No. 22-

IN THE

Supreme Court of the United States

KENDALL DEMARKO WYSINGER, a/k/a Demarko, a/k/a D,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether The Court Of Appeals Erred By Refusing To Reverse Wysinger's Conviction On Count One For Conspiracy To Violate 18 U.S.C. § 1591(a)(1) (Lawyers Edition 2008 and Cum. Supp. 2020)?

II. Whether The Court Of Appeals Erred By Refusing To Vacate Wysinger's Convictions Under Counts Three And Four For Misinstruction Under 21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020)?

III. Whether The Court Of Appeals Erred By Affirming The District Court's Ruling That Wysinger Was Subject To Mandatory Terms Of Imprisonment For Life On Counts Three And Four Under 21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020)?

STATEMENT OF RELATED CASES

United States v. Wysinger, No. 5:17-cr-00022, U.S. District Court for the Western District of Virginia. Judgment entered August 24, 2020.

United States v. Wysinger, No. 20-4475, U.S. Court of Appeals for the Fourth Circuit. Judgment entered March 30, 2023.

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CITATION TO OPINION BELOW

Filed with this Petition is the published Opinion of the United States Court of Appeals for the Fourth Circuit dated March 30, 2023 ("Opinion"). (Pet. App., 1a-20a), United States v. Wysinger, 64 F.4th 207 (4th Cir. 2023); (Pet. App. 22a), Transcript Excerpt of the United States District Court for the Western District of Virginia, Harrisonburg Division, dated August 24, 2020 (not reported); (Pet. App. 25a-39a), Opinion of the United States District Court for the Western District of Virginia, Harrisonburg Division, dated June 25, 2019, United States v. Wysinger, 2019 U.S. Dist. LEXIS 106320 (W.D. Va. 2019); (Pet. App. 41a-42a), Transcript Excerpt of the United States District Court for the Western District of Virginia, Harrisonburg Division, dated January 11, 2019) (not reported).

JURISDICTIONAL STATEMENT

The United States District Court for the Western District of Virginia assumed subject matter jurisdiction pursuant to 18 U.S.C.S. § 3231 (Lawyers Edition 2013). The district court entered a Final Judgment on September 10, 2020. (C.A.J.A. 1312-1319.)

Wysinger filed a timely Notice of Appeal to the United States Court of Appeals for the Fourth Circuit. The appellate court had jurisdiction to hear Wysinger's appeal pursuant to 28 U.S.C.S. § 1291 (Lawyers Edition 2017).

On March 30, 2023, the United States Court of Appeals for the Fourth Circuit affirmed Wysinger's conviction and sentence. (Pet. App. 1a-69a.) The Opinion took

effect April 21, 2023, when the appeals issued its mandate. (Fourth Cir. Document 70.)

The United States Supreme Court has jurisdiction pursuant to 28 U.S.C.S. § 1254(1) (Lawyers Edition 2017).

STATUTES, RULES AND REGULATIONS

21 U.S.C. § 802(14) (Lawyers Edition 2010)

> (14) The term "isomer" means the optical isomer, except as used in schedule I(c) and schedule II(a)(4). As used in schedule I(c), the term "isomer" means any optical, positional, or geometric isomer. As used in schedule II(a)(4), the term "isomer" means any optical or geometric isomer.

21 U.S.C. § 802(44) (Lawyers Edition 2010)

> The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

21 U.S.C. § 812, Schedule II(a)(4) (Lawyers Edition 2010)

> SCHEDULE II
> (a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis: . . . .
>
> > (4) coca [Coca] leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any

compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph.

21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020)

(b) . . . [A]ny person who violates subsection (a) of this section shall be sentenced as follows:
. . . (C) . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death and serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . . .

18 U.S.C. § 1591(a)(1) (Lawyers Edition 2008 and Cum. Supp. 2020)

(a) Whoever knowingly—
(1) . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; . . .
knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

18 U.S.C. § 1591(e)(2) (Lawyers Edition 2008 and Cum Supp. 2020)

(e) In this section:
(2) The term "coercion" means—
(A) threats of serious harm to or physical restraint against any person;
(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
(C) the abuse or threatened abuse of law or the legal process.

18 U.S.C. § 1594(c) (Lawyers Edition 2008 and Cum. Supp. 2020)

> (c) Whoever conspires with another to violate section 1591 [18 USCS § 1591] shall be fined under this title, imprisoned for any term of years or for life, or both.

VA. CODE ANN. § 54.1-3401 (Lawyers Edition 2019 and Cum. Supp. 2022)

> "*Narcotic Drug*" . . . coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof . . . .").

VA. CODE ANN. § 54.1-3448 (Lawyers Edition 2019 and Cum. Supp. 2022)

> Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine; cocaine or any salt or isomer thereof.

STATEMENT OF THE CASE

Kendall Demarko Wysinger ("Wysinger") petitions for certiorari review by the United States Supreme Court of the court of appeals' published Opinion affirming his convictions and sentence.

Proceedings in the District Court

Wysinger was charged in a six-count Superseding Indictment (C.A.J.A. 20-24.) Sex for hire was the subject of Counts One and Two. In Count One, Wysinger was charged with conspiracy to commit sex trafficking in violation of 18 U.S.C. §§ 1591(a)(1) and 1594(c) (Lawyers Edition 2008 and Cum. Supp. 2020). In Count Two, the grand jury charged Wysinger with interstate transportation for the

purpose of prostitution in violation of 18 U.S.C. § 2421 (Lawyers Edition 2008 and Cum. Supp. 2020). (C.A.J.A. 20-21.)

Counts Three and Four of the Superseding Indictment were drug trafficking charges under the Controlled Substances Act, 21 U.S.C. §§ 841 et seq. (Lawyers Edition 2010 and Cum. Supp. 2020.) In those counts Wysinger was accused of violating 21 U.S.C. § 841(a)(1) (Lawyers Edition 2010 and Cum. Supp. 2020) by distributing a Section II controlled substance, fentanyl, to two different recipients on March 23, 2016, one of whom died while the other lost consciousness temporarily but survived. (C.A.J.A. 21-22.) Finally, Counts Five and Six were obstruction of justice charges under 18 U.S.C. § 1512(c)(1) and 18 U.S.C. § 1512(b)(3) (Lawyers Edition 2008). (C.A.J.A. 22-23.)

Prior to trial, the United States filed an Information Pursuant to 21 U.S.C. § 851 to Establish Fact of Prior Conviction ("Section 851 Information"). (C.A.J.A. 18-19.) The government informed Wysinger that as a result of his two prior convictions in Maryland and Virginia state courts he would be subjected to a mandatory term of life in prison should he be found guilty on Counts Three and Four under the "death or serious bodily injury results" clause of 21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020). (C.A.J.A. 18-19.)

Following a six-day jury trial in Harrisonburg, Wysinger was convicted on Counts One through Five. (C.A.J.A. 1065-66; 1167-68.) He was acquitted on Count Six. Id. The district court subsequently granted Wysinger's motion for judgment of

acquittal on Count Five but denied his bid to set aside the convictions on Counts One, Three and Four. (C.A.J.A. 1190-1204.)

Wysinger's probation officer prepared a Presentence Investigation Report on April 25, 2019, applying the United States Sentencing Guidelines ("Guidelines" or "U.S.S.G."). Both Wysinger and the government objected to the PSR. (C.A.J.A. 1322-52.) On August 17, 2010, the probation officer filed a revised Presentence Investigation Report ("PSR"), which included an Addendum addressing the parties' objections. (C.A.J.A. 1353-89.) In the PSR, the probation officer concluded Wysinger's prior convictions in Maryland and Virginia state courts were "felony drug offenses" as defined in the Controlled Substances Act. In the probation officer's assessment, Wysinger was subject to mandatory terms of life in prison under 21 U.S.C. §§ 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020) and 851(a)(1) (Lawyers Edition 2016) on Counts Three and Four. (C.A.J.A. 56; 105.)

The trial court held a sentencing hearing on August 24, 2020. (C.A.J.A. 1232-1301.) Overruling defense objections, the district court found Wysinger's conviction in 2008 by the Circuit Court of Prince William County, Virginia, for possession with intent to distribute a Schedule I/II substance exposed him to a statutory imprisonment term of life on Counts Three and Four and rendered him a career offender under the Guidelines. (C.A.J.A. 1259; 1262.)

The district court sentenced Wysinger to a total of three life terms on Counts One, Three, and Four and another 120 months on Count Two. All of these terms

run concurrently, the district court ruled. (C.A.J.A. 1291-93.) On September 10, 2020, the court memorialized the concurrent sentences in a final Judgment. (C.A.J.A. 1312-19.) Wysinger noted an appeal.

Proceedings in the Court of Appeals

Among the arguments Wysinger advanced on appeal were the following:

- His conviction on Count One for conspiracy to violate 18 U.S.C. § 1591(a)(1) (Lawyers Edition 2008 and Cum. Supp. 2020) must be reversed for evidentiary insufficiency and instructional error.

- His convictions on Count Three and Four for distribution of fentanyl which resulted in serious bodily injury and death must be reversed for instructional error.

- The district court erred by ruling that Wysinger was subject to mandatory terms of imprisonment for life on Counts Three and Four under 21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020).

Rejecting each of these challenges to Wysinger's convictions and three life sentences, the court of appeals affirmed the district court in a published Opinion on March 30, 2023. (Pet. App. 1a-69a.); United States v. Wysinger, 64 F.4th 207 (4th Cir. 2023).

The focus of this Petition to the United States Supreme Court is Wysinger's convictions and sentences on Count One, Three, and Four.

Statement of Material Facts

1. Wysinger and Leslee Garza Live Together in Inwood, West Virginia in 2014.

Wysinger was a heroin dealer. Some of Wysinger's regular customers were female prostitutes who worked across a tri-state area encompassing the northern reaches of the Virginia's Shenandoah Valley, the eastern panhandle of West Virginia, and western Maryland.

Wysinger lived in the small town of Inwood, West Virginia, near the border with northwest Virginia. Residing with Wysinger at times during 2014 was Leslee ("Liz") Garza, the mother of his infant daughter. (C.A.J.A. 173-74; 217-19.)[1]

2. Maddison Jump and Cazmarin Sullivan Move In and Out of Wysinger's Home During 2014-2015.

Maddison Jump ("Jump") and Cazmarin ("CiCi") Sullivan ("Sullivan") were heroin addicts who cycled in and out of jails in Virginia and Maryland. (C.A.J.A. 222.) When not incarcerated, Jump and Sullivan financed their expensive addictions by turning tricks. They purchased heroin from Wysinger and other dealers with their illicit earnings. (C.A.J.A. 171-75; 195-96; 220-223.)

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[1] The court of appeals stated in its Opinion, "Garza–the mother of Wysinger's child–was not available to testify at trial because she died from a fentanyl overdose allegedly supplied by Wysinger." Wysinger, 64 F.4th at 213; (Pet. App. 8a.). No competent evidence supports the court of appeals' dictum. Tracked to its lair, this false report that Wysinger killed Garza was derived from hearsay remarks by an unidentified inmate whom the government never called to testify at either trial or sentencing. (C.A.J.A. 1361-62.)

Jump and Sullivan solicited gentlemen callers through advertisements they posted in the "adult entertainment" section of Backpage.com ("Backpage"), a website largely dedicated to facilitating hookups between female sex workers and their male clients, or "Johns." (C.A.J.A. 165-72.)

Jump and Sullivan were house guests of Wysinger in his Inwood, West Virginia townhome for weeks at a time between the summer 2014 and August 2015. (C.A.J.A. 218-19.) Throughout their intermittent residencies there, Jump and Sullivan purchased heroin from Wysinger and engaged in prostitution to fund their acquisitions of the drug. (C.A.J.A. 177-79.)

In addition to serving as one of their principal sources of heroin, Wysinger assisted the two ladies in their prostitution enterprises by providing them access to credit cards and transportation. Neither Jump nor Sullivan had a valid credit card. This lack of access to credit impeded their marketing campaigns. Backpage did not accept cash payments for running "adult" advertisements. When asked by Jump and Sullivan, Wysinger agreed to use his credit card to post advertisements for them on Backpage. Garza similarly lent the women assistance by posting advertisements for their services through either her credit card or Wysinger's. (C.A.J.A. 177-79.)

Neither Jump nor Sullivan had means of transportation. They repeatedly turned to Wysinger for rides to "dates" with Johns. Wysinger charged the women a

fee for each trip. On occasion, Wysinger delegated these driving assignments to an "old guy" named "Bill" who did odd jobs for him. (C.A.J.A. 177; 183-85.)

3. Sullivan's Overdose in March 2016.

While locked up for several months in early 2016, Sullivan befriended a cellmate named Tara McBrearty ("McBrearty"). On March 26, 2016, having just been released from jail, Sullivan had a reunion with McBrearty in Virginia. The pair within a day of their release from custody embarked on a search for heroin. (C.A.J.A. 739-44.) When their efforts to find a supplier in Virginia failed, Sullivan called Wysinger. He drove the two women to his home in Inwood. Sullivan and McBrearty waited in Wysinger's car while he went inside the house. Wysinger then returned to the car and drove them to a Motel 6 near Winchester. (C.A.J.A. 746-49.) Enroute to Motel 6, Wysinger cautioned the women ". . . to be careful, that, you know, people were dying and everything and not to overdo it." (C.A.J.A. 749-50; 770-771.)

Sullivan laid out two lines of brown powder in the Winchester motel room. She and McBrearty each snorted a line. Sullivan and Wysinger then prepared to have sex while McBrearty sat on the balcony outside their room. She quickly passed out. (C.A.J.A. 751-52; 796.)

McBrearty awoke in a semi-comatose state to discover Wysinger gone and Sullivan unconscious on the motel room bed. Realizing she and Sullivan had overdosed on the brown powder they snorted, McBrearty dialed 911 for lifesaving

assistance. Emergency medical technicians arrived to find McBrearty disoriented and Sullivan dead. (C.A.J.A. 752-56; 794-814.)

4. Sonja Feiser Travels with Wysinger to Ocean City in 2016.

Sonja Feiser was a West Virginia prostitute who plied her trade along the eastern seaboard for years before she met Appellant. Wysinger called upon her in response to one of her advertisements on Backpage, but never became her pimp. (C.A.J.A. 561-62.) But he was one of Feiser's regular Johns, paying her in cash and drugs. Feiser in 2016 bought heroin and cocaine from Wysinger on a succession of dates. Feiser testified their relationship was at once commercial and amicable. (C.A.J.A. 548-49; 555; 560-62.)

Feiser accompanied Wysinger on a sojourn to Ocean City in May of 2016. She decided to go on several dates with Johns there in order to generate revenue with which to keep purchasing heroin from Wysinger. To promote herself in Ocean City, Feiser ran advertisements on Backpage. Wysinger posted these Backpage advertisements for her because Feiser's lack of credit worthiness prevented her from posting herself. (C.A.J.A. 570; 588.)

ARGUMENT

I. THE COURT OF APPEALS ERRED BY REFUSING TO REVERSE WYSINGER'S CONVICTION ON COUNT ONE FOR CONSPIRACY TO VIOLATE 18 U.S.C. 1591(a)(1) (LAWYERS EDITION 2008 AND CUM. SUPP. 2020).

A. The Jury's Verdict On Count One Is Unsupported By Sufficient Evidence.

Wysinger's conspiracy conviction on Count One must be reversed because insufficient evidence supports the jury's finding that he conspired to engage in commercial sex trafficking in violation of 18 U.S.C. §§ 1591(a)(1) and 1594(c) (Lawyers Edition 2008 and Cum. Supp. 2020). The government failed to prove beyond a reasonable doubt that an agreement existed between Wysinger and his supposed co-conspirator, Garza, to coerce or force alleged victims into commercial sex acts. Prosecutors, moreover, also failed to prove Wysinger or Garza used or attempted to use coercive "means" against the alleged victims. 18 U.S.C. § 1591(a)(1) (Lawyers Edition 2008 and Cum. Supp. 2020). Force or coercion is necessary for a conviction under 18 U.S.C. § 1594(c) (Lawyers Edition 2008 and Cum. Supp. 2020).

Section 1594(c) criminalizes conspiracies to violate 18 U.S.C. § 1591(a)(1) (Lawyers Edition 2008 and Cum. Supp. 2020), which provides in relevant part,

> (a) Whoever knowingly—
> (1) . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; . . .

> knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

18 U.S.C. § 1591(a)(1) (Lawyers Edition 2008 and Cum. Supp. 2020).

Subsection (e) of this statute defines certain essential terms, including "coercion."

> (2) The term "coercion" means—
> (A) threats of serious harm to or physical restraint against any person;
> (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
> (C) the abuse or threatened abuse of law or the legal process.

18 U.S.C. § 1591(e)(2) (Lawyers Edition 2008 and Cum. Supp. 2020).

Taken together, the statutes just quoted do *not* criminalize conspiracies to engage in interstate prostitution which involve willing sex workers. As the government emphasized in the court below, commercial sex trafficking within the ambit of these specific statutes differs fundamentally from mere prostitution. (C.A.J.A. 1082-83.) The crime of prostitution entails a voluntary sale of sexual favors. Commercial sex trafficking proscribed by Sections 1591(a)(1) and 1594(c) (Lawyers Edition 2008 and Cum. Supp. 2020), in contrast, is necessarily involuntary. By definition, commercial sex acts result from "fraud," "force" or "coercion." 18 U.S.C. § 1591(a) (Lawyers Edition 2008 and Cum. Supp. 2020).

Applied here, these criminal statutes required the government to prove Wysinger and another person (Garza) agreed to recruit, entice or maintain the victims identified in Count One *and* that ". . . means of force, threats of force, fraud, coercion . . ." would be used to ". . . cause the person to engage in a commercial sex act." 18 U.S.C. § 1591(a)(1) (Lawyers Edition 2008 and Cum. Supp. 2020). See United States v. Maynes, 880 F.3d 110, 113 (4th Cir. 2018).

The district court erred as a matter of law by denying Wysinger's Rule 29 motion for judgment of acquittal on Count One. (C.A.J.A. 1048-49; 1170-72; 1192-93.) The government failed to prove the essential elements of conspiracy to conduct commercial sex trafficking.

The government did not prove Wysinger and Garza formed the specific type of conspiratorial agreement necessary for a conviction under 18 U.S.C. § 1591(a)(1) and 1594(c) (Lawyers Edition 2008 and Cum. Supp. 2020). Drawing every inference in favor of the United States, prosecutors at most proved Wysinger and Garza tacitly agreed to market certain alleged victims as prostitutes on Backpage and otherwise aid and abet their ventures as sex workers in Virginia and adjoining states. This is insufficient to render Wysinger culpable. The federal statutes at issue in Count One do not criminalize aiding and abetting interstate prostitution or conspiracy to commit *voluntary* prostitution. Sections 1591(a)(1) and 1594(c) by their express terms reach and punish only conspiracies to engage in commercial sex trafficking through the "means" Congress specified: ". . . force, threats of force,

fraud, coercion . . . ." 18 U.S.C. § 1591(a)(1) (Lawyers Edition 2008 and Cum. Supp. 2020).

The government's theory in both courts below was that Wysinger and Garza agreed to use threats of "serious harm" and thus "coercion" as the "means" to make their victims profitable prostitutes. Garza contributed to this conspiracy to coerce others into commercial sex activities by posting ads on Backpage, the government claimed. (C.A.J.A. 1112-1113; 1178.) Testimony by the alleged victims, however, did not support a finding by the jury that Wysinger or Garza threatened them with violence. Jump testified she considered Garza her "friend." (C.A.J.A. 173.) While Jump did not like Wysinger, she moved in and out of his West Virginia residence freely five times in the course of a year. (C.A.J.A. 204.) Wysinger never struck Jump. At no point did Jump even fear Wysinger might strike her. (C.A.J.A. 204.)

Feiser, for her part, testified Wysinger was her John rather than her pimp. (C.A.J.A. 561-62.) Wysinger gave Feiser money and drugs in exchange for sex. Feiser was unequivocal that Wysinger never harmed or threatened her. (C.A.J.A. 587.) Theirs was a commercial relationship tinged with friendship.

Despite the absence of any evidence of fraud or violence by Wysinger against the females named in Count One, the government below maintained that sufficient evidence existed to convict Wysinger because he and Garza conspired to use "coercion" as that term is defined in 18 U.S.C. § 1591(e)(2) (Lawyers Edition 2008 and Cum. Supp. 2020). The object of this conspiracy, according to prosecutors, was

to coerce the females into prostitution by exploiting their pre-existing addictions to heroin. (C.A.J.A. 1029-1032; 1039-50; 1114.) Wysinger's contributions to the charged conspiracy included selling heroin to the women, driving them to "outcalls" with Johns, and posting advertisements for their services on Backpage. Prosecutors emphasized that Garza, as co-conspirator, supported the commercial sex trafficking scheme by also posting Backpage advertisements. (C.A.J.A. 1112-1113; 1178.) The district court, rejecting Wysinger's renewed Rule 29 motion, held that Garza's placement of advertisements on Backpage sufficed to support his conspiracy conviction. (C.A.J.A. 1048-49; 1170-72.)

None of these activities by Wysinger and Garza qualifies as "coercion" within the meaning of Section 1591(e)(2). Equally important, the putative conspirators' efforts to promote prostitution, even considered in combination, do not meet the government's burden of proving an agreement existed between Wysinger and Garza to engage in *coercive* commercial sex trafficking. Without proof beyond a reasonable doubt of an agreement to commit commercial sex trafficking through "means" of "coercion," "force," or "fraud" as Congress uses those terms in Sections 1591(a)(1) and 1591(e)(2) the district court should have acquitted Wysinger or Count One pursuant to Rule 29.

The government convinced the courts below that because he repeatedly sold heroin to heavily addicted prostitutes Wysinger necessarily used "coercion" as defined in 18 U.S.C. § 1591(e)(2) (Lawyers Edition 2008 and Cum. Supp. 2020). In

the prosecutor's words, ". . . [W]ithholding of heroin is coercive to people in that situation." (C.A.J.A. 1030.) The trial judge asked in response to this argument whether every pimp who doubles as a drug supplier to prostitutes engages in "coercion" sufficient to satisfy Sections 1591(a)(1) and (e)(2).

> The Court. Does that mean if you have a pimp who's also the drug dealer that you always meet the requirements of the statute?
>
> Prosecutor. Yes, Your Honor.

(C.A.J.A. 1030.)

The government pointed below to two opinions as precedent for the specious proposition that a pimp who sells drugs to prostitutes necessarily "coerces" them, United States v. Mack, 808 F.3d 1074 (6th Cir. 2015) (J.A. 1031) and United States v. Fields, 625 Fed. Appx. 949 (11th Cir. 2015) (unpublished) (C.A.J.A. 1039). Neither decision lends credence to the government's claim that Wysinger coerced women into prostitution.

In Mack, 808 F.3d at 1074, the defendant used physical violence and threats of harm to terrorize three women into prostitution. In affirming the defendant's conviction under 18 U.S.C. § 1591 (Lawyers Edition 2008 and Cum. Supp. 2020), the Sixth Circuit pointed to ". . . abundant[,] testimony depicting the coercive and, at times, physically abusive atmosphere in which the victims felt compelled to prostitute themselves." Mack, 808 F.3d at 1081. Evidence of coercive violence included testimony by one victim, MB, that

> . . . defendant struck her and told her he was not afraid to "chop a bitch up and have no remorse after." SW similarly testified that she saw defendant almost punch another prostitute, and scream, "Bitch, you don't know what mean is[.]" When SW tried to intervene, defendant said "Do you want some, too?" Taken together, this evidence was sufficient for a reasonable jury to conclude that defendant used "force [or] threats of force" to cause CB, SW, and MB to engage in commercial sex acts.

Mack, 808 F.3d at 1082-83.

While the Mack Court also discussed the defendant's steady supply of narcotics to the prostitutes whose habits he supported, the court emphasized that the defendant did so under false pretenses. The defendant engaged in fraud and trickery in order to lure the women into his control as their creditor.

> The evidence adduced at trial showed that defendant coerced the victims into prostituting themselves by initially supplying them with drugs under the pretense that they were free. When he suddenly cut them off and demanded payment, he exploited their addiction, which his previous supply of free drugs had cultivated.

Mack, 808 F.3d at 1081.

The case at bar is not at all like Mack. Unlike the defendant in Mack, Wysinger did not use or threaten violence against prostitutes in his clutches. While he sold them drugs, Wysinger did not use fraudulent means by misrepresenting that the narcotics were free. Wysinger charged the prostitutes the same, relatively high prices others paid him for drugs. (C.A.J.A. 196.)

Although Wysinger offered the women heroin, he did not coerce or trick them into indebtedness. He also did not cultivate their addiction. These inveterate

prostitutes were heroin addicts when they met Wysinger. (C.A.J.A. 162; 167-170; 548-550.)

Wysinger never prevented his prostitute customers from buying heroin elsewhere. Jump, for example, purchased heroin from a dealer named "Rick" while she lived with Wysinger. (C.A.J.A. 195.) Feiser too had multiple heroin suppliers during the same period she was Wysinger's customer. (C.A.J.A. 564-65.)

The prostitutes' freedom to buy from drug dealers other than the defendant similarly distinguishes the instant appeal from Fields, 625 Fed. Appx. at 949, the unpublished Eleventh Circuit opinion cited by the government below. The defendant there, Fields, "substantially increased" the drug addictions of several females who turned to prostitution to feed their heightened hunger for opioid pills. Fields, 625 Fed. Appx. 952. Fields then isolated his victims and effectively prevented them from purchasing pills from other suppliers. Id. ("Fields isolated the victims to preclude them from obtaining drugs elsewhere and to render them dependent on him and subservient to his demands.").

It is certainly true that Wysinger and Garza posted advertisements for the women in the "adults" section of Backpage. But no rational juror could find the posted advertisements evinced a conspiratorial agreement between Garza and Wysinger to coerce the featured females into selling themselves to Johns. There was nothing coercive about the advertisements. The seasoned prostitutes posted

themselves on Backpage years before they first dealt with Wysinger. (C.A.J.A. 165-172; 548-550; 566-67.)

The prostitutes *solicited* Wysinger and Garza to post advertisements on Backpage. Jump and Sullivan recruited Wysinger and Garza to carry out the ministerial task of placing the ads only because the posting process required a credit card. Neither female had a credit card, just as neither had a means of transportation to their innumerable "outcalls" with Johns. Wysinger and Garza did the women "a favor" by placing the advertisements on Backpage with Wysinger's credit card, Jump testified. (C.A.J.A. 176-177.)

Feiser, who had worked as a prostitute in New York City and elsewhere before she met Wysinger, usually handled her own Backpage posting. (C.A.J.A. 567.) Wysinger posted an advertisement for Feiser's services when they spent a few days together in Ocean City, Maryland. But Wysinger hardly coerced her into running that advertisement. Feiser's lack of credit was an obstacle to posting her own ads on Backpage. (C.A.J.A. 570.) Feiser *directed* Wysinger to serve as her posting agent while the couple was in Ocean City.

> Q. And you have not thought of him as a pimp during the time that you were dealing with him?
>
> A. No.
>
> Q. I believe you did indicate you had asked him to put some pictures on Backpage?
>
> A. Yes.

Q. And he did that for you?

A. Yes.

Q. Did he pay for, I guess, a Backpage subscription to be able to put your pictures up?

A. Yes.

Q. That was at your direction?

A. Uh-huh.

Q. He didn't ask you for the pictures?

A. No.

Q. You just told him, Can you put some stuff up on Backpage?

A. Yes.

(C.A.J.A. 588.)

No rational jury, then, could find Wysinger's relationship with the women identified in the indictment was coercive rather than voluntary and collaborative. Undoubtedly, these heroin addicts would have experienced sickening withdrawal symptoms if they had ceased replenishing their supplies of the drug. But the women were always free to purchase – and indeed made frequent purchases – from heroin dealers other than Wysinger. Their purchases from the defendant were based on convenience rather than coercion. (C.A.J.A. 196.)

Even assuming, arguendo, reasonable jurors could infer a coercive intent on the part of Wysinger, they could not reasonably conclude Garza shared that mens

rea. No evidence exists Garza agreed to place advertisements on Backpage as part of a scheme to coerce the subjects of those advertisements. Garza certainly must have known the women who asked her to post ads for them on Backpage were seeking to attract paying sex clients. But 18 U.S.C. §§ 1591(a) and 1594(c) (Lawyers Edition 2008 and Cum. Supp. 2020) do not criminalize conspiracy to engage in prostitution standing alone, as discussed supra. The government presented no evidence Garza understood Wysinger's sales of heroin to the women somehow amounted to "coercion" or that the postings she and Wysinger made for them on Backpage were part of a scheme to force these long term prostitutes into continuing to follow their seedy vocation.

In sum, the jury's verdict on Count One must be vacated for insufficient evidence of a conspiratorial agreement between Wysinger and at least one other person to coerce the alleged victims into commercial sex trafficking.

B. Wysinger's Conviction On Count One Must Be Reversed For Instructional Error.

In addition to its lack of evidentiary support, Wysinger's conviction on Count One is reversible for instructional error. By misstating the mens rea element of 18 U.S.C. § 1591 (Lawyers Edition 2008 and Cum. Supp. 2020), the trial judge improperly relieved the government of having to prove the advertisements Garza and Wysinger made on Backpage were *knowingly* coercive within the meaning of Subsection(e)(2) of the statute.

The district court's instructional error was plain. The mens rea element of Section 1591(a)(1) requires the government to prove the defendant "knowingly" took any of several affirmative steps

> . . . knowing, or, *except where the act constituting the violation of paragraph (1) is advertising*, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act . . . .

18 U.S.C. § 1591(a)(1) [emphasis added] (Lawyers Edition 2008 and Cum. Supp. 2020).

When the government seeks to rely upon "advertising" activity by a defendant or his co-conspirator as a basis for conviction under 18 U.S.C. §§ 1591(a)(1) and 1594(c) (Lawyers Edition 2008 and Cum. Supp. 2020), a heightened mens rea standard applies. Prosecutors must prove the conspirators knew the victim whose services they advertised would be forced through threats of harm or otherwise coerced into serving as a sex worker. Proof that members of the conspiracy acted with "reckless disregard" of the fact that the advertised victim would be coerced into prostitution in insufficient. Conspirators must market their sex worker with actual knowledge that any commercial sex acts she performs for Johns lured by the advertisement shall be the product of "coercion." 18 U.S.C. § 1591(a)(1) (Lawyers Edition 2008 and Cum. Supp. 2020).

This stricter, actual knowledge requirement applies to the evidence of advertising in the case at bar rather than the less onerous "reckless disregard"

mens rea element. Wysinger was charged under 18 U.S.C. § 1591(a)(1) (Lawyers Edition 2008 and Cum. Supp. 2020) by, inter alia, advertising victims' services on Backpage, as the following excerpt from Count One makes clear.

> b. The defendant, KENDALL DEMARKO WYSINGER, and his coconspirators posted photographs of females on websites advertising commercial sex to solicit customers to engage in sex acts with those females.

(C.A.J.A. 21) [emphasis in original].

In its instructions on Count One, quoted in part below, the trial court erroneously failed to distinguish the mens rea requirement for violations of Section 1591(a)(1) involving advertising from the less stringent standard for violations based on affirmative acts such as recruitment, maintenance and transportation. The court instructed jurors that a defendant acts with the requisite mens rea to warrant conviction when he

> . . . knows or recklessly disregards the fact that force, threats of force, fraud, or coercion, or any combination of such means, would be used to cause the person to engage in a commercial sex act; . . . .

(C.A.J.A. 1135.)

The trial court's misstatement of the mens rea element with respect to advertising constituted plain and prejudicial error under Rule 52(b) of the Federal Rules of Criminal Procedure. See United States v. Olano, 507 U.S. 725, 732-34 (1993) (establishing four-pronged test for plain error). The instruction plainly was inconsistent with the express terms of 18 U.S.C. § 1591(a)(1) (Lawyers Edition 2008

and Cum. Supp. 2020). The misinstruction just as plainly could have affected the outcome at trial. Evidence of the Backpage advertisements Garza and Wysinger placed figured prominently in the government's case in chief. (C.A.J.A. 175-79; 184; 548-50; 567; 570; 588; 1112-1113; 1178.) Prosecutors made much of this advertising activity in their closing argument to the jury (C.A.J.A. 1088-89; 1112-1113) and in their opposition to Wysinger's Rule 29 motion. (C.A.J.A. 1178.) Accepting the government's argument, the district court denied Wysinger's Rule 29 motion because it found Garza's postings on Backpage for Jump and Sullivan amounted to sufficient evidence of a conspiratorial agreement. (C.A.J.A. 1192-93.)

Jurors should have been instructed that in forming the necessary agreement to advertise the alleged victims, both Garza and Wysinger must have actually known the ladies were laboring under "coercion." Failure to instruct jurors that both Garza and Wysinger must have acted with actual knowledge that the females featured in the ads were victims of "coercion" when they performed commercial sex acts substantially prejudiced Wysinger and led inexorably to a conviction for which he was sentenced to lifetime incarceration. See Olano, 570 U.S. at 734 (explaining substantial prejudice prong of plain error test).

The Court should exercise its discretion under the fourth prong of Olano to notice this substantially prejudicial plain error and reverse Wysinger's conviction on Count One. Olano, 570 U.S. at 734 (explaining that whether appellate court takes notice of a plain error is a matter of discretion under fourth prong of the inquiry).

II. THE COURT OF APPEALS ERRED BY REFUSING TO VACATE WYSINGER'S CONVICTIONS UNDER COUNTS THREE AND FOUR FOR MISINSTRUCTION UNDER 21 U.S.C. § 841(b)(1)(C) (LAWYERS EDITION 2010 AND CUM. SUPP. 2020).

In Counts Three and Four, the grand jury charged Wysinger with both possession with intent to distribute fentanyl to two women (McBrearty and Sullivan) on March 23, 2016, and actual distribution of the same controlled substance on the same date to the same two females. (C.A.J.A. 21-22.) Wysinger submitted an instruction that informed jurors they must find he actually distributed fentanyl to the two individuals identified in Counts Three and Four in order to return a verdict of guilty. (C.A.J.A. 60-63.)

The United States argued that Wysinger's proposed instruction was deficient because it was limited to distribution. Prosecutors successfully urged the court to permit jurors to find him guilty on an alternative, possession with intent to distribute theory. The United States objected in writing to Wysinger's proposed instructions on Counts Three and Four:

> *Defense Proposed Instructions–Counts 3 and 4:* The government strongly objects to these instructions; they omit possession with intent to distribute as a means by which the defendant could be found guilty, which is plainly alleged in Counts Three and Four in the indictment. . . . Instead, the government submits that its Proposed Instructions Nos. 33, 34, 35, 36, 37, 38, and 39 adequately inform the jury about the charged offense and the elements for the crimes alleged in Counts Three and Four.

(C.A.J.A. 141) [emphasis in original].

The government's proposed instructions afforded jurors two, alternative bases for finding Wysinger guilty on Counts Three and Four: possession of fentanyl with distributive intent or actual distribution of fentanyl. (C.A.J.A. 109-114.) Agreeing with prosecutors, the district court delivered instructions which permitted jurors to find Wysinger guilty on Counts Three and Four if they determined he either distributed fentanyl on March 23, 2016, or possessed the drug with intent to distribute it then. (C.A.J.A. 1143-48.) These instructions were incompatible with 21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020).

The trial court's instructions on Counts Three and Four misapplied essential elements of 21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020). The court's erroneous instruction to jurors that Wysinger could be found guilty under 21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020) even if he did not distribute fentanyl to the alleged victims identified in those twin counts requires reversal.

Since 1986 Congress has imposed certain mandatory minimum sentences on defendants who unlawfully distribute a Schedule I or II substance when "death or serious bodily injury results from the use of such substance." 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)-(C) (Lawyers Edition 2010 and Cum. Supp. 2020). This "death or serious bodily injury results" enhancement increases the minimum and maximum sentences to which the defendant is subjected if convicted of distribution. The "death or serious bodily injury results" requirement therefore is an essential

element of the offense which must be charged in the indictment and found by the jury beyond a reasonable doubt. Burrage v. United States, 571 U.S. 204, 210 (2014); Alleyne v. United States, 570 U.S. 99, 115-16 (2013).

Proof beyond a reasonable doubt that the defendant distributed a Schedule I or II controlled substance to the alleged victim who suffered death or serious bodily injury as a result of her "use" of the drug is a critical element of any Section 841(b)(1)(C) offense, the Supreme Court held in Burrage, 571 U.S. at 204. Burrage was charged under Sections 841(a)(1) and 841(b)(1)(C) with distributing heroin to an addict who died when he injected the contraband. A grand jury indicted Burrage under the "death results" prong of Section 841(b)(1)(C). In concluding that the trial court which convicted Burrage had misinstructed the jury on the elements of Section 841(b)(1)(C), the Supreme Court held that this statutory enhancement applies only when prosecutors prove a "distribution" of the Schedule I or II substance. The recipient must die or suffer serious bodily injury as a "result" of the defendant's distribution and victim's "use" of the controlled substance.

> Thus, the crime charged in count 2 of Burrage's superseding indictment has two principal elements: (1) knowing or intentional distribution of heroin, §841(a)(1), and (ii) death caused by ("resulting from") the use of that drug, §841(b)(1)(C).

Burrage, 571 U.S. at 210.

The United States Court of Appeals for the Fourth Circuit, applying Burrage, has emphasized that a knowing or intentional distribution by the defendant of a

Schedule I or II controlled substance is an essential, mens rea element of Section 841(b)(1)(C). United States v. Alvarado, 816 F.3d 242, 250 (4th Cir. 2016) (observing that Section 841(b)(1)(C) "contain[s] a mens rea requirement. . . . The first element -- knowing or intentional distribution of heroin -- explicitly includes a mens rea.").

The district court's instructions on Counts Three and Four unlawfully relieved the government of having to prove a knowing or intentional distribution of fentanyl to the user who suffered death or serious bodily injury as a result. Jurors were permitted to return guilty verdicts on these Section 841(b)(1)(C) counts even if they found Wysinger merely *intended* to distribute fentanyl. The verdict form does not specify whether jurors unanimously found Wysinger had actually distributed fentanyl. (C.A.J.A. 1167-68.) Petitioner's convictions on Counts Three and Four should have been vacated by the court of appeals on account of this prejudicial defect in the trial court's jury instructions.

III. THE COURT OF APPEALS ERRED BY AFFIRMING THE DISTRICT COURT'S RULING THAT WYSINGER WAS SUBJECT TO MANDATORY TERMS OF IMPRISONMENT FOR LIFE ON COUNTS THREE AND FOUR UNDER 21 U.S.C. § 841(b)(1)(C) (LAWYERS EDITION 2010 AND CUM. SUPP. 2020).

In the Section 851 Information it filed before trial, the government notified Wysinger he was ". . . subject to increased punishment under "21 U.S.C. §§ 841(b)(1)(C)" (Lawyers Edition 2010 and Cum. Supp. 2020) and 21 U.S.C. § 851(a)(1) (Lawyers Edition 2016) because when he allegedly distributed fentanyl on March 23, 2016, to Sullivan and McBrearty, as charged in Counts Three and Four of

the Superseding Indictment, he had two prior convictions for felony drug offenses in state courts. (C.A.J.A. 18.) The first prior conviction listed in the Section 851 Information occurred in 2008 in the Circuit Court of Prince William County, Virginia. The second conviction specified took place in 2002 in the Circuit Court for Anne Arundel County, Maryland. (C.A.J.A. 18.)

At Wysinger's sentencing, the court ruled that each of the convictions listed in the Section 851 Information was a predicate "felony drug offense" within the meaning of 21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020). As a result of those prior convictions, the court declared, Wysinger was subject to ". . . a mandatory life sentence for Counts Three and Four with the enhanced -- with the enhancements provided by Section 851." (C.A.J.A. 1259.) The court then sentenced Wysinger to concurrent life terms in prison on Counts Three and Four. (C.A.J.A. 1290-91; 1314.)

21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020) provides that a defendant with a "prior conviction for a felony drug offense" who subsequently distributes or possesses with intent to distribute a controlled substance faces one of several mandatory minimum sentences. When death or serious bodily injury results from a distribution of a Schedule II substance such as fentanyl by a defendant with "a prior conviction for a felony drug offense," the mandatory term is life.

> (b) . . . [A]ny person who violates subsection (a) of this section shall be sentenced as follows:
> . . . (C) . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death and serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . . .

21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Suppl. 2020).

Neither of the convictions listed in the Section 851 Information qualifies as a "prior conviction for a felony drug offense" under Section 841(b)(1)(C). Wysinger therefore should not have been subjected to mandatory life sentences on Counts Three and Four.

A. The Court Of Appeals Correctly Disregarded Wysinger's Maryland Conviction Under 21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020).

On appeal, the government conceded it had failed to prove at sentencing that Wysinger's Maryland conviction was "felony drug offense" for purposes of the mandatory life enhancement of 21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020). Accepting this concession, the court of appeals correctly disregarded Wysinger's Maryland conviction as a statutory predicate. Wysinger, 64 F.4th at 217 and note 4. (Pet. App. 16a.)

B. The Court Of Appeals Erroneously Concluded That Wysinger's Virginia Conviction Is Not A Felony Drug Offense Under 21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020).

The Section 851 Information filed by federal prosecutors prior to Wysinger's trial in the court below identified his Virginia state conviction as a predicate felony drug offense in the following terms:

> Possession with Intent to Distribute a Schedule I/II Controlled Substance, Case Number CR05067222, in the Circuit Court for Prince William County, Virginia, entered on January 23, 2008.

(C.A.J.A. 18.)

At sentencing, the United States introduced records of the Circuit Court for Prince William County, Virginia, concerning Wysinger's conviction there in 2008 for distribution of a controlled substance. (C.A.J.A. 1428; 1441-44.) The district court erred as a matter of law by finding that the government with these documents carried its burden of proving that this prior conviction related to a "felony drug offense" as defined by 21 U.S.C. § 802(44) (Lawyers Edition 2010).

To determine whether a defendant's prior state conviction is a "felony drug offense" for purposes of federal law courts follow a categorical approach. See Cucalon v. Barr, 958 F.3d 245, 250 (4th Cir. 2020). This analytical approach requires a court to undertake a comparative analysis of the elements of the prior crime of conviction to ascertain whether they ". . . match the elements of the federal recidivism statute." United States v. Ruth, 966 F.3d 642, 646 (7th Cir. 2020). The framework of analysis is confined to statutory elements. Courts applying the

categorical approach ". . . look only to the statutory definitions–i.e., the elements–of a defendant's [offense], and not to the particular facts underlying [the offense]" in determining whether the offense qualifies as a "felony drug offense" under Section 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020). Descamps v. United States, 570 U.S. 254, 261 (2013) [internal citations and quotations omitted]; Shular v. United States, ____ U.S. ____, 140 S. Ct. 779, 784 (2020) ("A court must look only to the state offense's elements, not the facts of the case or labels pinned to the state conviction" when applying a categorical approach.).

When the defendant's prior conviction arose under a state statute that is "divisible" by its elements, courts apply a modified categorical approach. This modified categorical approach examines the limited collection of judicial records described in Shepard v. United States, 544 U.S. 13, 16 (2005). See also Taylor v. United States, 495 U.S. 575 (1990).

The modified categorical approach applies here. Wysinger's conviction in Virginia was based on his violation of VA. CODE ANN. § 18.2-248 (Lawyers Edition 2021 Replacement Volume), a state statute criminalizing narcotics-related conduct which is divisible by the controlled substances it proscribes. Cucalon, 958 F.3d at 253 (concluding "that the identity of the prohibited substance is an element of Virginia Code § 18.2-248 and that the statute is divisible on that basis" and applying modified categorical approach). This Virginia statute is categorically

overbroad when compared to 21 U.S.C. § 841 (Lawyers Edition 2010 and Cum. Supp. 2020).

> As an initial matter, we agree with the parties that Virginia Code § 18.2-248 is categorically overbroad, because Virginia includes on its controlled substance schedules at least one substance not listed on the federal schedules. Thus, if the Virginia statute were indivisible, Cucalon's conviction would not qualify as a crime relating to a controlled substance or as a drug trafficking crime . . . .

Cucalon, 958 F.3d at 251.

Because VA. CODE ANN. § 18.2-248 (Lawyers Edition 2021 Replacement Volume) is divisible, the district court could consider Shepard-approved documents in an effort to determine whether Wysinger was convicted in the Virginia circuit court of distributing a controlled substance that matches a narcotic on the federal schedules. No Shepard-approved documents in the sentencing record identify the substance Wysinger distributed in violation of VA. CODE ANN. § 18.2-248 (Lawyers Edition 2021 Replacement Volume). Instead, the circuit court records introduce below establish only that Wysinger was found guilty after pleading guilty to possession with intent to distribute a schedule I or II controlled substance in violation of the Virginia statute. (C.A.J.A. 1428; 1435; 1441; 1444; 1447; 1451.) Wysinger's conviction under VA. CODE ANN. § 18.2-248 (Lawyers Edition 2021 Replacement Volume), then, is not a countable predicate for purposes of 21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020).

Even assuming, arguendo, the district court could ascertain from Shepard-approved sources that Wysinger's Virginia offense was related to cocaine, the conviction would not count as a proper predicate under 21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020). Virginia's definition of "cocaine" does not categorically match the federal definition of this controlled substance.

The term "controlled substances" as it is used by Virginia's legislature in VA. CODE ANN. § 18.2-248 (Lawyers Edition 2021 Replacement Volume) is defined in the Commonwealth's Drug Control Act, VA. CODE ANN. §§ 54.1-3400, et seq. (Lawyers Edition 2019 and Cum. Supp. 2022). See VA. CODE ANN. § 18.2-247.A. (Lawyers Edition 2021 Replacement Volume). Cocaine is a scheduled "narcotic drug" under the Drug Control Act. Cucalon, 958 F.3d at 250 ("In Virginia, cocaine is listed on Schedule II, one of the six schedules of controlled substances set forth in the Virginia Code."). Virginia's Schedule II list of controlled substances includes ". . . cocaine or *any* salt or *isomer* thereof." VA. CODE ANN. § 54.1-3448 (Lawyers Edition 2019 and Cum. Supp. 2022) [emphasis added]; see also § 54.1-3401 (Lawyers Edition 2019 and Cum. Supp. 2022) (defining "narcotic drug" to include ". . . coca leaves and *any* salt, compound, derivative, or preparation of coca leaves, and any salt, compound, *isomer*, derivative, or preparation thereof . . . ."). Thus Virginia's definition of cocaine encompasses *any* isomer of cocaine.

Compare Virginia's definition of cocaine, which includes any isomer of the narcotic, with the federal definition. Congress defines cocaine to include only the

narcotic's "optical and geometric isomers." 21 U.S.C. § 812, Schedule II(a)(4) (Lawyers Edition 2010). As used by Congress in the Controlled Substances Act, "isomer" refers only to geometric and optical isomers with respect to cocaine. Congress excludes positional isomers. 21 U.S.C. § 802(14) (Lawyers Edition 2010) (excluding positional isomers from the federal definition of cocaine and including only geometric and optical isomers).

Virginia's definition of cocaine, which broadly covers "any" isomer of the narcotic, sweeps more broadly than the federal definition. The Controlled Substance Act definition of cocaine encompasses only geometric and optical isomers. As a result, Virginia's proscription of "cocaine" does not categorically match the federal proscription of this scheduled substance. See United States v. Myers, 56 F.4th 595 (8th Cir. 2022) (holding that state legislature's inclusive reference to "the isomers of cocaine" in its definition of cocaine necessarily swept in all isomers, including *positional*, optical, and geometric isomers.") [emphasis in original]; United States v. Ruth, 966 F.3d 642, 647-51 (7th Cir. 2020) (holding that Illinois' statutory offense of cocaine distribution is categorically broader than the federal definition governing 21 U.S.C. § 841(b)(1)(C) because the state offense includes optical, positional, and geometric isomers in contrast to the federal offense, which is limited to optical and geometric isomers.).

In sum, Wysinger's Virginia conviction in 2008 under VA. CODE ANN. § 18.2-248 (Lawyers Edition 2021 Replacement Volume) is not a predicate "felony

drug offense" that triggers the mandatory life enhancement of 21 U.S.C. § 841(b)(1)(C) (Lawyers Edition 2010 and Cum. Supp. 2020). See Cucalon, 958 F.3d at 251. The district court plainly misapplied the categorical approach in counting the Virginia conviction as a predicate on which to enhance Wysinger's sentences for the offenses charged in Counts Three and Four.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioner Kendall Demarko Wysinger's Petition for Writ of Certiorari and reverse his convictions and sentences on Counts One, Three, and Four of the Superseding Indictment.

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APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4475

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

KENDALL DEMARKO WYSINGER, a/k/a Demarko, a/k/a D,

Defendant – Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg. Elizabeth Kay Dillon, District Judge. (5:17-cr-00022-EKD-JCH-1)

Argued: December 8, 2021 Decided: March 30, 2023

Before HARRIS and RUSHING, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed by published opinion. Judge Rushing wrote the opinion, in which Judge Harris and Senior Judge Keenan joined.

ARGUED: Paul Graham Beers, GLENN, FELDMAN, DARBY & GOODLATTE, Roanoke, Virginia, for Appellant. Laura Day Rottenborn, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee. **ON BRIEF:** Daniel P. Bubar, Acting United States Attorney, Roanoke, Virginia, Jennifer R. Bockhorst, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Abingdon, Virginia, for Appellee.

RUSHING, Circuit Judge:

Defendant Kendall Demarko Wysinger and his partner Leslee Garza conspired to ensnare drug-addicted women in debt-cycle sex trafficking. Wysinger would give the women heroin and cocaine they could not afford and then insist they repay their debt by prostituting themselves for his benefit throughout Virginia, West Virginia, and Maryland. On March 23, 2016, Wysinger provided fentanyl to two women who overdosed. Wysinger left the women for dead and destroyed the evidence. One of the women died, but the other survived and testified against him.

A jury convicted Wysinger of (1) conspiracy to commit sex-trafficking, in violation of 18 U.S.C. §§ 1591(a)(1) and 1594(c); (2) interstate transportation for the purpose of prostitution, in violation of 18 U.S.C. § 2421; (3) distribution of, and possession with intent to distribute, fentanyl, the use of which resulted in death, in violation of 21 U.S.C. § 841, *et seq.*; and (4) distribution of, and possession with intent to distribute, fentanyl, the use of which resulted in serious bodily injury, in violation of 21 U.S.C. § 841, *et seq*.[1] At sentencing, the district court found that Wysinger had a prior conviction for a felony drug offense, triggering a mandatory life sentence on Counts 3 and 4 pursuant to 21 U.S.C. § 841(b)(1)(C). The court sentenced Wysinger to life in prison on Counts 1, 3, and 4, and 120 months' imprisonment on Count 2, all to be served concurrently.

Wysinger now appeals his convictions and sentence. We affirm in full.

[1] The jury also convicted Wysinger of obstruction of justice, in violation of 18 U.S.C. § 1512(c)(1), but the district court set that conviction aside on Wysinger's motion. The jury acquitted Wysinger on a second obstruction charge.

I.

Wysinger first challenges his Count 1 conviction for conspiracy to violate 18 U.S.C. § 1591, which criminalizes sex trafficking by force, fraud, or coercion. He argues that the evidence was insufficient to support his conviction and that the district court instructed the jury incorrectly. We take each argument in turn.

A.

We review the sufficiency of the evidence de novo, sustaining the verdict if, "viewing the evidence in the light most favorable to the Government, it is supported by substantial evidence." *United States v. Alerre*, 430 F.3d 681, 693 (4th Cir. 2005) (internal quotation marks omitted). The jury, not the reviewing court, weighs credibility and resolves conflicts in the evidence; and "if the evidence supports different, reasonable interpretations, the jury decides which interpretation to believe." *United States v. Beidler*, 110 F.3d 1064, 1067 (4th Cir. 1997) (internal quotation marks omitted). A defendant bringing a sufficiency challenge therefore bears "a heavy burden," and reversal is warranted only "where the prosecution's failure is clear." *United States v. Engle*, 676 F.3d 405, 419 (4th Cir. 2012) (internal quotation marks and citation omitted).

As relevant here, Section 1591 criminalizes knowingly recruiting, enticing, harboring, transporting, providing, obtaining, or maintaining a person, knowing or in reckless disregard of the fact "that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act." 18 U.S.C. § 1591(a)(1). Nearby 18 U.S.C.

§ 1594(c) criminalizes conspiracy to violate Section 1591. Wysinger challenges the sufficiency of the evidence to prove the coercion and conspiracy elements.

1.

Wysinger first contends the Government did not prove that he used or conspired to use coercive means to cause his victims to prostitute themselves. The statute defines "coercion" to include "threats of serious harm to or physical restraint against any person" and "any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person." *Id.* § 1591(e)(2)(A)–(B). "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 commercial sexual activity in order to avoid incurring that harm." *Id.* § 1591(e)(5).

The Government's theory was that Wysinger intended—and in at least one case succeeded—to recruit women with drug addictions by fronting them drugs and then, once they began working for him, to keep the money they made from prostitution and give the women more drugs only when they earned him more money. In support, the Government presented testimony from 23 witnesses, including two victims, law enforcement officers, associates of Wysinger, and experts. An expert in drug dependence explained heroin and fentanyl addiction and withdrawal sickness. An expert in commercial sex trafficking testified about the difference between voluntary prostitution and sex trafficking, including the debt-bondage relationship created by pimps who compel prostitution through drug

dependence. Ultimately, the Government contended that Wysinger conspired to employ a "scheme, plan, or pattern" intended to cause the women to believe that if they failed to engage in commercial sex acts, they would incur a "serious harm" by going into drug withdrawal. *Id.* § 1591(e)(2).

Wysinger does not dispute that manipulating vulnerable women by exploiting their drug addictions in exchange for prostitution services can be coercion within the meaning of Section 1591 or, put another way, that the Government's theory is a permissible one. *See*, *e.g.*, *United States v. Mack*, 808 F.3d 1074, 1078, 1081–1082 (6th Cir. 2015) (upholding conviction for sex trafficking where defendant "recruit[ed] young female addicts" and exploited their addictions to coerce them "to prostitute themselves for his benefit"); *United States v. Fields*, 625 Fed. App. 949, 952 (11th Cir. 2015) (upholding sex-trafficking conviction where defendant coerced his victims to engage in commercial sex acts by "causing them to experience withdrawal sickness if they did not engage in prostitution"). Nor does he contest that withdrawal symptoms can be "serious harm" within the statute's broad definition of that term. Instead, Wysinger argues his conduct was not as egregious as that of defendants in other cases and that, in any event, the evidence simply did not prove the Government's theory. He claims that his relationship with the victims was "voluntary and collaborative," highlighting evidence that he was not violent with the women, that they had previously engaged in prostitution and were addicted when he met them, that he did not prevent them from buying drugs elsewhere, and that one of the women moved in and out of his house freely.

Considering the evidence in the light most favorable to the Government, as we must, we conclude that it supports the jury's finding that Wysinger intended to use coercion. For example, victim M.J. testified that Wysinger and Garza exploited her as a prostitute. She lived in the house shared by Wysinger and Garza for about a year, performing commercial sex acts there and conducting "outcalls" elsewhere. During the same year, victim C.S.S. also lived in the house and worked as a prostitute for Wysinger.[2] M.J. testified that on their very first day in Wysinger's house, he gave the women heroin and then posted advertisements for them on a prostitution website because they "owed him money" for the heroin they had consumed. J.A. 177. The women performed, and the cycle continued. Wysinger and Garza told M.J. she was indebted to them for Wysinger driving her to outcalls and for drugs. Wysinger took "[p]retty much all" of the money M.J. made, J.A. 211, and supplied her with daily rations of drugs. M.J. testified that Wysinger got angry at her when she "owed him money and . . . didn't want to work" or "was dope sick and . . . felt like [she] couldn't go work." J.A. 184.

Victim S.F. also testified. At first, Wysinger gave S.F. drugs in exchange for sex. Once S.F. was receiving drugs from Wysinger every day, he required her to prostitute for him in Ocean City. S.F. testified that she only went with Wysinger because he threatened to stop supplying her drugs if she refused. Because Wysinger was her best source of supply, S.F. testified, she would experience withdrawal and be "deathly ill" if she did not submit to Wysinger's proposal. J.A. 566. Wysinger drove S.F. to Ocean City, posted

[2] C.S.S. was not available to testify because she died from an overdose of fentanyl supplied by Wysinger. Her death was the subject of Count 3.

advertisements for her online, and drove her to outcalls until they were arrested in an undercover law enforcement operation. S.F. testified that during this trip, Wysinger supplied her with drugs only as much as she prostituted for him. This testimony, and other consistent evidence, supports the jury's finding that Wysinger intended to coerce his victims into prostitution by exploiting their drug dependencies, even if he did not fully accomplish his scheme before his arrest.

Wysinger's arguments largely ask us to reweigh the facts, which we cannot do. *See United States v. Maynes*, 880 F.3d 110, 114 (4th Cir. 2018). For example, he claims that this case is not like *Mack* because the defendant there provided "free" drugs to his victims, only to later claim the drugs were not free and that the women owed a large debt. But whatever factual distinctions exist between this case and *Mack* make no difference. M.J. testified that Wysinger "fronted" her drugs and then posted her on a prostitution website to pay for them. J.A. 174–175. Although "fronting" drugs and falsely providing them for free may not be exactly the same, the underlying coercion is identical. Like the defendant in *Mack*, Wysinger intended to exploit the addictions of vulnerable women for his own profit by using seemingly easy access to drugs to create a cycle of debt and dependence. Wysinger also argues he cannot be guilty of using coercion because his victims purchased heroin from other dealers while involved with him. But that is not universally true. M.J., for example, retained almost none of her earnings and thus remained dependent on Wysinger. And even if some of Wysinger's victims were not dependent on him at all times, that would merely show that his plot did not always succeed. It would not absolve him of guilt for concocting and attempting the scheme.

As for Wysinger's repeated argument that he was not violent with the women, the statute plainly condemns "means of . . . coercion" separate from and in addition to "means of force [and] threats of force." 18 U.S.C. § 1591(a); *see Mack*, 808 F.3d at 1081–1082 (addressing the defendant's use of coercion and use of force separately). Nor is physical violence necessary to establish coercion under the statute. *See* 18 U.S.C. § 1591(e)(2) (defining "coercion"), (5) (defining "serious harm"). The evidence sufficed to support the jury's finding of coercion.

2.

Next, Wysinger argues that even if he harbored coercive intent, the evidence does not show that his alleged co-conspirator Garza shared his intent. A basic requirement of the conspiracy offense is proof "that two or more people agreed to commit" the crime—here, sex trafficking by force, fraud, or coercion. *Smith v. United States*, 568 U.S. 106, 110 (2013). If Garza lacked criminal intent, there could be no agreement to commit the crime.

Contrary to Wysinger's contention, a reasonable jury could conclude that Garza knew of and intended to participate in Wysinger's illegal scheme. Garza—the mother of Wysinger's child—was not available to testify at trial because she died from a fentanyl overdose allegedly supplied by Wysinger. Nevertheless, the evidence showed that she lived in the same house with Wysinger and some of his victims, who engaged in commercial sex there. M.J. testified that she and C.S.S. worked for Wysinger seven days a week; he gave them only one day off all year, so that he, Garza, and the victims could watch football. What is more, Garza herself posted advertisements for the victims on a prostitution website. She knew that Wysinger was collecting the victims' money and

supplying them with drugs and that they had no cars or credit cards of their own. Indeed, when M.J. needed things from the store, Garza would drive her.

While this evidence may not compel the conclusion that Garza conspired with Wysinger, it suffices to support the jury's finding that Garza understood the nature of their undertaking and agreed to participate. As the jury was instructed (and Wysinger does not dispute), an agreement may be inferred from indirect and circumstantial evidence. A "'rational trier of fact,'" viewing the evidence and all inferences drawn therefrom in the light most favorable to the Government, "'could have agreed with the jury'" that Garza and Wysinger conspired to coerce the victims into prostitution. *Maynes*, 880 F.3d at 114 (quoting *Coleman v. Johnson*, 566 U.S. 650, 651 (2012) (per curiam)). We therefore cannot set aside the jury's verdict on this ground. *Id.*

B.

Wysinger also challenges the district court's instruction to the jury on the knowledge element of the Section 1591 offense. As he admits, Wysinger did not preserve this argument in the district court, so we review only for plain error. Under that standard, we will vacate the judgment if "(1) an error was made; (2) the error is plain; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Fall*, 955 F.3d 363, 373 (4th Cir. 2020) (internal quotation marks omitted). We find no error here.

Section 1591 punishes anyone who knowingly "recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person . . . *knowing, or, except where the act constituting the violation of paragraph (1) is*

advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion . . . , or any combination of such means will be used to cause the person to engage in a commercial sex act." 18 U.S.C. § 1591(a) (emphasis added). Wysinger contends the jury had to find that he acted knowing coercion would be used, not merely in reckless disregard of that fact, because the Government charged him with advertising under Section 1591. The jury instruction for Count 1 was erroneous, he argues, because it allowed the jury to convict him upon finding that he acted with the less culpable mental state of recklessness.

Wysinger is incorrect. The indictment charged him with conspiring "to recruit, entice, harbor, transport, provide, obtain, and maintain" the victims, and the jury was so instructed. J.A. 20, 1133. The charge did not include advertising, which would have required that he act with knowledge that coercion would be used. The indictment and instructions mentioned the word "advertising" in one of five overt acts alleged to support the charge, using the term to describe the website where Wysinger solicited customers to engage in sex acts with his victims, not to describe the charge's statutory basis. Consistent with the indictment, the instructions did not authorize the jury to convict Wysinger on Count 1 by finding that he conspired to advertise the victims. The district court therefore correctly instructed the jury that it could convict Wysinger on Count 1 upon finding that he acted with knowledge or reckless disregard of the fact that coercion would be used to cause the victims to engage in commercial sex acts.

II.

Wysinger next challenges his convictions on Counts 3 and 4 for distributing, or possessing with intent to distribute, fentanyl resulting in serious bodily injury or death. *See* 21 U.S.C. § 841(a)(1), (b)(1)(C). Specifically, Wysinger argues the jury instructions for Counts 3 and 4 were duplicitous and incompatible with the statute.

We may quickly dispense with the duplicity argument, which in truth stems from the indictment rather than the jury instructions. Wysinger complains that Counts 3 and 4 each charged both distribution of fentanyl and possession with intent to distribute fentanyl, which he claims is duplicitous. The jury instructions accurately reflected the indictment. Federal Rule of Criminal Procedure 12(b)(3)(B)(i) requires a defendant to raise a duplicity objection to the indictment before trial, which Wysinger failed to do. And although a court may consider an untimely duplicity objection upon a showing of "good cause," Fed. R. Crim. P. 12(c)(3), Wysinger has not attempted to make such a showing. We therefore decline to address his forfeited argument. *See United States v. King*, 628 F.3d 693, 699 (4th Cir. 2011).

As for the statutory elements, we review de novo Wysinger's claim that the jury instructions incorrectly stated the law. *See United States v. Mouzone*, 687 F.3d 207, 217 (4th Cir. 2012). Section 841 makes it unlawful to "knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," and imposes an increased penalty "if death or serious bodily injury results from the use of such substance." 21 U.S.C. § 841(a)(1), (b)(1)(C). The district court instructed the jury as follows:

> For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:
>
> First, that the defendant distributed a controlled substance, namely, fentanyl;
>
> Second, that the defendant knew that the substance distributed was a controlled substance under the law at the time of the distribution, and;
>
> Third, that the defendant did so knowingly or intentionally.
>
> Or: First, that the defendant possessed a detectable amount of controlled substance alleged in the indictment;
>
> Second, that the defendant knew that the substance possessed was a controlled substance under the law at the time of the possession; and
>
> Third, that the defendant did so with the intent to distribute the controlled substance.
>
> On each of these two counts, Count 3 and Count 4, if you find beyond a reasonable doubt that the government has established each of these elements, then you must determine whether death or serious bodily injury resulted from the use of the controlled substance by the alleged individual. This standard is satisfied if you find beyond a reasonable doubt that but for the individual ingesting the fentanyl, the individual would not have suffered a serious bodily injury or died.

J.A. 1144–1145. Wysinger claims that this instruction misapplied the statute because it allowed the jury to convict on a finding of possession with intent to distribute, even if Wysinger did not distribute fentanyl to the victims. According to Wysinger, Section 841's increased penalty when death or serious bodily injury results can apply only to defendants who actually distribute the drug to the victim.

Wysinger misreads the statute. Its enhanced penalty applies not when the prohibited conduct listed in Section 841(a)(1) results in death or injury but when "death or serious bodily injury results from *the use of* such substance." 21 U.S.C. § 841(b)(1)(C) (emphasis

added); *see United States v. Jeffries*, 958 F.3d 517, 524 (6th Cir. 2020). Properly read, the crime has two "principal elements": (1) conduct prohibited by Section 841(a)(1), and (2) "death caused by ('resulting from') the use of that drug." *Burrage v. United States*, 571 U.S. 204, 210 (2014) (citing 21 U.S.C. § 841(b)(1)(C)). Nothing in the statute requires a jury to find that the defendant actually delivered the drug to the victim in order for the increased penalty to apply. *Cf. United States v. Alvarado*, 816 F.3d 242, 249 (4th Cir. 2016) (reaffirming after *Burrage* that Section 841(b)(1)(C) "'imposes no reasonable foreseeability requirement'" (quoting *United States v. Patterson*, 38 F.3d 139, 145 (4th Cir. 1994))). Nor do Wysinger's authorities say anything of the sort. In each case, the crime charged happened to be distribution, but the court made no suggestion that the other conduct prohibited by the statute could not support a Section 841(b)(1)(C) conviction. Finding no error in the jury instruction, we affirm Wysinger's convictions on Counts 3 and 4.

III.

Wysinger's convictions on Counts 3 and 4 subjected him to mandatory life sentences because the district court found that he had "a prior conviction for a felony drug offense." 21 U.S.C. § 841(b)(1)(C). We review Wysinger's challenge to this sentencing enhancement for plain error because he did not preserve an objection to the enhancement in the district court, and he certainly did not preserve the argument he now presses on appeal. Under that standard, we will vacate the enhancement if (1) the district court erred by characterizing Wysinger's prior conviction as a "felony drug offense," (2) the error is plain, (3) the error affected his substantial rights, and (4) leaving the error uncorrected

would seriously affect the fairness, integrity, or public reputation of judicial proceedings. *See Fall*, 955 F.3d at 373.

A "felony drug offense" is "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44). The parties rightly agree that this definition requires us to apply a categorical approach that compares the elements of the defendant's prior offense with the criteria specified in Section 802(44). *See United States v. Ruth*, 966 F.3d 642, 647 (7th Cir. 2020) ("The conduct-based categorical approach applies here to § 841(b)(1)(C)'s sentencing enhancement."); *cf. Shular v. United States*, 140 S. Ct. 779, 782–783 (2020) (contrasting a "generic offense" categorical methodology with a criterion-based method). The parties differ, however, on the meaning of "narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances" in the statute. Specifically, they disagree about whether we should look to federal law or state law to define those terms when assessing a prior state conviction.

We find the answer in the statute's text. Section 802 provides highly detailed definitions of the terms "narcotic drug," 21 U.S.C. § 802(17), "marihuana," *id.* § 802(16), "anabolic steroid," *id.* § 802(41), and "depressant or stimulant substance," *id.* § 802(9)—the exact terms used in the "felony drug offense" definition in Section 802(44). Congress's use of these defined terms in Section 802(44) strongly suggests that it intended those definitions to control. *See Burgess v. United States*, 553 U.S. 124, 129 (2008) ("Statutory definitions control the meaning of statutory words in the usual case." (internal quotation

marks and ellipsis omitted)); *see*, *e.g.*, *United States v. Aviles*, 938 F.3d 503, 511 (3d Cir. 2019) (incorporating these definitions into Section 802(44)). Put another way, we doubt Congress meant for us to ignore the detailed definitions it provided for these precise terms in the same statutory section and instead search state codes to ascertain if and how the States define those terms.[3]

The parties miss the mark with arguments that turn on the meaning of "controlled substance," a term that appears nowhere in the definition of "felony drug offense." Wysinger would have us incorporate the federal drug schedules, *see* 21 U.S.C. § 812, which define a "controlled substance" under federal law, *see id.* § 802(6). But we see no reason to substitute a term Congress did not use for the words it actually did.

The Government, for its part, argues that our decision in *United States v. Ward*, 972 F.3d 364 (4th Cir. 2020), compels us to define the drug categories in Section 802(44) by reference to state law. But in *Ward*, we interpreted the Sentencing Guidelines' career-offender enhancement, which in relevant part defines a "controlled substance offense" as "an offense under federal or state law . . . that prohibits [certain conduct with respect to] *a controlled substance*." U.S.S.G. § 4B1.2(b) (emphasis added). As we explained, a "controlled substance" is "any type of drug . . . regulated by law," and the text of the Guideline made clear that *state* regulation of the drug sufficed. *Ward*, 972 F.3d at 371–372 (internal quotation marks and emphases omitted). Section 802(44), however, does not

[3] For example, a glance at the Virginia Code reveals no definition for any variation of "depressant" or "stimulant," much less the combined term "depressant or stimulant substance."

refer to "controlled substances" but instead restricts the universe of relevant regulated drugs to four categories: "narcotic drugs, marihuana, anabolic steroids, [and] depressant or stimulant substances." Although the Government urges us to consult state law, it does not identify any state law actually defining these categories to guide our inquiry. Yet Congress precisely defined these terms in the same statutory section. We will apply those definitions.

Having ascertained the criteria of a "felony drug offense" in Section 802(44), we must compare the elements of Wysinger's prior offense with those criteria to determine whether the two categorically match. *See Cucalon v. Barr*, 958 F.3d 245, 250 (4th Cir. 2020) (explaining the categorical approach). The Government relies on Wysinger's prior conviction for violating Virginia Code § 18.2-248.[4] We have held that Section 18.2-248 is divisible by prohibited substance, *Cucalon*, 958 F.3d at 253; therefore, we may consult certain records from Wysinger's state court case to understand which specific offense formed the basis of his conviction, *see Shepard v. United States*, 544 U.S. 13, 16–17 (2005) (explaining acceptable documents). Those documents do not reveal the exact substance Wysinger possessed, but they do establish that he pled guilty to "knowingly and intentionally manufactur[ing], sell[ing], giv[ing], distribut[ing] or possess[ing] with intent to manufacture, sell, give or distribute a Schedule I or II controlled substance, without authority." J.A. 1428.

[4] In the district court, the Government also relied on a prior Maryland conviction. On appeal, the Government concedes that the documentation it submitted to the district court fell short of establishing that conviction, so we do not consider it.

Wysinger does not contest that his Virginia offense was "punishable by imprisonment for more than one year." 21 U.S.C. § 802(44). Rightly so. Section 18.2-248 provides that a person who violates that section "with respect to a controlled substance classified in Schedule I or II" shall be "imprisoned for not less than five" years. Va. Code Ann. § 18.2-248(C) (2005).

Wysinger does contest whether his Virginia offense was under a state law "that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44). The question is whether Virginia's Schedules I and II—which were the basis for Wysinger's conviction—penalize conduct with respect to any substances that are not "narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances" as defined in Section 802. *See id.* § 802(9), (16), (17), (41). If they do, the state statute is not a categorical match for this "felony drug offense" criterion.

When Wysinger was convicted, Virginia Schedule I, broadly speaking, included opiates, opium derivatives, certain hallucinogenic substances, certain depressants, and certain stimulants. Va. Code Ann. § 54.1-3446 (2005). Virginia Schedule II, again broadly speaking, included opium and opiates, cocaine, certain stimulants, certain depressants, a hallucinogenic substance, and certain substances that "are immediate precursors to amphetamine and methamphetamine or phencyclidine." Va. Code Ann. § 54.1-3448 (2005). Exhaustively comparing these detailed schedules to the Section 802 definitions of "narcotic drugs," "marihuana," "anabolic steroid," and "depressant or stimulant substance" would be a job for a pharmaceutical chemist, but we need not do so because we review

only the arguments Wysinger has presented and only to the extent necessary under the plain error standard of review.

Wysinger first argues that we found Section 18.2-248 overbroad in *Cucalon* and that conclusion applies here. In *Cucalon*, however, we compared all the Virginia controlled substance schedules to all the federal schedules and concluded that the Virginia schedules include "at least one substance not listed on the federal schedules." 958 F.3d at 251. But that is not our inquiry here. Rather, we are comparing Virginia Schedules I and II with the Section 802 definitions of "narcotic drug," "marihuana," "anabolic steroid," and "depressant or stimulant substance." 21 U.S.C. § 802(9), (16), (17), (41). So *Cucalon* does not control.

Second, Wysinger zeroes in on purported variations between federal and Virginia law concerning isomers of cocaine.[5] Virginia's Schedule II includes "cocaine or *any* salt or isomer thereof." Va. Code Ann. § 54.1-3448(1) (2005) (emphasis added). Meanwhile, Section 802(17)'s definition of "narcotic drug" includes "[c]ocaine, its salts, *optical and geometric isomers*, and salts of isomers." 21 U.S.C. § 802(17)(D) (emphasis added). Wysinger contends that Virginia's definition includes positional isomers of cocaine while the federal definition does not, making the Virginia schedule fatally overbroad.

This argument falls significantly short of establishing plain error, as any mismatch between the state and federal definitions is far from obvious. *See United States v. Lester*,

[5] In his reply brief, Wysinger also mentions Virginia law regarding isomers of heroin, but he does not identify which Section 802 definition we should compare to Virginia's definition of heroin. We therefore need not consider this belated argument.

985 F.3d 377, 387 (4th Cir. 2021) ("An error is 'plain' if it is 'clear or obvious, rather than subject to reasonable dispute.'" (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009))). Even assuming that positional isomers of cocaine exist in the drug trade—a debatable proposition—Wysinger offers no support for reading "any . . . isomer" in Virginia law to include positional isomers of cocaine.[6] The only reference to positional isomers in Schedule I or II is in reference to certain hallucinogenic substances. *See* Va. Code § 54.1-3446(3); *cf.* 21 U.S.C. § 802(14) (including positional isomers only in reference to hallucinogenics). Moreover, even if Virginia law did criminalize positional isomers of cocaine, Wysinger has not answered the Government's contention that those isomers may nevertheless qualify as a "narcotic" or "stimulant" within other parts of the federal definitions. In sum, Wysinger's speculation about positional isomers of cocaine fails to show that the district court plainly erred in not finding overbreadth on this ground. We therefore affirm the district court's determination that Wysinger's Virginia conviction was for a "felony drug offense" that supports application of the Section 841(b)(1)(C) sentencing enhancement.

IV.

Finally, Wysinger contests application of the career-offender sentencing enhancement. *See* U.S.S.G. § 4B1.1. We need not address the merits of his argument because, even assuming error, the enhancement had no effect on his sentence.

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[6] This distinguishes the case on which Wysinger primarily relies, *United States v. Ruth*, 966 F.3d 642, 648 (7th Cir. 2020). The Illinois statute at issue there specifically defined "cocaine" as including its "optical, positional and geometric isomers." *Id.* at 647 (internal quotation marks omitted).

"A sentencing error is harmless if the resulting sentence was not longer than that to which the defendant would otherwise be subject." *See United States v. Hargrove*, 701 F.3d 156, 161 (4th Cir. 2012) (internal quotation marks and brackets omitted). In performing harmless-error review, we may "assume that a sentencing error occurred and proceed to examine whether the error affected the sentence imposed." *Id.*

There is no doubt that the district court would have sentenced Wysinger to life imprisonment even without the career-offender enhancement and that such a sentence would be reasonable. *See id.* at 162. As previously discussed, Wysinger's convictions on Counts 3 and 4 subjected him to statutorily required life sentences. And his Guidelines sentence, even without the career-offender designation, was imprisonment for life. Any error in applying the career-offender enhancement was harmless.

AFFIRMED

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF VIRGINIA

HARRISONBURG DIVISION

* * * * * * * * * * * * * * * * *	
UNITED STATES OF AMERICA,	* CRIMINAL NO. 5:17-CR-00022
	* AUGUST 24, 2020 10:10 A.M.
Plaintiff,	* SENTENCING
	* VOLUME I OF I
vs.	*
	*
KENDALL DEMARKO WYSINGER,	* Before:
	* HONORABLE ELIZABETH K. DILLON
Defendant.	* UNITED STATES DISTRICT JUDGE
* * * * * * * * * * * * * * * * *	* WESTERN DISTRICT OF VIRGINIA

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Proceedings recorded by mechanical stenography, transcript produced by computer.

The Court must also impose a $5,000 assessment under Title 18, United States Code, Section 3014 for Counts One and Two because of the nature of those offenses, unless it finds that Mr. Wysinger is indigent. Also, restitution may be ordered where applicable and fees may be imposed to pay for incarceration and supervised release.

And the Court may require the forfeiture of certain property to the government. But I understand that the government did not pursue forfeiture; is that correct, Ms. Swartz?

MS. SWARTZ: Yes, Your Honor. Did I hear you mention, though, the mandatory life imprisonment for Counts Three and Four?

THE COURT: I did not mention that. Thank you.

There is a mandatory life sentence for Counts Three and Four with the enhanced -- with the enhancements provided by Section 851.

Thank you, Ms. Swartz.

MS. SWARTZ: Thank you, Your Honor.

THE COURT: Any objection to the statutory penalties as stated, Counsel?

MR. COOK: No, ma'am.

THE COURT: Ms. Swartz? Any objection, Ms. Swartz?

MS. SWARTZ: No objection, Your Honor. I believe that there had been an outstanding legal argument from the

But like I said, I'm sorry for her loss and her family, and my other family and friends that lost. They know me, and I can't make everybody like me, because that's not going to happen. I don't expect that to happen, you know. But I expect that I'm still going to be a good person regardless. I'll end with that.

THE COURT: Thank you, Mr. Wysinger.

After calculating the guidelines and hearing argument and reviewing evidence and hearing from Mr. Wysinger, I must consider the relevant factors set out by Congress at Title 18, United States Code, Section 3553(a) and ensure that I impose a sentence that is sufficient but not greater than necessary to comply with the purposes of sentencing.

The purposes include the need for the sentence to reflect the seriousness of the crime, promote respect for the law, and provide just punishment for the offense. The sentence should also deter criminal conduct and protect the public from future crime and promote rehabilitation. In addition to the guidelines and policy statements, I must consider the nature and circumstances of the offense, Mr. Wysinger's history and characteristics, the need to avoid unwarranted sentence disparities among similarly situated defendants, and the types of sentences available.

And in this case, the Court believes that an appropriate sentence is that of life on each of Counts One,

Three, and Four, and 120 months on Count Two, all to be served concurrently.

Also, the Court will impose supervised release for a term of six years as to each count, to run concurrently.

And the Court will impose the mandatory special assessment of $400.

The Court is not going to impose the $5,000 special assessment, finding that Mr. Wysinger is indigent, and not going to impose a fine, finding that he doesn't have the ability to pay a fine. But I will order restitution to the family of CSS in the amount of $4,775, and in the amount of $64,000 to MAJ.

And these are the reasons for this sentence: In this case, we have the most serious of offenses. We have a death, we have a serious injury, and we have these two people left for dead. We have the victimization of women who were kept beholden to the defendant so he could profit from them while he promoted fear and supplied them with drugs, all the while taking their money.

He has lived a life of crime continuously as an adult, and despite the punishments for those crimes, he remains undeterred from any punishment that has been meted out for those crimes over the years. There is a need to punish him, deter him, and promote respect for the law.

There's also a need to protect the public in this

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 5:17-cr-00022
	)	
KENDALL DEMARKO WYSINGER	)	

MEMORANDUM OPINION

Defendant Kendall Demarko Wysinger was charged in a six-count superseding indictment, and he pleaded not guilty and proceeded to trial. The jury found him guilty of the first five counts of the indictment and not guilty on Count 6. Pending before the court is defendant's motion for judgment of acquittal (Dkt. No. 130), to which the United States has responded. (Dkt. No. 132.) Neither party has requested a hearing.

For the reasons set forth herein, the motion for acquittal will be denied in part and granted in part. It will be granted as to Count 5 and will be denied in all other respects.

I. BACKGROUND

The court will discuss pertinent facts in the context of discussing each count challenged by Wysinger. The jury convicted him of the following five counts:

> Count 1—conspiracy to commit sex trafficking (naming four victims: M.A.J., C.S.S., S.I.F., D.L.F.), in violation of 18 U.S.C. §§ 1591(a)(1) and 1594(c);
> Count 2—interstate transportation for prostitution of M.A.J., in violation of 18 U.S.C. § 2421;
> Count 3—possession with intent to distribute and distribution of fentanyl to C.S.S., causing serious bodily injury and death, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C);
> Count 4—possession with intent to distribute and distribution of fentanyl to T.J.M., causing serious bodily injury, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); and
> Count 5—evidence tampering, in violation of 18 U.S.C. § 1512(c)(1).

(Superseding Indictment, Dkt. No. 32.) In his motion, Wysinger challenges the jury's verdict on all counts but Count 2.

II. DISCUSSION

A. Standard of Review

Wysinger's motion for judgment of acquittal is brought pursuant to Federal Rule of Criminal Procedure 29. That rule provides that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). "A defendant challenging the sufficiency of the evidence faces a heavy burden . . . . " *United States v. Young*, 609 F.3d 348, 355 (4th Cir. 2010) (internal citations and alterations omitted). Specifically, "[t]he jury's verdict must stand unless . . . no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Royal*, 731 F.3d 333, 337 (4th Cir. 2013) (citing *Young*, 609 F.3d at 355).

Put differently, the motion should be denied if the jury's verdict on any given charge is supported by "substantial evidence." *United States v. Alvarez*, 351 F.3d 126, 129 (4th Cir. 2003). "[S]ubstantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996). In addressing a claim of insufficient evidence, moreover, this court must "view the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the [g]overnment . . . . " *Young*, 609 F.3d at 355 (citation omitted).

B. Count 1

The jury found Wysinger guilty of Count 1, in which he was charged with conspiracy to commit sex trafficking in violation of 18 U.S.C. §§ 1591(a)(1) and 1594(c). To prove that charge, the government was required to prove, beyond a reasonable doubt, first, that two or more persons formed or entered into a conspiracy, understanding, or agreement to commit sex trafficking; and second, that at some time during the existence or life of the conspiracy or agreement, the defendant deliberately joined it, knowing its purpose.

Wysinger argues that there was insufficient evidence to convict him of this charge because there was no evidence that any agreement was ever reached or that Wysinger was involved with any other person to carry out the "conspiracy." He contends that the only persons with whom he was shown to have an agreement were the prostitutes themselves. As such, he contends that "[a]t most, the government has proven that the defendant was involved as a pimp." (Mot. Acquittal 3, Dkt. No. 130.) He argues that the evidence about Leslee Garza—which was that she took and posted pictures of some prostitutes—was insufficient to make her a co-conspirator, primarily because there is no evidence of concerted action or an agreement.

The court disagrees and concludes that there was sufficient evidence for the jury to convict Wysinger of this charge. In order to show a conspiracy, there need not be direct evidence of an agreement; rather, the conduct of alleged conspirators can give rise to an inference that an agreement exists. *United States v. Collazo*, 732 F.2d 1200, 1205 (4th Cir. 1984). Here, there is evidence that Wysinger and Garza worked together to post online advertisements for other women for commercial sex. There is also evidence that Garza's actions, taken with the approval or at the direction of Wysinger, furthered the conspiracy and that she took these actions with knowledge that the conspiracy involved him profiting from commercial

sex acts. Specifically, Garza and Wysinger exchanged text messages during the alleged conspiracy in which Garza made statements indicating that she knew Wysinger profited from the commercial sex acts resulting from the online advertisements. (*See, e.g.*, Gov't Ex. 24, Dkt. No. 122-36.) Additionally, the jury heard testimony that Garza lived with Wysinger, at least for a time, and was present and observed him giving prostitutes drugs and requiring them to engage in prostitution to earn money to pay him back. This was occurring at the same time she was posting pictures of them. Taken together, all of this evidence is sufficient for a rational jury to conclude that Wysinger and Garza conspired to commit sex trafficking.[1]

C. Counts 3 & 4

One of the ways to prove the charges in Counts 3 and 4 was for the government to prove beyond a reasonable doubt that Wysinger knowingly or intentionally distributed fentanyl and that he knew that the substance was a controlled substance under the law at that time. After finding the government had established these elements, the jury further determined that, as to Count 3, C.S.S.'s death resulted from the use of the controlled substance. As to Count 4, the jury further determined that serious bodily injury resulted to T.J.M. from the use of the controlled substance. For each of these findings, the jury had to find that, but for the individual ingesting the fentanyl, the individual would not have suffered a serious bodily injury or died.

Wysinger first challenges the jury's verdict as to both counts on the grounds that there was insufficient evidence that it was Wysinger who gave the fentanyl to T.J.M. and C.S.S. In particular, he emphasizes that T.J.M. never actually observed Wysinger give C.S.S. the drugs.

[1] The evidence concerning the other possible co-conspirator is less strong, although the government references the evidence in support of the conspiracy charge. (Opp'n to Mot. Acquit 3, Dkt. No. 132.) Specifically, there is evidence that the defendant employed an individual named "Bill," sometimes referred to as the "old man," and that Bill transported the victims to pre-arranged "dates" where they planned to—and did—engage in commercial sex acts. Because the court finds there was sufficient evidence of a conspiracy between Wysinger and Garza, it does not address this argument.

The court concludes that there was ample evidence to support both convictions. First of all, T.J.M. credibly testified that she and C.S.S. sought out heroin the day after getting released from jail and that they had not obtained any before C.S.S. called Wysinger to pick them up. They asked him for heroin. Wysinger then drove them from the hotel to his residence in West Virginia, and he left the car for a short time, leaving C.S.S. and T.J.M. in the car. At some point after returning to his car, he provided them with what they thought was heroin but was actually fentanyl.

Although T.J.M. did not physically see Wysinger give the heroin to C.S.S., T.J.M. testified that she was in the back seat and that she was purposefully ignoring the activities in the front seat of the car where C.S.S. and Wysinger were engaged in a sexual act. Moreover, T.J.M. testified that she was constantly in the presence of C.S.S. during this time and she knew that C.S.S. had not received any heroin or fentanyl from any other individual. She testified that Wysinger must have handed it over either during the car ride, or once they got to the hotel, because they had the drugs in the hotel room.

The trio returned to the hotel room where T.J.M. and C.S.S. were staying. Once they arrived at the hotel, Wysinger told them "to be careful" because "people were dying" and "not to overdo it." She testified that she believed he meant that people were falling out (*i.e.*, overdosing) and dying from using the heroin. She and C.S.S. did not have a needle and were waiting for a different friend to bring a needle, but in the meantime both of them snorted some of the drugs Wysinger had given them. They snorted rather than injecting because they did not have a needle and because they wanted to see how strong it was.

Shortly thereafter, T.J.M. left C.S.S. and Wysinger in the hotel room and went and sat just outside the door to the room. She lit a cigarette and believes that, shortly thereafter, she

quickly "fell out" and was unconscious. She awoke later inside the hotel room and testified that she knew she had overdosed because of how she felt. In the same room, C.S.S. was lying on the bed, unconscious and not breathing. There were no drugs or drug paraphernalia found in the hotel room. After T.J.M. called 911 and attempted to perform CPR on C.S.S., she continued to have difficulty staying conscious. The emergency personnel that responded were unable to revive C.S.S., and her post-mortem blood sample showed an extremely high and lethal amount of fentanyl in her blood. T.J.M. was taken to the hospital and survived.

In messages Wysinger sent to T.J.M. through Facebook messenger in the days following the overdoses, Wysinger made some incriminating statements, although he also tried to convince T.J.M. that C.S.S. had left the room and gone elsewhere to get additional drugs. His statements included saying that T.J.M. fell out outside the door and that he brought her body back in the room. (*See* Gov't Ex. 34, Dkt. No. 122-52, stating that "u also died that day n I brought u back in the room.") He also stated that he "flush[ed]" the drugs left on the table in the room. (*See* Gov't Ex. 34, Dkt. No. 122-52.) The court easily concludes that the foregoing evidence, especially taken in the light most favorable to the government, was sufficient for the jury to find that Wysinger provided the fentanyl.

Wysinger next argues that there was insufficient evidence that any fentanyl was the but-for cause of the serious bodily injury to T.J.M. (Mot. Acquittal 5–6.) He notes that "there was no evidence that exclude[d] the possibility that the combination of the substances" in T.J.M.'s blood could have resulted in her overdose. (Mot. Acquittal 5.) In particular, he relies on the testimony of Dr. Schneider, who evaluated T.J.M's blood samples, taken that day at the hospital. Dr. Schneider testified that he had found fentanyl, doxylamine, and dextromethorphan in her blood. He also testified that generally a lethal dose of fentanyl would require a minimum of .005

milligrams per liter of blood, but T.J.M.'s blood only had .0044 mg/l, slightly below that lethal dose. From these facts, Wysinger argues that there is a "real possibility that it was a combination of drugs" that had caused T.J.M.'s overdose. (Mot. Acquittal 5.)

Wysinger's theory on this issue is not supported by the evidence. Although Dr. Schneider testified about two other substances detected in T.J.M.'s blood, he did not offer any testimony—nor did any other expert—that it was possible that a combination of drugs had caused the overdose. Indeed, his testimony about the other drugs effectively eliminated any such possibility. He testified that the first substance was doxylamine, a medication found in many different over-the-counter products, generally marketed as either an antihistamine medication or a sleep aid. It was present in a typical therapeutic dose in T.J.M.'s blood and was at the lower end of what would typically be considered therapeutic. Similarly, the second substance, dextromethorphan, is found in many over-the-counter cold medicines. It, too, was present in a typical therapeutic dose in T.J.M.'s blood.

As to the amount of fentanyl, Dr. Schneider testified that the amount in T.J.M.'s blood would be seen in someone who has been using it as a medication for an extended period of time and built up some tolerance or in someone who has consumed a fairly high dosage and may be experiencing overdose-type symptoms. T.J.M. testified that she had not used heroin in about a year and that she had recently been released from jail. Thus, the jury could eliminate the former option. Moreover, all of the evidence was consistent with an overdose. Additionally, the fact that the amount of fentanyl did not reach the minimum threshold for a lethal overdose does not call into question whether the fentanyl caused T.J.M.'s overdose, which was non-lethal.

In *United States v. Alvarado*, 816 F.3d 242 (4th Cir. 2016), there was evidence that the individual who died had heroin, Xanax, and Benadryl in his system. But the only person who

testified on causation had testified that it was the heroin that caused the death and, without it, he would not have died. *Id.* at 248–49. This was sufficient to satisfy the "but-for" causation standard set forth in *United States v. Burrage*, 571 U.S. 204 (2014), and so the appellate court concluded that the trial court's failure to instruct on but-for causation was neither plain error nor an abuse of discretion.

Much like *Alvarado*, there was no testimony or other evidence in this case that would have allowed the jury to find that the fentanyl "was only a nonessential contributing cause" of the serious bodily injury of T.J.M. *See Alvarado*, 816 F.3d at 249. Thus, this case is distinguishable from cases, like *Burrage*, where other drugs are referenced as a potential cause of the death or serious bodily injury. *See Burrage*, 571 U.S. at 207 (noting trial testimony of experts that the cause of death was "mixed drug intoxication" and that three other drugs played a "contributing role"; *see also, e.g.*, *Atkins v. Stancil*, 744 F. App'x 902, 903 (5th Cir. 2018) (per curiam) (explaining that where the medical examiner had concluded the victim died from "acute heroin toxicity" and there was no other claimed cause, the case was different from *Santillana v. Upton*, 846 F.3d 779, 785 (5th Cir. 2017), where the cause of death was "acute mixed drug intoxication"). Here, the amount of fentanyl in T.J.M.'s blood was close to a fatal dose and therefore sufficient to cause the overdose symptoms she experienced, and the other two medicines present in her blood were low levels of therapeutic cold medicine. There was no evidence from which the jury could have concluded that fentanyl was only a "nonessential contributing cause" of those symptoms.[2]

[2] Wysinger requests that, if the court were to decline to acquit him of Count 4, that the court "strike the enhanced penalty under 21 U.S.C. § 841(b)(1)(C) for 'serious bodily injury.'" For the same reasons that acquittal on this count in not appropriate, the court denies this request, as well. The jury's finding is supported by substantial evidence.

D. Count 5

The jury was instructed that, to find Wysinger guilty of Count 5, it had to find that the government had proved each of the following beyond a reasonable doubt:

> First, that the defendant altered, destroyed, mutilated, or concealed, or attempted to alter, destroy, mutilate, or conceal, a record, document or other object;
>
> Second, that the defendant did so with the intent to impair the object's integrity or availability for use in an official proceeding; and
>
> Third, that the defendant did so corruptly.

(Final Jury Instructions 48, Dkt. No. 126); *United States v. Sterling*, 860 F.3d 233, 245–46 (4th Cir. 2017).

Wysinger challenges the jury's verdict on Count 5 on two grounds. First, he claims that there was insufficient evidence to establish the first element: that he did alter, destroy, mutilate or conceal a document or other object or that he attempted to do so. The court disagrees. The facts set forth above in the court's discussion of Counts 3 and 4 were sufficient for a jury to find that he destroyed an object—the unused drugs in the hotel room. T.J.M. testified that, when she and C.S.S. took the drugs supplied by Wysinger, they were the only three people present, and T.J.M. testified that the two women used only a small portion of the drugs and Wysinger used none. There was certainly sufficient evidence for the jury to conclude that, shortly thereafter, T.J.M. and C.S.S. "fell out" or overdosed, and Wysinger's own after-the-fact statements place him in the hotel room at that time. Additionally, Wysinger told T.J.M. through Facebook messages days later that he had "flushed" the drugs. That statement by him is certainly consistent with the testimony of the responding law enforcement agents and medical personnel, who testified that there were no drugs or drug paraphernalia present when they arrived at the

room in response to the 911 call. All of this constitutes sufficient evidence to establish the first element of Count 5.

Wysinger's second argument is that the government failed to establish that he impaired an object of a crime for the specific purpose of impairing its use or availability in an official proceeding. He points out, in particular, that: (1) there was no investigation of which he was aware on the date of March 23, 2016, and that there was no evidence that any investigation was pending or forthcoming. The government responds that there is no requirement that the defendant knew of an official proceeding or that it had to be pending or about to be instituted, and the statute itself so states. 18 U.S.C. § 1512(f)(1) ("[A]n official proceeding need not be pending or about to be instituted at the time of the offense."). That is accurate insofar as it goes. But the mere fact that no proceeding was pending or imminent is not dispositive.

Instead, in a case decided after this trial and after the briefing on this motion, the Fourth Circuit made clear that any conviction under § 1512(c) must be supported by a certain "nexus" between the defendant's conduct and the official proceeding. *United States v. Young*, 916 F.3d 368, 386 (4th Cir. 2019).[3] The "nexus" requirement stems from a pair of Supreme Court cases that addressed other obstruction statutes: *United States v. Aguilar*, 515 U.S. 593 (1995) (addressing 18 U.S.C. § 1503), and *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005) (addressing 18 U.S.C. § 1512(b)(2)(A)).[4] As described by the *Young* court, "§ 1512(c) [requires] that (1) the obstructive conduct be connected to a specific official proceeding (the 'nexus requirement') that was (2) either pending or was reasonably foreseeable to [the defendant] when

[3] *Young* involved § 1512(c)(2), but it did not limit its reasoning to subsection (2) and includes several references simply to § 1512(c). *See also United States v. Matthews*, 505 F.3d 698 (7th Cir. 2007) (applying the same "nexus" requirement to § 1512(c)(1)).

[4] As the Seventh Circuit has noted, *Aguilar* was based on a statute that requires a "pending" proceeding, and § 1512 expressly disclaims that any proceeding must be pending or imminent. *Matthews*, 505 F.3d at 708 n.3. Nonetheless, the *Young* court relied on both in reaching its holding.

he engaged in the conduct (the 'reasonable foreseeability' requirement)." 916 F.3d at 385.

Here, the evidence could support that Wysinger disposed of the drugs in order to destroy evidence of a possible crime. But under the plain reasoning of *Young*, that is not sufficient to convict him under § 1512(c). Although at first blush that may seem a strange result, it is one compelled by the "nexus" requirement as it is set forth in *Young*.

In *Young*, the Fourth Circuit overturned the defendant's conviction under § 1512(c)(2) despite evidence that he attempted to deceive the FBI by providing statements consistent with a cover story and perhaps even "sufficient evidence to demonstrate that Young obstructed an FBI investigation." *Id.* at 387. The evidence was nonetheless insufficient to sustain the conviction because there was "no evidence to demonstrate he was aware either that his conduct would affect a grand jury proceeding or that a grand jury or similar proceeding was impending." *Id.* Put differently, he may have designed his conduct to thwart and obstruct an FBI inquiry, which he did foresee, but he did not foresee a specific grand jury investigation. *Id.* His conduct, therefore, lacked the requisite nexus. This was true despite evidence that Young was aware some of his acquaintances had been arrested and that he had a "heightened suspicion of FBI surveillance of him." *Id.* at 388.

Also telling is the *Young* court's discussion of cases from other circuits where evidence was held sufficient to sustain a conviction. It first described *United States v. Binday*, 804 F.3d 558, 590 (2d Cir. 2015), as "finding a grand jury proceeding was foreseeable because the defendant was aware that he was the target of a separate regulatory investigation into an insurance fraud scheme and had destroyed incriminating documents related to the scheme." *Young*, 916 F.3d at 387. It then referenced *United States v. Simpson*, 741 F.3d 529, 552 (5th Cir. 2014), as "finding a grand jury proceeding was reasonably foreseeable to a business owner who

had learned about the execution of search warrants for his company and had ordered the deletion of emails after learning of the warrants"). *Young*, 916 F.3d at 387.

The facts of this case resemble *Young* far more than they resemble *Binday* and *Simpson*. Here, there is evidence—in his own words—that Wysinger knew that T.J.M. had overdosed when he destroyed the drugs. Certainly, the jury could draw the reasonable inference that he destroyed the remaining fentanyl in order to prevent it from being found in a criminal investigation. Thus, it is likely he destroyed the drugs in order to hamper a criminal investigation and perhaps even a specifically foreseeable criminal investigation—one that would look into the harm to T.J.M. (or death of C.S.S.). But that alone does not provide sufficient evidence to show that a particular official proceeding was foreseeable to him. Much like in *Young*, a specific investigation may have been foreseeable, but there is no evidence that Wysinger knew there was any current investigation and no evidence that Wysinger reasonably foresaw a particular "official proceeding."

The court is not suggesting that Wysinger's conduct in destroying the drugs was not criminal conduct or otherwise subject to punishment, but simply that it did not violate § 1512(c)(1). *Cf. United States v. Sutherland*, __ F.3d __, 2019 WL 1746946, at *3 (4th Cir. Apr. 19, 2019) (discussing *Young* and clarifying that "[t]o be clear, knowingly giving false documents to a prosecutor without the intent to obstruct a grand jury may violate other federal statutes. E.g., 18 U.S.C. §§ 1001(a), 1519. Just not § 1512(c)(2)."); *United States v. Johnson*, 655 F.3d 594, 602 (7th Cir. 2011) (noting that similar conduct of flushing drugs down a toilet to prevent them from being found during execution of a search warrant by federal agents "likely violated other statutes," and citing "18 U.S.C. § 1519 (obstructing a federal agency investigation); and § 2232 (destruction or removal of property to prevent seizure)").

Neither party cited any cases on this issue, but the court's own research led it to *Johnson*, cited in the preceding paragraph, which is factually similar to this case. There, defendant Lamb had been convicted under § 1512(c)(1) because when police confronted her and told her there was a search warrant for her co-defendant's residence, she refused to wait for the warrant to arrive just inside the door, as instructed. Instead, she "slammed closed the metal door" and then "spent over 20 minutes deliberately eradicating evidence" of illegal drug activity, all "while the police were attempting to force their way into the house." 655 F.3d at 606. On appeal, Lamb argued that there was insufficient evidence that she foresaw grand jury or criminal proceedings. She argued that it could not be sufficient that she merely knew of an investigation and that allowing her conviction to stand would mean that any time a defendant threw drugs out of a car while the police were giving chase, it would constitute a violation of § 1512(c)(1). The Seventh Circuit was not persuaded by her argument, however:

> [The government] simply needed to provide enough evidence that Lamb foresaw that the contraband might be used in an official proceeding and destroyed it with the intent of preventing that use. But why else would Lamb aggressively destroy contraband while authorities were attempting to exercise a search warrant, other than to prevent the discovery of that evidence? And why would she want to prevent that discovery, if not to minimize or eliminate the evidence that could be used against her in a criminal prosecution?

Id. The *Johnson* court made clear, though, that its holding should not be interpreted too broadly: "We need not decide whether knowledge of *any* investigation is sufficient for a conviction under § 1512(c)(1), or even whether a person who destroys evidence when confronted with a search warrant *always* violates the statute. It is enough to conclude that under the facts in this case, the jury could conclude that Lamb foresaw a grand jury or criminal proceedings when she destroyed the contraband." *Id.* at 606 n.5.

The Fourth Circuit reached the same result—albeit with far less analysis and in an

unpublished decision—when confronted with similar factual circumstances. In *United States v. Stanley*, 533 F. App'x 325, 329 (4th Cir. July 19, 2013), the defendant answered the door and was informed that the people there were investigators from the Internet Crimes Against Children Task Force and were there to pursue an investigation into child pornography activities. He then asked if he could go back into the residence to get dressed, woke his roommate and told him that "[t]he cops are here for my computer," and then placed his laptop in the shower under running water. *Id.* On that evidence, and while acknowledging the nexus requirement, the Fourth Circuit affirmed his conviction under § 1512(c)(1).

The court is not certain that the result in *Stanley* would remain the same after the *Young* decision. Nonetheless, in both *Stanley* and *Young* there was more of a reasonable foreseeability of an official proceeding than there is here. In both of those cases, at the time the defendant was destroying evidence, the defendant could not deny that he (or she) had actual knowledge of an actual investigation into his or her of illegal activities and the evidence the defendant destroyed was evidence of that illegal activity. Here, by contrast, there is evidence that Wysinger may have known that C.C.S. and T.J.M. had overdosed, which would certainly make it reasonable to foresee that a criminal investigation might occur. But no one was waiting at the door with a warrant; no law enforcement agent was asking questions. To allow the jury to conclude that the type of nexus discussed in *Young* was satisfied on the facts here would be to allow the "pure speculation" that *Young* prohibits. *See* 916 F.3d at 388. In short, the court concludes that there was not sufficient evidence from which the jury could find that Wysinger destroyed the remaining fentanyl in order to impair its use in an official proceeding.

III. CONCLUSION

For the foregoing reasons, the court will grant Wysinger's motion for acquittal as to Count 5 and otherwise deny it. An appropriate order will be entered.

Entered: June 25, 2019.

/s/ Elizabeth K. Dillon
Elizabeth K. Dillon
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

UNITED STATES OF AMERICA, Criminal No. 5:17cr00022

Plaintiff,

vs. Harrisonburg, Virginia

KENDALL DEMARKO WYSINGER,

9:00 a.m.
VOLUME V of VI
Defendant. 01/11/2019

TRANSCRIPT OF JURY TRIAL PROCEEDINGS,
BEFORE THE HONORABLE ELIZABETH K. DILLON
UNITED STATES DISTRICT JUDGE, and a Jury

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Proceedings recorded by mechanical stenography; transcript produced by computer.

in the Fourth Circuit, I must look to whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. The Fourth Circuit has noted that that's a heavy burden for the defendant, and the prosecution's failure to provide sufficient evidence must be clear.

I also note that I'm not to assess the credibility of witnesses nor am I to weigh the evidence. I merely look to see whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. I'm guided by that instruction by the Fourth Circuit.

With regard to the argument as to Count 1, I will deny the Rule 29 motion with regard to Count 1 because, indeed, I find that the striking of victims, whether it be one or four victims, is not a proper relief granted by Rule 29, and as the government points out, the victims are not the persons that the government purports defendant had an agreement with. He was not in a conspiracy with them. They were merely victims of that. So Rule 29 does not provide for the striking of victims listed in the indictment. So I find that the relief requested under that motion is not appropriate.

With regard to the alternative grounds argued by the United States, which I think is mooted by my ruling -- but I will note that I think there is some weakness compared to other cases that the Court has seen with regard to the -- and

with regard to the evidence in this case with regard to the withholding of drugs. I didn't hear evidence of anyone being dope sick and not given drugs until they meet a quota, or that he was the only source of drugs. But, nonetheless, I think that's mooted by my ruling as to the motion on Rule 29 -- under Rule 29 on Count 1.

With regard to the motion and Count 4, which was the possession with intent to distribute and distribution to Ms. McBrearty leading to serious bodily injury, I agree with the United States that this is a question for the jury with respect to causation and that's what those cases talk about: What is the proper instruction with regard to causation? There is certainly substantial evidence from which a reasonable jury could find the defendant guilty in that regard. And I'm reminded, of course, of the testimony of Ms. McBrearty herself, and the testimony of the personnel who responded to her and testified as to her condition. So I think that that is a jury question and not proper for the Court to determine at the Rule 29 stage, only as to the sufficiency of evidence, and I find there to be sufficient evidence.

With regard to Count 5, which is the evidence tampering, I also deny the motion. Circumstantial evidence abounds in this case in that regard. The testimony is that the defendant gave them what they thought was heroin, which