No. _____

IN THE

Supreme Court of the United States

JOSE OSVALDO MELENDEZ-ROJAS, FRANCISCO MELENDEZ-PEREZ, ROSALIO MELENDEZ-ROJAS, and ABEL ROMERO-MELENDEZ,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

JOINT PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

1. Must the government prove that a defendant knew that the victim was less than 18 years old to support a conviction under 18 U.S.C. § 2423?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here.

Petitioners are Jose Osvaldo Melendez-Rojas, Francisco Melendez-Perez, Rosalio Melendez-Rojas, and Abel Romero-Melendez.

Respondent is the United States of America.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit affirming the judgment of the District Court is reported at 2024 WL 1881491 (2d Cir. 2024) and attached at Appendix A.

The relevant district court decision in *United States v. Melendez-Perez, et al.*, 17 Cr. 434 (ARR) (E.D.N.Y.) is a February 10, 2020 Opinion & Order attached at Appendix D.

JURISDICTION

This petition seeks review of a decision of the United States Court of Appeals for the Second Circuit entered April 30, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the Court of Appeals rested on 28 U.S.C. § 1291.

STATUTORY PROVISION INVOLVED

This case involves the following statutory provision.

Title 18 U.S.C. § 2423(a):

> *(a) Transportation With Intent To Engage in Criminal Sexual Activity.—*
>
> *A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.*

Id.

STATEMENT OF THE CASE

A. Petitioner Jose Osvaldo Melendez-Rojas

1. Introduction

Jose Osvaldo Melendez-Rojas (hereinafter referred to as petitioner or petitioners) was convicted after trial in the United States District Court for the Eastern District of New York of Alien Smuggling Conspiracy in violation of 8 U.S.C. §1324(a) (Count 1), Conspiracy to Transport Minors to Engage in Prostitution in violation of 18 U.S.C. § 2423(e) (Count 2), Sex Trafficking Conspiracy in violation of 18 U.S.C. § 1591(a) (Count 3), Sex Trafficking in violation of 18 U.S.C. § 1591(a) (Counts 5, 6 and 8), Alien Smuggling in violation of 8 U.S.C. § 1324(a) (Counts 7, 9 and 12), Sex Trafficking of a Minor in violation of 18 U.S.C. §1591(a) (Count 10), Transportation of a Minor to Engage in Prostitution in violation of 18 U.S.C. § 2423(a) (Count 11), Money Laundering Conspiracy in violation of 18 U.S.C. § 1956(a) (Count 15), and Distribution of Proceeds of a Prostitution Business in violation of 18 U.S.C. § 1952 (Count 16). He was sentenced to a total term of imprisonment of 472 months (39 years and 4 months), consisting of concurrent terms of imprisonment of ten years (120 months) on counts 1, 7, 9 and 12, 39 years and 4 months (472 months) on counts 2, 3, 5, 6, 8, 10 and 11, 20 years (240 months) on count 15, and 5 years (60 months) on count 16, to be followed by supervised release for a term of five years.

By indictment number 17-cr-434, petitioner was charged with Alien Smuggling Conspiracy in violation of 8 U.S.C. § 1324(a) (Count 1), Conspiracy

to Transport Minors to Engage in Prostitution in violation of 18 U.S.C. § 2423(e) (Count 2), Sex Trafficking Conspiracy in violation of 18 U.S.C. § 1591(a) (Count 3), Sex Trafficking in violation of 18 U.S.C. § 1591(a) (Counts 5, 6 and 8), Alien Smuggling in violation of 8 U.S.C. § 1324(a) (Counts 7, 9 and 12), Sex Trafficking of a Minor in violation of 18 U.S.C. § 1591(a) (Count 10), Transportation of a Minor to Engage in Prostitution in violation of 18 U.S.C. § 2423(a) (Count 11), Money Laundering Conspiracy in violation of 18 U.S.C. § 1956(a) (Count 15), and Distribution of Proceeds of a Prostitution Business in violation of 18 U.S.C. §1952 (Count 16). The charges arose out of allegations by six women that they were brought to Queens, N.Y., from Mexico by petitioner and co-defendants Jose Miguel Melendez-Rojas, Rosalio Melendez-Rojas, Francisco Melendez-Perez, Fabian Reyes-Rojas, and Abel Romero-Melendez and forced to work as prostitutes for the financial benefit of the defendants and others. Fabian Reyes-Rojas pled guilty before trial.

Petitioner was tried before a jury in March 2020. Petitioner joined co-counsel's request that the jury be charged that where the crime contains as an element that the purported victim was a minor, that the Court charge the jury that "[t]he government must also prove that defendant knew that [said individual] was less than eighteen years old at the time." The trial court denied that request and charged the jury, with respect to count two, charging Conspiracy to Transport Minors to Engage in Prostitution, and count eleven, charging Transportation of a Minor to Engage in Prostitution, that "[t]he

Government need not prove that the defendant knew that the individual was less than 18 years old." The jury found petitioner guilty of all thirteen counts against him (Counts 1-3, 5-12, and 15-16).

2. Trial Evidence

Six women, Daisy, Maria Rosalba, Fabiola, Delia, Diana and Veronica, each testified that they were from Mexico, had met one or more of the indicted defendants and had become close with them in Mexico, had agreed to come to the United States with one or more of the defendants to work to be able to send money to their families in Mexico, and, upon arrival in New York, had been forced, by physical violence and threats, to work as prostitutes. They were required to turn over all of the money they earned from prostitution to the indicted defendants. Two of the women, Delia and Diana, were under the age of 18 when they came to the United States and began working as prostitutes. Rosalio Melendez-Rojas and Jose Miguel Melendez-Rojas are petitioner's brothers, Abel Romero-Melendez and Fabian Reyes-Rojas are petitioner's cousins, and Francisco Melendez-Perez is petitioner's nephew.

The government offered additional evidence to corroborate the six women's claims through a series of stipulated wire records and telephone records and through the testimony of various government agents who testified concerning the stipulated records, search warrants, border encounters, and immigration records.

3. The Request to Charge and Charge

By letter dated December 11, 2019, Michael Hueston, attorney for Abel Romero-Melendez, filed a letter noting various objections to the government's proposed jury instruction. Appendix B. In that letter, Mr. Hueston requested, inter alia, that where the crime contains as an element that the purported victim was a minor, that the Court charge the jury that "[t]he government must also prove that defendant knew that [said individual] was less than eighteen years old at the time." Appendix B at p. 35.[1] By letter dated December 12, 2019, Mitchell Golub, petitioner's trial counsel, "join[ed] in the objections to the government's proposed jury instructions which have previously been filed by Michael Hueston, counsel for Abel Romero-Melendez." Appendix C.

With respect to count two, charging Conspiracy to Transport Minors to Engage in Prostitution, the Court first instructed the jury as to the definition of conspiracy and then instructed the jury as to the elements of transporting a minor for the purpose of prostitution. Appendix G. The Court told the jury that "[t]he third and last element that the Government must prove beyond a reasonable doubt is that the individual was less than 18 years old at the time of the acts alleged in the indictment. The Government need not prove that the defendant knew that the individual was less than 18 years old." Appendix G at p. 67. With respect to count eleven, charging Transportation of a Minor to Engage in Prostitution, the Court told the jury

[1] Page numbers refer to the page number in the appendix.

that it had "previously explained and defined the elements of transporting a minor for the purpose of prostitution." Appendix G at p. 68.

4. Verdict and Sentence

The district court presented the case to the jury on March 13, 2020, and the jury returned its verdict that same day. The jury found petitioner guilty of Alien Smuggling Conspiracy in violation of 8 U.S.C. § 1324(a) (Count 1), Conspiracy to Transport Minors to Engage in Prostitution in violation of 18 U.S.C. § 2423(e) (Count 2), Sex Trafficking Conspiracy in violation of 18 U.S.C. § 1591(a) (Count 3), Sex Trafficking in violation of 18 U.S.C. § 1591(a) (Counts 5, 6 and 8), Alien Smuggling in violation of 18 U.S.C. § 1324(a) (Counts 7, 9 and 12), Sex Trafficking of a Minor in violation of 18 U.S.C. §1591(a) (Count 10), Transportation of a Minor to Engage in Prostitution in violation of 18 U.S.C. § 2423(a) (Count 11), Money Laundering Conspiracy in violation of 18 U.S.C. § 1956(a) (Count 15), and Distribution of Proceeds of a Prostitution Business in violation of 18 U.S.C. §1952 (Count 16).

On February 8, 2022, petitioner was sentenced to a total term of imprisonment of 472 months (39 years and 4 months), consisting of concurrent terms of imprisonment of ten years (120 months) on counts 1, 7, 9 and 12, 39 years and 4 months (472 months) on Counts 2, 3, 5, 6, 8, 10 and 11, 20 years (240 months) on Count 15, and 5 years (60 months) on Count 16, to be followed by supervised release for a term of five years.

On April 30, 2024, the Second Circuit affirmed Petitioner's conviction and sentence. *United States v. Melendez-Rojas*, 2024 WL 1881491 (2d Cir. 2024). Appendix A.

B. Petitioner Abel Romero-Melendez

1. Conviction and Sentencing

Abel Romero-Melendez (hereinafter petitioner or petitioners) was convicted of the five counts he was charged with in the superseding indictment: Count 1 (Alien Smuggling Conspiracy from 2006 and June 2017) – 8 U.S.C. § 1324(a)(1)(A)(v)(I) and 8 U.S.C. § 1324(a)(1)(B)(i); Count 2 (Conspiracy to Transport Minors from August 2006 and April 2014) – 18 U.S.C. § 2423(e) and 18 U.S.C. § 2423(a); Count 3 (a Sex Trafficking Conspiracy from January 2009 and July 2017) – 18 U.S.C. § 1594(c), 18 U.S.C. § 1591(a)(1) and 18 U.S.C. § 1591(b)(1); Count 4 (Sex Trafficking of a Minor from August 2006 and March 2007 – Jane Doe # 1) 18 U.S.C. § 1591(a)(1), 18 U.S.C. § 1591(a)(2), and 18 U.S.C. § 1591(b)(1); and Count 18 (Illegal Reentry from 2013 and July 2017) – 8 U.S.C. § 1326(a); after which the district judge sentenced him to a total of 20 years of imprisonment and 5 years of supervised release.

The district court sentenced Romero-Melendez to terms of imprisonment of 10 years on Count 1, 20 years on Counts 2, 3, and 4, and 5 years on Count 18, all to run concurrently. Regarding his supervised release, the district court sentenced him to terms of supervision of 3 years on Count

1, 5 years on Counts 2, 3, and 4, and 3 years on Count 18, all to run concurrently.

The Second Circuit affirmed Romero-Melendez's convictions but agreed with his argument that the district court procedurally erred when it sentenced him to 5 years of imprisonment and 3 years of supervised release for Count 18, charging illegal reentry in violation of 8 U.S.C. § 1326(a) since he could only be sentenced to 2 years of imprisonment. Appendix A at pp. 28-29. It therefore remanded that aspect of the appeal to the district court to resentence Romero-Melendez as to Count 18, which occurred on May 1, 2024.

2. Objection to the Jury Charge

On December 4, 2019, the government filed its proposed jury instructions, and Romero-Melendez filed his objections and proposed instructions. Appendix B. Among other items, petitioner objected to the instruction: "Count Two: Conspiracy to Transport Minors to Engage in Prostitution", which did not require that: "The government must also prove that defendant knew that [said individual] was less than eighteen years old at the time[.]" Appendix B at p. 35.

On February 10, 2020, the Court provided its nearly complete draft, which stated, in pertinent part:

> The third and last element that the government must prove beyond a reasonable doubt is that the individual was less than eighteen years old at the time of the acts alleged in the indictment. The government need not prove that the defendant knew that the individual was less than eighteen years old.

Appendix F at p. 59. The district court stated, in its opinion, that after "[c]onsidering the Supreme Court and Second Circuit's existing precedent on the matter, I find that the government is correct." Appendix D at p. 48. Romero-Melendez continued his objection, and the case proceeded to trial. Appendix E at p. 53.

C. Petitioner Francisco Melendez Perez

1. Conviction and Sentencing

Francisco Melendez-Perez (hereinafter petitioner or petitioners) was charged by superseding indictment and ultimately convicted after jury trial on the following counts: Count 1, alien smuggling conspiracy in violation of 8 U.S.C. §§ 1324(a)(1)(A) and 1324(a)(1)(B); Count 2, conspiracy to transport minors with intent to engage in prostitution in violation of 18 U.S.C. § 2423(e); Count 3, sex trafficking conspiracy in violation of 18 U.S.C. § 1594(c); Counts 8 and 9, along with co-defendant Jose Osvaldo, alleging the sex-trafficking and alien smuggling of Maria Rosalba, in violation of 18 U.S.C. § 1591 and 8 U.S.C. § 1324; Counts 10, 11 and 12, along with co-defendants Jose Miguel, Jose Osvaldo, and Rosalio, alleging the sex trafficking, transportation of a minor with intent to engage in prostitution, and alien smuggling of Delia, in violation of 18 U.S.C. §§ 1591, 2423, and 8 U.S.C. § 1324; Count 15, money laundering conspiracy in violation of 18 U.S.C. § 1956; and Count 16, distribution of proceeds of a prostitution business in violation of 18 U.S.C. § 1952.

Melendez-Perez was sentenced to 25 years' imprisonment, followed by five years' supervised release. He received concurrent sentences of 25 years on Counts Two, Three, Eight, Ten and Eleven, 20 years on Count 15, 10 years on Counts One, Nine and Twelve, and 5 years on Count 16. The Second Circuit affirmed Melendez-Perez's convictions and sentence.

2. Objection to Jury Charge on 18 U.S.C. § 2423 *Mens Rea* Requirement

Defendant Abel Romero-Melendez requested that the court instruct the jury, on the charges of conspiracy to transport minors to engage in prostitution, under § 2423, that the government must prove the defendant knew that the involved individual was less than 18 years old at the time. Appendix B. Melendez-Perez joined in this request. Appendix I. The District Court declined the request, holding that 18 U.S.C. § 2423's knowledge requirement did not extend to the age of the putative victim. Appendix D at p. 48. The District Court instructed the jury on both Counts Two and Eleven that the "Government need not prove that the defendant knew that the individual was less than 18 years old." Appendix G at p. 67. Melendez-Perez's appeal on this issue was rejected by the Second Circuit. Appendix A.

D. Petitioner Rosalio Melendez-Rojas

By Superseding Indictment filed March 15, 2018, a grand jury of the Eastern District of New York charged petitioner Rosalio Melendez-Rojas with alien smuggling conspiracy (Count 1), conspiracy to transport minors to engage in prostitution (Count 2), sex trafficking conspiracy (Count 3), sex

trafficking of a minor (Counts 4 and 10), sex trafficking (Counts 5 and 6), alien smuggling (Counts 7, 12 and 14), transporting a minor to engage in prostitution (Count 11), money laundering conspiracy (Count 15), and distribution of the proceeds of a prostitution business (Count 16). Rosalio joined in his co-defendants' objections to the jury instruction at issue in this petition. Appendix J.

After a trial before Hon. Allyne Ross of the Eastern District of New York and a jury, Rosalio was convicted of all the above counts. Subsequently, on February 8, 2022, the district court sentenced Rosalio to an aggregate prison term of 39 years and 4 months, followed by five years of supervised release.

Following the entry of judgment, Rosalio timely appealed to the Second Circuit Court of Appeals and, inter alia, adopted his co-appellants' arguments regarding the jury instruction at issue. On April 30, 2024, the Second Circuit affirmed Rosalio's conviction and sentence. Appendix A

REASONS FOR GRANTING THE WRIT

POINT I

The Second Circuit's reliance on *United States v. Griffith*, 284 F.3d 338 (2d Cir. 2002) is misplaced, as a series of decisions from the Supreme Court have undermined the rationale of *Griffith* and rendered its

conclusion erroneous.

The Second Circuit relied on its 2002 decision in *United States v. Griffith*, 284 F.3d 338 (2d Cir. 2002) to affirm petitioner Jose Osvaldo Melendez-Rojas's conviction of Conspiracy to Transport Minors to Engage in Prostitution in violation of 18 U.S.C. § 2423(e) (Count 2) and Transportation of a Minor to Engage in Prostitution in violation of 18 U.S.C. §2423(a) (Count 11); petitioner Abel Romero-Melendez's conviction of Conspiracy to Transport Minors in violation of 18 U.S.C. § 2423(e) (Count 2); petitioner Francisco Melendez-Perez's conviction of Conspiracy to Transport Minors to Engage in Prostitution in violation of 18 U.S.C. § 2423(e) (Count 2), and Transportation of a Minor to Engage in Prostitution in violation of 18 U.S.C. §2423(a) (Count 11); and petitioner Rosalio Melendez-Rojas's conviction of Conspiracy to Transport Minors to Engage in Prostitution in violation of 18 U.S.C. § 2423(e) (Count 2), and Transportation of a Minor to Engage in Prostitution in violation of 18 U.S.C. §2423(a) (Count 11).

Griffith held that proof of knowledge of the victim's age is not required to support a conviction under § 2423(a). However, a series of decisions from the Supreme Court since *Griffith* was decided have undermined its holding. We submit that the District Court's jury instruction, and the *Griffith* decision on which the Circuit Court relied to uphold that jury instruction, are no longer correct in light of a series of Supreme Court decisions since *Griffith*.

Count two of the indictment charged petitioners and others with Sex Trafficking Conspiracy in violation of 18 U.S.C. § 2423(a) and (e) in that petitioners "did knowingly and intentionally conspire to transport one or more individuals who had not attained the age of 18 years in interstate and foreign commerce, with intent that such individuals engage in prostitution."

Count eleven of the indictment charged petitioners and others with Transportation of a Minor in violation of 18 U.S.C. § 2423(a) in that petitioners "did knowingly and intentionally transport an individual who had not attained the age of 18 years, to wit: Jane Doe #5, in interstate and foreign commerce, with intent that Jane Doe #5 engage in prostitution." The statute, 18 U.S.C. § 2423(a), makes it a crime when a person "knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce . . . with intent that the individual engage in prostitution."

With respect to these two counts, the District Court instructed the jury that "[t]he Government need not prove that the defendant knew that the individual was less than 18 years old." We submit that the District Court's instruction and the *Griffith* decision are no longer correct in light of a series of Supreme Court decisions since *Griffith*.

In 2009, in *Flores-Figueroa v. United States*, 556 U.S. 646, 129 S.Ct. 1886 (2009), the Supreme Court interpreted 18 U.S.C. §1028A(a)(1), which made it a crime when a person "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." *Id.* at

647, 129 S.Ct. at 1888. The Court held that "the statute requires the Government to show that the defendant knew that the 'means of identification' he or she unlawfully transferred, possessed, or used, in fact, belonged to 'another person.'" *Id.* The Court relied on "ordinary English grammar" to support its holding. *Id.* at 650, 129 S.Ct. at 1890. The Court also noted that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Id.* at 652, 129 S.Ct. at 1891.

Ten years later, in 2019, in *Rehaif v. United States*, 588 U.S. 225, 139 S.Ct. 2191 (2019), the Supreme Court interpreted 18 U.S.C. § 922(g) and 924(a)(2), which made it a crime to knowingly possess a firearm while illegally or unlawfully in the United States (one of a category of persons barred from possessing a firearm). The Court held that "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.* at 237, 139 S.Ct. at 2200. The Court, citing *Flores-Figueroa v. United States*, *supra*, again relied on "ordinary English grammar" to reach its conclusion. *Id.* at 230, 139 S.Ct. at 2196. The Court also noted the presumption that Congress intends to require a culpable mental state for each statutory element of a crime. *Id.* at 229, 139 S.Ct. at 2195. This "presumption in favor of scienter" applies "with equal or greater force when Congress includes a general scienter provision in the statute itself." *Id.*

And in 2022, in *Ruan v. United States*, 597 U.S. 450, 142 S.Ct. 2370 (2022), the Supreme Court interpreted 21 U.S.C. § 841, which made it a crime to knowingly dispense a controlled substance "except as authorized." The Court held that the government was required to prove that the defendant knew that he was not authorized to dispense the controlled substance at issue. *Id.* at 467, 142 S.Ct. at 2382. The Court, citing *Rehaif v. United States*, *supra*, again noted the presumption that Congress intends to require a culpable mental state for each statutory element of a crime, particularly when a statute includes a culpable mental state. *Id.* at 457-458, 142 S.Ct. at 2377.

Finally, in *United States v. Moreira-Bravo*, 56 F.4th 568 (8th Cir. 2022), Circuit Judge L. Steven Grasz, in dissent, pushed back against that court's reading out the *mens rea* requirement, writing:

> It is fundamental that a statute is to be interpreted according to its plain language and, if necessary, by using rules of statutory construction. We do not typically depart from this course to find statutory meaning from tradition or by looking to common law to support counter-textual "special context." Yet the court today holds that when trying to convict a person of violating 18 U.S.C. § 2423(a) the government need not prove the defendant knew the person transported was under eighteen years old. Because I believe both the plain language of the statute and well-established rules of statutory construction demand otherwise, I respectfully dissent.
>
> * * *
>
> [The language of 18 U.S.C. § 2423(a)] is not ambiguous. "In ordinary English, where a transitive

> verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence." Or as Justice Scalia explained, "'[k]nowingly' is not limited to the statute's verb[]," and "once it is understood to modify the object of [the] verb[], there is no reason to believe it does not extend to the phrase which limits that object[.]" [*Flores-Figueroa*,] at 657 (Scalia, J., concurring in part and concurring in the judgment). Applying the grammatical rule here, "knowingly" modifies both "transports" and "an individual who has not attained the age of 18 years[.]" 18 U.S.C. § 2423(a). Thus, in order to convict *Moreira-Bravo*, the government should have to prove he knew the person being transported was under eighteen. "Ordinary English usage supports this reading[.]" *Flores-Figueroa*, 556 U.S. at 657 (Scalia, J., concurring in part and concurring in the judgment). When the plain text is clear, our inquiry generally ends. *See id.; United States v. Boyster*, 436 F.3d 986, 990 (8th Cir. 2006).

Id. at 579-80.

Similar to the cases cited above, 18 U.S.C. § 2423(a) contains a general scienter requirement - that the defendant acted knowingly - and follows that with the additional element that the defendant "transports an individual who has not attained the age of 18 years in interstate or foreign commerce . . . with intent that the individual engage in prostitution."

We submit that this line of Supreme Court jurisprudence, dating back to 2009 and continuing into 2022, and the reasoning of Judge Grasz, makes clear that the holding in *Griffith* can no longer withstand scrutiny. "Ordinary English grammar," the presumption that a culpable mental state should apply to each element of a criminal statute, and the specific language of the

statute at issue, make clear that for petitioners to be found guilty under 18 U.S.C. § 2423(a) the government must prove that the petitioners *knew* that the Jane Does were less than 18 years of age. The failure to so charge was error.

Therefore, petitioners respectfully ask this Court to consider that, in light of *Flores-Figueroa*, *Rehaif* and *Ruan*, the Second Circuit's decision in *United States v. Griffith* was wrongly decided. Petitioners therefore submit that *certiorari* should be granted to clarify this area of the law.

CONCLUSION

For the foregoing reasons Petitioners Jose Osvaldo Melendez-Rojas, Abel Romero-Melendez, Francisco Melendez-Perez, and Rosalio Melendez-Rojas, respectfully request that a writ of certiorari issue to review the decision of the Second Circuit Court of Appeals in this matter.

Dated: Port Washington, New York
July 22, 2024

____/S/_____
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APPENDIX

22-333(L)
U.S. v. Melendez-Rojas

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of April, two thousand twenty-four.

PRESENT:

GERARD E. LYNCH,
ALISON J. NATHAN,
SARAH A. L. MERRIAM,
Circuit Judges.

United States of America,

Appellee,

v.

Nos. 22-333(L),
22-358(con),
22-386(con),
22-397(con),
22-399(con)

Rosalio Melendez-Rojas, AKA Leonel, AKA Wacho, AKA El Guacho; Francisco

Melendez-Perez, AKA Paco, AKA El Mojarra; Abel Romero-Melendez, AKA Borrega, AKA La Borrega; Jose Miguel Melendez-Rojas, AKA Gueramex, AKA Jose Melendez Perez; Jose Osvaldo Melendez-Rojas,

Defendants-Appellants,

Fabian Reyes-Rojas,

Defendant.[1]

FOR DEFENDANT-APPELLANT ROSALIO MELENDEZ-ROJAS:	JONATHAN I. EDELSTEIN, Edelstein & Grossman, New York, NY.
FOR DEFENDANT-APPELLANT FRANCISCO MELENDEZ-PEREZ:	DEVIN MCLAUGHLIN, Langrock Sperry & Wool, LLP, Middlebury, VT.
FOR DEFENDANT-APPELLANT ABEL ROMERO-MELENDEZ:	MICHAEL O. HUESTON (Jacqueline E. Cistaro, Law Offices of Jacqueline E. Cistaro, New York, NY, *on the brief*), Brooklyn, NY.
FOR DEFENDANT-APPELLANT JOSE MIGUEL MELENDEZ-ROJAS:	SUSAN G. KELLMAN, Law Offices of Susan G. Kellman, Brooklyn, NY.

[1] The Clerk of the Court is directed to amend the caption as set forth above.

FOR DEFENDANT-APPELLANT JOSE OSVALDO MELENDEZ-ROJAS: MURRAY E. SINGER, Port Washington, NY.

FOR APPELLEE: GILLIAN KASSNER (James Simmons, David C. James, Jo Ann M. Navickas, *on the brief*) Assistant United States Attorneys, *for* Breon Peace, United States Attorney for the Eastern District of New York, Brooklyn, NY.

* * *

Appeals from judgments of the United States District Court for the Eastern District of New York (Ross, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of the district court are **AFFIRMED** in part and **VACATED** and **REMANDED** in part.

Defendants-Appellants Rosalio Melendez-Rojas (Rosalio), Francisco Melendez-Perez (Francisco), Abel Romero-Melendez (Abel), Jose Miguel Melendez-Rojas (Miguel), and Jose Osvaldo Melendez-Rojas (Osvaldo) each appeal their convictions stemming from their participation in a multi-year,

international sex-trafficking organization, referred to here as the "Melendez-Rojas Trafficking Organization" (MRTO).[2] As part of the MRTO, Defendants smuggled young women, including minors, from Mexico into the United States. Once the victims were in the United States, Defendants used fraud, brutal beatings, threats of violence, and psychological manipulation to force the victims into prostitution, an arrangement from which Defendants benefitted financially.[3]

After a two-week trial, the jury rendered a guilty verdict against all Defendants on all Counts in which they were charged, and the district court subsequently sentenced each Defendant. In the present appeals, Defendants raise numerous challenges to the district court's rulings during and after trial, to their convictions, and, in two cases, to their sentences. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision.

[2] To avoid confusion, we refer to Defendants by their first or middle names, given that several share the same or similar names.

[3] The victims of the MRTO were identified in the superseding indictment as Jane Does #1–6. The Jane Does testified at trial and were identified using only their first names: Diana, Veronica, Fabiola, Maria Rosalba (Maria), Delia, and Daisy.

I. Sufficiency of the Evidence

Miguel, Francisco, Abel, and Rosalio each challenge the sufficiency of the evidence underlying their convictions.[4] Miguel, Francisco, and Abel argue that there was insufficient evidence to support certain of their convictions for alien smuggling under 8 U.S.C. § 1324; transportation of minors to engage in prostitution under 18 U.S.C. § 2423(a) and (e); and substantive sex trafficking under 18 U.S.C. §§ 1591 and 1594(c). Rosalio contends that there was insufficient evidence to support his money laundering conspiracy conviction pursuant to 18 U.S.C. § 1956(h).

Sufficiency of the evidence challenges are reviewed "*de novo*, but defendants face a heavy burden, as the standard of review is exceedingly deferential." *United States v. Baker*, 899 F.3d 123, 129 (2d Cir. 2018) (quotation marks omitted). "[W]e must view the evidence in the light most favorable to the Government, crediting every inference that could have been drawn in the Government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the

[4] After the jury rendered its verdict, Francisco, Abel, and Rosalio each moved for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The district court denied each motion.

weight of the evidence." *United States v. Brock*, 789 F.3d 60, 63 (2d Cir. 2015) (quotation marks omitted). Moreover, "[w]e will sustain the jury's verdict if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Pierce*, 785 F.3d 832, 838 (2d Cir. 2015) (quotation marks omitted).

A. Francisco

Francisco challenges the sufficiency of the evidence underlying his convictions for Count 8, aiding and abetting the sex trafficking of Maria, and Count 9, aiding and abetting the smuggling of Maria. Francisco asserts that he took no affirmative act to aid his uncle, Osvaldo, in smuggling and sex trafficking Maria. We disagree.

Evidence at trial established that Francisco assisted Osvaldo in recruiting Maria. He was present when Osvaldo and Maria began dating and went with them to Maria's parents' house to convince them that she was safe while living with Osvaldo, thereby lending credence to Osvaldo's false promise that he and his family would take care of Maria. *See United States v. Delgado*, 972 F.3d 63, 76 (2d Cir. 2020), *as amended* (Sept. 1, 2020) (noting that accomplice liability is satisfied

where "a defendant's presence helps or positively encourages the commission of a crime") (cleaned up).

While Maria lived at Osvaldo's family home in Mexico, Francisco also "watched over" Maria when Osvaldo was absent, and would tell Osvaldo "everything that [Maria] did." Rosalio App'x at 449. Maria testified that, while she lived with Osvaldo, he abused her, forced her to have an abortion, and forced her to work as a prostitute in Mexico City. Testimony at trial also demonstrated that Francisco knew of the plan to cross the border with Maria, as he accompanied her with his own victim, Delia, on at least two attempted crossings. A reasonable jury could conclude that this evidence established that Francisco knew Osvaldo recruited, harbored, maintained, and transported Maria and that he affirmatively participated in her trafficking by, at the very least, harboring and surveilling her at the home prior to the planned border crossing.

Francisco additionally asserts that he did not aid and abet Osvaldo's smuggling offense of Maria in violation of 8 U.S.C. § 1324(a)(1)(A)(iv). Francisco's argument rests on the mistaken impression that § 1324(a)(1)(A)(iv) requires a successful border crossing by the smuggled alien, and therefore to aid and abet the

offense, his actions must have furthered such a crossing. However, § 1324(a)(1)(A)(iv) only requires Francisco to have aided and abetted Osvaldo's efforts to "encourage[] or induce[]" an alien's illegal entry, and is satisfied regardless of whether that contemplated entry is accomplished or even attempted. 8 U.S.C. § 1324(a)(1)(A)(iv) (providing for liability where the defendant acts while "knowing or in reckless disregard of the fact that such . . . entry . . . is or *will be* in violation of law") (emphasis added).

As discussed above, Francisco attempted to cross the border with Maria and Delia on at least two occasions, and Delia testified that on their first attempt to cross the border, Francisco instructed her not to answer any questions. A rational juror could infer from Francisco's presence, and his affirmative instructions, that he knew of and contributed to Osvaldo's "encourage[ment] or induce[ment]" of Maria to illegally enter the United States. Francisco's active participation in the recruitment of Maria in Mexico and surveillance of her activities on behalf of Osvaldo prior to the border crossing attempts further demonstrates that he assisted Osvaldo, by, at minimum, keeping her within Osvaldo's grasp. The

evidence was therefore sufficient to convict Francisco of smuggling and sex trafficking Maria.

B. Abel

Abel argues that the evidence was insufficient to convict him of Count 1, alien smuggling conspiracy; Count 2, conspiracy to transport minors for prostitution; Count 3, sex trafficking conspiracy; and Count 4, sex trafficking of a minor, Diana.

As an initial matter, much of Abel's argument about the sufficiency of the evidence relates to Diana's testimony, which he asserts was inconsistent and noncredible as a matter of law. But as the district court recognized, Diana's inconsistencies were raised during cross examination and defense counsel's closing argument. Moreover, the Government redirected Diana, asking her about the inconsistencies in her testimony. "It is the province of the jury and not of the court to determine whether a witness who may have been inaccurate, contradictory and even untruthful in some respects was nonetheless entirely credible in the essentials of his testimony." *United States v. O'Connor*, 650 F.3d 839, 855 (2d Cir. 2011) (quotation marks omitted). We agree with the district court that

Diana's testimony was not incredible as a matter of law and that a reasonable jury could, and evidently did, believe that testimony.

As Abel concedes, Diana's testimony was sufficient to convict him on each challenged Count. Diana testified that Abel and Miguel attempted to cross the border with her multiple times when she was sixteen. Miguel obtained false identification for Diana to appear older, and Abel required Diana to rehearse her false birthday and corrected her when she was wrong. The Government's border crossing exhibits corroborate that Abel tried to cross the U.S.-Mexico border three times with Diana. Diana's testimony also established that Abel knew that she was forced to work in prostitution and that she suffered severe abuse. Diana also described how Abel encouraged the trafficking by discussing plans to relocate the operation to North Carolina.

Testimony and physical evidence also established that at least two other women worked as prostitutes for Abel. Witnesses testified that these women gave Abel their earnings, and that Abel participated with those earnings in a joint savings club with his co-defendants that pooled and distributed the prostitution proceeds of the MRTO's victims. Therefore, a rational jury could conclude that

Abel actively participated in the charged alien smuggling conspiracy, conspiracy to transport minors for prostitution, sex trafficking conspiracy, and sex trafficking of Diana.

C. Miguel

Miguel argues that the evidence was insufficient to convict him of aiding and abetting the sex trafficking, Count 10; transportation of a minor to engage in prostitution, Count 11; and smuggling of Delia, a minor, Count 12. Specifically, Miguel asserts that the evidence demonstrates only his mere presence as a passenger in a taxi that transported Delia from the Bronx to Queens, which he claims was insufficient for any rational juror to convict him. We disagree.

The evidence at trial demonstrated that Miguel's brother, Osvaldo, his sister, Guadalupe, and Francisco participated in arranging Delia's transportation across the border by securing identification documents and telling Delia what to say if confronted by the authorities. After two unsuccessful attempts, Delia successfully crossed the border with Gudalupe and Francisco. From the border, the three traveled to the Bronx, where one of the smugglers transporting them called "one of the brothers Melendez" to demand additional payment for bringing

Delia to the East Coast. Rosalio App'x at 686–87. Shortly thereafter, Miguel and Rosalio arrived, one of the brothers paid the fee, and the group left together in a taxi. Although Delia did not testify that Miguel paid those drivers, the jury could reasonably infer that Miguel was not merely present but rather actively aided the crime. He and Rosalio came to the Bronx to transport Delia, who had been recently smuggled across the border, to the apartment in Queens from which the MRTO operated, in response to a call demanding additional payment for her smuggling. The inference of active participation is further strengthened by Miguel's extensive participation in the sex-trafficking conspiracy and the fact that Rosalio had provided similar aid to Miguel when Miguel transported his victim, Diana. As with Delia, Rosalio picked up Miguel and Diana upon their arrival to New York and then transported Diana, with Miguel, to the Queens apartment.

Delia also testified to Miguel's participation with the other Defendants in the savings club, into which the proceeds from her prostitution were deposited. Contrary to his sole argument, Miguel was not merely present. He played an active role in the final leg of Delia's transportation, and he personally benefitted financially from his participation in the venture. As a result, sufficient evidence

was presented to convict Miguel, at least as an aider and abettor, of Counts 10, 11, and 12. *See Delgado*, 972 F.3d at 74 (A defendant does not need to "provide more than a minimal amount of aid to qualify as an aider and abettor" (quotation marks omitted)).

D. Rosalio

Rosalio asserts that there is insufficient evidence to support his money laundering conviction because the government failed to introduce evidence that the wire transfer transactions at issue were designed either to promote unlawful activity or to conceal the proceeds of unlawful activity as required by 18 U.S.C. § 1956(a)(1). We disagree. At minimum, there is sufficient evidence upon which a reasonable jury could find that Rosalio conspired with others to use the prostitution proceeds to further the interests of the MRTO, when he used the funds garnered from the prostitution to fund additional attempts to transport victims into the United States for commercial sex acts.

Delia and Maria both testified that Rosalio paid the smuggling fees for them to cross the border into the United States. Daisy also testified that, in August 2011, Rosalio wired money to his co-defendant Fabian Reyes-Rojas to cover her travel

expenses to cross the border with Fabian.[5] Wire transfer records confirmed that Rosalio transferred funds to Fabian in August 2011. Moreover, testimony demonstrated that Defendants used the obligation of repaying the border-crossing fees to coerce the victims into prostitution. Finally, Veronica testified that Rosalio did not have a job or source of income other than the proceeds garnered from the victims' prostitution, which reasonably gives rise to the inference that the funds sent in the wire transfers to pay the smuggling fees were the proceeds of that prostitution. *See United States v. Frazier*, 605 F.3d 1271, 1282 (11th Cir. 2010) (holding that the absence of "evidence that [defendant] had a source of income other than his [drug] smuggling" was sufficient to infer that the wired funds were proceeds of unlawful activity); *United States v. Foreste*, 751 F. App'x 48, 51 (2d Cir. 2018) (evidence that defendant "had no job, and reported no income to the I.R.S." was sufficient for rational jury to find "that the money deposited . . . was the proceeds from" unlawful activity). A rational juror could conclude that the Defendants wired prostitution proceeds which were then used to pay the

[5] Fabian Reyes-Rojas pled guilty to sex trafficking conspiracy and to the sex trafficking of Daisy.

smuggling fees, and the payment of those fees promoted further sex trafficking activity, by bringing more victims into the United States. The evidence was therefore sufficient to convict Rosalio for conspiracy to engage in the promotional element of money laundering.

II. Jury Instruction on 18 U.S.C. § 2423(a)

Defendants next challenge the district court's jury instructions as to 18 U.S.C. § 2423(a), which, as relevant here, makes it a crime to "knowingly transport[] an individual who has not attained the age of 18 years in interstate or foreign commerce . . . with intent that the individual engage in prostitution[.]"[6]

Defendants argue that to be convicted under 18 U.S.C. § 2423(a), the plain terms of the statute require that the defendant *know* the individual he transported was under eighteen, and therefore the district court erred by instructing the jury that the Defendants did not need to have such knowledge. Binding precedent establishes otherwise.

[6] The statute also prohibits such transport "with the intent that the individual engage . . . in any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2423(a). However, the Defendants were charged with, and the jury was instructed on, solely the "prostitution" prong of the offense.

We review preserved challenges to jury instructions *de novo*. *United States v. Applins*, 637 F.3d 59, 72 (2d Cir. 2011) (quotation marks omitted). "A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *Id.* (quotation marks omitted). Questions of statutory construction are also reviewed *de novo*. *See United States v. Shyne*, 617 F.3d 103, 106 (2d Cir. 2010).

In *United States v. Griffith*, 284 F.3d 338 (2d Cir. 2002), we held that knowledge of the victim's age is not required under § 2423(a). *See id.* at 351. Defendants assert that a trio of subsequent Supreme Court decisions have abrogated that decision. *See Flores-Figueroa v. United States*, 556 U.S. 646 (2009); *Rehaif v. United States*, 139 S. Ct. 2191 (2019); *Ruan v. United States*, 597 U.S. 450 (2022). In *Rehaif* and *Ruan*, the Supreme Court affirmed the "longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif*, 139 S. Ct. at 2195 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)); *Ruan*, 597 U.S. at 458. Meanwhile, in *Flores-Figueroa*, the Court announced that, where a

criminal statute uses the term "knowingly," courts should presume that that *mens rea* applies to all subsequently listed elements in that statute. 556 U.S. at 656–57.

But the Supreme Court, in each of those cases, simultaneously recognized "special context[s]" that require departing from the common law presumption in favor of scienter as to each element of a crime. *See, e.g.*, *Flores-Figueroa*, 556 U.S. at 652. Such special contexts include knowledge of the victim's age in sex offenses against minors, which is the precise conduct proscribed by § 2423(a). *See id.* at 652–53; *X-Citement Video, Inc.*, 513 U.S. at 72 n.2.

Moreover, as we recognized in *Griffith*, in § 2423(a), it is not the victim's age that marks the boundary between "lawful and unlawful conduct," because 18 U.S.C. § 2421 criminalizes the same conduct as § 2423 with the exception of an age requirement. *Griffith*, 284 F.3d at 350–51. Thus, the "defendant is already on notice that he is committing a crime when he transports an individual of any age in interstate commerce for the purpose of prostitution." *Id.* Imposing a *mens rea* requirement as to the age of the victim therefore does not serve the presumption that the defendant must be aware of the facts separating "wrongful from innocent acts." *Rehaif*, 139 S. Ct. at 2197.

For those reasons, *Griffith* is consistent with the Supreme Court's subsequent decisions, and we remain bound by it. The district court did not err in instructing the jury that § 2423(a) does not require knowledge that the victim is a minor.

III. Evidentiary Challenge

Rosalio challenges the district court's admission of testimony by certain victims that they were forced to have abortions. Under Federal Rule of Evidence 403, otherwise relevant evidence should be excluded "if its probative value is substantially outweighed by the danger of . . . unfair prejudice." We review Rule 403 rulings for "abuse of discretion," and will reverse only "[w]here there was inadequate consideration of the probative value of the evidence, or a failure to adequately consider the risk of unfair prejudice and to balance this risk against probative value." *United States v. Morgan*, 786 F.3d 227, 232 (2d Cir. 2015).

In a pre-trial conference, the district court held that the testimony was "relevant and probative of whether or not [the victims] were coerced into prostitution and commercial sex and other sexual activities. It demonstrates that the defendants engendered fear." Joint App'x at 108. But the district court also

warned the Government to treat the testimony "very carefully . . . so as not to unduly inflame." *Id.* at 109.

We detect no abuse of discretion in the district court's balancing analysis. The court properly determined that the testimony had probative value because it directly related to the charged sex trafficking offenses.[7] The court also adequately considered and took steps to minimize the dangers of unfair prejudice. Rosalio nevertheless asserts that the subject of abortion is so inflammatory that the testimony was necessarily unfairly prejudicial. But we reject that argument; this particular evidence is "no more inflammatory than the facts of the charged [offenses]." *United States v. Reichberg*, 5 F.4th 233, 242 (2d Cir. 2021).

Rosalio further argues that in some instances, the testimony indicated that the victims resisted or were at most tricked into receiving an abortion, which he claims is not probative of coercion. That argument also misses the mark. Even if the victims resisted or were tricked into having the abortions, they ultimately

[7] Indeed, we have recently affirmed the admission of abortion evidence, on similar grounds, by summary order. *See United States v. Raniere*, No. 20-3520-CR, 2022 WL 17544087, at *6 (2d Cir. Dec. 9, 2022), *cert. denied*, 143 S. Ct. 1756 (2023) (evidence that co-conspirator procured victims' abortions was probative of whether that person "facilitated the abuse of" sex-trafficking victims).

underwent abortions against their will. The evidence is therefore probative of the environment of fear and coercion that Defendants used to force the women into prostitution. Moreover, 18 U.S.C. § 1591 prohibits not only sex trafficking through coercion, but also by fraud, and the Defendants' use of trickery to obtain abortions is highly probative evidence that their promises used to recruit victims into the trafficking operation—that they would start families together—were fraudulent. There was no error here.

IV. Confrontation Clause

Abel argues that his rights under the Confrontation Clause of the Sixth Amendment were violated when the district court and the Government intervened during his attorney's cross-examination of Diana.

A district court has "wide latitude" to reasonably limit "cross-examination based on concerns about . . . harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). Simply put, the Confrontation Clause provides only "an *opportunity* for effective cross-examination," and does not guarantee a "cross-examination that is effective in whatever way, and to

whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). We therefore will reverse only for abuse of discretion, *see United States v. Crowley*, 318 F.3d 401, 417 (2d Cir. 2003), and we see none here.

Regarding the Government's actions, nothing suggests that its objections during Diana's cross-examination were improper, or that the district court erred in allowing the Government to discuss its objections at a sidebar, outside the presence of the jury.[8] The district court's colloquy with Diana attempted to ensure she understood what it meant for a document to refresh her recollection, because she did not speak English and appeared not to understand defense counsel's question on that subject. A district court does not err when it attempts to prevent "confusion of the issues" and ensure that a witness understands the question she is asked, *see Van Arsdall*, 475 U.S. at 679, particularly when the question invokes a legal concept unfamiliar to most lay witnesses. In any event, defense counsel was able to continue cross-examination afterwards, and nothing restricted counsel's ability to do so. We reject Abel's argument accordingly.

[8] Furthermore, the district court's admission in front of the jury that it was having difficulty reading the document merely demonstrated that a sidebar was necessary to clarify the questioning.

V. Verdict Sheet

Osvaldo argues that the district court's general verdict form for Count 15, money laundering conspiracy under 18 U.S.C. § 1956(a)(1), and (h), makes it impossible to tell whether the jury convicted him on a theory of liability for which there was insufficient evidence.

A general verdict sheet, must be overturned if that "verdict is supportable on one ground but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States*, 354 U.S. 298, 312 (1957), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978). However, that rule applies only to "legal error," that is, "a mistake about the law, as opposed to a mistake concerning the weight or the factual import of the evidence." *Griffin v. United States*, 502 U.S. 46, 56–59 (1991). Therefore, "where the error in a verdict is factual, as where one basis for conviction is 'unsupported by sufficient evidence,' a guilty verdict 'stands if the evidence is sufficient with respect to any one of the acts charged.'" *United States v. Salmonese*, 352 F.3d 608, 624 (2d Cir. 2003) (quoting *Griffin*, 502 U.S. at 56–57).

Section 1956(a)(1) has a promotional prong and a concealment prong, either of which is independently sufficient for liability. *See United States v. Quinones*, 635 F.3d 590, 597 (2d Cir. 2011). Although the district court instructed the jury that it must be unanimous as to at least one of those theories, its verdict form did not require the jury to specify which of the two theories was the basis for its verdict. Osvaldo argues that there is insufficient evidence to prove the concealment prong, and therefore the general verdict cannot stand because the jury might have erroneously convicted him on the concealment prong. But there is no error, as Osvaldo's argument is premised solely on the factual sufficiency of the evidence; it involves no mistake of law. And because Osvaldo concedes that the evidence was sufficient for conviction on the promotional prong, the guilty verdict stands. *See Salmonese*, 352 F.3d at 624.

VI. Motion for a New Trial on Jencks Act Material

Abel argues that the district court erred when it denied his motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. According to Abel, he is entitled to a new trial because the Government elicited testimony from Diana that was not contained in the Government's prior disclosures, which

demonstrates that the Government improperly withheld material that it was required to disclose under the Jencks Act, 18 U.S.C. § 3500.[9]

Rule 33 provides that a court "may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). We review for abuse of discretion, *see United States v. Snype*, 441 F.3d 119, 140 (2d Cir. 2006), and will reverse only if "the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice," *United States v. Landau*, 155 F.3d 93, 104 (2d Cir. 1998) (quotation marks omitted).

The Jencks Act provides that "[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the

[9] Abel further argues that the inconsistencies between Diana's testimony and prior statements demonstrates that the Government suborned her perjury. We reject this contention for the same reasons that we reject his contention that Diana's testimony was incredible as a matter of law. "Simple inaccuracies or inconsistencies in testimony do not rise to the level of perjury." *United States v. Monteleone*, 257 F.3d 210, 219 (2d Cir. 2001). Moreover, "when testimonial inconsistencies are revealed on cross-examination," it is for the jury to "determine whether an inconsistency in a witness's testimony represents intentionally false testimony or instead has innocent provenance such as confusion, mistake, or faulty memory." *United States v. Josephberg*, 562 F.3d 478, 494–95 (2d Cir. 2009) (quotation marks omitted).

witness has testified." 18 U.S.C. § 3500(b). A "statement" includes a "verbatim" transcription of an "oral statement." *Id.* § 3500(e). The Jencks Act, however, imposes no obligation on the Government to make written notes of its meetings with witnesses. *See United States v. Rodriguez*, 496 F.3d 221, 224–25 (2d Cir. 2007). Moreover, the harmless error doctrine applies to Jencks Act violations. *See Goldberg v. United States*, 425 U.S. 94, 111 n.21 (1976); *United States v. Nicolapolous*, 30 F.3d 381, 383–84 (2d Cir. 1994).

The district court did not abuse its discretion here. To the extent Abel contends that the Government failed to create written notes of any alleged additional meetings with Diana, we find no error because the Government has no obligation to memorialize all its meetings with witnesses under the Jencks Act. *See Rodriguez*, 496 F.3d at 224–25. To the extent Abel contends that the Government withheld relevant Jencks Act material, there is no basis in the record that any such material existed. In any event, any error would be harmless because defense counsel cross-examined Diana on the inconsistencies between her statements in the § 3500 material and her testimony at trial. Defense counsel also extensively described Diana's inconsistencies to the jury in summation. At most, the

hypothesized notes would have shown that Diana had made additional statements containing identical inconsistencies to those already elicited during her trial testimony. *See United States v. Orena*, 145 F.3d 551, 559 (2d Cir. 1998) ("It is well settled that where ample ammunition exists to attack a witness's credibility, evidence that would provide an additional basis for doing so is ordinarily deemed cumulative and hence immaterial."). Nothing suggests that Diana would have testified differently, or that the jury would have heard different arguments, had the Government disclosed any alleged additional notes. We therefore reject Abel's argument.

VII. Sentencing Challenges

Rosalio challenges the substantive reasonableness of his sentence of 472 months' imprisonment, while Abel argues that his five-year sentence for his illegal reentry conviction was procedurally unreasonable. We reject Rosalio's argument, but we remand Abel's sentence to the district court for correction.

A. Rosalio

"[O]ur review of a sentence for substantive reasonableness is particularly deferential," and we do not "substitut[e] our own judgment for that of district

courts." *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012). "A sentence is substantively unreasonable when it cannot be located within the range of permissible decisions, because it is shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Osuba*, 67 F.4th 56, 68 (2d Cir. 2023) (quotation marks omitted).

Rosalio argues that his sentence was substantively unreasonable (1) because the court failed to give sufficient weight to his proffered mitigating circumstances, including childhood abuse, and (2) the shorter sentence given to his co-defendant, Francisco. As an initial matter, Rosalio's sentence was below the Guidelines range of life imprisonment and it is "difficult to find that a below-Guidelines sentence is unreasonable." *United States v. Perez-Frias*, 636 F.3d 39, 43 (2d Cir. 2011). Additionally, the district court properly applied the sentencing factors in 18 U.S.C. § 3553(a), explaining that Rosalio's mitigating circumstances did not warrant leniency based on the nature and circumstances of the offense, which it found "could not be more heinous." Rosalio Sp. App'x at 20. The district court further explained that any mitigating factors could not "possibly excuse the despicable acts of violence, threats, and pain" caused by Rosalio's crimes, and that his

submissions failed to "hint[] at either acceptance of responsibility, or the slightest remorse." *Id.* at 25. In light of these circumstances, Rosalio's sentence is not "shockingly high," and "if the ultimate sentence is reasonable . . . , we will not second guess the weight (or lack thereof) that the judge accorded to a given factor." *United States v. Pope*, 554 F.3d 240, 246–47 (2d Cir. 2009) (internal alterations adopted). As for the purported sentencing disparity between Rosalio and Francisco, we have made clear that a district court is not required to consider sentencing disparities between codefendants. *United States v. Stevenson*, 834 F.3d 80, 84 (2d Cir. 2016). In any event, the district court identified several factors, such as Francisco's youth and lesser number of victims, that explain the difference between his sentence and that of Rosalio.

B. Abel

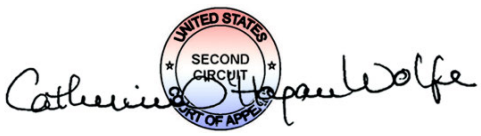
Abel argues that the district court procedurally erred when it sentenced him to five years' imprisonment and three years of supervised release for Count 18, charging illegal reentry in violation of 8 U.S.C. § 1326(a). That sentence exceeds the maximum authorized statutory penalty for the offense and is therefore plain error. *See* 8 U.S.C. § 1326(a) (providing for imprisonment of up to two years);

United States v. Cadet, 664 F.3d 27, 33 (2d Cir. 2011) ("[A] sentence that exceeds the statutory maximum qualifies as plain error."). We therefore remand for the district court to resentence Abel as to Count 18.

* * *

For the foregoing reasons, the convictions and sentences of all Defendants-Appellants except Abel Romero-Melendez are **AFFIRMED**, and the judgment with respect to Abel Romero-Melendez is **VACATED** and **REMANDED** for resentencing on Count 18.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



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ADMITTED NY

December 11, 2019

BY ECF
The Honorable Allyne R. Ross
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *United States v. Melendez-Perez, et al.*, 17 Cr. 434 (ARR)

Your Honor:

I represent defendant Mr. Abel Romero-Melendez. Please accept this letter as a list of our objections to the government's proposed jury instructions.

OBJECTIONS

Request No. 3 – II. Conspiracy

The instruction does not list all of the elements for a conspiracy, as it fails to state:

> Third, that one of the members of the conspiracy knowingly committed at least one of the overt acts charged in the indictment; and
>
> Fourth, that the overt act(s) which you find to have been committed was (were) to further some objective of the conspiracy.

See, Modern Federal Jury Instructions, ("Sand"), 19-3. *Compare,* Government's Proposed Jury Instructions, p. 6. These two elements should be listed in the instruction after the first two are mentioned, and the model instructions at Sand 19-7 and 19-8 used to define them for the jury.

This pattern of omission persists in the government's proposed charge for Counts One (Alien Smuggling Conspiracy), Two (Conspiracy to Transport Minors to Engage in Prostitution), and Three (Sex Trafficking Conspiracy). The government fails to clearly mention, much less emphasize, the need to prove these two additional elements. *See* Government's Proposed Jury Instructions, p. 15, 18, 20, 21, 23 and 33 (discussing conspiracy). Not including them overlooks their importance, and we object to the omission.

Further, we object to the government's deviation from the model language regarding its Existence of Agreement and Membership in the Conspiracy instructions, that proposes:

> Put another way, to establish a conspiracy, the government is not required to prove that the conspirators sat around a table and entered into a solemn contract, orally or in writing, stating that they have formed a conspiracy to violate the law, setting forth details of the plans, the means by which the unlawful project is to be carried out or the part to be played by each conspirator. It would be extraordinary if there were such a formal document or specific oral agreement. Common sense would suggest that when persons do, in fact undertake to enter into a conspiracy, much is left to an unexpressed understanding. A conspiracy, by its very nature, is almost invariably secret in both origin and execution. Therefore, it is sufficient for the government to show that the conspirators somehow came to a mutual understanding to accomplish an unlawful act by means of a joint plan or common scheme.

See, Government's Proposed Jury Instructions, p. 7. This proposed language is, in fact, an argument, which minimizes the government's burden. Conspiracies come in all shapes and sizes. Some are planned around a breakfast table. Others are written out in ledgers, listing profits. Some are texted and photographed in social media. A court telling a jury what is "extraordinary" invades the jury's province as the fact finder. Simply put, the proposed language, whether inadvertent or by design, tells jurors they should not listen to any defense argument – no matter how reasonable – that suggests that the government has failed in its burden because of the lack of proof. The model jury instructions set forth in Sand 19-4 and 19-6 should be used instead, which includes the appropriate Mere Presence and Mere Knowledge and Acquiescence instructions to be used. *See,* Sand 19-6.

Request No. 3 – III. Aiding and Abetting

Request No. 3, Aiding and Abetting, deviates from the model jury instruction set forth in Sand, Instructions 11.01. *Compare*, Government's Proposed Jury Instructions, p. 9-11. It improperly uses the descriptive term "best friend" which suggests a close association between the defendants, and does not mention "reasonable doubt" as the standard of proof. Thus, we object to the instruction, and propose the following:

> Section 2 of Title 18 of the United States Code provides: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." Under the aiding and abetting statute, it is not necessary for the government to show that a defendant himself physically committed the crime with which he is charged in order for you to find the defendant guilty. This is because, under the law, a person who aids or abets another to commit an offense is just as guilty of that offense as if he personally committed the acts.

> Therefore, you may find a defendant guilty of an offense if you find beyond a reasonable doubt that the government has proven (1) that another person actually committed the offense with which the defendant is charged, and (2) that the defendant aided or abetted that person in the commission of the offense.
>
> First, you must find that another person has committed the crime charged.
>
> Obviously, no one can be convicted of aiding or abetting the criminal acts of another person if no criminal acts were committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether the defendant you are considering aided or abetted the commission of the crime.
>
> Second, a defendant's mere presence where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by a defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and abettor must have an interest in the criminal venture and must, by his actions, seek to make the criminal venture succeed.

See, Sand 11-2; and as adapted from the charge in *United States v. Carneglia*, 08 Cr. 76 (JBW) (E.D.N.Y.) and in *United States v. Anastasio, et al.*, 06 Cr. 815 (BMC) (E.D.N.Y.).

Finally, this instruction should not be given unless there is an evidentiary basis to conclude that a defendant aided and abetted another who acted as a principal.

Request No. 5 – Count One: Alien Smuggling Conspiracy

The government's instruction fails to list the defendant's knowledge requirement. The instruction should include:

> The government must prove beyond a reasonable doubt that the defendant knew that [name of the alien] was an alien.
>
> Whether or not the defendant had this knowledge is a question of fact to be determined by you on the basis of the evidence. If you find that the evidence establishes that the defendant actually knew that [name of alien] was an alien, then this element is satisfied.

Sand 33A-4. *Compare*, Government's Proposed Jury Instructions, p. 16 (listing elements).

The government's proposed instruction is also argumentative and incorrectly redefines conspiracy, where it states:

> I have already instructed you on the general definition of conspiracy, which is an agreement among two or more people to commit a crime. I remind you that the crime of conspiracy to violate a federal law is a separate offense from the underlying crime. It is separate and distinct from an actual violation of alien smuggling, which is the object of the conspiracy and what we call the "substantive crime." In order to find the defendant you are considering guilty of conspiracy to commit alien smuggling, you must find that two or more persons agreed to commit the crime of alien smuggling, and that the defendant you are considering knowingly and intentionally became a member of the conspiracy. The government does not have to prove that the defendant actually committed the crime of alien smuggling. What the government must prove is that the defendant voluntarily entered into a conspiracy, the purpose of which was to commit alien smuggling.

See, Government's Proposed Jury Instructions, p. 15. As mentioned above in relation to Request 3, this truncated version of the conspiracy instruction fails to mention conspiracy's third and fourth elements. Further, it lowers the government's burden by emphasizing what the government does not have to prove. It also fails to mention the "reasonable doubt" standard. This language should be rejected, in total, or restated as follows:

> I have already instructed you on the general definition of conspiracy. I remind you that the crime of conspiracy to violate a federal law is a separate offense from the underlying crime. It is separate and distinct from an actual violation of alien smuggling, which is the alleged object of the conspiracy and what we call the "substantive crime." In order to find the defendant you are considering guilty of conspiracy to commit alien smuggling, you must find beyond a reasonable doubt the defendant you are considering knowingly and intentionally entered into the conspiracy, that the object of the conspiracy was to commit alien smuggling, and that at least one of the members of the conspiracy knowingly committed at least one overt act to further some objective of the conspiracy.

This pattern of minimizing the government's burden is repeated again, where the proposed instruction states:

> Now, as I already instructed you, a conspiracy is a crime even if it fails to achieve its purpose. Thus, to prove Count One, the government does not have to prove that any defendant actually committed the crime of alien smuggling. Rather, if you find that the defendant you are considering knowingly and intentionally agreed to commit the crime of alien smuggling, then you should find that defendant guilty of Count One.

See Government's Proposed Jury Instruction, p. 18. This repeated mentioning of what the government does not have to prove, this cadence, whether inadvertent or not, has the effect of lowering the government's burden, and is argument. By stating this suggestion to a jury, a court, in essence, nullifies arguments that the government has not met its burden. Often, inaction often speaks louder than words, and the fact that a conspiracy's purpose is not fulfilled may speak directly to the quality of the government's proof or lack there of. It may suggest that the defendant did not join the conspiracy, carry out its aim, or that there was no agreement. And this language unfairly tips the scales against defendants and should be rejected.

Request No. 6 – Count Two: Conspiracy to Transport Minors to Engage in Prostitution

The government's proposed instruction is argumentative and incorrectly redefines conspiracy, where it states:

> I have already instructed you on the general definition of conspiracy. You should apply that definition here. I remind you that the crime of conspiracy to violate a federal law is a separate offense from the underlying crime. In order to find the defendant you are considering guilty of conspiracy to transport minors to engage in prostitution, you must find that two or more persons agreed to transport minors to engage in prostitution, and that the defendant you are considering knowingly and intentionally became a member of the conspiracy. The government does not have to prove that the defendant actually committed the crime of transporting minors to engage in prostitution.

See Government's Proposed Jury Instruction, p. 20, 21. This language should be rejected, in total, or restated as follows:

> I have already instructed you on the general definition of conspiracy. I remind you that the crime of conspiracy to violate a federal law is a separate offense from the underlying crime. It is separate and distinct from an actual violation of transporting minors to engage in prostitution, which is the alleged object of the conspiracy and what we call the "substantive crime." In order to find the defendant you are considering guilty of conspiracy to transport minors to engage in prostitution, you must find beyond a reasonable doubt the defendant you are considering knowingly and intentionally became a member of the conspiracy and that the object of the conspiracy was to transport minors to engage in prostitution, and that at least one of the members of the conspiracy knowingly committed at least one overt act to further some objective of the conspiracy.

As to the remainder of the proposed charge, we also object because there is no reason to change or adapt the standard jury instruction on this Count, and we asked that it be used. *See*, Sand 64-15 through 64-19.

For instance, the word "minor" as used in the government's discussion of the elements, *see,* Government's Proposed Jury Instruction, p. 21, 22, is different than the terms used in Sand. *See* Sand 64-16 (Elements of the Offense), 64-18 (Second Element – Intent to Engage in Prostitution), 64-19 (Fourth Element – Age of the Victim) ("[name of the person]", "[said individuals]", "[name of individual]"). Because the age of an alleged victim is an element that must be proven beyond a reasonable doubt, referring to these individuals as "minors" assumes a fact that is in dispute.

Further, the government's charge does not adequately state the scienter requirement in its recitation of the Transport in Interstate Commerce element. *See,* Government's Proposed Jury Instruction, p. 22. It should be plainly included in the charge, stating:

> It must be shown that the defendant agreed to knowingly transport the individual[s] in interstate commerce. This means that the government must prove that the defendant knew that it was the object of the agreement that he, she or others transport the individual[s] as I just defined that term in interstate commerce. To act knowingly means to act voluntarily and intentionally and not because of accident, mistake or other innocent reason.

Adapted from Sand 64-17. Further, the jury should be charged that:

> The government must also prove that defendant knew that [said individual] was less than eighteen years old at the time.

See, Sand 64-19 (Fourth Element – Age of the Victim). The government does not include this element in its charge. *See,* Government's Proposed Jury Instruction, p. 23. However, it is listed in Sand, and as its commentary states, "On the other hand, when the defendant is charged with transportation for the purpose of engaging in illegal sexual activity, and the age of the victim is an element of the underlying offense, then there is good reason to require proof of age because that fact will often be the critical element that makes the defendant's conduct illegal." *See*, Sand 16-19, Comment (which discusses the tension in the Second Circuit's jurisprudence on this point, comparing *United States v. Shim*, 584 F.3d 394 (2d Cir. 2009) (holding that the word "knowingly" in Mann Act applies to the interstate commerce requirement) to *United States v. Griffith*, 284 F.3d 338, 351 (2d Cir. 2002) (holding in a 18 U.S.C. § 2423(a) case that knowledge of the age of the victim is not an element of the offense that needs to be proven); however the comment also notes that *Griffith* was decided before *Flores-Figueroa v. United States*, 556 U.S. 646 (2009) where the Supreme Court held in an aggravated identity theft case that the scienter applies to every element and discusses rules of statutory construction).

Further, the Supreme Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019) strongly suggests that all elements of a criminal charge must be proven, without exception. In *Rehaif*, the Court held that § 922(g) requires proof the defendant "knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif v. United States*, 139 S. Ct. at 2200. Section 2423(a) has a scienter, describing the offense as requiring proof that the defendant "knowingly transports an individual who has not attained the age of 18 years in

interstate or foreign commerce," and the defense respectfully requests that the jury be charged about this element to satisfy due process.

Request No. 7 – Count Three: Sex Trafficking Conspiracy

We object to the government's proposed instruction. There is no reason to change or adapt the standard Sand jury instruction on this Count. *See*, Sand 47A-17 through 47A-23. I have also attached the Hon. Jed S. Rakoff's instruction regarding this offense in *U.S. v. Luidji Benjamin,* 18 Cr. 874 (JSR) (S.D.N.Y.) (552-557) for the Court to consider.

Notably, the government's formulation of the first element is confusing, *see* Government's Proposed Jury Instruction, p. 26-28, and the charge improperly refers to "children". *Id.*, p. 24, 25, 33. The government makes the same improper reference to "children" later in its instruction. *Id.*, p. 35, 48.

Finally, as argued above, we object to the government's conspiracy instruction, and it should be modified or rejected.

Request No. 8, Count Four, Sex Trafficking Jane Doe # 1

See objections to Request No. 7, which are incorporated by reference.

The aiding and abetting instruction should not be given unless there is an evidentiary basis to conclude that a defendant aided and abetted another who acted as principal.

Request No. 23, All Available Evidence Need Not Be Produced

We object to Request 23 because no instruction is recommended to the effect that the prosecution is not legally required to call all witnesses with knowledge of the facts or offer as exhibits all pertinent documents. *See*, Sand 4-4, Comment.

Request No. 25, Uncalled Witness Equally Available to Both Sides

We object to Request 25 because it shifts the burden to the defense and does not follow the Sand instruction. *See*, Sand 6-7. If such an instruction is required, under the circumstances, the defense proposes:

> There are several persons whose names you have heard during the course of the trial but who did not appear here to testify, and one or more of the attorneys have referred to their absence from the trial. I instruct you that each party had an equal opportunity or lack of opportunity to call any of these witnesses. Therefore, you should not draw any inferences or reach any conclusions as to what they would have testified to had they been called. Their absence should not affect your judgment in any way.

> You also should, however, remember my instruction that the law does not impose on a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

Adapted from Sand 6-7; *see also United States v. Bahna*, 68 F.3d 19, 22 (2d Cir. 1995).

Respectfully,

s/
Michael O. Hueston

Enc.

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December 12, 2019

The Honorable Alleyne R. Ross
United States District Judge
Eastern District of New York
22 Cadman Plaza East
Brooklyn, NY 11201

Re: United States v. Melendez-Perez, et al.
Docket no. 17 Cr. 434 (ARR)

Dear Judge Ross:

I represent Jose Osvaldo Melendez-Rojas, a defendant in the above captioned matter.

On behalf of Jose Osvaldo Melendez-Rojas, I respectfully request the Court's permission to join in the objections to the government's proposed jury instructions which have previously been filed by Michael Hueston, counsel for Abel Romero-Melendez.

Thank you for your consideration of this request.

Respectfully submitted,

/s/ Mitchell A. Golub
Mitchell A. Golub

cc: all counsel (via ecf)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	**17-CR-434 (ARR)**
-against-	**Not for electronic or print publication**
FRANCISCO MELENDEZ-PEREZ et al.,	**Opinion & Order**
Defendants.	

ROSS, United States District Judge:

On December 4, 2019, the government filed a proposed jury charge. The Government's Request to Charge ("Original Gov't Jury Inst. Prop."), ECF No. 122.[1] On December 11, 2019, defendants filed a series of objections to the government's proposed charge. *See* Defense Objections on Behalf of Abel Romero-Melendez ("Hueston Def. Objs."), ECF No. 123, *joined by* Jose Miguel Melendez-Rojas, ECF No. 124; Jose Osvaldo Melendez-Rojas, ECF No. 125; Rosalio Melendez-Rojas, ECF No. 126; Francisco Melendez-Perez, ECF No. 127. I address three of the defendants' objections in this opinion. In particular, defendants contend that the government: (1) omitted two elements from the conspiracy charge, requiring the government to prove that defendants knowingly committed "overt acts" in furtherance of the conspiracy; (2) incorrectly stated the scienter

[1] The government has filed two revised versions of this jury charge since December 4, 2019. *See* First Revision to the Gov't Jury Inst. Prop., ECF No. 148; Second Revision to the Gov't Jury Inst. Prop., ECF No. 167. Neither revision affects my analysis here.

requirement in its alien smuggling conspiracy instruction; and (3) omitted an element from the conspiracy to transport minors to engage in prostitution charge, requiring the government to prove that defendants knew that the victim was under the age of eighteen. For the reasons discussed below, I reject each of these objections. Objections not discussed in this opinion were considered and, in some cases, incorporated into the court's revised jury charge.

DISCUSSION

I. The Government Appropriately Excluded the "Overt Act" Elements from Its Definition of Conspiracy.

Defendants object to the government's jury instruction on conspiracy, arguing that that the government erroneously excluded the third and fourth "overt act" elements. *See* Hueston Def. Objs. 1; *see also* Original Gov't Jury Inst. Prop. 6, 14–34. Defendants requested that the following two elements be added to the government's proposed charge:

> Third, that one of the members of the conspiracy knowingly committed at least one of the overt acts charged in the indictment; and
>
> Fourth, that the overt act(s) which you find to have been committed was (were) to further some objective of the conspiracy.

Hueston Def. Objs. 1. For each of the conspiracy counts challenged by defendants, however, the overt act elements are not required. Each conspiracy in this case is based on a conspiracy provision embedded in specific criminal statute, none of which require proof of an overt act, and not the general conspiracy statute, which does. *See* 8 U.S.C. § 1324(a)(1)(A)(v)(I) (2005) ("alien smuggling conspiracy"); 18 U.S.C. § 2423(e) (2018)

("conspiracy to transport minors"); 18 U.S.C. § 1594(c) (2015) ("sex trafficking conspiracy"); 18 U.S.C. § 371 ("general conspiracy statute"). Consequently, I deny defendants' request.

Defendants' citation to the *Modern Federal Jury Instructions* ("Sand") 19-3 in support of their objection is inapposite because Sand 19-3 pertains to the general conspiracy statute, which explicitly includes an overt act requirement—in contrast to the more specific conspiracy statutes at issue here. *See* 18 U.S.C. § 371 ("If two or more persons conspire either to commit any offense . . . in any manner or for any purpose, *and one or more of such persons do any act to effect the object of the conspiracy*, each shall be [punished]." (emphasis added)). In *Whitfield v. United States*, the Supreme Court held that the government need not prove an overt act to convict a defendant of conspiracy to commit money laundering because the general conspiracy statute, § 371, expressly included an overt act requirement that Congress omitted from § 1956(h), the conspiracy statute specific to money laundering. 543 U.S. 209, 212, 219 (2005); *see* 18 U.S.C. § 1956(h) (stating that "[a]ny person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."); *see also U.S. v. Shabani*, 513 U.S. 10, 14–15 (1994) (contrasting § 371 with the drug conspiracy statute, 21 U.S.C. § 846, and holding that the latter does not require the government to prove an overt act); *U.S. v. Catapano*, No. CR-05-229 (SJ), 2008 WL 2222013, at *28 (E.D.N.Y. May 22, 2008) (finding that "a conspiracy to launder money does not require proof of an overt act[]" because the statute's

text does not make an overt act an element of the offense), *report and recommendation*, *adopted by* No. 05-CR-229 (SJ) (SMG), 2008 WL 3992303 (E.D.N.Y. Aug. 28, 2008). A court in this district explained that "there are two types of conspiracy statutes: those that are modeled after 18 U.S.C. § 371, which requires an overt act, and those that are modeled after the common law of conspiracy, which does not require an overt act." *U.S. v. Ahmed*, 94 F. Supp. 3d 394, 431 (E.D.N.Y. 2015) (citing *United States v. Abdi*, 498 F. Supp. 2d 1048, 1064 (S.D. Oh. 2007)) (holding that a conspiracy to violate 18 U.S.C. § 2339B, "providing material support or resources to . . . terrorist organizations," did not require proof of an overt act because it fell in the second category of conspiracy statutes). "Where . . . Congress ha[s] omitted from the relevant provision any language expressly requiring an overt act, the Court [will] not read such a requirement into the statute." *Id.* (citing *Abdi*, 498 F. Supp. 2d at 1064).

I find that for each conspiracy charge to which defendants objected, the relevant statute is appropriately classified as the second "type"—namely, one in which Congress has not created an overt act requirement. I explain my reasoning in further detail below. Defendants have cited no cases in support of their proposition that the overt act elements must be included. Nor have defendants objected to the government's recitation of the elements of a money laundering conspiracy, so I do not address them here.

a. Alien Smuggling Conspiracy (8 U.S.C. § 1324(a)(1)(A)(v)(I))

The relevant statutory provision for an alien smuggling conspiracy reads, "[a]ny person who . . . engages in any conspiracy to commit any of the preceding acts . . . shall be

punished . . . [.]" 8 U.S.C. § 1324(a)(1)(A)(v)(I). The text of the provision contains no overt act requirement. In 2015, citing *Shabani*, the Ninth Circuit determined that the alien smuggling conspiracy provision did not require the government to prove an overt act. *See U.S. v. Torralba-Mendia,* 784 F.3d 652, 663 (9th Cir. 2015) ("To establish an alien smuggling conspiracy, the government must prove an agreement to carry out one of the substantive offenses, and that Torralba had the intent necessary to commit the underlying offense." (citing *United States v. Herrera–Gonzalez*, 263 F.3d 1092, 1095 (9th Cir. 2001)). Likewise, the Fifth Circuit omitted proof of an overt act from its recitation of the alien smuggling conspiracy's elements:

> To obtain a conspiracy conviction under 8 U.S.C. 1324(a)(1)(A)(v)(I), the government must establish:
>
> > (1) that the defendant and at least one other person made an agreement to commit the crime of transporting an alien within the United States for the purpose of commercial advantage or private financial gain; (2) that the defendant knew the unlawful purpose of the agreement; and (3) that the defendant joined in the agreement willfully.

U.S. v. Lopez-Cabrera, 617 F. App'x 332, 336 (5th Cir. 2015) (per curiam) (citing *U.S. v. Granadeno*, 605 F. App'x 298, 301 (5th Cir. 2015) (per curiam)). In *U.S. v. Pascacio-Rodriguez*, the Fifth Circuit explained that "[i]n more specifically tailored conspiracy statutes, the majority do not require an overt act," and cited § 1324(a)(1)(A)(v)(I) as one of those statutes that does not. 749 F.3d 353, 360–62 n.42 (5th Cir. 2014); *but see, e.g., U.S. v. Covarrubia-Mendiola*, 241 F. App'x 569, 573 (10th Cir. 2007) (unpublished decision) (including proof of an overt act as an element of the alien smuggling conspiracy

charge).

I find that the alien smuggling statute's conspiracy provision is appropriately categorized with the money laundering and drug conspiracy statutes. Consequently, I agree with the Ninth and Fifth Circuits that proof of an overt act is not an element of the offense.

b. Conspiracy to Transport Minors (18 U.S.C. § 2423(e))

Using language similar to the alien smuggling conspiracy statute previously discussed (see Part I(a)), the conspiracy to transport minors statute states that "[w]hoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in the same manner as a completed violation of that subsection." 18 U.S.C. § 2423(e) (2018).[2] At least two other district courts have determined that no overt act is required to prove this offense. In *U.S. v. Anderson*, the court explained that

> unlike the general conspiracy statute, 18 U.S.C. § 371, which explicitly requires an overt act, § 2423(e) does not specifically require an overt act. The Supreme Court has been clear that the Government is not required to allege or prove an overt act in furtherance of the conspiracy unless the statute explicitly requires it.

No. CR12–00914–TUC–RCC(CRP), 2013 WL 4544044, at *2 (D. Az. Aug. 28, 2013) (citing *Shabani*, 513 U.S. at 15–16), *adopting R&R*, Doc. No. 121. Another court arrived at the same conclusion, explaining that while the conspiracy count charged under § 371 "require[d] a fourth element—that an 'overt act' was performed by a member of the conspiracy during its existence and to further its objectives[,]" § 2423 imposed no such

[2] The language is consistent in all versions of the statute between 2006 and 2018.

requirement. *United States v. D'Ambrosio*, No. 1:15-CR-3, 2019 WL 3776510, at *1, *4 n.3 (M.D. Pa. Aug. 12, 2019); *see also United States v. Delgado*, 367 F. Supp. 3d 286, 295 (M.D. Pa. 2019) (same).

I agree with these courts' reasoning. Accordingly, I find that § 2423(e) contains no overt act requirement and that the government did not err in excluding it from the proposed jury charge.

c. Sex Trafficking Conspiracy (18 U.S.C. § 1594(c))

My analysis of the sex trafficking conspiracy statute is consistent with my reasoning above (*see* Parts I(a)–(b)). The relevant statute reads, "[w]hoever conspires with another to violate section 1591 shall be [punished]." 18 U.S.C. § 1594(c) (2015).[3] Like the statutes governing conspiracies to smuggle aliens and to transport minors, and in contrast to the general conspiracy statute laid out in § 371, the sex trafficking conspiracy provision "contains no [overt act] element." *U.S. v. Wilson*, No. 10–60102–CR, 2010 WL 2991561, *5 at n.1 (S.D. Fl. July 27, 2010). In *Paguirigan v. Prompt Nursing Employment Agency LLC*, Judge Gershon determined that § 1594(b), which contains text almost identical to § 1594(c), requires no overt act. 286 F. Supp. 3d 430, 440 n.6 (E.D.N.Y. 2017) (citing *Whitfield*, 543 U.S. at 213–14). The Fifth Circuit concurred, listing both § 1594(b) and (c) among those statutes not requiring proof of an overt act. *U.S. v. Pascacio-Rodriguez,* 749 F.3d at 360–62 n.42. I agree.

[3] This language is consistent with the version of the statute that was effective from December 23, 2008 to May 28, 2015.

Because defendants have failed to demonstrate that any of the aforementioned statutory provisions impose an overt act requirement, I deny defendants' request to add two overt act elements to the jury charge.

II. The Government Correctly Articulated the Knowledge Requirement Applicable to an Alien Smuggling Conspiracy.

Defendants also object to the government's proposed alien smuggling conspiracy instruction, asserting that it "fails to list the defendant's knowledge requirement." Hueston Def. Objs. 3; *see* Original Gov't Jury Inst. Prop. 16 (stating that "[t]he second element is that the person knew, or acted in reckless disregard of the fact that such alien came to, entered or remained in the United States in violation of law."). Defendants proposed the following language:

> The government must prove beyond a reasonable doubt that the defendant knew that [name of alien] was an alien.
>
> Whether or not the defendant had this knowledge is a question of fact to be determined by you on the basis of the evidence. If you find that the evidence establishes that the defendant actually knew that [name of alien] was an alien, then this element is satisfied.

Hueston Def. Objs. 3 (citing Sand 33A-4). Defendants' proposed instruction corresponds to a statutory provision that is not charged in this case—8 U.S.C. § 1324(a)(1)(A)(i), "Knowingly Bringing an Alien into the United States." *See* Sand 33A-1–6.1. The government's indictment and jury charge relates to Sections 1324(a)(1)(A)(ii) and (iii), "Transportation Within the United States of an Illegal Alien" and "Harboring an Illegal Alien." *See* Original Gov't Jury Inst. Prop. 14; Superseding Indictment 2, ECF No. 43. The

government's proposed instruction is consistent with Sand 33A-10[4] and 33A-17[5], both of which require the government to prove that the defendant knew *or* recklessly disregarded the fact that the relevant alien had "come to, entered, or remained in the United States in violation of the law." *See also* Sand 33A-8 and 33A-15. Defendants have cited no cases to the contrary. Accordingly, I reject defendants' objection and find that the government correctly stated the second element of the offense.

III. A Conspiracy to Transport Minors to Engage in Prostitution Does Not Require Proof of Defendants' Knowledge of the Victim's Age.

Defendants object that the government's instruction on conspiracy to transport minors to engage in prostitution is deficient because it omits an element of the offense—defendant's knowledge that the victim was under the age of eighteen. *See* Hueston Def. Objs. 6–7. 18 U.S.C. § 2423(a) states that "[a] person who *knowingly* transports an individual who has not attained the age of 18 years in interstate or foreign commerce . . . with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, [shall be punished]." (emphasis added). Defendants argue that the defendant must know not only that he was transporting an

[4] "The second element of the offense that the government must prove beyond a reasonable doubt is that the defendant knew that the alien he transported had come to, entered, or remained in the United States in violation of the law, or that the defendant acted in reckless disregard of that fact." Sand 33A-10.

[5] "The second element of the offense that the government must prove beyond a reasonable doubt is that the defendant knew that the alien he harbored had come to, entered, or remained in the United States in violation of the law, or that the defendant acted in reckless disregard of that fact." Sand 33A-17.

individual in interstate or foreign commerce with the intent that the victim engage in prostitution, but also that the victim was under the age of eighteen. *See* Hueston Def. Objs. 6–7. The government disagrees, maintaining that "knowingly" does not apply to the status element of the statute—the individual's age. Original Gov't Jury Inst. Prop. 23 (explicitly stating that "[t]he government need not prove that the defendant knew the minor was less than eighteen years old."). Considering the Supreme Court and Second Circuit's existing precedent on the matter, I find that the government is correct.

In 2002, the Second Circuit held that § 2423(a) does not require the government to prove the defendant's knowledge as to the victim's minor status. *United States v. Griffith*, 284 F.3d 338, 349–51 (2d Cir. 2002) ("[T]he district court did not err in instructing the jury that the government was not required to prove under . . . § 2423(a) that the [defendants] knew that [the victim] was a minor."). Defendants argue that *Griffith* no longer controls, however, following the Supreme Court's decision in *Flores-Figueroa v. United States.* 556 U.S. 646 (2009). In that case, the Court explained that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Id.* at 652 (citing *United States v. X–Citement Video, Inc*., 513 U.S. 64, 79 (1994) (Stevens, J., concurring)); Hueston Def. Objs. 6. Because subsequent decisions clarify that *Flores-Figueroa* did not overturn the Second Circuit's interpretation of § 2324(a) in *Griffith*, this argument fails.

In *U.S. v. Shim*, the Second Circuit applied the principle of statutory interpretation articulated in *Flores-Figueroa* to a related provision, 18 U.S.C. § 2421: "Whoever

knowingly transports any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution . . . [shall be punished].” 584 F.3d 394, 395 (2009); 18 U.S.C. § 2421(a) (1998). The Circuit held that “knowingly” applies to both of the elements following it—“transport[ing]” and “interstate commerce.” However, the Circuit explicitly noted that its holding was “confined to the statutory provision at hand[,]” distinguishing § 2423(a) and explaining that “Justice Alito[‘s concurrence in *Flores-Figueroa*] specifically cited § 2423(a) as an example of a statute that may not be compatible with the presumption that the *mens rea* requirement applies to all elements of the offense.” *Id.* at 396 n.2 (citing *Flores-Figueroa*, 556 U.S. at 659) (Alito, J., concurring)).

Shim clarifies, therefore, that *Griffith* was not overturned by the Supreme Court’s decision in *Flores-Figueroa*. *See also United States v. Murphy*, 942 F.3d 73, 82 (2d Cir. 2019) (citing *Griffith* for the proposition that under § 2423(a), the government need not prove that the defendant knew the victim’s status as a minor). This conclusion is bolstered by the Seventh Circuit’s decision in *United States v. Cox*, in which it held that § 2423(a) “does not require that the Government prove that a defendant knew his victim was a minor.” 577 F.3d 833, 836 (7th Cir. 2009) (noting that “at least four of our sister circuits have faced this issue and all have held that [the government need not prove the victim’s minor status],” citing the Second Circuit’s decision in *Griffith.*).

Contrary to defendants’ contention, the Supreme Court’s recent decision in *Rehaif v. United States* does not undermine this conclusion. 139 S. Ct. 2191 (2019); *see* Hueston Def. Objs. 6–7. In *Rehaif*, the defendant was convicted of possessing a firearm while he

was an immigrant "illegally or unlawfully in the United States." *Rehaif*, 139 S. Ct. at 2194–95; 18 U.S.C. §§ 922(g), 924(a)(2). The government maintained that it need only prove that the defendant knowingly possessed the firearm, whereas the defendant argued that the government must also prove that he knew his "status" as an immigrant illegally or unlawfully in the United States. The Court ruled in favor of the defendant, holding that "in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Rehaif*, 139 S. Ct. at 2200. Citing *Flores-Figueroa*, the Court explained that "[a]s 'a matter of ordinary English grammar,' we normally read the statutory term 'knowingly as applying to all the subsequently listed elements of the crime.'" *Id.* at 2196 (citing 556 U.S. at 650).

Defendants argue that *Rehaif* "strongly suggests that all elements of a criminal charge must be proven, without exception," and consequently, "knowingly" must apply to the victim's age here. Hueston Def. Objs. 6. Defendants' argument fails, however, because *Rehaif* is distinguishable from the instant case. In *Rehaif*, the Supreme Court explained that "Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct[.]'" 139 S. Ct. at 2195 (quoting *X-Citement Video, Inc.*, 513 U.S. at 72). The central purpose of a scienter requirement is to "separate wrongful from innocent acts." *Id.* at 2197. For the crime at issue in *Rehaif*, "the defendant's status [was] the 'crucial element' separating innocent from wrongful conduct." *Id.* (quoting *X-Citement Video*, 513 U.S. at 73). Absent knowledge that

he was in the United States illegally, the defendant's conduct—firing two firearms at a shooting range—was innocent. By contrast, transporting a woman over the age of eighteen across state lines for the purpose of prostitution is not legal, so the elements at issue are not comparable. *See U.S. v. Griffith*, 284 F.3d 338, 351 (2002) ("[A] defendant is already on notice that he is committing a crime when he transports an individual of any age in interstate commerce for the purpose of prostitution." (citing *U.S. v. Griffith*, No. 99CR786(HB), 2000 WL 1253265, at *16 (S.D.N.Y. Sept. 5, 2000); *U.S. v. Taylor*, 239 F.3d 994, 997 (9th Cir. 2001))).

Accordingly, I reject defendants' objection and find that the government appropriately excluded the fourth element from the jury charge.

CONCLUSION

For the reasons discussed above, I find that the government (1) properly omitted the overt act elements from the conspiracy charge; (2) correctly stated the scienter requirement in its alien smuggling conspiracy instruction; and (3) accurately instructed that the government is not required to prove that defendants knew that the victim of a conspiracy to transport minors was under eighteen years old.

SO ORDERED.

/s/
Allyne R. Ross
United States District Judge

Dated: February 10, 2020
Brooklyn, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

-versus-

FRANCISCO MELENDEZ-PEREZ, ET AL.,

Defendants.
----------x

17-CR-434(ARR)

United States Courthouse
Brooklyn, New York

February 18, 2020
11:00 a.m.

TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE ALLYNE R. ROSS
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES

For the Government: UNITED STATES ATTORNEY'S OFFICE
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201
BY: ERIN ARGO, ESQ.
TANYA HAJJAR, ESQ.
GILLIAN KASSNER, ESQ.
Assistant United States Attorneys

For FRANCISCO MELENDEZ-PEREZ:
BY: MICHAEL GOLD, ESQ.

For ABEL ROMERO-MELENDEZ: BY: MICHAEL HUESTON, ESQ.

For JOSE MELENDEZ-ROJAS: BY: SUSAN KELLMAN, ESQ.

For JOSE MELENDEZ-ROJAS: BY: MITCHELL GOLUB, ESQ.

For ROSALIO MELENDEZ-ROJAS:
BY: THOMAS DUNN

Also Present: ESTRELLITA PLESTED, Interpreter

Court Reporter: Rivka Teich, CSR, RPR, RMR, FCRR
Phone: 718-613-2268
Email: RivkaTeich@gmail.com

Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

with the most recent wire transfers in it.

THE COURT: Can we have everything today too, I was hoping?

MS. ARGO: Yes, of course. The Court will receive everything that we provided to defense counsel with respect to the 3500 material we will produce to your Honor.

THE COURT: And the exhibits and any summaries.

MS. ARGO: With respect to the rolling production of exhibits yes, your Honor, we'll do that as well.

THE COURT: I had posted quite a while ago a draft jury charge on February 10. Anyone have anything to say about that?

MS. HAJJAR: No objections from the Government, your Honor.

MR. GOLD: Neither do I.

THE COURT: That's fine. And the verdict sheet, is everyone satisfied with the verdict sheet?

MR. GOLD: Yes, your Honor.

MR. HUESTON: In terms of any exceptions to jury instruction we submitted a letter --

THE COURT: I got the letter. Essentially, as I understood it, they were reiterating the objections which were responded to in our opinion order.

MR. HUESTON: Thank you, your Honor.

THE COURT: What is out there? What do we need to

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

— against —

JOSE MIGUEL MELENDEZ-ROJAS,
also known as "Gueramex," "Gueracasa" and "Jose Melendez Perez,"
JOSE OSVALDO MELENDEZ-ROJAS,
ROSALIO MELENDEZ-ROJAS,
also known as "Leonel," "Wacho" and "El Guacho,"
FRANCISCO MELENDEZ-PEREZ,
also known as "Paco" and "el Mojarra," and
ABEL ROMERO-MELENDEZ,
also known as "La Borrega" and "Borrego,"

Defendants.

17-CR-434 (S-2) (ARR)

JURY CHARGE

March 13, 2020

ROSS, United States District Judge:

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If you find a defendant guilty of conspiracy to commit alien smuggling under Count One, you must then determine if the government proved beyond a reasonable doubt that defendant acted for the purpose of private financial gain. The phrase "private financial gain" should be given its ordinary and natural meaning. "Private financial gain" is profit or gain in money or property specifically for a particular person or group. There is no requirement that the defendant actually received some financial gain, although, of course, you may consider evidence that the defendant did receive financial gain in deciding whether he acted for that purpose.

H. Count Two: Conspiracy to Transport Minors to Engage in Prostitution

Count Two charges all of the defendants with conspiracy to transport minors to engage in prostitution between August 2006 and April 2014. The indictment reads as follows:

> In or about and between August 2006 and April 2014, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants JOSE MIGUEL MELENDEZ-ROJAS, also known as "Gueramex," "Gueracasa" and "Jose Melendez Perez," JOSE OSVALDO MELENDEZ-ROJAS, ROSALIO MELENDEZ-ROJAS, also known as "Leonel," "Wacho" and "El Guacho," FRANCISCO MELENDEZ-PEREZ, also known as "Paco" and "el Mojarra," and ABEL ROMERO-MELENDEZ, also known as "La Borrega" and "Borrego," together with others, did knowingly and intentionally conspire to transport one or more individuals who had not attained the age of 18 years in interstate and foreign commerce, with intent that such individuals engage in prostitution, contrary to Title 18, United States Code, Section 2423(a).

I have already instructed you on the general definition of conspiracy. You should apply that definition here. I remind you that the crime of conspiracy to violate a

federal law is a separate offense from the underlying crime. In order to find the defendant you are considering guilty of conspiracy to transport minors to engage in prostitution, you must find beyond a reasonable doubt that two or more persons agreed to transport minors to engage in prostitution, and that the defendant you are considering knowingly and intentionally became a member of the conspiracy. The government does not have to prove that the defendant actually committed the crime of transporting minors to engage in prostitution.

I will now define the elements of transporting a minor for the purpose of prostitution. The statute provides in relevant part:

> A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, . . . with intent that the individual engage in prostitution, shall be [guilty of a crime].

The elements of the crime of transporting a minor for the purpose of prostitution are as follows:

First, that the defendant knowingly transported an individual in interstate or foreign commerce;

Second, that the defendant transported that individual with the intent that she would engage in prostitution; and

Third, that the individual was less than eighteen years old at the time of the acts alleged in the indictment.

The first element requires that the defendant knowingly transported an individual in interstate or foreign commerce. To act knowingly means to act

voluntarily and intentionally and not because of accident, mistake or other innocent reason. "Interstate or foreign commerce" simply means movement between one state and another or between the United States and a foreign country. The defendant must have knowingly transported an individual in interstate commerce. This means that the government must prove that defendant knew both that he was transporting an individual and that he was transporting the individual in interstate or foreign commerce.

The government does not have to prove that the defendant personally transported the individual across a state line or from a foreign country to the United States. It is sufficient to satisfy this element that the defendant was actively engaged in the making of the travel arrangements, such as by purchasing the tickets necessary for the individual to travel as planned.

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

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

Whether or not a minor consented to engage in prostitution is irrelevant. The consent or voluntary participation of a minor is not a defense to this charge.

The third and last element that the government must prove beyond a reasonable doubt is that the individual was less than eighteen years old at the time of the acts alleged in the indictment. The government need not prove that the defendant knew that the individual was less than eighteen years old.

If you find that the government proved, beyond a reasonable doubt, that the defendant you are considering knowingly and intentionally agreed with others to transport one or more minors in interstate or foreign commerce to engage in prostitution, then you should find that defendant guilty of Count Two. As I already instructed you, a conspiracy is a crime even if it does not achieve its purpose. The government does not have to prove that the defendant or a co-conspirator actually committed the crime of transporting a minor to engage in prostitution. What the government must prove is that the defendant voluntarily entered into a conspiracy the

> elsewhere, the defendants JOSE MIGUEL MELENDEZ-ROJAS, also known as "Gueramex," "Gueracasa" and "Jose Melendez Perez," JOSE OSVALDO MELENDEZ-ROJAS, ROSALIO MELENDEZ-ROJAS, also known as "Leonel," "Wacho" and "El Guacho," and FRANCISCO MELENDEZ-PEREZ, also known as "Paco" and "el Mojarra," together with others, did knowingly and intentionally recruit, entice, harbor, transport, provide, obtain and maintain by any means [Delia], in and affecting interstate and foreign commerce, and did benefit, financially and by receiving anything of value, from participation in a venture which engaged in such acts, knowing that (1) force, threats of force, fraud and coercion and a combination of such means would be used to cause [Delia] to engage in one or more commercial sex acts, and (2) [Delia] had not attained the age of 18 years and would be caused to engage in one or more commercial sex acts, which offense was effected by means of force, threats of force, fraud and coercion and a combination of such means.

I have already instructed you on the elements of sex trafficking and sex trafficking of a minor under Count Three (see pages 32–41). You should apply those instructions here. As I instructed you in Count Three, whether or not a minor consented to engage in a commercial sex act is irrelevant. The consent or voluntary participation of a minor is not a defense to this charge.

You may also find the defendant you are considering guilty of Count Ten if the government has proven beyond a reasonable doubt that he aided and abetted sex trafficking or sex trafficking of a minor, that is, Delia. In determining whether the defendant is guilty as an aider and abettor, you must follow the general instructions on aiding and abetting that I have already given you (see pages 19–21).

Q. Count Eleven: Transportation of a Minor to Engage in Prostitution—Delia

Count Eleven charges the defendants Jose Miguel Melendez-Rojas, Jose

Osvaldo Melendez-Rojas, Rosalio Melendez-Rojas, and Francisco Melendez-Perez with transportation of a minor, Delia, to engage in prostitution between July 2010 and April 2014. The indictment reads as follows:

> In or about and between July 2010 and April 2014, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants JOSE MIGUEL MELENDEZ-ROJAS, also known as "Gueramex," "Gueracasa" and "Jose Melendez Perez," JOSE OSVALDO MELENDEZ-ROJAS, ROSALIO MELENDEZ-ROJAS, also known as "Leonel," "Wacho" and "El Guacho," and FRANCISCO MELENDEZ-PEREZ, also known as "Paco" and "el Mojarra," together with others, did knowingly and intentionally transport an individual who had not attained the age of 18 years, [Delia], in interstate and foreign commerce, with the intent that [Delia] engage in prostitution.

To find a defendant guilty of transporting a minor for the purpose of prostitution, you must find that the following elements have been proven beyond a reasonable doubt:

First, that the defendant you are considering knowingly transported Delia in interstate or foreign commerce as alleged in the indictment;

Second, that the defendant you are considering transported Delia with the intent that Delia would engage in prostitution; and

Third, that, at the time, Delia was less than eighteen years old.

I have previously explained and defined the elements of transporting a minor for the purpose of prostitution under Count Two, and you should apply those instructions here (see pages 28–30). As I previously instructed you, whether or not a minor consented to engage in prostitution is irrelevant. The consent or voluntary participation of a minor is not a defense to this charge.

You may also find the defendant you are considering guilty of Count Eleven if the government has proven beyond a reasonable doubt that he aided and abetted the transportation of Delia to engage in prostitution. In determining whether the defendant is guilty as an aider and abettor, you must follow the general instructions on aiding and abetting that I have already given you (see pages 19–21).

R. Count Twelve: Alien Smuggling—Delia

Count Twelve charges the defendants Jose Miguel Melendez-Rojas, Jose Osvaldo Melendez-Rojas, Rosalio Melendez-Rojas, and Francisco Melendez-Perez with committing alien smuggling of Delia between July 2010 and April 2014. The indictment reads as follows:

> In or about and between July 2010 and April 2014, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants JOSE MIGUEL MELENDEZ-ROJAS, also known as "Gueramex," "Gueracasa" and "Jose Melendez Perez," JOSE OSVALDO MELENDEZ-ROJAS, ROSALIO MELENDEZ-ROJAS, also known as "Leonel," "Wacho" and "El Guacho," and FRANCISCO MELENDEZ-PEREZ, also known as "Paco" and "el Mojarra," together with others, did knowingly and intentionally encourage and induce an alien, [Delia], to come to, enter and reside in the United States, knowing and in reckless disregard of the fact that such coming to, entry and residence was and would be in violation of law, for the purpose of private financial gain.

I have already instructed you on the elements of the crime of alien smuggling under Count Seven (see pages 49–50). You should apply those instructions here.

You may also find the defendant you are considering guilty of Count Twelve if the government has proven beyond a reasonable doubt that he aided and abetted alien

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA,

Plaintiff,

versus

JOSE MIGUEL MELENDEZ-ROJAS, et al.,

Defendant.
----------x

Docket No.: 17 CR 434 (ARR)

U.S. Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201

March 13, 2020
9:30 a.m.

Transcript of Criminal Cause for Trial

Before: HONORABLE ALLYNE R. ROSS,
District Court Senior Judge
(and a jury.)

APPEARANCES

For the Government: RICHARD P. DONOGHUE, ESQ.
United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201
BY: ERIN ARGO, ESQ.,
TANYA HAJJAR, ESQ.,
GILLIAN KASSNER, ESQ.,
Assistant U.S. Attorneys

For J.M. Melendez-Rojas: SUSAN KELLMAN, ESQ.

For J.O. Melendez-Rojas: MITCHELL GOLUB, ESQ.

For R. Melendez-Rojas: THOMAS DUNN, ESQ.

For F. Melendez-Perez: MICHAEL GOLD, ESQ.

For A. Romero-Melendez: MICHAEL O. HUESTON, ESQ.
JACQUELINE CISTARO, ESQ.

Official Court Reporter: MICHELE NARDONE, CSR
Email: Mishrpr@aol.com

Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

Rather, if you find beyond a reasonable doubt that the defendant you're considering knowingly and intentionally agreed to commit the crime of alien smuggling, then you should find that defendant guilty of Count 1.

If you find the defendant guilty of conspiracy to commit alien smuggling under Count 1, you must then determine if the Government proved beyond a reasonable doubt that the defendant acted for the purpose of private financial gain. The phrase "private financial gain" should be given its ordinary and nature meaning. Private financial gain is profit or gain in money or property specifically for a particular person or group. There is no requirement that the defendant actually received some financial gain. Although, of course, you may consider evidence that the defendant did receive financial gain in deciding whether he acted for that purpose.

Count 2 charges all of the defendants with conspiracy to transport minors to engage in prostitution between August 2006 and April 2014. I have already instructed you on the general definition of conspiracy. You should apply that definition here. I remind you that the crime of conspiracy to violate federal law is a separate offense from the underlying crime. In order to find the defendant you are considering guilty of conspiracy to transport minors to engage in prostitution, you must find beyond a reasonable doubt that two or more persons agreed to transport minors to engage in

prostitution, and that the defendant you are considering knowingly and intentionally became a member of that conspiracy. The Government does not have to prove that the defendant actually committed the crime of transporting minors to engage in prostitution.

I will now define the elements of transporting a minor for the purpose of prostitution. They are as follows: First, that the defendant knowingly transported an individual in interstate or foreign commerce.

Second, that the defendant transported that individual with the intent that she would engage in prostitution.

And third, that the individual would be less than 18 years old at the time of the acts alleged in the indictment.

The first element requires that the defendant knowingly transported an individual in interstate or foreign commerce. To act knowingly means to act voluntarily and intentionally and not because of accident, mistake, or other innocent reason. Interstate or foreign commerce simply means movement between one state or another, or between the United States and a foreign country. The defendant must have knowingly transported an individual in interstate commerce. This means that the Government must prove that the defendant knew both that he was transporting an individual, and that he was transporting the individual in interstate or foreign commerce. The Government does not have to prove that the

defendant personally transported the individual across the state line or from a foreign country to the United States. It is sufficient to satisfy this element that the defendant would actively engaged in the making of the travel arrangements such as by purchasing the tickets necessary for the individual to travel as planned.

The second element requires that the defendant transported the individual with the intent that she would engage in prostitution. In order to establish this element, it's not necessary for the Government to prove that engaging in prostitution was the sole purpose for crossing the state line or foreign border. A person may have several different purposes or motives for such travel, and each may prompt in varying degrees the act of making the journey. The Government must prove beyond a reasonable doubt, however, that a significant or motivating purpose of the travel across a state line was that the individual would engage in prostitution. In other words, that illegal activity must not have been merely incidental to the trip.

Direct proof of a person's intent is almost never available. It would be a rare case where it would be shown that a person wrote or stated that as of a given time he committed an act with that particular intent. Such direct proof is not required. The ultimate fact of intent, though subjective, may be established by circumstantial evidence based

upon a defendant's outward manifestations, his words, his conduct, his acts, and all the surrounding circumstances disclosed by the evidence and the rationale or logical inferences that may be drawn from them. Whether or not a minor consented to engage in prostitution is irrelevant. The consent or voluntary participation of a minor is not a defense to the charge.

The third and last element that the Government must prove beyond a reasonable doubt is that the individual was less than 18 years old at the time of the acts alleged not indictment. The Government need not prove that the defendant knew that the individual was less than 18 years old. If you find that the Government proved beyond a reasonable doubt the defendant you are considering knowingly and intentionally agreed with others to transport one or more minors in interstate or foreign commerce to engage in prostitution, then you should find that defendant guilty of counts 2. As I already instructed you, a conspiracy is a crime even if it does achieve its purpose. The Government does not have to prove that the defendant or a co-conspirator actually committed the crime of transporting a minor to engage in prostitution, but the Government must prove that the defendant voluntarily entered a conspiracy for the purpose of which was to transport a minor to engage in prostitution.

Count 3 of the indictment charges all of the

Counsel 11 charges the defendants, Jose Miguel Melendez Rojas, Jose Osvaldo Melendez Rojas, Rosalio Melendez Rojas, and Francisco Melendez Perez with transportation of a minor, Delia, to engage in prostitution between July 2010 and 2014.

To establish this crime, you must find that the following elements have been proven beyond a reasonable doubt: First, that the defendant you are considering knowingly transported Delia in interstate or foreign commerce, as alleged in the indictment; second, that the defendant you are considering transported Delia with the intent that Delia would engage in prostitution; and third, that at the time, Delia was less than 18 years old. I've previously explained and defined the elements of transporting a minor for the purpose of prostitution under Count 2, and you should apply those instructions here. As I've previously instructed you, whether or not a minor consented to engage in prostitution is irrelevant if consent or voluntary participation of a minor is not a defense to the charge.

You may also find the defendant you are considering guilty of Count 11 if the Government has proven beyond a reasonable doubt that he aided and abetted the transportation of Delia to engage in position prostitution. In determining that, you must follow the instructions that I gave you on aiding and abetting.

18 U.S. Code § 2423 - Transportation of minors

(a) Transportation With Intent To Engage in Criminal Sexual Activity.—
A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory or possession of the United States, with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

Michael H. Gold
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New York, New York
10118
Tel (212) 838 0699
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December 12, 2019

Hon. Allyne R. Ross
United States District Judge
Eastern District of New York
100 Federal Plaza
Central Islip, New York 11201

Re: United States v. Francisco Melendez Perez, et al, 17 CR 434 (ARR)

Dear Judge Ross;

I apologize for not filing this application sooner. Until receipt of today's scheduling Order, I was under the mistaken understanding that all defendants were deemed to automatically join in motions submitted by their co-defendants. Therefore, on behalf of my client, I respectfully join in all motions submitted by co-counsel to the extent applicable to him.

Thank you for your consideration of this application.

Respectfully,

Michael H. Gold

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ATTORNEY AT LAW
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New York, New York 10007
Tel: 212-941-9940
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Thomasdunnlaw@aol.com

By ECF

December 12, 2019

Honorable Alleyne R. Ross
United States District Judge
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Melendez-Rojas,
17 Cr. 434(ARR)

Dear Judge Ross:

I represent Rosalio Melendez-Rojas. I write to request your Honor's permission to join in the objections to the government's proposed jury instructions submitted by Michael Hueston, the attorney for Abdel Romero-Melendez.

Thank you for your consideration of this request.

Respectfully yours,
/s/
Thomas F.X. Dunn

Cc: All counsel (by ECF)