APPENDIX A

20-1958

Lassissi Afolabi
#28877-050
Northlake CI
P.O. Box 1500
Baldwin, MI 49304

CLD-298 **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1958

LASSISSI AFOLABI,
Appellant

v.

WARDEN FORT DIX FCI

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 1-19-cv-08802)
District Judge: Honorable Noel L. Hillman

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
September 3, 2020
Before: JORDAN, KRAUSE and MATEY, Circuit Judges

(Opinion filed: September 16, 2020)

OPINION*

PER CURIAM

Pro se appellant Lassissi Afolabi appeals the District Court's dismissal of his habeas petition filed pursuant to 28 U.S.C. § 2241. Because the appeal fails to present a

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not

substantial question, we will summarily affirm the District Court's judgment. See 3d Cir. L.A.R. 27.4; 3d Cir. I.O.P. 10.6.

Afolabi, a federal prisoner, is currently serving a 292 months' sentence imposed by the United States District Court for the District of New Jersey after pleading guilty to conspiracy to commit forced labor, conspiracy to commit trafficking with respect to forced labor, and conspiracy to commit document servitude in violation of 18 U.S.C. § 371; providing and obtaining forced labor, two counts of which involved aggravated sexual abuse, in violation of 18 U.S.C. §§ 1589, 1590, & 1592; and transportation of a minor with intent to engage in criminal sexual activity in violation of 18 U.S.C. § 2423(b). The charges stemmed from a human trafficking scheme he ran with his ex-wife, their son, and others, through which they brought more than 20 West African girls, ages 10-19, from Togo and Ghana to the United States, and forced them to work in hair-braiding salons for up to 14 hours a day, six or seven days a week. We affirmed Afolabi's judgment of sentence on direct appeal. See United States v. Afolabi, 455 F. App'x 184 (3d Cir. 2011).

In 2013, Afolabi filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, in which he claimed that his counsel provided ineffective assistance for, inter alia, failing to adequately investigate his defense, causing him to plead guilty to charges despite his innocence. The District Court denied the § 2255 motion on the merits, and we declined to issue a certificate of appealability. See C.A. No. 16-1983.

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constitute binding precedent.

While he was in custody in Fort Dix, New Jersey, Afolabi filed the instant § 2241 petition challenging his conviction and sentence on various grounds, including that his counsel's erroneous advice caused him to plead guilty despite his innocence. The District Court dismissed the petition for lack of jurisdiction, and this appeal ensued.

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. In reviewing the District Court's dismissal of the § 2241 petition, we exercise plenary review over its legal conclusions and review its factual findings for clear error. See Cradle v. United States ex rel. Miner, 290 F.3d 536, 538 (3d Cir. 2002) (per curiam).

Generally, the execution or carrying out of an initially valid confinement is the purview of a § 2241 proceeding, as attacks on the validity of a conviction or sentence must be asserted under § 2255. See Okereke v. United States, 307 F.3d 117, 120 (3d Cir. 2002). Afolabi may not pursue a collateral attack on his conviction and sentence by way of § 2241 unless he can show that "the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Under this "safety valve" provision, a prior unsuccessful § 2255 motion or the inability to meet the statute's stringent gatekeeping requirements does not render § 2255 inadequate or ineffective. See In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997). Rather, the exception is narrow, limited to extraordinary circumstances such as where the petitioner "had no earlier opportunity" to present his claims and has been convicted for conduct which is no longer deemed criminal. Id.

This is clearly not a situation in which Afolabi "had no earlier opportunity to challenge his conviction." Id. Indeed, he challenged the validity of his guilty plea on direct appeal and in § 2255 proceedings on the same, or substantively similar, bases. Afolabi reasons that he should be allowed to seek relief under § 2241's "saving[s] clause" because he is actually innocent of the charges against him. Specifically, he maintains that he "had no sex with S.X." and "she was older than 16" at the time of the alleged offense. As the District Court explained, Afolabi's admissions at the plea hearing belie his claim of innocence, and, in any event, his actual innocence claim does not come within the scope of the savings clause. See Bruce v. Warden Lewisburg USP, 868 F.3d 170, 180 (3d Cir. 2017) (noting that access to § 2241 is limited to actual innocence claims based "on the theory that [the defendant] is being detained for conduct that has subsequently been rendered non-criminal by an intervening Supreme Court decision") (internal quotation marks omitted)). The thrust of Afolabi's other innocence argument is that the Government and the District Court are wrongly interpreting the statute under which he was convicted, not that the Supreme Court has construed or interpreted it differently. Cf. Dorsainvil, 119 F.3d at 247, 251 (holding that petitioner could resort to § 2241 to pursue his claim where the Supreme Court's decision interpreting 18 U.S.C. § 924(c)(1) rendered his conviction invalid). We also agree, for the reasons provided by the District Court, that Afolabi may not pursue, in a § 2241 petition, his claim that his sentence is unconstitutional because he was not convicted of a crime of violence. See also Gardner v. Warden Lewisburg USP, 845 F.3d 99, 103 (3d Cir. 2017) ("unlike the change in

substantive law leading to the exception in Dorsainvil, issues that might arise regarding sentencing did not make § 2255 inadequate or ineffective").

For the foregoing reasons, the District Court correctly ruled that it lacked jurisdiction to entertain the § 2241 petition. Accordingly, because no "substantial question" is presented as to the petition's dismissal, we will summarily affirm the judgment of the District Court. See 3d Cir. LAR 27.4; 3d Cir. I.O.P. 10.6. Appellant's motion for appointment of counsel is denied.

CLD-298

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1958

LASSISSI AFOLABI,
Appellant

v.

WARDEN FORT DIX FCI

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 1-19-cv-08802)
District Judge: Honorable Noel L. Hillman

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
September 3, 2020
Before: JORDAN, KRAUSE and MATEY, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted for possible dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) and for possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on September 3, 2020. On consideration whereof, it is now hereby

ORDERED and **ADJUDGED** by this Court that the judgment of the District Court entered March 23, 2020, be and the same hereby is affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: September 16, 2020

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

September 16, 2020

Lassissi Afolabi
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J. Andrew Ruymann
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RE: Lassissi Afolabi v. Warden Fort Dix FCI
Case Number: 20-1958
District Court Case Number: 1-19-cv-08802

ENTRY OF JUDGMENT

Today, **September 16, 2020** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,

s/ Patricia S. Dodszuweit
Clerk

By: James King
Case Manager
267-299-4958

APPENDIX B

Other Orders/Judgments

1:19-cv-08802-NLH AFOLABI v. ORTIZ

HABEAS,IFP,PLO

U.S. District Court

District of New Jersey [LIVE]

Notice of Electronic Filing

The following transaction was entered on 3/23/2020 at 8:51 AM EDT and filed on 3/23/2020
Case Name: AFOLABI v. ORTIZ
Case Number: 1:19-cv-08802-NLH
Filer:
Document Number: 11

Docket Text:
OPINION. Signed by Judge Noel L. Hillman on 3/23/2020. (tf, n.m.)

1:19-cv-08802-NLH Notice has been electronically mailed to:

JOHN ANDREW RUYMANN john.ruymann@usdoj.gov, usanj.ecftrentoncivil@usdoj.gov

SUSAN R MILLENKY susan.millenky@usdoj.gov, usanj.ecfcivildocketing@usdoj.gov

1:19-cv-08802-NLH Notice has been sent by regular U.S. Mail:

LASSISSI AFOLABI
28877-050
FORT DIX-FEDERAL CORRECTIONAL INSTITUTION
EAST: P.O. BOX 2000
FORT DIX, NJ 08640

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1046708974 [Date=3/23/2020] [FileNumber=13548641-0] [612aa5b7e62732183ac2643b26295bd7d84c42e9dffa3fe7df91db52cbac170076 12b32fd7a9649f3bf7d795d739e037b8914e24465beaf095fb71869b360382]]

Orders on Motions

1:19-cv-08802-NLH AFOLABI v. ORTIZ

HABEAS,IFP,PLO

U.S. District Court

District of New Jersey [LIVE]

Notice of Electronic Filing

The following transaction was entered on 3/23/2020 at 8:54 AM EDT and filed on 3/23/2020

Case Name: AFOLABI v. ORTIZ
Case Number: 1:19-cv-08802-NLH
Filer:
WARNING: CASE CLOSED on 03/23/2020
Document Number: 12

Docket Text:
ORDER granting [8] Motion to Dismiss for Lack of Jurisdiction ***CIVIL CASE TERMINATED. Signed by Judge Noel L. Hillman on 3/23/2020. (tf, n.m.)

1:19-cv-08802-NLH Notice has been electronically mailed to:

JOHN ANDREW RUYMANN john.ruymann@usdoj.gov, usanj.ecftrentoncivil@usdoj.gov

SUSAN R MILLENKY susan.millenky@usdoj.gov, usanj.ecfcivildocketing@usdoj.gov

1:19-cv-08802-NLH Notice has been sent by regular U.S. Mail:

LASSISSI AFOLABI
28877-050
FORT DIX-FEDERAL CORRECTIONAL INSTITUTION
EAST: P.O. BOX 2000
FORT DIX, NJ 08640

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1046708974 [Date=3/23/2020] [FileNumber=13548657-0] [a4c8a1a9bb82340692296b09c1696e74f1f2c0a89fdd7fcdd746317918a2093720c8fbbd5b95ce43098efccd7520eefd26b893fb2608c7ff7dab1cd8e4061def]]

Other Orders/Judgments

1:19-cv-08802-NLH AFOLABI v. ORTIZ **CASE CLOSED on 03/23/2020**

CLOSED,HABEAS,IFP,PLO

U.S. District Court

District of New Jersey [LIVE]

Notice of Electronic Filing

The following transaction was entered on 3/23/2020 at 1:50 PM EDT and filed on 3/23/2020
Case Name: AFOLABI v. ORTIZ
Case Number: 1:19-cv-08802-NLH
Filer:
WARNING: CASE CLOSED on 03/23/2020
Document Number: 13

Docket Text:
ORDER TO SEAL: Clerk shall seal Docket Entry 1-2. Signed by Judge Noel L. Hillman on 3/23/2020. (tf, n.m.)

1:19-cv-08802-NLH Notice has been electronically mailed to:

JOHN ANDREW RUYMANN john.ruymann@usdoj.gov, usanj.ecftrentoncivil@usdoj.gov

SUSAN R MILLENKY susan.millenky@usdoj.gov, usanj.ecfcivildocketing@usdoj.gov

1:19-cv-08802-NLH Notice has been sent by regular U.S. Mail:

LASSISSI AFOLABI
28877-050
FORT DIX-FEDERAL CORRECTIONAL INSTITUTION
EAST: P.O. BOX 2000
FORT DIX, NJ 08640

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1046708974 [Date=3/23/2020] [FileNumber=13551139-0] [70586356b6be659d2bbf8ddecb1cecf2265be24da5e3267180840c6e81e778c79e4148f969bf34639389e2aa9b44c4929826fe9d8a0f2883835ce22d23f8b172]]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LASSISSI AFOLABI,	:	
Petitioner,	:	Civ. No. 19-8802 (NLH)
v.	:	ORDER TO SEAL
DAVID E. ORTIZ,	:	
Respondent.	:	

APPEARANCES:

Lassissi Afolabi
28877-050
Fort Dix
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Petitioner Pro se

John Andrew Ruymann, Chief, Civil Division
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Counsel for Respondent

HILLMAN, District Judge

WHEREAS, Petitioner Lassissi Afolabi submitted his presentence report (PSR) as an exhibit to his petition for writ of habeas corpus, see ECF No. 1-2;

WHEREAS, a PSR is a confidential court document not intended for public filing, see Local Cr. R. 32.1, and in this

particular case the PSR contains confidential information about victims of sexual abuse, including minors. There are compelling interests in keeping that information off the public docket,

THEREFORE, IT IS on this 23rd day of March, 2020,

ORDERED that the Clerk shall seal Docket Entry 1-2; and it is finally

ORDERED that the Clerk of the Court shall serve a copy of this Order upon Petitioner by regular U.S. mail.

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

At Camden, New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LASSISSI AFOLABI,	:	
Petitioner,	:	Civ. No. 19-8802 (NLH)
v.	:	OPINION
DAVID E. ORTIZ,	:	
Respondent.	:	

APPEARANCES:

Lassissi Afolabi
28877-050
Fort Dix
Federal Correctional Institution
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Fort Dix, NJ 08640

Petitioner Pro se

John Andrew Ruymann, Chief, Civil Division
Susan R. Millenky, AUSA
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Newark, NJ 07102

Counsel for Respondent

HILLMAN, District Judge

Petitioner Lassissi Afolabi, a prisoner presently confined at FCI Fort Dix, New Jersey, filed this Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 seeking to vacate his guilty plea entered on August 26, 2009 before the Honorable Jose L. Linares, D.N.J.. ECF No. 1; see also United States v.

Lassissi Afolabi, No. 07-cr-0785 (D.N.J. Aug. 26, 2009) (ECF No. 120). He argues "he was premised [sic], adduced, and coerced to plead guilty by his attorney in conjunction with the government, thereby incarcerated in violation of the constitution and law of the United States." ECF No. 1 at 3. Respondent United States now moves to dismiss the petition for lack of jurisdiction. ECF No. 8. Petitioner opposes the motion. ECF No. 9.

The Motion is now ripe for disposition. For the reasons that follow, the Court will grant the motion to dismiss.

I. BACKGROUND

"From October 2002 through September 2007, Afolabi conspired with his wife, Akouavi Afolabi, and others to commit forced labor of more than 20 girls, aged 10 to 19." United States v. Afolabi, 455 F. App'x 184, 185 (3d Cir. 2011). "They recruited the girls from impoverished villages in Togo and Ghana and brought them to the United States with fraudulently obtained visas. The girls were required to work in hair-braiding salons for up to 14 hours per day, six or seven days a week, and to relinquish all of their earnings. They were beaten and psychologically and sexually abused." Id. On August 26, 2009, Petitioner pled guilty to three counts of a superseding indictment charging him with "conspiracy to commit forced labor, trafficking with respect to forced labor, and document servitude, contrary to 18 U.S.C. §§ 1589, 1590, and 1592, in

violation of 18 U.S.C. § 371; in Count 13, with providing and obtaining the forced labor of P.H. in violation of 18 U.S.C. §§ 1589 and 2; and in Count 23, with traveling for the purpose of engaging in illicit sexual conduct with S.X, in violation of 18 U.S.C. §§ 2423(b) and 2." Plea Agreement, Afolabi, No. 07-cr-0785 (D.N.J. Aug. 26, 2009) (ECF No. 122 at 1). Petitioner received a 292-month term of imprisonment with a life term of supervised release. Amended Judgment, Afolabi, No. 07-cr-0785 (D.N.J. July 13, 2010) (ECF No. 206). Petitioner was also required to register as a sex offender and pay $3,949,140.80 in restitution. Id.

Petitioner filed a direct appeal arguing the United States breached his plea agreement and the sentencing court improperly calculated his offense level. The Court of Appeals rejected both of those arguments and affirmed Petitioner's conviction and sentence. Afolabi, 455 F. App'x 184. Petitioner thereafter filed a motion to correct, vacate, or set aside his federal sentence under 28 U.S.C. § 2255. "Although Petitioner presents his claims as manifold, he essentially presents two arguments as to how counsel was allegedly ineffective: that counsel failed to fully investigate and prepare his defense, and that counsel pushed him to take a plea agreement he didn't adequately understand." Afolabi v. United States, No. 13-1686, 2016 WL 816749, *6 (D.N.J. Feb. 29, 2016). The court denied the § 2255

motion, and the Third Circuit denied a certificate of appealability, Afolabi v. United States, No. 16-1983 (3d Cir. Aug 29, 2016).

Petitioner filed this petition under 28 U.S.C. § 2241 on March 21, 2019. ECF No. 1. "The Petitioner claims that he is actually innocent of all the charges against him because of erroneous advice he had from his attorney to enter into a plea agreement for the crime he did not commit." Id. at 19. "Mr. Afolabi argues that fact, he did not have sex with the girl when they travelled to North Carolina, therefore, this crime could not stand. Mr. Afolabi had no sex with S.X. and based on the age approximation of S.X. - she was older than 16 as indicated in Mr. Afolabi's PSR."[1] Id. at 20. "Under New Jersey and North Carolina Penal Codes Statute one has to be under 16 years old to qualify as a minor." Id. He also asserts that his sentence was improperly "enhanced by 4 levels based on an alleged aggrivated [sic] sexual abuse claims of an adult ex-girlfriend whom he had a relationship with four years earlier, way before his arrest." Id. at 21. He argues this charge is not a crime of violence and therefore his sentence is unconstitutional. Id. at 21-22 (citing Sessions v. Dimaya, 138 S. Ct. 1204 (2018)).

[1] Petitioner submitted his PSR to be filed on the docket. ECF No. 1-2. Because a PSR is not a document intended for public filing, the Court will order the exhibit to be sealed.

Respondent United States now moves to dismiss the petition based on a lack of jurisdiction under § 2241. ECF No. 8. It argues the claims raised in the petition may only be brought in a § 2255 proceeding and that Petitioner does not qualify for the savings clause of § 2255(e). Petitioner opposes the motion. ECF No. 9.

II. DISCUSSION

A. Legal Standard

Title 28, Section 2243 of the United States Code provides in relevant part as follows:

> A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

A pro se pleading is held to less stringent standards than more formal pleadings drafted by lawyers. Estelle v. Gamble, 429 U.S. 97, 106 (1976); Haines v. Kerner, 404 U.S. 519, 520 (1972). A pro se habeas petition must be construed liberally. See Hunterson v. DiSabato, 308 F.3d 236, 243 (3d Cir. 2002).

B. Analysis

Section 2241 "confers habeas jurisdiction to hear the petition of a federal prisoner who is challenging not the validity but the execution of his sentence." Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir. 2001). A challenge to the validity

of a federal conviction or sentence must be brought under 28 U.S.C. § 2255. See Jackman v. Shartle, 535 F. App'x 87, 88 (3d Cir. 2013) (per curiam) (citing Okereke v. United States, 307 F.3d 117, 120 (3d Cir. 2002)). "[Section] 2255 expressly prohibits a district court from considering a challenge to a prisoner's federal sentence under § 2241 unless the remedy under § 2255 is 'inadequate or ineffective to test the legality of his detention.'" Snyder v. Dix, 588 F. App'x 205, 206 (3d Cir. 2015) (quoting 28 U.S.C. § 2255(e)); see also In re Dorsainvil, 119 F.3d 245, 249 (3d Cir. 1997).

Petitioner asserts this Court should exercise jurisdiction over the merits of the petition because he is actually innocent of the crimes to which he pled guilty. Actual innocence for purposes of § 2241 means "he is being detained for conduct that has subsequently been rendered non-criminal by an intervening Supreme Court decision . . . ." Dorsainvil, 119 F.3d at 252. However, Petitioner argues he was never guilty to begin with because he never had sex with S.X., S.X. was over 16, his relationship with P.H. was consensual, and P.H. was an adult. He argues trial counsel was aware of all of these facts but coerced him into pleading guilty. See ECF No. 1 at 15 ("Mr. Afolabi raises a number of interrelated challenges to the validity of his guilty plea, but specifically argues that his plea was adduced, coerced, made without fully understanding of

the charges, and in reliance on promises made (and subsequently broken) by the prosecutor."); Id. at 27 (arguing trial counsel "failed Mr. Afolabi by ignoring, omitting, and suppressing the facts surrounding the trip to North Carolina with S.X. that he defendant/petitioner did not have sex with S.X. who at the time the government claimed was under 18, including the purpose of the trip.").

Petitioner has not established actual innocence within the meaning of § 2241. He admitted at his Rule 11 hearing that S.X. was "around 11 years old" when he picked her up from JFK on October 24, 2002. Transcript of Plea, Afolabi, No. 07-cr-0785 (D.N.J. Aug. 26, 2009) (ECF No. 124, 34:19). The trip to North Carolina took place on or about March 4, 2006, which would have made S.X. 14 or 15 years old. Id. at 39:12-17. Petitioner prevaricated on her exact age, but he admitted he knew she was under 18. Id. at 40:12-14. "Petitioner also testified that, during that trip, he pushed [S.X.] onto a bed and tried to have sex with her, even though she begged him not to do so as he was old enough to be her father." Afolabi v. United States, No. 13-1686, 2016 WL 816749, at *3 (D.N.J. Feb. 29, 2016).

Both parties occasionally refer to Petitioner's conviction as being for "Transportation of minor with Intent to Engage in Criminal Sexual Activity", but "[b]y its unambiguous terms, § 2423(b) criminalizes interstate travel for an illicit purpose.

The actual age of the intended victim is not an element of the offense; criminal liability 'turns simply on the purpose for which [the defendant] traveled.'" United States v. Tykarsky, 446 F.3d 458, 469 (3d Cir. 2006) ((quoting United States v. Root, 296 F.3d 1222, 1231 (11th Cir. 2002) (alteration in original)). See also Plea Agreement, Afolabi No. 07-cr-0785 (D.N.J. Aug. 26, 2009) (ECF No. 122 at 1) ("traveling for the purpose of engaging in illicit sexual conduct with S.X, in violation of 18 U.S.C. §§ 2423(b) and 2"). Therefore even Petitioner admitted facts that establish S.X.'s age, Petitioner's § 2423(b) conviction would stand even if S.X. was over 16.[2] Petitioner has not pointed to a Supreme Court decision

[2] Many of the cases cited by Petitioner regarding age limits are immigration cases deciding what offenses make someone removable from the United States. See, e.g., Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1567 (2017). Although it is presumed that immigration proceedings will commence upon the conclusion of Petitioner's custodial term, he is currently in the custody of the Bureau of Prisons, not immigration authorities. The Court is not aware of Petitioner, who is a citizen of Togo, being subject to a final order of removal, nor does this Court have jurisdiction to determine whether he is removable from the United States. 8 U.S.C. § 1252(g). Petitioner must wait until immigration proceedings have commenced before challenging his removal status in the appropriate Court of Appeals as § 1252(g), as amended by the REAL ID Act. Pub. L. No. 10943, 119 Stat. 231 (2005), explicitly bars judicial review by district courts of three classes of actions and decisions committed to the Government's discretion: "the 'decision or action to [(a)] commence proceedings, [(b)] adjudicate cases, or [(c)] execute removal orders.'" Chehazeh v. Att'y Gen., 666 F.3d 118, 134 (3d Cir. 2012) (quoting Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999)).

that invalidates his conduct; therefore, he has not demonstrated "actual innocence" for purposes of § 2241.

To the extent he argues he was coerced into taking this plea by his counsel, Petitioner substantively raised this claim in his motion under § 2255. See Afolabi v. United States, No. 13-1686, 2016 WL 816749, at *7 (D.N.J. Feb. 29, 2016) ("Petitioner asserts that had counsel properly investigated, he would have found that Petitioner was innocent of the charges arrayed against him."). Judge Linares rejected this argument, noting that "Petitioner admitted during his plea colloquy that he and his former wife kept the girls, forced them to work in their salons, did not pay them nor keep any tips they made . . . and that Petitioner engaged in sexual intercourse with several of the girls, including the use of force and his transport of one under age girl out of state so that Petitioner could have sex with her." Id. Judge Linares also related Petitioner's testimony at Petitioner's ex-wife's trial, wherein he testified "that he forced [P.H.] into having sex with him, and attempted to do likewise with underage [S.X.] when he took her to the Carolinas with the purpose of having sex with her, which he attempted to do over her objections. Thus, it is clear from Petitioner's own testimony that he is guilty of all three of the counts to which he pled guilty, and his current assertions of innocence are without merit." Id.

"A § 2255 motion is inadequate or ineffective only where the petitioner demonstrates that some limitation or procedure would prevent a § 2255 proceeding from affording him a full hearing and adjudication of his wrongful detention claim." Cradle v. U.S. ex rel. Miner, 290 F.3d 536, 538 (3d Cir. 2002) (citations omitted). "Section 2255 is not inadequate or ineffective merely because the sentencing court does not grant relief . . . ." Id. at 539. See also Litterio v. Parker, 369 F.2d 395, 396 (3d Cir. 1966) (per curiam) (sentencing court's prior denial of identical claims does not render § 2255 remedy "inadequate or ineffective"). Because this argument is merely a rehashing of an argument raised in Petitioner's § 2255 motion or is an argument that Petitioner could have made in his § 2255 motion, the Court lacks jurisdiction under § 2241. See Francis v. Smith, 165 F. App'x 199 (3d Cir. 2006) (challenge to voluntariness of plea improper under § 2241).

Petitioner also argues his sentence was improperly enhanced for aggravated sexual abuse of P.H. ECF No. 1 at 31. "The generic federal definition of sexual abuse a minor requires that the victim be younger than 16. Here, [P.H.] was an adult not a minor. She was older than 18 years of age at the time." Id. He argues he had a consensual relationship with P.H. and was coerced into admitting he raped her. "In this instant case, Mr. Afolabi did not commit the crime his being enhanced for by 4

levels. Also, the Petitioner does not meet the above - stipulated elements as to this alleged 'Rape' charge that did not occur." Id. at 39.

The Third Circuit has not addressed whether prisoners may challenge sentencing enhancements using § 2241. See Murray v. Warden Fairton FCI, 710 F. App'x 518, 520 (3d Cir. 2018) (per curiam) ("We have not held that innocence-of-the-sentence claims fall within the exception to the rule that habeas claims must be brought in § 2255 motions."); Boatwright v. Warden Fairton FCI, 742 F. App'x 701, 702 (3d Cir. 2018) (citing United States v. Doe, 810 F.3d 132, 160-61 (3d Cir. 2015)). To use § 2241, "[w]hat matters is that the prisoner has had no earlier opportunity to test the legality of his detention since the intervening Supreme Court decision issued." Bruce v. Warden Lewisburg USP, 868 F.3d 170, 180 (3d Cir. 2017). Petitioner insists his sexual relationship with P.H. was consensual and between adults. This is an argument Petitioner could have raised on direct appeal or in his § 2255 motion. Moreover, there is no intervening Supreme Court decision rendering Petitioner's conviction invalid as Sessions v. Dimaya, which held that the Immigration and Nationality Act's residual clause and its definition of "crime of violence" was void for vagueness, is not applicable to Petitioner's sentence. 138 S.

Ct. 1204 (2018). The Court therefore lacks jurisdiction over the § 2241 petition.

Whenever a civil action is filed in a court that lacks jurisdiction, "the court shall, if it is in the interests of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed." 28 U.S.C. § 1631. As Petitioner has already filed a motion under § 2255, he may only file a second or successive motion with the permission of the Third Circuit. 28 U.S.C. §§ 2244, 2255(h). The Court finds that it is not in the interests of justice to transfer this habeas petition to the Third Circuit as it does not appear that he can meet the requirements of § 2255(h) for filing a second or successive § 2255 motion. Nothing in this opinion, however, should be construed as prohibiting Petitioner from seeking the Third Circuit's permission to file on his own should he so choose.

III. CONCLUSION

For the foregoing reasons, the motion to dismiss for lack of jurisdiction the Petition brought pursuant to 28 U.S.C. § 2241 will be granted. An appropriate order will be entered.

Dated: March 23, 2020
At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LASSISSI AFOLABI,	:	
Petitioner,	:	Civ. No. 19-8802 (NLH)
v.	:	ORDER
DAVID E. ORTIZ,	:	
Respondent.	:	

For the reasons set forth in the Court's opinion,

IT IS on this 23rd day of March, 2020,

ORDERED that Respondent's Motion to Dismiss, ECF No. 8, is GRANTED to the extent that the Court finds that it lacks jurisdiction over the Petition for Writ of Habeas Corpus brought pursuant to 28 U.S.C. § 2241, ECF No. 1; and it is finally

ORDERED that the Clerk of the Court shall serve a copy of this Order upon Petitioner by regular U.S. mail and mark this matter closed.

At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

APPENDIX C

20-1958

Lassissi Afolabi
#28877-050
Northlake CI
P.O. Box 1500
Baldwin, MI 49304

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1958

LASSISSI AFOLABI,
Appellant

v.

WARDEN FORT DIX FCI

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 1-19-cv-08802)

PETITION FOR REHEARING

BEFORE: SMITH, *Chief Judge*, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY and PHIPPS, *Circuit Judges*

The petition for rehearing filed by Appellant Lassissi Afolabi in the above-captioned matter has been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service. No judge who concurred in the decision asked for rehearing, and a majority of the circuit judges of the Court in regular active service who are not disqualified did not vote for rehearing by the Court. It is now hereby **ORDERED** that the petition for rehearing is **DENIED**.

BY THE COURT,

s/ Paul B. Matey
Circuit Judge

Dated: November 27, 2020
JK/cc: Lassissi Afolabi
All Counsel of Record

APPENDIX D

20-1958

Lassissi Afolabi
#28877-050
Northlake CI
P.O. Box 1500
Baldwin, MI 49304

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 20-1958

Afolabi v. Warden Fort Dix FCI
(D.N.J. No. 1-19-cv-08802)

To: Clerk

1) Motion by Appellant for leave to appeal in forma pauperis

The foregoing motion to proceed in forma pauperis is granted. In addition to the issue of possible summary affirmance under Third Circuit L.A.R. 27.4 and I.O.P. 10.6 set forth in the letter of May 12, 2020, the appeal will be submitted to a panel of this court for determination under 28 U.S.C. § 1915(e)(2) as to whether the appeal will be dismissed as legally frivolous. Although not necessary at this time, appellant may submit argument, which should not exceed 5 pages, in support of the appeal. The document, with certificate of service, must be filed with the clerk within 21 days of the date of this order. Appellee need not file a response unless directed to do so or until a briefing schedule is issued. The Court may reconsider in forma pauperis status or request additional information at any time during the course of this appeal.

For the Court,

s/ Patricia S. Dodszuweit
Clerk

Dated: June 8, 2020
JK/cc: Lassissi Afolabi
Susan Millenky, Esq.
J. Andrew Ruymann, Esq.

APPENDIX E

20-1958

Lassissi Afolabi
#28877-050
Northlake CI
P.O. Box 1500
Baldwin, MI 49304

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

December 7, 2020

Mr. William T. Walsh
United States District Court for the District of New Jersey
Mitchell H. Cohen Building & United States Courthouse
4th & Cooper Streets
Room 1050
Camden, NJ 08101

RE: Lassissi Afolabi v. Warden Fort Dix FCI
Case Number: 20-1958
District Court Case Number: 1-19-cv-08802

Dear District Court Clerk,
Enclosed herewith is the certified judgment together with copy of the opinion in the above-captioned case(s). The certified judgment is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

Counsel are advised of the issuance of the mandate by copy of this letter. The certified judgment is also enclosed showing costs taxed, if any.

Very truly yours,

s/ Patricia S. Dodszuweit
Clerk

By: James King
Case Manager
267-299-4958

cc: Lassissi Afolabi
Mark E. Coyne
Susan Millenky
J. Andrew Ruymann

CLD-298

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1958

LASSISSI AFOLABI,
Appellant

v.

WARDEN FORT DIX FCI

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 1-19-cv-08802)
District Judge: Honorable Noel L. Hillman

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
September 3, 2020
Before: JORDAN, KRAUSE and MATEY, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted for possible dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) and for possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on September 3, 2020. On consideration whereof, it is now hereby

ORDERED and **ADJUDGED** by this Court that the judgment of the District Court entered March 23, 2020, be and the same hereby is affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: September 16, 2020

Certified as a true copy and issued in lieu of a formal mandate on 12/07/2020

Teste: Patricia A Dodszuweit
Clerk, U.S. Court of Appeals for the Third Circuit

CLD-298 **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1958

LASSISSI AFOLABI,
Appellant

v.

WARDEN FORT DIX FCI

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 1-19-cv-08802)
District Judge: Honorable Noel L. Hillman

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
September 3, 2020
Before: JORDAN, KRAUSE and MATEY, Circuit Judges

(Opinion filed: September 16, 2020)

OPINION*

PER CURIAM

Pro se appellant Lassissi Afolabi appeals the District Court's dismissal of his habeas petition filed pursuant to 28 U.S.C. § 2241. Because the appeal fails to present a

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not

substantial question, we will summarily affirm the District Court's judgment. See 3d Cir. L.A.R. 27.4; 3d Cir. I.O.P. 10.6.

Afolabi, a federal prisoner, is currently serving a 292 months' sentence imposed by the United States District Court for the District of New Jersey after pleading guilty to conspiracy to commit forced labor, conspiracy to commit trafficking with respect to forced labor, and conspiracy to commit document servitude in violation of 18 U.S.C. § 371; providing and obtaining forced labor, two counts of which involved aggravated sexual abuse, in violation of 18 U.S.C. §§ 1589, 1590, & 1592; and transportation of a minor with intent to engage in criminal sexual activity in violation of 18 U.S.C. § 2423(b). The charges stemmed from a human trafficking scheme he ran with his ex-wife, their son, and others, through which they brought more than 20 West African girls, ages 10-19, from Togo and Ghana to the United States, and forced them to work in hair-braiding salons for up to 14 hours a day, six or seven days a week. We affirmed Afolabi's judgment of sentence on direct appeal. See United States v. Afolabi, 455 F. App'x 184 (3d Cir. 2011).

In 2013, Afolabi filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, in which he claimed that his counsel provided ineffective assistance for, inter alia, failing to adequately investigate his defense, causing him to plead guilty to charges despite his innocence. The District Court denied the § 2255 motion on the merits, and we declined to issue a certificate of appealability. See C.A. No. 16-1983.

---

constitute binding precedent.

While he was in custody in Fort Dix, New Jersey, Afolabi filed the instant § 2241 petition challenging his conviction and sentence on various grounds, including that his counsel's erroneous advice caused him to plead guilty despite his innocence. The District Court dismissed the petition for lack of jurisdiction, and this appeal ensued.

We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. In reviewing the District Court's dismissal of the § 2241 petition, we exercise plenary review over its legal conclusions and review its factual findings for clear error. See Cradle v. United States ex rel. Miner, 290 F.3d 536, 538 (3d Cir. 2002) (per curiam).

Generally, the execution or carrying out of an initially valid confinement is the purview of a § 2241 proceeding, as attacks on the validity of a conviction or sentence must be asserted under § 2255. See Okereke v. United States, 307 F.3d 117, 120 (3d Cir. 2002). Afolabi may not pursue a collateral attack on his conviction and sentence by way of § 2241 unless he can show that "the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Under this "safety valve" provision, a prior unsuccessful § 2255 motion or the inability to meet the statute's stringent gatekeeping requirements does not render § 2255 inadequate or ineffective. See In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997). Rather, the exception is narrow, limited to extraordinary circumstances such as where the petitioner "had no earlier opportunity" to present his claims and has been convicted for conduct which is no longer deemed criminal. Id.

This is clearly not a situation in which Afolabi "had no earlier opportunity to challenge his conviction." Id. Indeed, he challenged the validity of his guilty plea on direct appeal and in § 2255 proceedings on the same, or substantively similar, bases. Afolabi reasons that he should be allowed to seek relief under § 2241's "saving[s] clause" because he is actually innocent of the charges against him. Specifically, he maintains that he "had no sex with S.X." and "she was older than 16" at the time of the alleged offense. As the District Court explained, Afolabi's admissions at the plea hearing belie his claim of innocence, and, in any event, his actual innocence claim does not come within the scope of the savings clause. See Bruce v. Warden Lewisburg USP, 868 F.3d 170, 180 (3d Cir. 2017) (noting that access to § 2241 is limited to actual innocence claims based "on the theory that [the defendant] is being detained for conduct that has subsequently been rendered non-criminal by an intervening Supreme Court decision") (internal quotation marks omitted)). The thrust of Afolabi's other innocence argument is that the Government and the District Court are wrongly interpreting the statute under which he was convicted, not that the Supreme Court has construed or interpreted it differently. Cf. Dorsainvil, 119 F.3d at 247, 251 (holding that petitioner could resort to § 2241 to pursue his claim where the Supreme Court's decision interpreting 18 U.S.C. § 924(c)(1) rendered his conviction invalid). We also agree, for the reasons provided by the District Court, that Afolabi may not pursue, in a § 2241 petition, his claim that his sentence is unconstitutional because he was not convicted of a crime of violence. See also Gardner v. Warden Lewisburg USP, 845 F.3d 99, 103 (3d Cir. 2017) ("unlike the change in

substantive law leading to the exception in Dorsainvil, issues that might arise regarding sentencing did not make § 2255 inadequate or ineffective").

For the foregoing reasons, the District Court correctly ruled that it lacked jurisdiction to entertain the § 2241 petition. Accordingly, because no "substantial question" is presented as to the petition's dismissal, we will summarily affirm the judgment of the District Court. See 3d Cir. LAR 27.4; 3d Cir. I.O.P. 10.6. Appellant's motion for appointment of counsel is denied.

APPENDIX F

Other Orders/Judgments

1:19-cv-08802-NLH AFOLABI v. ORTIZ

HABEAS,IFP,PLO

U.S. District Court

District of New Jersey [LIVE]

Notice of Electronic Filing

The following transaction was entered on 8/7/2019 at 8:29 AM EDT and filed on 8/7/2019
Case Name: AFOLABI v. ORTIZ
Case Number: 1:19-cv-08802-NLH
Filer:
Document Number: 6

Docket Text:
ORDER that Respondent's request for an extension of time is GRANTED; Respondent must file the answer within fourteen days from the date of entry of this order. Signed by Judge Noel L. Hillman on 8/6/2019. (tf, n.m.)

1:19-cv-08802-NLH Notice has been electronically mailed to:

JOHN ANDREW RUYMANN john.ruymann@usdoj.gov, usanj.ecftrentoncivil@usdoj.gov

1:19-cv-08802-NLH Notice has been sent by regular U.S. Mail:

LASSISSI AFOLABI
28877-050
FORT DIX
FEDERAL CORRECTIONAL INSTITUTION
Inmate Mail/Parcels
EAST: P.O. BOX 2000
FORT DIX, NJ 08640

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1046708974 [Date=8/7/2019] [FileNumber=12842680-0
] [7acd5d882ca9a32b23a8ca3097bf8fd9a0d9fbece5c50e9bf5f50b6204161ecbd79
a0c4eed63da142483c2295544ab2c87571994fb75a460c5ae3f44fb231b94]]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LASSISSI AFOLABI, Petitioner, v. DAVID E. ORTIZ, Respondent.	:	No. 19-cv-8802 (NLH) ORDER

1. Respondent has filed a request for a brief extension of time in which to file the answer to Petitioner's Petition for Writ of Habeas Corpus brought pursuant to 28 U.S.C. § 2241. See ECF No. 4.

2. Specifically, Respondent requests the additional time in order to permit coordination with the U.S. Attorney's Office's Criminal Division to provide a more complete response to the Petition. See id.

2. The Court will grant the requested extension of time in which to file the answer.

IT IS therefore on this 6th day of August, 2019,

ORDERED that Respondent's request for an extension of time, ECF No. 4, is GRANTED; and it is further

ORDERED that Respondent must file the answer within fourteen days from the date of entry of this order; and it is finally

ORDERED that the Clerk of Court shall serve a copy of this Order on Petitioner by regular U.S. mail.

At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

Other Orders/Judgments

1:19-cv-08802-NLH AFOLABI v. ORTIZ

HABEAS,IFP,PLO

U.S. District Court

District of New Jersey [LIVE]

Notice of Electronic Filing

The following transaction was entered on 8/7/2019 at 2:33 PM EDT and filed on 8/7/2019

Case Name: AFOLABI v. ORTIZ
Case Number: 1:19-cv-08802-NLH
Filer:
Document Number: 7

Docket Text:
ORDER granting Respondent's request to file a motion to dismiss. Signed by Judge Noel L. Hillman on 8/7/2019. (tf, n.m.)

1:19-cv-08802-NLH Notice has been electronically mailed to:

JOHN ANDREW RUYMANN john.ruymann@usdoj.gov, usanj.ecftrentoncivil@usdoj.gov

1:19-cv-08802-NLH Notice has been sent by regular U.S. Mail:

LASSISSI AFOLABI
28877-050
FORT DIX
FEDERAL CORRECTIONAL INSTITUTION
Inmate Mail/Parcels
EAST: P.O. BOX 2000
FORT DIX, NJ 08640

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1046708974 [Date=8/7/2019] [FileNumber=12845263-0
] [58a4aaa36a13559a9e5ac69782acc4cd69442431a327ff77ee799404f0f8c70edee
d8db1d114c5b93561fd23215f28e35244b42d747ead7b1cb0905226330162]]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LASSISSI AFOLABI, Petitioner,	:	No. 19-cv-8802 (NLH)
v.	:	ORDER
DAVID E. ORTIZ, Respondent.	:	

IT APPEARING THAT:

1. Respondent has requested by letter leave of Court to file a motion to dismiss regarding jurisdiction in lieu of an answer. See ECF No. 5.

2. The Court will permit Respondent to file a motion to dismiss in lieu of an answer.

IT IS therefore on this 7th day of August, 2019,

ORDERED that Respondent's request to file a motion to dismiss, ECF No. 5, is GRANTED; and it is finally

ORDERED that the Clerk of Court shall serve a copy of this Order on Petitioner by regular U.S. mail.

At Camden, New Jersey

Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

APPENDIX G

Other Orders/Judgments

1:19-cv-08802-NLH AFOLABI v. ORTIZ

HABEAS,IFP,PLO

U.S. District Court

District of New Jersey [LIVE]

Notice of Electronic Filing

The following transaction was entered on 6/24/2019 at 3:07 PM EDT and filed on 6/24/2019

Case Name: AFOLABI v. ORTIZ

Case Number: 1:19-cv-08802-NLH

Filer:

Document Number: 3

Docket Text:

ORDER TO ANSWER; Respondent shall file an answer within forty-five (45) days of the date of this Order, etc. Signed by Judge Noel L. Hillman on 6/24/2019. (rss,)

1:19-cv-08802-NLH Notice has been electronically mailed to:

JOHN ANDREW RUYMANN john.ruymann@usdoj.gov, usanj.ecftrentoncivil@usdoj.gov

1:19-cv-08802-NLH Notice has been sent by regular U.S. Mail:

LASSISSI AFOLABI
28877-050
FORT DIX
FEDERAL CORRECTIONAL INSTITUTION
Inmate Mail/Parcels
EAST: P.O. BOX 2000
FORT DIX, NJ 08640

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1046708974 [Date=6/24/2019] [FileNumber=12691332-0] [0213f8b0cbe82f94d671f0859bb0d7e001088cb93a022df718af01de3ed81a62b52c64cce2c883399dff00367a60c580b3b85d6cbb6b995a5658227b2d0a8b73]]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LASSISSI AFOLABI,	:	
Petitioner,	:	Civ. No. 19-8802 (NLH)
v.	:	
	:	ORDER TO ANSWER
DAVID E. ORTIZ,	:	
Respondent.	:	

Petitioner is a prisoner currently incarcerated at the Federal Correctional Institution at Fort Dix in Fort Dix, New Jersey. ECF No. 1. He is proceeding pro se with a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 and has paid the required filing fee. Id.

In accordance with Rule 4 of the Rules Governing Section 2254 Cases, applicable to § 2241 cases through Rule 1(b) of the Rules Governing Section 2254 Cases, this Court has screened the Petition for dismissal and determined that dismissal without an answer and production of the record is not warranted.

Therefore, IT IS on this 24th day of June, 2019,

ORDERED that the Clerk shall serve a copy of the Petition, ECF No. 1, and this Order upon Respondent by regular mail, with all costs of service advanced by the United States; and it is further

ORDERED that the Clerk shall forward a copy of the Petition and this Order to the Chief, Civil Division, United States

Attorney's Office, at the following email address: USANJ-HabeasCases@usdoj.gov; and it is further

ORDERED that within forty-five (45) days of the date of this Order, Respondent shall file and serve an answer which responds to the allegations and grounds in the Petition and which includes all affirmative defenses Respondent seeks to invoke; and it is further

ORDERED that Respondent shall file and serve with the answer certified copies of all documents necessary to resolve Petitioner's claims and affirmative defenses; and it is further

ORDERED that within thirty (30) days of receipt of the answer, Petitioner may file a reply to the answer; and it is finally

ORDERED that within seven (7) days of Petitioner's release, be it parole or otherwise, Respondent shall electronically file a written notice of the same with the Clerk.

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

At Camden, New Jersey

APPENDIX H

20-1958

Lassissi Afolabi
#28877-050
Northlake CI
P.O. Box 1500
Baldwin, MI 49304

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 20-1958

LASSISSI AFOLABI

v.

WARDEN FORT DIX FCI

(D.N.J. No. 1-19-cv-08802)

Present: JORDAN, KRAUSE and MATEY, Circuit Judges

1. Motion by Appellant Lassissi Afolabi titled Application for Admission to Bail.

Respectfully,
Clerk/JK

ORDER

The foregoing Motion is DENIED.

By the Court,

s/Paul B. Matey
Circuit Judge

Dated: November 16, 2020
JK/cc: Lassissi Afolabi
Mark E. Coyne, Esq.
Susan Millenky, Esq.
J. Andrew Ruymann, Esq.

APPENDIX I

¶ 64.05 Interstate Travel to Engage in Illicit Sexual Conduct (18 U.S.C. § 2423(b)).

Instruction 64-20 The Indictment and the Statute

The indictment charges the defendant with interstate travel to engage in illicit sexual conduct. The indictment reads as follows:

[Read Indictment]

The indictment charges the defendant with violating section 2423(b) of Title 18 of the United States Code. That section provides in relevant part:

A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be [guilty of a crime].

Comment

Section 2423(b) was originally enacted in 1994. As originally passed, the statute provided as follows:

A person who travels in interstate commerce, or conspires to do so, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any sexual act (as defined in section 2245) 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 shall be fined under this title, imprisoned not more than 10 years, or both. 1

Note that the reference to the definition of a sexual act as defined in section 2245 was erroneous. Section 2245 is the provision authorizing the death penalty if the victim of sexual abuse dies as a result of the offense. The actual definition of sexual act is in section 2246(2). Because of this error, several convictions were reversed since the section as drafted required the death of the victim. 2 This error was corrected in 1995 by eliminating the cross-reference, and adopting the definition of "illicit sexual conduct" in section 2423(f), which in turn incorporates the definition in section 2246. 3

The constitutionality of section 2423(b) has been upheld against several constitutional

challenges. This provision does not violate the Commerce Clause because it requires as an element that the defendant travel in interstate commerce or foreign commerce with an improper motive. 4 The First Amendment challenges have been rejected because the statute regulates conduct (interstate or foreign travel) with illegal intent. 5 Finally, the statute does not burden any rights under the Travel Clause because the constitutional right to cross state lines does not imply a right to cross state lines to engage in illegal activity. 6

Footnotes

1
Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, Title XVI, § 160001(g), 108 Stat. 2037 (1994).

2
United States v. Moore, 136 F.3d 1343, 1344–45 (9th Cir. 1998); United States v. Childress, 104 F.3d 47, 50–53 (4th Cir. 1996).

3
Sex Crimes Against Children Prevention Act, Pub. L. 104-71, § 5, 109 Stat. 774 (1995).

4
United States v. Hawkins, 513 F.3d 59, 61 (2d Cir.), *cert. denied,* 553 U.S. 1060 (2008); United States v. Tykarsky, 446 F.3d 458, 470 (3d Cir. 2006); United States v. Bredimus, 352 F.3d 200, 205–208 (5th Cir. 2003) (noting that Congress has even greater latitude to regulate foreign commerce than it does to regulate interstate commerce); United States v. Brockdorff, 992 F. Supp. 22, 24–25 (D.D.C. 1997).

5
United States v. Tykarsky, 446 F.3d 458, 471 (3d Cir. 2006); United States v. Buttrick, 432 F.3d 373, 375–76 (1st Cir. 2005); United States v. Bredimus, 352 F.3d 200, 205–08 (5th Cir. 2003); United States v. Han, 230 F.3d 560, 562–63 (2d Cir. 2000).

6
United States v. Tykarsky, 446 F.3d 458, 472 (3d Cir. 2006); United States v. Buttrick, 432 F.3d 373, 376 (1st Cir. 2005); United States v. Brockdorff, 992 F. Supp. 22, 25 (D.D.C. 1997) (citing United States v. Hoke, 227 U.S. 308, 33 S. Ct. 281, 57 L. Ed. 523 (1913)).

Instruction 64-21 Elements of the Offense

In order to prove the defendant guilty of interstate travel to engage in illicit sexual conduct, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant traveled in interstate or foreign commerce; and

Second, that defendant acted with the intent to engage in illicit sexual conduct.

Authority

First Circuit: United States v. Gamache, 156 F.3d 1 (1st Cir. 1998).

Second Circuit: United States v. Murphy, 942 F.3d 73 (2d Cir. 2019) (quoting **Treatise**).

Fifth Circuit: United States v. Bredimus, 352 F.3d 200 (5th Cir. 2003).

Sixth Circuit: United States v. DeCarlo, 434 F.3d 447 (6th Cir. 2006).

Seventh Circuit: United States v. Vang, 128 F.3d 1065 (7th Cir. 1997).

Eleventh Circuit: United States v. Hersh, 297 F.3d 1233 (11th Cir. 2002); United States v. Root, 296 F.3d 1222 (11th Cir. 2002).

Comment

The recommended formulation is widely accepted. 1 Note that engaging in the intended illegal sex at the destination is not an element of this offense. 2

Footnotes
1
See, e.g., United States v. Murphy, 942 F.3d 73, 80 (2d Cir. 2019) (quoting **Treatise**); United States v. DeCarlo, 434 F.3d 447, 456 (6th Cir. 2006); United States v. Bredimus, 352 F.3d 200, 208 (5th Cir. 2003); United States v. Hersh, 297 F.3d 1233, 1246 (11th Cir. 2002); United States v. Gamache, 156 F.3d 1, 8 (1st Cir. 1998); United States v. Vang, 128 F.3d 1065, 1068 (7th Cir. 1997).
2
United States v. Hersh, 297 F.3d 1233, 1246–47 (11th Cir. 2002); United States v. Root, 296 F.3d 1222, 1231–32 (11th Cir. 2002).

Instruction 64-22 First Element—Interstate Travel

The first element that the government must prove beyond a reasonable doubt is that defendant traveled in interstate commerce (*or* traveled into the United States *or* being a U.S. citizen or alien admitted for permanent residence traveled in foreign commerce), as alleged in the indictment.

"Travel in interstate commerce" means simply movement between one state and another.

Comment

The Second Circuit has recently held that "travel in foreign commerce" does not include travel entirely between two foreign countries. 1

Footnotes
1

United States v. Weingarten, 632 F.3d 60, 65–70 (2d Cir. 2011). In this case, defendant was an American citizen residing in Belgium and later in Israel. He was charged with several violations of section 2423(b) for sexually abusing his daughter. One of the counts related to travel from Israel to the United States, another for travel from the United States to Belgium, and a third for travel between Belgium and Israel. The court of appeals held that since the first count involved sexual conduct in the United States, it clearly was covered, and that the second was covered because it involved travel from the United States to engage in illegal conduct. However, the court reversed the conviction on the third count because it involved only travel between two foreign countries. *Id.*

Instruction 64-23 Second Element—Intent to Engage in Illicit Sexual Conduct

The second element that the government must prove beyond a reasonable doubt is that defendant traveled in interstate commerce with the intent to engage in illicit sexual conduct.

The term "illicit sexual conduct" means [describe allegations in indictment, *e.g.*, a sexual act with a person who had reached the age of twelve years old but had not reached the age of sixteen years old, and who is at least four years younger than the defendant] (*or* any sex act, on account of which anything of value is given to or received by any person).

The government does not have to prove that the defendant actually engaged in illicit sexual conduct, but must prove that he or she traveled with the intent to engage in such conduct. Direct proof of a person's intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time he committed an act with a particular intent. Such direct proof is not required. The ultimate fact of intent, though subjective, may be established by circumstantial evidence, based upon the defendant's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them.

In order to establish this element, it is not necessary for the government to prove that engaging in illicit sexual conduct was the sole purpose for crossing the state line. A person may have several different purposes or motives for such travel, and each may prompt in varying degrees the act of making the journey. The government must prove beyond a reasonable doubt, however, that a significant or motivating purpose of the travel across a state line was to engage in illicit sexual conduct. In other words, that illegal activity must not have been merely incidental to the trip.

Authority

Second Circuit: United States v. Murphy, 942 F.3d 73 (2d Cir. 2019) (quoting **Treatise**).

Comment

Formulating a proper charge on this element requires reference to a number of statutes and the particular allegations in the indictment or bill of particulars. With respect to this element, section 2423(b) provides that defendant must travel "for the purpose of engaging in any illicit sexual conduct with another person." The phrase "illicit sexual conduct" is defined in section 2423(f) as follows:

(1) 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; or (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age. 1

Section 2246 defines a "sexual act" as:

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; 2

Chapter 109A contains the sexual abuse offenses in the United States Code, 3 the elements of which are discussed in Chapter 61, *Sexual Abuse*. Finally, section 1591 defines a commercial sexual act as "any sex act, on account of which anything of value is given to or received by any person." 4

Put simply, the government must allege and prove that the defendant traveled with the intent to engage in sexual activity that, if it had occurred, could have been charged as a federal offense if it had occurred in a federal enclave. Thus, it will be necessary to incorporate a general description of the conduct element of the sexual abuse offense that it is alleged defendant intended to commit. This is relatively simple in cases involving the sexual abuse of children. Thus, if the intended victim was less than twelve years old, then that should be incorporated into the instruction; if the victim was between twelve and sixteen, then the age of the intended victim and

the age difference between the victim and the defendant should be included. The age of consent under federal law is sixteen years old, so under federal law, sex with a person between sixteen and eighteen is chargeable only if the defendant engaged in coercive conduct, such as the use of force or threats or administering some intoxicant to the victim. 5 If the intended victim is older than eighteen, it is not chargeable under section 2423(b), although it might be a violation of some other provision such as the Travel Act 6 or the interstate stalking statute. 7

In *United States v. Murphy*, 7.1 the Second Circuit rejected the government's arguments that this crime does not require that the defendant know that the intended victim was under the age of sixteen. Therefore, a defendant who apparently believed that he was going to have sex with a sixteen-year-old was not guilty of violating § 2423(b).

This element concerns only the defendant's intent, so it is not an element that the intended sexual activity actually occurred or that the minor victim actually existed. Thus, in a sting operation in which a law enforcement officer poses as a minor or the parent of a minor, if the defendant travels with the necessary intent to engage in sexual activity with that minor, it is chargeable under this provision as a completed offense. 8 Further, the District of Columbia Circuit has held that it is not necessary to prove that defendant intended to engage in illegal sexual activity on this interstate trip, as long as the trip was in anticipation of that underlying purpose. 9

Finally, for authority for and discussion of the last paragraph concerning the defense that the sexual activity was not the sole purpose of the travel, see Instruction 64-4, *above*.

Footnotes

1
18 U.S.C. § 2423(f).

2
18 U.S.C. § 2246(2).

3
18 U.S.C. §§ 2241–2245.

4
18 U.S.C. § 1591(c)(1).

5
See United States v. Murphy, 942 F.3d 73 (2d Cir. 2019) (quoting **Treatise**). Note that the Justice Department has previously requested Congress to delete the reference to chapter 109A because the discrepancy between the age of consent in the sexual abuse offenses and the age limit in section 2423 has resulted in the inability to prosecute in some potential cases. *See* H.R. Rep. No. 105-557, at 27–28, *reprinted at* 1998 U.S. Code. Cong. & Admin. News 678, 696 (letter of Ann M. Harkins, Acting Assistant Attorney General).

6
18 U.S.C. § 1952; *see* Chapter 60, *above*.

7
18 U.S.C. § 2261A(1); *see* Chapter 63, *above*.

7.1
942 F.3d 73 (2d Cir. 2019) (quoting **Treatise**).

8
United States v. Langley, 549 F.3d 726, 730 (8th Cir. 2008); United States v. Kelly, 510 F.3d 433, 440–41 (4th Cir. 2007), *cert. denied,* 552 U.S. 1329 (2008); United States v. Tykarsky, 446 F.3d 458, 469 (3d Cir. 2006); United States v. Sims, 428 F.3d 945, 959 (10th Cir. 2005); United States v. Root, 296 F.3d 1222, 1231–32 (11th Cir. 2002).
9
United States v. Laureys, 653 F.3d 27, 33 (D.C. Cir. 2011), *cert. denied*, 565 U.S. 1132, 132 S. Ct. 1053, 181 L. Ed. 2d 773 (2012). In *Laureys*, the defendant had engaged in a discussion with what he believed was an adult (actually a police officer) who was willing to arrange for defendant to engage in sexual conduct with a nine-year-old girl. The two arranged to meet for a beer and possibly to engage in sexual activity with each other with no understanding that the girl would be present. The court of appeals held this was sufficient, reasoning that the trip was "in anticipation of the intended sexual conduct with a minor." *Id.* at 33. *But see id.* at 44 (Brown, J., dissenting) (arguing that this trip was at most "mere preparation" for a future attempt, but not an attempt in itself).

APPENDIX J

¶ 47A.02 Forced Labor (18 U.S.C. § 1589)

Instruction 47A-8 The Indictment and the Statute

The indictment charges the defendant with holding another person in forced labor. The indictment reads as follows:

[Read Indictment]

The indictment charges the defendant with violating section 1589 of Title 18 of the United States Code. That section provides in part:

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

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

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

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

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

shall be [guilty of a crime].

Comment

Section 1589 was originally enacted in 2000 as part of the Trafficking Victims Protection Act (TVPA). 1 It was substantially reorganized in 2008, 2 although the amendment did not make significant substantive changes.

As discussed in the Comment to Instruction 47A-3, *above*, in *United States v. Kozminski*, 3 the Supreme Court interpreted the term "involuntary servitude" in the Thirteenth Amendment and section 1584 to include only the use or threat of physical or legal coercion, and to exclude the use

of psychological coercion. 4 As a result, this created a gap in the law when an individual used purely psychological means to hold another to compulsory service. Congress determined that there was a need

to address the increasingly subtle methods of traffickers who place their victims in modern-day slavery, such as where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence. 5

One option available to Congress was to simply redefine the term "involuntary servitude" in section 1584 to include psychological coercion, an option approved by the Senate. 6 At conference, the legislature chose the House option, passing new section 1589, a more comprehensive provision that includes psychological coercion and also overlaps some of the coverage of section 1584(a). Thus, section 1589 provides broader protections than section 1584(a) as it was limited in *Kozminski*, covering what one court has called "non-violent" and "non-physical" forms of coercion. 7

The 2008 amendment reorganized and clarified the descriptions of the types of coercion that would constitute an offense, added a provision stating that any one or any combination of the coercive methods listed constitutes an offense, and provided more explicit definitions of some of the terms in the statute. 8

Section 1589 has been the subject of several constitutional challenges, all of which have been rejected. First, a vagueness challenge has been rejected by several courts because the statute contains a scienter element that fairly puts potential defendants on notice of what they cannot do. 9 Second, a First Amendment overbreadth challenge was rejected because the statute punishes conduct and not speech. 10 Finally, a Commerce Clause challenge was rejected because the statute is authorized by section 2 of the Thirteenth Amendment, which gives Congress authority " 'to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States,' " and so is constitutional without proof of any effect on interstate commerce. 11

Footnotes

1
Pub. L. No. 106-386, § 112, 114 Stat. 1486 (2000).

2
William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, tit. II, § 222(b)(3), 122 Stat. 5068 (2008). William Wilberforce was a member of the British parliament in the late 18th and early 19th centuries, and was a leading advocate for the abolition of slavery in the United Kingdom.

3
487 U.S. 931, 108 S. Ct. 2751, 101 L. Ed. 2d 788 (1988).

4
Id. at 951-53.

5
H. Rep. No. 106-939, at 101 (Conf. Rep.), *reprinted at* 2000 U.S. Code Cong. & Admin. News

1380, 1392-93.
6
See id. at 100, *reprinted at* 2000 U.S. Code Cong. & Admin. News 1380, 1392.
7
United States v. Calimlim, 538 F.3d 706, 712, 714 (7th Cir. 2008); *see also* United States v. Bradley, 390 F.3d 145, 150 (1st Cir. 2004), *vacated on sentencing grounds,* 545 U.S. 1101 (2005).
8
William Wilberforce Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, tit. II, § 222(b)(3), 122 Stat. 5068 (2008).
9
United States v. Calimlim, 538 F.3d 706, 711 (7th Cir. 2008); United States v. Garcia, 2003 U.S. Dist. LEXIS 22088 (W.D.N.Y. 12/2/2003); *see* United States v. Marcus, 628 F.3d 36, 45 n.12 (2d Cir. 2010) (rejecting vagueness challenge because defendant's conduct was "clearly proscribed by the statute").
10
United States v. Calimlim, 538 F.3d 706, 712 (7th Cir. 2008).
11
United States v. Garcia, 2003 U.S. Dist. LEXIS 22088 (W.D.N.Y. 12/2/2003) (quoting Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968)).

Instruction 47A-9 Elements of the Offense

In order to prove the defendant guilty of holding another person in forced labor, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant obtained (*or* provided) the labor or services of another;

Second, *(choose applicable options)* (1) (*for conduct after Dec. 23, 2008:* that the defendant used force or physical restraint, or a threat of force or physical restraint, against that person or another); *and/or* (2) that the defendant used a threat of serious harm to (*or* seriously harmed) that person or another; *and/or* (3) that the defendant abused or threatened to abuse law or the legal process; *and/or* (4) that the defendant used a scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; and

Third, that the defendant acted knowingly.

***If applicable:* Fourth, that a victim died as a result of defendant's actions (*or* was kidnapped *or* was the victim of aggravated sexual abuse).**

Authority

Second Circuit: United States v. Sabhnani, 539 F. Supp. 2d 617 (E.D.N.Y. 2008), *aff'd*, 599 F.3d 215 (2d Cir. 2010).

Instruction 47A-10 First Element—Obtaining Labor or Services of Another 1

The first element of the offense that the government must prove beyond a reasonable doubt is that the defendant obtained (*or* provided) the labor or services of [the victim].

To "obtain" means to gain or acquire. "Labor" means the expenditure of physical or mental effort. "Services" means conduct or performance that assists or benefits someone.

If appropriate: **The government does not have to prove that [the victim] performed work for the defendant in the economic sense, although that would satisfy this element. All the government must prove is that [the victim] provided labor or services as I just defined them.**

Authority

Second Circuit: United States v. Marcus, 628 F.3d 36 (2d Cir. 2010).

Fourth Circuit: United States v. Udeozor, 515 F.3d 260 (4th Cir. 2008).

Tenth Circuit: United States v. Kaufman, 546 F.3d 1242 (10th Cir. 2008).

Comment

The terms "obtain," "labor," and "services" are sufficiently common that they will not require further definition in the typical cases where the victim is held in compulsory service as a farm worker or domestic. Additional language is included in cases that depart from the ordinary such as *United States v. Kaufman*, 2 where the defendant, a doctor of social work who operated an unlicensed group home for the mentally ill, required his patients to engage in compelled sexual activity, including masturbation, genital shaving, and frequent nudity, much of which was videotaped. The court of appeals made clear that the phrase "labor or services" is not limited to work in the economic sense, and included the compelled activity that the evidence revealed. 3

Footnotes
2
United States v. Kaufman, 546 F.3d 1242 (10th Cir. 2008).
3
Id. at 1260–61.

Instruction 47A-11 Second Element—Force or Restraint

For conduct after Dec. 23, 2008: **The second element of the offense that the government must prove beyond a reasonable doubt is that the defendant used force or physical restraint, or a threat of force or physical restraint against that person or another.**

If applicable: **A threat is a serious statement expressing an intention to inflict harm, at once or in the future, as distinguished from idle or careless talk, exaggeration, or something said in a joking manner. For a statement to be a threat, the statement must have been made under such circumstances that a reasonable person who heard or read the statement would understand it as a serious expression of an intent to cause harm. In addition, the defendant must have made the statement intending it to be a threat, or with the knowledge that the statement would be viewed as a threat.**

Comment

The critical element of a charge under section 1589 is that the defendant used some form of coercion to obtain the services of the victim. As amended in late 2008, the statute defines four types of coercion: (1) force, physical restraint, or the threat of either; (2) serious harm or the threat thereof; (3) the abuse or threatened abuse of the legal process; and (4) the use of a scheme or plan, short of a threat, to induce the victim to believe that serious harm could occur. This instruction covers the first of these; the others are discussed in Instructions 47A-12 through 47A-14, *below*, respectively. The statute, as amended, specifically states that one or any combination of these four forms of coercion is sufficient, so the court should join the relevant instructions to form one element.

Prior to the 2008 amendments to section 1589, the use of force or physical restraint was subsumed in the category of "serious harm." The amendment separated out force and physical restraint as a separate category and then defined "serious harm" to include various forms of physical and nonphysical harm. 1 As discussed in the instructions concerning section 1584, coercion through the use of force or physical restraint is part of the classic definition of "involuntary servitude" in the Thirteenth Amendment and the statutes. 2 In *United States v. Kozminski,* 3 the Supreme Court limited the definition of involuntary servitude to the use of physical or legal coercion, excluding purely psychological coercion. 4 Thus, although section 1584 is arguably not a lesser included offense of section 1589 because the former requires proof of willfulness, which the latter does not, all of the conduct that is covered by this category is also covered under section 1584(a). As most of the recent cases involve more than one form of coercion, it is likely that practice under section 1584(a) will diminish (unless there is evidence of peonage, as well) and that section 1589 will become the predominant avenue for prosecuting cases involving compelled labor.

In pre-amendment cases involving threats of serious harm, there is authority that a standard definition of "threat" should apply, 5 so the instruction incorporates the definition from the offense of threatening the President. Note that there was something of a division of authority in the courts, with most of the courts of appeals holding that the test for determining whether a statement is a "true threat" is an objective one, based on whether a reasonable person who heard or read the statement would perceive it as a threat, or whether a reasonable person making the statement would foresee that the recipient would regard it as a

threat. 6 The Ninth 7 and Tenth Circuits took the position that the defendant must have made the statement intending it to be a threat, or with the knowledge that the statement would be viewed as a threat. 8 In *Elonis v. United States*, 9 the Supreme Court ended this division, rejecting the standard under which a conviction could be based solely on how a communication would be understood by a reasonable person. For a more in-depth discussion of threats, see Instruction 31-4, *above*.

Footnotes
1
See **18 U.S.C. § 1589**(c)(2).
2
See Instruction 47A-3, *above*.
3
487 U.S. 931, 108 S. Ct. 2751, 101 L. Ed. 2d 788 (1988).
4
Id. at 951-53.
5
United States v. Calimlim, 538 F.3d 706, 713 (7th Cir. 2008).
6
See, e.g., United States v. Elonis, 730 F.3d 321, 332 (3d Cir. 2013), *rev'd*, 575 U.S. 723, 135 S.Ct. 2001, 192 L. Ed. 2d 1 (2015); United States v. Jeffries, 692 F.3d 473, 478 (6th Cir. 2012), *cert. denied,* 571 U.S. 817, 134 S. Ct. 59, 187 L. Ed. 2d 25 (2013); United States v. White, 670 F.3d 498, 507–08 (4th Cir. 2012); United States v. Mabie, 663 F.3d 322, 330 (8th Cir. 2011); United States v. Walker, 665 F.3d 212, 226 (1st Cir. 2011); United States v. Dixon, 449 F.3d 194, 200 (1st Cir. 2006); United States v. Zavrel, 384 F.3d 130, 136 (3d Cir. 2004); United States v. Alaboud, 347 F.3d 1293, 1296–97 (11th Cir. 2003); United States v. Morales, 272 F.3d 284, 287 (5th Cir. 2001); United States v. Sovie, 122 F.3d 122, 125 (2d Cir. 1997).
7
United States v. Bagdasarian, 652 F.3d 1113 (9th Cir. 2011).
8
United States v. Heineman, 767 F.3d 970 (10th Cir. 2014); *see also* United States v. Teague, 443 F.3d 1310, 1318–19 (10th Cir. 2006) (given split in authority, use of this instruction cannot be plain error).
9
575 U.S. 723, 135 S.Ct. 2001, 192 L. Ed. 2d 1 (2015).

Instruction 47A-12 Second Element—Threat of Serious Harm 1

The second element of the offense that the government must prove beyond a reasonable doubt is that the defendant used threats of serious harm to (*or* seriously harmed) that person or another.

A threat is a serious statement expressing an intention to inflict harm, at once or in the future, as distinguished from idle or careless talk, exaggeration, or something said in a joking manner. For a statement to be a threat, the statement must have been made under such circumstances that a

reasonable person who heard or read the statement would understand it as a serious expression of an intent to cause harm. In addition, the defendant must have made the statement intending it to be a threat, or with the knowledge that the statement would be viewed as a threat.

The term "serious harm" includes both physical and non-physical types of harm including psychological, financial, or reputational harm. A threat of serious harm includes any threat that is sufficient under all of the surrounding circumstances to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

(*If appropriate:* Some warnings by an employer to an employee can be legitimate. Warnings of legitimate but adverse consequences of an employee's actions, standing alone, are not sufficient to violate the forced labor statute. It is for you to determine whether the statements made by defendant to [the victim] were legitimate warnings, or threats as I just defined that term to you.)

In determining whether the defendant made a threat of serious harm that could reasonably be believed by [the victim], you should consider [the victim's] particular station in life, physical and mental condition, age, education, training, experience, and intelligence. A threat of serious harm must be sufficient in kind or degree to completely overcome the will of an ordinary person having the same general station in life as that of [the victim], causing a reasonable belief that there was no reasonable choice except to provide labor and services to the defendant.

Authority

First Circuit: United States v. Bradley, 390 F.3d 145 (1st Cir. 2004), *vacated on sentencing grounds,* 545 U.S. 1101 (2005).

Ninth Circuit: United States v. Dann, 652 F.3d 1160 (9th Cir. 2011).

Comment

The critical element of a charge under section 1589 is that the defendant used some form of coercion to obtain the services of the victim. As amended in late 2008, the statute defines four types of coercion: (1) force, physical restraint, or the threat of either; (2) serious harm or the threat thereof; (3) the abuse or threatened abuse of the legal process; and (4) the use of a scheme or plan, short of a threat, to induce the victim to believe that serious harm could occur. This instruction covers the second of these; the others are discussed in Instructions 47A-11, *above*, and 47A-13 and 47A-14, *below*, respectively. The statute, as amended, specifically states that one or any combination of these four forms of coercion is sufficient, so the court should join the relevant instructions to form one element.

Prior to the 2008 amendments to section 1589, there was some overlap between this category of

coercion and "involuntary servitude" as defined by the Supreme Court in *United States v. Kozminski* 2 with respect to the use of force and physical restraint. The amendment separated out that physical coercion into new subsection (a)(1) leaving the nonphysical coercion that does not fall within *Kozminsky*'s definition of involuntary servitude in subsection (a)(2) covered in this instruction. The amendment also provided a new definition for "serious harm" as follows:

The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm. 3

As discussed below, this definition basically codifies existing caselaw, so the instruction would be appropriate in cases involving both pre- and post-amendment conduct. 4

The first part of this element is that the defendant threatened the victim. There is authority that a standard definition of "threat" should apply, 5 so the instruction incorporates the definition from the offense of threatening the President. 6 For a discussion of threats, see Instruction 31-4, *above*.

Prior to the 2008 amendment, the term "serious harm" was not defined. The legislative history provided little guidance stating only that "[t]he term 'serious harm' as used in this Act refers to a broad array of harms, including both physical and nonphysical." 7 The recommended charge adopts the language of the instruction in *United States v. Bradley* 8 by equating the seriousness of the harm with its sufficiency to achieve the desired result: obtaining the compelled service of the victim. 9 The 2008 amendment incorporates the same standard in virtually the same language used by the court in *Bradley*. The legislative history to the amendment suggests that the purpose of the new definition is to "more fully capture the imbalance of power between trafficker and victim." 10

In several pre-amendment cases, the defendant has argued that the "threats" were actually legitimate warnings of the adverse consequences of an employee's failure to follow the directions of an employer. There is a qualitative difference, however, between a statement that an employee must conform to the employer's wishes or be fired, and a statement that the failure to follow directions will result in the employee's arrest and deportation in that in the former, the employee always has the option to leave this employer and find other work, while the latter threat is intended to cut off the employee's options. The cases have suggested that the charge on this element should include some reference to this matter, 11 so such language has been included in an optional paragraph, although it leaves the issue mostly to the argument of counsel.

The original legislative history states that whether the threat is of serious harm should be informed by "the individual circumstances of victims that are relevant in determining whether a

particular type or certain degree of harm or coercion is sufficient to maintain or obtain a victim's labor or services, including the age and background of the victims." 12 The recommended instruction adopts language from the charge in *Bradley*, 13 which is similar to language used in the involuntary servitude instruction. 14

Footnotes

2
487 U.S. 931, 108 S. Ct. 2751, 101 L. Ed. 2d 788 (1988).

3
18 U.S.C. § 1589(c)(2).

4
The recommended instruction does include the phrase "psychological, financial, or reputational harm," which was added by the 2008 amendment, but it is clear that these would qualify as serious nonphysical harm under the pre-amendment version. In the typical case of an undocumented domestic worker, threats of financial harm (for example, "your family depends on the money we send them, so if you leave us, they will be destitute") and reputational harm ("if you are deported, you'll return home in shame") are forms of psychological coercion intended to convince the victim that she has no choice but to continue to work for the employer. For example, in United States v. Dann, 652 F.3d 1160 (9th Cir. 2011), the court separately analyzed each type of harm in a case involving a nanny brought to the United States. The court found a threat of financial harm in the defendant's statement that if the nanny left, the nanny would owe the defendant substantial sums even though the nanny had never been paid; a threat of reputational harm in the defendant's statements that if the nanny returned home, the defendant would let it be known that she was terminated for being a thief; and psychological harm in the defendant's threat that if the nanny left, the defendant's children would be placed in foster care. Id. at 1172–73.

5
United States v. Calimlim, 538 F.3d 706, 713 (7th Cir. 2008).

6
See Instruction 31-4, *above*.

7
H. Rep. No. 106-939, at 101 (Conf. Rep.), *reprinted at* 2000 U.S. Code Cong. & Admin. News 1380, 1393.

8
390 F.3d 145 (1st Cir. 2004), *vacated on sentencing grounds,* 545 U.S. 1101 (2005).

9
See id. at 150; *accord* United States v. Dann, 652 F.3d 1160, 1169–70 (9th Cir. 2011) (the threat must be sufficient to "compel someone in [the victim's] circumstances to continue working to avoid that harm").

10
154 Cong. Rec. H10904 (Dec. 12, 2008) (explanatory statement of Reps. Berman and Conyers).

11
See United States v. Calimlim, 538 F.3d 706, 712 (7th Cir. 2008); United States v. Bradley, 390 F.3d 145, 151 (1st Cir. 2004), *vacated on sentencing grounds,* 545 U.S. 1101 (2005).

12
H. Rep. No. 106-939, at 101 (2000) (Conf. Rep.), *reprinted at* 2000 U.S. Code Cong. & Admin. News 1380, 1393.

13

390 F.3d at 150-51.
14
See Instruction 47A-3, *above*.

Instruction 47A-13 Second Element—Abuse of Legal Process

The second element of the offense that the government must prove beyond a reasonable doubt is that the defendant abused or threatened to abuse law or the legal process.

It is an abuse of the legal process to use threats of legal action, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed in order to coerce someone into working against that person's will.

(*If appropriate:* However, not all warnings by an employer to an employee are an abuse of the legal process. Warnings of legitimate but adverse consequences of an employee's actions, standing alone, are not sufficient to violate the forced labor statute. It is for you to determine whether the statements made by defendant to [the victim] were legitimate warnings, or threats to abuse the legal process.)

Authority

Seventh Circuit: United States v. Calimlim, 538 F.3d 706 (7th Cir. 2008).

Comment

The critical element of a charge under section 1589 is that the defendant used some form of coercion to obtain the services of the victim. As amended in late 2008, the statute defines four types of coercion: (1) force, physical restraint, or the threat of either; (2) serious harm or the threat thereof; (3) the abuse or threatened abuse of the legal process; and (4) the use of a scheme or plan, short of a threat, to induce the victim to believe that serious harm could occur. This instruction covers the third of these; the others are discussed in Instructions 47A-11 and 47A-12, *above*, and 47A-14, *below*, respectively. The statute, as amended, specifically states that one or any combination of these four forms of coercion is sufficient, so the court should join the relevant instructions to form one element.

Legal coercion was an incident of slavery, so it was included in the meaning of the term "involuntary servitude" under the Thirteenth Amendment and in section 1584 as defined by the Supreme Court in *United States v. Kozminski.* 1 The phrase "abuse or threatened abuse of law or the legal process" was included in the original version of section 1589, but was not defined. The 2008 amendment provides a new definition for the phrase as follows:

The term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action. 2

As discussed below, this definition basically codifies existing caselaw, so the Instruction would be appropriate in cases involving both pre- and post-amendment conduct.

To satisfy this element, the government must prove some sort of coercion involving the use or threat of the legal process. Thus, in a recent case, the district court dismissed a section 1589 count because there was no coercion involved where a county sheriff gave an inmate an opportunity to work on a private farm in violation of state law. As the court pointed out, the alleged victim was not required to work on the farm, and always had the choice of refusing, and so was not coerced into working on the farm. 3

The typical factual situation that arises under this element is when a domestic servant is brought to the United States under some false pretense, and then forced to work under harsh circumstances enforced by frequent threats that the employer will have the servant arrested and deported. As the Seventh Circuit explained in *United States v. Calimlim*, 4 this is an empty threat because it conveniently omits any mention of the employer's vulnerability to criminal prosecution for employing an undocumented worker under 8 U.S.C. § 1324a, harboring under 8 U.S.C. § 1324, and other provisions of the immigration laws. 5 Thus, even though the threat of arrest and deportation is technically true, it is an abuse of legal process because the purpose of the immigration laws is not to enable employers to retain "secret employees" by the threat of deportation, so using the threat in this manner is an abuse "directed to an end different from [that] envisioned by the law." 6 Language embodying this conclusion is adopted in the 2008 definition quoted above.

Footnotes

1
487 U.S. 931, 108 S. Ct. 2751, 101 L. Ed. 2d 788 (1988).

2
18 U.S.C. § 1589(c)(1).

3
United States v. Peterson, 2008 U.S. Dist. LEXIS 78780 (M.D. Ga. Aug. 22, 2008).

4
538 F.3d 706 (7th Cir. 2008).

5
Id. at 711; *see also* United States v. Garcia, 2003 U.S. Dist. LEXIS 22088 (W.D.N.Y. Dec. 2, 2003).

6
538 F.3d at 713.

Instruction 47A-14 Second Element—Scheme or Plan

The second element of the offense that the government must prove beyond a reasonable doubt is that the defendant used a scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

To satisfy this element, the government must prove that the defendant engaged in a course of behavior intended to cause [the victim] to believe that if he or she did not provide labor or services to the defendant, [the victim], or (e.g., her family) would suffer serious harm.

Authority

Seventh Circuit: United States v. Calimlim, 538 F.3d 706 (7th Cir. 2008).

Comment

The critical element of a charge under section 1589 is that the defendant used some form of coercion to obtain the services of the victim. As amended in late 2008, the statute defines four types of coercion: (1) force, physical restraint, or the threat of either; (2) serious harm or the threat thereof; (3) the abuse or threatened abuse of the legal process; and (4) the use of a scheme or plan, short of a threat, to induce the victim to believe that serious harm could occur. This instruction covers the last of these; the others are discussed in Instructions 47A-11 through 47A-13, *above*, respectively. The statute, as amended, specifically states that one or any combination of these four forms of coercion is sufficient, so the court should join the relevant instructions to form one element.

Unlike the forms of coercion involving nonphysical harm and legal coercion, the 2008 amendment did not provide a separate definition for the "scheme, plan or pattern" provision.

This element expands well beyond "involuntary servitude" as defined by the Supreme Court in *United States v. Kozminski.* 1 Thus, while "involuntary servitude" requires the use or threat of physical or legal coercion, it excludes purely psychological coercion, which this element allows. As stated in the legislative history to the original provision, section 1589 "is intended to address the increasingly subtle methods of traffickers who place their victims in modern-day slavery [including] threatening to harm third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence." 2 The explanatory statement by the sponsors of the 2008 legislation states that "[a] scheme, plan, or pattern intended to inculcate a belief of serious harm may refer to nonviolent and psychological coercion, including but not limited to isolation, denial of sleep and punishments, or preying

on mental illness, infirmity, drug use or addictions (whether pre-existing or developed by the trafficker)." 3

A good example of a scheme that satisfied this element is in *United States v. Calimlim*, 4 where the victim came to the United States at the age of nineteen as a nanny and housekeeper (lying to immigration officials to do so), and remained in the service of the defendants for nineteen years, working sixteen hours a day, seven days a week. She was told that any purchases she made were charged against her wages, which she never received (except for a small amount sent each year to her family back in the Philippines), kept mostly isolated from the outside world, and regularly threatened with deportation. The court of appeals highlighted how the defendants had engaged in a course of conduct that was a scheme under this element because it was all intended to manipulate the victim into believing that she had no choice except to continue to work for the defendants. In addition to the evidence noted above, this included constant reminders to the victim that her family would be impoverished if not for the money sent to them by the defendants (which was considerably less than the victim was led to believe), keeping the victim's passport, and failing to tell her that there was a way to regularize her presence in this country. 5

Footnotes
1
487 U.S. 931, 108 S. Ct. 2751, 101 L. Ed. 2d 788 (1988).
2
H. Rep. No. 106-939, at 101 (Conf. Rep.), *reprinted at* 2000 U.S. Code Cong. & Admin. News 1380, 1392–93.
3
154 Cong. Rec. H10904 (Dec. 12, 2008) (explanatory statement of Reps. Berman and Conyers).
4
538 F.3d 706 (7th Cir. 2008).
5
Id. at 713.

Instruction 47A-15 Third Element—Defendant Acted Knowingly

The third element that the government must prove beyond a reasonable doubt is that the defendant acted knowingly.

An act is done knowingly when it is done purposely and intentionally, as opposed to mistakenly or inadvertently.

To satisfy this element, the government must prove that the defendant acted knowingly by e.g., threatening serious harm to [the victim] in order to obtain [the victim's] labor or services.

Comment

There has been little or no discussion of this element in the cases, so the definition of "knowingly" used throughout this Treatise is adopted here. 1 Note that the scienter element of section 1584(a), the involuntary servitude statute, requires that the defendant act knowingly and willfully, 2 while section 1589 requires only that the defendant act knowingly.

Footnotes
1
See Instruction 3A-1, *above*.
2
See Instruction 47A-5, *above*.

Instruction 47A-16 Fourth Element—Death, Kidnapping, or Sexual Abuse

If applicable: **The fourth element that the government must prove beyond a reasonable doubt is that a victim died as a result of the defendant's actions (*or* was kidnapped *or* was the victim of aggravated sexual abuse).**

If death of victim is alleged: **In order to establish that the defendant's conduct resulted in the death of [the victim], the government must prove beyond a reasonable doubt that but for the defendant's actions, [the victim] would not have died. The government is not required to prove that the defendant intended to cause the death of [the victim].**

If kidnapping or attempted kidnapping is alleged: **In order to satisfy this element, the government must prove that the defendant kidnapped (*or* attempted to kidnap) [name of victim]. For the purpose of this element, kidnapping means to abduct or confine someone without his or her consent.**

If aggravated sexual abuse is alleged: **In order to satisfy this element, the government must prove that the defendant committed (*or* attempted to commit) aggravated sexual abuse of [name of victim]. For the purpose of this element, aggravated sexual abuse means to engage knowingly in a sexual act with another person: *(choose appropriate alternative)* by using force against that person *or* by threatening or placing that person in fear that the person or another would be subjected to death, serious bodily injury, or kidnapping *or* by rendering that person unconscious *or* by administering to that person by force or threat of force or without that person's knowledge a drug or intoxicant that substantially impairs the ability of that person to control his or her conduct *or* when the person is less than twelve years of age. The term "sexual act" means (1) penetration, however slight, of the vulva or anus by the penis; (2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (3) penetration, however slight, of the anal or genital opening of another by a hand, a finger, or by any other object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or (4) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.**

Authority

United States Supreme Court: Burrage v. United States, 571 U.S. 204, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014).

Comment

This instruction has been revised in light of the Supreme Court's decision in *Burrage v. United States.* 1 As no court has yet had the opportunity to discuss the effect of *Burrage* on this element in the context of section 1589, the charge should be treated with caution.

The baseline sentence for a violation of section 1589 is up to 20 years imprisonment. 2 This sentence may be enhanced up to life imprisonment if the victim died, or was kidnapped or was the subject of aggravated sexual abuse. 3 Under the Supreme Court's decision in *Apprendi v. New Jersey*, 4 holding that it is unconstitutional to remove from the jury the assessment of facts, other than a prior conviction, which might take a sentence beyond the unenhanced statutory maximum, 5 it is clear that this enhancement "must be submitted to the jury and found beyond a reasonable doubt." 6

In *Burrage*, which involved a similar enhancement in 21 U.S.C. § 841 when a drug user died as a result of drugs distributed by the defendant, the Court held that the phrase "if death or serious bodily injury results" requires "but for" causation. 7 The Court explained that absent some indication in the statute that the term "results" is intended to have some lesser meaning, it should be defined as imposing "a requirement of actual causality." 8 Quoting from a recent decision concerning retaliation under Title VII of the Civil Rights Act of 1964, the court defined "actual causality" as requiring proof "that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct." 9 The court also made clear that this is a rule of general application, stating that "it is one of the traditional background principles 'against which Congress legislate[s],' ... that a phrase such as 'results from' imposes a requirement of but-for causation." 10 Accordingly, the recommended charge has been revised to make it absolutely clear that "but for" causation is required.

The only court to consider the enhanced penalty for kidnapping the victim, the Fifth Circuit in *United States v. Guidry*, 11 held that the government is not required to prove all of the elements of a violation of section 1201, but that instead, a generic definition of the term should apply. 12 Specifically, the court held that the government is not required to prove that the defendant transported the victim across a state line during the commission of the offense. 13

The term "aggravated sexual abuse" is not defined in the TVPA, and does not have a generally accepted generic definition as does kidnapping. It is, however, the title of the principal federal rape statute, 18 U.S.C. § 2241, and the only court to address the issue in the context of similar enhancement provisions in the involuntary servitude statutes, 18 U.S.C. §§ 1584 and 1589, 14 held that the enhancement should incorporate the definition of aggravated sexual abuse from that statute. 15 Presumably, the holding in

Guidry that proof of the jurisdictional act (in section 2241 cases, that the offense occurred in a federal enclave) is not required. Thus, the recommended instruction adopts the language defining the offense in section 2241 cases, omitting the jurisdictional element. For a complete discussion of section 2241, see Chapter 61, *below*. 16

Footnotes
1
571 U.S. 204, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014).
2
18 U.S.C. § 1589(d).
3
18 U.S.C. § 1589(d).
4
530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).
5
Apprendi, 530 U.S. at 490.
6
Burrage v. United States, 571 U.S. 204, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014).
7
571 U.S. at 218–19.
8
571 U.S. at 211.
9
Burrage, 571 U.S. at 211 (quoting University of Texas Southwestern Medical Center v. Nassar, 570 U.S. 338, 346–47, 133 S. Ct. 2517, 2525, 186 L. Ed. 2d 503, 514 (2013)).
10
Burrage, 571 U.S. at 214 (quoting Univ. of Tex. Southwestern Med. Ctr. v. Nassar, 570 U.S. 338, 345–47, 133 S. Ct. 2517, 2525, 186 L. Ed. 2d 503, 513 (2013)).
11
United States v. Guidry, 456 F.3d 493 (5th Cir. 2006).
12
Guidry, 456 F.3d at 509–11.
13
Id. at 510.
14
See Instruction 47A-7, *above*.
15
United States v. Ramos-Ramos, 2007 U.S. Dist. LEXIS 36452 (W.D. Mich. May 18, 2007).
16
Specifically, Instruction 61-3 (definition of "sexual act"), Instruction 61-4 (scienter), and Instruction 61-5 (the "force or threat" element).

Footnotes for 47A.02[47A-10]

1 Adapted from the charge of Judge Belot in *United States v. Kaufman*, 546 F.3d 1242 (10th Cir. 2008).

Footnotes for 47A.02[47A-12]

1 Adapted from the charge of Judge DiClerico in *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004), *vacated on sentencing grounds,* 545 U.S. 1101 (2005).