No. 10-10191

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MABELLE DE LA ROSA DANN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES AS APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NO. 08-CR-00390 CW

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BRIEF FOR THE UNITED STATES AS APPELLEE

Defendant-Appellant Mabelle de la Rosa Dann ("Dann") arranged for a domestic worker, Zoraida Peña Canal ("Peña Canal"), to enter the United States in 2006 from Peru under a fraudulently-obtained visa. Once in the United States, Dann took Peña Canal's passport and identification, kept her working long hours caring for Dann's children and home without any pay for nearly two years, and severely limited her contact with the outside world. Based on this conduct, a jury found Dann guilty of five counts of immigration and trafficking offenses. There is no merit to Dann's claims that the evidence at trial was insufficient to support her conviction of forced labor, document servitude, and alien harboring for financial gain, or to Dann's challenges to her sentence and the restitution order.

JURISDICTION, TIMELINESS, AND BAIL STATUS

The district court, the Honorable Claudia Wilken, had jurisdiction over the case pursuant to 18 U.S.C. § 3231. CR:26.1/ The judgment of conviction was entered on April 22, 2010. CR:116. Dann filed a timely notice of appeal the same day. CR:118; *see* Fed. R. App. P. 4(b)(1)(A)(i) & (4)(b)(2). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Dann is presently serving her sentence. Her projected release date is November 19, 2014. *See* http://www.bop.gov (inmate locator).

ISSUES PRESENTED

I. Whether there was sufficient evidence to support the jury's verdict that

(A) Dann knowingly obtained Peña Canal's labor by means of a scheme, plan, or pattern intended to cause Peña Canal to believe that if she did not work for Dann, she or others would suffer "serious harm," a necessary element of forced labor, 18 U.S.C. §§ 1589, 1594(a);

(B) Dann committed document servitude, in violation of 18 U.S.C. § 1592, by possessing Peña Canal's passport in the course of

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1/ "CR" refers to the Court Record for the case on appeal. "ER" refers to the Excerpts of Record. "SER" refers to the Government's Supplemental Excerpts of Records. "PSR" refers to the defendant's presentence report, filed under seal. "AOB" refers to the Appellant's Opening Brief.

committing forced labor, or with the intent of committing forced labor; and

(C) Dann "harbored" an illegal alien for financial gain, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(iii) & (B)(i), by having Peña Canal, an illegal alien, live with her while working as her nanny and housekeeper.

II. Whether the district court erred in calculating Dann's offense level under the United States Sentencing Guidelines ("U.S.S.G." or "guidelines") by

(A) applying a three-level enhancement under U.S.S.G. § 2H4.1(b)(3)(A), based on its finding that Peña Canal was held in a condition of forced labor for more than one year;

(B) applying a two-level enhancement under U.S.S.G. § 2H4.1(b)(4)(A), based on its finding that during the commission of, or in connection with, the forced labor offense, Dann harbored Peña Canal for financial gain, and conspired to obtain and actually obtained a visa under false pretenses for Peña Canal to enter the United States; and

(C) applying a four-level enhancement under U.S.S.G. § 2L2.1(b)(3), based on its finding that Dann knew, believed, or had reason to believe that the fraudulently-obtained visa was to be used to facilitate

the commission of a felony offense other than one involving violation of the immigration laws, namely forced labor and document servitude.

III. Whether the district court erred in determining that arrearages in child support from Dann's ex-husband constituted her property, an thus within the proper reach of the court's order of restitution to Peña Canal for her unpaid childcare services.

STATEMENT OF THE CASE

On February 4, 2009, a federal grand jury returned a Superseding Indictment charging Dann with five offenses: (1) conspiracy to commit visa fraud, in violation of 18 U.S.C. §§ 371 & 1546; (2) visa fraud, in violation of 18 U.S.C. § 1546; (3) forced labor and attempted forced labor, in violation of 18 U.S.C. §§ 1589 & 1594(a); (4) document servitude, in violation of 18 U.S.C. § 1592; and (5) harboring an illegal alien for private financial gain, in violation of 8 U.S.C. §§ 1324(a)(1)(A(iii) & (B)(i). CR:26; ER:77-82.

Dann's trial began on September 29, 2009, and ended on October 8, 2009, with a jury verdict of guilty on all counts. CR:87, 96. Dann moved for a judgment of acquittal and for a new trial. CR:99; ER:391-98, 415-28; SER:147, 187-90. The district court denied both motions. CR:106.

Dann was sentenced on April 14, 2010, to 60 months' imprisonment on each count, to run concurrently. CR:115. She was also ordered to pay $123,740.34 in restitution to Peña Canal. *Id.* She filed her notice of appeal on April 22, 2010, the day judgment was filed. CR:116, 118.

STATEMENT OF THE FACTS

I. THE GOVERNMENT'S EVIDENCE AT TRIAL

A. Dann's schemes to bring Peña Canal to the United States

Dann, an American citizen of Peruvian descent who graduated from U.C. Berkeley's business school, first contacted Peña Canal during a visit to Peru in March 2002. ER:114; SER:201-02, 215-17, 242-43. Peña Canal, a Peruvian, had worked as a nanny since finishing high school in 1997, and was then employed to take care of Dann's niece and nephew. ER:107-16; SER:215-17. Dann spoke to Peña Canal about working for her instead, in the United States. ER:115-18

In June 2002, Dann returned to Peru and hired Peña Canal to care for Dann's twin baby boys for a trial period of four months. ER:120-24. Dann continued to talk to Peña Canal about going to the United States, promising (1) a starting salary of $300 that would increase to $600 (around 1200 soles) per month, (2) to provide Peña Canal a room in which to live, and (3) the opportunity to study

English, which would help Peña Canal reach her dream of going into business for herself. ER:123-25, 136.

When Peña Canal eventually agreed to work for Dann in the United States, Dann shepherded Peña Canal, who had never before left Peru, through the process of obtaining a United States visa. ER:125-26. Dann told Peña Canal to pretend to be a tourist going to the United States for vacation, and to conjure up a compelling reason to return to Peru – such as a daughter or sick mother or bank account – to convince the United States Embassy that she would not try to stay in the United States illegally. ER:126-28; SER:38.

Between August and November 2002, Dann filled out two visa applications for Peña Canal. ER:128. Both applications were rejected, but Dann vowed to find some way to bring Peña Canal to the United States, even if it meant smuggling her in through Mexico. ER:134-36.

Dann returned to the United States in November 2002, but continued her efforts to get Peña Canal into the United States. ER:137. In February 2003, Dann put Peña Canal in touch with someone traveling to the United States. ER:138. Then, in 2004, Dann sent Peña Canal a letter saying that she would try to get Peña Canal into the United States through a male contact, and that Peña Canal should keep all of these machinations secret even from her family. ER:142-44. The letter

also explained Dann's increased urgency for Peña Canal's help: Dann had gotten a divorce, had to find work, and needed Peña Canal to take care of her three sons. ER:139-41.

In December 2004, Dann arranged for Peña Canal to enter the United States with Silvana de la Rosa ("de la Rosa"), Dann's friend. ER:145; SER:97. De la Rosa was to pretend that she wanted to visit Disney World, but was so frail from bone cancer that she needed her assistant, Peña Canal, to accompany her. ER:146-47, 154-55. Dann recruited a consultant to coach Peña Canal how to lie. ER:147, 149-50, 152-53. The plan worked, and Peña Canal's visa application was granted. ER:152, 156.

On July 27, 2006, Peña Canal entered the United States on a tourist visa expiring October 26, 2006. ER:159, 162-63; SER:31. Following Dann's instructions on how to look like a tourist, Peña Canal brought virtually no belongings. ER:155-62, 165.

B. Peña Canal's conditions of work as Dann's nanny and housekeeper

Dann immediately put Peña Canal to work. While Dann and de la Rosa went sight-seeing, sometimes with Dann's friend and fellow Peruvian Claudia Fetzer ("Fetzer"), Peña Canal watched Dann's children and cooked. ER:166;

SER:99-108. When de la Rosa returned to Peru, Dann tore up Peña Canal's return ticket. ER:168. Dann also took and hid Peña Canal's passport in a locked case, under the pretext of doing it for safekeeping. ER:166-67, 187, 242. In March 2007, Dann also took Peña Canal's Peruvian identification card. ER:187.

Just after Peña Canal's visa expired, Fetzer counseled Dann not to engage in anything illegal and suggested that Dann use the day-care services at her children's school instead of Peña Canal. SER:31, 108-13. Dann ignored Fetzer's advice.

Instead, "Señora Mabelle," as Peña Canal addressed Dann, kept Peña Canal as her full-time nanny. ER:172. Between October 2006 and September 2007, she left her children with Peña Canal on several occasions when she went on weekend get-aways with her boyfriend. SER:150-53. Dann also had Peña Canal cook and clean the apartment. ER:172, 190; SER:156-57. In return for her labor, Peña Canal received no wages, no room of her own, and no opportunity to study English.

i. No pay

Dann had little intention of paying Peña Canal. In 2005, when Dann was busy trying to get Peña Canal into the United States, Dann was unemployed, earning no income, and receiving no child support. SER:218-27. Although her

financial condition did not improve markedly, Dann periodically assured Peña Canal that payment was just around the corner. ER:173, 184, 187, 194-96; SER:233. In March 2007, to convince Peña Canal that she eventually would be paid, Dann opened up a bank account for Peña Canal (falsely informing the bank that Peña Canal was employed by Whole Foods), but kept the bank documents so that Peña Canal could not access the account herself. ER:185-86. Dann also appealed to Peña Canal's sympathies, telling her that if she left, Dann would have no way of caring for her children and the government would take them away. ER:184.

Not only did Dann not pay Peña Canal, she took half of the $100 she had gifted to Peña Canal at Christmas 2006 as reimbursement for calls Peña Canal had made to her family in Peru in November 2006. ER:176-77, 187. Sometime in the winter of 2007, Dann began restricting Peña Canal's food intake. ER:223, 246-48. She forbade Peña Canal from eating the fruit or drinking tea without permission. ER:224-27. Eventually, she began weighing the meat, and counting the eggs and bread to make sure Peña Canal was not eating more than her ration. ER:249-50. Peña Canal was so hungry that she ate oranges off trees on the road to the twins' school, and accepted food from people at the school. ER:248-51; SER:59-60.

Dann repeatedly accused Peña Canal of stealing from her. In March 2007, Dann accused Peña Canal of stealing $13,000 from her. ER:244. In May 2007, she accused Peña Canal of stealing several hundred dollars. ER:245. On a third occasion, she accused Peña Canal of stealing $600. ER:245-46. Each time that Dann accused Peña Canal of stealing, she also threatened to send Peña Canal back to Peru. ER:244.

ii. No room or privacy

Peña Canal also never got her own room or any privacy. Upon her arrival to the United States, Peña Canal lived with Dann and her children at Dann's mother's apartment. ER:164. There, Peña Canal did not have a room and slept on the floor. ER:165. Dann told her that it would only be for a few days. ER:165. Peña Canal ended up sleeping in the living room on the floor again, however, when Dann and her three sons moved to a two-bedroom apartment in a complex in Walnut Creek, California in September of 2006. ER:167, 170, 172. Dann told Peña Canal that this arrangement would only be for six months, but it was not. ER:171, 175.

iii. Isolation: No opportunity to learn English or make friends

By keeping Peña Canal constantly busy with work and restricting Peña Canal's contact with the outside world, Dann also prevented Peña Canal from learning English or making social contacts.

Peña Canal's work schedule left her no time to herself. During the children's summer vacation, she was with them all day long, in addition to cooking and cleaning for the entire household. ER:191. During the school year, her work schedule was even more demanding. For example, during the 2007-2008 school year, Peña Canal was required to wake up at 6:00 a.m., prepare food for Dann, get the twins ready for school by 7:30 a.m., and get Dann's older son ready for school by 8:30 a.m. ER:192, 218-19. Then, she had until noon to clean the apartment, launder and iron all the clothing, shine Dann's shoes, and prepare lunch. ER:219, 221-22, 224.

Around 12:30 p.m., rain or shine, Peña Canal had to walk the 30-minute route to the twins' school to pick them up. ER:198-99, 221; SER:41-42. After lunch, Peña Canal would supervise the twins' homework and feed Dann's older son when he returned home. ER:222-23. Then, she would take the children out to play, feed them dinner by 6:00 p.m., bathe them, and have them ready for bed by 8:00 p.m. ER:223. If Dann and her boyfriend were present, Peña Canal would not eat at the table with them, but return to clean up after them. SER:155. After the children were asleep, around 9:00 p.m., Peña Canal tidied up the house before finally retiring for the night around 10:00 p.m. ER:223.

Starting in January 2007, Dann forbade Peña Canal from leaving the apartment without her permission or under her watch. ER:174-75, 181-83, 188-90. When Dann's friends came over to visit, Dann made Peña Canal hide in the gym of the apartment complex. ER:323. Even Dann's own mother was not free to take Peña Canal to church. ER:188-89, 347.

Dann told Peña Canal not to talk to anyone because she did not want Peña Canal telling "anybody about the things here at home." ER:183, 226. Dann would call to check that Peña Canal did not leave the apartment earlier than necessary to pick up the twins from school, or stay out unnecessarily long after picking them up. ER:200. If Peña Canal did not answer the phone, Dann would become upset and accuse Peña Canal of talking to people. ER:220. Dann even asked the property manager at her apartment complex to instruct the Spanish-speaking personnel not to talk with Peña Canal. SER:123, 128-42.

In October 2007, when Dann learned that Peña Canal had accepted a ride with Dann's friend Fetzer, Dann flew into a rage. ER:207-08; SER:114-22. Dann confronted Fetzer in a manner that caused Fetzer to go to the police. SER:120-22. Dann also confiscated Peña Canal's address book and personal correspondence. ER:214-17; SER:75-76.

C. Worsening conditions leading to Peña Canal's escape

In January 2008, when she heard that Peña Canal had spoken to her older son's teacher, Dann flew into a rage and accused Peña Canal of violating her order not to talk to anybody and causing Dann trouble "on purpose." ER:229-32. Dann said she would send Peña Canal back to Peru, but that first, Peña Canal had to pay Dann $8,000. ER:232-75. According to Dann's accounts, she had spent about $15,000 on Peña Canal, and Peña Canal had only paid back $7,000 through her services. ER:233-34. Dann said she would give Peña Canal another chance, but emphasized that Peña Canal was not to talk to anyone. ER:234.

The next day, Dann smashed a radio Peña Canal had purchased with commissions she had earned from selling chocolates made by Dann's mother on the road to and around the twins' school. ER:201-41, 235-36. Dann had listened to Spanish-language news on the radio. ER:204, 235.

Soon after, Dann increased Peña Canal's work. ER:236-37. Dann also restricted Peña Canal's access to the shower so that Peña Canal was only able to wash up at the kitchen sink. ER:250. Peña Canal had a toothache, but could not see a dentist. ER:255-56.

In February 2008, Peña Canal began keeping a calendar to mark each day that she got through. ER:248-49. But Peña Canal felt that she could not stop

working for Dann because she had no one to go to, Dann had her passport and Peruvian identification card, Dann would accuse her of taking her money, and because she could not abandon Dann's children. ER:243-44, 247.

On March 1, 2008, Dann again accused Peña Canal of stealing her money. ER:252-54. After Peña Canal stood up for herself, Dann barged in on Peña Canal in the bathroom. ER:254. Dann closed the door on her children, turned off the light, grabbed Peña Canal by the throat, called her names, and threatened to send her back to Peru. ER:254-55. When Peña Canal said that she in fact wanted to go home, Dann again recounted the debt that Peña Canal allegedly owed her. ER:255.

Dann did not send Peña Canal back to Peru, but kept her working, and began insulting her regularly. ER:256-60. Dann no longer permitted Peña Canal to leave the house to pick up the twins from school. ER:266-67. In late March 2008, the police brought the children home from school when Dann's carpooling arrangements had failed, leaving Dann's children stranded. ER:266-67. Dann commented to Peña Canal that the police might have picked Peña Canal up, and afterwards, had Peña Canal resume picking the children up from school. ER:267, 271-72.

On March 27, 2008, Dann told Peña Canal, "You're talking to me about rights. What rights do you have in the United States?" ER:258-59. Peña Canal responded that she did not come to the United States to die, and that Dann was treating her like a slave. ER:259-60. Dann responded that it was her house, and "[i]n my house, I can do whatever I want." ER:260.

On March 30, 2008, Dann said to her mother, in front of Peña Canal, that Peña Canal had no rights "[s]ince here in the United States, the illegal people don't even have as much as Medi-Cal. They die here." ER:262-63.

Dann then told Peña Canal to sign a letter stating that Dann had paid her the minimum wage in California, starting on July 27, 2006, when Peña Canal had arrived in the United States, for the care of her children. ER:263-64. The agreement stated that Peña Canal received lodging at the value of $500 in rent, as well as board, and gifts, and that Peña Canal had been compensated a total of $10,200. ER:264. Dann told Peña Canal that if she did not sign this, she would personally deliver Peña Canal back to Peru. ER:265. Even though the contents of the letter were false, Peña Canal signed it. ER:264-65.

Dann began talking to Peña Canal about the police and immigration, and telling her about reports in the newspaper that Americans were returning all immigrants. ER:265-66. She told Peña Canal to be careful of the police. ER:266.

D. Peña Canal's escape

Despite Dann's efforts to keep Peña Canal isolated, Peña Canal made a number of friends during her trips to pick up the twins from school. Because of Dann's instructions to keep to herself, Peña Canal initially did not greet or look at anyone, including Anselma Soto ("Soto"), the Spanish-speaking school custodian, who made overtures to Peña Canal. SER:54. Peña Canal finally spoke with Soto in October 2007, when she was thirsty and Soto offered her water. SER:55. Soto observed that Peña Canal always seemed in a hurry, looked tired, and wore very used clothing. SER:56. As Peña Canal became more comfortable with Soto, she told Soto about her working conditions, that she had not been paid, and that she was not allowed to talk to anyone. SER:60-62.

Peña Canal also asked Soto if she could use the phone to call her family, because she had not been in touch with them for a year. SER:57. When Peña Canal spoke with her family, she started crying, but assured her family that she was okay and would call another day. SER:58. When Soto suggested that Peña Canal leave Dann, Peña Canal told her that she could not leave the children, and that she was afraid Dann would accuse her of stealing. SER:63-68. Eventually, Peña Canal began keeping some of her belongings with Soto at the school in an envelope under a pseudonym. ER:214-17; SER 75-76.

In October 2007, when Peña Canal began selling chocolates, she met a gardener named Miguel Lopez ("Lopez"), who purchased some of her candy. SER:58-59, 130-32. Peña Canal eventually told Lopez about her working conditions, that Dann had her identification papers, and that she was afraid to leave work because Dann "was accusing her, saying that she was going to report her to immigration, that she was illegal and that she couldn't be in this country." SER:136. Lopez took pity on Peña Canal and gave her money and food. SER:134-36. Others did too. SER:143-45.

Sometime in January or February 2008, Amy Oz ("Oz"), a mother at Dann's twins' school, who spoke a little Spanish, began giving Peña Canal rides to and from school. SER:41-43. Peña Canal sadly informed Oz that she would get into trouble if Dann's children told their mother that Peña Canal was talking with Oz. SER:46-47.

On March 18, 2008, Peña Canal confided to Soto, Oz, and others about her worsening working conditions. SER:44-45, 65. Peña Canal also said that she wished to stay in the United States and did not want to be deported. SER:53. Oz was sufficiently alarmed that, without telling Peña Canal, she contacted an organization that assists domestic workers. SER:45-46.

On April 7, 2008, Peña Canal, crying, went to her friends at the twins' school. ER:272, 274. Her friends rallied around her, and helped Peña Canal to escape Dann on April 16, 2008. ER:275.

Peña Canal chose to leave on a day when she knew Dann was not working so the children would be safe. SER:67-68. After delivering the children to school, a frightened Peña Canal went through the school kitchen and hid in a car, which was driven to a safe house. ER:276-82; SER:69-71, 200. Oz, who was not part of the escape plan, was asked to inform Dann of Peña Canal's departure, that Dann would need to pick her children up herself, and that she should pick up a letter at the school. SER:47. The letter was from Peña Canal. ER:277. It contained keys to Dann's apartment and asked Dann to return Peña Canal's passport. SER:67-68, 197-99. Oz's husband spoke with Dann, who was hysterical. ER:353.

After reading the letter at the school, Dann said that Peña Canal had taken everything – emptied Dann's house, taking the keys, "all my jewelry and all my money." ER:357; SER:73-74, 146. Dann later told Oz that Peña Canal had been a terrible nanny and had stolen Dann's jewelry. SER:50.

Flora Mello ("Mello"), who took Peña Canal in, observed that Peña Canal was dirty, thin, and pallid. SER:89-90, 93. Peña Canal just wanted to get her passport back so she could return to Peru. SER:90, 95. Peña Canal did not want

to report Dann for fear that the children would be left without their mother, but Mello's father-in-law insisted that Peña Canal go to the police. ER:282; SER:93, 199. Peña Canal asked the police to get her passport back from Dann. ER:283. Dann told the police that she did not have Peña Canal's passport. ER:87.

A few days after Peña Canal left Dann, Oz gave Peña Canal phone numbers of organizations and attorneys that could assist her. ER:354. One of these attorneys, as well as Mello who perceived that Peña Canal needed psychological help to deal with her traumatic experience, contacted the Immigration and Customs Enforcement Agency ("ICE"). SER:98, 148-49.

On April 21, 2008, Dann sent her sister an email stating that "Zoraida escaped, got away, left. But at least she was here for two years. But I realized from the day she got here that she wanted to look for another job." SER:137-39.

In June of 2008, ICE agents searched Dann's apartment. SER:28-29. Peña Canal's passport, her Peruvian identification card, and checks for a bank account in her name were found buried under clothing in a drawer in Dann's room. ER:94; SER:30-32. Officers also found various other documents, including the agreement Dann had forced Peña Canal to sign regarding her pay, which Dann kept in a plastic document protector. SER:34-35, 196a, 228.

II. DEFENSE

Dann argued that Peña Canal had adjusted the truth, lied, and that her friends had been taken in by her. SER:162, 168. The evidence more plausibly suggested that Peña Canal had agreed to work for Dann in exchange for room and board, and the opportunity to be in the United States. SER:163-67. Dann presented evidence from her relatives and friends suggesting that Dann had treated Peña Canal like a sister. SER:162a-j, 174. However, Peña Canal decided to pose as a trafficking victim in order to obtain government benefits. SER:162j, 168-86.

III. THE JURY NOTES AND THE VERDICT

During deliberations, the jury sent out four notes with questions. One note was about visa fraud. SER:192. The other notes were about the forced labor charge. ER:411-12.

On the question of whether the charge of forced labor had to apply to the entire duration of Peña Canal's service, the district court answered, "it need not apply to the entire duration of Ms. Peña Canal's service. It could be applied to only a portion of the time." ER:411-12.

Regarding whether duration of time was relevant to determining serious harm, the district court stated, "yes, the duration of time is relevant. A harm that might be serious if it happened for only a short – that might not be serious if it

happened for only a short time might be serious if it went on for a very long time." ER:412.

Shortly after receiving this instruction, the jury returned with a unanimous verdict of guilty on all five counts. SER:194-96.

IV. THE MOTION FOR JUDGMENT OF ACQUITTAL

At the close of the government's case-in-chief, Dann moved for a judgment of acquittal, pursuant to Fed. R. Crim. P. 29, and for a new trial, pursuant to Rule 33. SER:147. The district court heard some arguments on the motion, but reserved judgment until after the verdict, briefing, and a hearing. ER:391-98, 415-28; SER:187-90; CR:106. Dann challenged the sufficiency of evidence on Counts Three (forced labor), Four (document servitude), and Five (harboring an illegal alien), but not Counts One and Two (conspiracy, visa fraud). ER:58-59.

In a published order filed on December 23, 2009, the district court denied Dann's motion. ER:58-68; *United States v. Dann*, Slip Op. No. C 08-00390 CW, 2009 WL 50623456 (N.D. Cal. 2009). It found sufficient evidence to support the conviction on the three challenged counts.

Regarding the forced labor conviction, the district court found that the evidence showed that Dann had led Peña Canal to believe that she would suffer serious financial harm and reputational harm if she left Dann's employ. ER:60-64.

Regarding the document servitude conviction, the district court concluded that evidence that Dann had falsely denied to police that she had Peña Canal's passport and identification card, and evidence that Dann had repeatedly threatened to send Peña Canal back to Peru, supported that Dann knowingly possessed Peña Canal's passport and identification card for the purposed of forcing Peña Canal to work. ER:64-65.

On the conviction for harboring an illegal alien, the district court noted that the evidence clearly showed that Dann kept Peña Canal in her apartment and limited her contact with the outside world. ER:65-67. Given Dann's knowledge of Peña Canal's illegal status, a jury could conclude that she was harboring Peña Canal to avoid detection by immigration authorities. ER:67.

V. SENTENCING

On April 14, 2010, the district court sentenced Dann to 60 months on each count, to run concurrent, and ordered $123,740.34 in restitution. CR:115.

A. Guidelines calculation

Dann's advisory guidelines range was 70 to 87 months, based on an offense level of 27, and criminal history of I. ER:47.

Dann's five counts of conviction were grouped together, and the highest offense level was used to calculate her sentencing range. PSR ¶ 24. The highest

offense level was 27, for Count Three (forced labor). PSR ¶ 37. The base offense level under U.S.S.G. § 2H4.1(a) was 22. PSR ¶ 31. Three levels were added under U.S.S.G. § 2H4.1(b)(3)(A), because the victim was held in a condition of involuntary servitude for more than one year. PSR ¶ 31. Two levels were added under U.S.S.G. § 2H4.1(b)(4)(A) because another felony offense was committed during the commission of, or in connection with, the involuntary servitude offense. PSR ¶ 33.

Dann's offense level for Count Four (document servitude) was 23. PSR ¶ 44. Her offense level for Count Five (harboring) was 18. PSR ¶ 50.

Her offense level for Counts One and Two (conspiracy to commit visa fraud and visa fraud) was 15. PSR ¶ 30. The base offense level under U.S.S.G. § 2L2.1(a) was 11. PSR ¶ 25. This was increased by four levels under U.S.S.G. § 2L2.1(b)(3) because Dann knew, believed, or had reason to believe that the visa was to be used to faciliate the commission of a felony offense, other than an offense involving violation of the immigration laws. PSR ¶ 26.

Dann objected to the three enhancements referenced above. *See* ER:4-9, 14; SER:1-9.

B. Restitution order

The district court ordered Dann to pay Peña Canal $109,340.34 in back pay and $14,400 for therapy, in restitution. ER:48; SER:12-15. The district court was "interested in having that paid" prior to Dann's release from prison. ER:40-41, 44. To maximize the chances that restitution would be paid, the district court imposed no fine and chose not to order that Dann contribute to the costs of her defense. ER:47-48.

The court also noted that the father of Dann's children "owes her $30,000 in back child support," and ordered that "any back child support payments that [Dann] receive[d] must be signed over immediately to Ms. Pena Canal." ER:42, 50-51, 436; CR:116.

Dann moved to correct her sentence under Fed. R. Crim. 35, arguing that the district court did not have jurisdiction to require Dann to sign over child support arrearages because those belonged to Dann's children rather than Dann. CR:120, 122; SER:16-17. The government argued that while present child support obligations belonged to Dann's children, back child support belonged to Dann because it was reimbursement for Dann's outlay. SER:19.

On July 22, 2010, the district court issued an order denying Dann's motion to correct her sentence. ER:69-73. It stated that any arrearages paid to Dann

while she was incarcerated could not benefit her children, and so did not belong to them. ER:72. The district court noted that it would be willing to modify its order if the arrearages were paid to Dann at a time when she had custody of her children and needed the arrearages to support them. *Id.* But "[d]uring the time these child support arrearages were accruing, [Dann] and her children were receiving the benefit of unpaid childcare services from the victim. It is equitable that these arrearages be paid over, although belatedly, to the victim." *Id.*

SUMMARY OF ARGUMENT

I. Under the deferential standard of review applicable in reviewing challenges to the sufficiency of evidence, this Court should affirm the district court's denial of Dann's motion for a judgment of aquittal.

The evidence, taken in the light most favorable to the government, supports the jury's verdict on forced labor, given that Dann forced Peña Canal to work by means of a scheme, plan, or pattern intended to cause Peña Canal to believe that if she did not continue to work for Dann, she would (1) be fined $8,000 and lose all of her back wages, (2) lose her reputation as an honest employee through Dann's accusations of theft, (3) be exposed to law enforcement or deported to Peru, and (4) cause Dann's children to be removed by the government because Dann could not care for them by herself. Given that Dann withheld Peña Canal's passport and

Peruvian identification card, and that Peña Canal was a professional nanny, had no money, and spoke no English, these consequences independently and collectively constituted serious harms.

The evidence was also sufficient to support Dann's conviction of document servitude, which required proof that Dann held Peña Canal's passport in the course of committing or with the intent to commit the crime of forced labor. There was ample evidence that Dann committed the crime of forced labor against Peña Canal, and that she possessed Peña Canal's passport while doing so. Alternatively, there was also evidence that Dann kept Peña Canal's passport with the intent to force her labor. Peña Canal testified that Dann kept her passport in a locked case, talked to her about deportation, and threatened to send her back to Peru if she did not comply with all of Dann's work demands.

There was sufficient evidence that Dann committed harbored an illegal alien for financial gain. Contrary to Dann's claim, under this Court's binding precedent, the offense does not require proof that a defendant harbored an illegal alien with the intent to shelter her from immigration authorities. It is enough that a defendant harbors, or shelters, an illegal alien, thus facilitating her illegal presence in the United States. It is undisputed that Peña Canal was an illegal alien during the nearly two years she lived with Dann in the United States. The evidence also

supports the conclusion that Dann benefited from Peña Canal's unpaid work as a nanny and housekeeper.

II. The district court did not clearly err in finding that a preponderance of the evidence supported several sentencing enhancements.

First, the district court properly applied enhancements in its calculation of the offense level for Count Three (forced labor). The evidence showed that Peña Canal was in a condition of forced labor from before April 16, 2007, which was one year before her escape. She was brought to the United States in July 2006 and was immediately put to work taking care of Dann's children and home. Shortly after Peña Canal's arrival, Dann took and withheld her passport and visa, and then later took her Peruvian identification card. Dann never paid her, and kept her from learning English and establishing ties that would permit her to leave. These facts warranted the three-level enhancement under U.S.S.G. § 2H4.1(b)(3)(A) for holding a victim in a condition of forced labor for more than one year.

The evidence also showed that that Dann harbored Peña Canal, an illegal alien, for financial gain, and that Dann engaged in conspiracy to commit visa fraud and visa fraud to get Peña Canal into the United States. All three are felony offenses, and all three were related to Dann's plan to get Peña Canal to work for her for free. These facts warranted the two-level enhancement under U.S.S.G. §

2H4.1(b)(4) for committing any other felony offense during the commission of, or in connection with the forced labor offense.

Second, in its calculation of the guidelines for Counts One and Two, (conspiracy, visa fraud), the district court properly applied the four-level enhancement under U.S.S.G. § 2L2.1(b)(3) for a defendant who knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than one in violation of the immigration laws. Dann arranged for Peña Canal to enter the United States on a false visa, and she withheld Peña Canal's passport to prevent her from leaving, all in service of her plan to have Peña Canal work for her for free. This Court has made clear that forced labor is not an immigration crime because it does not necessarily involve immigration. In any case, any error was harmless, since Dann's advisory guidelines range was driven by Count Three (forced labor).

III. The district court's order that any child support arrearages paid to Dann be signed over to Peña Canal was within its authority to impose and fashion an individualized restitution order. Under California law, although child support belongs to the child, child support arrearages are presumed to belong to the custodial parent under a reimbursement theory. The district court's restitution

order was particularly appropriate because the restitution was for unpaid childcare services Peña Canal had been forced to provide.

ARGUMENT

I. SUFFICIENT EVIDENCE SUPPORTED THE JURY'S VERDICT AGAINST DANN

A. Standard of review

This Court reviews a district court's denial of a motion for judgment of acquittal de novo. *United States v. Thomas*, 612 F.3d 1107, 1115 n.4 (9th Cir. 2010). As clarified in *United States v. Nevils,* 598 F.3d 1158, 1163-64 (9th Cir. 2010) (en banc), this review is governed by the highly deferential standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This standard requires this Court to engage in a two-step process.

First, the Court must view the evidence presented at trial in the light most favorable to the prosecution. *Nevils,* 598 F.3d at 1163-64. Where evidence could support conflicting inferences, this Court must adopt the inference that favors the prosecution. *Id.* at 1164. It may not construe the evidence in favor of an innocent explanation, even if the innocent explanation is plausible and the Court believes more likely. *Id.* at 1166-67. A witness's testimony need not be corroborated if believed beyond a reasonable doubt. *See Bruce v. Terhune*, 376 F.3d 950, 956 (9th Cir. 2004). The reviewing court "may not usurp the role of the finder of fact."

Nevils, 598 F.3d at 1164. Rather, based on the jury's verdict of guilty, the reviewing court "'must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Id.* (quoting *Jackson*, 443 U.S. at 326).

Second, this Court must determine whether *any* rational trier of fact could have found that the evidence, viewed most favorably to the prosecution, supported the essential elements of the crime beyond a reasonable doubt. *Id.* There is only a due process violation if the evidence is "so supportive of innocence that no rational juror could could conclude that the government proved its case beyond a reasonable doubt," or that the evidence does not "establish every element of the crime." *Id.* at 1167.

B. Sufficient evidence supports Dann's forced labor conviction

The evidence at trial showed that Dann knowingly caused Peña Canal to believe that if she stopped working for Dann, Peña Canal would suffer serious financial harm, serious reputational harm, and be sent or deported to Peru, and that Dann's children would be removed from their home. Thus, there is no merit to Dann's claim that there was insufficient evidence of the second element on Count Three, the charge of forced labor, that Dann "knowingly" obtained Peña Canal's

labor by means of a "scheme, plan, or pattern intended to cause" Peña Canal "to believe that" if she "did not perform such labor or services," she "or another person would suffer serious harm." AOB:26-33.

i. Statutory elements of 18 U.S.C. § 1589

To find Dann guilty of violating 18 U.S.C. § 1589, the forced labor statute, a jury was required to find beyond a reasonable doubt that (1) Dann obtained or attempted to obtain Peña Canal's labor or services; (2) by prohibited means; and (3) did so knowingly. SER:j-k. Section 1589 broadly specifies the prohibited means of procuring another person's labor to include "any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm."2/ 18 U.S.C. § 1589(a)(4).

Congress enacted Section 1589 to correct what it viewed as the Supreme Court's "mistakenly narrow[ing] the definition of involuntary servitude [18 U.S.C. § 1584] by limiting [it to] physical coercion" or legal coercion in *United States v. Kozminski*, 487 U.S. 931, 952 (1988). *United States v. Bradley*, 390 F.3d 145, 156

2/ Although the Superseding Indictment also charged other theories, ER:81, the jury was only instructed on the "scheme, plan, or pattern" theory. SER:j-k. Under *McCormick v. United States*, 500 U.S. 257, 269-70 & n.8 (1991), this Court may only affirm based on the theory instructed to the jury.

(1st Cir. 2004), *vacated on other grounds*, 545 U.S. 1101 (2005). Section 1589 was intended to broaden federal trafficking laws "to reach cases in which persons are held in a condition of servitude through nonviolent coercion." Pub. L. 106-386, § 102(b)(13), 114 Stat. at 1467 (discussing purposes of Victims of Trafficking and Violence Protection Act of 2000). Specifically, Congress recognized that modern-day traffickers employ "increasingly subtle methods" "such as where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence." H.R. Rep. No. 939, 106th Cong., 2d Sess. 101 (2000) (Conf. Rep.). For this reason, "[t]he term 'serious harm' as used in this Act refers to a broad array of harms, including both physical and nonphysical," and encompasses bankruptcy to a victim's family as one type of serious harm. *Id.*; *see United States v. Calimlim*, 538 F.3d 706, 712, 714 (7th Cir. 2008) (finding threat to stop paying victim's poor family members constituted "serious harm").

In its 2008 amendment of Section 1589, Congress further explained that "serious harm" refers to "any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same

background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm." Pub. L. 110-457, § 222(b)(3), 122 Stat. 5068.

The "serious harm" need not be unlawful. *See Calimlim*, 538 F.3d at 712 (rejecting argument that forced labor statute is overbroad and would criminalize warnings about consequences of illegal immigration based on scienter requirement, not because deportation does not constitute serious harm). Nor does the "serious harm" have to be "at the defendant's hand"; it may simply "befall" either the victim or another person if the victim stops working for the defendant. *Id*. at 711, 713.

ii. Jury instructions

The district court's instructions to the jury on Section 1589, unchallenged by Dann, were consistent with the statute's legislative history. The jury was instructed that the term "serious harm" means any harm, whether physical or non-physical harm, "including psychological, financial, or reputation harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm." ER:401-02; SER:j-k; *see Bradley*, 390 F.3d at 150.

In addition, the jury was instructed to consider Peña Canal's "individual circumstances, including her age, education, intelligence, experience, background, social isolation, social status, any inequalities between Ms. Peña Canal and . . . Dann, and any reasonable means of escape or terminating the relationship" in "determining whether a particular type or certain degree of harm or coercion was sufficient to obtain Ms. Peña Canal's labor or services." ER:401-02; *see Bradley*, 390 F.3d at 150, 153. If a person is "compelled to labor against her will by any one of the prohibited means, the person's service is forced even if she is given money, benefits, or gifts." ER:402.

iii. Fear of serious financial harm

The evidence showed that Dann intentionally caused Peña Canal to believe that if she left Dann's employ, she would suffer serious financial harm.

Peña Canal testified that before she traveled to the United States, Dann had promised to pay her $300 to $600 per month for working as Dann's nanny. ER:123-25, 136. Although Dann never paid her, Dann continually promised that she would eventually come up with the money to pay Peña Canal and Peña Canal believed her. ER:173, 184-85, 191-92, 243. In fact, Dann opened up a bank account in Peña Canal's name in March of 2007 for the purpose of making such payments, but Dann controlled access to the account. ER:185, 195-96. When Peña Canal escaped, she did not have a bank card, and the personal checks issued

to that account were later found in Dann's possession. SER:30, 32, 199. A rational juror could conclude from these facts that Dann, who had made extraordinary efforts between 2002 and 2006 to get Peña Canal into the United States to work as her nanny, intentionally led Peña Canal to believe that if she left Dann, she would lose her backwages, including any money that may have been deposited into her account.

The evidence showed that in January of 2008, when Peña Canal had not perfectly complied with Dann's order not to speak with anyone, Dann threatened to send Peña Canal back to Peru, but required Peña Canal to first "pay me now." ER:228-31. According to Dann, Peña Canal owed her $8,000 for, among other things, clothing and airfare from Peru. ER:231-32. In March of 2008, when Peña Canal again showed signs of rebelliousness, Dann again recounted this alleged debt, while also trapping Peña Canal in the bathroom, grabbing her by the throat, and calling her derogatory names. ER:254. A rational juror could conclude from these facts that Dann intentionally led Peña Canal to believe that if she stopped working for Dann, she would owe Dann $8,000.

The evidence showed that the threat of this financial harm was serious and coercive to Peña Canal, given her background and circumstances. *Cf. Calimlim*, 538 F.3d at 711 (threats of refusal to send money to family in Philippines was "serious harm" to victim). Peña Canal testified that she endured Dann's increasing

demands and abuse in the months subsequent to Dann's bringing up of the $8,000 debt, saying to herself, "My God, I hope there's nothing big like she did [sic] in January when she started adding up amounts, my God." ER:249.

"The test of undue pressure is an objective one, asking how a reasonable employee would have behaved," "[b]ut . . . known objective conditions that make the victim especially vulnerable to pressure (such as youth or immigrant status) bear on whether the employee's labor was obtained by forbidden means." *Bradley*, 390 F.3d at 153 (internal quotations and citation omitted).

The objective conditions of Peña Canal's existence in the United States made her particularly vulnerable to the threat of financial harm. Peña Canal did not have any money, not to speak of $8,000, because Dann had never paid her any wages. Peña Canal had earned a little money selling chocolates and collected some contributions from friends, but she spent all of this money on the radio that Dann eventually destroyed. Peña Canal had earned approximately 400 soles3/ a month years ago in Peru, but there was no evidence that she had any savings or that she could access any savings. Peña Canal could not afford to lose her back wages or to incur an $8,000 debt to Dann, and this reasonably felt compelled to continue working for Dann to avoid these consequences.

3/ The district court noted that the Peruvian minimum wage was $150 a month. ER:61.

Moreover, Peña Canal's earning power in the United States was severely limited by her illegal status, Dann's witholding of her passport and Peruvian identification card, Peña Canal's lack of English proficiency, her social isolation, her inability to leave Dann until she had paid the $8,000 debt, and Dann's threats to send Peña Canal directly back to Peru. It appeared that if she left Dann, she would have no hope of collecting what was owed her without going to the police, a risky proposition, given her immigration status.

Given Peña Canal's unfamiliarity with American laws, it was reasonable for her to believe that Dann – who had graduated from U.C. Berkeley, had managed to get Peña Canal out of Peru illegally, had family and contacts in Peru, had confronted Fetzer in a manner to causer Fetzer to report Dann to the police, and had grabbed Peña Canal by the neck in anger – could find a way to collect the debt she claimed Peña Canal owed her. *See, e.g., United States v. Farrell*, 563 F.3d 364, 373 (8th Cir. 2009) (finding victims' fear of defendant reasonable based on defendant's volatile temper and defendant's ability to obtain visas).

Dann's claim that the evidence is nevertheless insufficient to support the forced labor conviction erroneously compares the facts of this case to an employee's voluntary decision to continue working for an employer who does not make timely wage payments, based on the employee's expectation of future payment. *See* AOB:31. Unlike the legal employee in Dann's hypothetical,

however, Peña Canal could not freely choose to continue working for Dann because Peña Canal had almost no ability to leave Dann. Peña Canal was an illegal alien who, through Dann's actions, spoke no English, lacked identification, had no money, and had no social contacts. In other words, Peña Canal was "completely dependent on [Dann] for food, clothing, and shelter," which Dann's "provision . . . contributed to [Peña Canal's] obligated status." *United States v. Sabhnani*, 599 F.3d 215, 243 (2d Cir. 2010).

In sum, there was ample evidence for a rational juror to conclude that Dann coerced Peña Canal's labor by engaging in a pattern of behavior intended to cause Peña Canal to believe that if she stopped working for Dann, Peña Canal would lose her back wages and incur an $8,000 debt.

iv. Fear of serious reputational harm

The evidence also supported a conclusion that Dann knowingly obtained Peña Canal's labor through a scheme, plan, or pattern intended to cause Peña Canal to believe that if she stopped working for Dann, her reputation would be seriously damaged.

Dann repeatedly accused Peña Canal of stealing from her. *See supra* pp. 8-10, 14. Peña Canal understood from this that Dann would accuse her of theft if she left Dann's employ, and to avoid that reputational harm, she must continue working for Dann. *See supra* pp. 16-19. Given Dann's contacts in Peru, Peña

Canal could anticipate that Dann would ruin her reputation both in Walnut Creek, California, and in Lima, Peru.

Because Peña Canal was younger and less educated than Dann, was illegally in the United States, was unable to speak English, and was restricted from talking to people in Spanish, she reasonably believed that she would be unable to refute any false claims Dann made against her. Hence, when she finally escaped, Peña Canal made sure to do so in a manner that would protect her from any accusation of theft. *See* ER:271. She gave her key to Dann's apartment to the school secretary to return to Dann, and she did not take anything – including her worn clothes – from the apartment.

Notwithstanding these efforts, Dann made good on her threat to accuse Peña Canal of theft by immediately telling Soto that Peña Canal had stolen everything, and later telling Oz that Peña Canal was a terrible nanny who had stolen her jewelry. ER:357; SER:50, 146. Given Dann's efforts to procure Peña Canal's services, the jury could reasonably infer that Dann intended her threats of reputational harm to keep Peña Canal working for her.

Moreover, a person with Peña Canal's background and in her circumstances would reasonably view being labeled a thief a serious harm, as Peña Canal did. Peña Canal was a professional nanny. Nannies and other domestic workers depend on good references to get work; no one wants to let a thief into his or her

home. Thus, Peña Canal's reputation as a trustworthy employee was critical to her ability to earn a living. A person who had few worldly possessions like Peña Canal would prize her reputation highly.

A rational juror could conclude from this evidence that Dann intentionally used the threat of serious reptutational harm to keep Peña Canal working for her.

v. Fear of authorities and deportation

The evidence also showed that Dann knowingly obtained Peña Canal's labor by means of a scheme, plan, or pattern intended to cause Peña Canal to believe that if she did not work for Dann, she would be removed – sent back to Peru by Dann or formally deported – from the United States.4/

Kozminski observed that threatening an immigrant with deportation may constitute threat of legal coercion inducing involuntary servitude. 487 U.S. at 948; *see United States v. Djoumessi*, 538 F.3d 547, 552 (6th Cir. 2008) (noting that defendant's threats to send victim back to Cameroon were coercive in light of victim's special vulnerability as illegal immigrant). While *Kozminski* is a Section 1584 case, its point that an undocumented immigrant may reasonably regard the prospect of being sent back or deported to her home country as coercive supports

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4/ Although the district court relied only on financial and reputational harm in denying Dann's motion for a judgment of acquittal, this Court "may affirm on any ground supported by the record." *United States v. Tello*, 600 F.3d 1161, 1167 & n.6 (9th Cir. 2010).

the view that removal from the United States can qualify as a serious harm under Section 1589. As *Calimlim* put it, a victim may "not have an exit option" if "the threats in her case involved her immigration status," and so "she could not freely work for another employer in order to escape the threatened harm." 538 F.3d at 710-12 (noting that defendant's warning to victim about consequences of illegal immigration may lead to conviction under 18 U.S.C. § 1589 for forced labor only if there is proof that warning was made for purpose of procuring labor).

In this case, the evidence supported that Dann threatened to report Peña Canal, whom she knew was an illegal immigrant, to immigration authorities. SER:136. In March of 2008, Dann specifically told Peña Canal that she had no rights in the United States. ER:258-63. She told Peña Canal that Americans were returning all immigrants to their countries and cautioned Peña Canal to be careful about the police. ER:265-66. Dann warned Peña Canal not to talk to anyone – to keep the details of her presence and existence in the United States as secret as possible. *See supra* pp. 10-12. Peña Canal could reasonably infer from Dann's repeated warnings that detection by the authorities and deportation were looming possibilitities.

Dann also repeatedly threatened to send Peña Canal back to Peru if Peña Canal did not obey her commands. Additionally, Dann repeatedly accused Peña

Canal of theft. ER:244-46, 252-54. Any person in Peña Canal's circumstances could reasonably infer that if she tried to leave the United States, her expired visa would be detected by airport authorities. Similarly, Peña Canal could reasonably infer that if Dann accused her of theft, the police would be involved.

Peña Canal reasonably regarded detection by the authorities and deportation as serious harms. If the police discovered her illegal status, she might be prosecuted for committing immigration crimes, through a legal process completely foreign to her. Peña Canal would also face deportation. This would impede Peña Canal's ability to collect her back wages and cause her to incur the debt imposed by Dann. Moreover, Peña Canal had given up existing employment and ties in Peru to pursue educational and employment opportunities in the United States. To be forced to return to Peru without earnings, with debt, and not having learned English would impose a significantly worse condition than her status before leaving Peru.

The evidence supported that Dann understood Peña Canal's fear of authorities and deportation and used this to keep Peña Canal working for her. Having made the arrangements herself, Dann obviously knew that Peña Canal had entered and was staying in the United States illegally. Dann also knew that Peña Canal had come to the United States for the opportunity to study English and

better herself; when Dann was recruiting her, those had been selling points. And Dann repeatedly threatened either to send Peña Canal back to Peru, or report her to the immigration authorities, and police when she was displeased with Peña Canal's performance.

vi. Fear of harm to children

A rational juror could also find that the evidence established beyond a reasonable doubt that Dann knowingly caused Peña Canal to work for her by intentionally causing Peña Canal to believe that if she stopped, Dann's children would suffer the serious harm of being removed from their home.

In February 2007, about seven months after Peña Canal had been in the United States caring for Dann's children, and in the context of discussing Dann's nonpayment of wages, Dann told Peña Canal that if she left, Dann would have no way to care for her children and that the government would take them away. ER:184.

To a reasonable person of Peña Canal's background, who had little knowledge of American laws, this was a credible and coercive consequence of ceasing to work. Peña Canal was almost completely responsible for watching Dann's children because Dann, who had to work to pay the rent and provide for her children, could not. *See supra* pp. 7-8, 11.

Having taken care of Dann's children for four months in 2002 and then constantly since July 2006, Peña Canal reasonably felt both a professional responsibility and an emotional attachment to her charges. Peña Canal testified that she felt she could not stop working for Dann because she could not abandon Dann's children. ER:241-42, 245. She said the same thing to Soto in October 2007. SER:63-66. When Peña Canal finally decided to leave Dann, she did so on a day when she knew that Dann could pick up her children. SER:67-68. Peña Canal also explained that she did not want to report Dann's treatment of her to the police because she did not want Dann's children to be deprived of their mother. ER:282; SER:93.

18 U.S.C. § 1589 was enacted precisely to address "traffickers [who] use more subtle means designed to cause their victims to believe that serious harm will result to themselves or others if they leave, *as when a nanny is led to believe that children in her care will be harmed if she leaves the home*." H.R. Conf. Rep. 106-939 at 101 (emphasis added).

A rational juror could conclude from the evidence that Dann intentionally caused Peña Canal to believe that unless she continued working for Dann, Dann's children would be removed from their home.

C. Sufficient evidence supports Dann's document servitude conviction

To find Dann guilty of Count Four, document servitude, in violation of 18 U.S.C. § 1592, the jury must have found beyond a reasonable doubt that (1) Dann concealed, removed, confiscated or possessed Peña Canal's passport or other immigration document or government identification document, (2) such act or acts were undertaken in the course of committing or with the intent to commit the crime of forced labor, and (3) Dann acted knowingly in doing such act or acts. *See United States v. Sabhnani*, 599 F.3d 215, 245 (2d Cir. 2010); SER:k-l. Dann claims that there was insufficient evidence to support her conviction of document servitude because there was no evidence that Dann held Peña Canal's passport and visa "in the course of committing or with the intent to commit the crime of forced labor." AOB 34-35. This is manifestly untrue.

As discussed above, there was ample evidence to support the jury's conclusion that Dann had committed the crime of forced labor against Peña Canal. There was also ample evidence that Dann held Peña Canal's passport during the period of forced labor. That satisfies the document servitude statute. *See Farrell*, 563 F.3d at 376-77 (finding evidence sufficient for jury to convict defendants of document servitude based on evidence that defendants "had the intent to commit

peonage and retained [workers' passports] *while* committing peonage" (emphasis added)).

Peña Canal testified that she initially agreed to turn over her passport to Dann for safekeeping because she had no personal space of her own. ER 167. Peña Canal did not have any personal space of her own because she was living with and working for Dann. Peña Canal testified that Dann kept her passport in a locked case. The day Peña Canal escaped, she did not have her passport, and had a letter delivered to Dann requesting its return. When pressed to go to the police, Peña Canal's main request was to get her passport and Peruvian identification card back. Dann denied to the police that she had these documents, but a search of her apartment recovered them. *See Farrell*, 563 F.3d at 377 (finding significant to proof of document servitude that defendant did not return workers' immigration documents even after initial police request for documents).

It is true that the federal authorities found Peña Canal's passport and Peruvian identification card hidden beneath clothing in Dann's nightstand as opposed to in a locked case. AOB:35. However, the search took place months after Peña Canal's April 2008 departure from Dann's apartment. The jury was entitled to infer that Dann had kept Peña Canal's documents in a locked case until after Peña Canal had left, and there was no danger that Peña Canal could access

them, or that Peña Canal was too fearful of Dann to take back her own documents, even if they were physically accessible to her.

Dann suggests that the government was required to prove that she took Peña Canal's documents for the purpose of committing forced labor. AOB:35-36. This is inaccurate. Section 1592 only requires proof that Dann possessed Peña Canal's passport or other immigration document "in the course of a violation of" Section 1589. 18 U.S.C. § 1592(a)(1). Possession of such a document "with the intent to violate" Section 1589 is an alternative theory. 18 U.S.C. § 1592(a)(2). It permits a defendant to be convicted of document servitude if he possessed another person's passport with the intent to force that person to work, even if the attempt ultimately failed. *Sabhnani*, 599 F.3d at 245.

In any case, the connection between Dann's possession of Peña Canal's passport and Peruvian identification card and her forced labor is unequivocal. Dann warned Peña Canal that illegal immigrants had no rights. And one of the reasons Peña Canal did not leave Dann was because Dann had all of her identification documents, including her passport. The jury had ample evidence to conclude that Dann committed document servitude.

D. Sufficient evidence supports Dann's conviction for alien harboring for financial gain

There was also sufficient evidence to support Dann's conviction of Count Five, harboring an illegal alien for the purpose of financial gain.

8 U.S.C. §§ 1324(a)(1)(A)(iii) & (B)(i) punishes any person who, "for the purpose of commercial advantage or private financial gain," "knowingly or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation." *See also* SER:l-m.

The undisputed evidence showed that having arranged for Peña Canal to enter the United States, Dann knew that Peña Canal was in the United States illegally when Peña Canal lived with and worked for Dann the entire time she was in the United States prior to her escape on April 16, 2008. The evidence also showed that while living with Dann, Peña Canal worked as Dann's nanny and housekeeper without collecting any wages. This was sufficient to convict Dann of harboring Peña Canal for financial gain.

Dann appears to argue that the government was also required to prove that Dann harbored Peña Canal for the purpose of avoiding Peña Canal's detection by

immigration authorities.5/ AOB:37-39. There is no such requirement. Citing legislative history, this Court in *United States v. Acosta de Evans*, 531 F.2d 428, 429-30 (9th Cir. 1976), squarely rejected the contention that the statute requires proof that the defendant harbored "so as to prevent detection by law enforcement agents." To "harbor" means to afford shelter, not necessarily clandestine shelter. *Id.* The statute's phrase "from detection" only modifies "shields," not "conceals" or "harbors." *Id.* at 430 n.3. This Court's precedent is binding. *See United States v. Aguilar*, 883 F.2d 662, 690 & n.25 (9th Cir. 1989) (declining appellants' invitation to reconsider *Acosta de Evans*, noting that only en banc panel has authority to overturn Ninth Circuit precedent), *superseded on other grounds by statute*. This Court's holding in *Acosta de Evans* is also consistent with its sister circuits' interpretation of 8 U.S.C. § 1324(a)(1)(A)(iii). *See United States v. Ozcelik*, 527 F.3d 88, 99-100 (3d Cir. 2008); *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1069-70 (5th Cir. 1982); *United States v. Lopez*, 521 F.2d 437, 439-41 (2d Cir. 1975).

5/ The jury was instructed that an element of the harboring charge was that Dann "concealed, harbored or shielded Ms. Peña Canal for the purpose of avoiding [her] detection by immigration authorities. ER:403; SER:l. This was based on the Ninth Circuit Model Jury Instruction 9.3, but transposed "concealed" and "harbored," and omitted a comma before "or shielded."

In any case, there was evidence to support Dann's conviction for concealing or shielding Peña Canal for the purpose of avoiding her detection by immigration authorities. Dann knew that Peña Canal was in the United States and working for her illegally. Dann did not register Peña Canal as a resident in her apartment, even though she was required to do so. SER:124-27, 203-04. She falsely gave Whole Foods as Peña Canal's employer when she opened up a bank account in Peña Canal's name. ER:186. Dann also severely restricted Peña Canal's contact with anyone outside of her family and inner circle, requiring Peña Canal stay inside the apartment except under limited circumstances.

It is true that Dann, nevertheless, did leave the apartment when with Dann's children, *see* AOB 37, but the statute is aimed at avoiding detection by immigration authorities, not detection by other members of the community. By forbidding Peña Canal from talking to others or socializing on her own, Dann tried to keep anyone likely to report Peña Canal to immigration authorities from having any basis to report her. That is why she was particularly upset when Peña Canal spoke with Fetzer, who had reason to believe that Peña Canal was not in the United States lawfully and had cautioned Dann to use a day-care service instead. And in fact, Peña Canal's talking to Oz about her employment conditions led Oz to contact an organization aimed at supporting domestic workers.

Dann argues that her actions may be explained as trying to keep her nanny from being poached by other parents. AOB 39. A jury could have concluded this, but Dann's jury did not. Under the deferential standard of review, this Court must affirm.

II. THE DISTRICT COURT DID NOT ERR IN CALCULATING DANN'S GUIDELINES RANGE

A. Standard of review

The Court reviews the district court's interpretation and application of the Sentencing Guidelines de novo. *United States v. Rivera-Alonzo*, 584 F.3d 829, 836 (9th Cir. 2009). It reviews the district court's factual findings in support of a sentencing enhancement for clear error. *Id.*

B. The district court properly applied the enhancements for Count Three (forced labor)

i. A preponderance of evidence supported the enhancement under U.S.S.G. § 2H4.1(b)(3)(A)

U.S.S.G. § 2H4.1(b)(3)(A) provides for an increase of three levels to a defendant's offense level if "any victim was held in a condition of peonage or involuntary servitude" "for more than one year." Application Note 1 defines "peonage or involuntary servitude" as including forced labor. Facts supporting sentencing enhancements need only be found by a preponderance of the evidence.

See United States v. Treadwell, 593 F.3d 990, 1000 (9th Cir. 2010). Here the district court clearly did not err in finding by a preponderance of the evidence that Peña Canal had been held in a condition of forced labor from before April 16, 2007 until her escape on April 16, 2008.

Peña Canal started working for Dann in the United States at the end of July 2006. She did not leave Dann until nearly two years later in April 2008. From the first day of Peña Canal's employment, Dann perpetuated a scheme, plan, or pattern that reasonably caused Peña Canal to believe that unless she continued working for Dann, Peña Canal or Dann's children would suffer serious harm. *See supra* pp. 6-19. Because Dann arranged for Peña Canal to enter the United States on a visitor visa, but Peña Canal began working for Dann as soon as she arrived, Peña Canal's status in the United States was illegal from the beginning. When her visa expired on October 26, 2006, Peña Canal truly lacked any legal basis for staying in the United States. But Dann tore up Peña Canal's return ticket to Peru and took Peña Canal's passport, so that Peña Canal, who was never paid, had no way back to her home.

Peña Canal also did not have the option of leaving Dann but staying in the United States. Given that Dann kept Peña Canal too busy and confined to learn English or develop social contacts, Peña Canal was dependent on Dann. In March

2007, Dann took Peña Canal's Peruvian identification card from her, so that Peña Canal was completely undocumented.

Dann also suggested that Peña Canal would come to harm if authorities discovered Peña Canal's presence in the United States by repeatedly instructing Peña Canal not to talk to anyone or leave the apartment. In sum, Dann isolated Peña Canal from "sources of protection and support, leaving the victim defenseless and vulnerable." 22 U.S.C. § 7101(b)(5) (describing Congressional findings on characteristics of traffickers).

Dann's scheme or pattern induced Peña Canal to work for Dann under unreasonable conditions: no pay, no days off, long hours, restrictions on food, minimal breaks, onerous work demands, lack of personal space. Because Dann's tactics were subtle, Peña Canal could not necessarily articulate when she began feeling forced to work for Dann. But by April 2007, Peña Canal risked losing the ability to collect eight months of accrued back-pay if she stopped working for Dann. The district court could certainly infer that Peña Canal was forced to work for Dann against Peña Canal's true desire, and that this condition of forced labor began before April 16, 2007.

Dann argues that the government's closing argument focused on the period beginning in early 2008 until April 16, 2008, as evidence that Peña Canal's

condition of forced labor was a year or less. *See* AOB:44. This argument is flawed for two reasons. First, as the jury was instructed, the government's argument is not evidence of anything. Second, because Dann's coercive behavior towards Peña Canal became increasingly overt and aggressive in 2008, it was natural for the government to focus on this evidence, since it was not required to prove any particular duration of forced labor at trial.

Dann also argues that a jury note asking whether the charge of forced labor had to apply to the entire duration of Peña Canal's service to Dann suggests that there was insufficient proof that any forced labor conduct lasted more than one year. *See* AOB:44. This argument also fails. The jury note suggests that one or more jurors may not have believed that the entire period of Peña Canal's two-year service to Dann was forced labor. It suggests nothing about whether the jury believed that more than one year of that period of service was forced labor. More importantly, the jury did not make any finding as to the duration of Peña Canal's forced labor. It was the district court's job to find by a much lower standard of evidence whether Peña Canal's length of forced labor qualified Dann for the enhancement under U.S.S.G. §2H4.1. It did, and its finding was not clearly erroneous.

ii. A preponderance of evidence supported the enhancement under U.S.S.G. § 2H4.1(b)(4)(A)

U.S.S.G. § 2H4.1(b)(4) provides for a two-level increase in the offense level "[i]f any other felony offense was committed during the commission of, or in connection with, the peonage or involuntary servitude offense." The district court applied this enhancement. It did not clearly err in doing so.

In addition to the force labor and document servitude counts, the jury also convicted Dann of harboring an alien for private financial gain, conspiring to commit visa fraud, and visa fraud. The government pointed to all three convictions as the basis for the enhancement. SER:11. So did the PSR, which the district court adopted. *See* PSR ¶ 40 ("The defendant committed felony crimes against immigration laws in connection with this count . . . ."). All three qualified as "any other felony offense." *See* U.S.S.G. § 2H4.1, cmt. n.2; *Calimlim*, 538 F.3d at 716 (holding that harboring conviction, in violation of 8 U.S.C. § 1324(a)(1), was other felony than forced labor conviction, in violation of 18 U.S.C. § 1589, qualifying defendant for two-level enhancement under U.S.S.G. § 2H4.1(b)(4)).

There was clearly a preponderance of evidence that these three felonies were committed in connection with the forced labor offense. Dann met Peña Canal in 2002. From the start, she told Peña Canal that she wanted Peña Canal to

come to the United States to take care of Dann's children. To that end, Dann schemed to have Peña Canal obtain a visitor visa as Silvana's companion, and once Peña Canal arrived in the United States, Dann had Peña Canal live with her so that Peña Canal could be put to work taking care of Dann's children and household without pay and under increasingly coercive and controlling circumstances.

Dann argues that there could be no connection between the visa fraud and the forced labor because Dann "had not yet formed any intent to engage in either forced labor or document servitude at the time that the visa fraud conduct occurred and concluded." *See* AOB:46. But the district court was entitled to reject Dann's interpretation of the evidence, as it did. The district court was entitled to find that there was a preponderance of evidence that forced labor was precisely what Dann – who was divorced at the time she arranged for Peña Canal to come to the United States and had little income (*see* SER:233) – had in mind when she took extraordinary measures to arrange for a non-English speaking young Peruvian woman to come to the United States to take care of her children.

C. The district court properly enhanced Dann's sentence under U.S.S.G. § 2L2.1(b)(3), and any error was harmless

Dann argues that the district court improperly enhanced his offense level for the visa fraud charges by four levels under U.S.S.G. § 2L2.1(b)(3). This enhancement applies where "the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws." U.S.S.G. § 2L2.1(b)(3). The district court did not clearly err in applying the enhancement.

A preponderance of the evidence supported the finding that Dann used Peña Canal's passport and visa to facilitate Dann's commission of forced labor, an offense that does not involve the violation of the immigration laws. *See Calimlim*, 538 F.3d at 716 ("In no sense does forced labor necessarily imply that the victim is an alien.").

Even if the district court had erred, the error is harmless, since Dann's advisory guideline range was determined by the offense level for her forced labor count, not the document servitude count. *See* PSR ¶¶ 30, 37, 51; *United States v. Calderon Espinosa*, 569 F.3d 1005, 1008-09 (9th Cir. 2009) (noting that where

material error in district court's calculation of guidelines range is harmless, no remand for resentencing is required).6/

III. THE DISTRICT COURT DID NOT ERR IN ITS RESTITUTION ORDER

A. Standard of review

This Court reviews the legality of a restitution order de novo. *United States v. Fu Sheng Kuo*, 620 F.3d 1158, 1162 (9th Cir. 2010); *see United States v. Godoy*, 678 F.2d 84, 87-88 (9th Cir. 1982) (appearing to review de novo district court's denial of motion to correct sentence under Fed. R. Crim. P. 35).

B. The district court had authority to order that back child support payments paid to Dann be signed over as restitution to Peña Canal

The district court acted within its authority when it ordered that Dann sign over any child support arrearages she received as restitution.

"The determination of child support rights is a matter of state statutory and common law." *In re Ramirez*, 795 F.2d 1494, 1497 (9th Cir. 1986). Under California law, child support is an amount "required to be paid under a judgment, decree, or order . . . for the support and maintenance of a child." 42 U.S.C. §

6/ *United States v. Munoz-Camarena*, 621 F.3d 967, 969-70 (9th Cir. 2010), which the United States has petitioned for rehearing, C.A. No. 09-50088 (docket no 50-1), holds that an erroneously calculated guidelines range is never harmless. But here, the alleged miscalculation would not affect the guidelines range.

659(i)(2); Cal. Fam. Code § 4001 (authorizing court to order either or both parents to pay child support); Cal. Fam. Code § 4053(f) (noting that purpose of child support is to allow child to "share in the standard of living of both parents"). The child support obligation belongs to the child, and "the parent, to whom such support is paid, is but a mere conduit for the disbursement of the support." *Williams v. Williams*, 8 Cal. App. 3d 636, 640 (1970). Hence, when child support payments are past due, the child, through a guardian ad litem, or a parent on behalf of the child, may bring an action against the delinquent parent to enforce the duty. *See* Cal. Fam. Code § 4000; *see also In re Marriage of Comer*, 14 Cal. 4th 504, 510 (1996) (finding mother's concealment of children did not estop her from collecting child support arrearages on their behalf).

However, when the parent who is ordered to pay child support fails to do so, the other parent may also bring an action *on behalf of herself* to enforce the child support order and collect the child support arrearages, on a reimbursement theory. *See* Cal. Fam. Code § 4000; *see also In re Marriage of Damico*, 7 Cal. 4th 673, 680 (1994) (finding mother's concealment of child estopped her from collecting child support arrearages as reimbursement to herself). This right of reimbursement may be assigned. *See Ramirez*, 795 F.2d at 1497 (recognizing right of reimbursement based on child support order, and its assignability); *In re*

Visness, 57 F.3d 775, 777-79 (9th Cir. 1995) (confirming validity of *Ramirez* depite amendments to statute); *Comer*, 14 Cal. 4th at 511, 520 (noting that mother assigned her rights to child support as condition of receiving public assistance). If the government steps in to furnish support, it may also have an independent right to secure "reimbursement." Cal. Fam. Code §§ 4002(b), 4550, 4901(l).

In fact, California courts "presume[] that where the action is for *accrued* child support," the parent trying to collect child support arrearages is operating under the "reimbursement" theory. *In re Marriage of Utigard*, 126 Cal. App. 3d 133, 143 (1981) (original emphasis) (holding that adult children were not real parties in interest in mother's action to collect child support arrearages).

Given this framework of California law, and the particular facts of this case, it was reasonable for the district court to regard Dann's claim7/ to the outstanding $30,000 child support arrearages as her asset, which could be used to satisfy her restitution.

7/ The district court's order only pertained to "any payments" actually made to Dann. Either Dann or her ex-husband could seek to modify these arrearages in state court. *See Utigard*, 126 Cal. App. 3d at 140 (noting that enforcement of judgment for child support arrearages is subject to equitable considerations); *Jackson v. Jackson*, 51 Cal. App. 3d 363, 366-68 (1975) (denying enforcement of judgment and quashing writ of execution where obligor parent showed he had satisfied his obligation for arrearages by shouldering financial responsibility for child in amount exceeding arrearages, and that child was living with him full time).

Boston v. Gardner, 365 F.2d 242 (9th Cir. 1966), which Dann cites, AOB:50, is not to the contrary. The question in *Gardner* was whether, under the applicable Oregon law, child support arrearages held in trust by the custodial parent could be considered the parent's asset under a reimbursement theory during bankruptcy proceedings. This case is governed by California law, which clearly presumes that child support arrearages belong to the custodial parent as reimbursement.

Additionally, the child support arrearages at issue in *Gardner* were being used to pay the mother's private creditors, presumably who had nothing directly to do with her child. Not so in this case. The district court's restitution order regarding any child support arrearages Dann might receive was particularly appropriate because the restitution was for childcare services that Peña Canal had provided. Dann had forced Peña Canal to provide childcare, the costs of which child support is supposed to cover. *See* Cal. Fam. Code § 4062(a)(1) (providing that courts "shall order" as "additional child support" "[c]hild care costs related to employment or to reasonably necessary education or training for employment skills"). In fact, Dann listed $968 per month as her childcare costs in 2007 in documentation seeking the payment of child support. SER:223, 227. Instead of footing the bill that Dann's ex-husband was supposed to have paid, Dann forced

Peña Canal to foot the bill by not paying her $109,340.34 in wages. It was therefore Peña Canal who should be reimbursed for covering the unpaid child support. *Cf. In re Leibowitz*, 217 F.3d 799, 803-04 (9th Cir. 2000) (interpreting federal bankruptcy law's reference to debt "in the nature of support" of children, to include debts to third parties for expenses previously incurred for child's benefit and support, as well as debts that will benefit children).

Moreover, the district court's order, insofar as it pertained to the time when Dann is incarcerated, is consistent with 18 U.S.C. § 3664(n)'s requirement that a defendant who receives "substantial resources from any source, including inheritance, settlement, or other judgment" while incarcerated "shall be required to apply the value of such resources to any restitution . . . still owed." Under California law, "[a]ccrued support arrearages are treated as a judgment for money." *Utigard*, 126 Cal. App. 3d at 140. Thus, Dann must apply the value of any child support arrearages she receives while incarcerated towards her restitution payments.

The district court's requirement that Dann sign over to Peña Canal any payments made toward back child support is different than the requirement that Dann apply the value of received payments towards her restitution obligation. However, restitution orders should be tailored to individual circumstances of each

case. *See* 18 U.S.C. §§ 3664(f)(2) & (k). And 18 U.S.C. § 3664(f)(3)(A) permits a district court to "direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments." In-kind payments may be in the form of replacement of property. 18 U.S.C. § 3664(f)(4)(B). Ordering Dann to sign over any payments made towards child support arrearages was tantamount to ordering her to assign her claim to such arrearages, a form of replacing Peña Canal's lost wages. The district court was authorized to make such an order.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

DATED: December 3, 2010

Respectfully submitted,

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Civil Rights Division

MELINDA HAAG
United States Attorney

BARBARA J. VALLIERE
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Chief, Appellate Section

/s/
MERRY JEAN CHAN
Assistant United States Attorney

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6(b) of the United States Court of Appeals for the Ninth Circuit, counsel for Plaintiff-Appellee hereby states that she is not aware of any cases related to this appeal in *United States v. Dann*, No. 10-10191

Dated: December 3, 2010

/s/
MERRY JEAN CHAN
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, I certify that:

_X_ Pursuant to Fed. R. App. P. 32 (a)(7)(B(I) and Ninth Circuit Rule 32-1, the attached answering brief is:

_X_ Proportionately spaced, has a typeface of 14 points or more and contains 13, 954 words or less; or,

___ Monospaced, has 10.5 or fewer characters per inch, and contains ____words or _____ lines of text

Dated: December 3, 2010

/s/
MERRY JEAN CHAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that I served a copy of the Excerpts of Record in the same action on each of the parties listed below by placing a true copy thereof enclosed in a sealed envelope and have delivered the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following:

Jerome Matthews, AFPD
Federal Public Defender
555 -12th Street, Ste. 650
Oakland, CA 94607

I declare under penalty of perjury that the foregoing is true and correct.

/s/
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United States Attorney
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November 16, 2010

Jerome Matthews
Federal Public Defender's Office
555 - 12th Street, Ste. 650
Oakland, CA 94607

Re: ***United States v. Mabelle de la Rosa Dann*,**
9th Circuit Court of Appeals Case # 10-10191

Dear Mr. Matthews:

Per my telephone message of November 16, 2010, I have requested a 14-day extension to file the United States's Answering Brief in *United States v. Dann*. The Court granted my request. The United States's Answering Brief, originally due November 19, 2010, is now due December 3, 2010.

The Appellant's optional Reply Brief is due 14-days after the filing of the United States's Answering Brief. Thank you.

Very truly yours,

MELINDA HAAG
United States Attorney

/s/

MERRY JEAN CHAN
Assistant United States Attorney

ADDENDUM

TABLE OF CONTENTS

8 U.S.C.A. § 1324

United States Code Annotated Currentness
Title 8. Aliens and Nationality (Refs & Annos)
Chapter 12. Immigration and Nationality (Refs & Annos)
Subchapter II. Immigration
Part VIII. General Penalty Provisions
§ 1324. Bringing in and harboring certain aliens

(a) Criminal penalties

(1)(A) Any person who--

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts, shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs--

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under Title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A) (ii), (iii), (iv), or (v)(II), be fined under Title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A) (i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of Title 18) to, or places in jeopardy the life of, any person, be fined under Title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A) (i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under Title 18, or both.

(C) It is not a violation of clauses [FN1] (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United

States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs--

(A) be fined in accordance with Title 18 or imprisoned not more than one year, or both; or

(B) in the case of--

(i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry,

be fined under Title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.

(3)(A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under Title 18 or imprisoned for not more than 5 years, or both.

(B) An alien described in this subparagraph is an alien who--

(i) is an unauthorized alien (as defined in section 1324a(h)(3) of this title), and

(ii) has been brought into the United States in violation of this subsection.

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if--

(A) the offense was part of an ongoing commercial organization or enterprise;

(B) aliens were transported in groups of 10 or more; and

(C)(i) aliens were transported in a manner that endangered their lives; or

(ii) the aliens presented a life-threatening health risk to people in the United States.

(b) Seizure and forfeiture

(1) In general

Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a) of this section, the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

(2) Applicable procedures

Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of Title 18 relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Attorney General.

(3) Prima facie evidence in determinations of violations

In determining whether a violation of subsection (a) of this section has occurred, any of the following shall be prima facie evidence that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or

reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(B) Official records of the Service or of the Department of State showing that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(c) Authority to arrest

No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

(d) Admissibility of videotaped witness testimony

Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) of this section who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.

(e) Outreach program

The Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State, as appropriate, shall develop and implement an outreach program to educate the public in the United States and abroad about the penalties for bringing in and harboring aliens in violation of this section.

18 U.S.C.A. § 1589

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 77. Peonage, Slavery, and Trafficking in Persons (Refs & Annos)
§ 1589. Forced labor

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

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

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

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

(4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint, shall be punished as provided under subsection (d).

(b) Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).

(c) In this section:

(1) The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to

exert pressure on another person to cause that person to take some action or refrain from taking some action.

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

(d) Whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both. If death results from a violation of this section, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title, imprisoned for any term of years or life, or both.

18 U.S.C.A. § 1592

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 77. Peonage, Slavery, and Trafficking in Persons (Refs & Annos)
§ 1592. Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor

(a) Whoever knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person--

(1) in the course of a violation of section 1581, 1583, 1584, 1589, 1590, 1591, or 1594(a);

(2) with intent to violate section 1581, 1583, 1584, 1589, 1590, or 1591; or

(3) to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel, in order to maintain the labor or services of that person, when the person is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000,

shall be fined under this title or imprisoned for not more than 5 years, or both.

(b) Subsection (a) does not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000, if that conduct is caused by, or incident to, that trafficking.

(c) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be subject to the penalties described in subsection (a).

USSG, § 2L2.1, 18 U.S.C.A.

United States Code Annotated Currentness
Federal Sentencing Guidelines (Refs & Annos)
Chapter Two. Offense Conduct (Refs & Annos)
Part L. Offenses Involving Immigration, Naturalization, and Passports
2. Naturalization and Passports
§ 2L2.1. Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law

(a) Base Offense Level: 11

(b) Specific Offense Characteristics

(1) If the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), decrease by 3 levels.

(2) If the offense involved six or more documents or passports, increase as follows:

Number of Documents/Passports Increase in Level
(A) 6-24 add 3
(B) 25-99 add 6
(C) 100 or more add 9

(3) If the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws, increase by 4 levels.

(4) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels.

(5) If the defendant fraudulently obtained or used (A) a United States passport, increase by 4 levels; or (B) a foreign passport, increase by 2 levels.

USSG, § 2H4.1, 18 U.S.C.A.

United States Code Annotated Currentness
Federal Sentencing Guidelines (Refs & Annos)
Chapter Two. Offense Conduct (Refs & Annos)
Part H. Offenses Involving Individual Rights
4. Peonage, Involuntary Servitude, Slave Trade, and Child Soldiers (Refs & Annos)
§ 2H4.1. Peonage, Involuntary Servitude, Slave Trade, and Child Soldiers

(a) Base Offense Level:

(1) 22; or

(2) 18, if (A) the defendant was convicted of an offense under 18 U.S.C. 1592, or (B) the defendant was convicted of an offense under 18 U.S.C. 1593A based on an act in violation of 18 U.S.C. 1592.

(b) Specific Offense Characteristics

(1)(A) If any victim sustained permanent or life-threatening bodily injury, increase by 4 levels; or (B) if any victim sustained serious bodily injury, increase by 2 levels.

(2) If (A) a dangerous weapon was used, increase by 4 levels; or (B) a dangerous weapon was brandished, or the use of a dangerous weapon was threatened, increase by 2 levels.

(3) If any victim was held in a condition of peonage or involuntary servitude for (A) more than one year, increase by 3 levels; (B) between 180 days and one year, increase by 2 levels; or (C) more than 30 days but less than 180 days, increase by 1 level.

(4) If any other felony offense was committed during the commission of, or in connection with, the peonage or involuntary servitude offense, increase to the greater of:

(A) 2 plus the offense level as determined above, or

(B) 2 plus the offense level from the offense guideline applicable to that other offense, but in no event greater than level 43.