No. 06-4467

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ADAOBI STELLA UDEOZOR,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES AS APPELLEE

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

STATEMENT OF JURISDICTION

The government concurs in defendant's jurisdictional statement.

STATEMENT OF ISSUES

1. Whether the district court abused its discretion in admitting evidence of sexual abuse by defendant's co-conspirator.

2. Whether defendant's Sixth Amendment rights were violated by the admission of recorded conversations between the victim and defendant's co-

conspirator.

3. Whether the district court abused its discretion in utilizing a special verdict form, or committed plain error by not *sua sponte* redacting certain language from the indictment before providing it to the jury.

4. Whether defendant's sentence is reasonable.

STATEMENT OF THE CASE

On August 18, 2004, a federal grand jury returned a second superseding indictment charging defendant, Adaobi Stella Udeozor, and her former husband, George Udeozor, with conspiracy in violation of 18 U.S.C. 371 (Count I), holding a juvenile in involuntary servitude in violation of 18 U.S.C. 1584 (Count II), and harboring a juvenile alien in violation of 8 U.S.C. 1324(a)(1)(A)(iii) and (B)(i) (Count III). J.A. 22-28.[1] Following a jury trial in October and November 2004, defendant was convicted on Counts I and III. J.A. 2117-2118.

On April 18, 2006, the district court sentenced defendant to 87 months' imprisonment, J.A. 2261, and ordered her to pay the victim $110,249.60 in restitution, J.A. 2264. This appeal followed.[2]

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[1] George Udeozor no longer resides in this country. The government's efforts to extradite him to the United States to stand trial have been unsuccessful.

[2] Defendant filed an emergency motion in this Court seeking bail pending

(continued...)

STATEMENT OF FACTS[3]

1. General Background

The victim was 14 years old when she arrived in defendant's home in October 1996. J.A. 417, 444. She left approximately five years later, at age 19.

The victim was born and raised in Nigeria. She, her parents, and six siblings lived in one room of a five-room house that lacked indoor plumbing. J.A. 417-419. She attended school in Nigeria. J.A. 421. By 1995, the victim – then living with an aunt – was working toward finishing seventh grade. J.A. 421, 423.

At that time, her father removed the victim from her aunt's home, telling her she would go to the United States with defendant and defendant's husband, George Udeozor, and would continue her schooling in America. J.A. 423-424. While defendant was present, J.A. 199, an agreement was reached between George Udeozor and the victim's father whereby the victim would care for defendant's children and attend school in the United States, and payment for her services would be sent to her parents in Nigeria. J.A. 196, 428. The Udeozors' promise to educate

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[2](...continued)
appeal based on purported medical necessity and the existence of significant legal issues. The government opposed defendant's request and this Court denied the motion without opinion on August 24, 2006.

[3] The facts contained herein are set forth in the light most favorable to the government.

the victim was a key part of the agreement, as her father would not otherwise have agreed to allow the Udeozors to take her. J.A. 200. At no time did the victim's father give the Udeozors permission to adopt the victim. J.A. 203. Nor did the Udeozors ever raise the possibility of adoption. J.A. 203-204.

George Udeozor assured the victim's father he would obtain the documents necessary to bring the victim to the United States. J.A. 429-430. Instead, he smuggled the victim into the country using the passport of his oldest daughter. J.A. 437-442, 572, 2096. George Udeozor and the victim – then 14 years old – arrived at defendant's home on or about October 1, 1996. J.A. 324, 444. Upon seeing the victim when she arrived home from work that evening, defendant expressed amazement that her husband "pulled it off." J.A. 447.

2. The Victim's Work In Defendant's Home And Office

The victim was required to care for the Udeozors' five children, clean their house, and cook for the family. She started work each day at approximately 6:00 a.m., J.A. 456, and sometimes did not finish until late in the evening. J.A. 350, 364. At first, the victim shared her duties with Grace Baffoe, a paid live-in nanny. But a few months after the birth of defendant's sixth child in September, 1997, the paid live-in nanny departed and the victim – just shy of her sixteenth birthday – did

all the work alone. J.A. 462-463, 417.[4]

Apart from her work in defendant's home, the victim also worked in defendant's medical office. Following the departure of the paid live-in nanny, the victim worked in defendant's office approximately three days per week during the school year, J.A. 580, and five days per week during the summer. J.A. 583. When there, she verified patients' insurance information, rescheduled patients, answered the phone, prepared patients' charts, cleaned out examination rooms, and escorted patients to examination rooms to wait to be seen by defendant. J.A. 579. Defendant told the victim to say she was defendant's niece or adopted daughter. J.A. 581-582. Defendant also told the victim that, if asked why she was working and was not in school, she should say she was enrolled in Montgomery College. J.A. 583. The victim never was paid for her work in defendant's home or office. J.A. 578-579; J.A. 217 (the victim's father received only "[o]ne piece of cloth and a bag of rice").

Despite spending between $9,000 and $10,000 per child per year to send her oldest children to private school, J.A. 927-929, defendant never allowed the victim to attend school. J.A. 566. The victim asked defendant about school at least twice

[4] Defendant's and George Udeozor's mothers sometimes visited the home for extended periods, but their presence did not substantially alter the victim's workload. J.A. 412-413, 468-469, 836-837.

per month, beginning when she first arrived, but was told she could not attend because she did not have the necessary papers and entered the country using someone else's passport. J.A. 571-572. George Udeozor typically gave the same response, sometimes telling the victim she would go to school soon. J.A. 575-576.[5]

3. Defendant's And George Udeozor's Control Over And Abuse Of The Victim

The victim was verbally, physically, and sexually abused while living in defendant's home. Defendant never abused the victim in public, J.A. 591, and in fact treated her nicely in public, but treated her differently at home. J.A. 1405-1406.

At trial, the victim estimated defendant verbally abused her an average of five times per week, J.A. 475, usually for minor things. J.A. 593. Sometimes these outbursts were the result of the victim accidentally breaking something, J.A. 477, or of her purported failure to keep the house clean, J.A. 477, properly feed or control the Udeozor children, J.A. 593, or clean a child's clothing, J.A. 478. Other times there was no apparent reason. J.A. 474-476. During these outbursts,

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[5] Although a tutor occasionally came to the Udeozor home, the victim testified that he was there for defendant's children, not for her. J.A. 567. The victim also testified that defendant's mother did not tutor her during visits to defendant's home. J.A. 470.

defendant would tell the victim she is "not in Nigeria anymore," and should "stop acting stupid," or "stop acting bush," or "stop acting like a goat." J.A. 475, 490.

There were many instances of physical abuse. Defendant beat the victim with an open hand, fist, or object, threw things at her, or twisted and pulled her ear. J.A. 476-477. This physical abuse began within a week of the victim's arrival in defendant's home. J.A. 477.

The most severe incident occurred after one of the Udeozor children under the victim's care fell and hurt his neck while playing in the house. Defendant called the victim upstairs, where George Udeozor was waiting. J.A. 482-484. They made the victim kneel and raise her hands above her head while defendant struck the victim's side more than a dozen times with a flexible wooden cane. J.A. 483-485. George Udeozor then struck her on the hand with the metal portion of a belt, telling her it was because she hurt his child. J.A. 485-486. Defendant then made the victim kneel for another 45 minutes before allowing her to leave. J.A. 486. Following this beating, the victim had marks on her sides and difficulty breathing, but received no medical attention. J.A. 487-488.

Another beating occurred after the victim, at defendant's instruction, cleaned defendant's room and washed out her jacuzzi, only to have this work undone when defendant's children later played in the room. J.A. 488-490. Defendant became

angry and struck the victim on the head with both an open and closed fist. J.A. 489. Another happened when the victim paid the woman who cleaned the Udeozor home while the victim and the Udeozors were traveling. J.A. 492-495. The home was not cleaned to defendant's specifications, and defendant, believing the victim should not have paid the woman, struck the victim with an open and closed fist. J.A. 492-495.

Other beatings included incidents where defendant (1) believed the victim broke the tap on the kitchen sink and beat her with an open and closed hand, J.A. 479-480; (2) beat the victim with a shoe, dislocating her wrist and then requiring the victim – who received no medical attention for her wrist – to work through the night packing the family's bags and cleaning prior to their departure the following day for an out-of-town trip, J.A. 527-528; and (3) woke the victim in the middle of the night, pulling her ear and making her go downstairs to clean off the kitchen table, J.A. 570-571.

The victim was raped on a number of occasions by George Udeozor. The rapes began in late 1997, J.A. 500, and continued until George Udeozor left the country in 1999. J.A. 511. George Udeozor typically would awaken the victim during the night and take her to the basement of the Udeozor home, where the majority of the rapes occurred. J.A. 506. In telephone conversations recorded

after the victim left defendant's home, George Udeozor denied raping her and attempted to convince her the sex was consensual. J.A. 2095-2110.

The victim testified George Udeozor threatened to – and did – make the rapes longer and more severe when the children under her care misbehaved. J.A. 507. He also told the victim if she ever spoke to anyone about the rapes, he would send her back to Nigeria and tell her parents she had become a prostitute. J.A. 506-507.

During her time in their home, the Udeozors exercised near total control over all aspects of the victim's life. Defendant told her the United States was a dangerous place, and she would be killed or deported if she attempted to leave the Udeozor home. J.A. 496-497, 560. Defendant instilled in the victim a fear of police in particular, telling her they would deport her if they saw her. J.A. 497. This was done to prevent the victim from running away. J.A. 566.

The Udeozors also controlled most of the victim's contact with her family in Nigeria, including her incoming and outgoing mail. J.A. J.A. 528-544, 546-547, 554. She had only the clothes they provided her, J.A. 545-547, and no money to spend on herself, J.A. 548.

4. The Victim's Exit From Defendant's Home

While not imprisoned in a traditional sense, escaping the Udeozor home was

not a viable option for the victim. She did not know anyone, and had nowhere to go, no friends, and no money. J.A. 554-555, 634, 769-770. She did not know how to take a bus, and none ran in the Udeozor's neighborhood. J.A. 559.

What the victim did have was access to a computer, which she taught herself to use. J.A. 560. Through use of the Udeozors' computer, the victim compiled a list of immigration-related websites, J.A. 596-597, conducting research and making contacts during the afternoon while the Udeozor children were in school. J.A. 614-615. The victim began reaching out for help in September 2001, J.A. 596, communicating with non-profit groups about her ordeal. J.A. 978-982, 986-989.

One of these contacts recommended the victim write a letter to defendant. J.A. 615-616. She did so, giving the letter to defendant on October 30, 2001. J.A. 617-618, 2079-2080. A confrontation ensued, after which the victim called the police, J.A. 625, and fled to the home of a neighbor until police arrived. The victim told the neighbor she had been brought over from Nigeria but not permitted to attend school, J.A. 160, and had been "held against her will and * * * abused," J.A. 156, including being beaten for not properly caring for the Udeozor children, J.A. 161.

When police arrived, defendant admitted hitting the victim that evening but protested when the victim sought to leave. J.A. 629-630. Because the victim was

over 18 years of age, however, the police permitted her to leave with them. J.A. 630.

At some point after midnight the evening the victim left, defendant called the police to report a burglary, telling them upon their arrival it was committed by the person employed to watch her children. J.A. 1093-1094, 1104-1105, 1109. But defendant, described by the responding officer as "agitated, * * * upset, angry, and very demanding," J.A. 1094, refused to allow police to enter her home to investigate. J.A. 1094-1095. She nevertheless insisted the burglary be documented. J.A. 1094-1096.

SUMMARY OF ARGUMENT

On appeal, defendant challenges the district court's (1) admission of evidence of sexual abuse by defendant's co-conspirator, (2) admission of recorded conversations between defendant's co-conspirator and the victim, (3) use of a special verdict form and failure to *sua sponte* redact a certain portion of the indictment before giving it to the jury, and (4) sentence. All of defendant's arguments fail. This Court therefore should affirm the judgment below.

1. The district court did not abuse its discretion in admitting evidence of sexual abuse. The abuse was committed in furtherance of the conspiracy, and its probative value thus was not outweighed – let alone substantially outweighed – by

its potentially prejudicial effect under Federal Rule of Evidence 403, particularly when viewed in light of the government's unique evidentiary burden in involuntary-servitude cases. Further, any error in admitting this evidence was harmless, as defendant was acquitted of the charge to which the evidence was most probative, and the remaining evidence against defendant was overwhelming.

2. The admission of recorded conversations between defendant's co-conspirator and the victim did not violate the Confrontation Clause. Precedent establishes that evidence cannot be testimonial where, as here, the declarant does not reasonably expect the challenged statements to be used at trial. No reasonable person would have expected the statements at issue here to be used in such manner. Nor were the statements exculpatory, as defendant contends. And any error in admitting the statements was harmless for the reasons stated above.

3. The district court did not abuse its discretion in using a special verdict form to have the jury make special findings regarding sentencing. This trial occurred after the Supreme Court's decision in *Blakely* v. *Washington*, 542 U.S. 296 (2004), but before its decision in *United States* v. *Booker*, 543 U.S. 220 (2005), a period of legal uncertainty during which it was reasonable to submit sentencing enhancements to the jury. This is particularly true where, as here, the jury was instructed not to address the special findings unless it first determined

guilt. Defendant's additional complaints regarding the jury's alleged failure to specify the object of the conspiracy and the district court's failure to redact certain language from the indictment were not raised below, and are unfounded at any rate. The jury did specify the object of the conspiracy, and the language contained in the indictment was not prejudicial, particularly when viewed in light of the district court's instructions.

4. The district court properly calculated defendant's guideline range based on the jury's finding that involuntary servitude was an object of the conspiracy. And the court did not commit clear error in denying defendant's request for a downward adjustment based on her role in the offense. Defendant was – at a minimum – a co-equal partner in the conspiracy. Finally, the district court's sentence is supported by its analysis of the factors relevant under 18 U.S.C. 3553(a).

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE REGARDING THE CO-CONSPIRATOR'S SEXUAL ABUSE OF THE VICTIM

"Rule 403 judgments are preeminently the province of the trial courts," *United States* v. *Love*, 134 F.3d 595, 603 (4th Cir. 1998), and are reviewed for abuse of discretion. *United States* v. *Rivera*, 412 F.3d 562, 571 (4th Cir. 2005). In conducting its review, this Court "must examine the evidence in the 'light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.'" *Love*, 134 F.3d at 603 (citation and internal quotations omitted).

This Court "generally favor[s] admissibility, and will find undue prejudice only if there is a genuine risk that the emotions of a jury will be excited to irrational behavior, and this risk is disproportionate to the probative value of the offered evidence." *United States* v. *Wells*, 163 F.3d 889, 896 (4th Cir. 1998) (citation and internal quotations omitted). Moreover, "[a] district court's decision to admit evidence over a Rule 403 objection will not be overturned except under the most extraordinary of circumstances, where that discretion has been plainly abused." *United States* v. *Williams*, 445 F.3d 724, 732 (4th Cir. 2006) (internal

quotations omitted). "Such an abuse occurs only when it can be said that the trial court acted arbitrarily or irrationally in admitting evidence." *Ibid.* (internal quotations omitted).

A. The Challenged Evidence Was Properly Admitted

In order to prove involuntary servitude, the government was required to establish the victim was "compelled to work against her will, for the benefit of another person or persons, by the use of force, the threat of force or the threat of legal coercion." J.A. 1047 (jury instruction on involuntary servitude). See also *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988). To do so, the government had to demonstrate that the victim's will was overborne.

The evidentiary burden on the government was substantial. "[C]ompulsion is an essential element of involuntary servitude under section 1584." *United States* v. *Alzanki*, 54 F.3d 994, 1000 (1st Cir. 1995). "[T]he requisite compulsion * * * obtains when an individual, through an actual or threatened use of physical *or* legal coercion, intentionally causes the oppressed person reasonably to believe, given her 'special vulnerabilities,' that she has no alternative but to remain in involuntary service for a time." *Ibid.* "A sustainable conviction * * * therefore requires sufficient evidence to enable a finding, *inter alia*, that the defendant used *or* threatened physical restraint, bodily harm *or* legal coercion." *Ibid.*

This requires a fact-intensive, individualized inquiry. See *Kozminski*, 487 U.S. at 952 (although definition of involuntary servitude encompasses cases involving fear of "physical restraint or injury or legal coercion," this "does not imply that evidence of other means of coercion, or of poor working conditions, or of the victim's special vulnerabilities is irrelevant in a prosecution" for involuntary servitude). Indeed, "the vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve." *Ibid.*

In view of the foregoing, the government was entitled to marshal all available evidence of force and threats of force to convince the jury that the victim believed she had no choice but to comply. For this reason, the government introduced proof that George Udeozor used rape as a method of controlling the victim and compelling her to work harder, as he threatened to – and did – inflict upon the victim rapes that were longer and more severe when the Udeozor children under her care misbehaved. J.A. 507. It is immaterial that the sexual abuse was committed by a co-conspirator, as this Court already has recognized that physical abuse in these types of cases can be a means of furthering the conspiracy to obtain free labor from the victim. See *United States* v. *Bonetti*, 277 F.3d 441, 447 (4th Cir. 2002).

Thus, the challenged evidence of sexual abuse was directly relevant to the involuntary-servitude and conspiracy charges. This is particularly true when viewed in light of the fact that the victim had special vulnerabilities; she was a juvenile from an impoverished background who was living in a foreign country and completely dependent upon the Udeozors. As the district court held, sexual abuse clearly could be considered an act of intimidation used to keep a minor in a condition of servitude. J.A. 64-65, 865. And the district court told defendant's trial counsel he was free to argue to the contrary. J.A. 865-866 ("It doesn't preclude you from arguing to the jury that this act shouldn't be taken into account at all because it had nothing to do with the conspiracy.").

The evidence of sexual abuse also was relevant in another sense. Although defendant does not pursue the issue on appeal, a major thrust of her defense at trial was her claim that she believed George Udeozor had adopted the victim, and that the victim therefore was the couple's daughter. J.A. 1975-1979 (closing argument). The evidence of sexual abuse – more than any other evidence available to the government – directly undercut this claim. There was no evidence George Udeozor sexually abused his children. His sexual abuse of the victim therefore was consistent with the government's assertion that the couple viewed her not as an adopted daughter entrusted to their care, but rather as a servant over whom they

exercised complete dominion.

Moreover, with regard to the nature of the evidence, it bears noting that the government did not elicit graphic or inflammatory testimony regarding the details of the rapes. And, while defendant now takes issue (Br. 27-30) with the government's use of the term "rape" to describe what happened to the victim, defendant's trial counsel did not object to this characterization, even using the phrase himself. J.A. 734 (in presence of jury); J.A. 860-861 (outside presence of jury). Indeed, trial counsel demurred when given the opportunity to argue the sex was consensual. J.A. 866-867. Thus, even assuming *arguendo* that the references to rape had a cumulative effect over the course of the trial, as defendant asserts (Br. 29-30), the argument that such effect was improper fails both because it was waived and because it relies on the benefit of hindsight, which the Supreme Court has instructed is inappropriate in the Rule 403 context. See *Old Chief* v. *United States*, 519 U.S. 172, 182 n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight.").

In view of the foregoing, admission of this evidence was not an abuse of discretion. Courts routinely admit evidence of sexual abuse over a Rule 403 objection where, as here, it is probative of a charged offense. See, *e.g.*, *United*

States v. *Evans*, 272 F.3d 1069, 1083 (8th Cir. 2001) (no abuse of discretion in admission of evidence of gang rapes used "to recruit, control, and discipline prostitutes"); *United States* v. *Rosario-Diaz*, 202 F.3d 54, 71 (1st Cir. 2000) (no abuse of discretion in admission of rape evidence in carjacking case where "the rape evidence was inseparably intertwined with the carjacking and murder"); *United States* v. *Hicks*, 103 F.3d 837, 844 (9th Cir. 1996) (no abuse of discretion in admission of "evidence of murder, rape, and assault" where evidence was probative of carjacking offense and allowed the government "to offer a coherent and comprehensible story regarding the commission of the crime") (internal quotations omitted). See also *United States* v. *Oglesbee*, 177 Fed. Appx. 359, 361 (4th Cir. 2006) (unpublished) (admission of evidence of animal cruelty not abuse of discretion where it "helped place in context" why the victim submitted to sexual abuse). And, for the reasons discussed above, such evidence is particularly probative here given the nature of the government's evidentiary burden in involuntary-servitude cases.

Defendant's argument to the contrary is based on her assertions that (1) the evidence was "unfairly prejudicial," Br. 30, under this Court's decision in *United States* v. *Ham*, 998 F.2d 1247 (4th Cir. 1993); (2) other allegedly less prejudicial evidence served the same purpose, Br. 30; and (3) the sexual abuse was not in

furtherance of the conspiracy, Br. 27-31. These arguments are without merit.

1. The Evidence Is Not Unfairly Prejudicial

No evidence, standing alone, is properly labeled "unfairly prejudicial." See *United States* v. *Heater*, 63 F.3d 311, 321 (4th Cir. 1995) ("'Unfair prejudice' does not include within its purview the damage done to a defendant's case which arises from the legitimate probative force of the evidence.") (internal quotations omitted). Instead, it must be viewed in context. See *United States* v. *Duncan*, 598 F.2d 839, 857 (4th Cir. 1979).

Defendant's reliance on *Ham* is misplaced. There, the evidence regarding child molestation was extensive and only marginally probative. The *Ham* jury heard testimony from "[s]everal witnesses" over the course of two days, 998 F.2d at 1252, indicating child molestation was "seemingly rampant in the [defendants'] community." 998 F.2d at 1253. None of this evidence was probative of an element of any charged offense in *Ham*. Instead, it was relevant only to the extent it indirectly provided motive for one of the charges. 998 F.2d at 1253. And, even if credible, the challenged evidence in *Ham* only would have "ma[d]e the motive slightly more likely." 998 F.2d at 1253.

This case therefore is distinguishable from *Ham*, and is instead more closely analogous to the Seventh Circuit's recent decision in *United States* v. *Holt*, 460

F.3d 934 (7th Cir. 2006). In *Holt*, evidence the defendant had a sexual relationship with a witness that began when the defendant "was in his mid-thirties" and the witness "was only 14 or 15 years old," 460 F.3d at 936, was admitted by the district court as relevant to a charge of witness intimidation. *Id.* at 938. While "recogniz[ing] that the prejudicial impact could have been considerable," the Seventh Circuit concluded "[t]he district court did not abuse its discretion in deeming this evidence relevant to prove an element of the charged crime," in part because the evidence "provided background for the jury" and "might have helped the jury to understand the intimidation charge." *Ibid.* In doing so, the panel emphasized "[t]he kind of prejudice that Rule 403 is designed to address is that which would cause the jury to decide on a basis other than the facts put before it." *Ibid.*

Here, as in *Holt*, the evidence clearly was probative of a charged offense, and therefore admissible. As the district court noted,"[i]t is relevant. It may well be inflammatory, but so be it, it's the nature of the charge. There's no basis to exclude it under Rule 403." J.A. 65. In no way was this ruling "arbitrar[y] or irrational[]," *Williams*, 445 F.3d at 732, in view of the relevant facts and charges.

Defendant's claim of unfair prejudice therefore fails.[6]

2. The Existence Of Allegedly Less Prejudicial Evidence Did Not Preclude Admission Of The Challenged Evidence

The existence of other, allegedly less prejudicial evidence regarding the same point did not preclude admission of the challenged evidence. As a preliminary matter, this argument was not asserted below, and therefore was waived. See, *e.g.*, *United States* v. *Linwood*, 142 F.3d 418, 422 (7th Cir. 1998) ("[N]ot just any objection will save an issue for review – neither a general objection to the evidence nor a specific objection on a ground other than the one advanced on appeal is enough."); *United States* v. *Norman T.*, 129 F.3d 1099, 1106 (10th Cir. 1997); Fed. R. Evid. 103(a)(1) (objecting party must "stat[e] the specific ground of objection, if the specific ground was not apparent from the context").

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[6] Defendant also complains (Br. 29) she was denied a limiting instruction with respect to the issue of sexual abuse, noting one was given in *Ham*. But denial of a limiting instruction must be viewed in context. A limiting instruction was appropriate in *Ham*, where evidence of sexual abuse was not probative of any element of a charged offense, but rather was admitted for the limited purpose of establishing motive, as the *Ham* jury was told in the limiting instruction. *Ham*, 998 F.2d at 1253. Here, by contrast, the evidence was probative of an element of the crime, and therefore was – as the district court noted in refusing to give a limiting instruction – covered in the general instructions regarding conspiracy and properly resolved by argument of counsel. J.A. 866 ("[I]t's just evidence that they can argue as part of the conspiracy, and you can say that it isn't. I mean, I'm going to tell them that an act has to be in furtherance of the conspiracy, and they'll say it was, and you'll say it wasn't, and that's all that I do. I give fairly spare instructions on that and let counsel argue.").

Where an objection was not made on the same ground at trial, review is for plain error. *Linwood*, 142 F.3d at 422; *Norman T.*, 129 F.3d at 1106.

Even if not waived, however, the argument fails. It is well established that the government has the "right to detail the full scope of the conspiracy and to present its case in the proper context." *United States* v. *Leavis*, 853 F.2d 215, 218 (4th Cir. 1988). See also *United States* v. *Tipton*, 90 F.3d 861, 883 (4th Cir. 1996) ("The Government may not properly be deprived * * * of its right to detail the full scope of the conspiracy and to present its case in proper context simply because particular co-conspirators were not involved in the full scope of its activities") (citation and internal quotations omitted). Defendant cites no case in which a district court was held to have abused its discretion by not requiring the government to use only the least prejudicial evidence probative of a given point.

To the contrary, the Supreme Court has recognized that, in evaluating such matters, district courts must "make these calculations with an appreciation of the offering party's need for evidentiary richness and narrative integrity in presenting a case, and the mere fact that two pieces of evidence might go to the same point would not, of course, necessarily mean that only one of them might come in." *Old Chief*, 519 U.S. at 183. Thus, as the Court observed in *Old Chief*, abuse of discretion in the Rule 403 context "is not satisfied by a mere showing of some

alternative means of proof that the prosecution in its broad discretion chose not to rely on." 519 U.S. at 183 n.7.[7] This is especially true in an involuntary servitude prosecution, where the government must show that the victim was coerced into providing services. Defendant's argument accordingly fails.

3. The Co-Conspirator's Sexual Abuse Of The Victim Was In Furtherance Of The Conspiracy

Defendant's argument that George Udeozor's sexual abuse of the victim was not in furtherance of the conspiracy has no merit. This Court already resolved this issue in *Bonetti*. There, a husband and wife entered into a conspiracy "to obtain free labor" from an illegal alien forced to work as a domestic servant in their home. *Bonetti*, 277 F.3d at 447. This Court held that one spouse's physical abuse of the alien may "further[] that conspiracy by intimidating [the alien] from asserting her right to payment or resisting [the couple's] demands that she work." *Ibid.*

Here, the challenged evidence involved sexual abuse. But in both cases the abuse was employed to further the conspiracy by subjugating the victim. As the district court noted, "clearly it's an act of subjugation, it's not very different in the Court's view from an outright beating." J.A. 865. The victim testified George

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[7] The Court's ruling in *Old Chief* "is limited to cases involving proof of felon status." 519 U.S. at 183 n.7. But the government respectfully submits the Court's rationale applies with equal – if not greater – force where, as here, the element in question is more difficult to establish than proof-of-felon status.

Udeozor threatened to – and did – inflict more severe sexual abuse upon her when the children under her care misbehaved. J.A. 507. Under these circumstances it does not matter that the charged crimes are, as defendant argues, "unrelated to any sex act." Br. 31.

It also does not matter whether defendant knew of the sexual abuse.[8] Indeed, it is black-letter law that a defendant need not have knowledge of all of the details of a conspiracy. *United States* v. *Morsley*, 64 F.3d 907, 919 (4th Cir. 1995). This argument therefore fails as well.

B. Any Error In Admitting The Challenged Evidence Was Harmless

"Evidentiary rulings are subject to review for harmless error." *United States* v. *Weaver*, 282 F.3d 302, 313 (4th Cir. 2002). "[I]n the realm of nonconstitutional error, the appropriate test of harmlessness * * * is whether [this Court] can say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *United States* v. *Williams*, 41 F.3d 192, 199-200 (4th Cir. 1994) (internal quotations omitted). Even if the district court should not have admitted the challenged evidence, any error was harmless.

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[8] The government does not concede defendant was entirely unaware of the sexual abuse. Defendant's former driver testified he overheard a conversation in which defendant expressed suspicion about this issue. J.A. 853-854, 912-913.

1. Defendant Was Acquitted On The Charge To Which The Challenged Evidence Was Most Relevant

That the judgment in this case was not substantially swayed by evidence of sexual abuse is best illustrated by the verdict itself. The jury acquitted defendant on the substantive involuntary-servitude charge, J.A. 2117, the charge as to which the challenged evidence was most directly relevant. Courts routinely take acquittals into account in weighing the harm of potential error. See *United States* v. *Wooten*, 688 F.2d 941, 947 (4th Cir. 1982) (any error in failing to give requested instruction was harmless where defendant was acquitted of relevant charge). See also *Holt*, 460 F.3d at 938 (any error in admission of evidence regarding defendant's sexual relationship with minor was harmless in light of acquittal on the charge to which the evidence was relevant); *United States* v. *Masters*, 924 F.2d 1362, 1368 (7th Cir. 1991) (any error in limiting cross-examination was harmless because "it went to a charge * * * on which the defendants were acquitted"). Accordingly, defendant's argument that the alleged error was not harmless fails on this basis alone.

2. The Evidence Against Defendant Was Overwhelming

At its core, this case is simple: the Udeozors used their status and means to take advantage of a family with few resources, promising to legally bring their daughter to America, provide an education, and send money back to Nigeria. They

did none of these things. Instead, the Udeozors held the victim out of school, made her work long hours in their home and office without pay, and abused her when she failed to meet their expectations. These facts came through easily in the victim's testimony, the bulk of which was not about sexual abuse and was corroborated by other witnesses.[9]

The victim testified that the agreement between her father and the Udeozors was that she would go to school and her family would be paid for her work. J.A. 427-428; J.A. 196-197, 200 (corroborating testimony). Despite this agreement, the victim never attended school while living in defendant's home. J.A. 566; J.A. 369, 837, 1114 (corroborating testimony). Nor was she tutored. J.A. 470, 567; J.A. 413, 846, 1220, 1406 (corroborating testimony).

Instead of going to school, she was forced to spend her days working for defendant. J.A. 457-461, 580, 583; J.A. 353-364, 821-823, 828-829,1406-1407 (corroborating testimony). She did so without assistance from defendant's children. J.A. 498, 659; J.A. 367 (corroborating testimony). And this workload did not substantially change when defendant's and George Udeozor's mothers came to visit. J.A. 468-469; J.A. 412-413, 836-837 (corroborating testimony).

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[9] As defendant concedes, if found credible, the victim's testimony provided "sufficient evidence of force" separate and apart from the evidence of sexual abuse. Br. 30.

The victim explained defendant abused her verbally, J.A. 474-475; J.A. 839, 1408-1409 (corroborating testimony), and physically. J.A. 476-477 & 482-495; J.A. 847-851, 1409 (testimony by other witnesses regarding the victim's contemporaneous statements about the physical abuse). And defendant instilled in the victim a fear of America in general and of police in particular, warning her she would be killed or deported if she attempted to leave the Udeozor home. J.A. 496-497, 560.

Unlike the Udeozor children, J.A. 565, the victim had no friends other than members of the Udeozor family and related acquaintances. J.A. 554-555, 770; J.A. 368, 872, 1133, 1173 (corroborating testimony). And she did not leave the home by herself. J.A. 555; J.A. 872 (corroborating testimony)

This evidence was more than ample to establish a conviction for involuntary-servitude conspiracy and alien harboring, without regard to any evidence of sexual assault.

3. Defendant's Theory Of The Case Was Weak

The strength of the government's case stands in sharp contrast to that of the defense. Indeed, defendant's trial strategy amounted to little more than attempting to smear the victim by (1) suggesting her goal was to sue defendant, J.A. 713; and (2) portraying her as a freeloader who spent much of her time sitting around the

Udeozors' home watching soap operas and other television programs, J.A. 1577-1585, 1590, 1681-1690 (testimony of defendant's oldest daughter); J.A. 1790-1795 (testimony of defendant's oldest son). As noted above, these assertions were flatly contradicted by unequivocal testimony from disinterested witness who were not related to the victim or defendant and had no stake in the outcome of this case.

Simply stated, defendant's trial strategy failed at the most basic level because it offered no plausible benign explanation for the victim's presence in defendant's home. It strains credulity to suggest the Udeozors smuggled the victim into the country illegally, held her out of school for five years, and instructed her to lie about her relationship to the Udeozors and her reasons for not being in school so she could lounge around their home all day watching television while they were at work and their children were cared for by periodic house guests. In short, defendant's theory of the case was implausible and would have been rejected by any reasonable jury, with or without the evidence of sexual abuse.

II

ADMISSION OF RECORDED CONVERSATIONS BETWEEN A CO-CONSPIRATOR AND THE VICTIM DID NOT VIOLATE DEFENDANT'S SIXTH AMENDMENT RIGHTS

This Court exercises *de novo* review over alleged violations of the Confrontation Clause. *United States* v. *Rivera*, 412 F.3d 562, 566 (4th Cir. 2005). This review is subject to harmless error analysis. *United States* v. *Khan*, 461 F.3d 477, 496 (4th Cir. 2006). Other evidentiary rulings are reviewed for abuse of discretion. *United States* v. *Perkins*, 470 F.3d 150, 155 (4th Cir. 2006).

A. The Challenged Evidence Was Properly Admitted

Defendant argues that the district court erred in admitting recorded conversations between her co-conspirator and the victim because the recordings (1) were testimonial, Br. 32-36; and (2) contained statements by George Udeozor that were exculpatory as to the use of force, Br. 39-43. Neither argument is persuasive.

1. The Co-Conspirator Statements Contained In The Recordings Are Not Testimonial

Defendant argues that the challenged statements were testimonial, and therefore their admission into evidence violated her Sixth Amendment rights. The statements were not testimonial.

Defendant's reliance on the Supreme Court's decisions in *Crawford* v. *Washington*, 541 U.S. 36 (2004), and *Davis* v. *Washington*, 126 S. Ct. 2266 (2006), is misplaced. Defendant correctly notes (Br. 33) that *Crawford* left "for

another day any effort to spell out a comprehensive definition of 'testimonial.'" 541 U.S. at 68. But, as the circuit courts that have addressed this issue have held, *Crawford* made clear that evidence could not be considered testimonial unless, at the very least, the declarant was aware or could reasonably expect that his or her statements might later be used at trial. See, *e.g.*, *United States* v. *Ellis*, 460 F.3d 920, 925 (7th Cir. 2006) ("[T]he courts of appeals have taken to defining testimonial in terms of whether the declarant reasonably expected the statement to be used prosecutorially.") (citing cases); *United States* v. *Hinton*, 423 F.3d 355, 360 (3d Cir. 2005) ("[S]tatements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial are testimonial."); *United States* v. *Saget*, 377 F.3d 223, 228 (2d Cir. 2004) ("*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the declarant's awareness or expectation that his or her statements may later be used at trial."). This Court has taken a similar approach, albeit in an unpublished opinion. *United States* v. *Canady*, 139 Fed. Appx. 499, 500-501 (4th Cir. 2005). Thus, even under the broadest reading of *Crawford*, statements made by a witness who does not reasonably believe or

expect them to be used at trial clearly are not testimonial.[10]

Applying this widely-accepted understanding of *Crawford* here, a reasonable person in George Udeozor's position would not expect his statements to be used in the context of a criminal prosecution. Had he believed they would, George Udeozor certainly would have denied any sexual contact or other illegal behavior, or, at a minimum, simply refused to talk about such issues.

Instead, George Udeozor specifically asks near the outset of the first call whether the victim is alone, and is told she is. J.A. 2096 (Udeozor: "I, I worry (In

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[10] The Supreme Court's subsequent decision in *Davis* does not alter this analysis. As a preliminary matter, the ruling in *Davis* is limited to statements made in the context of police interrogation, see *United States* v. *Townley*, 472 F.3d 1267, 1272 (10th Cir. 2007) (discussing *Davis*), and therefore is not controlling here. But even so understood, the limited holding in *Davis* is sufficient to demonstrate its consistency with the decisions cited above.

Davis holds that statements made in the interrogation context aimed at enabling police to respond to an ongoing emergency are not testimonial, while statements unrelated to an ongoing emergency and made during an interrogation – the primary purpose of which "is to establish or prove past events potentially relevant to later criminal prosecution" – are testimonial. *Davis*, 126 S. Ct. at 2273-2274. This ruling is consistent with decisions holding that evidence is testimonial when a reasonable person in the declarant's position would expect his or her statement to be used in a criminal investigation or prosecution. That is, a reasonable declarant likely would not expect statements made to enable police to respond to an ongoing emergency to be used in such fashion, while those made during a police interrogation aimed at later prosecution obviously would be. Thus, as at least one circuit has noted, the ruling in *Davis* – rather than undercutting the above-described interpretation of *Crawford* – actually "lends credence" to it. *Townley*, 472 F.3d at 1272.

Igbo – you are alone by yourself?) because I want to ask you some sp . . . specific questions." [The victim]: "Yeah."). He also asks at the outset of both calls where the victim is, and is told she is at a pay phone. J.A. 2095, 2101. He then converses with her about, *inter alia*, (1) how he is "concerned for [his] own self" since the police picked her up, J.A. 2096; (2) how he brought her into the country, including admitting he used his daughter's passport, J.A. 2096; (3) his need to retain counsel, J.A. 2096; (4) his need to know what she told authorities so he can make sure his story matches hers, J.A. 2096; (5) whether the authorities are looking for him, J.A. 2097-2099; (6) whether she made any accusations about being beaten, J.A. 2098-2099; and (7) the fact he had sex with her, J.A. 2098, 2102-2106, 2108-2109. And he instructs her at the end of the second call to keep things between the two of them. J.A. 2109 ("And please, [victim], the things that happened between you and I, keep in, keep, keep them between you and I."). These are not statements a reasonable person makes if he or she believes they will be used in the context of a criminal prosecution.

Moreover, contrary to defendant's assertion, the government did not use the victim "in lieu of an investigator, to ask questions or elicit responses to establish whether criminal conduct had occurred." Br. 35. Rather, as the victim testified, no one told her what to say and she was free to end the calls if she felt uncomfortable.

J.A. 644.[11]

Thus, this case is analogous to those in which courts have held that statements made to government informants are not testimonial under *Crawford*. For example, in *Saget* the declarant's "statements were elicited by an agent of law enforcement officials," but "without [the declarant's] knowledge, and not in the context of the structured environment of formal interrogation." *Saget*, 377 F.3d at 228. As in the cases cited above, the panel in *Saget* read *Crawford* as "suggest[ing] that the Court would use the reasonable expectation of the declarant as the anchor of a more concrete definition of testimony." *Id.* at 229. It concluded the declarant's statements were not testimonial, basing this holding in part on *Crawford*'s citation of the Supreme Court's prior decision in *Bourjaily* v. *United States*, 483 U.S. 171 (1987). As here, *Bourjaily* involved statements made unwittingly to a government informant. As the *Saget* court noted, the Supreme Court cited *Bourjaily* approvingly "as an example of a case in which

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[11] The government's involvement in the production of these statements does not bear on the question whether they are testimonial at any rate. Defendant's assertion to the contrary (Br. 33, 35) misreads *Crawford*. The *Crawford* Court's footnote regarding the "potential for prosecutorial abuse," 541 U.S. at 56 n.7 – upon which defendant relies – was a response to an assertion made in a concurring opinion regarding whether the Confrontation Clause requires exclusion of admittedly testimonial statements. 541 U.S. at 71-74 (Rehnquist, C.J., concurring). It was not part of the Court's discussion of what falls within the definition of "testimonial."

nontestimonial statements were correctly admitted against the defendant without a prior opportunity for cross-examination." *Saget*, 377 F.3d at 229 (citing *Crawford*, 124 S. Ct. at 1367). The *Saget* court therefore held "a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*," and such statements accordingly are admissible. *Id.* at 229-230. Other courts have reached similar conclusions. See, *e.g.*, *United States* v. *Hendricks*, 395 F.3d 173, 183-184 (3d Cir. 2005) (concluding, based largely on *Crawford*'s citation of *Bourjaily*, that statements made to a confidential informant are not testimonial); *Canady*, 139 Fed. Appx. at 501 (unpublished) (same).

Like the declarant in *Saget*, George Udeozor had no knowledge his statements were being monitored by law enforcement officials. Defendant's trial counsel admitted as much during closing argument. J.A. 1979. And the statements were not made in the context of formal interrogation. Accordingly, the statements were not testimonial. See *Saget*, 377 F.3d at 228; *Hendricks*, 395 F.3d at 183-184.

2. The Challenged Statements Are Not Exculpatory

Defendant next contends (Br. 39-43) the statements made by George Udeozor in the challenged recordings are not against interest, and therefore do not fall within the hearsay exception contained in Federal Rule of Evidence 804(b)(3). Specifically, defendant asserts that (1) the only inculpatory statements contained in the recordings relate to George Udeozor smuggling the victim into the country, Br. 40-41; and (2) George Udeozor's recorded statements deny improper or forcible sexual relations with the victim, Br. 41-43. This Court reviews decisions regarding the admissibility of evidence under Rule 804(b)(3) for abuse of discretion. *United States* v. *Lowe*, 65 F.3d 1137, 1145 (4th Cir. 1995).

Although defendant objected to the admission of the recordings below, trial counsel never argued the statements were not sufficiently inculpatory. J.A. 54-63; see also Defendant's Opp'n to United States' Mot. to Admit Evidence of Abuse (Dist. Ct. Docket No. 52). Accordingly, the argument that George Udeozor's statements as to the use of force were exculpatory was not properly preserved and thus fails on this basis alone. *Linwood*, 142 F.3d at 422; *Norman T.*, 129 F.3d at 1106. Even if this argument were properly preserved, however, it would fail.

Defendant's assertion that George Udeozor's recorded statements do not satisfy the requirements of Rule 804(b)(3) because he denies raping the victim –

and instead implies the sex was consensual – is wholly without support. Rule 804(b)(3) provides for admission of "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability * * * that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Fed. R. Evid. 804(b)(3). Defendant's argument (Br. 43) is based on the assumption George Udeozor's recorded statements are inadmissible under this provision unless he admits to the complete crime of rape (*i.e.*, both (1) sex, and (2) use of force or knowledge the victim was below the age of consent).

Rule 804(b)(3) is not so narrow. Rather, "whether a statement is self-inculpatory or not can only be determined by viewing it in context." *Williamson* v. *United States*, 512 U.S. 594, 603 (1994). And "[e]ven statements that are on their face neutral may actually be against the declarant's interest." *Ibid.* Accordingly, statements that fall short of admitting a completed crime – or even a given element of a crime – are admissible under Rule 804(b)(3) if a reasonable person would not make them under the circumstances unless true. See *Williamson*, 512 U.S. at 603-604 (statements about hiding a gun at someone's apartment or going to someone's house might be against interest, as might other statements providing details of a crime). See also *id.* at 606 (Scalia, J., concurring) ("A statement obviously can be

self-inculpatory * * * without consisting of the confession 'I committed X element of crime Y.'").

Here, George Udeozor admitted having sex with a minor he smuggled into the country illegally to live in his home and care for his children. There is no getting around this fundamental fact, and no way to parse George Udeozor's recorded statements so as to render these admissions exculpatory. That George Udeozor denied forcing himself on the victim means only that he did not admit to the completed crime of rape. It does not change the fact he admitted a key element of the crime of rape (*i.e.*, sex with the minor victim), which unquestionably was so contrary to his interests a reasonable person in his position would not have made it if not true. This is all Rule 804(b)(3) requires.[12]

B. Any Error In Admitting The Recordings Was Harmless

This Court need not reach the merits of defendant's Sixth Amendment arguments if it concludes any potential error was harmless. See *United States* v. *Khan*, 461 F.3d 477, 496 (4th Cir. 2006); *United States* v. *Iskander*, 407 F.3d 232, 240 (4th Cir. 2005). The government bears a slightly higher burden in

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[12] In addition to Rule 804(b)(3), the government also sought to have the challenged recordings admitted pursuant to Federal Rule of Evidence 807. J.A. 47. The district court did not reach this argument, J.A. 47-48, but this Court "can affirm a trial court's opinion on different grounds than those employed by the trial court." *United States* v. *Dorsey*, 45 F.3d 809, 814 (4th Cir. 1995).

demonstrating harmless error in the context of alleged constitutional violations. It must demonstrate "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder* v. *United States*, 527 U.S. 1, 18 (1999). See also *United States* v. *Rodriguez*, 94 Fed. Appx. 139, 142 (4th Cir. 2004) (unpublished) (citing standards for both constitutional and nonconstitutional error).

In the interest of brevity, the government incorporates by reference the harmless error argument made in Section I(B) above and asserts that, for the reasons stated therein, any Sixth Amendment error was harmless beyond a reasonable doubt.

III

THE DISTRICT COURT'S USE OF SPECIAL FINDINGS WAS PROPER

The government agrees with defendant that the proper standard of review for a district court's use of special findings over a defendant's objection is abuse of discretion. Br. 44 (citing cases).[13] Defendant asserts use of special findings was improper here because (1) the district court included the special findings as a

[13] Although the abuse-of-discretion standard generally is applicable to determinations regarding use of special findings, as explained in Sections III(B) and III(C) below, defendant's second and third arguments regarding this issue are subject to plain-error review.

second portion of the same verdict form used to determine guilt or innocence, as opposed to having the jury first determine whether defendant is guilty and then sending the jury back with a separate form to address special findings, Br. 47; (2) the district court did not require the jury to specify which object (or objects) of the conspiracy served as the basis for its finding of guilt with respect to the multi-object conspiracy count, Br. 47-48; and (3) material given to the jury during deliberations included a statement indicating the grand jury already had found the existence of the special factors charged in this case, Br. 48-49. Each argument fails.

A. The Special Verdict Form Was Proper

The special findings in this case were submitted to the jury as part of a two-page verdict form. J.A. 2117-2118. The first page asked the jury to determine guilt or innocence on each of three charged counts. J.A. 2117. The second page then asked the jury to answer "yes" or "no" questions with respect to three special findings. J.A. 2118. The district court instructed the jury – both in its formal instructions, J.A. 1920-1921, and in the verdict form itself, J.A. 2118 – not to consider the special findings unless it first found defendant guilty. The jury is presumed to have followed these instructions. *United States* v. *Ellis*, 121 F.3d 908, 921 (4th Cir. 1997).

Significantly, defendant cites no cases holding this approach amounts to abuse of discretion. Instead, defendant's argument is grounded on (1) the general notion that special verdicts are discouraged in criminal cases, Br. 44-46; and (2) citation to cases in which her preferred approach was followed, Br. 47. Neither supports the weight of defendant's argument.

First, it is true special verdicts traditionally were discouraged in criminal cases. "Over the course of the last two decades, however, '[e]xceptions to the general rule disfavoring special verdicts in criminal cases have been expanded and approved in an increasing number of circumstances.'" *United States* v. *Stonefish*, 402 F.3d 691, 698 (6th Cir. 2005) (quoting *United States* v. *Reed*, 147 F.3d 1178, 1180 (9th Cir. 1998)). And case law "make[s] it clear that use of a special verdict form is a matter of the district court's discretion to be determined on the facts of each case." *Reed*, 147 F.3d at 1181 (citing cases).

Defendant's trial occurred in October and November 2004, shortly after the Supreme Court's decision in *Blakely* v. *Washington*, 542 U.S. 296 (2004), but before its decision in *United States* v. *Booker*, 543 U.S. 220 (2005). As this Court has observed, "in the uncertainty between *Blakely* and *Booker*, it was reasonable to assume that enhancements, other than prior conviction enhancements, had to be pled in the indictment and the facts supporting those enhancements found by the

jury beyond a reasonable doubt." *United States* v. *Robinson*, 2007 WL 98110, at *2 (4th Cir. 2007) (unpublished). See also *United States* v. *Wallace*, 461 F.3d 15, 21 n.2 (1st Cir. 2006); *United States* v. *Beal*, 430 F.3d 950, 953-954 (8th Cir. 2005). Thus, historical disfavor of special verdicts – already waning – properly was set aside given the state of the law at the time of defendant's trial.

Second, and more importantly, defendant provides no case law to support her claim the jury must first return a guilty verdict and then be sent back to deliberate with regard to special factors. Rather, defendant simply cites cases in which courts used two separate verdict forms and contends the same approach should have been followed here. Br. 47. But the fact other district courts handled similar situations in such a manner does not establish it is an abuse of discretion not to do so. In fact, applicable case law points to the opposite conclusion.

The Third Circuit recently rejected a nearly identical argument. In *United States* v. *Hedgepeth*, 434 F.3d 609 (3d Cir. 2006), the panel noted that while special interrogatories used for sentencing purposes must be submitted after a guilty verdict is returned, this requirement is satisfied "when jurors are instructed on a single form to answer the special interrogatory only after filling out a verdict of guilty or not guilty." 434 F.3d at 613 & n.2.

As in this case, the verdict form in *Hedgepeth* "was structured so that the

jury was first instructed to determine whether [defendant] was guilty of possession of a firearm by a felon and only then move to consideration of the special findings," thereby alleviating the potential prejudice. *Id.* at 613 & n.3. The court concluded "[t]he danger of prejudice to [defendant] was thus alleviated, as we cannot say that the jury was led step-by-step to a guilty verdict when the special findings followed the guilt determination." *Id.* at 613. And "[a]lthough an argument could be made that the jurors could have looked down the page at the special findings before rendering a guilty verdict, [the court of appeals] must assume that the jury understood and followed the court's instructions." *Id.* at 614 n.4 (citation and internal quotations omitted). Other courts have reached similar conclusions. See, *e.g.*, *United States* v. *Console*, 13 F.3d 641, 663 (3d Cir. 1993); *United States* v. *Adams*, 2007 WL 4209, at *1-*2 (10th Cir. 2007) (unpublished).

The position taken in these cases is sensible. There is no substantive difference between a jury that reaches a finding of guilt and then moves on to the second page of a verdict form to determine the existence of special factors, and one that returns a finding of guilt only to be handed a new piece of paper and told to deliberate with regard to special factors. Certainly there is not enough of a difference to say a district court that chooses the former over the latter abuses its discretion, particularly where, as here, the jury was instructed not to consider the

special factors unless it first determined guilt. Defendant's argument to the contrary simply elevates form over substance, and therefore fails.

B. The Jury Specified The Object Of The Conspiracy

Defendant's second argument regarding the use of special findings – that the district court failed to instruct the jury to determine defendant's guilt regarding each object of the conspiracy, Br. 47-48 – is not altogether clear. Defendant cites this failure as one of three enumerated problems with the district court's use of special findings, but does not specify what harm allegedly resulted from this failure or cite any case law, thereby making it difficult for the government to respond. The government nevertheless notes the following with respect to this issue.

First, defendant failed to request such an instruction. Review of this issue accordingly is for plain error. *United States* v. *Smith*, 451 F.3d 209, 217 n.4 (4th Cir. 2006).

Second, it is clear the jury unanimously found that the government established the most serious object of the conspiracy – involuntary servitude – beyond a reasonable doubt. The jury was told both in the court's instructions and in the verdict form not to answer the special interrogatories regarding involuntary servitude unless it first (1) found defendant guilty of the substantive involuntary-servitude charge, *or* (2) found defendant guilty of conspiracy *and* unanimously

concluded an object of the conspiracy was to hold the victim in involuntary servitude. J.A. 1920, 2118. The jury acquitted defendant on the substantive involuntary-servitude charge, J.A. 2117, but proceeded to answer the special interrogatories regarding involuntary servitude. J.A. 2118. Thus, assuming – as we must – the jury followed the court's instructions, *Ellis*, 121 F.3d at 921, it only could have reached the special findings regarding involuntary servitude by concluding one object of the conspiracy was to hold the victim in involuntary servitude.

Third, to the extent defendant contends the failure to require the jury to determine the existence of other objects of the conspiracy constitutes error, this argument fails. It is well settled that guilty verdicts in multiple-object conspiracy cases are valid provided any single object is established. See *United States* v. *Bolden*, 325 F.3d 471, 492 (4th Cir. 2003); *United States* v. *Wells*, 163 F.3d 889, 898 (4th Cir. 1998). Accordingly, the district court committed no error – let alone plain error – in not requiring the jury to determine defendant's guilt regarding each object of the conspiracy.[14]

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[14] Defendant's assertion that the district court should have expressly asked the jury to make findings with regard to each object of the conspiracy (Br. 47-48) is odd in view of her complaints regarding the alleged complexity of the special verdict form (Br. 44-47). The district court arguably employed the most efficient

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C. Inclusion Of The Challenged Language In The Indictment Given To The Jury Was Not Plain Error

Defendant's final argument regarding special findings fares no better. Citing pages 22-25 and 1919 of the joint appendix, defendant claims "a second copy of the Special Findings" was "attached" to the second superseding indictment and given to the jury. Br. 48. Because the preamble to the special findings states that the grand jury found them as facts, Defendant asserts "prejudicial evidence" not introduced at trial came before the jury. Br. 48. Defendant contends a new trial therefore is required in accordance with this Court's decision in *United States* v. *Lentz*, 383 F.3d 191 (4th Cir. 2004). This argument is incorrect.

The government assumes defendant is referring to the language contained in the first line of page 28 of the joint appendix, which matches the language quoted on page 48 of defendant's brief.[15] But this page was not "attached" to the second

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[14](...continued)
verdict form possible under the circumstances, in that it obtained the information necessary to perform its sentencing function without cluttering the verdict form with additional questions. Defendant cannot have it both ways, and should not be heard to argue both that the verdict form was too complex and that it was not specific enough.

[15] Pages 22-25 of the joint appendix are simply the first four pages of the second superseding indictment. The challenged language regarding the grand jury's findings does not appear on these pages. Nor does it appear on page 1919 of the joint appendix, the other page cited by defendant.

(continued...)

superseding indictment, as defendant claims. Page 28 of the joint appendix is *part* of the second superseding indictment, as evidenced by the fact it is paginated accordingly (*i.e.*, it is labeled page "7" and is in fact the seventh page of the indictment) and contains the signatures of the United States Attorney and grand jury foreperson at the bottom of the page. J.A. 28.[16]

Lentz, the case upon which defendant relies, involved a situation in which the district court accused the prosecution of deliberately sending excluded physical evidence – a murder victim's day planners – into the jury room. 383 F.3d at 206. This Court's ruling in *Lentz* accordingly is limited to cases in which prejudicial *evidence* improperly comes before a jury. See *Lentz*, 383 F.3d at 219.

It is black-letter law, however, that indictments are not evidence. See *United States* v. *Short*, 671 F.2d 178, 183 (6th Cir. 1982). And defendant's jury was instructed on this point no fewer than three times. J.A. 1868, 1870. It also was instructed to "base [its] decision solely upon the evidence developed at trial or the

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[15](...continued)

[16] To the extent there is any doubt the special factors were part of the second superseding indictment, the government respectfully refers the Court to the transcript of defendant's arraignment on the second superseding indictment, in which the district court specifically cited page 7 and noted the special findings. See Sept. 13, 2004 Tr. at 73-75. While not included in the joint appendix, this portion of the record may be relied upon by the Court. Fed. R. App. P. 30(a)(2).

lack of evidence." J.A. 1867. And it was told "[t]he defendant begins the trial * * * with a clean slate." J.A. 1869. The jury is presumed to have followed these instructions. *Ellis*, 121 F.3d at 921.

Defendant did not move, pursuant to Federal Rule of Criminal Procedure 7(d), to have the challenged language redacted. See Fed. R. Crim. P. 7(d) ("Upon the defendant's motion, the court may strike surplusage from the indictment or information."). Nor did she object to the content of the second superseding indictment, or to its being given to the jury during deliberations.[17] Plain-error review therefore is appropriate. *United States* v. *Schuler*, 458 F.3d 1148, 1153 (10th Cir. 2006).

No error – plain or otherwise – occurred here. See *United States* v. *Ramirez*, 710 F.2d 535, 545 (9th Cir. 1983). In *Ramirez*, the defendant brought a Rule 7(d) motion seeking to have the district court delete from the indictment the phrases "a true bill" and "the Grand Jury charges," along with the signatures of the grand jury foreperson and the United States Attorney. 710 F.2d at 545. Similar to this case, the argument in *Ramirez* was "that this language prejudiced [the defendant] by

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[17] Indeed, defendant's trial counsel was alerted to the possibility of redacting information before sending the indictment to the jury when the district court asked whether George Udeozor's name should first be removed from the indictment, and trial counsel indicated he had no objection to the indictment being sent to the jury with George Udeozor's name included. J.A. 1840-1841.

telling the jury in effect that a higher jury, the grand jury, has found the facts in the indictment to be true and that the United States Attorney concurs in that opinion." *Ibid.* The Ninth Circuit rejected this argument as "frivolous," ruling the district court's refusal to strike the language was not error where the jury was instructed both at the beginning and end of the trial that the indictment was not evidence and "afford[ed] no inference of guilt or innocence." *Ibid.* See also *United States* v. *Solina*, 733 F.2d 1208, 1214 (7th Cir. 1984) (concluding the phrase "a true bill" should have been removed, but failure to do so did not warrant reversal).

Accordingly, there is no basis for concluding the challenged language was prejudicial to defendant, and certainly no basis for finding plain error. See *United States* v. *Coward*, 669 F.2d 180, 184 (4th Cir. 1982) (district court's repeated admonitions that indictment is not evidence "effectively offset any hypothetical prejudice resulting from the jury's receipt of the unedited indictment"); see also *United States* v. *Marshall*, 985 F.2d 901, 906 (7th Cir. 1993); *Lowther* v. *United States*, 455 F.2d 657, 666-667 (10th Cir. 1972).[18] Defendant's argument therefore

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[18] The same analysis would hold true even if *Lentz* applied to this case. Under *Lentz*, the standard for determining whether evidence is prejudicial – and therefore warrants a new trial – "is whether there is a reasonable possibility that the jury's verdict was influenced by the material that improperly came before it." 383 F.3d at 219. Putting aside the fact that the indictment is not evidence and was not improperly placed before the jury, the challenged language could not have

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fails.

IV

DEFENDANT'S SENTENCE IS REASONABLE

In reviewing a sentence for reasonableness, this court reviews legal questions *de novo* and factual findings for clear error. *United States* v. *Moreland*, 437 F.3d 424, 433 (4th Cir. 2006). "[A] sentence within a properly calculated advisory Guidelines range is presumptively reasonable," and may be rebutted only "by demonstrating that the sentence is unreasonable when measured against the [18 U.S.C. 3553(a)] factors." *United States* v. *Montes-Pineda*, 445 F.3d 375, 379 (4th Cir. 2006) (citation and internal quotations omitted).

Defendant asserts her sentence was (1) substantively unreasonable because the district court based it on the jury's special finding that involuntary servitude was the object of the conspiracy, Br. 51-55; and (2) procedurally unreasonable because the court made factual findings that precluded a downward adjustment based on defendant's role in the offense, Br. 56-60. Both arguments fail.

A. Defendant's Sentence Is Substantively Reasonable

Defendant's challenge to the substantive reasonableness of the sentence is

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[18](...continued)
influenced the jury in light of the above-cited instructions from the district court. Accordingly, even under *Lentz* defendant would not be entitled to a new trial.

based primarily on her claims that (1) the jury was not required to unanimously identify the object of the conspiracy, and (2) the jury could not have found involuntary servitude to be the object of the conspiracy because it acquitted her of the substantive involuntary-servitude offense. Br. 51-53. Neither of these assertions is legally or factually correct. As a result, defendant's challenge to the substance of her sentence should be rejected.

First, there is no doubt that the jury identified the object of the conspiracy to be involuntary servitude. Under Section 2X1.1 of the Sentencing Guidelines, the base offense level for the underlying substantive offense that was the object of the conspiracy is used in calculating the base offense level for the conspiracy charge. Here, there were three potential objects of the conspiracy: involuntary servitude, in violation of 18 U.S.C. 1584; harboring a juvenile alien, in violation of 8 U.S.C. 1324(a)(1)(A)(iii); and inducing a juvenile alien to enter and reside in this country, in violation of 8 U.S.C. 1324(a)(1)(A)(iv). J.A. 22-23. The applicable guideline for involuntary servitude is Section 2H4.1, which provides for a base offense level of 22. The applicable guideline for both of the other potential objects of the conspiracy is Section 2L1.1, which provides for a base offense level of 12. Accordingly, with regard to the object(s) of the conspiracy, *only one issue needed to be resolved:* whether the object of the conspiracy was involuntary servitude. If

it was, defendant's base offense level would be 22. If not, the guideline for the immigration offenses would apply, placing defendant's base offense level at 12.

As previously noted, *supra* at 44-45, the jury twice was told not to answer the special interrogatories regarding involuntary servitude unless it first (1) found defendant guilty of the substantive involuntary-servitude charge, *or* (2) found defendant guilty of conspiracy *and* unanimously concluded an object of the conspiracy was to hold the victim in involuntary servitude. J.A. 1920, 2118. Because the jury acquitted defendant on the substantive involuntary-servitude charge, J.A. 2117, but proceeded to answer the special interrogatories regarding involuntary servitude, J.A. 2118, it is clear that it unanimously found involuntary servitude to be the object of the conspiracy. The district court recognized this at sentencing. J.A. 2158 ("[I]n looking at the special findings the Court's read is that the defendant was in the minds of the jury guilty of, among other things, conspiracy that included among it's [sic] objects the involuntary servitude."). This fact distinguishes this case from both cases relied upon by defendant. See *United States* v. *Rhynes*, 206 F.3d 349, 380 (4th Cir. 1999); *United States* v. *Quicksey*, 525 F.2d 337, 340-341 (4th Cir. 1975).

Second, there is no inconsistency between the jury's acquittal of defendant on the substantive charge of involuntary servitude and its finding involuntary

servitude was an object of the conspiracy. The two charges have different elements, and courts routinely uphold sentences under such circumstances. See, *e.g.*, *United States* v. *Jackson*, 167 F.3d 1280, 1285 (9th Cir. 1999); *United States* v. *Ross*, 131 F.3d 970, 989 (11th Cir. 1997) (rejecting as "contrary to well established law" defendant's contention that acquittal on substantive count precluded use of the applicable guideline for that offense in sentencing on conspiracy charge).[19]

And even if the verdict were irreconcilably inconsistent, it is well established that jury verdicts are not subject to challenge on the ground of inconsistency. *United States* v. *Powell*, 469 U.S. 57, 65 (1984). See also *United States* v. *Thomas*, 900 F.2d 37, 40 (4th Cir. 1990). If defendant truly believed the verdict was inconsistent and the acquittal on the substantive involuntary-servitude charge – as opposed to the finding that involuntary servitude was an object of the conspiracy – represented the jury's "true" feelings on the issue, the appropriate

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[19] Defendant asserts additional variations of the same basic argument regarding the alleged inconsistency between the jury's acquittal on the substantive involuntary-servitude charge and its finding involuntary servitude was an object of the conspiracy. Br. 53 (use of allegedly contradictory special findings "negated the acquittal" on the substantive charge); *ibid.* (special findings gave prosecution "second bite at the apple of conviction") *ibid.* (various steps should be taken if acquittal on substantive count is contradicted by special findings). All fail for the reasons discussed above.

course of action would have been to challenge the sufficiency of the evidence supporting the finding that involuntary servitude was an object of the conspiracy. See *Powell*, 469 U.S. at 67; *Thomas*, 900 F.2d at 40. But defendant eschewed this course, instead taking the unfounded position that no such finding was made in the first place, a tactical decision that foreclosed any argument regarding verdict inconsistency. Because the jury found that involuntary servitude was an object of the conspiracy and the evidence supported conviction on the conspiracy count, the district court's reliance on that conviction in sentencing defendant is unassailable.

Defendant's remaining arguments (Br. 54-55) merit little discussion. Defendant's assertion that her trial counsel asked the district court for clarification regarding the basis of the conspiracy (Br. 54) is factually incorrect. Clarification was not sought as to the basis for the conspiracy. Rather, defendant's trial counsel sought clarification only with respect to whether the jury's conviction on count three (the substantive harboring charge) was based on her own acts or on her liability for acts committed by her co-conspirator under *Pinkerton*. J.A. 2070. And defendant's trial counsel conceded such clarification would *not* affect her score under the guidelines, as it was only relevant to where the judge would

sentence her within the guideline range. J.A. 2070-2071.[20]

In addition, the fact an application note to a general provision of the guidelines counsels caution where the verdict does not establish the object of the conspiracy, Br. 54-55, obviously is not relevant where, as here, we know from the structure of the verdict form and accompanying instructions the jury reached unanimity regarding the most serious object of the conspiracy.

Finally, for the reasons stated above, the district court did not, as defendant asserts, "ignore[] the acquittal," Br. 55, on the substantive involuntary-servitude charge when it used involuntary servitude as the object offense for the conspiracy conviction in calculating defendant's sentence. More to the point, however, this argument fails because district courts are permitted to ignore acquittals. Indeed, it is well established district courts may consider all relevant conduct – including acquitted conduct – at sentencing. See *United States* v. *Watts*, 519 U.S. 148, 157 (1997); *United States* v. *Jackson*, 167 F.3d 1280, 1285 (9th Cir. 1999) (invoking

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[20] Defendant also suggests (Br. 54) the district court went back on its purported promise to apply the rule of lenity in calculating her guideline range. This is incorrect. As noted above, the court's comment related only to where defendant would be sentenced within the guideline range once it was set, not on the calculation of the range. J.A. 2070-2071. At any rate, the district court did show lenity in regard to where defendant's sentence fell within the guideline range, sentencing defendant to the bottom of the applicable range, J.A. 2247, even though defendant's trial counsel conceded the court was not bound by its earlier comments, J.A. 2178-2179.

Watts where jury convicted on conspiracy charge but acquitted on substantive charge despite having been given a *Pinkerton* instruction).[21] Accordingly, the jury's acquittal of defendant on the substantive involuntary-servitude charge did not preclude the district court from calculating defendant's sentence based on the involuntary-servitude guideline, both because the verdict form unequivocally indicates the jury unanimously concluded involuntary servitude was an object of the conspiracy, and because the district court was entitled to consider acquitted conduct at any rate.

B. Defendant's Sentence Is Procedurally Reasonable

Defendant next challenges the reasonableness of her sentence because of the district court's denial of her request for a downward adjustment based on her role in the offense. This Court reviews the district court's determination for clear error. *United States* v. *Kiulin*, 360 F.3d 456, 463 (4th Cir. 2004).

Section 3B1.2 allows for a four-level reduction if defendant is found to be a "minimal participant," a two-level reduction for a "minor participant," and a three-

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[21] Courts uniformly have held this principle remains valid post-*Booker*. See *United States* v. *Mercado*, 474 F.3d 654, 657 (9th Cir. 2007) (citing cases). This Court does not appear to have addressed this issue in a published opinion, but has recognized it in unpublished opinions. See, *e.g.*, *United States* v. *Bokman*, 2007 WL 216290, at *2 (4th Cir. 2007); *United States* v. *Cooper*, 201 Fed. Appx. 155 (4th Cir. 2006).

level reduction for a defendant falling somewhere in between. Sentencing Guidelines § 3B1.2. Defendant bears the burden of proving entitlement to such a reduction "by a preponderance of the evidence." *United States* v. *Akinkoye*, 185 F.3d 192, 202 (4th Cir. 1999).

Here, the district court concluded "there is no reason to suppose that the jury found that the defendant was other than co-equally responsible with George Udeozor in connection with the conspiracy." J.A. 2182. Noting that defendant would have to demonstrate "substantially less culpability" in order to be entitled to a reduction, the district court accordingly found "no basis under the guidelines for any sort of departure on that basis." J.A. 2182-2183.

In no way was this finding clearly erroneous. Defendant was the day-to-day taskmaster for the victim, supervising her work both at home and at defendant's medical office. Defendant was the one giving orders on a daily basis, punishing the victim when work was not performed to her satisfaction, and inflicting the majority of the non-sexual abuse on the victim. And it was defendant – not George Udeozor – who told the victim what to say when asked about her relationship to the Udeozors. J.A. 581-582. Most importantly, defendant continued to hold the victim in involuntary servitude for almost two years after George Udeozor left the country. Accordingly, defendant was – at a minimum – a co-equal partner in the

conspiracy, and the district court's rejection of defendant's argument was not clear error.

C. Defendant's Sentence Is Reasonable Under Section 3553(a)

Defendant's challenge to the reasonableness of her sentence tellingly omits any discussion of the district court's required analysis of the Section 3553(a) factors. This analysis strongly reinforces the reasonableness of defendant's sentence.

During the sentencing hearing, the victim described the overwhelming responsibility defendant placed on her at such a young age, J.A. 2206; how defendant's actions deprived her of an education and of her teenage years, J.A. 2208-2209; the fact she still is in counseling as the result of her ordeal in defendant's home, J.A. 2209; and the fact the Udeozors have retaliated against her family in Nigeria as the result of this case. J.A. 2210-2213. For her part, defendant remained unrepentant, continuing to claim innocence, J.A. 2233, and accusing the victim of fabricating the events that led to her conviction and "manipulat[ing] the system to punish [defendant]." J.A. 2234-2235.

In assessing the Section 3553(a) factors, the district court found the offense to be a serious one, and described as "very troubling" the fact defendant continued to view herself as a victim. J.A. 2242-2243. The court further found defendant

"engaged in a pattern of fraud throughout her time in this country," J.A. 2243, including marriage fraud with regard to her immigration status, J.A. 2243-2244, and Medicaid fraud in the running of her medical practice, J.A. 2244, in addition to the acts of which she was convicted in this case. The court concluded "the characteristics of the defendant are that she doesn't understand, in light of this entire history, and particularly the history of this case, that you cannot speak and do these things the way you have done them." J.A. 2244-2245.

Proceeding through the remaining Section 3553(a) factors, the district court addressed, *inter alia*, the need for deterrence in these types of cases, J.A. 2245, the type of sentences available and range of sentences in similar cases, J.A. 2246, and the Bureau of Prisons' ability to address defendant's medical needs, J.A. 2246. Following this analysis, the court sentenced defendant to 87 months – the low end of the guideline range, J.A. 2241 – and ordered restitution in the amount of $110,249.60, half the amount the government sought. J.A. 2247-2248. Defendant's sentence accordingly is reasonable under Section 3553(a).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

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 12 and contains no more than 13,668 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

/s/
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Date: April 16, 2007

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2007, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE were served via first-class mail on the following counsel of record:

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