Nos. 08-4757, 08-4758

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

JESUS PEREZ-LAGUNA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS APPELLEE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant Jesus Perez-Laguna on July 24, 2008. JA 33.[1] Perez-Laguna filed a timely notice of appeal. This Court's jurisdiction arises

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[1] "JA __" refers to the page number of the Joint Appendix. "Br. __" and "*Pro Se* Br.__" indicate the page number of the *Anders* Brief and *Pro Se* Brief, respectively. "PSR ¶ __" refers to particular paragraph of the Presentence Investigation Report. While the second, amended PSR is found at JA 302, the brief will refer to particular paragraphs of the PSR for precision.

under 28 U.S.C. 1291.

STATEMENT OF ISSUES

1. Whether the government breached the plea agreement by refusing to move for a third-level reduction for acceptance of responsibility when Perez-Laguna did not readily demonstrate acceptance of responsibility.

2. Whether the district court erred by calculating the defendant's sentence pursuant to United States Sentencing Guidelines (U.S.S.G.) § 2A3.1.

STATEMENT OF THE CASE

On August 21, 2007, a federal grand jury sitting in the District of South Carolina returned a 20-count superseding indictment charging defendant, Jesus Perez-Laguna, and two others, Guadalupe Reyes-Rivera and Ciro Bustos-Rosales, with, among other things, conspiracy in violation of 18 U.S.C. 371 (Count 1), sex trafficking of a minor in violation of 18 U.S.C. 1591 and 2 (Count 2), transporting a minor with intent to engage in criminal sexual activity in violation of 18 U.S.C. 2423 and 2 (Count 3), and importation of an alien for prostitution in violation of 8 U.S.C. 1328 and 2 (Counts 6 and 8). JA 24, 136-167. Perez-Laguna was also charged in a one-count information in the Western District of North Carolina with

sex-trafficking in violation of 18 U.S.C. 1591, 1594(a), and 2. JA 176.[2] On September 20, 2007, pursuant to a plea agreement, Perez-Laguna pled guilty to Counts 1, 2, 3, and 8 of the Superseding Indictment and to Count 1 of the Criminal Information. JA 179, 190, 202.

On April 25, 2008, the Court convened a scheduled sentencing hearing, but continued it to another date after the defendant expressed reservations about proceeding. JA 243. On July 17, 2008, a second sentencing hearing was held. JA 254. On July 24, 2008, the district court entered final judgment sentencing Perez-Laguna to 170 months' imprisonment, JA 274-276, 279, 284, and ordering him to pay the minor victim $52,500 in restitution, JA 275, 286. This appeal followed.

STATEMENT OF FACTS[3]

1. Facts Underlying Conviction

Jesus Perez-Laguna is a Mexican national who illegally entered the United States in June 2005. PSR ¶ 2. Guadalupe Reyes-Rivera is a Guatemalan national who entered the United States illegally in October 1998. PSR ¶ 2. Ciro Bustos-

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[2] Perez-Laguna consented to transfer the North Carolina case to the District of South Carolina. JA 174.

[3] The defendant pled guilty pursuant to a plea agreement and the facts of his crimes are not at issue in this appeal. Thus, this statement of facts is abbreviated and is based on the PSR, which the District Court adopted. JA 266.

Rosales is a Mexican national who illegally entered the United States in July 2005. PSR ¶ 2. ARVA is a Mexican national, identified by her initials, who was the victim of Perez-Laguna's crimes. PSR ¶ 2.

Perez-Laguna, Reyes-Rivera, and Bustos-Rosales operated a prostitution ring in Charlotte, North Carolina, and Columbia, South Carolina, between at least July 2006 and March 2007. PSR ¶ 3. Perez-Laguna recruited women from Mexico for the prostitution ring. PSR ¶ 5(A). The conspirators operated the ring in Charlotte and Columbia by moving women from one "pimp" to another approximately every week. The "pimps," who included the conspirators, offered the women to customers to perform sex acts in exchange for money. PSR ¶ 5(B).

Around June 2006, Perez-Laguna recruited ARVA, who was then 14 years old, to come to the United States. PSR ¶ 6(A); JA 137. After she arrived in July 2006, Perez-Laguna told ARVA she had to engage in prostitution. PSR ¶ 6(E). Perez-Laguna raped ARVA. PSR ¶¶ 6(F) & (G), 36. Perez-Laguna also beat ARVA and forced her to enter into prostitution. PSR ¶ 30. Perez-Laguna transported ARVA to various locations to perform acts of prostitution. PSR ¶ 6(H). He transported her from North Carolina to South Carolina to deliver her to Bustos-Rosales to perform acts of prostitution. PSR ¶ 6(K) & (L). On another occasion, Perez-Laguna transported ARVA from North Carolina to South Carolina

to deliver her to Reyes-Rivera to perform acts of prostitution. PSR ¶ 6(P). Perez-Laguna knew ARVA was a minor. PSR ¶ 42.

2. Plea Agreement And Sentencing Hearings

Perez-Laguna and the government entered into a plea agreement. JA 179, 190.[4] Pursuant to the agreement, Perez-Laguna agreed to plead guilty to Counts 1-3 and 8 of Superseding Indictment and Count 1 of the Information in exchange for dismissal of the remaining counts. JA 179, 182. The plea agreement stated that the parties agreed that, if the court determined that Perez-Laguna had "readily demonstrated acceptance of responsibility," U.S.S.G. § 3E1.1(a) would apply, "thereby providing for a decrease [in his offense level] of two (2) levels." JA 186. This same paragraph also stated that if Perez-Laguna "qualifie[d]" for that decrease, the government would move for the one-level decrease in Section 3E1.1(b) and that the government "request[ed] that this provision be considered as that request." JA 186.[5] Under the plea agreement, Perez-Laguna also waived his

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[4] Because of the North Carolina charges, two plea agreements were entered into, though they are substantively identical.

[5] U.S.S.G. § 3E1.1 states:

> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(continued...)

"right to contest either the conviction or the sentence in any direct appeal or other post-conviction action." JA 187.

On September 20, 2007, Perez-Laguna pled guilty pursuant to this plea agreement. JA 202. On April 25, 2008, the district court held a sentencing hearing. JA 243. When the district court asked Perez-Laguna whether he had had "enough time to read over the presentence report" and discuss it with his attorney, Perez-Laguna answered, "No. Sincerely, actually, no, Your Honor. Well, yes, but she only tells me what she wishes to tell me, not the whole thing." JA 244-245. Perez-Laguna's counsel stated that she and an interpreter had gone over the PSR with Perez-Laguna, summarizing it at "some length." JA 245. The district court did not feel comfortable proceeding, and said that because of how delayed its docket was that day the parties would need to reschedule the sentencing hearing.

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[5](...continued)

> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

JA 245.

Perez-Laguna then began to express further dissatisfaction with his attorney. JA 246. He stated that he wanted another lawyer because his lawyer had not "helped [him] at all," and the "only thing [he had] received from her has been pressure and questioning. Everything that she wants to tell me, she tells me, and the things that actually affect me, she does not tell me." JA 248. Perez-Laguna also stated that she had him "sign various documents * * * based on pure lies." JA 248. The only alleged lie Perez-Laguna described related to a document he signed regarding his son's deportation. JA 249. The district court then advised Perez-Laguna's lawyer that she "need[ed] to advise [her] client about the possibility of the loss of acceptance of responsibility and what that might impact on his sentence," though the court assured her that this was simply a matter of information, not a threat. JA 252.

On July 17, 2008, the district court held a second sentencing hearing. The PSR, which had been amended, now recommended only a two-level, rather than a three-level, decrease for acceptance of responsibility. PSR ¶¶ 107, 140.[6] Perez-Laguna's counsel objected to his losing the third-level reduction for acceptance of

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[6] PSR ¶ 107 indicates that the previous PSR had included a third-level decrease.

responsibility. JA 258. She argued that if the district court granted Perez-Laguna a two-level reduction, the government had a contractual obligation to move for the third level of reduction. JA 259. The government responded that Perez-Laguna had failed to "show * * * that he has readily demonstrated overall, that he" had accepted responsibility. JA 260. The government indicated that it believed it could have objected to any reduction for acceptance of responsibility based on Perez-Laguna's behavior at the first sentencing hearing. JA 260. The district court overruled Perez-Laguna's objection and granted the two-level reduction for acceptance of responsibility, but not the third level. JA 265-266. It reasoned that Perez-Laguna's conduct at the previous hearing was "extreme" and had required the court "to allocate resources inefficiently." JA 265-266. The district court noted that it believed the government would have been within its rights to "object to any reduction for acceptance of responsibility," and accordingly found no violation of the plea agreement. JA 266. The district court adopted the PSR, which calculated a total offense level of 34 and an advisory guideline range of 151-188 months. JA 266-267.[7] The district court imposed a sentence in the middle of that range of 170 months. JA 275, 279, 284.

[7] Had the third level of acceptance been granted, the advisory guideline range would have been 135-168 months.

SUMMARY OF ARGUMENT

Perez-Laguna argues on appeal that the government breached the plea agreement by refusing to move for a third level of reduction for acceptance of responsibility. Perez-Laguna also argues that the district court calculated the advisory guidelines range under an incorrect sentencing guideline. These arguments fail. Because the government did not breach the plea agreement and because Perez-Laguna validly waived his appellate rights, this Court should enforce the waiver and dismiss his appeal.

1. The government did not breach the plea agreement. The parties agreed that Perez-Laguna needed to demonstrate, and the district court needed to find, that he had "readily" accepted responsibility in order to qualify for the two-level decrease under U.S.S.G. § 3E1.1(a). Only if Perez-Laguna demonstrated and the district court found such ready acceptance would the government be obligated to move for a third level of reduction under Section 3E1.1(b). Perez-Laguna failed to demonstrate that he had "readily" accepted responsibility. His actions at the first sentencing hearing belied any such acceptance. Moreover, the district court never found that he had "readily demonstrated acceptance of responsibility." Accordingly, the government was not required under the plea agreement to move for a third-level reduction under Section 3E1.1(b). Because the government did

not breach the agreement, Perez-Laguna is bound by his agreement not to appeal his sentence. Accordingly, this Court should dismiss this appeal.

2. Perez-Laguna's contention that the district court miscalculated the advisory guidelines range is similarly unavailing. He cannot raise this argument because he validly waived his appellate rights, and this argument falls within the scope of that waiver. Moreover, he failed to raise this argument below, so even if he could properly raise it here, the plain error standard would apply. Finally, the district court committed no error in calculating his sentence. U.S.S.G. § 2G1.3 specifically requires the sentencing court to apply U.S.S.G. § 2A3.1 when the defendant's offense included conduct described in 18 U.S.C. 2241 or 2242, and where Section 2A3.1 establishes a higher base offense level than Section 2G1.3. Perez-Laguna's offense included conduct described in those two statutes, and Section 2A3.1 established a higher base offense level. Thus, the district court properly applied the advisory guidelines.

ARGUMENT

I

THE GOVERNMENT DID NOT BREACH ITS OBLIGATIONS UNDER THE PLEA AGREEMENT BY REFUSING TO MOVE FOR A THIRD LEVEL DECREASE FOR ACCEPTANCE OF RESPONSIBILITY

A. Standard Of Review

"The interpretation of the terms of a plea agreement is a question of law" that this Court reviews "de novo." *United States* v. *Holbrook*, 368 F.3d 415, 420 (4th Cir. 2004) (citing *United States* v. *Snow*, 234 F.3d 187, 189 (4th Cir. 2000)); see also *United States* v. *Martin*, 25 F.3d 211, 217 (4th Cir. 1994) (the Court reviews "what the parties said or did * * * under the 'clearly erroneous' standard while principles of contract interpretation applied to the facts are reviewed de novo"). The Court construes "plea agreements in accordance with principles of contract law so that each party receives the benefit of its bargain." *Holbrook*, 368 F.3d at 420 (citing *United States* v. *Ringling*, 988 F.2d 504, 506 (4th Cir. 1993)). This means that the Court "enforce[s] a contract's 'plain language in its ordinary sense.'" *Ibid*. (quoting *Bynum* v. *Cigna Healthcare of North Carolina, Inc.*, 287 F.3d 305, 313 (4th Cir. 2002)). In the plea context, because "a defendant's fundamental and constitutional rights are implicated when [he] is induced to plead guilty by reason of a plea agreement," this Court reviews "a plea agreement 'with

greater scrutiny' than would apply to a commercial contract." *Ibid*. (quoting *United States* v. *McQueen*, 108 F.3d 64, 66 (4th Cir. 1997)). This means that this Court holds "the Government to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements." *Ibid*. (quoting *United States* v. *Harvey*, 791 F.2d 294, 300 (4th Cir. 1986)).

It is also well "settled that a defendant alleging the Government's breach of a plea agreement bears the burden of establishing that breach by a preponderance of the evidence." *Snow*, 234 F.3d at 189 (citing *United States* v. *Conner*, 930 F.2d 1073, 1076 (4th Cir.), cert. denied, 502 U.S. 958 (1991)).

B. The Government Did Not Breach The Plea Agreement

Perez-Laguna has failed to establish any breach of the plea agreement on the part of the government. He argues that the government "welch[ed]" upon its agreement. *Pro Se* Br. 2. The *Anders* Brief makes the same argument. Br. 7-8. Specifically, Perez-Laguna argues that the government violated its promise in the plea agreement to move for a third-level decrease under U.S.S.G. § 3E1.1(b) if he qualified for the two-level decrease under Section 3E1.1(a). Br. 7-8.

The government did not breach the plea agreement. The *Anders* Brief asserts that the "written plea agreement is clear and unequivocal," yet fails to analyze the agreement's language. Br. 7. Paragraph 11 of the plea agreement

reads:

> The parties agree that *if the Court determines* the Defendant *has readily demonstrated acceptance of responsibility* for his offenses, that U.S.S.G. § 3E1.1(a) applies, thereby providing for a decrease of two (2) levels. In addition, if the Defendant qualifies for a decrease under § 3E1.1(a), the Government will move that he receive the one level decrease set forth in § 3E1.1(b), and requests that this provision be considered as that request.

JA 186 (emphasis added). The italicized language in this paragraph shows that the parties had in mind something beyond simple receipt of the two-level Section 3E1.1(a) reduction. The language does not say that the parties agree that "if the defendant receives a two-level reduction pursuant to Section 3E1.1(a), the government shall move for a third-level reduction for acceptance of responsibility." The unequivocal language requires that the district court make a determination that Perez-Laguna "readily demonstrated acceptance of responsibility." Nor does Paragraph 11's language match the language of Section 3E1.1(a), which requires the court to "decrease the offense level by 2 levels" where a defendant "*clearly* demonstrates acceptance of responsibility." U.S.S.G. § 3E1.1(a) (emphasis added). The parties could have drafted language that perfectly matched that of Section 3E1.1(a), but did not to do so.

Paragraph 11's second sentence makes the government's obligation

contingent on the first sentence. Only if the defendant has "qualifie[d]" for the two-level decrease under Section 3E1.1(a) – that is, by the district court's finding that he has "readily demonstrated acceptance of responsibility" – will the government be required to move for a third level of reduction. This second sentence must be read in light of the first because contractual terms are read as a whole, not in isolation. *Nationwide Mut. Ins. Co.* v. *Akers*, 340 F.2d 150, 154 (4th Cir. 1965) ("To construe each clause or endorsement in isolation and without reference to the other policy provisions would do violence to basic contract law[, because contracts] must be read and construed as a whole and not piecemeal."); see also *Bozetarnik* v. *Mahland*, 195 F.3d 77, 82 (2d Cir. 1999) ("[W]e read the contract as a whole, and we construe individual phrases in their context, not in isolation.").

It is clear that at the second sentencing hearing the district court never determined that Perez-Laguna "readily demonstrated acceptance of responsibility." Nothing in the transcript can be read even to suggest such a finding. During the hearing, on several occasions, the government argued that it would have been within its rights to object to any acceptance of responsibility because of Perez-Laguna's post-plea conduct. JA 260, 262, 265. It refrained from arguing against the two-level reduction out of "genero[sity]," "charit[y]," or "grace." JA 261, 264-

265. The district court accepted the government's argument:

> [T]he defendant's conduct at last hearing was extreme. It caused us to allocate resources inefficiently. We had to reschedule the hearing, start over, have a status of counsel hearing[.]
>
> And I think based on the record produced thus far the government would be within its right to object to any reduction for acceptance of responsibility, the two levels or the additional third level. And if the government had taken that position I would probably be inclined to sustain that position and remove acceptance of responsibility completely. But the government has not done that, they have suggested that they would essentially not fight about the first two levels but object to the third level. And I think that that is the government's prerogative. I do not find any violation of plea agreement in that respect, so I'm going to overrule the objection and leave in the two level reduction for acceptance of responsibility but deny the third level.

JA 265-266. This passage makes clear that the district court did not believe that the defendant readily accepted responsibility. The transcript indicates that the district court merely granted Perez-Laguna the two-level reduction in the court's discretion because the government decided not to oppose it. At the same time, the court made it abundantly clear that, in its view, the defendant had not satisfied the "readily demonstrated acceptance of responsibility" requirement in the plea agreement; thus, Perez-Laguna was not entitled under the plea agreement to the government's motion for a third-level decrease. The district court simply decided

to "leave in the two level reduction" because the government did not object to it. JA 266. Rather than affirmatively determining that Perez-Laguna had established that he had "readily demonstrated acceptance of responsibility," the district court in its discretion granted the two-level reduction as a default determination. Thus, under the clear terms of the plea agreement, Perez-Laguna's claim fails.

Because the government did not breach the plea agreement, Perez-Laguna is bound by his waiver in Paragraph 13 of the agreement of his right "to contest either the conviction or the sentence in any direct appeal." JA 187. See, *e.g.*, *United States* v. *Blick*, 408 F.3d 162, 169 (4th Cir. 2005) (where defendant does not deny that he "knowingly and intelligently" waived his right to appeal, and issue falls within the scope of the waiver, he is precluded from raising that issue on appeal).[8]

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[8] On appeal, the defendant raises the additional argument that, even if the government was not bound by the plea agreement to move for the third level of reduction, it was required to do so as a matter of law under Section 3E1.1(b). The defendant has waived his appellate right to argue that the government's conduct violated the guideline absent a breach of the plea agreement. See *Blick*, 408 F.3d at 168-169. In any case, Perez-Laguna's argument fails on the merits. He does not allege that the government's refusal to move for the third level was because of any unconstitutional motive or that it was not rationally related to a legitimate governmental end. *United States* v. *Chase*, 466 F.3d 310, 315 n.4 (4th Cir. 2006); see also *United States* v. *Moreno-Trevino*, 432 F.3d 1181, 1185-1186 (10th Cir. 2005); *United States* v. *Drennon*, 516 F.3d 160, 162-163 (3d Cir.), cert. denied, 129 S. Ct. 478 (2008).

II

THE DISTRICT COURT COMMITTED NO ERROR IN CALCULATING THE GUIDELINE SENTENCE

A. *Standard Of Review*

This Court reviews "the interpretation of the guidelines, de novo, while factual findings are reviewed for clear error." *United States* v. *Moreland*, 437 F.3d 424, 433 (4th Cir.), cert. denied, 547 U.S. 1142 (2006); see also *United States* v. *Fitzgerald*, 435 F.3d 484, 486 n.2 (4th Cir. 2006). Where, as here, a defendant fails to raise an argument below, he waives that argument on appeal and this Court's review is limited to plain error. *United States* v. *Benton*, 523 F.3d 424, 428 (4th Cir.), cert. denied, 129 S. Ct. 490 (2008); *United States* v. *Boynes*, 515 F.3d 284, 288 (4th Cir. 2008). This applies in the sentencing context. *United States* v. *Karam*, 201 F.3d 320, 327-328 (4th Cir. 2000) (because defendant failed to raise argument at sentencing, plain error standard of review governed). On plain error review, this Court "will reverse the district court only if [it] (1) identif[ies] an error, (2) which is plain, (3) which affects substantial rights, and (4) which seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Foster*, 507 F.3d 233, 249-250 (4th Cir. 2007), cert. denied, 128 S. Ct. 1690 (2008).

B. Applicable Law And Background

U.S.S.G. § 2G1.3 is the guideline that applies to commercial sex acts with a minor. It establishes a base offense level of 24. U.S.S.G. § 2G1.3(a). It includes various enhancements for specific offense characteristics. These include a two-level increase for unduly influencing a minor to engage in prohibited sexual conduct, Section 2G1.3(b)(2)(B), and a two-level increase for the commission of a sex act or a commercial sex act, Section 2G1.3(b)(4). Section 2G1.3 also includes certain cross-references. See U.S.S.G. § 2G1.3(c). Among these is a cross-reference that states that if "the offense involved conduct described in 18 U.S.C. § 2241 or § 2242," the court should apply U.S.S.G. § 2A3.1 "if the resulting offense level is greater than that" determined under Section 2G1.3. U.S.S.G. § 2G1.3(c)(3).

U.S.S.G. § 2A3.1 is the sentencing guideline for criminal sexual abuse. It establishes a base offense level of 30. U.S.S.G. § 2A3.1(a). It also includes various enhancements for specific offense characteristics, including an increase of four levels if the "offense involved conduct described in 18 U.S.C. § 2241(a) or (b)," and two levels if the victims was older than 12 but younger than 16 years of age. U.S.S.G. § 2A3.1(b)(1) & (b)(2)(B).

18 U.S.C. 2241 makes it a crime for any person within the "special maritime

and territorial jurisdiction of the United States" or within a federal prison or a facility that holds persons in custody for a federal agency to "knowingly cause[] another person to engage in a sexual act * * * by using force," or "threatening or placing" the person in fear of "death, seriously bodily injury, or kidnapping." 18 U.S.C. 2241(a). 18 U.S.C. 2242 makes it a crime for any person within the "special maritime and territorial jurisdiction of the United States" or within a federal prison or a facility that holds persons in custody for a federal agency to, among other things, "knowingly * * * cause[] another person to engage in a sexual act by threatening or placing" the person in fear. 18 U.S.C. 2242(1).

Paragraph 10 of the plea agreement stated that the parties agreed that Perez-Laguna's guidelines range "should be calculated with resort to U.S.S.G. § 2G1.3." JA 185. It further stated that Perez-Laguna "understands that these stipulations are not binding upon the Court or the United States Probation Office." JA 185-186. The PSR, which the district court adopted, JA 266, calculated Perez-Laguna's offense level pursuant to the 2006 Sentencing Guidelines, PSR ¶ 113. As the plea agreement specified, the PSR began by referencing U.S.S.G. § 2G1.3, which establishes a base offense level of 24. PSR ¶ 117. It then looked to Section 2G1.3(b)(2)(B) and (b)(4) to add an additional four levels (two levels for each) to establish an offense level of 28. PSR ¶¶ 118-119. Section 2G1.3(c) also lists

cross-references to which a sentencing court must refer. The PSR used Section 2G1.3(c)(3), which referred it to Section 2A3.1. PSR ¶ 120. The offense level for Section 2A3.1 was 30, and thus greater than that established by Section 2G1.3 (*i.e.*, 28). To the base offense level of 30, the PSR added four levels because the offense "involved conduct described in 18 U.S.C. §2241(a) or (b)," U.S.S.G. § 2A3.1(b)(1), and two levels, pursuant to U.S.S.G. § 2A3.1(b)(2)(B), because the victim was 14 years old. PSR ¶¶ 121-122. This established an adjusted offense level of 36. PSR ¶ 126.

C. The District Court Committed No Error In Calculating The Applicable Guidelines Range

Perez-Laguna argues, *Pro Se* Br. 2-3, that the PSR and the district court determined his appropriate offense level under the incorrect guideline section. As an initial matter, because Perez-Laguna validly waived his appellate rights and this issue falls within the scope of that waiver, he is precluded from raising it on appeal. See, *e.g.*, *United States* v. *Blick*, 408 F.3d 162, 168-169 (4th Cir. 2005). Second, even assuming that Perez-Laguna can raise this argument on appeal, he failed to raise it at sentencing, and therefore this Court reviews his argument under a plain error standard. *Benton*, 523 F.3d at 428-429. Under any standard his argument is without merit.

Perez-Laguna argues that because Section 2A3.1 was not referenced in the plea agreement and because he was not convicted under 18 U.S.C. 2241 or 2242,[9] the Probation Office and the district court erred in calculating his advisory guidelines sentence. Perez-Laguna admits, *Pro Se* Br. 2-3, that in the plea agreement he agreed that "no limitation shall be placed upon the Court's consideration of information concerning the background, character, and conduct of the Defendant for the purpose of imposing an appropriate sentence, and such other offenses may be considered as relevant conduct pursuant to U.S.S.G. § 1B1.3." JA 185. Still, he maintains that the district court's guidelines calculation constitutes error and violates the plea agreement. His arguments are without merit.

Section 2G1.3 required the district court to ask whether any of the cross-references applied. The Court properly applied Section 2A3.1 because that provision was cross-referenced within the provisions of Section 2G1.3, the applicable guideline. While it is true that Perez-Laguna was not convicted of violating 18 U.S.C. 2241 or 2242, he did not have to be so convicted for Section 2A3.1 to apply according to the cross-reference in Section 2G1.3(c)(3). As this

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[9] His brief seems to refer to 18 U.S.C. 2242 erroneously as 18 U.S.C. 2243. *Pro Se* Br. 2.

Court has made clear, the "sentencing guidelines establish that certain relevant conduct may be considered in determining the guidelines range for a criminal defendant." *United States* v. *Hodge*, 354 F.3d 305, 312 (4th Cir. 2004). Where a defendant "has committed multiple offenses similar to the charged offense, all conduct that is 'part of the same course of conduct or common scheme or plan as the offense of conviction' constitutes relevant conduct." *Ibid*. (citation omitted). Offenses "are within the 'same course of conduct' when 'they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses.'" *Id*. at 313 (citation omitted). Furthermore, "overt acts constitute relevant conduct under section 1B1.3." *United States* v. *May*, 359 F.3d 683, 694 n.18 (4th Cir. 2004).

Here the overt acts of Count 1, the conspiracy count, included: (a) forcing ARVA, a 14-year-old Mexican national, to engage in prostitution, JA 142; (b) having sexual relations with her, JA 137, 143; and (c) physically assaulting her, JA 143. The conspiracy specifically charged Perez-Laguna with harboring and transporting women to engage in commercial sex acts "knowing that force, fraud, and coercion would be used to cause the women to engage" in such acts. JA 139. Thus, among the relevant conduct Perez-Laguna admitted by pleading guilty was conduct which matched that set out in both 18 U.S.C. 2241 and 2242. He

knowingly caused ARVA to engage in a sexual act by using force against her. 18 U.S.C. 2241(a)(1). He caused ARVA to "engage in a sexual act by threatening or placing" her in fear. 18 U.S.C. 2242(1).

Nor can Perez-Laguna properly argue that Section 2A3.1 is inapplicable because his conduct did not meet either 18 U.S.C. 2241 or 2242's jurisdictional requirements. The plain language of both Section 2G1.3(c)(3) and Section 2A3.1 makes clear that the relevant question is not whether the defendant's offense was a technical violation of the statute or met its jurisdictional requirements, but rather whether his "offense involved conduct," U.S.S.G. § 2G1.3(c)(3); U.S.S.G. 2A3.1(b), described in 18 U.S.C. 2241. See *United States* v. *Monroe*, 259 F.3d 1220, 1224 (10th Cir. 2001) (agreeing with government that "independent federal jurisdiction is not required for [Section 2A3.1] to apply and for the court to consider criminal sexual abuse as relevant conduct * * * [because] [o]nce a jurisdictional basis existed over the kidnapping, the district court could properly consider all relevant conduct in calculating" defendant's sentence); see also *United States* v. *Bordeaux*, 997 F.2d 419, 420 (8th Cir. 1993) ("[T]he plain language of [an earlier version of] the guideline requires only that the offense have been committed 'by the means set forth' in 18 U.S.C. § 2241(a)."). Perez-Laguna's offense clearly involved conduct described in 18 U.S.C. 2241 and 2242.

Accordingly, the district court did not err in applying this cross-reference in calculating Perez-Laguna's sentence.[10]

[10] Even assuming *arguendo* some error on the part of the district court, the caselaw cited above supports its calculation, demonstrating that any error committed by the district court was "neither 'obvious' nor 'clear,'" and thus not plain. *Benton*, 523 F.3d at 433.

CONCLUSION

For the foregoing reasons, this Court should dismiss the defendant's appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect X4 and contains no more than 5,168 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: July 22, 2009

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2009, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF user:

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I further certify that on July 22, 2009, I mailed two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE to the following non-CM/ECF participant by first class mail, addressed as follows:

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