

22-5576

No. _____

FILED

AUG 03 2022

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SUPREME COURT U.S.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Thoucharin Ruttanamongkongul — PETITIONER
(Your Name)

vs.

United States Court Of Appeals
For The Eight Circuit — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court Of Appeals For The Eight Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Thoucharin Ruttanamongkongul
(Your Name)

P.O. Box 4000 (FCI Aliceville)
(Address)

Aliceville, AL 35442
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- I. When there was no evidence to show that Petitioner had actual knowledge of the debt women incurred to come to the United States to work as commercial sex workers, and thus agreed to participate in a conspiracy to compel women to engage in commercial sex activity through means of force, threats of force, fraud or coercion, was the evidence at trial sufficient to convict Petitioner for conspiracy to engage in sex trafficking?

- II. When the offense of conviction is not for the substantive offense of sex trafficking but for conspiracy alone, did the district court err to determine that the base offense level applicable to Petitioner under U.S.G.G. § 261.1 was 34 when it imposed a sentence of 142 months?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- I. United States V. Thoucharin Ruttanamongkongul
2019 U.S. Dist. LEXIS 26454
U.S. District court for the district of Minnesota
Judgment entered Feb. 20, 2019.
- II. United States V. Thoucharin Ruttanamongkongul
2022 U.S. Dist. LEXIS 51312
U.S. District court for the district of Minnesota
Judgment entered Mar. 22, 2022
- III. United States V. Pawinee Unpradit, Thoucharin Ruttanamongkongul, Saowapa Thinram, Michael Morris, Waralee Wanless
35 F.4th 615; 2022 U.S. App. LEXIS 13648 (No. 19-3313)
Judgment entered May 20, 2022

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	10
CONCLUSION.....	28

INDEX TO APPENDICES

APPENDIX A	Decision of United States Court Of Appeals For The Eight Circuit (No: 19-3313)
APPENDIX B	A Petition For an extension of time is granted.
APPENDIX C	§ 1591
APPENDIX D	§ 1594
APPENDIX E	§ 2421
APPENDIX F	§ 3553
APPENDIX G	§ 261.1
APPENDIX H	701 Amendment Section 261.1
APPENDIX I	701 Amendment, Sixth, Section 208 of the Adam Walsh Act.
APPENDIX J	§ 2X1.1
APPENDIX K	§ 1B1.3

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

United States V. Barker, 556 F.3d 682, 689 (8th Cir. 2009)	17.
United States V. Gelinas, 299 F.3d 978, 979 (8th Cir. 2002)	17.
United States V. Gibson, 840 F.3d 512, 514 (8th Cir. 2016)	24.
United States V. Jackson, 2018 WL 1316933 (D. South-Carolina, March 14, 2018)	25.
United States V. McFarlane, 64 F.3d 1235, 1236 (8th Cir 1995)	17.
United States V. Waller, 689 F.3d 947, 958 (8th Cir. 2012)	27.
United States V. Wei Lin, 841 F.3d 823 (8th Cir 2016)	8, 21, 22, 24, 25, 26
Gall V. United States, 552 U.S. 38, 49, 128 S.Ct. 586, 596 (2007)	17

STATUTES AND RULES

U.S.C § 1591 (a) or (b)(1)	17, 18, 19, 20, 21, 22, 23, 24, 25, 26
U.S.C § 1594 (a), (b), (c)	18, 20, 21, 23, 24, 25
U.S.C § 2421	4.
U.S.C § 3553	9.

OTHER

U.S.S.G §§ 2G1.1 (a), (b)	7, 19, 20, 23, 24, 25
U.S.S.G §§ 1B1.3	7, 23, 24
U.S.S.G §§ 2X1.1	23, 24
Adam Walsh Act:	19, 25

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☒ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was May 20, 2022.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1591 (a) or 1591 (b)(1)	Appendix C
18 U.S.C. § 1594 (a), (b), (c)	Appendix D
18 U.S.C. § 2421	Appendix E
18 U.S.C. § 3553 (a)	Appendix F

Sentencing Guidelines

U.S.G. § 2G1.1 (a), (b)	Appendix G
U.S.G. § 1B1.3	Appendix K
U.S.G. § 2X1.1	Appendix J.

STATEMENT OF THE CASE

In two separate indictments, the government indicted over 35 people living in various states within the United States, including California, Georgia, Illinois, Texas, Arizona and Minnesota in a single conspiracy. Many of these people did not know each other, and have never met. Prior to Ruttanamongkongul's arrest, she knew none of her co-defendants at trial. The common bond was prostitution and Ruttanamongkongul did not dispute she was engaged in prostitution in violation of 18 U.S.C 2421 (Count-III). She did dispute she acted or agreed to act in a scheme to use force, threats of force, fraud or coercion to compell women to engage in commercial sex activity. And despite the jury's verdict, and the government's frequently repeated references throughout trial to an international sex trafficking "organization", the evidence did not conclusively establish that Ruttanamongkongul joined a conspiracy, knowing its purpose and agreeing to a scheme to compel women to engage in commercial sex by virtue of force, threats of force, fraud or coercion because all of women were over 18 years old and had previously worked as prostitution in Thailand and another Countries. As proved, not all women were under debt infact many were not.

The evidence at trial concerning Ruttanamongkongul disclose the following :

I Agent Tschida, an investigator with the IRS criminal investigations unit identified the phone as Ruttanamongkongul's personal phone, "not a working phone" (Trial transcript, Vol. XII, p. 38). He testified that by the time of her arrest the government knew Ruttanamongkongul had been "out of the business" for quite some time. (Trial transcript, Vol. XII, p. 38). The government was able to connect Ruttanamongkongul to Wilaiwan Phimkhalee (a/k/a Pim), an indicted alleged co-conspirator who government indentified as a "house boss" living in Chicago. (Vol. XII, pp. 153-154). There were approximately 21 emails exchanged over a two year period, 19 of which were escort photos Pim sent to Ruttanamongkongul. Id. pp. 154-164. There was also one email that cooperating defendant Pantila Rodphokha (a/k/a Noon) sent to Ruttanamongkongul (Vol. XIII, p. 164) was blank, containing no written content or attachments. Id. 165; (Vol. XIV, p. 110) The government also presented Ruttanamongkongul's bank record from 2011 thru 2017. Id. pp. 110, 132-138; Ex. 1316-1322. From 2011 thru 2014, she filed joint returns with her husband. Id. pp. 131-134. She filed single in 2015 and 2016. Id. pp. 134-137.

II Pantila Rodphokha (a/k/a Noon). Noon lived and worked in Chicago. (Vol. X, pp. 171, 174). She testified she held debt of some 10-12 women who traveled from Thailand and worked in apartments. In October 2016, she was arrested. Id. p. 170; (Vol. XI, p. 28). She pleaded guilty to conspiracy to commit sex trafficking and money laundering and agreed to cooperate in the hopes of a reduced sentence. (Vol. X, pp. 172-173, 175).

Noon testified she met Ruttanamongkongul "before I came in this business." (Vol. X, p. 202). She specifically testified that she never partnered with Ruttanamongkongul. Id. p. 203. Noon testified after she fully came into the business she barely spoke to Ruttanamongkongul - "[i]t was like we hardly talked. We didn't talk at all." (Vol. XI, p. 47). When asked to describe her relationship to other "house bosses" in Chicago, Noon testified "[m]ost of the time I didn't talk to anyone." Id. p. 204. Noon also testified a working girl under debt named Karn went to Ruttanamongkongul's apartment to work but she "didn't sen[d] Karn" to her house that Karn "asked for making [sic] travel around for work" and that "I'm not sure how she contacted [Ruttanamongkongul]... Id. p. 238. She assumed Karn booked her own schedule with Ruttanamongkongul. Id. This wasn't unusual because girls under debt sometimes asked to move from a

particular apartment, and would do so without objection (Vol. XI, p. 38). Noon further testified "as far as I heard" a woman named Soysuda worked at one of Ruttanamongkongul's apartment while under debt. Id. p. 88.

III

Manuel Guzman. He testified that Ruttanamongkongul asked him to sign leases for apartments at three separate building in Chicago, which he believed were used for prostitution. Id. pp. 103, 111-114. Ruttanamongkongul paid \$200 a month for the service. Id. p. 112, 121. He testified he had little knowledge about the women who stayed in the apartments or what was happening at the apartment day-to-day. Id. p. 122-123. The final lease he signed ended prematurely in July 2015. Id. p. 115; Ex. 831.

Sentencing Hearing

Following the jury's verdict, the case moved to the sentencing phase. The presentence report (PSR), relying on both U.S.S.G §§ 2G1.1 and 1B1.3, comment (n.7), recommended a base offense level of 34. (DOC. 1064, PSR 90). (The PSR also recommended a 2-level victim related adjustment and a 5-level increase for number of victims, for a total offense level of 41. (DOC. 1064,

PSR 92, 103, 136, 140). Ruttanamongkongul objected to the recommended base offense level 34. (Addendum, p. 42). Instead, relying on the plain language of U.S.S.G § 2G1.1(a), and United States v. Wei Lin, 841 F.3d 823 (9th Cir. 2016) (The court in Wei Lin, one of only two case in the Country on point at the time, held that the proper base offense level for a conspiracy conviction under 18 U.S.C. § 1594 (c) was 14, not 34.), she asserted the correct offense level was 14. *Id.* At sentencing on October 8, 2019, the District Court overruled Ruttanamongkongul's objection, concluding that conspiracy should be treated the same as the substantive crime of sex trafficking. (Sent. Tr. pp. 31-32). The District Court adopted the recommendations of the PSR, including the base offense level of 34, and the other adjustments, for a total offense level of 41, with a corresponding sentencing range of 324-405 months. *Id.* pp. 32-34. The government agreed with the Court's determination. *Id.* p. 35.

Ultimately, the government, noting that the number of women under debt who worked at Ruttanamongkongul's apartment was "notably fewer" than was typical of other "house bosses", that "she exited the conspiracy before she was caught", that she proffered honestly with the government before trial, her apology and

support in the community, recommended a sentence comparative to a co-defendant who had pleaded guilty - 176 months. Id. pp 48-51, 54. Using the factors set forth in 18 U.S.C. § 3553(a), the District Court imposed a sentence of 142 months, citing the relatively fewer number of women under debt, her "caring" and "kind" nature and her early departure from the business to start a restaurant almost a year before she was arrested. Id. pp. 55-61

REASONS FOR GRANTING THE PETITION

- I. There was no evidence that Ruttanamongkongul agreed to scheme which involved force, threats of force, fraud or coercion to compell women to engage in sexual activity.

In the responsive brief, the Government, as it did at trial, reverts to a general notion of "criminal enterprise" to peg Ruttanamongkongul as guilty. This court should look to the specifically testimony and exhibits as they relate specifically to her. If the court does this, there can be only one conclusion: the evidence fell short and the jury was left to speculate.

For example, the government points to the testimony of Pantila Rodphokha (a/k/a Noon), it is clear how little she really had to offer on the important issue of what Ruttanamongkongul knew about the women who were purportedly working under debt.

As Noon testified she never partnered with Ruttanamongkongul (Vol. X, pp. 203) and Noon knew who was working under debt doesn't prove Ruttanamongkongul did. Noon was Ma-Tac, in the government's vernacular, she "owned" the women who worked for her. She knew who was under debt and who was not under debt. In fact, Noon testified of the working girls, "some of them were under debt, some of them didn't" (Vol. X, p. 202)

Noon believed the women who traveled to the United States to work as sex workers had a clear expectation they'd be under debt for a while, but they'd get established, pay off the debt and then make a lot of money. (Vol. XI, pp. 52) Noon also testified most of the women worked previously as prostitutes in Thailand and other countries. (Vol. XI, pp. 55).

Futher, Noon testified a working girl under debt name Karn went to Ruttanamongkongul's apartment to work but she "didn't sen[d] Karn..." (Vol. XIV, p. 238) She assumed Karn booked her own schedule with Ruttanamongkongul, which wasn't that unusual because women, even those under debt, would ask to make to different apartments, and did so without objection. Id. (Vol. XI, p. 38). Noon also testified "as far as I heard" a woman name Soysuda (Co-conspirator) worked at one of Ruttanamongkongul's apartment while under debt. (Vol. XI, p. 88): Additionally, the fact that Ruttanamongkongul rented an apartment in Washington D.C. with a woman name Li again says very little about what Ruttanamongkongul knew or did not know about Li's past life under debt. Li like Karn and Soysuda or other women who the Government claimed Ruttanamongkongul "received... under bondage debt" never testified. (Appellee's brief, p. 40). Therefore, the

only evidence the Government introduced to, show that any of women connected to Ruttanamongkongul were under debt was Noon's belief. Moreover, that Ruttanamongkongul may have "picked up the phone for Pim (Co-conspirator) for some period while Pim went to beauty School" say very little about what she knew of the women themselves. (Vol. X, p. 207). Or Ruttanamongkongul may have known about these women. As it was, Pim did not testify, neither of these women testified at trial, which beg the question whether Ruttanamongkongul was aware they may have been under debt. The government presented absolutely no evidence or testimony that Ruttanamongkongul knew or was aware what the "Ma Tac" or others in Thailand were telling women who contracted to the United States about the debt, term of debt, type of sex work they'd perform, any promises made, true or false, what their expectations were or their financial arrangements were. There was also no evidence or testimony to demonstrate their freedom of movement (or lack thereof), their ability to choose their customers within Ruttanamongkongul's apartment. The jury similarly did not hear or present that Ruttanamongkongul sought to isolate women or that she knew of any attempts of others to isolate anyone. There was no evidence that she held debt

herself or held anybody's passport. There was no evidence she threatened or manipulated anyone or was aware that anyone else did. There was absolutely no evidence that Ruttanamongkongul use force, threats of force, fraud or coercion in any way whatsoever. Evidence or testimony of this kind would be crucial to demonstrating Ruttanamongkongul's knowledge, yet there was none. The jury was left to speculate about this very important element.

Separately, the Government mixes up a "P'Noiy" with Ruttanamongkongul. At trial, Noon was asked:

Q. Do you know if Odd [a Thai trafficking] only sent girls to the United States or if this [sic] were other countries he would send them to?

A. As far as I knew, I think he sent to other countries, too.

Q. Do you know which other countries?

A. If I remember correctly, P'Noiy told me that Odd had sent her to Korea before she came to the America.

(Vol. X, pp. 206-207). The "P'Noiy" reference in this section of Noon's testimony was not Ruttanamongkongul. As Noon testified, Ruttanamongkongul was never a "working girl". (Vol. X, p. 204; see also government's clarification with Noon about a "P'Noiy" trafficker in Thailand and

"P'Noiy" [Petitioner] at trial. Vol. XI, p. 22). The Government in its responsive brief was simply wrong to characterize her as the person who communicated with Odd. This was a completely different person. There is no evidence Ruttanamongkongul ever traveled to Korea. And by extension, the government was wrong to say Ruttanamongkongul "was aware of overseas activity by traffickers in the organization." (Appellee's brief, p. 40). There was no evidence presented anywhere at trial that Ruttanamongkongul knew, or was aware her co-defendants at trial, or critically, that she ever contracted or communicated or coordinated for any reason with Odd or anyone in Thailand who government identified as "Ma-Tac". DOJ senior Investigator Steve Baker confirmed all of this. (Vol. XIV, pp. 110-114).

The Government generalizes about the escort photo which Wilaiwan Phimkhalee (Aikla Pim) received and then sent to Ruttanamongkongul, and claims the photo depict women under debt. There are approximately twenty emails that contained escort photo without any text or message, only one photo depicted a person known to be under debt or was under debt. (Vol. XII, p. 160) No evidence was introduced to show Ruttanamongkongul knew this. In addition, the "passport" referenced was actually a "Thailand International Driving Permit."

Id. p. 156. The fact that Pim sent escort photos to Ruttanamongkongul reflect activity associated with prostitution but says nothing about whether Ruttanamongkongul intentionally joined an agreement knowing women were under debt and therefore compelled to engage in commercial sex work. And unlike the electronic devices examined from some of the other trial defendants, Ruttanamongkongul's phone had not a single piece of evidence revealing interaction with sex buyers, sex workers, co-defendants, any arrangement, money transfer, or website associated with commercial sex. Also Mr. Guzmans' testimony falls short and strongly suggest prostitution occurring but does not prove sex trafficking. He failed to describe any interaction or conversation with Ruttanamongkongul, let alone that they spoke about prostitution. (Vol. XI, p. 115). The last he heard Ruttanamongkongul had opened a restaurant. Id.

This was more than a prosecution for prostitution. A critical and objective review of the record shows the government did not prove that Ruttanamongkongul engaged in sex trafficking, which requires more than sitting at the same table as four other defendants she did not know in a highly charged and sensational trial. Even the District Court, in denying Ruttanamongkongul's rule 29 motion at the close of the Government's

case was not so convinced, describing it ruling a "closer call" than the others. (Vol. XV, p. 49)

I understand juries are entitled to draw inference from the evidence admitted at trial, but convictions cannot be based on inference alone. There must be some credible facts connecting the inferences to demonstrate that Ruttanamongkongul knew the women working in her apartments were under debt, especially when (still under debt or after finished theirs debt), as proved, not all women were in fact under debt. Many were not, and there is little to show Ruttanamongkongul knew the difference.

2. To avoid erroneous in determining the base level for conspiracy to be the same as the base level for the substantive crime of sex trafficking.

"The interpretation and applicability of the Guidelines is a question of law that is reviewed de novo."

United States v. Gelinas, 299 F.3d 978, 979 (8th Cir. 2002).

United States v. McFarlane, 64 F.3d 1235, 1236 (8th Cir. 1995).

This Court will "[r]eview a sentence in two part: First, we review for significant procedural error, such as an improper calculation of the advisory sentencing guidelines range; and second, absent significant procedural error, we review for substantive reasonableness"

United States v. Barker, 556 F.3d 682, 689 (8th Cir. 2009).

A District's Court's miscalculation of the applicable Guidelines range constitutes a "significant procedural error"

Gall v. United States, 552 U.S. 38, 49, 128 S. Ct. 586,

596 (2007). It is significant because once this initial calculation is made, it is then used by the district court as the "starting point and the initial benchmark" for determining a proper sentence. *Id.*

Here, the district court erred in calculating Ruttanamongkoul's base offense level. The base offense level of 34 should only apply to defendants who were convicted of the penalty subsection § 1591 (b)(1). Ruttanamongkoul

was not. This miscalculation was significant and this Court should remand for resentencing.

18 U.S.C. § 1594 (c) is the conspiracy provision applicable to the substantive crime of sex trafficking under § 1591 (a). (Appendix G, H), It provides:

(a) Whoever attempts to violate section 1581, 1583, 1584, 1589, 1590, or 1591 shall be punishable in the same manner as a completed violation of that section.

(b) Whoever conspires with another to violate section 1581, 1583, 1589, 1590, or 1592 shall be punished in same manner as a completed violation of such section.

(c) whoever conspires with another to violate section 1591 shall be fined under this title, imprisoned for any term of years or life, or both.

Under the statute, all related sex offense conspiracies are subject to the same penalties as the completed crimes except a conspiracy to violate § 1591. Instead, conspiracy to violate § 1591 is specifically excluded from the same punishment set forth in subsection (a) and (b). In other words, there is no fifteen year mandatory minimum sentence for a conspiracy conviction, whereas the

substantive offense requires one.

The Guidelines read literally, complement the statutory scheme and accommodate the difference. The applicable Guidelines reads :

§ 2G1.1 Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor. (Appendix K)

(a) Base Offense Level :

(1) 34, if the offense of conviction is 18 U.S.C. § 1591 (b)(1) ; or

(2) 14, otherwise.

(b) Specific Offense Characteristic

If (A) subsection (a)(2) applies ; and (B) the offense involved fraud or coercion, increase by 4 levels.

2021 Federal Sentencing Guidelines Manual (Appendix M)

Amendment 701. Chapter Two, Part A, Subpart Three, is amended in the heading by adding at the end " AND OFFENSE RELATED TO REGISTRATION AS A SEX OFFENDER " state :

Sixth, section 208 of Adam Walsh Act add a new mandatory minimum term of imprisonment 15 years under 18 U.S.C. § 1591(b)(1) for sex trafficking of an adult

by force, fraud, or coercion. In response, the amendment provides a new base offense level of 34 in § 2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor) if the offense of conviction is 18 U.S.C. § 1591 (b)(1), but retains a base offense level of 14 for all other offense. In addition, the amendment limits application of the specific offense characteristic at § 2G1.1 (b)(1) that applies if the offense involved fraud or coercion only to those offense receiving a base offense level of 14. Offense under 18 U.S.C. § 1591 (b)(1) necessarily involve fraud and coercion and, therefore, such conduct is built into the heightened base offense level of 34. This limitation thus avoids unwarranted double counting.

U.S.S.G. § 2G1.1 (a) and (b). It stands to reason that when conspiracy to violate § 1591 is not to be punished in the same manner as the substantive offense under § 1591 (C), then the Guideline base offense level of conspiracy should not be the same as the substantive offense. This is further recognized in that § 2G1.1 (b)(1) provides for a 4 level increase in the base offense level where certain offense conduct - fraud and coercion is present.

Wei Lin

In United States v. Wei Lin, 841 F.3d 823 (9th Cir. 2016), the court addressed the proper base offense level for convictions involving conspiracy to commit sex trafficking. The Wei Lin court held that when sentencing for convictions involving conspiracy if the defendant wasn't subject to the 15-year mandatory minimum, the base offense level should be 14, not 34.

In Wei Lin, the defendant pleaded guilty to conspiracy to commit sex trafficking, in violation of 18 U.S.C. § 1594 (C), which carried no mandatory minimum. The district court determined, for purpose of assessing Lin's base offense level, that his underlying conviction was 18 U.S.C. § 1591 (b)(1) "because the conduct involved in the underlying substantive offense would have been punished under § 1591 (b)(1) if Lin had been convicted of the substantive offense." Wei Lin, 841 F.3d at 825-826.

In rejecting a conduct base analysis, the Court wrote: The most straightforward interpretation of U.S.S.G. § 2G1.1 (a)(1) is that a base offense level of 34 applies only when the defendant is actually convicted of an offense subject to the punishment provide in 18 U.S.C.

§ 1591 (b)(1)

Here, a simple matching exercise can be done to determine if the offense of conviction is U.S.C. § 1591 (b)(1) — simply by looking at the judgment. This is not a situation where we must translate from state statutes to federal statutes, or from plain English names of crimes to federal statutes. We are translating from federal statutes to federal statutes. It seems tortured to say that, when we know what federal statutes the defendant was convicted of, and we are asked to determine if the defendant's offense of conviction was a specific federal statutes, we should break those statutes down into their offense conduct and then compare that conduct, as opposed to simply comparing the federal statutes that we have on both sides of the equation.

Here, the District Court, in refusing to employ in Wei Lin, stated:

Well, first of all, with respect to the appro-

priate offense level, really apart from how people have interpreted [Wei Lin], outliers or not outliers, I respectfully state that contrary to the position of the Defendant, the fact that she was convicted to conspiracy as opposed to the substantive count of sex trafficking does not change the offense level, noting the strong objection of the defense counsel.

And for the reasons, you know, with respect to - for the court looking to both not just 18 U.S.C. 1591 and 1594, but also looking at 2G1.1 (a), 1B1.3 and 2X1.1.

And also, generally speaking, the notion that in the presence of a conspiracy, even though the potential maximum sentence doesn't change at all, but the guidelines take this huge jump, it seems that in itself would be contrary to the intent of Congress, no matter what the statutes arguments are on the language with respect to the presence or a absence of the mandatory 15-year minimum.

(Sent. Tr pp. 31-32). Yet, the court failed to fully explain how §§ 1B1.3 and 2X1.1 justify the higher level. First § 1B1.3, the "Relevant Conduct" guideline, deals in general terms with offense conduct and its determination of the base offense level. It does not speak to the determination of the "offense of conviction" which is the relevant question here. Second, it provides more general guidance than does § 2G1.1 (Amendment 701, chapter two, part A, subpart Three, section 2G1.1 state; "Background: This guideline also cover offense under section 1591 of title 18, United States Code,...") which again, more specifically and directly applies to Ruttanamongkongul's case. Indeed, the Wei Lin court was able to reason its result by reference to the exact guidelines provisions without resort to more general provisions. Finally, reliance on commentary rather than the language of the guideline itself is improper. See United States v Gibson, 840 F.3d 512, 514 (8th Cir. 2016) ("When there is a conflict between a guideline and the commentary, it is the guideline that controls and not vice versa.")

The holding of Adam Walsh Act. and Wei Lin is grounded on the fact that no mandatory minimum sentence is required under § 1594(c). See Wei Lin, 841 F.3d at 827 ("The Commission therefore likely did not want the higher base offense level to apply when the defendant was not subject

to § 1591 (b)(1)'s fifteen-year mandatory minimum.").

The focus is on the "offense of conviction", not the offense conduct, which specifically tracks the language of § 261.1

This is consistent with the notion that the base offense level is 34 only applies when the offense of conviction is the substantive offense specifically tied to its punishment in § 1591 (b)(1). The court's decision in Wei Lin is well-reasoned and highly applicable to Puttanamongkol's situation. In the end, "common sense, and the plain language of the guidelines" dictates that the lower base level applies to a conspiracy conviction Wei Lin, 841 F.3d at 827, as well as in Adam Walsh Act.

("the amendment provides a new base offense level of 34 in 261.1 if the offense of conviction is 18 U.S.C. § 1591 (b)(1), but retains a base offense level of 14 for all other offense. In addition, the amendment limits application of the specific offense characteristic at § 261.1 (b)(1) that applies if the offense involved fraud or coercion only to those offense receiving a base offense level of 14. ...

This limitation thus avoids unwarranted double counting").

The one other court to address this specific issue - whether those defendants convicted of conspiracy under § 1594 (C) were "convicted under" § section 1591 (b)(1) such that the higher base offense level should apply, agreed with the rationals set forth in Wei Lin, and

concluded that it should not apply. In United State v. Jackson, 2018 WL 1316933 (D. South Carolina, March 14, 2018) the court wrote :

The legislative history and the history of the Guidelines make clear that the offense level should only be 34 if the "offense of conviction" is § 1591 (b)(1). In a case such as this, where none of the defendants have been convicted of the substantive offense in § 1591 (b)(1) namely, sex trafficking of children or by force, fraud or coercion the base offense level is 14. Indeed, the US Sentencing Commission clearly states that "For all other offense" that are not the substantive § 1591 (b)(1) offense, the base offense level remain 14. USGG. Amend 701, Reason for Amendment, USGG. Ap. C, Vol III, p. 213.

Jackson, 2018 WL 1316933, at *3. Wei Lin and Jackson and plain language of § 2611(a) make clear the District Court in this case should not have treated conspiracy the same as the substantive crime of sex trafficking in determining the base offense level.

Harmless Error

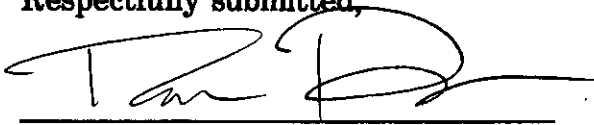
If a court improperly calculates the Sentencing Guidelines range, this Court reviews for harmless error. United States v. Waller, 689 F.3d 947, 958 (8th Cir. 2012).

Here the miscalculation was not harmless. The District Court began with a base offense level 20 levels higher than it should have been. Had the District Court determined the base offense level to be 14, even with enhancements for victim vulnerability (+2) and the presence of fraud or coercion (+4), Ruttanamongkongul's total offense level would have been 23, for a guideline range of 46-57 months. Under these circumstances, this Court cannot simply say that a pronounced sentence of 142 months would have been the same regardless of the guideline calculation, as the District Court said. (Sent. Tr. pp. 69-70). Accordingly, the District Court's error was not harmless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to be "T. D.", written over a horizontal line.

Date: August, 28, 2022