions for domestic violence among the states, district courts cannot reasonably be expected to preside over 18 U.S.C. § 1204 prosecutions without guidance as to the instructions they must give to juries concerning the phrase "fleeing an incidence or pattern of domestic violence."

As the district court recognized in *Huong Thi Kim Ly*, Congress' failure to provide a definition for domestic violence is the root of the problem underlying this issue. By relying on two inconsistent and overly narrow state law definitions for the term domestic violence, the District Court deprived Mr. Morcombe of his affirmative defense. Because the jury was required to find that the alleged acts fit within the limited examples of acts of "domestic violence" that were provided in the jury instructions, Mr. Morcombe did not receive due process or a fair trial in this case. If certiorari is not granted to address the question presented herein, the error that the District Court committed in the instant case is likely to arise in every other future prosecution under the International Parental Kidnapping statute whenever a defendant raises the affirmative defense of fleeing from an incidence or pattern of domestic violence. For that reason, Petitioner Morcombe respectfully submits that

the instant question is one of great importance and one which will arise frequently in the lower courts in the future. SUP. CT. R. 10(c).

CONCLUSION

Based on the foregoing, the Petitioner respectfully request that this Honorable Court grant this petition for a writ of certiorari.

Respectfully Submitted on this 12th day of December, 2019,

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APPENDIX A

ELEVENTH CIRCUIT OPINION BELOW

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13237
Non-Argument Calendar

D.C. Docket No. 8:16-cr-00295-MSS-AEP-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANDREW HALEY MORCOMBE,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(September 13, 2019)

Before JILL PRYOR, NEWSOM, and ANDERSON, Circuit Judges.

PER CURIAM:

Andrew Haley Morcombe appeals his conviction and sentence of 36 months' imprisonment for international parental kidnapping in violation of 18 U.S.C. § 1204(a). Morcombe argues that the district court erred in five respects: first, in excluding testimony concerning the minor victim's (his daughter, V.M.'s) out-of-court statements as inadmissible hearsay; second, in concluding that a psychologist's deposition addressing V.M.'s mental condition was also inadmissible because Morcombe had arranged for the psychologist to assess V.M. in anticipation of litigation; third, in issuing erroneous jury instructions regarding the definition of "domestic violence" in § 1204(c)(2)[1]; fourth, in denying Morcombe's motion to continue the trial; and fifth, in imposing a sentence that exceeded the range recommended by the Sentencing Guidelines. We conclude that none of Morcombe's contentions are persuasive and therefore affirm his conviction and sentence.

The parties are familiar with the facts of the case; we repeat them here only as necessary.

I

We review the district court's rulings on the admissibility of evidence for abuse of discretion. *United States v. Gibson*, 708 F.3d 1256, 1275 (11th Cir.

[1] "It shall be an affirmative defense under this section that . . . the defendant was fleeing an incidence or pattern of domestic violence." 18 U.S.C. § 1204(c)(2).

2013). A district court abuses its discretion if it "applies an incorrect legal standard or makes findings of fact that are clearly erroneous." *Id.* (citation omitted)

Hearsay is defined in Rule 801 of the Federal Rules of Evidence as a statement, other than one made by the declarant while testifying at trial, offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Hearsay statements are inadmissible unless otherwise authorized by federal statute, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court. Fed. R. Evid. 802. An out-of-court statement submitted to show the statement's effect on the hearer, by contrast, is generally not hearsay because it is neither (1) an assertive statement nor (2) offered to prove the truth of the matter asserted. *United States v. Rivera*, 780 F.3d 1084, 1092 (11th Cir. 2015); *United States v. Cruz*, 805 F.2d 1464, 1478 (11th Cir. 1986) ("[A]n utterance may be admitted to show the effect it has on a hearer.").

Morcombe contends that he submitted testimony relating V.M.'s out-of-court statements not to prove their truth but rather to show their effect on him. In particular, Morcombe argues that these statements indicated V.M.'s susceptibility to domestic violence when living with his ex-wife, and thus contributed to Morcombe's affirmative defense under § 1204(c)(2).

The text of § 1204(c) indicates why Morcombe's argument fails. It provides an affirmative defense for a defendant "fleeing an incidence or pattern of domestic violence." 18 U.S.C. § 1204(c)(2). But the provision says nothing about fleeing based on a *reasonable belief* about an incident or pattern of domestic violence. Morcombe's state of mind—and any effect that V.M.'s statements had on it—was thus immaterial to his affirmative defense. The testimony from third parties relating V.M.'s statements to them was therefore either inadmissible as irrelevant or, as the district court found, because Morcombe's actual intention was to prove the truth of the matter asserted (that V.M. had suffered domestic violence). In either case, the statements were inadmissible.

II

Statements made for medical diagnosis or treatment are admissible as exceptions to the rule against hearsay. Federal Rule of Evidence 803(4) limits this exception to a statement that "(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause." Morcombe contends that V.M.'s statements to a psychologist in Australia, as detailed in that psychologist's deposition, were admissible because they demonstrated the trauma that V.M. sustained due to domestic violence. Given the psychologist's deposition and related e-mails included in the record—in particular, an email in which

Morcombe indicated that he was seeking the psychologist's aid in convincing a judge to grant him an injunction—we agree with the district court that Morcombe sought the psychologist's opinion principally in anticipation of family-court litigation.

We also conclude that any error in excluding this evidence was harmless. An evidentiary error is harmless if, in light of the entire record, the error had no substantial influence on the outcome and sufficient evidence uninfected by error supports the verdict. *United States v. Khanani*, 502 F.3d 1281, 1292 (11th Cir. 2007). The relevant portions of the psychologist's opinion were ultimately shown to the jury, and Morcombe has not persuaded us that any of the material that the district court excluded would have influenced the jury's verdict or his sentence.

III

This Court does not review alleged errors "invited" by the party alleging the same error. *United States v. Love*, 449 F.3d 1154, 1157 (11th Cir. 2006). As relevant here, the doctrine of invited error provides that a defendant generally waives his right to challenge jury instructions when his counsel has expressly agreed to their content. *See United States v. Silvestri*, 409 F.3d 1311, 1337 (11th Cir. 2005) ("[The defendant] affirmatively waived his right to challenge the instruction when his counsel told the district court that the jury instructions 'covered the bases.'"). When invited error applies, we may not review the claim

even if plain error would result. *United States v. Frank*, 599 F.3d 1221, 1240 (11th Cir. 2010) (concluding that a defendant waived review of the alleged error because he "not only agreed with" the jury instructions, "but requested them").

Not only did Morcombe fail to object when the district court concluded that state-law definitions of "domestic violence" were appropriate for the jury instructions, he agreed that domestic violence was defined by the applicable state laws. And even if we were to credit Morcombe's argument that he acceded to the state-law definitions only after the district court had made its inclinations clear, Morcombe has not demonstrated that the district court plainly erred in using state-law definitions. To establish that an error is "plain," Morcombe must show, among other things, that the district court's error was contrary to controlling precedent or the clear words of a statute or rule. *United States v. Humphrey*, 164 F.3d 585, 588 (11th Cir. 1999). But Morcombe has expressly acknowledged that § 1204 does not define "domestic violence," and points us toward only non-binding case law in arguing that the definitions used here were erroneous. We therefore affirm the district court's jury instructions as well.

IV

We review the district court's denial of Morcombe's motion for a continuance for abuse of discretion. *United States v. Graham*, 643 F.3d 885, 893 (11th Cir. 2011). The Sixth and Fourteenth Amendments to the Constitution

guarantee that any person brought to trial in a federal court will be afforded the right to assistance of counsel before he can be validly convicted and punished by imprisonment. *United States v. Jeri*, 869 F.3d 1247, 1257 (11th Cir. 2017). Implicit in that guarantee is the right to adequate time for counsel to prepare a defense. *Id.*

There is no mechanical test to determine whether the denial of a continuance deprived a party of due process. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). Instead, "[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.* Among other relevant circumstances, we have considered the "time available for preparation, the likelihood of prejudice from denial, the accused's role in shortening the effective preparation time, the degree of complexity of the case, and the availability of discovery from the prosecution." *United States v. Garmany*, 762 F.2d 929, 936 (11th Cir. 1985) (quotations omitted).

We refuse to conclude that the district court abused its discretion because Morcombe has not identified specific, substantial prejudice that resulted from the district court's denial of his motion for a continuance. *See United States v. Saget*, 991 F.2d 702, 708 (11th Cir. 1993). The district court's decision did not limit Morcombe's own ability to testify or to call other witnesses to testify regarding their personal observations. And although Morcombe ultimately did not put on a

defense, that was a strategic decision. Morcombe decided to rest only after seeing things "develop[] in trial"—adding that evidence had been introduced that he "did not anticipate was going to come in during the Government's case." The time available for preparation, Morcombe's attorney's role in shortening the effective preparation time, and the complexity of the case do not call for a different conclusion. We therefore affirm in this respect as well.

V

Finally, we review the procedural and substantive reasonableness of the district court's sentence for abuse of discretion. *United States v. Duperval*, 777 F.3d 1324, 1331 (11th Cir. 2015). The party challenging the sentence bears the burden of showing that it is unreasonable in light of the record and the factors detailed in 18 U.S.C. § 3553(a). *United States v. Tome*, 611 F.3d 1371, 1378 (11th Cir. 2010).

A sentence is procedurally unreasonable if the district court erred in calculating the Guidelines range; treated the Sentencing Guidelines as mandatory; failed to consider the § 3553(a) factors; selected a sentence based on clearly erroneous facts; or failed to adequately explain the sentence, including any deviation from the Guidelines range. *United States v. Rodriguez*, 628 F.3d 1258, 1264 (11th Cir. 2010).

If we find that a sentence is procedurally reasonable, we then examine whether the sentence is also substantively reasonable. *Gall v. United States*, 552 U.S. 38, 51 (2007). The district court must impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" indicated by § 3553(a)(2), including the need to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, deter criminal conduct, and protect the public from the defendant's future criminal conduct. The weight given to a particular factor is committed to the sound discretion of the district court. *United States v. Clay*, 483 F.3d 739, 743 (11th Cir. 2007), and we will reverse its determination only if we are left with the firm conviction that the court committed a clear error of judgment, *United States v. Irey*, 612 F.3d 1160, 1186 (11th Cir. 2010) (*en banc*).

First, we conclude that Morcombe's 36-month sentence was procedurally reasonable. The district court's findings that Morcombe made false allegations and displayed little remorse were supported by the record. *See Rodriguez*, 628 F.3d at 1264. In addition, when imposing the sentence, the district court stated that it had considered the § 3553(a) factors and explained why it varied Morcombe's sentence above the Guidelines range. *Id.*

Morcombe's sentence was also substantively reasonable. It was well within the district court's discretion to reject the testimony of Morcombe's character

witnesses, or to find that their testimony was outweighed by that of his victims. *See* 18 U.S.C. § 3553(a)(1); *Clay*, 483 F.3d at 743. It was also within the district court's discretion to give little weight to Morcombe's career, education, and lack of a criminal history given the court's emphasis on the seriousness of the other sentencing factors. In sum, nothing in the record indicates that the district court committed clear error. We therefore affirm its sentence.

AFFIRMED.