No. 08-13124

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MAUDE PAULIN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

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United States v. Maude Paulin, Case No. 08-13124-FF
United States's *Amended* Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant to 11th Cir. R. 26.1-2(f), we respectfully amend our previously filed Certificate of Interested Persons and Corporate Disclosure Statement. While there are no deletions or corrections, there is an addition; therefore, in accordance with 11th Cir. R. 26.1-2(f)(2), the new entry appears in bold. In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned counsel certify that this is a complete list of all persons and entities known to have an interest in the outcome of this case:

Acosta, The Honorable R. Alexander

Becker, Grace Chung

Celestin, Simone

Chung, Edward K.

D'Amitie orphanage

Dansoh, Richard O.

DeFabio, Joel

Dubé, Hon. Robert L.

Fenn, Leonard Paul

Gonzalez, The Honorable Jose A.

Gross, Mark L.

Houlihan, Raymond D'Arsey, III

King, Loretta

Lenard, The Honorable Joan A.

Lewis, Guy A.

McAliley, Hon. Chris M.

Moore, Michael G.

O'Daniel, Cyra Cay

Palermo, Hon. Peter R.

Paulin, Maude

Paulin, Saintfort

Schultz, Anne R.

Smachetti, Emily M.

Smith, Jan Christopher, II

Stamm, Edward N.

Stevens, Karen L.

Tantillo, Brent

Tein, Michael R

Telasco, Claire

Theodore, Evelyn

Torres, Hon. Edwin G.

Walkins, Arimentha

Williams, Kathleen M.

s/ Karen L. Stevens
KAREN L. STEVENS
Attorney

STATEMENT REGARDING ORAL ARGUMENT

The United States of America has no objection to the defendant's request for oral argument.

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IN THE UNITED STATES COURT OF APPEALS
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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———————————

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. The district court entered judgment on May 20, 2008, ER. 159,[1] and defendant filed a timely notice of appeal on May 28, 2008, R. 163. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

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[1] Citations to the record in the district court are denoted "R." Citations to the exhibits admitted at trial by the district court are denoted "Exh." Citations to Paulin's Brief as Appellant are denoted "Br." Citations to Paulin's Record Excerpts are denoted "ER."

STATEMENT OF THE ISSUES

1. Did Paulin's conviction for forced labor on Count Two violate her right to Due Process under the Fifth Amendment and constitute plain error?

2. Did the district court constructively amend the conspiracy charge in Count One of the indictment in violation of the Fifth Amendment?

3. Did the district court abuse its discretion by refusing to instruct the jury that the government must prove that the defendant was not motivated by affection or charity in order to convict on Count Three, harboring an alien for private financial gain?

STATEMENT OF THE CASE

1. Course Of Proceedings And Disposition Below

This case arose from defendant Maude Paulin's treatment of Simone Celestin, a young girl Paulin brought to Miami from Haiti in August 1999. A grand jury returned a three-count indictment against Paulin and co-defendants Evelyn Theodore, Paulin's mother, Claire Telasco, Paulin's sister, and Saintfort Paulin, Paulin's ex-husband. ER. 3. Count One charged Paulin, Theodore, and Telasco with violating 18 U.S.C. 241 by conspiring to injure, threaten, and intimidate Celestin in the free exercise of her right to be free from slavery and involuntary servitude under the Thirteenth Amendment. ER. 3 at 1-4. Count Two charged Paulin and Theodore with obtaining Celestin's labor and services through threats of serious harm or physical restraint or abuse of legal process, in violation

of 18 U.S.C. 1589 and 18 U.S.C. 2. ER. 3 at 4-5. Count Three charged Paulin, Theodore, and Saintfort Paulin with harboring an illegal alien for commercial advantage and private financial gain in violation of 8 U.S.C. 1324(a)(1)(A)(iii) and 18 U.S.C. 2. ER. 3 at 5.

Paulin, Theodore, Telasco and Saintfort Paulin were tried together before a jury. After six days at trial, and approximately five hours of deliberation, R. 202 at 64, the jury found Paulin and Theodore guilty on all three counts, R. 202 at 64-66. Saintfort Paulin and Theodore were convicted of a lesser included charge on Count Three. Telasco was acquitted. R. 202 at 64-68.

On May 20, 2008, Paulin was sentenced to 87 months of imprisonment followed by three years of supervised release. ER. 159 at 2-3. The court ordered restitution to Celestin in the amount of $162,765, joint and several with Theodore. ER. 159 at 5.

Paulin appealed. Paulin entered federal custody on July 30, 2008. Br. 5. Theodore has not yet been sentenced. R. 193; R. 207.

2. Statement Of Facts

A. The Government's Proof

1. Paulin Brings Celestin to Miami From Haiti

Defendant Maude Paulin (Paulin) was born in Haiti. She lived in Miami with her husband, Saintfort Paulin, and her daughter, Erica Paulin from at least 1983. Exh. 1, Petition for Dissolution of Marriage at 2. Paulin's parents, Diomede

and Evelyn Theodore (Theodore), owned and operated an orphanage in Haiti. R. 195 at 71; R. 199 at 8.

Simone Celestin testified that she was born in a village in Haiti in 1985. R. 199 at 4-5. When she was five years old, Celestin was taken to the Theodore's orphanage, where she lived for five years. R. 199 at 5, 8, 13. For the next two years, Celestin, along with four or five other children, lived with Theodore at her home in Haiti. R. 199 at 18-19, 21. The children attended school sporadically. Theodore assigned them heavy chores. R. 199 at 19-20. The children fetched water from the neighborhood well and climbed a ladder to Theodore's roof to fill the water tank. Theodore kept animals in the yard at night and ordered the children to clean the yard in the morning. R. 199 at 20. The children lived on the bottom floor of Theodore's house and did not have their own beds. R. 199 at 21-22. When the children did not complete their chores, Theodore slapped and hit them with her hands and anything that was handy and kept them out of school. R. 199 at 22-23.

Celestin next went to live with the family of Paulin's sister Magalie in Haiti for approximately a year and half. R. 201 at 40. While living there, Celestin was treated like Magalie's son, Kareem Jeudy, who was a few years younger than Celestin. Magalie's family had a maid, a nanny, and a gardener to do chores and take care of the house. Celestin had her own room, attended a French school, and had chores similar to Kareem's. R. 201 at 41-43.

In 1999, when Celestin was fourteen years old, Maude and Saintfort Paulin began the process to adopt a child. The Paulins made arrangements for Celestin to come to Miami to help care for the baby. R. 195 at 61-63; R. 199 at 25-26. At some point, the Paulins stopped pursuing the adoption, but they still brought Celestin to the United States. R. 195 at 69-70. Paulin arranged for her friend Guerda, who worked for an airline, to bring Celestin to the United States. R. 195 at 63-64; R. 198 at 221; R. 199 at 26. Celestin was first taken to the Dominican Republic and then flew to Germany, where she lived for two months. R. 199 at 26. Celestin then flew with Guerda to Miami. R. 199 at 27. Saintfort Paulin met her at the Miami airport on August 21, 1999. R. 198 at 23, R. 199 at 28. Saintfort Paulin set her up in a guest room in the Paulin home and outlined her chores. R. 199 at 28. Guerda kept Celestin's passport. R. 200 at 33-34.

2. Celestin's Life With The Paulins

A few days after Celestin arrived in Miami, Maude Paulin returned from Haiti. Paulin told Celestin that she could not stay in the guest room and that she smelled. Paulin moved her to a sleeping bag on the dining room floor. R. 199 at 28-29. Celestin's belongings were moved to the garage. R. 199 at 28. Paulin gave Celestin a much longer list of chores to do. R. 199 at 29.

For the next six years, Celestin worked for approximately fifteen hours a day, seven days a week, cleaning, cooking, and doing other household chores in the Paulin home. On the weekends, she often worked in the homes of Paulin's

sister Claire Telasco or other friends. R. 196 at 79-81; R. 199 at 37-41. For example, Marie Jo Sam, a close friend of the Paulin family, testified that she stayed at the Paulin's home for about a month in 2001. R. 197 at 68-69. Sam testified that during her stay, Celestin got up at 5 a.m. to make breakfast for the family and to clean the kitchen. While the Paulins went to work and their daughter Erica went to school, Celestin remained at the house, cleaning, gardening, and doing other chores. R. 195 at 67, 73-74.

During Sam's stay, Celestin slept on the floor of the living room. R. 195 at 83. Celestin wore old clothes that had been donated for children at the Theodore's orphanage. R. 195 at 83; R. 199 at 30. Celestin was not allowed to eat with the family, to attend school, or to socialize with people outside of the family. R. 195 at 86-87, 89-90. She was allowed out only to attend church services with Theodore, who had moved to Miami in 2000 and lived in the Paulin home. R. 195 at 54, 73-74, 87-88. Sam also testified that Paulin made Celestin sleep in the garage when Maude's friends came over so that those friends would not see Celestin and ask questions about her. R. 195 at 90.

Sam testified that when Paulin and Theodore were not satisfied with Celestin's work, they would push, shove, and slap her. R. 195 at 80-82. Paulin also forced Celestin to wash herself outside in the yard with a bucket and a hose. R. 195 at 83-84. Sam testified that when Celestin slept past 5 a.m., Theodore would awaken her loudly, sometimes pushing her with a broom. R. 195 at 75.

Sam testified that on one occasion in 2001, she saw Theodore hit Celestin because Celestin ate some of the food she was cooking for the family without asking permission. R. 195 at 80-81. Sam also testified that she saw Paulin slap Celestin when Celestin rebelled or talked back to her. R. 195 at 82.

Sam heard Paulin and Theodore tell Celestin that if Celestin refused to do what she was asked or tried to run away, she would be arrested by the police and sent back to Haiti. R. 195 at 82-83, 89. Sam testified that on one occasion before her 2001 stay, Theodore referred to Celestin as "her property" and objected when Sam took Celestin to her home for a weekend visit. R. 195 at 72-73.

There was a difference of two years in age between Paulin's daughter Erica and Celestin. R. 195 at 87. Sam and Celestin testified that Erica attended school in Miami, R. 195 at 86; R. 199 at 50, had her own room, R. 195 at 83; R. 199 at 50, received new clothes, R. 199 at 50, and was allowed to socialize with friends, R. 195 at 90. Erica did not have to perform household chores and was not shoved and slapped when she overslept or disappointed her parents. R. 195 at 86-88; R. 199 at 50-51.

Sam testified that during her stay in 2001, Saintfort Paulin and Paulin argued frequently about Paulin's treatment of Celestin. Saintfort told Paulin that she should treat Celestin the same way she treated Erica, because Celestin was a child and not a maid. R. 195 at 92. Paulin eventually stopped beating Celestin in front of Saintfort Paulin, but continued to do so when he was not at home. R. 199 at 54.

Saintfort Paulin and Maude Paulin separated in 2001, and Saintfort Paulin moved out of the house. R. 199 at 219.

Sam testified that she continued to visit Maude Paulin at her home between 2002 and 2004, sometimes spending the night. Sam testified that between 2002 and 2004, Celestin's chores, living conditions, and treatment by Paulin and Theodore were virtually the same as what Sam witnessed when she stayed with the Paulins in 2001. R. 195 at 99-102.

Celestin testified in detail about her life with the Paulins. Her testimony was consistent with Sam's testimony. Celestin testified that every day, she woke up at 5 a.m. to make the Paulins breakfast. R. 199 at 40. After the Paulins left for work and school, Celestin had to make the beds and clean and vacuum the floors. She had to clean the bathroom floors on her hands and knees with a towel, clean the walls with a brush, and clean the mirrors and light fixtures. R. 199 at 38-39, 43. Celestin also had to clean, weed, and water the yard and patio, and bathe the Paulins' dog. R. 199 at 39-40. Celestin testified that she did not eat with the Paulins, but rather ate standing in the kitchen or on the patio. R. 199 at 41.

According to Celestin, after Theodore came to live with the Paulins, if Celestin did not complete her chores, Paulin would beat her, using her hands, a broom, or a shoe. R. 199 at 45. Theodore would beat Celestin using her hands, a broom, or a pot from the kitchen. R. 199 at 45-46; R. 197 at 75.

Celestin testified that in 2004, she worked in the home and yard of a Jamaican woman who paid her ten dollars an hour. R. 199 at 72. Celestin had to give the money she earned to Paulin. R. 199 at 73. Celestin also testified that in November 2004, Theodore beat her because Celestin had not made Theodore's bed. R. 199 at 82-84. After that beating, Celestin lost hope of ever escaping from the Paulin home. She testified that she had no money, no papers, and believed she had no family in Haiti. R. 199 at 73-74. Celestin tried to kill herself by drinking motor oil, but a relative of Paulin's stopped her. R. 199 at 82-83.

Another friend of Paulin's, Marlene Montperios, testified that she stayed at Paulin's home for six weeks in 2004. R. 200 at 150, 160. Montperios testified that Celestin slept on the floor of the living room and woke up at 5 a.m. to cook breakfast and clean. R. 200 at 162-163. Montperios testified that Celestin did not attend school, R. 200 at 158, and continued to wear clothes taken from donations to the orphanage, R. 200 at 169. Montperios heard Paulin and Theodore threaten Celestin that they would send her back to Haiti. Montperios testified that she saw Paulin and Theodore push and shove Celestin, and that on more than one occasion she heard physical altercations between Theodore and Celestin, with sounds of slapping and shoving. R. 200 at 181-183. Montperios also saw scratches on Celestin's face. Paulin told Montperios that Theodore had scratched Celestin for "being fresh." R. 200 at 184.

In 2005, Paulin sent Celestin to stay with Sam for two weeks because Sam had undergone surgery and needed help at home. R. 195 at 102-103. Sam noticed that Celestin was thin and had many bruises. R. 195 at 102-103. Celestin spoke to Sam about her situation and her despair. R. 195 at 103. Sam and a friend, Dr. Jerome, decided to help Celestin escape. R. 197 at 204-205. Celestin sent Jerome a copy of her birth certificate, which she found in Paulin's drawer, R. 199 at 80-81, and Jerome obtained a Haitian passport for Celestin, R. 198 at 123-124.

In June 2005, Celestin left the Paulin home and was picked up by Sam and Jerome at a train station. R. 197 at 111; R. 199 at 86. Jerome took her to a hospital to evaluate a bruise on her cheek, which Celestin testified she received when Theodore hit her with a pestle. R. 199 at 86-87. Celestin stayed with Jerome for several days and then went to live with a family he knew for a few weeks. R. 198 at 126-129. Jerome also took Celestin to meet with the Florida Immigrant Advocacy Center, an organization that helps immigrants. R. 200 at 170. That organization arranged for her to live in a shelter. R. 199 at 139.

B. The Defense Case

Paulin presented testimony from four witnesses in her defense. Alexys Garcia, a friend of Erica Paulin, testified that she saw Celestin when she visited Erica at the Paulin home and that Celestin watched television with them and was free to get food from the refrigerator. R. 201 at 28-30. Kareem Jeudy, Paulin's nephew and Magalie's son, testified that he visited Paulin a few times a year, most

often during his summer vacations. Jeudy, who lived in New York, testified that he kept in touch with Celestin on the phone during the school year, R. 201 at 45, 61, that Celestin woke up at the same time he did when he visited, R. 201 at 46-47, and that Celestin told him she had been to the mall, to the beach, to the movies and to McDonalds, R. 201 at 46. Jeudy testified that Paulin did most of the chores in the house, and that Paulin and Theodore left Celestin home schooling work to do because she could not attend school. R. 201 at 48.

Marlande Lazard-Louchin, Paulin's third cousin, testified that she visited Paulin's home two or three times a week after 2001 and sometimes spent the night. R. 201 at 101-102. Lazard testified that Celestin watched television, ate with the family, and helped Paulin and others do chores around the house, but no more than anyone else. R. 201 at 103-104. Lazard testified that she took Celestin to the mall with her daughter regularly, R. 201 at 105, and that Celestin was upset with Paulin because Paulin had not paid the $10,000 required to get Celestin papers, R. 201 at 108-109. Lazard testified that she was upset that Paulin had not enrolled Celestin in school and confronted Paulin. R. 201 at 110. Lazard said Celestin told her that Paulin could not enroll Celestin in school because Paulin didn't have Celestin's birth certificate or passport. R. 201 at 108-109. Lazard testified that she asked Celestin about a bruise on Celestin's face, and Celestin told her that a boy Celestin dated had hit her. R. 201 at 114-115. Finally, Antonio Casteneda, an FBI agent who interviewed Celestin during the investigation, testified about discrepancies

between his report on his interview with Celestin and other records and reports. R. 201 at 127-131. Paulin did not testify.

3. Standard Of Review

1. An Ex Post Facto question not raised before the district court is reviewed for plain error. *United States* v. *Miranda*, 197 F.3d 1357, 1358 (11th Cir. 1999) (citing *United States* v. *Hayes*, 40 F.3d 362, 364 (11th Cir. 1994)). To satisfy this standard, a defendant must show that there is "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 467, 117 S. Ct. 1544, 1549 (1997) (quoting *United States* v. *Olano*, 507 U.S. 725, 732, 113 S. Ct. 1770, 1776 (1993), cert. denied, 519 U.S. 981, 117 S. Ct. 303 (1996)). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Hall*, 312 F.3d 1250, 1259 (11th Cir. 2002) (quoting *Olano*, 507 U.S. at 732, 110 S. Ct. at 1776) (other internal quotation marks and citation omitted), cert. denied, 538 U.S. 954, 123 S. Ct. 1646 (2003).

2. "[T]he rule in the Eleventh Circuit is that a jury instruction which results in the constructive amendment of a grand jury indictment is reversible error *per se*." *United States* v. *Peel*, 837 F.2d 975, 979 (11th Cir. 1988).

3. "A district judge's 'refusal to give a requested jury instruction is reviewed for abuse of discretion.'" *United States* v. *Grigsby*, 111 F.3d 806, 814

(11th Cir. 1997) (quoting *United States* v. *Morris*, 20 F.3d 1111, 1114-1115 (11th Cir. 1994)).

SUMMARY OF ARGUMENT

Under the standards enunciated by this Court, Paulin's conviction for forced labor does not violate the Ex Post Facto Clause or her right to Due Process under the Fifth Amendment. Section 1589, the statute at issue, was enacted on October 28, 2000. Count Two of Paulin's indictment charged Paulin with violating Section 1589 from October 29, 2000 through June 2005; it did not charge her with violations before the effective date of the statute. In *United States* v. *Cortez*, this Court held that, even where a defendant was charged with a defective indictment charging pre-enactment conduct, the lack of an instruction to consider only pre-enactment evidence does not require reversal. 757 F.2d 1204 (11th Cir. 1985). Where there is enough evidence of post-enactment violations to remove any suggestion that the jury would not have convicted had an instruction been given, the conviction must be upheld. Here, three witnesses – Sam, Celestin, and Lazard – testified at length about Paulin's abuse of Celestin between 2001 and 2005, a *four and a half year period well after the statute's effective date*. This evidence is sufficient to remove any doubt about the jury's verdict and more than sufficient to satisfy the standard of plain error. Paulin's reliance on a decision in the Second Circuit decided under a different standard thus cannot support her claim.

Paulin's other claims are without merit. Paulin argues that Count One of the indictment was constructively amended in violation of her right to due process. Paulin admits that the district court properly instructed the jury on Count One, making clear that the jury must find either physical or legal coercion to convict Paulin of conspiracy to deprive Celestin of her right to be free of involuntary servitude. Paulin nevertheless claims that the government's opening and closing arguments conflated that standard with the less rigid standard for a conviction under Section 1589, which may be based on psychological coercion. The cases on which Paulin relies, however, found a constructive amendment of an indictment where the district court's *jury instructions*, not the arguments of counsel, "so modif[y] the elements of the offense charged that the defendant may have been convicted on a ground not alleged by the grand jury's indictment." *United States* v. *Peel*, 837 F.2d 975, 979 (11th Cir. 1988). There was no such error in the district court's instructions in this case, which clearly articulated the proper standard for conviction under Count One.

Finally, the district court did not abuse its discretion in refusing to instruct the jury that to convict for harboring an alien for private financial gain, it must find that the defendant did not act out of charity or affection. The cases Paulin cites did not so hold. Rather, they illustrate that evidence of a defendant's affection or good intentions may be considered by the jury, along with other evidence at trial, to determine whether the defendant acted with the purpose of financial gain. The

court allowed Paulin to present testimony that she attempted to enroll Celestin in school, that Celestin was allowed to socialize with her daughter Erica and her nieces and nephews at family events, and that Paulin's father asked her to bring Celestin to the United States because Celestin was one of his favorites. Paulin thus was permitted to present evidence of a non-financial motive for the jury to consider. No more was required.

Accordingly, this Court should affirm the jury verdict.

STATUTORY BACKGROUND

A grand jury indicted Paulin on three counts. ER. 3. Count One charged Paulin, Theodore, and Paulin's sister, Claire Telasco, with violating 18 U.S.C. 241 by conspiring to injure, threaten, and intimidate Celestin in the free exercise of her right to be free from slavery and involuntary servitude under the Thirteenth Amendment. ER. 3 at 2-4. Section 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; * * * They shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. 241. The Thirteenth Amendment provides, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject

to their jurisdiction." U.S. Const. Amend. XIII, § 1. To prove a conspiracy to violate the Thirteenth Amendment, the government must prove that the defendant conspired to compel the victim's labor through the "use or threat of physical restraint or physical injury, or by the use or threat of coercion through the law or the legal process." *United States* v. *Kozminski*, 487 U.S. 931, 952, 108 S. Ct. 2751, 2765 (1988).

Count Two charged Paulin and Theodore with obtaining Celestin's labor or services through threats of serious harm or physical restraint or abuse of legal process, in violation of 18 U.S.C. 1589 and 2. ER. 3 at 4-5. Section 1589 makes it a crime to

> knowingly provide[] or obtain[] the labor or services of a person--
>
> (1) by threats of serious harm to, or physical restraint against, that person or another person;
>
> (2) by means of 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 or physical restraint; or
>
> (3) by means of the abuse or threatened abuse of law or the legal process.

18 U.S.C. 1589 (2005).

Count Three charged Paulin, Theodore, and Saintfort Paulin with harboring

an illegal alien for commercial advantage or private financial gain in violation of 8 U.S.C. 1324(a)(1)(A)(iii). ER. 3 at 5-6. In relevant part, Section 1324(a) provides: "Any person who – * * * 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, * * * such alien in any place, * * * shall be punished as provided in subparagraph (B)." "[I]n the case of a violation * * * in which the offense was done for the purpose of commercial advantage or private financial gain," the penalty is a fine, imprisonment for not more than 10 years, or both. 8 U.S.C. 1324(a)(1)(B)(i).

ARGUMENT

I

PAULIN'S CONVICTION ON COUNT TWO DOES NOT IMPLICATE THE EX POST FACTO OR DUE PROCESS CLAUSES, MUCH LESS CONSTITUTE PLAIN ERROR, BECAUSE THERE WAS AMPLE EVIDENCE THAT THE CONSPIRACY CONTINUED WELL AFTER SECTION 1589'S EFFECTIVE DATE

1. Defendant Paulin contends (Br. 21) that her conviction was improper because the jury was presented with evidence of her abuse of Celestin that may have predated the effective date of 18 U.S.C. 1589. Because Paulin did not raise this issue below, this Court reviews only for plain error. *United States* v. *Miranda*, 197 F.3d 1357, 1358 (11th Cir. 1999) (citing *United States* v. *Hayes*, 40 F.3d 362,

364 (11th Cir. 1994)).

Section 1589 took effect on October 28, 2000, and made it unlawful to obtain the labor or services of another through threats of serious harm of physical restraint, by means of "any scheme, plan, or pattern intended to cause" the victim to believe that she or another person would suffer serious harm or physical restraint if the victim did not perform the labor, or by means of "abuse or threatened abuse" of legal process. 18 U.S.C. 1589 (2005). This statute formed the basis of Count Two of the indictment.

Although Paulin addresses the issue in terms of an "Ex Post Facto" violation, the record is clear that the government never contended in this case that the jury should convict the defendant on anything but actions that occurred after the October 28, 2000, effective date of the Act. Indeed, the indictment specifically charged violations beginning on October 29, 2000, one day after the effective date. ER. 3 at 4. Accordingly, this is not a case in which the government contended that pre-Act evidence could be relied upon for a conviction.

The Ex Post Facto Clause "itself only prohibits Congress from enacting legislation retroactively punishing acts which were innocent when done. The principle embodied in the clause is, however, encompassed in the concept of due process and is therefore a limitation on the power of the other two branches of

government as well." *United States* v. *Brown*, 555 F.2d 407, 419 (5th Cir. 1977)[2] (citing *Marks* v. *United States*, 430 U.S. 188, 97 S. Ct. 990 (1977)), cert. denied, 435 U.S. 904, 98 S. Ct. 1448 (1978). "[T]he principle on which the clause is based [–] the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties [–] is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment." *Brown*, 555 F.2d at 419 (internal citation omitted).

Section 1589 was enacted as part of the Trafficking Victims Protection Act, Pub. L. No. 106-386, Div. A., §112(a)(2), 114 Stat. 1486, on October 28, 2000. Prior to the enactment of Section 1589, the crime of holding someone in involuntary servitude required proof of "use or threatened use of physical or legal coercion." *United States* v. *Kozminski*, 487 U.S. 931, 944, 108 S. Ct. 2751, 2761 (1988). In *Kozminski,* the Supreme Court held that the Thirteenth Amendment did not encompass "psychological coercion." In enacting Section 1589, Congress addressed the Court's holding in *Kozminski* by providing that psychological coercion is sufficient to hold a victim in "forced labor." See 22 U.S.C.

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[2] Decisions of the former Fifth Circuit handed down before October 1, 1981 are binding precedent in the 11th Circuit. *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

7101(b)(13). Evidence of such psychological coercion was a critical part of the evidence presented in this case.

2. Paulin contends (Br. 22-23), without citation to any authority in this Circuit, that her conviction violated her Due Process rights and the principles underlying the Ex Post Facto Clause because the district court did not instruct the jury about the statute's effective date and therefore her conviction "was possibly based exclusively on pre-October 28, 2000 conduct." This argument is contradicted both by this Court's precedents and the record in this case.

This Court has held that, even where an indictment defectively charges a defendant with pre-enactment conduct – a defect more significant than that alleged in this case – the lack of a jury instruction directing the jury to consider only post-enactment evidence does not require reversal. In *United States* v. *Cortez*, 757 F.2d 1204 (11th Cir.), cert. denied, 474 U.S. 945, 106 S. Ct. 310 (1985), this Court upheld a conviction for conspiracy to smuggle narcotics in violation of 21 U.S.C. 955a(d)(1), even though the indictment in that case charged that the conspiracy began *before* the enactment of the conspiracy statute. *Ibid*. The evidence introduced at trial in that case showed that the acts of the conspirators had continued until early 1981, "long after [the statute's] September 1980 enactment." *Id.* at 1206. This Court affirmed the conviction, holding that reversal was not

warranted because there was evidence that "[e]nough activities of the conspirators continued after [the statute's] enactment so that even if the jury had been instructed by the trial court as to the date of enactment and to consider only activities thereafter, there is no doubt that the jury would have decided the case the same way." *Id.* at 1207.

By contrast, in *Brown*, the former Fifth Circuit reversed a conviction based on a defective indictment where both the significant weight of the evidence came from pre-enactment conduct, and the verdicts of the jury on other counts, made a conviction on the challenged count implausible unless based on pre-enactment actions. In *Brown*, the court held that a RICO conspiracy prosecution violated due process because the RICO conspiracy count in the indictment alleged that the conspiracy was formed before the October 15, 1970, effective date of the conspiracy statute, and also cited as objects of the conspiracy substantive acts of racketeering which allegedly had been committed before the effective date. As in *Cortez*, the jury had not been instructed that it had to find that the defendant was a member of a conspiracy in existence after the effective date of the RICO conspiracy statute. But, unlike *Cortez*, the record in *Brown* indicated that much of the government's proof regarding the conspiracy pertained to the period before, rather than after, the effective date. In those circumstances, where the conviction

necessarily rested substantially on pre-enactment activity, the Court ruled that the defect in the "constitutionally deficient" indictment had not been cured. *Brown*, 555 F.2d at 420-21.

This case, however, easily satisfies the standard in *Cortez*. Here, of course, Paulin's indictment was not defective; Paulin was specifically charged with violating Section 1589 "[b]eginning on or about *October 29, 2000*, and continuing through on or about June 14, 2005." ER. 3 at 4 (emphasis added). The indictment thus specifically charged, and the jury was required to find, that Paulin violated Section 1589 *after* October 28, 2000, the date the statute was enacted. As such, the indictment did not charge a "retroactive" crime.

Any danger that the jury would convict Paulin based solely on pre-enactment evidence was virtually eliminated by the specific dates in the indictment and by the district court's instructions directing the jury to refer to the indictment itself during its deliberations. While Paulin did not request an instruction explaining the enactment date of Section 1589, the district court did give a general instruction on the dates in the indictment, stating "[Y]ou will note that the Indictment charges that the offense was committed 'on or about' a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that

the offense was committed on a date reasonably near the date alleged." ER. 202 at 49. Paulin did not object to this instruction.

The district court's instructions, furthermore, repeatedly instructed the jury to consider each count independently, dispelling any risk of confusion of dates between Count One and Count Two. See ER. 202 at 36-37 (noting jury will have indictment during its deliberations); ER. 202 at 42, 49-50 (referring to the indictment to define terms in the elements of each offense). Near the conclusion of its instructions, before going over the verdict form, the district court reminded the jury of the importance of the counts as outlined in the Indictment:

> A separate crime or offense is charged against one or more of the defendants in each count of the Indictment. Each charge, and the evidence pertaining to it, should be considered separately. * * * I caution you, members of the jury, that you are here to determine from the evidence in this case whether each defendant is guilty or not guilty. Each defendant is on trial only for the specific offense alleged in the Indictment.

ER. 202 at 50.

An additional factor demonstrating that the conviction should be upheld under *Cortez* is the abundant evidence, as outlined supra pp. 6-10, that Paulin's victimization of Celestin continued until June 2005, *nearly five years* after the enactment of Section 1589. Several witnesses, including Celestin, Sam, and Lazard, testified about Paulin's unlawful treatment of Celestin between 2001 and

2005. The evidence showed that during the period between Sam's 2001 stay with the Paulins and Celestin's escape in 2005, Celestin woke up at 5 a.m. everyday to cook, clean, weed and garden at the Paulin home. She was not allowed to attend school or socialize outside of the house. She suffered beatings, and even more threats of beatings and threats that she would be returned to Haiti, from Paulin and Theodore during this long period of time.

In addition to that evidence, Chandra Burgess, a former child welfare worker, testified that on December 20, 2000, her office received an anonymous complaint alleging that the Paulins had a child who was forced to be a maid at their home, did not attend school, was not allowed out of the home and who was afraid of Maude Paulin. R. 200 at 20, 24. Burgess testified that she went to the Paulin home to investigate on December 21, 2000, and spoke to Celestin. R. 200 at 24, 29. Celestin testified that Paulin and Theodore told her that if the social worker found out Celestin did not have any papers, she would be put in jail and sent back to Haiti. Celestin followed their instructions and lied to Burgess during that visit, telling Burgess that she had her own bed, was treated well, and went to school. R. 199 at 55-56.

Therefore, given the abundance of evidence in this record of conduct clearly occurring after the effective date of the statute, there quite simply is no doubt the

jury would have decided the case the same way even if it had received, in addition to the directions to follow the date-specific charges in the indictment, a specific instruction to consider only post-enactment evidence.

Paulin points (Br. 18-21) to statements by counsel during the government's closing arguments that Paulin forced Celestin to work in her home for six years, from the time that Paulin brought her to Miami in 1999 until Celestin escaped in 2005. Citing the Second Circuit's decision in *United States* v. *Marcus*, 538 F.3d 97, 103 (2d Cir. 2008), Paulin claims (Br. 22) that these statements create a "possibility" that Paulin was convicted based solely on pre-enactment conduct.

This argument fails on several grounds. First, while Paulin contends that all the evidence she cites on pages 16-18 of her brief occurred before the effective date of the Act, that is simply not true. As summarized above, much of this evidence described conduct that either occurred entirely after the effective date of the Act, or may have begun before the effective date of the act, but clearly continued well after the effective date. After all, the testimony of Sam and of Montperios was based on visits each had with Paulin after October 28, 2000.

Second, the standard set by this Court in *Cortez*, not the "possibility" standard cited in *Marcus*, is controlling authority in this Circuit. The record in this case is more than sufficient to satisfy that standard, which calls for an inquiry into

whether the jury would have reached the same result if more specifically instructed to consider only evidence after the effective date. *Cortez*, 757 F.2d at 1207. In this case, where substantial evidence pertained to acts either entirely after the effective date or continuing well after the effective date, and more of the evidence specifically described actions that occurred after October 28, 2000, Paulin's argument is without merit.

Third, the district court specifically instructed the jury that the arguments of counsel are not evidence and that the jury should follow the court's instructions in determining its verdict. See, *e.g.*, R. 201 at 158 ("As you know, what the lawyers will say to you now in the course of closing arguments is not the evidence in the case."); ER. 202 at 33 ("Remember that anything the lawyers say to you is not the evidence in the case."). Finally, the jury was given a copy of the indictment for reference during its deliberations. ER. 202 at 37. The indictment specifically charged Paulin with actions occurring after October 28, 2000, further ensuring that its verdict conformed to those requirements.

Certainly, Paulin has not established plain error. "'Plain' is synonymous with 'clear' or, equivalently, 'obvious.' Accordingly, the Supreme Court has stated that a court of appeals may not correct an error pursuant to Rule 52(b) 'unless the error is clear under current law.'" *United States* v. *Mitchell*, 146 F.3d

1338, 1342 (11th Cir.) (quoting *United States* v. *Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777), cert. denied, 519 U.S. 981, 117 S. Ct. 303 (1996)), cert. denied, 525 U.S. 1031, 119 S. Ct. 571 (1998); *United States* v. *Humphrey*, 164 F.3d 585, 588 (11th Cir. 1999) ("Without precedent directly resolving Humphrey's kind of claim, we conclude the district court's alleged error is not 'obvious' or 'clear under current law.'").

Paulin did not request an instruction about the statute's effective date at trial. Given this Court's precedents in *Cortez* and *Brown*, any alleged error by the district court in failing to include such an instruction on its own initiative would not rise to "clear" or "obvious" error, the second requirement for plain error.

Finally, even if the error were deemed plain, this Court should decline to reverse because Paulin has not satisfied the fourth condition of plain error. "[A]n appellate court may * * * exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Hall*, 312 F.3d 1250, 1259 (11th Cir. 2002) (quoting *Olano*, 507 U.S. at 732, 110 S. Ct. at 1776) (other internal quotation marks and citation omitted), cert. denied, 538 U.S. 954, 123 S. Ct. 1646 (2003). The clear language of the indictment, the clear instructions to refer to the language of the indictment and to consider each charge separately, and the

substantial evidence in the record regarding Paulin's post-enactment treatment of Celestin are easily sufficient to ensure that the jury's verdict was properly based on ample post-enactment evidence. Any asserted error, therefore, does not call the fairness or integrity of the judicial proceedings into question, and this case clearly does not rise to a "manifest miscarriage of justice." *Hall*, 312 F.3d at 1259. Paulin therefore clearly has failed to establish any error, much less satisfy the requirements of establishing plain error.

II

THERE WAS NO CONSTRUCTIVE AMENDMENT OF THE CONSPIRACY CHARGE IN COUNT ONE OF THE INDICTMENT

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. Amend. V. Accordingly, "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone* v. *United States*, 361 U.S. 212, 215-216, 80 S. Ct. 270, 272-273 (1960). "[T]he rule in the Eleventh Circuit is that a jury instruction which results in the constructive amendment of a grand jury indictment is reversible error *per se*." *United States* v. *Peel*, 837 F.2d 975, 979 (11th Cir. 1988).

Paulin contends (Br. 24-25) that while Count One of the indictment charged her with violating 18 U.S.C. 241 by conspiring to deprive Celestin of her

constitutional right to be from involuntary servitude under the Thirteenth Amendment, she was "effectively tried" under 18 U.S.C. 371 for conspiracy to engage in human trafficking and forced labor. Paulin concedes (Br. 26) that the district court properly instructed the jury on the elements required to prove a conspiracy to deprive Celestin of her Thirteenth Amendment rights under Section 241, namely, that "physical or legal coercion was required under Count One." Br. 26; see ER. 202 at 40. But Paulin argues that this instruction was insufficient to clarify the difference between the elements of Count One and Count Two, the charge for forced labor in violation of 18 U.S.C. 1589, again pointing (Br. 25) to the government's statements during its opening and closing arguments. Paulin argues that the government "connected the conspiracy in Count One to the crime in Count Two," referring to "their plan, their scheme, their conspiracy." Br. 25. These statements, she maintains, "collaps[ed] the distinction between conceptually distinct (and historically separated) legal concepts" and amounted to a constructive amendment of Count Two of the indictment. *Ibid*.

None of the cases on which Paulin relies, however, found a constructive amendment based on statements by counsel. Rather, this Court has found a constructive amendment where a *jury instruction* "so modifies the elements of the offense charged that the defendant may have been convicted on a ground not

alleged by the grand jury's indictment." *Peel*, 837 F.2d at 979 (quoting *United States* v. *Lignarolo*, 770 F.2d 971, 981 n.15 (11th Cir. 1985), cert. denied, 476 U.S. 1105, 106 S. Ct. 1948 (1986); *United States* v. *Weissman*, 899 F.2d 1111, 1114 (11th Cir. 1990) (district court's supplemental jury instruction actually amended the charges to allow the jury to convict defendants of a RICO conspiracy other than the one charged by the grand jury in the indictment). Perhaps recognizing this deficit, Paulin argues (Br. 26) that in light of the government's statements, the district court's instruction that "[s]everal of the instructions * * * [you received] regarding count one of the Indictment also apply here." Br. 26 (citing ER. 202 at 44.)

Viewed in context, however, it is clear that the district court's statement did not refer to the standards for coercion pertaining to each of the two counts. After outlining the elements for the forced labor count, the court instructed the jury that

> Several of the instructions I gave you regarding count one of the indictment also apply here. You may consider Simone Celestin's special vulnerability, if any, to determine whether the action of the defendant and any others acting in concert with the defendants were enough to reasonably compel Simone Celestin to work, even if those actions may not have been sufficient to compel a different person to work. * * *
>
> Additionally, it is not a defense to a charge of forced labor that a defendant was freely exercising his or her religious beliefs, or that his or her actions were taken in conformity with his or her own cultural or moral code, or that his or her actions would not be illegal in the country of his or her origin. * * *

> Finally, and again, whether a person is paid a salary or a wage is not determinative of the question of whether that person has been a victim of forced labor.

ER. 202 at 44-45. The district court had given the same instructions on the relevance of payment of wage and the free exercise of religious beliefs after completing its instructions on the elements required for a conviction for the conspiracy charge in Count One. ER. 202 at 40-41. The district court's instructions thus in no way conflated the distinct standards for coercion under the Thirteenth Amendment and Section 1589, and did not effectively amend Count One of the Indictment. Paulin's conviction on Count One should be affirmed.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO INSTRUCT THE JURY THAT THE GOVERNMENT HAD TO PROVE PAULIN DID NOT ACT OUT OF CHARITY

Paulin's third and final argument (Br. 29-30) is that the district court abused its discretion when it refused to instruct the jury that a conviction under 8 U.S.C. 1324(a)(1)(A)(iii) "requires the absence of any motive for charity or affection." The district court denied the request without explanation. ER. 201 at 145-146. Both at trial and in her Brief, Paulin cited *United States* v. *Zheng,* 306 F.3d 1080 (11th Cir. 2002). *Zheng* reversed a district court's grant of a judgment of acquittal

on a charge of harboring aliens for financial gain, ruling that acquittal was not warranted where the government had proven that the defendants provided housing and employment for illegal aliens without any evidence that they did so out of feelings of charity or affection. *Id.* at 1086.

The district court did not abuse its discretion in refusing Paulin's requested instruction. This Court reverses under an abuse of discretion standard when "[it is] left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *United States* v. *Grigsby*, 111 F.3d 806, 814 (11th Cir. 1997) (citation omitted). Paulin's requested instruction stated that the government was required to prove an absence of charity or affection in order to convict the defendants of harboring an alien for financial gain. *Zheng*, however, did not hold that absence of charity is an element of this offense. Rather, *Zheng* suggests that evidence that the defendants acted out of affection and concern for the victim may be presented to the jury as a defense to the element requiring proof that the defendant acted with the purpose of commercial advantage or private financial gain. It is then for the jury to assess the weight and credibility of that evidence and reach a determination on whether the government has met its burden of proof.

That is precisely what happened in this case. As Paulin enumerates in her brief, defendants presented testimony, for example, that Paulin's father asked

Paulin to bring Celestin to the United States to give her a better life, that the Paulins attempted to enroll Celestin in school, and that Celestin was taken to the beach and to a family wedding. Br. 30-32. The jury was able to consider this testimony along with the other evidence in the case.

Paulin's claim (Br. 34) that the court's instructions "glossed over the core of criminality" is belied by the court's instructions. The court instructed the jury that in order to convict, it must conclude beyond a reasonable doubt that the defendants "knew or acted in reckless disregard of the fact that the alien entered or remained in the United States in violation of the law" and that the offense was committed for the purpose of commercial advantage or private financial gain. ER. 202 at 46-47. The jury was able to consider these instructions in light of Paulin's evidence that she acted out of affection, and not for financial gain, and the jury reached a verdict that was supported by the evidence. This result does not create the "substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations" required to find an abuse of discretion. *Grigsby*, 111 F.3d at 814.

CONCLUSION

This Court should affirm district court's judgment finding Paulin guilty of Counts One, Two and Three.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation required by Fed. R. App. P. 32(a)(7)(B). This brief was prepared using WordPerfect 12.0 and contains no more than 8,166 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ Karen L. Stevens
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Date: February 4, 2009

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2009, I electronically filed the BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court using the EDF system.

In addition, I hereby certify that on February 4, 2009, the original and six copies of the BRIEF FOR THE UNITED STATES AS APPELLEE were served by federal express mail on the Clerk of the Court. I also certify that three copies of the foregoing were served by federal express mail on the following:

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