No. 02-50566

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SARDAR ELDAROVICH GASANOV AND NADIRA GASANOVA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES OF AMERICA AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose oral argument.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-50556

UNITED STATES OF AMERICA,

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Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

This is an appeal from a final judgment by the district court in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The defendants, Sardar Eldarovich Gasanov and his wife, Nadira Gasanova, were sentenced and subject to an order of forfeiture on May 17, 2002, and the district court entered final judgments for both defendants on May 21, 2002 (2 R. 423-427/SG RE 11; 4 R. 398-402/NG RE 13).[1] Gasanov filed a timely Notice Of Appeal on May 28,

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[1] __ R. __" refers, respectively, to the volume and page number of the record on appeal. When available, corresponding cites are noted by a front-slash (/). "SG RE __" refers to the entry in Sardar Gasanov's Record Excerpts. "NG RE __"

(continued...)

2002 (2 R. 428/SG RE 12). Gasanova filed a timely Notice of Appeal on May 24, 2002 (4 R. 403/NG RE 14). This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion when it instructed the jury that 8 U.S.C. 1324(a)(2)(B)(ii), which prohibits the entry of an alien without "prior official authorization," prohibits the entry of aliens who receive legitimate documents through fraud or willful misrepresentations.

2. Whether the district court abused its discretion when it determined that questions regarding Gasanov's sexual relations with one victim on a few occasions would be highly prejudicial and without probative value, and thus barred Gasanova's cross-examination of the victim on this topic.

3. Whether the district court abused its discretion when it denied a request for individual polling of the jury regarding an article that predominantly summarized the defendants' charges and trial testimony to date.

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[1](...continued)
refers to the entry in Nadira Gasanova's Record Excerpts. When items are contained in both defendants' Record Excerpts, a citation will only be made to Gasanovs' Record Excerpts.

Based on custom, the last name of the wife of defendant Sardar Gasanov is Gasanova. For ease of reference, both defendants will be referred to as "the Gasanovs." Individually, husband and wife will be referred to as Gasanov and Gasanova, respectively.

4. Whether the district court erred in assessing criminal forfeiture based on the preponderance of the evidence.

5. Whether the district court erred in its findings of a conspiracy to commit human trafficking in determining one aspect of defendants' sentence.

STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the Western District of Texas, defendants Sardar Gasanov and Nadira Gasanova were convicted on two counts of multi-object conspiracies to violate criminal and immigration laws. Specifically, the defendants were convicted of Count One, which charged the Gasanovs with conspiracy, under 18 U.S.C. 371, to commit three offenses: a) to obtain and use non immigrant visas through false claims and statements, in violation of 18 U.S.C. 1546; b) to give a false statement, under oath, and present applications with false statements in violation of 18 U.S.C. 1546; and c) to "knowingly remove, conceal, confiscate and possess" passports and other immigration documents, with intent to violate 18 U.S.C. 1581 (peonage), 1589 (forced labor), and 1590 (trafficking in respect to peonage, involuntary servitude and forced labor), and to "attempt to prevent and restrict, without lawful authority, certain persons' liberty to move and travel," to retain control of labor and services, in violation of 18 U.S.C. 1592. (1 R. 5-6/SG RE 2 at 2-3).

The Gasanovs also were convicted on Count Two, which charged them with conspiracy to commit three offenses: a) to encourage and induce aliens to come to, enter and reside in the United States, knowing and in reckless disregard that their

entry is in violation of the law, for financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iv); b) to bring and attempt to bring aliens to the United States knowing and in reckless disregard that the aliens did not have prior official authorization to come to, enter, or reside in the United States, for private financial gain, in violation of 8 U.S.C. 1324(a)(2)(B)(ii); and c) to conceal, harbor, and shield from detection, or attempt thereof, knowing and in reckless disregard that the aliens had come to the United States in violation of law, for purposes of financial gain, in violation of 8 U.S.C. 1324(a)(1)(A)(iii) (1 R. 13-14).

Finally, the Gasanovs were convicted of three counts of substantive violations of 18 U.S.C. 1324(a)(2)(B)(ii), which prohibits a person from bringing and attempting to bring aliens to the United States knowing and in reckless disregard that the aliens did not have prior official authorization to come to, enter, or reside in the United States, for private financial gain. The Gasanovs were acquitted of one charge of money laundering. The Gasanovs were sentenced to concurrent terms of 60 months' imprisonment, followed by concurrent terms of three years of supervised release. The court also ordered forfeiture of their home, two vehicles, and approximately $500,000, the latter as restitution for the three victims.

STATEMENT OF FACTS

The Gasanovs lured three women from Uzbekistan to the United States with false promises of modeling careers. The Gasanovs obtained legitimate visas for each of the women through fraudulent representations. Once in the United States,

the women worked as topless dancers and gave all of their proceeds, which exceeded $500,000, to the Gasanovs. The women worked as dancers and gave their money to the Gasanovs for extended periods of time because of the Gasanovs' false promises, threats, withholding of passports and identification documents, and other means of coercion. The Gasanovs executed their plan and treated the women during the approximate three-year period, Winter 1998 - Spring 2001, in similar fashion.

Ms. Marina Sabirova arrived in the United States in January 1998 (6 R. 188). From February 1998 - August 1999, and June 2000 - May 2001, Ms. Sabirova continuously gave her earnings, approximately $120,000, from topless dancing to the Gasanovs (6 R. 221; Gov. Exh. 10A/10B-11A/11B). Ms. Nadejda Romanova arrived in the United States in February 1999 (6 R. 201). From February 1999 - June 2001, with the exception of two months in 2000, she continuously gave her earnings, which exceed $350,000, as a topless dancer to the Gasanovs (6 R. 201; 7 R. 186; 7 R. 177; Gov. Exh. 10A/10B-12A/12B). Ms. Nargiza Ikmatova arrived in the United States in October 2000 (7 R. 180). From October 2000 - May 2001, Ms. Ikmatova continuously gave her earnings, which exceeded $58,000, from topless dancing to the Gasanovs (8 R. 169; Gov. Exh. 11A/11B-12A/12B).

A. Convincing Women To Come To The United States

Ms. Sabirova, Ms. Romanova, and Ms. Ikmatova are citizens of Uzbekistan (6 R. 169; 7 R. 116; 8 R. 129). Either through responding to fliers advertising for models or friend's introductions, the women met with either Gasanov or Gasanova

in Tashkent, and the Gasanovs spoke about the prospects of earning large sums of money in the United States through careers in modeling (6 R. 175-176; 7 R. 118-120, 178; 8 R. 133-134; 9 R. 64). The Gasanovs said that after they earned $300,000 through topless dancing, they would have enough money to set up a company to allow them to begin a modeling career (6 R. 175-176; 7 R. 118-120; 8 R. 133-134).[2] The Gasanovs told the women it would take three or five years to earn $300,000 (7 R. 118-120; 8 R. 133-134). After the modeling company was started, the women were told alternatively that they would have money to bring members of their family to the United States, to send back to their family, or they would eventually get their earnings back if they wanted to return to Uzbekistan (6 R. 178; 7 R. 128, 181; 8 R. 134-135).

Gasanov explained that topless dancing involved removing their blouses and dancing approximately five feet away from customers (6 R. 176-177; 7 R. 123). Even with this description, Ms. Sabirova and Ms. Romanova did not fully understand the nature of topless dancing since there are no similar bars in their country (6 R. 177, 192-193; 7 R. 123).[3] Moreover, Gasanov did not accurately describe the form of topless dancing performed in the clubs in El Paso, Texas; the

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[2] While Ms. Sabirova and Ms. Romanova were told they needed to earn $300,000, Ms. Ikmatova was told she needed to earn $200,000.

[3] Ms. Romanova gave an accurate and detailed explanation of the kind of dancing required to Ms. Ikmatova before she agreed to come to the United States (7 R. 179).

dancing in Texas was more explicit and much closer to the customers than he described (6 R. 192; 7 R. 143-144).

Finally, the Gasanovs told the women that they would be living with them (the Gasanovs), and that they were not permitted to have any relationships with men in the United States or get married because they needed to focus on their work and earn money as fast as possible (6 R. 177-178, 180; 7 R. 125; 8 R. 135-136, 187). Gasanova told Ms. Sabirova that if she left them before she earned and paid the $300,000, she would have to pay back all of her expenses, including her airline ticket to the United States and lodging (6 R. 180).

Once they obtained their respective visas, Gasanova provided airline tickets and accompanied Ms. Sabirova and Ms. Romanova on their respective flights from Uzbekistan to the United States, and helped them pass through immigration and customs inquiries at the airports since they did not speak English (6 R. 188-189; 7 R. 137). Ms. Ikmatova traveled alone, after receiving her ticket and explicit directions from Gasanova (8 R. 143-144, 147). She was met at the El Paso airport by Gasanov (8 R. 147-148).

B. False Representations To Obtain Valid Visas And Other Documentation

The Gasanovs concede (SG Br. 3; NG Br. 3) that they submitted false documentation to obtain J-1 visas for each of the women.

A J-1 visa is given to a non-U.S. citizen solely for the purposes of entering the United States to study or conduct research at a specific sponsoring educational institution (6 R. 107). A form IAP-66 is the primary basis for issuance of a J-1 visa

(6 R. 107-108, 150). The IAP-66 records the name of the applicant, the purpose or nature of her work or studies, the name of the sponsoring institution, the individual who will oversee the student's research or studies, and the source of funding to support the student (6 R. 154). At the University of Texas, El Paso (UTEP), the professor who is seeking permission for an alien student's entry to the United States prepares an application for the IAP-66, which is then reviewed and approved by various UTEP officials before the IAP-66 is issued (6 R. 153).

Gasanov, a researcher at UTEP and a director of the United Nations Development Program (UNDP), was known in UTEP's scientific community (6 R. 128, 132). Gasanov either prepared false documentation, or arranged for others to unwittingly prepare false documentation, to support the women's visa applications (*e.g.*, 7 R. 91-93). For example, Gasanov created false letters of recommendation, curriculum vitae, and other correspondence on his computer to support the visa applications (*e.g.*, 9 R. 95-96, 100; *e.g.*, Gov. Exh. 22, 81; see Gov. Exh. 6C, 6D). Mr. Siddartha Das, a fellow professor/researcher at UTEP, believed and relied upon Gasanov's false representations of Ms. Sabirova's and Ms. Romanova's qualifications, and prepared an application for the IAP-66 and other documentation to support their entry to the United States (6 R. 131-132, 134-135). Mr. Eppie Rael, another colleague at UTEP, similarly relied on Gasanov's false representations to sign an application for the IAP-66 on behalf of Ms. Ikmatova (7 R. 102-103, 105).

Once the underlying documentation was completed, including the IAP-66, Gasanov or Gasanova gave the materials to the women to submit to the embassy in Uzbekistan, and instructed them on what to say during their interviews for the visas (6 R. 181, 183-185, Gov. Exh. 5, 7; 7 R. 129-130, Gov. Exh. 25; 8 R. 140-141, Gov. Exh. 46-49). Based on the false documentation and the instructed, false statements, the women received legitimate J-1 visas (6 R. 186-187, Gov. Exh. 7; 7 R. 133, Gov. Exh. 28).

Each of the women's IAP-66 forms stated that they would be performing research at UTEP (*e.g.*, 6 R. 136, 156). None of the women had science degrees or experience working in laboratories, and none of the women performed the research described on the application for the IAP-66 (6 R. 188-190; 7 R. 132-133; 8 R. 150). None of the women could read, write, or speak English at the time they came to the United States (6 R. 188; 7 R. 106; 8 R. 197). Their ability to speak English did not substantially improve while they were topless dancers (7 R. 160; 8 R. 76, 90; 8 R. 197). Ms. Sabirova and Ms. Romanova never set foot at UTEP to perform any research (6 R. 138, 161-162; 7 R. 139; 8 R. 199-200). Ms. Ikmatova only came to the laboratory on a few occasions to wash laboratory dishes and "make microbes," as instructed by Gasanov (8 R. 150-151). Gasanov said she had to come so that other professors would see her in the laboratory (8 R. 150). Gasanova admitted that she had no intention that the women would be students or perform research; the primary purpose was for the women to earn money by working as topless dancers (9 R. 77).

Gasanov prepared another set of false papers to obtain a second J-1 visa for Ms. Sabirova in February 1999 (6 R. 206). At that time, Ms. Sabirova still was unable to read or write English so she did not know what was stated on the application forms or the letters Gasanov submitted on her behalf (6 R. 207). Gasanov represented that Ms. Sabirova would be working at Northern Arizona University as a science researcher (*ibid.*). Gasanov did all of the talking on behalf of Ms. Sabirova at the embassy (*ibid.*). Her visa was renewed. Once again, she did not have the skills nor did she perform the work that was the basis for issuance of her second J-1 visa (6 R. 207-208).

Rather than apply for a second J-1 visa on behalf of Ms. Romanova, Gasanov arranged for her to marry an American citizen, Mr. Ruben Kareem Dagda, in November 1999 (7 R. 159, 162; 8 R. 70, 83).[4] Ms. Romanova and Mr. Dagda met only briefly before they were married (7 R. 159-160; 8 R. 81). They never lived together as husband and wife, and met again only when they filed for divorce (7 R. 162-163; 8 R. 86-87). In addition, Gasanov arranged that Ms. Romanova would pay her "husband" approximately $400/month as compensation for this arrangement (7 R. 160, 170-171; 8 R. 81-82, Gov. Exh 11A/11B-12A/12B). After Ms. Romanova was married, Gasanov took her to the Immigration and Naturalization Service where he filled out forms to adjust her status (7 R. 163-164, Gov. Exh. 37A-E). The information on the forms, including a false statement that

[4] Ms. Ikmatova's original visa did not expire before the Gasanovs were arrested.

she was employed by the Institute of Molecular Genetics in Uzbekistan, is written by Gasanov (7 R. 165-167). She signed the forms because Gasanov told her to, but she did not know what they said, what they meant, or why they were being prepared, other than that she needed them to be "legally in [the] United States" (7 R. 165-166).

C. Required Employment As Topless Dancers

Within just a few days of arriving in El Paso, the Gasanovs obtained social security and employment cards for the women, and had them working at one of two topless dance clubs; the Lampliter Lounge or Prince Machiavelli (6 R. 190-191, Gov. Exh 9/9A; 7 R. 141; 8 R. 152-153). Ms. Sabirova and Ms. Romanova were shocked and upset by what they saw their first night of work, and both voiced objections to the Gasanovs (6 R. 192-195; 7 R. 143-144). The Gasanovs either convinced them to continue, or told them that they could not go home until they earned the money to return (6 R. 192-195; 7 R. 144-145).

The women worked almost every night of the week; they were told by Gasanov that they had to work as much as possible to earn money as quickly as possible (6 R. 192; 7 R. 158-159). Every night, the women returned home to the Gasanov household with their cash and gave the entire sum to the Gasanovs (6 R. 195; 7 R. 145-147; 8 R. 154). The daily earnings were recorded in ledgers prepared for each year, 1998-2001 (7 R. 147; 8 R. 154; Gov. Exh. 10/10A, 11/11A,

12A/12B).[5] The ledgers included entries that tallied the various personal expenses, including makeup, clothing, a few payments to family in Uzbekistan, and Ms. Romanov's payments to her "husband" (7 R. 148-149, 157, 184). The Gasanovs also charged Ms. Sabirova and Ms. Romanova each 1/3 of shared expenses, such as groceries, rent, gas, electricity, and the cost of a car (6 R. 201-202; 7 R. 156, 176; 8 R. 156). The expenses were deducted from the tally of total earnings (6 R. 196; 7 R. 148-149). Gasanov primarily made the entries, but Gasanova made entries as well (6 R. 199; 7 R. 184). When the women recorded earnings or expenses in the ledger, these figures were checked by Gasanov, as indicated by his initials 'SG' next to the entry (7 R. 149-150; 8 R. 62).

A review of the ledger shows the nominal sums spent by the women, particularly compared to their substantial earnings. For example, between February - July 1999, Ms. Romanov earned $66,778 (7 R. 153), and Ms. Ikmatova earned $2,261 in an eight day period (8 R. 155, Gov. Exh. 11A). Ms. Romanov's expenses for one month totaled $1,336.84; $877.59 covered "joint expenses" (including $300 charges for rent), $300 was sent to Ms. Romanova's sister in Uzbekistan, and this left $159 for her own, personal expenses (7 R. 156-157).

Gasanov told the women that their money was invested in "shares" or in "a company" so that they could buy or set up a modeling company (6 R. 196; 7 R.

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[5] Ms. Sabirova destroyed the ledger for 1998 at Gasanova's request, in order to hide certain expenses from Gasanov (6 R. 197).

150; 8 R. 159). The women never saw certificates or account statements (6 R. 196; 7 R. 150; 8 R. 159).

The women never had independent access to their earnings (6 R. 214; 7 R. 146; 8 R. 159). They always had to ask Gasanov for money when they wanted it for personal expenses, and they had to submit receipts for their purchases (6 R. 196, 202; 7 R. 146; 8 R. 159). The women, however, would rarely if ever see documentation supporting the shared expenses that they were charged by the Gasanovs (6 R. 202; 8 R. 157). While one bank account was established jointly in Ms. Romanova's name, she did not know of its existence for almost two years, and she never had access to the money in that account (7 R. 150-151; 9 R. 76). All of the money in that account came from Ms. Romanova's earnings, not the Gasanovs' earnings (9 R. 76).

D. Retention Of Passports, Threats And Other Actions That Compelled Continued Labor

The Gasanovs had Ms. Sabirova's passport and birth certificate since her arrival in the United States and they refused to return it to her when she asked for it (6 R. 204-206, 209-210; 9 R. 70-71). When she needed her passport to apply for her second visa, Gasanov brought the passport and kept it in his possession (6 R. 209). Her passport and other identification documents were found hidden in the trunk of the Gasanovs' car during execution of a search warrant when the Gasanovs were arrested (6 R. 212-213, Gov. Exh. 16-18; 9 R. 93-94).

In August or September 1999, Ms. Sabirova wanted to leave the Gasanovs; she was pregnant and she wanted to move in with her boyfriend (6 R. 204). Ms. Sabirova asked for her passport and the status of her earnings. The Gasanovs told her that she would have to pay $60,000 for the two visas they obtained for her before they would return her passport (6 R. 209, 211). Gasanov also told her that the money was gone (6 R. 215). At that time, Gasanova told her to go away, and threatened that she would have "problems" (6 R. 215, 221). Ms. Sabirova understood Gasanova's reference to "problems" meant that she should no longer ask about her money or do anything against the Gasanovs because if she did, her family in Uzbekistan would be harmed (6 R. 215, 221). Gasanova admitted she was very angry with Ms. Sabirova for wanting to leave and she openly threatened her, saying she would destroy Ms. Sabirova's passport and make her family disappear, or arrange to have her younger brother put in jail (9 R. 69-70).

On another occasion, after Ms. Sabirova received a notice from the Immigration and Naturalization Service, she asked Gasanov for her passport. Gasanov again refused and repeated his demand for $60,000 for its return (6 R. 218-219). He also threatened Ms. Sabirova, stating that she would "have problems" if she reported her situation to the police or immigration authorities (6 R. 219). Gasanov stated that he had a brother-in-law in the KGB in Uzbekistan (6 R. 219-220). Ms. Sabirova feared the Gasanovs, and believed that they had the contacts, influence, and ability to harm her family in Uzbekistan (*Ibid.*).

In June 2000, after Ms. Sabirova had her baby, she returned to topless dancing at the Lampliter Lounge (6 R. 216, Gov. Exh. 9B). She did this because Gasanov still had her passport and he still was demanding $60,000 (6 R. 217). At that time, Ms. Sabirova earned approximately $2,000-3,000/month, and she delivered cash to the Gasanovs approximately every two weeks, until May 2001 (6 R. 217-218).

The Gasanovs reluctantly allowed Ms. Romanova to travel back to Uzbekistan in 2000 for a two month visit (7 R. 173-174). By the time of her trip to Uzbekistan, Ms. Romanova had earned and given the Gasanovs almost $200,000 (7 R. 176-177). She came back to the Gasanovs and returned to topless dancing because she did not believe she would receive any of her earnings if she stayed in Uzbekistan (7 R. 177). She also believed the Gasanovs' false promises that if she earned $300,000, her dancing job would end and her modeling career would begin (7 R. 177, 8 R. 63). When Ms. Romanova had earned nearly $300,000, Gasanov told her that she needed to earn an additional $60,000 before she could stop dancing and bring her family to the United States (7 R. 181-182).

When she returned from Uzbekistan in 2000, Ms. Romanova gave her passport to Gasanov (7 R. 195). She first asked Gasanova to get back her passport in June 2001 (7 R. 195). Gasanova responded that she needed to sign a document stating how much she owed Gasanova, and that after that amount was paid, she would get the passport (7 R. 195-196). Ms. Romanova signed an IOU, dated June 6, 2001, that stated she owed and promised to pay Gasanova $2,429 by June 16,

2001, in return for her passport and other documents (7 R. 197, Gov. Exh. 40). The IOU also included other handwritten notations about debts for the telephone, washing machine, and work permit that Ms. Romanova had not seen before (7 R. 197). She never received her passport from the Gasanovs (7 R. 198). Her identification and INS documents, including the approval notice for the adjustment of her status from INS, her social security card, and work authorization card were seized from the trunk of the Gasanovs' car (7 R. 1990-200, 9 R. 112). Because the Gasanovs had her work papers, she could not get a job anywhere other than Prince Machiavelli (8 R. 59).

When Ms. Romanova started doubting the Gasanovs' honesty and their willingness to pay her back, and asked questions about her money, she was threatened by Gasanov (7 R. 202-203). She was "very nervous" and "scared" because she thought Gasanov was "very dangerous" and could hurt her and her family (7 R. 203). Gasanov had referred to his brother-in-law who worked for the KGB, and she too took this to mean her family's safety was threatened (*Ibid.*). He also specifically referred to her sister's safety, and said her sister could go to jail if she did not keep quiet (7 R. 202).

The Gasanovs tried to get Ms. Ikmatova to turn over her passport on false claims that Gasanov needed it at the university, but she refused to give it to him (8 R. 168). When Ms. Ikmatova twice asked Gasanov for her earnings, he refused to give them to her, stating that the money was gone (8 R. 162, 168). Her tenure as a dancer had continued because she believed the Gasanovs' representations that her

earnings as a dancer were essential to any future as a model, and she fully trusted and depended on the Gasanovs.

STANDARDS OF REVIEW

This Court reviews preserved challenges to a district court's jury instructions for an abuse of discretion. *United States* v. *Daniels*, 281 F.3d 168, 183 (5th Cir.), cert. denied, 122 S. Ct. 2313 (2002); *United States* v. *Wise*, 221 F.3d 140, 147 (5th Cir. 2000), cert. denied, 532 U.S. 959 (2001). This court considers whether the district court's charge, "as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of the law applicable to the factual issues confronting them." *Ibid.*

This court reviews a district court's denial of a request for individual voir dire regarding mid-trial publicity for an abuse of discretion. *United States* v. *Aragon*, 962 F.2d 439, 443 (5th Cir. 1992). A trial court has "broad discretion" to address claims of prejudice resulting from a jury's potential exposure to media coverage during trial. *Id.* at 443-444.

In the absence of a constitutional violation, this Court reviews district court rulings on the scope of cross-examination for an abuse of discretion. See *United States* v. *Brown*, 217 F.3d 247, 257 (5th Cir. 2000), vacated on other grounds, 531 U.S. 1136 (2001). To show a Sixth Amendment violation, Gasanova must show that she was denied an opportunity to question Ms. Sabirova in order to give the jury sufficient information to assess Ms. Sabirova's bias and motives. See *ibid.*

This Court reviews questions of law concerning forfeiture *de novo*. See *United States* v. *Marmolejo*, 89 F.3d 1185, 1197 (5th Cir. 1996), aff'd on other grounds, 522 U.S. 52 (1997).

This Court reviews allegations that the court erred in its interpretation or application of the U.S. Sentencing Guidelines *de novo*, and factual findings for clear error. See *United States* v. *Manges*, 110 F.3d 1162, 1178 (5th Cir. 1997).

SUMMARY OF ARGUMENT

8 U.S.C. 1324(a)(2)(B) prohibits, among other things, a person from bringing to the United States an alien who has "not received prior official authorization." Given the plain meaning and formal definitions of these terms, and in accordance with Congressional intent and precedent, an alien who receives legitimate documentation through false pretenses has not received "prior official authorization." The Gasanovs give no sound basis, and there is none, to conclude that "prior official authorization" equally encompasses persons who meet the standards for legitimate documents, and those who do not qualify, but submit fraudulent documentation to assert their qualification. Accordingly, the district court did not abuse its discretion when it instructed the jury that this provision is violated, and an alien is inadmissible, if by "fraud or willfully misrepresenting a material fact," that person seeks or procures documentation or admission to the United States (3 R. 220). See *United States* v. *Wise*, 221 F.3d 140, 147 (5th Cir. 2000), cert. denied, 532 U.S. 959 (2001).

The district court did not abuse its discretion when it denied a request for individual inquiry of the jury on whether the members saw a newspaper article published mid-trial since the article was not "innately prejudicial" and there is a low probability that the publicity reached the jury. *United States* v. *Aragon*, 962 F.2d 439, 443-446 (5th Cir. 1992). The challenged text refers to defendants' post-arrest threats to the victims and victims' families, and is limited to one sentence in a lengthy article that objectively reported the charges and prior day's trial testimony. Given that the jury heard testimony of defendants' pre-arrest threats, the challenged text is not significantly different, inflammatory, or innately prejudicial. Moreover, the district court gave three instructions to the jury to avoid media reports. These factors, and the jury's acquittal of defendants on one count, support the district court's decision against individual voir dire. *Ibid.*

The right to cross-examination is not completely unfettered; the district court has discretion to impose "reasonable limits" on matters that are, among other things, prejudicial. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986); see *United States* v. *Brown*, 217 F.3d 247, 257 (5th Cir. 2000), vacated on other grounds, 531 U.S. 1136 (2001). Here, the district court appropriately prohibited inquiry on a subject that it deemed "highly prejudicial" and of no probative value; Gasanov's few sexual contacts with one victim, Ms. Sabirova, under circumstances that raise questions of consent. Gasanova had ample opportunity to cross-examine Ms. Sabirova regarding her motives and bias, and the jury was aware that Ms. Sabirova's relationship with Gasanova deteriorated over time. An additional

reason for that fall-out (Gasanova's knowledge of these sexual contacts) is of minimal significance in assessing Ms. Sabirova's bias and credibility, and Gasanova's guilt. Given its extremely prejudicial nature, the district court did not abuse its discretion in barring cross-examination on this topic. See *ibid*. Moreover, any error was harmless given the overwhelming, corroborative evidence of guilt.

The district court properly assessed items subject to forfeiture based on the preponderance of the evidence. This standard has been applied by the majority of circuits, and nothing in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), changes that standard. *Apprendi* addresses only a jury's obligation to determine facts that increase a statutory maximum penalty. Forfeiture is not akin to an element of a greater offense, but is part of the statutorily authorized sentence for the Gasanovs. See *United States* v. *Vera*, 278 F.3d 672, 672-673 (7th Cir.), cert. denied, 122 S. Ct. 2372 (2002). Moreover, the Eighth Amendment standard for excessive fines is distinct from the principles of *Apprendi* and has no bearing on assessing forfeiture. See *United States* v. *Bajakajian*, 524 U.S. 321 (1998).

The district court appropriately determined the Gasanovs' sentence for the multi-object conspiracy under Count One, offense (c), pursuant to U.S. Sentencing Guideline 1B1.2(d). The district court was required to determine, as it did, that there was proof beyond a reasonable doubt that the Gasanovs conspired to violate, among other things, 18 U.S.C. 1592. See *United States* v. *Jackson*, 167 F.3d 1280, 1285-1286 (9th Cir.), cert. denied, 528 U.S. 1012 (1999). The Court was not

required to find that the Gasanovs substantively violated 18 U.S.C. 1592 in order to apply the base offense level of Guideline 2H4.1(a)(2). *Ibid.*

ARGUMENT

I

THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY THAT VISAS OBTAINED BASED ON FRAUDULENT REPRESENTATIONS DO NOT GIVE "OFFICIAL AUTHORIZATION" TO ENTER OR REMAIN IN THE UNITED STATES UNDER 8 U.S.C. 1324(a)(2)(B)

The Gasanovs assert (SG Br. 18-24; NG Br. 18-24) that the district court abused its discretion when it instructed the jury that a person violates 8 U.S.C. 1324(a)(2)(B) if the visa or other documentation is obtained through fraud or willful misrepresentations of material facts.[6] Because the challenged instruction is correct, the Gasanovs' claim is without merit.

8 U.S.C. 1324(a)(2)(B) prohibits, among other things,

> 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 * * * for the purpose of commercial advantage or private financial gain.

(emphasis added).

As part of the court's instruction to the jury on the Gasanovs' alleged violation of Section 1324(a)(2)(B) (Counts 3-5), the court stated:

> [y]ou have heard testimony that the aliens in this case acquired J-1 visas under which they entered or resided in the United States. You

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[6] The text of the arguments raised by Gasanov and Gasanova is virtually identical.

are instructed, however, that bringing aliens who are not admissible into the United States is a violation of Title 8, United States Code, section 1324, even if the aliens have the documents for entry.

A person who is not admissible under the immigration laws is ineligible to receive visas and ineligible to be admitted to the United States. Moreover, an alien is not admissible to the United States if, *by fraud or willfully misrepresenting a material fact*, that person seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States.

(3 R. 220) (emphasis added).

The Gasanovs assert (SG Br. 20-24; NG Br. 20-24) that "official authorization" in Section 1324(a)(2)(B) encompasses visas and documents obtained through both honest and fraudulent representations. They claim (SG Br. 20; NG Br. 20) that this broad view is supported by the text of the statute, which refers to "official authorization" without any limitation or exception; they note it does not read "official authorization that was legitimately obtained." The Gasanovs' argument is contrary to the terms and intent of Section 1324, and the courts' interpretations of earlier versions of this provision.

Initially, while the phrase "official authorization" is not defined in the statute, the everyday meaning of these terms, common sense, and formal definitions inexorably lead to the conclusion that this phrase only encompasses action that is sanctioned and legitimate, and does not include the receipt of official documentation through false pretenses. *Webster's Collegiate Dictionary* 807 (10th Ed. 1997) defines "official" to include: "authoritative; authorized." *Black's Law Dictionary* 978 (5th Ed. 1979) defines "official," in part, as "authorized act."

"Authorization" refers to an "instrument that authorizes: sanction." *Webster's* at 78. Moreover, "authorize" means, "to establish by or as if by authority: sanction," *ibid*., or "[t]o empower; to give a right or authority to act. * * * 'Authorized' is sometimes construed as equivalent to 'permitted.'" *Black's Law Dictionary* at 122.

Given these definitions, "official authorization" is action that is sanctioned or permitted; that is, performed in accordance with stated standards. Thus, if someone gives false information to reflect compliance with standards for action or authorization, yet does not in fact meet those standards, the act is not authorized. Given Congress's use of the phrase "official authorization," there is no need for Congress to include the phrase "that were legitimately obtained" since that concept is encompassed in the everyday and formal meaning of the phrase itself. Cf. *United States* v. *Trevino-Martinez*, 86 F.3d 65, 67-69 (5th Cir. 1996) (no abuse of discretion in denying proposed instruction that is an incorrect statement of the law), cert. denied, 520 U.S. 1105 (1997).

In addition, there is no difference between obtaining legitimate documentation from an officer by giving false information, or truthful information with no intent to abide by the limitations or restrictions set forth on the visa, and obtaining proper documentation through stealth, without the official's knowledge. Thus, to adopt the Gasanovs' analysis also would mean that an alien has received "official authorization" if someone steals a visa and types in the alien's name - simply because the document itself is legitimate. In neither instance, despite the possession of legitimate documentation, is the entry "officially authorized."

Moreover, this circuit and other courts have held that the pre-1986 version of Section 1324 prohibits the illegal entry, travel, or detention of aliens who have legitimate documents that were obtained or used under false pretenses.[7] See *United States* v. *Bunker*, 532 F.2d 1262, 1266 (9th Cir. 1976) (violation of Section 1324(a)(1) to knowingly breach terms of valid documentation for entry to the United States that prohibit transport and employment of aliens); *United States* v. *Bland*, 299 F.2d 105, 107 (5th Cir. 1962) ("[b]ringing aliens not duly admitted into the United States is a violation of * * * Sec. 1324, even if the aliens have the proper papers for entry"); *United States* v. *Mount Fuji Japanese Steak House*, 435 F. Supp. 1194 (E.D.N.Y. 1977); see also *United States* v. *One Lear Jet Aircraft*, 808 F.2d 765, 767 (11th Cir. 1987) (forfeiture under 8 U.S.C. 1324 valid based on guilty pleas to violations of 18 U.S.C. 1546 for material misrepresentations made to obtain legitimate visas), vacated on other grounds, 836 F.2d 1571 (11th Cir. 1988). In *Bunker*, 532 F.2d at 1263-1264, the defendant knowingly transported aliens who had visas that only permitted entry in the United States for 72 hours and within 25 miles of the border to his home in Salt Lake City for several months' employment. The Ninth Circuit noted that the "core" of Section 1324's violations involve alien smuggling and surreptitious entry of aliens, yet it concluded this provision also

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[7] The pre-1986 text of Section 1324(a) defined an illegal alien as a person who was "not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any law relating to the immigration or expulsion of aliens."

encompassed illegal entry through fraud, including legitimate documents obtained with fraudulent information, or lack of intent to abide by the restrictions imposed by legitimate documents. *Id*. at 1265. Similarly, in *Mount Fuji*, 435 F. Supp. at 1198, the court refused to dismiss an indictment charging that the defendant induced aliens' travel and entry into the United States based on valid non-immigrant tourist visas that were obtained on fraudulent representations under 8 U.S.C. 1324(a). The aliens and defendant intended to work in defendant's restaurant indefinitely, in violation of the tourist visa. *Ibid*.

In 1986, Section 1324 was amended by the Immigration Reform and Control Act (IRCA), Pub. L. No. 99-603, §§ 101, 112, 100 Stat. 3359, 3360-3374, 3381-3382 (1986), to reverse judicial opinions that held transport short of "entering" the United States did not violate Section 1324. See H.R. Rep. No. 99-682(I), 99th Cong., 2d Sess. 65-66 (1986).[8] Virtually the entire text of Section 1324 was

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[8] Congress explained that this expansion was

> essential in light of recent judicial opinions which have interpreted existing law as not applying to certain activities that clearly are prejudicial to the interest of the United States[:] * * * to correct the shortcomings and ambiguities in existing law identified in *United States* v. *Anaya*, 509 F. Supp. 2289, *en banc*, (S.D. Fla. 1980), aff'd on other grounds, sub nom., *United States* v. *Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982), and in * * * *Zayas-Morales* as well.

H.R. Rep. No. 99-682(I) at 65-66. In *Anaya*, 509 F. Supp. at 299, the district court dismissed indictments against individuals transporting aliens under the Mariel

(continued...)

rewritten by IRCA. Now, Section 1324(a)(1) focuses on violations that occur at a place "other than a designated port of entry" and Section 1324(a)(2) focuses on violations that occur without "prior official authorization." As noted, the modification relevant here is Congress's definition of an illegal alien; he is now an alien who does not have "prior official authorization to come to, enter, or reside in the United States" instead of a person who "was not lawfully entitled to enter, or reside within, the United States."

The Gasanovs claim (SG Br. 22; NG Br. 22) that Congress meant to make a "distinction" between unlawful entry and IRCA's use of "official authorization," yet they fail to assert what that difference is or how it affects them. We are not aware of any legislative history that addresses why Congress made this particular change in the text regarding who is an illegal alien. There is no basis, however, and none asserted by the Gasanovs, to conclude that the revised text of Section 1324 now allows what it once sanctioned; aliens who obtain legitimate documents based on false pretenses, or false intentions to abide by the valid documents' restrictions. In fact, given the expansion of Section 1324's coverage to reverse restrictive judicial decisions and Congress' overall efforts to stem the tide of illegal immigration through IRCA, to interpret Section 1324 as now allowing entry

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[8](...continued)
Cuban boatlift and held that the aliens, who were brought by defendants to the INS to apply for asylum, did not "enter" the United States. The court of appeals affirmed on other grounds and held that the government failed to prove the defendants' requisite criminal intent. *Zayas-Morales*, 685 F.2d at 1277.

through fraud and false pretenses simply flies in the face of Congress's objectives. See H.R. Rep. 99-682(I) at 46. The expansive scope of illegal conduct addressed by this provision is incongruous with any conclusion that Congress now permits entry to someone who has lied in order to obtain the necessary documentation for entry into the United States. While stated with reference to the pre-IRCA version of Section 1324, the district court's comments in *Mount Fuji* remain true today:

> [i]t belies common sense to suggest that an alien who has entered this country to do other than he has represented in his documentation, even though he successfully passes through immigration authorities, is lawfully entitled to enter or reside in the United States.

Mount Fuji Japanese Steak House, 435 F. Supp. at 1198-1199.

Moreover, the Gasanovs' repeated concession that their conduct violates other provisions of the Immigration and Nationality Act (INA) (*e.g.,* SG Br. 3, 20), yet not Section 1324(a)(2)(B) (SG Br. 21; NG Br. 21) since that provision does not address fraudulently obtained visas, is without merit. The fact that other provisions of the INA or U.S. Code address entry by false representations or concealment of a material fact (see, *e.g.*, 8 U.S.C. 1321, 1325, 18 U.S.C. 1546), does not restrict the scope of the plain language of Section 1324's coverage for similar if not identical violations. See *United States* v. *Batchelder*, 442 U.S. 114, 118, 122 (1979) (statutes may "overlap" or have "partial redundancy" yet be "fully capable of coexisting"); *United States* v. *Zheng*, 306 F.3d 1080, 1085 (11th Cir. 2002); *Bunker*, 532 F.2d at 1266 (while Section 1325 punishes aliens who provide willful

misrepresentations, Section 1324 similarly punishes those who bring aliens to the United States for illegal entry by misrepresentation).

In *Zheng*, 306 F.3d at 1084-1085, the Eleventh Circuit rejected defendants' claim that charges should only be brought under 8 U.S.C. 1324a, and not Section 1324; the former provision imposes lesser sanctions for employers who employ aliens without authorization to work. The court explained that although Sections 1324 and 1324a "appear to cover some of the same conduct, 'the fact that Congress has enacted two sections encompassing similar conduct but prescribing different penalties does not compel a conclusion that one statute was meant to limit, repeal, or affect enforcement of the other.'" *Id*. at 1085 (quoting *United States* v. *Kim*, 193 F.3d 567, 573 (2d Cir. 1999); see *United States* v. *Barajas-Montiel*, 185 F.3d 947, 952-953 (9th Cir. 1999) (noting similarity in offenses covered by Section 1324(a)(1)(A) and (a)(2)(B), particularly 1324(a)(2)(B)(iii) and 1324(a)(1)(A)), cert. denied, 531 U.S. 849 (2000). Similar to the pre-1986 version, while Section 1324(a) primarily addresses smuggling and illegal entry by aliens without any documentation, that does not foreclose the provision's application to instances such as this: obtaining documents through false representations. See *Bunker*, 532 F.2d at 1265.

The United States is not aware of any decision that specifically addresses the meaning of "prior official authorization" as that phrase is used now in Section 1324, yet one court upheld charges under this provision that were based on presentation of false documents and lack of intent to abide by the terms of the

requested visa. In *United States* v. *Darsan*, 811 F. Supp. 119, 119-120 (W.D.N.Y. 1993), the defendant was charged with conspiracy under 18 U.S.C. 371 to violate 8 U.S.C. 1324(a)(2)(B)(ii). The court rejected defendant's motion to dismiss the indictment and defendant's claim that the alien he was transporting was entitled to admission into the United States. *Id*. at 120. Because the alien, among other things, attempted to gain entry into the United States by using false identification papers, he was excludable under 8 U.S.C. 1182(a)(6)(C)(i). Moreover, evidence supported defendant's knowledge that the alien intended to remain in the United States beyond the terms of the sought-after documentation. Accordingly, the court held that there was probable cause to conclude that the defendant "knew or recklessly disregarded" that the alien "had not received prior official authorization to enter the United States, and that [defendant] consequently committed violations of 8 U.S.C. 1324(a)(2)(B)(ii) and 18 U.S.C. 371." *Id*. at 121.

The Gasanovs assert (SG Br. 22-23; NG Br. 23-24) that *Darsan* is factually inapposite. While not every fact is identical to defendants' scheme, one significant fact is shared; the court in *Darsan* upheld the charges under 1324(a), in part, based on the defendant's knowledge and intent not to abide by the terms of the requested visa – just as the Gasanovs did.

Finally, the Gasanovs alternatively assert that the court abused its discretion in its instruction, *i.e.*, identification of the proper legal standard of what constitutes "official authorization," and that the government did not provide sufficient proof of an element of the crime, *i.e.*, lack of official authorization, to sustain the

convictions on Counts 3-5. They make these arguments separately (Argument II, SG Br. 24-25; NG Br. 24-25) and mix the claim of insufficient evidence with their challenge to the jury instruction (SG Br. 20; NG Br. 20-21). However characterized, these arguments fail.

Their claim (SG Br. 20; NG Br. 21) that the court's instruction "completely eviscerated the defense" to Counts 3-5 is correct, and appropriate. The Gasanovs' argument to the jury (9 R. 179-180, 191) was that the government failed to present evidence to prove an element of the crime (lack of official authorization); they were, in effect, arguing that the element as defined by the court should be otherwise. That claim, of course, is one properly presented to the district court and to this court on appeal; it is a not a factual issue to be decided by the jury. In light of the district court's identification of the correct legal standard, the overwhelming evidence that fraudulent documents were submitted to obtain the J-1 visas, see *infra*, p. 7-11, and defendants' repeated admissions that the visas were obtained by fraudulent representations (*e.g.*, SG Br. 24), there is ample evidence to support defendants' convictions. See *United States* v. *Sanchez-Milam*, 305 F.3d 310 (5th Cir. 2002) (sufficient evidence to support conviction under 8 U.S.C. 1326, illegal entry after deportation without consent of the Attorney General).

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO CONDUCT VOIR DIRE REGARDING A NEWS ARTICLE THAT REPORTED TESTIMONY AT TRIAL

The Gasanovs assert (SG Br. 25-30; NG Br. 28-36) that the district court abused its discretion when it denied their request for individual voir dire of the jury's possible exposure to a news article published during the trial. Because the article did not contain "innately prejudicial" information and, even if so, since the jury was instructed repeatedly to avoid all media coverage about the trial, the district court did not abuse its discretion in denying an individualized inquiry.

Individualized voir dire is "required if there could arise 'serious questions of possible prejudice.'" *United States* v. *Aragon*, 962 F.2d 439, 443 (5th Cir. 1992) (quoting *United States* v. *Herring*, 568 F.2d 1099 (5th Cir. 1978)). This Court conducts a two-prong analysis for the presence of prejudice arising from mid-trial publicity. First, the court determines whether the text of the challenged report is "innately prejudicial" by considering "the timing of the media coverage, its possible effects on legal defenses, and the character of the material disseminated." *Id*. at 444; see *United States* v. *Faulkner*, 17 F.3d 745, 764 (5th Cir.) (quoting *Aragon*), cert. denied, 513 U.S. 870 (1994). For example, in *United States* v. *Arzola-Amaya*, 867 F.2d 1504, 1513-1514 (5th Cir.), cert. denied, 493 U.S. 933 (1989), this Court affirmed the trial court's denial of individualized voir dire because the mid-trial media "blitz" in El Paso and Juarez newspapers, "*for [the] most part,*" summarized trial testimony, and the court gave jurors two instructions

to avoid all media coverage (emphasis added.) In contrast, in *Aragon*, 962 F.2d at 445-446, this Court held that a newspaper article was "innately prejudicial" because the "major thrust" of the article referred to defendants' criminal histories, their alleged connections to drug kingpins and other guilty parties, and alleged boasting of illegal conduct.

If deemed prejudicial, a court then must assess the "probability that the publicity has in fact reached the jury" by considering "the prominence of the media coverage and the nature, number, and regularity of warnings [by the district court] against viewing the coverage." *Faulkner*, 17 F.3d at 764 (quoting *Aragon*, 962 F.2d at 444). There is no required text, mandate for daily instructions, or other formulaic methodology for the court's instruction that jurors avoid media coverage of the trial. See *United States* v. *Bermea*, 30 F.3d 1539, 1559 (5th Cir. 1994) (no abuse of discretion to decline individualized voir dire despite inherently prejudicial nature of media reports given periodic (not daily) instructions to jury, and three general queries to jury regarding exposure to media), cert. denied, 513 U.S. 1156 (1995); *Arzola-Amaya*, 867 F.2d at 1514 (cautionary instructions to avoid media reports of the trial given on two occasions (during voir dire and before presentation of evidence) are "adequate safeguards" despite a "blitz" of media reports on the front page of the El Paso newspapers). "Every claim of potential jury prejudice due to publicity must turn upon its own facts." *Aragon*, 962 F.2d at 444.

On the second day of trial, defense counsel notified the district court of an article published in the city's daily paper, *the El Paso Times* (7 R. 6/SG RE 3).

Defendants objected to one sentence in a lengthy article that summarized the charges against the defendants and the first day's trial testimony (SG RE 4). The sentence noted the government's request that the victims' names not be published given "credible threats" made against them and their families after the defendants' arrest (SG RE 4). The district court denied the Gasanovs' request for individualized voir dire on whether members of the jury saw this article. The court stated, "[q]uite frankly, if that's what they printed, it's part of the testimony that came out yesterday." (7 R. 6/SG RE 3). The court concluded, correctly, that the article was not prejudicial (*Ibid.*).

The Gasanovs assert that the court abused its discretion in denying voir dire because 1) the reported comment on post-arrest threats exceeded the testimony at trial and was, therefore, "innately prejudicial" (SG Br. 30; NG Br. 31-33); and 2) there was a "strong possibility" (SG Br. 30; NG Br. 35) that the jury saw the article. First, the Gasanovs' challenge is similar to the circumstances of *Arzola-Amaya*, 867 F.2d at 1513-1514; the vast bulk of the article objectively summarizes the charges and trial testimony, and only one sentence refers to conduct outside the trial record. The mere fact that the article included a statement by the United States (as reported by the Assistant U.S. Attorney (AUSA)) that was somewhat different from the trial testimony does not render it "innately prejudicial."[9] In addition, the

[9] The United States further denies the Gasanovs' suggestion (SG Br. 29 n.12; NG Br. 33 n.7) that AUSA J. Brandy Gardes violated the Texas Ethics Rules (continued...)

comment is not inflammatory, and this sentence was in the fifth paragraph of a lengthy (eight-paragraph) article whose "major thrust" is not the defendants' criminal history or alleged connections to convicted or known criminals, but a recitation of the defendants' charges and testimony to date. Cf. *Aragon*, 962 F.2d at 446; *United States* v. *Manzella*, 782 F.2d 533, 541 (5th Cir.) (no abuse of discretion to decline individualized voir dire due, in part, because challenged text consisted of one paragraph at the end of an article), cert. denied, 476 U.S. 1123 (1986).

The Gasanovs also assert (SG Br. 27-28; NG Br. 31-33) that the text of the article was highly prejudicial because there was no evidence of threats in the first day's trial testimony. Contrary to their efforts (SG Br. 27-28; NG Br. 31-33) to minimize or parse the scope of Ms. Sabirova's testimony, she unequivocally testified during the first day of trial that she feared the Gasanovs and she believed, based on their threats and comments, that they were capable of and would hurt her family in Uzbekistan if she failed to do as they ordered (6 R. 215, 218-221). As the Gasanovs recognize (SG Br. 27; NG Br. 31), media reports on trial testimony are not prejudicial since the jury has heard the evidence. See *United States* v. *Martinez-Moncivais*, 14 F.3d 1030, 1037 (5th Cir.) (no potential for prejudice when

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[9](...continued)
when she asked the reporter to withhold the victims' names due to known threats to their safety that were made after defendants' arrests. AUSA Gardes made these statements based on testimony given at the defendants' detention hearing, which was part of the public record (5 R. 14-15, 17, 36-37).

article reports trial testimony or issues already presented to jury), cert. denied, 513 U.S. 816 (1994).

Moreover, the difference between the article's reference to threats made after the Gasanovs' arrest and Ms. Sabirova's testimony to pre-arrest threats is of minimal significance and does not prejudice the defendants. Cf. *United States* v. *Rasco*, 123 F.3d 222, 229-231 (5th Cir. 1997) (article identifying defendant's two prior convictions, when jury was aware of only one, coupled with admonishments to avoid media reports, does not warrant individualized inquiry to jury for possible prejudice), cert. denied, 522 U.S. 1083 (1998). The critical fact is that Ms. Sabirova testified she was threatened by the Gasanovs' conduct. Finally, there is no basis for Gasanova's assertion (Br. 34) that this one sentence "bolstered" the credibility of the victims' testimony.

Even if this Court deems the article's reporting of the AUSA's statement as "innately prejudicial," other factors minimize the adverse affect, if any, of this text.[10] Contrary to Gasanovs' assertion (SG Br. 30; NG Br. 34-35), publication of this article on the first page of the metro section of the daily newspaper does not alone create a "strong possibility" that it was seen by the jury to warrant an individualized inquiry. Cf. *Bermea*, 30 F.3d at 1558, 1560 (likelihood of exposure

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[10] While this Court need not address the second prong if it finds that the challenged sentence is not prejudicial, see *Martinez-Moncivais*, 14 F.3d at 1037, this Court has examined the second prong factors even without a finding that text is "innately prejudicial." See, *e.g.*, *Arzola-Amaya*, 867 F.2d at 1513-1514.

to some of the prejudicial material was "so low" despite "prominent" publication in the "leading daily newspaper" (the *McCallen Monitor*) where the trial took place; there was no abuse of discretion to deny individual voir dire).

In addition, during general voir dire of the jury pool, several prospective jurors were questioned, and some were excused, because of their exposure to pretrial publicity (6 R. 43-49). Once selected, the court emphatically and repeatedly instructed the jurors to avoid and disregard news accounts of the trial. Before opening statements, the district court instructed the jury to avoid all media reports about the trial (6 R. 82). At the start of the second trial day, when the Gasanovs raised this issue and with agreement by defense counsel, the court gave a lengthy instruction reminding the jury of their obligation to not read or listen to news accounts of the trial (7 R. 8-9/SG RE 3).[11] At the end of that day's testimony, the court repeated its instruction that the jury avoid media coverage of the trial (7

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[11] The court's instruction included the following text:

> members of the jury, remember I gave you some instructions yesterday on not reading anything having to do with this article [sic] or listening to anything having to do with this article [sic]. Now, I want to emphasize that again, because, it's come to my attention that there was an article in this morning's paper, and there were some news accounts last night on some of the stations. But I want to caution you, you are not to listen to anything or read anything having to do with this trial in any way whatsoever. * * *
>
> So please, do not do anything that would make me stop this trial and have to start all over again. Because if you do listen or read anything having to do with this trial, it could happen. Okay?

R. 248), and this was again repeated after the third day's testimony (8 R. 260). While not phrased exactly as a question, especially given the district court's comments at the start of the trial's second day (7 R. 8-9/SG RE 3), this court can presume that a juror would have responded or spoken had he or she seen the article or any other media coverage. Cf. *Bermea*, 30 F.3d at 1559 (court presumes jury followed its instructions; failure to respond to query "strongly suggests [] no contamination" or prejudice).

Finally, the jury's acquittal of defendants on the money laundering charge is yet another factor that "weigh[s] in favor of finding no abuse of discretion." *Faulkner*, 17 F.3d at 764. As this Court explained, acquittal of at least one count reflects a "fair minded consideration of the issues and reinforces our belief and conclusion that the media coverage did not lead to the deprivation of appellants[']right to an impartial trial." *Arzola-Amaya*, 867 F.2d at 1514.

III

THE DISTRICT COURT APPROPRIATELY BARRED CROSS-EXAMINATION THAT WOULD ELICIT PREJUDICIAL TESTIMONY THAT HAD NO PROBATIVE VALUE

Gasanova asserts (Br. 27-28) that the district court violated her Sixth Amendment right to cross-examine Ms. Sabirova by prohibiting questions about her limited sexual contact with Gasanov because such evidence would demonstrate a "motive and incentive to testify falsely." This claim is without merit. Gasanova had ample opportunity to cross-examine Ms. Sabirova about her credibility and motives, and the truthfulness of her testimony. Moreover, after an offer of proof,

the district court appropriately determined that under Fed. R. Evid. 403, the prejudice from the sought-after testimony far outweighed any possible probative value (7 R. 115).

After the district court denied Gasanova's request to cross-examine Ms. Sabirova regarding past sexual relations with Gasanov, Gasanova made an offer of proof (7 R. 61-62, 111-112). Gasanova's counsel's queries to Ms. Sabirova (outside the presence of the jury) only established that after Gasanova learned that Gasanov had "sexual relations" with Ms. Sabirova, the relationship between the two women deteriorated. Ms. Sabirova agreed with counsel's characterization that she and Gasanova became "enemies" (7 R. 111-112). The United States notes that during this proffer, Gasanova's counsel did not ask Ms. Sabirova how many times Gasanov had sex with Ms. Sabirova, whether this was consensual sex, whether she felt any intimacy towards Gasanov, or how long this relationship lasted.

On further examination by the United States, Ms. Sabirova stated she had sex with Gasanov on three or four occasions, all of which occurred during her first month in the United States after traveling from Uzbekistan, when they (and Gasanova) were in New York City (7 R. 112-113). Ms. Sabirova stated that she "felt sorry" for Gasanova (7 R. 112). The record also raises questions as to whether Ms. Sabirova fully consented to these sexual encounters (7 R. 113; see 9 R. 8-9). It is clear, however, that Ms. Sabirova had just arrived in the country, she

did not speak English, and she was clearly impressionable (6 R. 188-189; 7 R. 113; see 9 R. 9).[12]

A defendant's right to cross-examination is not completely unfettered; "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, [and] confusion of the issues." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). Thus, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Ibid.* (quoting *Delaware* v. *Fernsterer*, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original). Thus, the question is whether the defendant was given a sufficient opportunity to expose a witness's bias and motives, or was fully barred from addressing such matters. In *Van Arsdall*, the trial court erred in barring all questioning of a witness regarding an agreement with the government to drop pending charges in the wake of his testimony since the court eliminated any exposure of the witness's motive or bias to testify in favor of the government.

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[12] In addition, Gasanova raised with the court the issue of questioning FBI Agent Leslie Nelson about Gasanov's sexual contact with Ms. Sabirova (9 R. 6-9). Ultimately, however, Gasanova did not elicit any testimony from Agent Nelson that supported further questioning on this topic (See 9 R. 80-81). Finally, the United States notes that Gasanova's counsel acknowledged that this testimony could be harmful to both her client and Gasanov (9 R. 8-9).

The crux of the Gasanovs' defense was to challenge the victims' credibility. Neither defendant called any witnesses at trial (9 R. 164). Gasanova had sufficient opportunity to cross-examine Ms. Sabirova regarding the nature of her relationship with defendants and, therefore, there is no constitutional violation. First, Ms. Sabirova's status as a victim and the bias inherent to that circumstance were evident. Second, counsel questioned Ms. Sabirova about possible benefits from testifying, but she did not know she stood to receive restitution of the money she earned and gave to the Gasanovs if the government succeeded in forfeiture (7 R. 62). Gasanova had the opportunity to question Ms. Sabirova about the nature of her relationship with the defendants, including the extent to which she was forced, or voluntarily chose, to work as a topless dancer and give her money to the Gasanovs (See 7 R. 41-65). Finally, Ms. Sabirova testified that her relationship with Gasanova deteriorated significantly from the point of being "close friends" to "hating each other" (7 R. 61). She stated that this falling out was due to her not earning the $300,000 demanded by the Gasanovs (7 R. 62).

Whether there were other factors that influenced the worsening communication between Gasanova and Ms. Sabirova is of little significance to assessing Ms. Sabirova's credibility or the elements for conviction. While Gasanova claims that this cross-examination was necessary to support her claim that Ms. Sabirova "testified falsely," there is ample corroborating evidence that supports all aspects of Ms. Sabirova's testimony. Fraudulent documents were submitted to obtain her two J-1 visas; the ledgers reflect the substantial earnings

she gave to the Gasanovs, and her minimal expenses; her passport and other documents were found hidden in the Gasanovs' car; and the other victims' testimony corroborates the Gasanovs' false promises, threats, demands, and other coercive behavior that perpetuated her continued, forced labor (see *infra*, p. 5-16).

In addition, Gasanova's citations (Br. 27) are inapposite; they concern instances where this court found error (and not necessarily reversible error) when defendants were barred completely from questioning a cooperating witness about that witness's possible deals with the government to lessen the sentence on his own pending criminal charges. See, *e.g.*, *United States* v. *Alexius*, 76 F.3d 642, 646 (5th Cir. 1996) (reversible error to bar cross-examination of government witness on possible deals with the government for pending criminal charges; this was sole basis of impeachment of the government's lead and only witness); *United States* v. *Cooks*, 52 F.3d 101, 104 (5th Cir. 1995) (error to limit cross-examination of witness regarding extent of cooperation with the government and potential for harsh (99-year) sentence on pending charges; error was harmless since there was "an abundance of other evidence to support the verdict"). Ms. Sabirova is a *victim*, and as such, she is a witness on behalf of the government. However, she is not a cooperating witness akin to co-conspirators or other witnesses with pending criminal charges who can materially benefit from testifying on behalf of the government. Cf. *Alexius*, 76 F.3d at 646, *Cooks*, 52 F.3d at 104. Thus, this is not a situation where foreclosing questions to elicit evidence about a witness's cooperation with the government or possible benefit from testimony that will affect

his liberty may give "a significantly different impression of a witness's credibility had defense counsel pursued his proposed line of cross-examination." *United States* v. *Pace*, 10 F.3d 1106, 1114 (5th Cir. 1993), cert. denied, 511 U.S. 1149 (1994) (quoting *United States* v. *Baresh*, 790 F.2d 392, 400 (5th Cir. 1986)).

Moreover, even if some evidence is indicative of bias, counsel may not question a witness to elicit evidence that does not comply with the Federal Rules of Evidence. The constitutional right to cross-examination does not override the court's power and duty to assess the proffered evidence against Rule 403. See *United States* v. *Brown*, 217 F.3d 247, 257-258 (5th Cir.) (potential for prejudice outweighed probative value to support court's allowance of questions on defendant's "longstanding antagonism" between himself and the police department, yet disallowance of questions on specific lawsuits filed), vacated on other grounds, 531 U.S. 1136 (2001). As noted, the court concluded that any testimony on a few sexual encounters, under questionable circumstances, was "highly prejudicial" and had no probative value (7 R. 115). Gasanova never asserts *how* the district court's balance of prejudice and probative value was an abuse of discretion - nor can she. The court's balancing of interests and its ultimate resolution was well within its discretion. Cf. *Brown*, 217 F.3d at 257-258.

Finally, even if this Court considered the district court's limitation on Gasanova's cross-examination of Ms. Sabirova error, it was harmless. Cf. *ibid*. To obtain relief, Gasanova must show that the court's restrictions were "'clearly prejudicial' based on the overall strength of the prosecution's case, the

circumstances surrounding the challenged testimony, the importance of that testimony, and its corroboration or contradiction elsewhere at trial." *Id.* at 257. First, as noted, the jury already knew that relations between Ms. Sabirova and Gasanova deteriorated over time. Even if the jury were informed of another reason for this change, that information is of limited value, if any, in further assessing Ms. Sabirova's bias, and is not critical to the jury's conviction. Moreover, as stated, there was overwhelming, corroborative evidence to support the verdicts, including fraudulent documents to obtain Ms. Sabirova's visa; passports and other documents seized from the Gasanovs' vehicle; the ledgers recording receipt of all of Ms. Sabirova's earnings as a dancer, and minimal payments to her for personal expenses; and other victims' testimony regarding the Gasanovs' treatment, including false promises, threats, and other actions that coerced continued labor. See *infra*, p. 5-16.

IV

THE DISTRICT COURT APPROPRIATELY DETERMINED ITEMS SUBJECT TO CRIMINAL FORFEITURE BASED ON THE PREPONDERANCE OF THE EVIDENCE

The Gasanovs assert (SG Br. 31-32; NG Br. 36-37) that the court erred in granting forfeiture based on the preponderance of the evidence rather than proof beyond a reasonable doubt. Appellants also argue that since forfeiture is subject to review under the Eighth Amendment's excessive fine clause, it should be subject to proof beyond a reasonable doubt as set forth in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). Initially, since the Gasanovs raise these issues for the first time on

appeal, their claim is reviewed only for plain error. See *Johnson* v. *United States*, 520 U.S. 461 (1997); *United States* v. *Longoria*, 298 F.3d 367, 373 (5th Cir. 2002) (challenges to sentencing under *Apprendi* raised for the first time on appeal are reviewed for plain error). Appellants' claims are without merit and do not establish plain error. Consistent with Supreme Court precedent and every circuit to consider the question, the district court correctly assessed criminal forfeiture based on the preponderance of the evidence. Moreover, the Supreme Court's decision in *Apprendi* is limited to factual findings that increase a statutory maximum penalty, and it has no bearing on forfeiture determinations.

The district court initially noted that all circuits to consider the question have held that criminal forfeiture is determined by the preponderance of the evidence (1 R. 90 at 9 n.6/SG RE 9 at 9 n.6). See *United States* v. *Voigt*, 89 F.3d 1050, 1084 (3d Cir.) (forfeiture under Section 982(a)(1)), cert. denied, 519 U.S. 1047 (1996); *United States* v. *Bieri*, 21 F.3d 819, 822 (8th Cir. 1994) (preponderance standard for Section 853); *United States* v. *Smith*, 966 F.2d 1045, 1052 (6th Cir. 1992) (same); *United States* v. *Herrero*, 893 F.2d 1512, 1542 (7th Cir.) (same), cert. denied, 496 U.S. 927 (1990); *United States* v. *Hernandez-Escarsega*, 886 F.2d 1560, 1577 (9th Cir. 1989) (same), cert. denied, 497 U.S. 1003 (1990). The district court further noted dicta in this circuit's opinion of *United States* v. *Cauble*, 706 F.2d 1322, 1347-1348 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984), that suggested the possible imposition of a higher standard. In *Cauble*, 706 F.2d at 1347, this Court noted, without comment, the district court's instruction on

forfeiture by proof beyond a reasonable doubt. There is no indication that the defendant challenged this aspect of the instruction. The district court followed the majority rule.

Nothing in *Apprendi* changes the rule that forfeiture is constitutional when it is based on the preponderance of the evidence. See *United States* v. *Vera*, 278 F.3d 672 (7th Cir.), cert. denied, 122 S. Ct. 2372 (2002). *Apprendi* held that, as a matter of constitutional law, "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the *prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). Because the New Jersey statute at issue in *Apprendi* created a second mens rea element, exposing the defendant to greater punishment if he selected his victims with a purpose to intimidate them on account of their race, it was "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Id*. at 494 n.19. In *United States* v. *Harris*, 122 S. Ct. 2406, 2414-2418 (2002), the Court reaffirmed *Apprendi*'s limited ruling and held that *Apprendi* has no bearing on factual determinations that increase a statutory *minimum* penalty. The Court distinguished facts that expose a defendant to a penalty exceeding the statutory maximum covered by the verdict (*e.g.*, *Apprendi*) from *Harris*, where the jury's verdict *alone* authorized the court to impose the mandatory minimum sentence. *Id*. at 2414. Thus, not every fact that

relates to a defendant's sentence must be established beyond a reasonable doubt. See *ibid*.[13]

Every circuit to consider the question has held that forfeiture does not fall within *Apprendi*'s ambit and, therefore, forfeiture remains to be determined by the preponderance of the evidence. See *United States* v. *Najjar*, 300 F.3d 466, 485-486 (4th Cir.), cert. denied, No. 02-7328, 2002 WL 31608243 (Dec. 16, 2002); *United States* v. *Vera*, 278 F.3d at 672-673; *United States* v. *Cabeza*, 258 F.3d 1256, 1257 (11th Cir. 2001); *United States* v. *Corrado*, 227 F.3d 543, 550-551 (6th Cir.), cert. denied, 123 S. Ct. 106 (2002). As the Seventh Circuit explained, forfeiture "does not come within *Apprendi*'s rule, because there is no 'prescribed statutory maximum' and no risk that the defendant has been convicted *de facto* of a more serious offense." *Vera*, 278 F.3d 673. Criminal forfeiture is not the functional equivalent of an element of a greater offense. Forfeiture, which was pled in this indictment (1R. 3/SG RE 2 at 14-15), is part of the statutorily-authorized sentence for the Gasanovs' convictions of conspiracy to violate 18 U.S.C. 1546 and

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[13] In *Libretti* v. *United States*, 516 U.S. 29, 41 (1995), the Court held that forfeiture was not a substantive offense. "Congress plainly intended forfeiture of assets to operate as punishment for criminal conduct in violation of the federal drug and racketeering laws, not as a separate substantive offense." *Id*. at 39.

The Supreme Court's approval of Rule 32.2, effective December 1, 2000, further reflects the Court's classification of forfeiture as one aspect of a defendant's sentence. Rule 32.2(a) provides that the indictment must give defendant notice that the Government seeks forfeiture "as part of any sentence."

violations of 8 U.S.C. 1324(a); it did not increase the maximum penalty for these crimes (See 3 R. 403-422). Cf. *Corrado*, 227 F.3d at 550 (notice under the indictment of forfeiture upon conviction of specified crimes is "an entirely different circumstance from the situation in *Apprendi*"). "There is no requirement under *Apprendi* * * * that the jury pass upon the extent of a forfeiture." *Ibid.*

Finally, the Gasanovs make a conclusory assertion that because criminal forfeiture is subject to review under the Eighth Amendment, it should fall within the rubric of *Apprendi* and, therefore, must be based on proof beyond a reasonable doubt. The mere fact that forfeiture is subject to one constitutional limitation does not mean it is subject to all constitutional principles. Moreover, the Eighth Amendment's standard of what constitutes an excessive fine is distinct from the principles underlying *Apprendi*. Cf. *United States* v. *Bajakajian*, 524 U.S. 321 (1998). The test of whether a fine is excessive is whether the punishment is proportional to the "gravity of the offense." *Id.* at 334; see *id.* at 333-337. The Court rejected "strict proportionality," and "adopt[ed] the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents." *Id.* at 336. This determination is based primarily on two factors: the deference due to a legislature's determination of the scope of punishment in the first instance, and a court's "inherently imprecise" assessment of a crime's "gravity." *Ibid.* In sum, the issues and analysis associated with excessive fines are distinguishable from those relevant to *Apprendi*. Accordingly, the district court's

findings for forfeiture based on the preponderance of the evidence should be affirmed.

V

AMPLE EVIDENCE SUPPORTED THE GASANOVS' SENTENCE FOR CONSPIRACY TO VIOLATE THE HUMAN TRAFFICKING LAWS

The Gasanovs assert (SG Br. 33-36) that there is insufficient evidence to support their sentence under Count One based on U.S. Sentencing Guideline (U.S.S.G. or Guideline) 2H4.1(a)(2) (2001).[14] The Gasanovs' claim is without merit since they ignore the methodology and plain terms of the applicable Guideline for assessing their sentence, and therefore misstate the elements of proof for this aspect of their sentence.

Pursuant to U.S.S.G. 1B1.2(d), when a defendant is convicted of a multi-object conspiracy, the conviction should be "treated as if the defendant had been convicted on a separate count for conspiracy for each offense that the defendant conspired to commit." The Application Notes explain that in the instance of a general verdict, as here, this provision only should be applied to a conspiracy charge for a specific object offense "if the court, were it sitting as a trier of fact, would convict the defendant of *conspiring* to commit that object offense." U.S.S.G. 1B1.2(d), comment. 4 (emphasis added). This Court applies a reasonable doubt standard to that determination. See *United States* v. *Manges*, 110 F.3d 1162

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[14] Gasanova adopts (Br. 38) the arguments presented by Gasanov on this issue. Accordingly, there are only citations to Gasanov's brief.

(5th Cir. 1997), cert. denied, 523 U.S. 1106 (1998); *United States* v. *Fisher*, 22 F.3d 574, 577 (5th Cir.), cert. denied, 513 U.S. 1008 (1994). While specific findings may be preferred, findings to support a sentence may be "express or implied." *Manges*, 110 F.3d at 1179; *Fischer*, 22 F.3d at 577. Findings are implied when there is ample evidence to support the sentence. See *ibid*.

Under U.S.S.G. 1B1.2(d), the court will calculate an offense level based on the guideline for the substantive offense. The factual determination under Guideline 1B1.2(d), however, is whether there is evidence of a *conspiracy* to commit that substantive offense. See *United States* v. *Jackson*, 167 F.3d 1280, 1285-1286 (9th Cir.) (acquittal of a substantive offense does not bar a court from finding a conspiracy to commit the same object offense for purposes of sentencing under U.S.S.G. 1B1.2(d)), cert. denied, 528 U.S. 1012 (1999); *United States* v. *Kimmons*, 965 F.2d 1001 (11th Cir. 1992), vacated on other grounds, 508 U.S. 902 (1993). In *Kimmons*, 965 F.2d at 1006-1007, the court affirmed the district court's sentence for conspiracy to rob three armored trucks when two robberies "did not go down," and the only evidence for these two was that the defendants had followed and monitored trucks' movements on a few occasions.

Count One charged the Gasanovs with conspiracy, under 18 U.S.C. 371, to commit three offenses: a) to obtain and use non-immigrant visas through false claims and statements, in violation of 18 U.S.C. 1546; b) to give a false statement, under oath, and present applications with false statements in violation of 18 U.S.C. 1546; and c) to "knowingly remove, conceal, confiscate and possess" passports and

other immigration documents, with intent to violate 18 U.S.C. 1581 (peonage), 1589 (forced labor), and 1590 (trafficking in respect to peonage, involuntary servitude and forced labor), and to "attempt to prevent and restrict, without lawful authority, certain persons' liberty to move and travel," to retain control of labor and services, in violation of 18 U.S.C. 1592. Because the jury issued a general verdict, the Gasanovs' sentences were appropriately calculated with reference to U.S. Sentencing Guideline 1B1.2(d); for offense (c), Guideline 2H4.1 determined the base offense level.

The district court was required to find an *agreement* between the Gasanovs to confiscate or take possession of a passport or immigration documents for the three women in order to force their labor and services, and one overt act in furtherance of that agreement. See *Jackson*, 167 F.3d at 1285-1286; *Kimmons*, 965 F.2d at 1006-1007; see also *United States* v. *Onyiego*, 286 F.3d 249, 254 (5th Cir. 2002) (to prove a violation of 18 U.S.C. 371, the government must show "(1) an agreement between two or more persons (2) to commit the underlying crimes and (3) an overt act committed by one of the conspirators in furtherance of the agreement."), cert. denied, 123 S. Ct. 254 (2002); U.S.S.G. 1B1.2(d). While ignored by the Gasanovs, the elements of the crime of conspiracy under 18 U.S.C. 371 are significantly and substantively different from the elements of the substantive offense. See *United States* v. *Prince*, 868 F.2d 1379, 1386 (5th Cir.), cert. denied, 493 U.S. 932 (1989).

At sentencing (12 R. 4-11, 13-16) and now (SG Br. 33-35), the Gasanovs assert that a sentence under Guideline 1B1.2(d) requires findings that they committed a substantive violation of 18 U.S.C. 1592, and that there is insufficient evidence to prove that violation.[15] The United States asserted (12 R. 11-13), as it continues here, that the Court need only find a conspiracy to violate Section 1592, and that there was ample evidence of an agreement and overt acts to support the court's findings. At the end of the hearing, the court stated, "[Counsel for Gasanov], I'm overruling your objection. I find a violation of 1592 beyond a reasonable doubt" (12 R. 16-17). Given the nature of the Gasanovs' claims and his rejection of their arguments, and the government's assertion that the appropriate standard of proof was conspiracy, the court's ruling, albeit inartful, includes the findings of a conspiracy to violate 18 U.S.C. 1592. Cf. *Fisher*, 22 F.3d at 577 (even without specific "beyond a reasonable doubt" finding as to one drug, and no finding as to second drug, ample evidence supported findings of conspiracy to traffic in narcotics to uphold sentence under 1B1.2(d)).

Even without cataloging all of the evidence to support the Gasanovs' actions in furtherance of the conspiracy to violate Section 1592, the evidence is overwhelming. The Gasanovs had a concerted plan to use falsely obtained visas,

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[15] Specifically, the Gasanovs argue (SG Br. 34-35) that they did not violate 18 U.S.C. 1592 since they never held Ms. Ikmatova's documents; that Ms. Romanova voluntarily gave her documents as security for a promissory note; and that while they held Ms. Sabirova's documents for a period of time, that act alone did not violate Section 1592.

false promises, threats of harm to family members, possession of passports, and other methods to coerce and perpetuate the victims' labors as topless dancers for their benefit. The Gasanovs imposed a restrictive lifestyle that perpetuated the women's dependence on them; they did not speak, write, or read English when they came to the United States; Ms. Romanova and Ms. Ikmatova lived in the Gasanovs' home and had minimal contact with any one else; they had no independent access to money as it was all turned over to Gasanov on a nightly basis; and they had no means to pursue other employment. The extent to which this plan was effectuated provides overwhelming instances of overt acts. Notably, the Gasanovs have not asserted, and cannot successfully claim, that this evidence is insufficient to support a *conspiracy* to violate 18 U.S.C. 1592. Accordingly, their sentence under Count One, Offense C was based appropriately on Guidelines 1B1.2(d) and 2H4.1(a)(2), and should be affirmed.

CONCLUSION

For the above reasons, this Court should affirm the Gasanovs' respective convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I certify that the foregoing Brief For the United States As Appellee complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 13,871 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

December 20, 2002

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2002, two copies of the foregoing Brief For The United States As Appellee, and a diskette containing same, were served by Federal Express, overnight mail, on:

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