

No. \_\_\_\_-\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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JUSTIN RIVERA,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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PETER J. TOMAO, ESQ.  
*Attorney for Petitioner*  
600 Old Country Road, Suite 328  
Garden City, New York 11530  
516-877-7015  
ptomao@tomaolaw.com

November 20, 2024

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit erred by affirming the judgment of conviction and sentence pronounced by the United States District Court for the Southern District of New York on single count of conspiracy to commit sex trafficking by force, fraud, or coercion, in violation of 18 U.S.C. § 1594(c) based on an interpretation of the sentencing guidelines which conflicts with the Ninth Circuit Court of Appeals for the Ninth Circuit.

# TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
REASON FOR GRANTING THE PETITION	7
ARGUMENT	7
CERTIORARI SHOULD BE GRANTED TO RESOLVE A SPLIT AMONG THE CIRCUIT COURTS OF APPEALS ON WHETHER U.S.S.G. § 2G1.1(a)(1) APPLIES TO VIOLATIONS OF TITLE 18, UNITED STATES CODE, SECTION 1594(c)	
CONCLUSION	12

FOR ALL OF THE FOREGOING REASONS, THIS COURT IS RESPECTFULLY URGED TO GRANT THE WRIT OF CERTIORARI TO REVIEW THE OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING THE SENTENCE

## TABLE OF APPENDICES

<b>Appendix A:</b> Opinion and Order of the United States Court of Appeals for the Second Circuit in <i>United States v. Rivera</i> , Docket No. 22-2780cr, dated June 3, 2024	A 1
<b>Appendix B:</b> Order of the United States Court of Appeals for the Second Circuit in <i>United States v. Ayyad</i> , Docket No. 20-3832cr, dated August 23, 2024, denying a timely filed petition for rehearing	B 1

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	11
<i>Payer v. United States</i> , 2013 U.S. Dist. LEXIS 22698 (D.S.D. Feb. 20, 2013)	10
<i>United States v. Banks</i> , No. JKB-14-0015, 2023 U.S. Dist. LEXIS 77005 (D. Md. Apr. 28, 2023)	10
<i>United States v. Caldwell</i> , Crim. No. 2:17-002, 2021 U.S. Dist. LEXIS 229663 (E.D. Va. Nov. 30, 2021)	10
<i>United States v. Carter</i> , 960 F.3d 1007 (8th Cir. 2020)	10
<i>United States v. Jackson</i> , No. 2:16-cr-00054-DCN, 2018 U.S. Dist. LEXIS 41571 (D.S.C. Mar. 14, 2018)	10
<i>United States v. Kelly</i> , 627 F. Supp. 3d 148 (E.D.N.Y. 2022)	11

<i>United States v. Maxwell</i> , 118 F.4th 256 (2d Cir. 2024)	11
<i>United States v. Sims</i> , 957 F.3d 362 (3d Cir. 2019)	9
<i>United States v. Valdez</i> , 2021 U.S. App. LEXIS 23498 (11th Cir. Aug. 9, 2021)	9
<i>United States v. Wei Lin</i> , 841 F.3d 823 (9 <sup>th</sup> Cir. 2016)	8, 9

## **UNITED STATES CONSTITUTION**

Eighth Amendment	1, 6
------------------	------

## **FEDERAL STATUTES**

Title 18, United States Code, Section 1591	2, 5, 7, 8
Title 18, United States Code, Section 1591(b)(1)	4, 8, 9
Title 18, United States Code, Section 1594	2
Title 18, United States Code, Section 1594(c)	i, 4, 7, 8
Title 28, United States Code, Section 1254(1)	1

## **UNITED STATES SENTENCING GUIDELINES**

Section 1B1.2	3, 10
Section 1B1.3	3, 10
Section 1B1.3 n. 7	10

Section 2G1.1	4
Section 2G1.1(a)	8
Section 2G1.1(a)(1)	5, 7, 8, 9
Section 2G1.1(a)(2)	5, 7, 8
Section 2G1.1(c)	9

### **SUPREME COURT RULES**

Rule 10(a)	8
Rule 13(1)	1
Rule 13(3)	1

### **FEDERAL RULES OF CRIMINAL PROCEDURE**

Rule 29	5
Rule 33	6

## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner Justin Rivera respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

### **OPINION BELOW**

The Summary Order and Judgment of the United States Court of Appeals for the Second Circuit in *United States v. Rivera*, Docket No. No. 22-2780cr, dated June 3, 2024, which is unpublished, appears as Appendix A to the Petition (“Pet. App”) at A1-11.

### **JURISDICTIONAL STATEMENT**

Jurisdiction of this Court is invoked under Title 28, United States Code §1254(1).

The Second Circuit denied the rehearing Petition without explanation by Order dated August 23, 2024, a copy of which is reprinted in Appendix B at B1. Ninety days from that date is November 21, 2024. Thus, this Petition is filed timely under U.S. Sup. Ct. Rule 13 (1) and (3).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Eighth Amendment to the United States Constitution states that:

Excessive bail shall not be required, nor excessive fines imposed, nor

cruel and unusual punishments inflicted.

Title 18, United States Code, Section § 1591 states in relevant part:

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

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

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

...

Title 18, United States Code, Section § 1594, states in relevant part:

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

of that section.

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

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

...

Title 18, United States Code, App. Section 1B1.2 states in relevant part:

(a) Determine the offense guideline section in Chapter Two (Offense Conduct) applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted). ...

Refer to the Statutory Index (Appendix A) to determine the Chapter Two offense guideline, referenced in the Statutory Index for the offense of conviction. If the offense involved a conspiracy, attempt, or solicitation, refer to § 2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, use the most analogous guideline. See § 2X5.1 (Other Offenses).

...

(b) After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with §1B1.3 (Relevant Conduct).

Title 18, United States Code, App. Section 1B1.3 states:

(a) Chapters Two (Offense Conduct) and Three (Adjustments).

— Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1)

(A) all acts and omissions committed, aided, abetted, counseled,

commanded, induced, procured, or willfully caused by the defendant;  
and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were—

(i) within the scope of the jointly undertaken criminal activity,  
(ii) in furtherance of that criminal activity, and  
(iii) reasonably foreseeable in connection with that criminal activity;  
that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense; ...

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).— Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines. ...

Title 18, United States Code, App. Section 2G1.1, states in relevant part:

(a) Base Offense Level:

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

(2) 14, otherwise.

## **STATEMENT OF THE CASE**

Justin Rivera was convicted following a jury trial of one count of Conspiracy to Commit Sex Trafficking by Force, Fraud, or Coercion in violation of 18 U.S.C. §1594(c) and was sentenced to a term of imprisonment of two hundred fifty-two (252) months, five years

supervised release and \$100 assessment. The indictment as narrowed and presented to the jury in the trial of this case alleged that Mr. Rivera and his alleged conspirator, Lorenzo Randall, engaged in a sex trafficking conspiracy involving two women “N.R.” and “D.P.” Mr. Rivera worked with N.R., while Randall worked with D.P. The lower court found that Mr. Rivera and Randall had a “tacit understanding” with Randall to traffic the two women and helped each other’s sex trafficking in multiple ways.

Mr. Rivera was not charged with any substantive sex trafficking or other offenses. He was never charged with violating 18, United States Code, Section § 1591.

Nevertheless, the sentencing court erroneously applied the sentencing guideline for the substantive offense, namely, U.S.S.G. § 2G1.1(a)(1) instead of U.S.S.G. § 2G1.1(a)(2), arriving at a Guidelines base offense level of 34 rather than 14.

On appeal, Mr. Rivera argued that the district court erred in denying his motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29 and his motion for a new trial under Rule

33 based on insufficient evidence because, while he and Randall each operated a commercial sex business, their operations were separate and even competing. Mr. Rivera further argued that he was denied a fair trial due to three of the district court's evidentiary rulings namely, 1) admitting expert opinion testimony on traumatic bonding; 2) limiting questions about N.R.'s previous history as a sex worker; and 3) admitting evidence that N.R. was once kidnapped.

The Second Circuit rejected Mr. Rivera's arguments and affirmed the sentence without determining whether the district court erred in calculating the offense level because the district court stated that it would have imposed the exact same sentence even if it had the lower base offense level (A9). Although the sentencing court imposed a sentence below the sentencing guidelines imprisonment range<sup>1</sup> resulting from employing the higher base level, the final sentence of 21 years was substantially unreasonable and violated Mr. Rivera's rights under the Eighth Amendment.

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<sup>1</sup> The sentencing court found that based upon a total offense level of 38 and a criminal history category of VI, the guideline imprisonment range was 360 months to life.

This was the first time in which the Second Circuit upheld a sentence based on the U.S.S.G. § 2G1.1(a)(1) where the defendant-appellant had argued that U.S.S.G. § 2G1.1(a)(2) applied.

Mr. Rivera timely sought panel and en banc rehearing, which the Circuit denied without explanation on August 23, 2024 (Appendix B).

This petition for certiorari asks the Court to resolve the conflict among the circuits on the important question of whether, where a defendant is convicted of violation of Title 18, United States Code, Section 1594(c), a district court may base its sentence U.S.S.G. § 2G1.1(a)(1) which by its terms is limited to violations of Title 18, United States Code, Section 1591, as the Second Circuit in this case and several other circuits have held, in contradiction to the holding of the Ninth Circuit that U.S.S.G. § 2G1.1(a)(2) applied.

### **REASON FOR GRANTING THE PETITION**

**CERTIORARI SHOULD BE GRANTED TO RESOLVE A SPLIT  
AMONG THE CIRCUIT COURTS OF APPEALS ON WHETHER  
U.S.S.G. § 2G1.1(a)(1) APPLIES TO VIOLATIONS OF TITLE 18,  
UNITED STATES CODE, SECTION 1594(c)**

At present, when confronted with sentencing for conspiracy to engage in sex trafficking in violation of Title 18, United States Code,

Section 1594(c), district courts apply sentencing guidelines as set by their respective circuit courts of appeal. Certiorari is sought pursuant to Rule 10(a) to resolve the conflict between the Circuits on this issue.

In the Second, Third, Eighth, and Eleventh Circuit, sentencing courts are directed to apply sentencing guideline U.S.S.G. § 2G1.1(a)(1) although by its terms that guideline is limited to violations of Title 18, United States Code, Section 1591, while in the Ninth Circuit, sentencing courts apply U.S.S.G. § 2G1.1(a)(2) which is twenty levels lower.

The Ninth Circuit reasoned in *United States v. Wei Lin*, 841 F.3d 823, 827 (9<sup>th</sup> Cir. 2016), that the guideline offense level cannot be 34 since the offense of conviction was not §1591(b)(1). 841 F.3d at 827. As a result, the applicable offense of conviction necessarily then falls into the second category of §2G1.1(a) where the offense of conviction is "otherwise." In that case, the offense level must be 14. The Ninth Circuit stated

It seems tortured to say that, when we know what federal statutes the defendant was convicted of, and we are asked to determine if the defendant's offense of conviction was a specific federal statute, we should break those statutes down

into their offense conduct and then compare that conduct, as opposed to simply comparing the federal statutes that we have on both sides of the equation.

*Id.* at 826. As the Ninth Circuit reasoned, it is unlikely that the Sentencing Commission intended an offense conduct comparison; if they wanted §2G1.1(a)(1) to apply whenever the defendant's offense involved conduct described in §1591(b)(1), they would have used the same language in §2G1.1(a)(1) as they did in the cross-reference subsection §2G1.1(c). *Id.* at 827. Additionally, the Commission likely intended §2G1.1(a)(1) to apply only when the defendant received a fifteen-year mandatory minimum sentence, because the higher base offense level was created in direct response to Congress's creation of the mandatory minimum.

In reaching contrary conclusions, the Third, Eighth, and Eleventh Circuits ignore the instructions in §1B1.2 and §1B1.3 that base offense level applications, such as the requirement under Section 2G1.1(a)(1), require a defendant to have been convicted of a particular statute. *See United States v. Sims*, 957 F.3d 362, 363 (3d Cir. 2019); *United States v. Valdez*, 2021 U.S. App. LEXIS 23498, at \*14 (11th Cir. Aug. 9, 2021)

(misapplying §1B1.3 n.7); *United States v. Carter*, 960 F.3d 1007, 1014 (8th Cir. 2020); *but see Payer v. United States*, 2013 U.S. Dist. LEXIS 22698, at \*5 (D.S.D. Feb. 20, 2013) (having been convicted of violating §1594(c), Payer is not subject to the penalties that accompany §1591(a)(1)). *See also United States v. Caldwell*, 2021 U.S. Dist. LEXIS 229663, at \*18 (E.D.V.A. Nov. 30, 2021) (discussing the conflicting authorities).

The Fourth Circuit has not yet addressed this question, and the lower courts in that circuit are divided. *United States v. Banks*, No. JKB-14-0015, 2023 U.S. Dist. LEXIS 77005, at \*8 (D. Md. Apr. 28, 2023) (not reaching the issue, comparing *United States v. Caldwell*, Crim. No. 2:17-002, 2021 U.S. Dist. LEXIS 229663 (E.D. Va. Nov. 30, 2021) with *United States v. Jackson*, No. 2:16-cr-00054-DCN, 2018 U.S. Dist. LEXIS 41571 (D.S.C. Mar. 14, 2018)).

While we recognize that in affirming Mr. Rivera’s sentence, the Second Circuit relied on the sentencing judge’s claim that the sentence “would have been the exact same even if [he] had adopted the defense's view of the base offense level” (A9), under the Court’s precedent Mr.

Rivera was nevertheless entitled to have the judge properly calculate the sentencing guidelines as the starting step of its sentencing calculus. *Gall v. United States*, 552 U.S. 38, 49 (2007).

The 21-year sentence imposed on Mr. Rivera is manifestly injustice. It was excessive in light of sentences imposed for similar offenses. The sentence imposed on Mr. Rivera was comparable to those imposed in two high-profile cases which involved crimes lasting years and targeting numerous minor victims, namely, *United States v. Maxwell*, 118 F.4th 256, 260 (2d Cir. 2024), and *United States v. Kelly*, 627 F. Supp. 3d 148, 149 (E.D.N.Y. 2022), notwithstanding that Mr. Rivera was charged with a conspiracy lasting approximately two months and involving at most two adult victims.

The 21-year sentence which the sentencing court imposed was the kind of sentencing disparity Congress intended for judges to avoid. Even considering Mr. Rivera's criminal history, the conduct in the cases involving Maxwell, Kelly and the others was strikingly more extensive and severe.

Nothing in Mr. Rivera's background warranted such sentencing

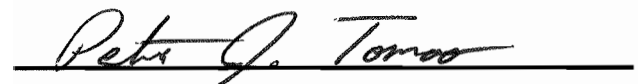
disparities. Second Circuit countenanced the imposition of a sentence imposed, although the sentencing court acknowledged Mr. Rivera's history of trauma, associated with living in crack houses, being raised by a single mother addicted to drugs and engaged in sex work, waking up to a dead friend, being a victim of repeated sexual abuse and witnessing constant violence and criminality. The sentencing court also noted that despite Mr. Rivera's long criminal history, there were people who saw good in him and believed he could turn his life around.

### CONCLUSION

**FOR ALL OF THE FOREGOING REASONS, THIS COURT IS  
RESPECTFULLY URGED TO GRANT THE WRIT OF CERTIORARI  
TO REVIEW THE OPINION AND ORDER OF THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT  
AFFIRMING THE SENTENCE**

Dated: Garden City, New York  
November 20, 2024

Respectfully Submitted,

A handwritten signature in black ink, reading "Peter J. Tomao", is written over a horizontal line.

Peter J. Tomao, Esq.  
CJA Counsel to the Petitioner  
JUSTIN RIVERA  
600 Old Country Road Suite 323  
Garden City, New York 11530  
(516) 877-7015