No. 11-15054-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

BIDEMI BELLO,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS APPELLEE

THOMAS E. PEREZ
Assistant Attorney General

JESSICA DUNSAY SILVER
ERIN ASLAN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-2773

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for the United States files this Certificate Of Interested Persons And Corporate Disclosure Statement. The following persons may have an interest in the outcome of this case:

1. Aslan, Erin, Attorney, United States Department of Justice, Civil Rights Division, Appellate Section, counsel for the United States
2. Bello, Bidemi, defendant-appellant
3. Coppedge, Susan, Assistant United States Attorney, United States Attorney's Office for the Northern District of Georgia, counsel for the United States
4. Duffey, William S., The Honorable, United States District Court Judge, Northern District of Georgia
5. Friel, Gregory B., Deputy Assistant Attorney General, United States Department of Justice, Civil Rights Division, counsel for the United States
6. Hashimi, Suzanne, Assistant Federal Defender, The Federal Defender Program, Inc., Northern District of Georgia, counsel for the defendant-appellant, Bidemi Bello
7. Kapplehoff, Mark, Chief, United States Department of Justice, Civil Rights Division, Criminal Section, counsel for the United States

8. Kearns, Stephanie A., Executive Director, The Federal Defender Program, Inc., Northern District of Georgia, counsel for defendant-appellant, Bidemi Bello

9. Maloney, Karima, Deputy Chief, United States Department of Justice, Civil Rights Division, Criminal Section, counsel for the United States

10. Olatunbosum, Olawunmi (Laome), victim

11. Perez, Thomas E., Assistant Attorney General, United States Department of Justice, Civil Rights Division, counsel for the United States

12. Shorinola, Olayemia (Dupe), victim

13. Silver, Jessica Dunsay, Principal Deputy Chief, United States Department of Justice, Civil Rights Division, Appellate Section, counsel for the United States

14. Walker, Linda T., The Honorable, United States Magistrate Judge, Northern District of Georgia

15. Yates, Sally Quillan, United States Attorney, Northern District of Georgia, counsel for the United States

Dated: May 16, 2012

ERIN ASLAN
Attorney

STATEMENT REGARDING ORAL ARGUMENT

The United States requests oral argument. This case raises a legal question regarding the interpretation of 18 U.S.C. 1589, which criminalizes obtaining or providing forced labor. Specifically, this Court must decide whether a jury must unanimously agree upon which of the statutorily enumerated means the defendant used to compel the victim's labor. The United States believes that oral argument would be helpful, as this appears to be a question of first impression in this Court.

TABLE OF CONTENTES

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CITATIONS

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES: **PAGE**

STATUTES (continued): **PAGE**

LEGISLATIVE HISTORY:

RULES:

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-15054-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

BIDEMI BELLO,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

This is a direct appeal from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The district court entered its judgment on October 14, 2011, (R.Vol.2-84),[1] and defendant Bidemi

[1] Citations to "R.Vol.__-__ at __" refer to the record on appeal (R.), including the volume (Vol.__), document (-__), and, if applicable, page number(s) (at __), as identified in the Certificate of Readiness of Record on Appeal filed in this Court on January 12, 2012. Citations to "Def.Br. __" refer to the pages of the defendant's opening brief, which was filed in this Court on March 16, 2012.

Bello filed a timely notice of appeal on October 27, 2011, (R.Vol.2-86). See Fed. R. App. P. 4(b)(1)(A). This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion when it denied the defendant's request for a specific unanimity instruction and overruled the defendant's objection to an instruction that correctly permitted the jury to convict the defendant of violating 18 U.S.C. 1589 without unanimously agreeing upon the particular means the defendant used to forcibly obtain the victims' labor and services.

STATEMENT OF THE CASE

This is a domestic servitude case in which the defendant was convicted of labor trafficking and immigration offenses arising out of her treatment of two young women whom the defendant brought from Nigeria to work in her home outside Atlanta, Georgia. On October 5, 2010, a grand jury sitting in the Northern District of Georgia returned a nine-count superseding indictment charging the defendant with two counts of forced labor, in violation of 18 U.S.C. 1589 (Counts One and Four); two counts of trafficking with respect to forced labor, in violation of 18 U.S.C. 1590 (Counts Two and Five); two counts of document servitude, in violation of 18 U.S.C. 1592 (Counts Three and Six); three counts of harboring and naturalization crimes, in violation of 8 U.S.C. 1324(a)(1)(A)(iii), (B)(I) and 18

U.S.C. 1425(a) (Counts Seven, Eight, and Nine), and a forfeiture provision, pursuant to 18 U.S.C. 982(b) and 21 U.S.C. 853(p). R.Vol.1-12.

The defendant pleaded not guilty and proceeded to trial. R.Vol.1-17. On June 10, 2011, a jury found the defendant guilty of all charges, except one count of document servitude (Count Six). R.Vol.2-71; R.Vol.8-81 at 1181-1187. On October 13, 2011, the district court sentenced the defendant to 140 months of imprisonment on Counts One, Two, Four, and Five; 120 months on Counts Seven, Eight, and Nine; and 60 months on Count Three, all to run consecutively and to be followed by three years of supervised release. R.Vol.2-83, 84. The district court also ordered the defendant to pay $144,200 in restitution to the two victims and $800 in special assessments. R.Vol.2-84. On the United States' motion, the district court revoked the defendant's United States citizenship. R.Vol.2-82, 85. The defendant filed her timely notice of appeal on October 27, 2011. R.Vol.2-86. The defendant is presently serving her sentence. Def.Br. 3.

STATEMENT OF THE FACTS

1. Offense Conduct

a. Forced Labor of Olawunmi Olatunbosun (Laome)[2]

(i) Recruitment

In 2001, the defendant traveled to her home country of Nigeria and, through false promises, recruited 17-year-old Olawunmi Olatunbosun (Laome) to work for the defendant in the United States. R.Vol.5-78 at 228-231, 284. Laome came from a poor family. R.Vol.5-78 at 226. Laome lived with her parents and four siblings in one bedroom; her family shared a bathroom and kitchen with approximately 20 other people. R.Vol.5-78 at 225. Laome had an eleventh grade education and neither she nor her parents spoke English. R.Vol.5-78 at 227. The defendant told Laome and Laome's father that if Laome agreed to work as a babysitter for the defendant in the United States, the defendant would pay Laome a monthly salary, send money to Laome's parents every year, and allow Laome to attend school. R.Vol.5-78 at 228, 230-231, 415-417. Laome accepted the job and left her family for the first time because of the opportunity to travel to the United States and to pursue an education. R.Vol.5-78 at 232.

[2] For the sake of clarity, in this brief the United States refers to the witnesses by the nicknames used throughout the trial transcript and jury charge.

(ii) Passport And Illegal Entry Into The United States

The defendant took care of Laome's travel arrangements and told Laome to sign her passport application using the defendant's last name instead of her own. R.Vol.5-78 at 233-234, 420. Laome left Nigeria with no money and only the clothes on her back (R.Vol.5-78 at 237, 239); she never possessed the passport that the defendant procured on her behalf (R.Vol.5-78 at 234, 238-239, 311). Laome later learned that the defendant had brought her into the United States illegally. R.Vol.5-78 at 319. In fact, the defendant later admitted to a friend that she had brought Laome into the United States (falsely) as her own child. R.Vol.6-79 at 654. Laome arrived in the United States with the defendant on October 12, 2001. R.Vol.7-80 at 879-881.

(iii) Labor And Services

Laome quickly realized that she would not simply be working as a nanny for the defendant's two-month-old baby, T., as the defendant had represented. R.Vol.5-78 at 229-231, 235, 242-243. The defendant told Laome that in addition to childcare, she had to cook, clean the house, and complete household chores. R.Vol.5-78 at 249-251. The defendant had a large house outside Atlanta with four bedrooms and three bathrooms. R.Vol.5-78 at 245, 248. Laome was constantly working around the house, oftentimes with T. tied on her back with a wrap. R.Vol.6-79 at 655; R.Vol.7-80 at 940.

The defendant did not allow Laome to use the lawn mower, vacuum cleaner, dish washer, or washing machine, all of which were available in the house. R.Vol.5-78 at 251, 253-254; R.Vol.7-80 at 941-942. Instead, she required Laome to cut the grass by hand, sweep the carpets with a broom, and hand wash the dishes, clothes, and T.'s dirty diapers. R.Vol.5-78 at 249-255. Every day, Laome had to wash the fence in the back of the house with bleach and clean all three bathrooms, whether they were dirty or not. R.Vol.5-78 at 249-250, 254-255.

In addition to housework, Laome cared for the defendant's baby 24 hours a day. R.Vol.5-78 at 263-264. If T. cried during the night, the defendant would yell for Laome to care for the baby. R.Vol.5-78 at 264. To keep the baby from crying, Laome often had to carry her throughout the night or sleep on the ground with T. tied on her back with a wrap. R.Vol.5-78 at 264-265; R.Vol.6-79 at 656. Laome often slept only two to three hours a night because if T. cried during the night, the defendant would beat Laome. R.Vol.5-78 at 265-266.

The defendant was employed intermittently (R.Vol.5-78 at 267, 269-271), but she did not clean the house, cook, bath T., change her diapers, or play with her (R.Vol.5-78 at 266-267). Instead, when the defendant was not working, she would stay in bed and watch television or talk on the telephone. R.Vol.5-78 at 270-271. When the defendant returned home from work, she would call Laome to bring her food and then watch television and talk on the telephone. R.Vol.5-78 at 272. The

defendant continually yelled at Laome, shouting at her, for example, when T. was crying or when the defendant needed a glass of water. R.Vol.5-78 at 255. And when Laome brought the defendant what she had demanded, Laome had to bow before the defendant and call her "Mommy." R.Vol.5-78 at 256. Laome did not have breaks or days off; the defendant told Laome that she was supposed to work all of the time. R.Vol.5-78 at 272; R.Vol.6-79 at 657.

The defendant drove a Mercedes-Benz and often bought expensive things. R.Vol.5-78 at 283-284, R.Vol.6-79 at 743; R.Vol.7-80 at 767. But the defendant did not pay Laome for any of her work. R.Vol.5-78 at 273, 284, 327; R.Vol.7-80 at 942-943. Over the two and a half years that Laome worked for the defendant, the defendant sent a total of $300 to Laome's parents. R.Vol.5-78 at 284-285. Laome did not attend school, as the defendant had promised. R.Vol.5-78 at 284. Laome did not want to work for the defendant, but she was afraid that if she did not, the defendant would beat her. R.Vol.5-78 at 285. Laome felt as though she did not have a choice but to work for the defendant because she was afraid of the defendant and because there was nowhere else for her to go. R.Vol.5-78 at 327-328.

(iv) Coercion: Beatings, Threats, Humiliation, Isolation

The defendant obtained Laome's labor by physically and mentally abusing her. R.Vol.6-79 at 655. The defendant smacked, hit, and beat Laome if the house

was not clean enough or if the defendant was unsatisfied with Laome's work. R.Vol.5-78 at 257. The defendant hit Laome in the head with the back of her hand, a shoe, a wooden spoon, an extension cord, a belt, a hanger, a broom, or anything that was nearby. R.Vol.5-78 at 257-260, 274; R.Vol.6-79 at 673-674; R.Vol.7-80 at 947. On other occasions, the defendant would stand on Laome's stomach as she beat her. R.Vol.5-78 at 280-281. As a result of the defendant's beatings, Laome suffered cut lips, a bruised and swollen face, and bloodshot eyes. R.Vol.6-79 at 674-675.

The defendant also threatened Laome with harm. R.Vol.7-80 at 947. The defendant repeatedly threatened to beat and kill Laome and send her to jail in Nigeria. R.Vol.5-78 at 260, 281-282; R.Vol.7-80 at 947-948. The defendant also told Laome that if she answered the door or talked to any of the neighbors, the police would take her to jail. R.Vol.5-78 at 295-296. Laome believed these threats and was scared by them. R.Vol.5-78 at 260. Laome wanted to return to Nigeria, but she was scared that she might have to go to jail if she returned. R.Vol.5-78 at 282.

The defendant insulted Laome, calling her dumb, stupid, poor, dirty, ugly, a slave, a witch, demonic, and a bitch. R.Vol.5-78 at 256-257; R.Vol.6-79 at 675-676, 702; R.Vol.7-80 at 945. The defendant took Laome to church and told the pastor that Laome was a witch. R.Vol.5-78 at 294.

The defendant did not allow Laome to sleep in any one of the four bedrooms or use any of the three bathrooms in the house; Laome had to sleep on the couch and bathe using a bucket. R.Vol.5-78 at 247-248; R.Vol.6-79 at 656; R.Vol.7-80 at 943. The defendant cut Laome's hair very short against her wishes and made Laome wear the defendant's old clothes, including the defendant's old underwear. R.Vol.5-78 at 261-262. Laome had no privacy; she had to change her clothes in the hallway near the linen closet where she kept her things. R.Vol.6-79 at 657. Under the threat of another beating, the defendant repeatedly forced Laome to eat moldy food, which made her vomit. R.Vol.5-78 at 262-263; R.Vol.6-79 at 698-699; R.Vol.7-80 at 943-944. The defendant would then order Laome to eat her own throw-up. R.Vol.5-78 at 263; R.Vol.6-79 at 698-699. While she lived with the defendant, Laome was always hungry and very thin. R.Vol.6-79 at 679.

The defendant completely isolated Laome; she did not have a cell phone, keys to the house, or money. R.Vol.5-78 at 273. Laome, who did not speak English, was not allowed to use the telephone and did not have any friends or know anyone in the United States. R.Vol.5-78 at 227, 272-274; R.Vol.6-79 at 672-673; R.Vol.7-80 at 945-946. Laome was very scared and wanted to kill herself. R.Vol.6-79 at 679. On one occasion, Laome spoke with her father and told him that the defendant beat her every day and that she wanted to kill herself. R.Vol.5-78 at 275-276, 425. When Laome told the defendant that her father had called, the

defendant kicked and beat Laome for hours and forced Laome to stand naked for 24 hours with one hand and one foot on the ground and the other foot in the air. R.Vol.5-78 at 274, 276-278. Laome was injured and in pain from this beating, but was not allowed to see a doctor. R.Vol.5-78 at 278-279.

(v) Escape

Laome asked for help from the defendant's relatives and friends who visited the house and saw how the defendant treated Laome. R.Vol.5-78 at 287-290, 400-401, 407-408. These people tried to help Laome, but they were scared of the defendant. R.Vol.5-78 at 290. Laome, too, was scared of the defendant and feared that she would beat her. R.Vol.5-78 at 293. One person tried to help Laome, but when the defendant found out she beat Laome over and over again until Laome confessed and told the defendant who had tried to help her. R.Vol.6-79 at 685-686.

Eventually, in May 2004, one of the defendant's friends, Omotolani Akintunde (Tolani), and another woman, Olundotun Kuku (Dot), helped Laome escape. R.Vol.5-78 at 305, 308, 378-381, 488-489; R.Vol.6-79 at 649, 676; R.Vol.7-80 at 901. After seeing the defendant beat Laome, Tolani told Laome that she would arrange for someone to get her the following day when there was a party planned. R.Vol.5-78 at 308-309; R.Vol.6-79 at 687, 690. Dot drove to the party and Tolani signaled to Loame to get her things and go outside. R.Vol.5-78 at 308-

310, 383-384; R.Vol.6-79 at 691. Laome grabbed a trash bag with a suit and two tops, went outside, ran to Dot's car, and jumped into the backseat. R.Vol.5-78 at 310-311, 385. Dot covered Laome with clothing or blankets and drove away. R.Vol.5-78 at 311, 384-385. When the defendant learned that Laome had escaped, she was very angry. R.Vol.6-79 at 692. The defendant screamed and yelled – and then went to check to make sure she still had Laome's passport. R.Vol.6-79 at 692-693.

b. Forced Labor Of Olayemia Shorinola (Dupe)

(i) Recruitment, Passport, And Illegal Entry Into The United States

After Laome escaped, the defendant needed someone to take care of T. and do all of the household chores. R.Vol.7-80 at 953. So, the defendant recruited a second young woman, Olayemia Shorinola (Dupe), from Nigeria to work for her in the United States – again using false promises. R.Vol.5-78 at 440-441, 458-459; R.Vol.6-79 at 503, 625-626, 639-640, 642-643.

The defendant said that she wanted to take Dupe to the United States to care for the defendant's daughter, T., who was then about three years old. R.Vol.5-78 at 440-441; R.Vol.6-79 at 631. The defendant told Dupe's father that she would treat Dupe like family and help put her through school. R.Vol.6-79 at 631, 642-643. The defendant said that Dupe would also help out around the house, but that there was not much to be done. R.Vol.5-78 at 441. At Dupe's father's request, the

defendant agreed to send Dupe to school instead of paying her. R.Vol.5-78 at 441, 630-631. The defendant treated Dupe just as badly as she had treated Laome, yelling at her and beating her. R.Vol.7-80 at 953-954.

Like Laome, Dupe came from modest means. R.Vol.5-78 at 439-440; R.Vol.6-79 at 626-627. Dupe lived with her parents and five siblings in a two-bedroom home with no ceiling and with clothing covering the windows; the family cooked on an outdoor stove with wood. R.Vol.5-78 at 439, 627. Dupe agreed to work for the defendant because of the opportunity to go to school. R.Vol.5-78 at 442. Dupe had completed high school and had learned some English in school, but she had never traveled outside of Nigeria. R.Vol.5-78 at 443-445.

Dupe did not purchase or possess her airline ticket; she never saw her passport. R.Vol.5-78 at 451. On November 27, 2004, Dupe traveled to the United States by way of the United Kingdom, using the false last name of Abdullai. R.Vol.5-78 at 452-454; R.Vol.6-79 at 576, 580, 582, 610; R.Vol.7-80 at 870-871, 874-875, 877. Dupe brought only the clothes the defendant had given her in Nigeria. R.Vol.5-78 at 457.

(ii) Labor And Services

When Dupe arrived, the defendant said that Dupe should start cleaning the next morning because the house was dirty. R.Vol.5-78 at 458. Dupe understood that she would help the defendant, but not that she would do everything at the

house while the defendant sat in bed and watched television. R.Vol.5-78 at 458-459. When she lived with the defendant, Dupe always had to be busy, cleaning or washing clothes or doing other chores. R.Vol.5-78 at 470. When she finished one task, there was always something else to do. R.Vol.5-78 at 470. Dupe was not allowed to rest; she did not have days or nights off. R.Vol.5-78 at 470. Contrary to her promises, the defendant never sent Dupe to school and never paid Dupe or sent any money to her parents. R.Vol.6-79 at 503.

On a typical day, Dupe would wake up at 5 a.m. and clean up, mop, clean the kitchen, cook, wash clothes, and watch T. R.Vol.5-78 at 459. If T. woke up at night, Dupe would care for her; the defendant did not do anything for her child. R.Vol.5-78 at 459. Dupe also did yard work, cut the grass, and painted a fence. R.Vol.5-78 at 470-473.

Like Laome, the defendant did not allow Dupe to use any available appliances to complete her household chores. Dupe had to kneel and wash the floors by hand with a rag every day, cut the grass by hand with a big knife, and hand wash the laundry. R.Vol.5-78 at 460, 471-472; R.Vol.6-79 at 531-532. When the defendant found out that Dupe had used the washing machine and caused it to malfunction, she slapped Dupe hard. R.Vol.5-78 at 460-461.

(iii) Coercion: Beatings, Humiliation, Isolation, Threats

That was not the only time the defendant hit Dupe. When the defendant got mad at Dupe, she would slap her, hit her, beat her, curse at her, insult her family, and call her poor, stupid, a witch, and a slave. R.Vol.5-78 at 475; R.Vol.6-79 at 509-510, 547, 608-609; R.Vol.7-80 at 953-954. The defendant would chase Dupe until she was cornered against a wall and then beat her. R.Vol.6-79 at 529-530. The defendant slapped Dupe and the defendant's ring cut Dupe's lip and caused it to bleed (R.Vol.5-78 at 461; R.Vol.6-79 at 523); the defendant hit Dupe in the nose and caused it to bleed (R.Vol.6-79 at 527-528); the defendant beat Dupe with a broom and a wooden spoon (R.Vol.7-80 at 954).

The reason for these beatings was often tied to Dupe's performance of the duties the defendant required her to perform. For example, the defendant hit, slapped, and beat Dupe because T.'s pajamas were dirty (R.Vol.6-79 at 526-527); because T. fell down (R.Vol.6-79 at 542-543); because T. was standing too close to the stove (R.Vol.6-79 at 551); because Dupe accidentally locked the keys in the car (R.Vol.5-78 at 463); because Dupe fell asleep and was not available to open the front door for the defendant when she returned home from a party at 2 a.m. or 3 a.m. (R.Vol.6-79 at 545-546). In addition, the defendant beat Dupe in the face and head with a stick because Dupe talked back to the defendant. R.Vol.5-78 at 464-465; R.Vol.6-79 at 499-500. The defendant made Dupe cover the marks on

her face from this last beating with a scarf, but Dupe showed people at church the marks and told them that the defendant had beaten her. R.Vol.6-79 at 500-501.

As with Laome, the defendant made Dupe sleep on the floor (R.Vol.5-78 at 457) and bathe using a bucket instead of one of the showers in the house (R.Vol.6-79 at 495-496). Dupe was not allowed to eat the food she prepared for the defendant; instead, the defendant would buy her cheap food items that were about to expire. R.Vol.5-78 at 474-475. On one occasion, the defendant made Dupe eat spoiled leftovers. R.Vol.6-79 at 559. Dupe was not allowed to help herself to food in the defendant's refrigerator or the defendant would beat her or curse at her. R.Vol.6-79 at 494-495. The defendant made Dupe cut off her braids because the defendant did not want to pay for their upkeep. R.Vol.6-79 at 496.

The defendant wanted to isolate Dupe because she did not want her to escape like Laome had. R.Vol.6-79 at 703. Dupe did not have a key to the house and was not allowed to use the telephone or go outside the house without the defendant's permission. R.Vol.6-79 at 497; R.Vol.7-80 at 956. When the defendant took Dupe to church, she told Dupe that she was not allowed to talk to anyone. R.Vol.6-79 at 497-498. Dupe did not have any friends. R.Vol.6-79 at 503-504. When Dupe's father telephoned to speak with his daughter, the defendant asked how he got her number, why he was calling, and then hung up the telephone. R.Vol.6-79 at 635, 637.

Dupe felt helpless. R.Vol.6-79 at 544. She was saddened by how the defendant treated her, but there was nothing that she could do because the defendant was the only person Dupe knew in the United States. R.Vol.5-78 at 476. Dupe was scared that the defendant would beat her. R.Vol.5-78 at 462. Dupe was also scared of the defendant because she believed that the defendant, who knew senators and governors in Nigeria, was powerful. R.Vol.5-78 at 462, 465-466; R.Vol.6-79 at 593-594; R.Vol.7-80 at 813-814. Dupe believed that the defendant could have her or her parents arrested or do whatever she wanted. R.Vol.5-78 at 462; R.Vol.6-79 at 502-503, 618-619; R.Vol.7-80 at 814. The defendant also told Dupe that if she spoke to the police, they would put her in jail or send her back to Nigeria. R.Vol.6-79 at 502.

(iv) Escape

The defendant's friends would sometimes give Dupe money, which Dupe saved until she had $60. R.Vol.6-79 at 535, 562. Dupe packed her bags several times to leave, but she did not find an opportunity to leave. R.Vol.6-79 at 593. Finally, one day in April 2006, Dupe could not take it any longer. R.Vol.6-79 at 600, 722. Dupe called a taxi and snuck out of the house, taking some clothes, shoes, and two notebooks. R.Vol.6-79 at 562-564. Dupe asked the taxi driver to take her to Marietta, a place Dupe had heard of on television and thought was far away from the defendant. R.Vol.6-79 at 563-565. The taxi driver dropped her off

at a church and Dupe told one of the pastors what the defendant had done to her. R.Vol.6-79 at 565-566; R.Vol.7-80 at 722-724, 733-734.

2. The Jury Charge

The defendant objected to the United States' proposed jury instruction concerning the forced labor offenses, 18 U.S.C. 1589, charged in Counts One and Four of the superseding indictment. R.Vol.1-57. In pertinent part, the defendant argued that the jury had to unanimously agree upon the means by which the defendant compelled the victims' forced labor. R.Vol.1-57 at 8-12. The defendant reiterated this objection during the charge conference and following the jury charge. R.Vol.8-81 at 1008-1009, 1173-1174. The United States argued, and the district court ruled, that unanimity was not required as to the statutorily enumerated means to satisfy the second element of the forced labor charges: the specific manner by which the defendant coerced the victims' labor. R.Vol.2-61 at 9-12; R.Vol.8-81 at 1031-1035.

With respect to the forced labor offenses, the district court charged the jury, in pertinent part, as follows:

> Counts One and Four are the counts alleging forced labor.
>
> Title 18 of the United States Code Section 1589 makes it a federal crime for anyone to knowingly provide or obtain the labor or services of another person by certain prohibited means.

> To find a defendant guilty of forced labor, you must find that the government has proved each of the following elements beyond a reasonable doubt:
>
> First, that the defendant provided or obtained the labor or services of another person.
>
> Second, that the defendant did so through at least one of the following prohibited means:
>
> > One, by threats of serious harm to, or physical restraint against, the person or any other person;
> >
> > Or, two, by a scheme, plan or pattern intended to cause the person to believe that nonperformance of labor or services would result in serious harm to that person or any other person;
> >
> > Or, three, by the abuse or threatened abuse of law or the legal process.
>
> And thirdly -- this is the third element -- that the defendant acted knowingly.
>
> * * *
>
> If you find that the defendant used one of the prohibited means, you must then determine whether such use was sufficient to cause Laome in Count One or Dupe in Count Four reasonably to believe that she had no choice but to remain working for the defendant.

R.Vol.8-81 at 1154-1156. The district court also charged the jury that, "Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict, you must all agree." R.Vol.8-81 at 1169. Following return of the verdict, the district court polled the jury to ensure that the verdict was unanimous. R.Vol.8-81 at 1183-1187.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion by denying the defendant's jury charge request and refusing to give a legally incorrect jury instruction. The forced labor statute has three essential elements: (1) that the defendant provided or obtained the labor or services of a person; (2) that the defendant did so through one or more of the prohibited means (threats of serious harm or physical restraint; a scheme, plan, or pattern; or abuse or threatened abuse of law or legal process); and (3) that the defendant acted knowingly. It is firmly established that a jury verdict must be unanimous *only* as to the elements of an offense, not the means by which an element may be satisfied. The statutory text, legislative history, and narrow scope of the conduct encompassed in 18 U.S.C. 1589 all compel a finding that the methods of coercion set out in subsections 1589(1)-(3) are means, not separate elements. Congress did not exceed the limits of the Due Process Clause in defining the various means by which a defendant is prohibited from obtaining or providing a victim's labor or services. The district court's general unanimity instruction was sufficient to assure that the jury's verdict was unanimous. Finally, any error in the forced labor jury charge was harmless, as there was overwhelming evidence that the defendant employed all of the enumerated methods of coercion. This Court should affirm the defendant's convictions.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE DEFENDANT'S REQUEST FOR A SPECIAL UNANIMITY INSTRUCTION REGARDING THE MEANS THE DEFENDANT USED TO COMPEL THE VICTIMS' LABOR

A. Standard Of Review

A district court's jury instructions are subject to a deferential standard of review. *United States* v. *Trujillo*, 146 F.3d 838, 846 (11th Cir. 1998). "[T]he district court has broad discretion in formulating its charge as long as the charge accurately reflects the law and the facts." *United States* v. *Spoerke*, 568 F.3d 1236, 1244 (11th Cir. 2009) (citation omitted). A jury instruction that tracks the statutory language will nearly always properly communicate the statutory requirements for a conviction. *United States* v. *Lebowitz*, No. 10-13349, 2012 WL 1123845, at *9 (11th Cir. Apr. 5, 2012); *United States* v. *Hurn*, 368 F.3d 1359, 1362 (11th Cir. 2004).

This Court reviews a district court's denial of a defendant's proposed jury instruction for abuse of discretion. *United States* v. *Tobin*, Nos. 09-13944, 09-13945, 09-13975, 09-14009 & 09-14012, 2012 WL 1216220, at *3 (11th Cir. Apr. 12, 2012). This Court will reverse the district court's refusal to include a defendant's jury charge request "only if (1) the requested instruction was substantively correct, (2) the court's charge to the jury did not cover the gist of the instruction, and (3) the failure to give the instruction substantially impaired the

defendant's ability to present an effective defense." *Lebowitz*, 2012 WL 1123845, at *9 (internal quotation marks and citation omitted).[3]

B. Discussion

1. Title 18, United States Code, Sections 1589(1)-(3) (2000) Identify Means Of Satisfying The Coercion Element, Not Separate Elements[4]

Section 1589 was enacted as part of the Trafficking Victims Protection Act of 2000 (TVPA), which was part of the broader Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, Div. A., §§ 101-113, 114 Stat. 1464. See *United States* v. *Kaufman*, 546 F.3d 1242, 1261 (10th Cir. 2008), cert. denied, 130 S. Ct. 1013 (2009); *Alvarado* v. *Universidad Carlos Albizu*, No. 10-22072-CIV, 2010 WL 3385345, at *2 (S.D. Fla. Aug. 25, 2010); *United States* v. *Peterson*, 627 F. Supp. 2d 1359, 1372 (M.D. Ga. 2008). Section "1589 is a

[3] The defendant's assertion that the issue in this appeal is subject to *de novo* review (Def.Br. 20) is inaccurate. The defendant "does not argue * * * that what the court instructed was erroneous; rather [the defendant] argues that the court omitted an instruction that would have insured that the jury return a unanimous verdict." *United States* v. *Acosta*, 748 F.2d 577, 582 (11th Cir. 1984); see also Def.Br. 21 (The defendant "*requested* the jury be instructed that they must * * * reach a unanimous decision as to the prohibited means * * * employed * * * to obtain the forced labor of [the victims].") (emphasis added). The issue is therefore whether the district court abused its authority in rejecting the defendant's requested instruction, not whether the instructions the court gave were legally correct.

[4] Unless otherwise specified, all references to 18 U.S.C. 1589 in this brief refer to the 2000 version of the statute.

statute designed to prohibit obtaining another's labor through coercive conduct." *Peterson*, 627 F. Supp. 2d at 1371.

The forced labor statute at issue in this appeal provides that:

> Whoever knowingly provides or obtains the labor or services of a person –
>
> > (1) by threats of serious harm to, or physical restraint against, that person or another person;
> >
> > (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or
> >
> > (3) by means of the abuse or threatened abuse of law or the legal process,
>
> shall be [guilty of an offense against the United States].

18 U.S.C. 1589.

The methods of coercion set out in subsections 1589(1)-(3) are means, not separate elements. Thus, Section 1589 requires proof of three essential elements: (1) that the defendant provided or obtained the labor or services of a person; (2) that the defendant did so through one or more of the prohibited means set out in subsections (1)-(3) (threats of serious harm or physical restraint; a scheme, plan, or pattern; or abuse or threatened abuse of law or legal process; and (3) that the defendant acted knowingly. 18 U.S.C. 1589; *United States* v. *Alstatt*, No. 8:10-CR-420, 2012 WL 870261, at *7 (D. Neb. Mar. 14, 2012); *United States* v.

Sabhnani, 539 F. Supp. 2d 617, 629 (E.D.N.Y. 2008), aff'd, 599 F.3d. 215 (2d Cir. 2010), cert. denied, 131 S. Ct. 1000 (2011); *United States* v. *Marcus*, 487 F. Supp. 2d 289, 310 (E.D.N.Y. 2007), vacated on other grounds, 538 F.3d 97 (2d Cir. 2008), rev'd, 130 S. Ct. 2159 (2010); see also *Shukla* v. *Sharma*, No. 07-CV-2972, 2012 WL 481796, at *2 (E.D.N.Y. Feb. 14, 2012) (discussing the elements of a civil forced labor claim). The district court's instruction on the forced labor offenses charged in Counts One and Four of the superseding indictment (R.Vol.8-81 at 1154-1156) was correct because it included all of the elements of a forced labor violation.

2. The Defendant's Requested Instruction Was Legally Incorrect Because Jury Unanimity Is Required Only For Statutory Elements, Not The Means Of Satisfying An Element

The district court properly rejected the defendant's request for a special unanimity instruction in the jury charge on the forced labor offenses (Counts One and Four). The defendant's argument that "the jury had to reach a unanimous decision as to which prohibited means were used to compel the labor" of the victims is ill founded. Def.Br. 24. As a general rule, "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element." *Richardson* v. *United States*, 526 U.S. 813, 817, 119 S. Ct. 1707, 1710 (1999); *Schad* v. *Arizona*, 501 U.S. 624, 631, 649, 111 S. Ct. 2491, 2496-2497, 2506 (1991) (plurality opinion); *Lebowitz*, 2012 WL 1123845, at

*8. The unanimity requirement extends *only* to the elements of an offense, not the means by which the defendant commits the element. *Richardson*, 526 U.S. at 817, 119 S. Ct. at 1710; *Schad*, 501 U.S. at 631, 111 S. Ct. at 2496-2497; Fed. R. Crim. P. 7(c)(1). As the Supreme Court has recognized, "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes." *Schad*, 501 U.S. at 636, 111 S. Ct. at 2499. Moreover, "there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." *Schad*, 501 U.S. at 632, 111 S. Ct. at 2497 (citation omitted).

The forced labor statute, 18 U.S.C. 1589, has not yet been subjected to the means-element analysis by this Court. Nevertheless, the district court's refusal to give the requested instruction was correct under the precedents of this Court and the Supreme Court, and is consistent with the only apparent reported decisions addressing the elements of a forced labor offense. See *Alstatt*, 2012 WL 870261, at *7; *Sabhnani*, 539 F. Supp. 2d at 629; *Marcus*, 487 F. Supp. 2d at 310; see also *Shukla*, 2012 WL 481796, at *2.

a. The Schad-Richardson *Analytical Framework*

Two Supreme Court decisions set out the proper method for distinguishing elements, which require unanimity, from means, which do not. The Court first considered this issue in *Schad*, a case in which the defendant challenged the lack of

a unanimity instruction on the *mens rea* element (premeditated or felony murder) of the defendant's first degree murder conviction. 501 U.S. at 630, 111 S. Ct. at 2496. In *Schad* the Court engaged in a two-step inquiry, analyzing: (1) whether the legislature intended to create separate offenses or identify different means to commit a single offense; and (2) whether defining the conduct as means would violate the Due Process Clause. *Schad*, 501 U.S. at 632-633, 636-637, 111 S. Ct. at 2497-2500; see also *United States* v. *Edmonds*, 80 F.3d 810, 815 (3d Cir.) (en banc), cert. denied, 519 U.S. 927, 117 S. Ct. 295 (1996). The Court held that unanimity was not required because the state legislature defined premeditation and the commission of a felony as alternate means to satisfy the murder statute's *mens rea* requirement and the Constitution did not prohibit the legislature from doing so. *Schad*, 501 U.S. at 637, 645, 111 S. Ct. at 2500, 2504.

Although *Schad* was a plurality decision, eight years later the Supreme Court re-affirmed this analysis. In *Richardson*, 526 U.S. 813, 119 S. Ct. 1707, the Supreme Court decided this same means-element issue in the context of the federal continuing criminal enterprise (CCE) statute, 21 U.S.C. 848(a). Specifically, the Court decided that a jury must be unanimous as to which offenses constituted the "continuing series of violations" required for conviction. *Richardson*, 526 U.S. at 818-820, 119 S. Ct. at 1710-1711. The Court engaged in the *Schad* analysis and parsed the two-step inquiry into three determinative factors: (1) the statutory

language; (2) the breadth of the statute; and (3) constitutional limits on the legislature's power to define criminal offenses. *Ibid*.; see also *United States* v. *McGarity*, 669 F.3d 1218, 1248 (11th Cir. 2012) (applying the *Schad-Richardson* analytical framework).

b. Statutory Text And Legislative History

The first step of the *Schad-Richardson* analysis is statutory interpretation, which begins with the text of the statute. *Richardson*, 526 U.S. at 818, 119 S. Ct. at 1710; *Schad*, 501 U.S. at 636, 111 S. Ct. at 2499; *United States* v. *Range*, 94 F.3d 614, 619 (11th Cir. 1996). The specific words of the statute, and whether they carry any legal consequence, are important to the means-element analysis. *Richardson*, 526 U.S. at 818-819, 119 S. Ct. at 1710-1711. Accordingly, the *Richardson* Court found it important that the CCE statute used the words "violates" and "violations." *Ibid.* The Court found that such terms had "a legal ring," based, in part, on the fact that "violation" is defined as "not simply an act or conduct; [but as] * * * an act or conduct that is contrary to law." *Ibid.* (citing Black's Law Dictionary 1570 (6th ed. 1990)). The Court found that the specific statutory language ("violates" and "violations") connoted separate offenses upon which the jury had to unanimously agree. *Ibid.*

Here, the forced labor statute repeatedly uses the words "by" and "by means of," which indicates that the statute describe different means of satisfying a single

element. Coercion is the ultimate fact that constitutes an element that must be proven to sustain a forced labor conviction. See *Alstatt*, 2012 WL 870261, at *7; *Sabhnani*, 539 F. Supp. 2d at 629; *Marcus*, 487 F. Supp. 2d at 310; see also *Shukla*, 2012 WL 481796, at *2. Subsections 1589(1)-(3) simply set out different instruments of coercion and different coercive methods a defendant is prohibited from using to forcibly provide or obtain labor and services. *Peterson*, 627 F. Supp. 2d at 1371-1372.

This interpretation of Section 1589 is supported by the definition of "coercion" found elsewhere in the TVPA. When it enacted the TVPA, Congress included a section in the Act that defined relevant terms, including "coercion." Pub. L. No. 106-386, Div. A, § 103(2), 114 Stat. 1464 (22 U.S.C. 7102(2) (2000)). This definition provides:

> The term "coercion" means –
> (A) threats of serious harm to or physical restraint against any person;
> (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
> (C) the abuse or threatened abuse of the legal process.

Ibid. The three means of coercion identified in subsections 1589(1)-(3) mirror exactly this three-part definition of coercion. The fact that Section 1589 contains identical language to the TVPA definition of coercion provides further evidence that coercion is the ultimate fact that can be accomplished by the means identified in subsections 1589(1)-(3).

The 2008 amendment to Section 1589 confirms congressional intent to make subsections 1589(1)-(3) describe means, not elements. The amendment added a means of coercing one into forced labor. Congress referred to the changes as "refinements" that were intended to "streamline the jury's consideration in cases involving coercion." 154 Cong. Rec. H10,903, H10,904 (daily ed. Dec. 10, 2008) (statement of Rep. Howard Berman).

The 2008 amendment, enacted as part of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, amended Section 1589 to provide, in pertinent part that:

> (a) Whoever knowingly provides or obtains the labor or services of a person *by any one of, or by any combination of, the following means* --
>
> > (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
> >
> > (2) by means of serious harm or threats of serious harm to that person or another person;
> >
> > (3) by means of the abuse or threatened abuse of law or legal process; or
> >
> > (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint,
>
> shall be [guilty of an offense against the United States].

18 U.S.C. 1589(a) (effective Dec. 23, 2008) (emphasis added). The amended statute specifically identifies the subsections as means and prefaces each

subsection with the language "by means of," thus making it clear that each method of coercion is a means, not a separate element of the offense. The amended Section 1589 also explicitly provides that a defendant may be convicted upon evidence of "any combination of" the enumerated prohibited means. 18 U.S.C. 1589(a) (effective Dec. 23, 2008). If the offense can consist of any combination of the prohibited means, each means cannot alone be an element of the offense. This language eliminates any possibility that Congress intended to define separate crimes within the forced labor statute.

This means-element analysis of Section 1589 is also consistent with the statute's legislative history. When Congress enacted Section 1589 it intended that this new offense would better address domestic servitude cases "where [ ] victims are kept in service through overt beatings, but also where the traffickers use more subtle means designed to cause their victims to believe that serious harm will result to themselves or others if they leave." H.R. Rep. No. 939, 106th Cong., 2d Sess. 101 (2000) (Conference Report). When it enacted the new forced labor offense, Congress explicitly referred to it in the singular, describing Section 1589 as "a new crime." *Id.* at 99-100.

Congress has consistently provided that this crime can be committed through a variety of different means. Congress has done so based on its recognition that traffickers, such as the defendant, use multiple, overlapping, and interrelated

methods of physical and nonphysical coercion to secure a victim's labor. See, *e.g.*, Conference Report 101 ("Section 1589 is intended to address the increasingly subtle methods of traffickers who place their victims in modern-day slavery, such as where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence."); *ibid.* ("The term 'serious harm' * * * refers to a broad array of harms, including both physical and nonphysical."); 154 Cong. Rec. H10,903, H10,904 (daily ed. Dec. 10, 2008) (statement of Rep. Howard Berman) (stating that Section 1589 was amended to more accurately reflect "the various and subtle forms of coercion used by traffickers"); see also Charles Doyle, Cong. Research Serv., R40190, *The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L. 110-457): Criminal Law Provisions* 8 (2009) ("The 2000 Trafficking legislation clearly stated that the forced labor * * * ban[] in [S]ection[] 1589 * * * condemned violations accomplished by the use of physical restraint and abuse of law, but also by threat of serious harm, or by a scheme intended to convey the impression of such coercive threats.").

c. Breadth

The second step of the *Schad-Richardson* analysis examines the breadth of the conduct encompassed in the statute. The *Richardson* Court analyzed the CCE statute, which imposes a 20-year mandatory minimum on a defendant who violates

the federal drug laws as part of a "continuing series of violations" that are undertaken by five or more people under the defendant's supervision and that provide the defendant with substantial income or resources. 526 U.S. at 815-816, 119 S. Ct. at 1709. Specifically, the issue presented was whether the jury had to unanimously agree upon which offenses constituted the "series of violations." *Richardson*, 526 U.S. at 817-818, 119 S. Ct. at 1710. The Court found it persuasive that the "series of violations" language broadly covered "many different kinds of behavior of varying degrees of seriousness" that were found in "approximately 90 numbered sections" across "two chapters of the Federal Criminal Code." *Richardson*, 526 U.S. at 819, 119 S. Ct. at 1711. The breadth of the encompassed conduct weighed in favor of finding that the "continuing series of violations" were separate elements that required the jury to be unanimous.

Similarly, this Court recently held that the child exploitation enterprise (CEE) statute, 18 U.S.C. 2252A(g), requires jury unanimity as to the "series of felony violations" that constitute the enterprise. *McGarity*, 669 F.3d at 1247-1249. This Court was guided by the similarity between the CCE and CEE statutes, *id.* at 1238, 1247 n.39, and, among other things, "the broad range of 'violations' that qualify as CEE predicate offenses," *id.* at 1249.

In contrast to the statutes at issue in *Richardson* and *McGarity*, the scope of prohibited activity in Section 1589 is narrow, and the means are overlapping. This

further indicates that the statute defines a single offense. Subsection 1589(1) and (2) both involve methods of employing "serious harm" or "physical restraint" against another person to compel a victim's labor, whether by threats, acts, or a scheme, plan, or pattern intended to make the victim believe such harm or restraint will occur. See 18 U.S.C. 1589(1) ("by threats of serious harm to, or physical restraint against"); 18 U.S.C. 1589(2) ("by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint"). Subsection 1589(3) addresses another method of compulsion – abuse or threatened abuse of law or legal process – which is also designed to force a victim to provide labor or services. See 18 U.S.C. 1589(c)(1) (effective Dec. 23, 2008) (defining "abuse or threatened abuse of law or legal process" as meaning "to exert pressure * * * to cause that person to take * * * or refrain from taking some action."); *Peterson*, 627 F. Supp. 2d at 1371 (finding that "an analysis of the overall statutory scheme demonstrates that coercion is a requirement" of subsection 1589(3)).

Thus, there is considerable overlap in the conduct described in the three subsections. The actions enumerated in 1589(1)-(3) simply constitute different ways in which a defendant is prohibited from extracting labor or services from a victim. The core of the prohibited conduct is the same: coercion. *Peterson*, 627

F. Supp. 2d at 1371-1372. In this case, there is overwhelming evidence that the defendant employed all three prohibited means of coercion to forcibly obtain the labor and services of Laome and Dupe.

It is worth noting that under the defendant's theory, Section 1589 creates three distinct offenses. This reading of the statute would hardly benefit the defendant. Followed to its logical conclusion, this interpretation would mean that the defendant could have been charged with three forced labor offenses for each victim, one for each of the ways defendant obtained their labor.

The plain language of Section 1589, its legislative history, and the narrow scope of conduct encompassed in the statute all reveal that subsections 1589(1)-(3) set out various prohibited means of coercion, not separate elements. This is precisely the conclusion of all apparent reported decisions addressing the elements of a forced labor offense. See *Alstatt*, 2012 WL 870261, at *7; *Sabhnani*, 539 F. Supp. 2d at 629; *Marcus*, 487 F. Supp. 2d at 310; see also *Shukla*, 2012 WL 481796, at *2.

d. Due Process

Finally, Congress did not exceed the limits of the Due Process Clause by defining various methods by which a defendant is prohibited from obtaining or providing a victim's labor or services. Given that forced labor is a relatively new criminal offense without common law roots, "history [is] less useful as a yardstick"

in evaluating Section 1589. See *Schad*, 501 U.S. at 640 n.7, 111 S. Ct. at 2501 n.7. Nevertheless, there are no due process concerns.

The *Schad* Court noted the importance of the long-standing principle that "no person may be punished criminally save upon proof of some specific illegal conduct." *Schad*, 501 U.S. at 633, 111 S. Ct. at 2497. The conduct encompassed in subsections 1589(1)-(3) comports with this principle because it is specific and detailed. The prohibited methods of coercion set out in 1589 are not "so vague that people of common intelligence would be relegated to differing guesses about [their] meaning." *Schad*, 501 U.S. at 632, 111 S. Ct. at 2497. Indeed, this Court has adopted a definition of coercion for the sex trafficking statute, 18 U.S.C. 1591(a)(1)-(2), that is almost identical to the methods of coercion set out in the forced labor statute. See Pattern Crim. Jury Instr. 63 (2010) (defining "coercion" as "(A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of law or the legal process."). This Court obviously did not think such a definition of coercion is vague or "risks serious unfairness," *Richardson*, 526 U.S. at 820, 119 S. Ct. at 1711, or it would not have adopted this jury instruction.

Similarly, Section 1589 cannot reasonably be said to be so "generic" as to violate due process. As an example of a crime that would violate due process, the Supreme Court identified "a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." *Schad*, 501 U.S. at 633, 111 S. Ct. at 2497-2498. In contrast to this example, all of the conduct set out in 1589(1)-(3) consists of various coercive strategies that traffickers, like the defendant, employ to subjugate their victims and extract their labor and services. Congress was well within the limits of the Due Process Clause when it enacted Section 1589.

The district court's refusal to instruct the jury that it must unanimously agree upon the means by which the defendant coerced the victims' labor was correct. Indeed, it would have been error for the district court to have given the requested instruction. There was no abuse of discretion.[5]

---

[5] In support of her appeal, the defendant almost exclusively relies on *United States* v. *Gipson*, 553 F.2d 453, 458 (5th Cir. 1977), and its "distinct conceptual groupings" test. Def.Br. 25-30. Yet, as this Court has recognized, *Schad* discredited *Gipson*; indeed, *Schad* likely overruled *Gipson*. *United States* v. *Verbitskaya*, 406 F.3d 1324, 1334 (11th Cir. 2005), cert. denied, 546 U.S. 1096, 126 S. Ct. 1095 (2006); *United States* v. *Sanderson*, 966 F.2d 184, 187-188 (6th Cir. 1992) (discussing *Schad's* rejection of *Gipson*). The *Schad* Court expressly rejected *Gipson's* analysis. 501 U.S. at 635, 111 S. Ct. at 2498-2499 ("We are not persuaded that the *Gipson* approach really answers the question. * * * In short, the

(continued…)

3. Any Error In The Forced Labor Jury Charge Was Harmless Because The Evidence Overwhelmingly Proves That The Defendant Used All Three Means Of Coercion

Finally, even if a special unanimity instruction had been required, any failure to provide such an instruction is subject to harmless error review. *Ross* v. *United States*, 289 F.3d 677, 681-682 (11th Cir. 2002), cert. denied, 537 U.S. 1113, 123 S.

(…continued)
notion of 'distinct conceptual groupings' is simply too conclusory to serve as a real test.").

This Court has applied *Gipson* after *Schad*, but only in appeals involving "claims by the defendants that the language of the charging count in the *indictment* was insufficient." *Verbitskaya*, 406 F.3d at 1334 n.12 (discussing *United States* v. *Bobo*, 344 F.3d 1076 (11th Cir. 2003) and *United States* v. *Adkinson*, 135 F.3d 1363 (11th Cir. 1998)). When confronted with the issue presented in this appeal – whether the district court properly rejected a defendant's request for a special unanimity instruction – this Court has refused to apply the *Gipson* test. *Verbitskaya*, 406 F.3d at 1334.

Instead, this Court has applied the *Schad-Richardson* analysis to determine whether statutorily enumerated acts are separate elements or means to commit a single element. See, *e.g.*, *McGarity*, 669 F.3d at 1248; *United States* v. *Seher*, 562 F.3d 1344, 1361-1362 (11th Cir. 2009) (citing with approval *United States* v. *Navarro*, 145 F.3d 580, 585-586 (3d Cir. 1998)). Thus, controlling precedent dictates that the *Schad-Richardson* analysis determines whether the forced labor statute sets out different offenses or a single offense that may be accomplished through different means.

Even if the "distinct conceptual groupings" test were valid, the defendant's argument in this appeal would still fail. As discussed previously, subsections 1589(1)-(3) set out a narrow scope of conduct, all of which falls into the same conceptual group: methods of coercion. See pp. 30-32, *supra*. "*Gipson* does not require a charge to be granulated to the point that a jury must find which specific acts were committed in finding the commission of an offense." *United States* v. *De Jesus-Ojeda*, 515 F.3d 434, 446 (5th Cir. 2008).

Ct. 944 (2003). Under this analysis, the defendant's conviction will stand if "the error did not influence, or had but very slight effect" on the verdict. *McGarity*, 669 F.3d at 1249 (quoting *Ross*, 289 F.3d at 683). This Court will reverse a conviction under harmless error review only if it has a "grave doubt" that the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Ibid.*

Here, any error in omitting a specific unanimity instruction is slight given the overwhelming evidence that the defendant employed *all three* methods of coercion set out in Section 1589(1)-(3) to compel the victims' labor and services until each of the two young women escaped. The defendant inflicted serious harm upon Laome and Dupe when she repeatedly beat and physically abused them. R.Vol.5-78 at 257-260, 274-281, 461-464, 475; R.Vol.6-79 at 499-500, 509-510, 523-524, 526-530, 542-543, 551, 655, 673-675, 685-687; R.Vol.7-80 at 947, 953-954. The defendant threatened serious harm and abuse of law and legal process when she threatened to send Laome, Dupe, and their families to jail. R.Vol.5-78 at 260, 281-282, 295-296, 462; R.Vol.6-79 at 502-503, 618-619; R.Vol.7-80 at 813-814, 947-948.

The defendant also used a scheme, plan, and pattern intended to cause Laome and Dupe to believe that if they did not work for her, they or their families would suffer serious harm. The scheme, plan, or pattern prohibited by subsection

1589(2) was intended to address situations when a trafficker uses "nonviolent and psychological coercion, including but not limited to isolation, denial of sleep and punishments." 154 Cong. Rec. H10,903, H10,904 (daily ed. Dec. 10, 2008) (statement of Rep. Howard Berman). In addition to her beatings and threats, the defendant executed her scheme, plan, and pattern by systematically controlling, isolating, and humiliating Laome and Dupe by depriving them of sleep and rest (R.Vol.5-78 at 263-266, 470; R.Vol.6-79 at 655); by prohibiting them from having contact with anyone outside the home or monetary or other resources (R.Vol.5-78 at 272-274, 284, 286-287, 327; R.Vol.6-79 at 497-498, 503-504, 672-673; R.Vol.7-80 at 942-943, 945-946, 956); by insulting them (R.Vol.5-78 at 257, 475; R.Vol.6-79 at 509-510, 608-609, 675-676, 702; R.Vol.7-80 at 945, 953-954); by making them sleep on the floor and bathe with buckets (R.Vol.5-78 at 247-248, 457; R.Vol.6-79 at 495-496, 656; R.Vol.7-80 at 943); by cutting their hair against their will (R.Vol.5-78 at 261-262; R.Vol.6-79 at 496-497); by forcing them to eat spoiled food (R.Vol.5-78 at 262-263; R.Vol.6-79 at 559, 698-699; R.Vol.7-80 at 943-944); and, in the case of Laome, by making her eat her own vomit (R.Vol.5-78 at 263; R.Vol.6-79 at 698-699). This scheme, pattern, and plan was designed to instill fear in Laome and Dupe and compel them to work for the defendant. Through this scheme, plan, and pattern, the defendant made the victims believe

that even greater harm would befall them or their families if they did not continue working for the defendant.

In light of this overwhelming evidence, there can be no question that the defendant used all of the prohibited means of coercion to force Laome and Dupe to perform grueling work until these young women finally escaped. The defendant employed threats, physical abuse, a scheme, plan, and pattern, and abuse and threatened abuse of the law and legal process, even though any one of these methods of coercion would have sufficed to sustain the defendant's forced labor convictions. Notably, the defendant has not challenged the sufficiency of the evidence supporting her convictions.

The district court gave a general unanimity instruction (R.Vol.8-81 at 1169), which the jury is presumed to have followed, see, *e.g.*, *United States* v. *Lopez*, 649 F.3d 1222, 1237 (11th Cir. 2011). The Due Process Clause and the Sixth Amendment right to a unanimous verdict require no more. The jury does not need to unanimously agree upon the specific means the defendant employed to compel the victims' labor. It would have been error to charge the jury otherwise. Consequently, the district court properly rejected the defendant's request for a

special unanimity instruction on Counts One and Four and the defendant's convictions should be affirmed.[6]

[6] The defendant suggests in her Summary of Argument that her contention on appeal somehow affects *all* of the counts of conviction and not merely her forced labor convictions (Counts One and Four). Def.Br. 21. The defendant offers no authority to support her contention that a reversal of Counts One and Four would somehow implicate the remaining convictions. Nor could she, for each of the offenses required separate consideration by the jury, and the jury was so charged. (R.Vol.8-81 at 1168-1169; see also Pattern Crim. Jury Instr., 11th Cir., 10.2 (2010)); see also *United States* v. *Sabhnani*, 599 F.3d 215, 244-245 (2d Cir. 2010) (rejecting a defendant's argument that his document servitude conviction was a "derivative" offense that required a forced labor or peonage conviction), cert. denied, 131 S. Ct. 1000 (2011); *Alstatt*, 2012 WL 870261, at *12 (same). The jury deliberated and convicted the defendant on all counts, save the document servitude charge with respect to Dupe (Count Six). Defendant's bare statement that the remaining counts must be reversed is inadequate to merit consideration in this appeal. See Fed. R. App. P. 28(a)(9)(A); 11th Cir. R. 28-1(k).

CONCLUSION

For the reasons stated herein, this Court should affirm the defendant's convictions.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

JESSICA DUNSAY SILVER
ERIN ASLAN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-2773

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Fed. R. App. 32(a)(7)(C), that the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 9,560 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally-spaced typeface using Word 2007, 14-point Times New Roman font.

ERIN ASLAN
Attorney

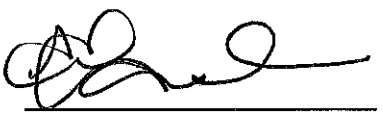
Dated: May 16, 2012

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2012, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system and that one original and six paper copies of the electronically-filed brief were sent to the Clerk of the Court by First Class mail.

I further certify that the following counsel of record for the defendant-appellant will be served via the appellate CM/ECF system and that two paper copies of the electronically-filed brief were sent via First Class mail:

Stephanie A. Kearns
Suzanne Hashimi
Federal Defender Program, Inc.
Suite 1500, Centennial Tower
101 Marietta Tower
Atlanta, GA 30303



ERIN ASLAN
Attorney