Nos. 18-3597, 18-3653

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MICHAEL WOOD & MARY WOOD,

Defendants-Appellants

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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# CONSOLIDATED BRIEF FOR THE UNITED STATES AS APPELLEE

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## TABLE OF CONTENTS

**PAGE**

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

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

## TABLE OF AUTHORITIES

**CASES:** **PAGE**

**CASES (continued):** **PAGE**

**CASES (continued):** **PAGE**

**STATUTES:** **PAGE**

## CROSS REFERENCE INDEX

Pursuant to Third Circuit Local Appellate Rule 28.2, the CONSOLIDATED BRIEF FOR THE UNITED STATES AS APPELLEE responds to the individual and joint issues raised on appeal by defendants-appellants as set forth below:

| **Issue** | **Aplt. Br. (Page Nos.)** | **Govt. Br. Page Nos.** |
|---|---|---|
| Sufficiency of the Evidence | Michael (26-31)<br>Mary (31, 40-46, 50-51) | 17-31 |
| Constructive Amendment/ Prejudicial Variance | Michael (31)<br>Mary (14-31) | 31-36 |
| Duplicity of Substantive Harboring Count | Michael (31)<br>Mary (51-52) | 36-38 |
| Validity of Conspiracy Conviction Under Supreme Court Precedent | Michael (10-17)<br>Mary (32-39) | 39-47 |
| Legal Impossibility of Conspiracy Conviction | Michael (31)<br>Mary (47-50) | 43 |
| Facial Overbreadth of 8 U.S.C. 1324(a)(1)(A)(iv) | Michael (18-26)<br>Mary (53) | 47-51 |

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## STATEMENT OF JURISDICTION

This appeal is from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendants on November 26, 2018. J.A. 5-16.[1] Defendant

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[1] "J.A. ___" refers to pages of the consecutively paginated Joint Appendix filed by defendants-appellants Michael Wood and Mary Wood. "Michael Br. ___" refers to pages of Michael Wood's opening brief and "Mary Br. __" refers to pages of Mary Wood's opening brief, though we use "Br. __" alone where it is clear that we are referring to a specific defendant's brief (*e.g.*, Mary argues (Br. __)). "Doc. ___, at __" refers to pages of filings in the district court by docket number.

Michael Wood filed a timely notice of appeal on November 27, 2018, and defendant Mary Wood filed a timely notice of appeal on December 3, 2018. J.A. 1-4. This Court has jurisdiction under 28 U.S.C. 1291.

## STATEMENT OF THE ISSUES[2]

Defendants Michael and Mary Wood were convicted of conspiring to violate 8 U.S.C. 1324(a) by agreeing to (1) encourage or induce P.I., an alien, to enter or reside in the United States unlawfully, (2) transport P.I. in furtherance of such violation, or (3) commit alien harboring, all for defendants' private financial gain and with knowledge or in reckless disregard of P.I.'s unlawful presence. The jury also found each defendant guilty of one substantive alien-harboring offense for concealing, harboring, or shielding P.I. from detection, or attempting to do so, with knowledge or in reckless disregard of her unlawful presence and for purposes of defendants' private financial gain. Defendants' appeal primarily concerns whether these offenses occurred during the applicable ten-year limitations period, and whether they were continuing offenses that included Mary Wood's attempt to retrieve P.I. for defendants' benefit after P.I. was removed from their home. Defendants also raise, for the first time on appeal, an overbreadth challenge to the

[2] Defendants raise individual and joint issues on appeal, and adopt by reference arguments made by the other defendant. The cross reference index required by Local Appellate Rule 28.2 identifies and relates the United States' answering contentions to defendants' specific contentions.

encouraging-and-inducing subsection of Section 1324(a). The appeal presents the following issues:

1. Whether there was sufficient evidence for a rational juror to conclude beyond a reasonable doubt that defendants' criminal conduct—*i.e.*, conspiring to commit an act prohibited under 8 U.S.C. 1324(a) and harboring an alien for financial gain—took place within the ten-year statute of limitations.

2. Whether there was a constructive amendment of the indictment, prejudicial variance, or, on the substantive alien-harboring count, a duplicitous charge when the jury considered Mary's attempt to retrieve P.I. as part of the offense conduct.

3. Whether any of the objects of the conspiracy were legally invalid as time-barred, and if so, whether that would require vacatur of defendants' conspiracy convictions under Supreme Court precedent.

4. Whether the district court plainly erred in submitting the encouraging-and-inducing object of the conspiracy to the jury where defendants did not argue below that Section 1324(a)'s encouraging-and-inducing language is facially overbroad and neither this Court nor the Supreme Court have ever reached that conclusion.

## STATEMENT OF RELATED CASES OR PROCEEDINGS

These cases have not previously been before this Court.

Six defendants were indicted in the related case, *United States* v. *Murunga*, No. 14-cr-175-JRS (E.D. Pa.). One of the defendants, Anne Murunga, pled guilty to Count One of that indictment, which charged her with harboring an alien for financial gain in violation of 8 U.S.C. 1324(a)(1)(A)(iii) and (B)(i). She subsequently moved to withdraw her guilty plea, which the district court denied. The court sentenced her to 18 months' imprisonment. Murunga appealed the district court's denial of her motion to withdraw her guilty plea and its final judgment. This Court summarily dismissed her appeal (No. 18-3554) on August 9, 2019.

The government dismissed No. 14-cr-175-JRS as to the remaining five defendants. Subsequently, these defendants pled guilty to one count of conspiracy to violate federal minimum wage laws in No. 14-cr-453-JRS (E.D. Pa.). None appealed.

## STATEMENT OF THE CASE

*1. Procedural History*

On June 9, 2016, a federal grand jury in the District of New Jersey indicted defendants-appellants Michael and Mary Wood. J.A. 35-41. Count One alleged that between approximately August 2005 and June 28, 2006, defendants engaged in a conspiracy to commit three acts prohibited under 8 U.S.C. 1324(a), in violation of 8 U.S.C. 1324(a)(1)(A)(v)(I). J.A. 35-38. Specifically, the indictment

alleged that defendants agreed to (1) encourage or induce P.I., an alien, to come to, enter, or reside in the United States for the purpose of private financial gain and knowing that such activity was illegal; (2) transport or move P.I. in furtherance of a legal violation and for the purpose of private financial gain and with knowledge or reckless disregard of P.I.'s illegal presence in the United States; and (3) conceal, harbor, or shield P.I. from detection, for the purpose of private financial gain and with knowledge or reckless disregard of P.I.'s illegal presence in the United States. J.A. 35-36 (citing 8 U.S.C. 1324(a)(1)(A)(ii)-(iv) as the underlying offenses and (a)(1)(B)(i) as the penalty provision) (the three objects). The indictment described the goal of the conspiracy as "facilitat[ing] the unlawful presence of [P.I.] in the United States for the purpose of obtaining childcare and domestic work at minimal to no cost." J.A. 36. Count Two alleged that from approximately August 2005 and "continuing through on or about June 28, 2006," defendants knowingly and in reckless disregard of P.I.'s unlawful presence in the United States concealed, harbored, or shielded P.I. from detection, and attempted to do so, for the purpose of private financial gain in violation of Sections 1324(a)(1)(A)(iii), (v)(II) and 1324(a)(1)(B)(i)-(ii). J.A. 38.[3]

The case proceeded to trial in May 2017. J.A. 26. At the close of the government's case, defendants moved for judgment of acquittal on both counts

[3] The relevant text of Section 1324(a) is set forth in the Addendum.

arguing that the charged criminal conduct—including all three objects of the conspiracy charged in Count One—did not continue on or after June 9, 2006, and thus fell outside 18 U.S.C. 3298's ten-year statute of limitations for violations of 8 U.S.C. 1324(a). See J.A. 554-557. The district court denied defendants' motions, concluding that "the conspiracy to harbor [P.I.] continued" on or after June 9, 2006. J.A. 570. The court pointed to a conversation between Mary Wood and P.I. that took place at least a few weeks into June 2006 following P.I.'s departure from defendants' home that evinced Mary's intent "to get [P.I.] to continue on with what was going on before, which is harboring [P.I.] for financial gain." J.A. 570.

Defendants then moved for a jury instruction that would prohibit the jury from considering any events after P.I. left defendants' home, asserting that such evidence constructively amended the indictment by broadening the basis for conviction. Doc. 84. The court denied the motion. J.A. 666-667.

Nevertheless, the court instructed the jury several times that the government needed to prove beyond a reasonable doubt that the conspiracy and substantive alien-harboring offenses continued on or after June 9, 2006. J.A. 705, 723, 728-729. Also both defendants emphasized at closing argument that, before the jury could convict them of conspiracy and alien harboring, it had to find beyond a reasonable doubt that the alleged criminal conduct occurred on or after June 9, 2006. J.A. 771-772, 781-782, 821-823. Consistent with the court's instructions

and defendants' closing arguments, the jury requested transcripts of witness testimony that the parties had highlighted as particularly relevant to the limitations defense. J.A. 883.

The jury convicted defendants of the conspiracy and alien harboring counts. J.A. 889-891. As relevant here, defendants filed post-trial motions for judgments of acquittal and new trials on both counts.[4] They argued, *inter alia*, that the government failed to prove that those offenses continued after June 9, 2006, within the statute of limitations; that Mary's conversation with P.I. after she left defendants' home did not further the conspiracy and that the substantive alien-harboring offense did not include the conversation; and that including post-departure conduct as part of the offense conduct constructively amended the indictment or created a prejudicial variance as to Counts One and Two and rendered Count Two duplicitous. Doc. 125, 128, 129. The court denied the motions. J.A. 945-946; Doc. 152. It concluded that there was no constructive amendment of the indictment because the indictment "explicitly charge[d]" crimes that "continued up through June 28, 2006" and the government presented such

[4] Mary Wood was also charged with the unlawful procurement of naturalization, in violation of 18 U.S.C. 1425(a), and with false statements, in violation of 18 U.S.C. 1001(a)(2). J.A. 38-40 (Counts Three and Four). The jury convicted her of Count Three and acquitted her of Count Four. J.A. 891. The court subsequently entered judgment of acquittal on Count Three. J.A. 946-947; Doc. 152.

evidence at trial. J.A. 945. It also concluded that there was no duplicitous charge because the criminal conduct did not end with P.I.'s departure from defendants' home, but rather "continued up through some point later in June of 2006" and involved "harboring [P.I.] so that she could continue to reside in the United States and continue to provide services to the defendants." J.A. 945-946.

The court sentenced each defendant to 20 months' imprisonment on each count, with the sentences to run concurrently. J.A. 1015, 1022; Doc. 161, 163. Defendants timely appealed. J.A. 1-4.

*2. Underlying Facts*

Viewed in the light most favorable to the government, see, *e.g.*, *United States* v. *Caraballo-Rodriguez*, 726 F.3d 418, 424-425 (3d Cir. 2013) (en banc), the evidence presented at trial established the following:

In July 2005, defendants Michael and Mary Wood, a married couple residing in New Jersey with four young children, were having issues with their nanny. J.A. 332, 334, 379-380. Defendants therefore recruited a relative, P.I., from Africa to help with childcare. J.A. 360. Mary's family in Kenya helped P.I. travel to Ghana for the ostensible purpose of assisting with defendants' childcare during their summer vacation there. J.A. 360-364. Once there, defendants confiscated P.I.'s travel documents and informed her that she would be traveling to the United States with them. J.A. 367-368. Defendants then used a fraudulent British passport to

bring P.I. to the United States. J.A. 290, 368-369, 377. In August 2005, P.I. traveled from Ghana to New Jersey with Michael and three of defendants' children. J.A. 186, 290, 375-376. When they arrived, Mary picked them up from the airport with defendants' youngest child and brought everyone to defendants' home. J.A. 376-377.

From her arrival in August 2005 to June 2006, P.I. provided full-time care for defendants' four children and handled defendants' household chores. J.A. 379-381. Because Mary, a full-time nurse, worked at night and Michael, an airline pilot regularly stationed in Japan, did not engage in his children's care even when he was at home, P.I. worked long hours, seven days a week. J.A. 379-384. During this time, defendants paid P.I. $200 per month but sent 90% of that money directly to P.I.'s family in Africa. J.A. 384-385. Defendants warned P.I. not to leave their home without permission or talk to anyone outside their house and otherwise isolated and threatened P.I., including by controlling her access to food and basic necessities. J.A. 386-388, 390-391. Defendants also told P.I. that Michael had returned their previous nanny to Ghana for considering complaining to the police about her treatment. J.A. 393-395.

P.I. became increasingly distraught working for defendants and, unbeknownst to defendants, called one of Mary's brothers and informed him that defendants were mistreating her. J.A. 398. Shortly thereafter, another of Mary's

brothers concocted a plan without P.I.'s knowledge to remove P.I. from defendants' home. At some point in June 2006, the second brother picked P.I. up from defendants' home and dropped her off at the Pennsylvania home of Mary's sister, Anne Murunga, and Anne's then-husband, Newton Adoyo. J.A. 399-402.

A few weeks later, Mary showed up unannounced at the Murunga-Adoyo home and urged P.I. to return to defendants' home to provide childcare, telling P.I. that the kids missed her. J.A. 235-236, 238, 401. P.I. rejected Mary's request to return to defendants' household. J.A. 401. Mary became upset, and ultimately Adoyo had to separate the two women. J.A. 238-239, 401. After Mary's visit, P.I. did not see either Michael or Mary again and did not receive her belongings from them until nearly five years later, even though she continued to reside at the Murunga-Adoyo home. J.A. 402, 408-409.

## SUMMARY OF ARGUMENT

Defendants raise four issues challenging their convictions. None has merit.

1. Defendants argue that the government's evidence was insufficient to show that their criminal activity continued on or after June 9, 2006, and therefore fell within the ten-year statute of limitations period for the conspiracy and substantive harboring offenses. This argument fails. The record shows that defendants, knowing or in reckless disregard of P.I.'s unlawful presence, conspired to keep P.I. in the United States to extract low-cost childcare and household help

from her. The record also shows that defendants committed the substantive alien-harboring offense by engaging in conduct that tended to substantially facilitate P.I.'s unlawful presence in the United States and prevent government authorities from detecting her presence, and did so for their private financial gain. P.I. resided with defendants from August 2005 to June 2006, when one of Mary's brothers secretly took P.I. to the Murunga-Adoyo home after P.I. alerted Mary's relatives that defendants were mistreating her.

Defendants' criminal conduct did not end with P.I.'s departure from their home. At least a few weeks into June, Mary made an unannounced visit to the Murunga-Adoyo home and attempted to persuade P.I. to return to defendants' home. A reasonable jury could interpret this conversation, which closely followed P.I.'s removal, as an attempt to bring P.I. back to defendants' home under the same conditions and for the same purpose they had kept P.I. for almost a year. In other words, the jury could reasonably find that the conversation was an extension of defendants' criminal conduct, as it furthered the conspiracy's ongoing purpose to obtain low-cost childcare and household help for defendants and their four young children. Given defendants' isolation of and threatening behavior toward P.I. during her time in their home, a reasonable jury could also conclude that Mary's request that P.I. return to this situation, combined with defendants' ongoing possession of her belongings and decision not to report her to immigration

authorities, tended to substantially facilitate P.I.'s unlawful presence in the United States and prevent her detection by government authorities, all for defendants' benefit. Accordingly, the jury could find that defendants' criminal conduct extended to on or after June 9, 2006, and into the limitations period.

2. Defendants argue that construing Counts One and Two to include Mary's conversation with P.I. after P.I. left defendants' home constructively amended the indictment by broadening the basis for conviction, and also varied from the indictment's allegations to such an extent that it constituted a prejudicial variance. Defendants also argue that Count Two, the substantive alien-harboring count, was duplicitous because, according to them, it charged two separate crimes—the initial alien-harboring offense and Mary's subsequent attempt to retrieve P.I. These arguments are incorrect.

As for defendants' first two arguments, there was no constructive amendment of the indictment or prejudicial variance. The indictment charged that "[f]rom in or about August 2005 and continuing through on or about June 28, 2006, in Burlington County and Gloucester County, in the District of New Jersey, and elsewhere," defendants engaged in a conspiracy to facilitate P.I.'s unlawful presence in the United States for defendants' private financial gain, and concealed, harbored, and shielded P.I. from detection, and attempted to do so, for that same purpose. J.A. 35-38. The government presented evidence that Mary's relatives

removed P.I. from defendants' home in June 2006 and that Mary, who remained in need of childcare and household help, attempted to retrieve P.I. from the Murunga-Adoyo home a few weeks later. The government stated in its opening that the jury would hear evidence of this post-departure conversation, and it argued in closing that Mary's actions were a continuation of defendants' criminal conduct. The district court instructed the jury several times that to convict defendants of Counts One and Two, it must find beyond a reasonable doubt that the conspiracy continued on or after June 9, 2006, and that some element of the alien harboring offense took place on or after June 9, 2006. Accordingly, the indictment's factual theory accords with the evidence, jury instructions, and government's arguments, and defendants were convicted as charged with no constructive amendment. There was also no variance, much less a prejudicial one, because the indictment's plain language charged that the alleged crimes ended on or about a particular date rather than with a particular event, and thus the facts the government proved at trial did not materially differ from those the indictment alleged.

There was also no duplicitous charge. The indictment and the jury instructions both charged that the substantive harboring offense continued through on or about June 28, 2006, and the government argued to the jury that Mary's attempt to bring P.I. back to defendants' home occurred after June 9, 2006 and was a continuation of their alien harboring. Based on the language of the indictment,

the jury instructions, and the government's argument, a reasonable jury would have understood that Mary was charged with *one* continuing course of conduct of alien harboring that included Mary's attempt to retrieve P.I.—not two separate harboring offenses.

3. Defendants argue that all three objects of the conspiracy were legally invalid as time-barred, and that their conspiracy convictions therefore must be vacated under *Yates* v. *United States*, 354 U.S. 298 (1957). According to defendants, the general verdict made it impossible to determine whether the jury based their conspiracy convictions on a valid theory. This argument is meritless.

The entire premise of defendants' argument is flawed because none of the objects of the conspiracy was time-barred. The government's evidence at trial showed that defendants conspired to encourage and induce P.I. to reside in the United States unlawfully, transport her in furtherance of that violation, and conceal, harbor, and shield her from detection, all for defendants' financial gain, and that the conspiracy—namely, facilitating P.I.'s unlawful presence in the United States to secure childcare and domestic help at little to no cost—persisted on or after June 9, 2006. First, Mary's attempt to retrieve P.I. at least a few weeks into June 2006, taken together with defendants' continued possession of her belongings and decision not to report her to government authorities, "encourage[d] or induce[d]" P.I. to "reside" in the United States to provide low-cost childcare and

household help to defendants despite her unlawful presence. 8 U.S.C. 1324(a)(1)(A)(iv). Second, these actions also constituted an attempt to "transport or move" P.I. from the Murunga-Adoyo residence back to defendants' home in furtherance of P.I.'s unlawful presence so that P.I. could continue providing low-cost childcare and household help to defendants. 8 U.S.C. 1324(a)(1)(A)(ii). Finally, these actions were an ongoing attempt to "conceal, harbor, or shield" P.I. from detection with knowledge or in reckless disregard of P.I.'s illegal presence and for defendants' private financial gain. 8 U.S.C. 1324(a)(1)(A)(iii).

At any rate, even if one or more of the objects were time-barred, *Yates* would not support vacating defendants' conspiracy convictions. In that case, the Supreme Court vacated a conviction under the general federal conspiracy statute, 18 U.S.C. 371, which requires an overt act, because it was not clear whether the jury relied on the overt act that fell within the limitations period or the other overt act that clearly was time-barred and therefore legally invalid. *Yates* does not require the same result where, as here, the conspiracy statute at issue does not require an overt act, but only an agreement to violate the law—that is, to violate one of Section 1324(a)'s substantive prohibitions. In that circumstance, the government must prove only that the conspiracy continued into the limitations period for the jury to convict, which is exactly what the jury here found. There is no requirement that a particular violation of Section 1324(a)'s substantive

prohibitions continue into the limitations period, or that an overt act in furtherance of the conspiracy occur during the limitations period.

*Yates* also does not apply because, at bottom, defendants are challenging the factual sufficiency of the evidence that the conspiratorial objects extended into the limitations period, not the objects' legal validity. Because the jury's guilty verdict on the substantive alien-harboring charge makes clear that the jury found beyond a reasonable doubt that the harboring object of the conspiracy continued into the limitations period, defendants' convictions must be affirmed under *Griffin* v. *United States*, 502 U.S. 46 (1991), which requires affirmance of a conspiracy conviction if there is sufficient evidence for *any* of the objects of the conspiracy.

4. Finally, defendants argue that 8 U.S.C. 1324(a)(1)(A)(iv), which prohibits "encourag[ing]" or "induc[ing]" an alien "to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that" such action "is or will be in violation of law" is facially overbroad in violation of the First Amendment. Because they did not raise this issue below, it is reviewed only for plain error.

The district court committed no error, let alone plain error, when it submitted the encouraging-and-inducing object to the jury as one object of the conspiracy. This Court's precedent strongly suggests that Section 1324(a)'s prohibition on encouraging or inducing an alien to enter or reside in the United

States unlawfully is not facially overbroad in violation of the First Amendment. Even if such precedent did not already exist, any overbreadth problem would not be clear under current law merely because the Ninth Circuit recently reached a contrary conclusion in a case decided after the jury rendered its verdict here. Thus, this Court need not reach the merits of defendants' overbreadth challenge, or wait for the Supreme Court to resolve any circuit conflict over Section 1324(a)(1)(A)(iv)'s reach.

In any event, even assuming defendants are correct and that any error was plain, defendants cannot show that the error affected their substantial rights where the jury's guilty verdict on the substantive alien-harboring count makes clear that, regardless of whether the encouraging-and-inducing subsection of Section 1324(a) is legally valid, the jury still would have found defendants guilty of conspiracy based on the concealing-and-harboring object.

## ARGUMENT

## I

## SUFFICIENT EVIDENCE SUPPORTS THE JURY'S FINDING THAT THE CONSPIRACY AND SUBSTANTIVE HARBORING OFFENSES TOOK PLACE WITHIN THE TEN-YEAR STATUTE OF LIMITATIONS

### *A. Standard Of Review*

This Court reviews de novo a district court's denial of a Rule 29 motion for judgment of acquittal. *United States* v. *Bobb*, 471 F.3d 491, 494 (3d Cir. 2006),

cert. denied, 549 U.S. 1360 (2007). This standard of review is "particularly deferential" where the defendant challenges the sufficiency of the evidence. *United States* v. *Dent*, 149 F.3d 180, 187 (3d Cir. 1998), cert. denied, 525 U.S. 1085 (1999). This Court will sustain a defendant's conviction against a sufficiency challenge if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States* v. *Caraballo-Rodriguez*, 726 F.3d 418, 424-425 (3d Cir. 2013) (en banc) (citation omitted).

In its review, this Court examines the evidence as a whole, not piecemeal, and "do[es] not weigh evidence or determine the credibility of witnesses." *United States* v. *Bailey*, 840 F.3d 99, 109 (3d Cir. 2016) (internal quotation marks and citation omitted), cert. denied, 137 S. Ct. 839, 137 S. Ct. 1116, 137 S. Ct. 1118, and 137 S. Ct. 1122 (2017). "Furthermore, when the facts support conflicting inferences, [this Court] must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Ibid.* (internal quotation marks and citation omitted).

*B. A Rational Juror Could Find That Mary's Attempt To Retrieve P.I. Took Place On Or After June 9, 2006, And Was An Act In Furtherance Of Defendants' Conspiracy And A Continuation Of Their Harboring Offense*

Michael and Mary's sole sufficiency challenge to their convictions is that the government's evidence was insufficient to show that their criminal activity continued on or after June 9, 2006, and therefore fell within the ten-year statute of limitations period for the conspiracy and substantive harboring offenses. Michael Br. 26-30; Mary Br. 31, 40-46, 50-51. Because a rational juror could find beyond a reasonable doubt that defendants engaged in a continuing course of criminal conduct that persisted on or after June 9, 2006, *i.e.*, at least until Mary spoke with P.I. at the Murunga-Adoyo home urging her to return to defendants' home, this Court should uphold the jury's verdict.

1. "[S]tatutes of limitations normally begin to run when the crime is complete." *Toussie* v. *United States*, 397 U.S. 112, 115 (1970) (citation omitted). A statute of limitations for a continuing offense, however, begins to run from the last act that was part of the offense. See *United States* v. *Amirnazmi*, 645 F.3d 564, 592 (3d Cir.), cert. denied, 565 U.S. 921 (2011). "A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse." *United States* v. *Rowe*, 919 F.3d 752, 760 (3d Cir. 2019) (citation omitted). Said differently, "[t]he defining characteristic of a continuing offense is that it involves ongoing perpetration, which produces an ongoing threat of harm." *United States* v.

*Tavarez-Levario*, 788 F.3d 433, 439 (5th Cir. 2015). Whether a particular offense is continuing in nature depends on whether "the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie*, 397 U.S. at 115.

It is well-settled that conspiracy, such as the violation of 8 U.S.C. 1324(a)(1)(A)(v)(I) charged in Count One, is a continuing offense. See, *e.g.*, *Smith* v. *United States*, 568 U.S. 106, 111 (2013). "[A] defendant who has joined a conspiracy continues to violate the law through every moment of the conspiracy's existence." *Ibid.* (internal quotation marks, citation, and brackets omitted). "The time when a continuing conspiracy terminates depends upon the particular facts and purposes of the conspiracy." *United States* v. *Armocida*, 515 F.2d 29, 47 (3d Cir.), cert. denied, 423 U.S. 858 (1975). An unlawful conspiracy continues until its purpose is achieved, *ibid.*, "or until an affirmative act of termination by its members," *United States* v. *O'Grady*, 280 F. App'x 124, 132 (3d Cir. 2008).

The substantive harboring offense in Count Two is also a continuing offense. See *Toussie*, 397 U.S. at 115. Section 1324(a)(1)(A)(iii) criminalizes "conceal[ing], harbor[ing], or shield[ing] [an alien] from detection" with knowledge or reckless disregard of the alien's illegal presence in the United States. 8 U.S.C. 1324(a)(1)(A)(iii). To prove a violation, the government must show

"conduct tending to substantially facilitate an alien's remaining in the United States illegally and to prevent government authorities from detecting the alien's unlawful presence." *United States* v. *Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008) (internal quotation marks and citation omitted), cert. denied, 555 U.S. 1153 (2009). Each day that a defendant continues to conceal and harbor an alien from the government's detection, or attempts to do so, brings a "renewed threat of the substantive evil Congress sought to prevent." *Toussie*, 397 F.3d at 122. Consistent with this view, federal courts of appeals have concluded in other contexts that violations of statutes that criminalize concealment are continuing offenses. See, *e.g.*, *United States* v. *Strain*, 396 F.3d 689, 697 (5th Cir. 2005) (concealing and harboring fugitive may be a continuing offense once it has commenced); *United States* v. *Blizzard*, 27 F.3d 100, 102-103 (4th Cir. 1994) (concealing and retaining stolen government property is a continuing offense).

Here, a ten-year limitations period applies to defendants' conspiracy and substantive harboring offenses. See 18 U.S.C. 3298 (covering "section 274(a) of the Immigration and Nationality Act," or 8 U.S.C. 1324(a)). Defendants were indicted on June 9, 2016. J.A. 20. Therefore, their convictions for the continuing offenses of conspiracy and alien harboring can be sustained only if their criminal conduct continued on or after June 9, 2006. Viewed in the light most favorable to the government, sufficient evidence supports the jury's conclusion that it did.

2. The record shows that defendants, knowing or in reckless disregard of P.I.'s unlawful presence, conspired to keep P.I. in the United States to extract low-cost childcare and household help from her. The record also shows that defendants committed the substantive alien-harboring offense by engaging in conduct that tended to substantially facilitate P.I.'s unlawful presence in the United States and prevent government authorities from detecting her presence, and did so for their private financial gain. After sending a prior nanny back to Africa after she questioned defendants' treatment of her, defendants brought P.I. to the United States to provide them with childcare and other household help. J.A. 360-363, 375-377, 393-394. From approximately August 2005 to sometime in June 2006, defendants paid P.I. $200 per month for these services, with 90% of the payments going directly to P.I.'s family in Africa. J.A. 360, 379-385. During this time, defendants warned P.I. not to talk to anyone outside their house and otherwise threatened and isolated P.I., including by telling her that Michael had returned defendants' prior nanny to Africa for contemplating going to the police. J.A. 386-387, 390-391, 393-395.

After P.I. surreptitiously alerted Mary's siblings that defendants were mistreating her, Mary's brother picked P.I. up from defendants' home sometime in June 2006 and dropped her off at the Murunga-Adoyo residence in Pennsylvania. J.A. 398-402. But P.I.'s departure from defendants' home did not end their

criminal conduct. Rather, Adoyo testified that Mary came to Adoyo's house "*a few weeks after*" P.I.'s June 2006 arrival and engaged in a heated conversation with P.I. J.A. 235-236. He recalled specific details from Mary's unannounced visit and Mary and P.I.'s interaction, including what he could overhear, where their conversation took place, where they sat in the room together, their facial expressions, the volume of their voices, and who else was in the house at the time. J.A. 236-239. Adoyo testified that both women were upset, that Mary told P.I. that "the kids miss [her]," that Mary had raised her voice, and that Adoyo ultimately intervened to separate the women. J.A. 237-238. P.I. testified that Mary asked her to return to the Wood household but that she told Mary that she "wasn't coming with her," which upset Mary. J.A. 401. Mary's response was not surprising, considering that P.I. assisted with childcare ever since defendants returned their previous nanny to Ghana. J.A. 332-333. And, during this time period, even as P.I. resided at the Murunga-Adoyo household, defendants kept P.I.'s possessions at their home. J.A. 402.

A reasonable jury could infer from this testimony that Mary's attempt to retrieve P.I. occurred at least a few weeks into June 2006—*i.e.*, on or after June 9, 2006—and extended defendants' criminal conduct into the limitations period.[5] In

[5] Mary challenges (Br. 28-31) the rationality of the jury's decision to credit Adoyo's testimony that Mary's conversation with P.I. took place a few weeks after (continued…)

attempting to retrieve P.I. and return to the status quo—namely, keeping P.I. at defendants' home for their benefit—Mary furthered the conspiracy's goal to facilitate P.I.'s presence to extract low-cost childcare and household help from her. A rational factfinder could also conclude that defendants' continued possession of P.I.'s personal effects was intended to lure P.I. back to their home, at which time defendants would seek to have her resume working for them, and that their choice not to report P.I.'s continued presence to immigration authorities was further evidence of their continued interest and intent in securing her services. Given defendants' isolation of P.I. during her time with them, which included warnings not to talk to outsiders and threats that they would send her back to Africa if she did not comply, a reasonable jury could also conclude that Mary's request that P.I. return to this situation, taken together with her continued possession of P.I.'s belongings and decision not to report her unlawful presence, violated the substantive harboring statute because it tended to substantially facilitate P.I.'s remaining in the country illegally and prevent her detection by government authorities. See *Ozcelik*, 527 F.3d at 100.

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(…continued)
P.I.'s departure from defendants' home over P.I.'s testimony that the conversation took place two days later. In reviewing a sufficiency challenge, however, this Court must presume that the jury resolved this conflicting testimony in the government's favor and defer to that decision. See *Bailey*, 840 F.3d at 109; see also J.A. 920-921 (district court recognizing as much before denying defendants' sufficiency challenge).

The court thus properly rejected defendants' post-trial arguments that their criminal conduct ended when P.I. left their house. As the court explained, "[t]his is a scheme that continued up through some point later in June of 2006 of harboring this victim so that she could continue to reside in the United States and continue to provide services to the defendants in the United States." J.A. 946.

3. Not only was there substantial evidence to support the conclusion that the criminal offenses continued on or after June 9, 2006, it is clear that the jury carefully considered this issue. The district court, at Michael's request, instructed the jury that it had to find beyond a reasonable doubt that the criminal activity continued on or after June 9, 2006. At the outset of its instructions, the court stated that "the Government must prove beyond a reasonable doubt the conspiracy alleged in Count One continued on or after June 9, 2006, and some element of the alien harboring alleged in Count Two took place on or after June 9, 2006." J.A. 705. When instructing the jury on the conspiracy count, the court reiterated that "the Government must prove beyond a reasonable doubt that the conspiracy alleged in Count One continued on or after June 9th, 2006." J.A. 723. And, the court repeated for a third time that "the Government must prove beyond a reasonable doubt that the conspiracy continued on or after June 9th, 2006," and that "the Government must prove beyond a reasonable doubt that some element of alien harboring took place on or after June 9, 2006." J.A. 728-729.

This Court presumes the jury followed these instructions. See *United States* v. *Hodge*, 870 F.3d 184, 205 (3d Cir. 2017). But even apart from that presumption, the record shows that the jury focused on this critical date. Michael's counsel argued in closing that the jury should "focus [their] deliberations on * * * the statute of limitations." J.A. 771. Counsel reiterated that the jury must find "unanimously" and "beyond a reasonable doubt" that the "Government has proved criminal conduct occurring on or after June 9, 2006." J.A. 772. Turning to the facts, counsel argued that any criminal activity ended when P.I. moved to the Murunga-Adoyo residence and that the government had not established that the move happened on or after June 9, 2006. J.A. 781-782. During its deliberations, the jury requested transcripts of P.I. and Adoyo's testimony regarding Mary's conversation with P.I. at the Murunga-Adoyo residence. J.A. 883. In short, counsel's argument, the jury instructions, and the jury's request make clear both that the jury focused its deliberations on ensuring that part of the criminal scheme (here, Mary's attempt to bring P.I. back to defendants' home to provide low-cost childcare and household help) continued on or after June 9, 2006, and that the jury convicted based on the trial evidence.

4. Defendants' arguments to the contrary are not persuasive.

a. Defendants primarily argue (Michael Br. 26-30; Mary Br. 31, 40-46, 50-51) that their conspiracy and harboring offenses ended when P.I. moved to the

Murunga-Adoyo household, and that Mary's subsequent conversation with P.I. was at best an attempt to initiate a new offense. That argument fails. Although Mary contends (Br. 43-44 (citation omitted)) that the conspiracy did not include "periods of dormancy" in which P.I. was absent from defendants' home, this Court has recognized that "[t]he fact that the conspiratorial object was postponed or slowed down does not unequivocally show that the conspiracy was terminated." *United States* v. *Ammar*, 714 F.2d 238, 253 (3d Cir.) (citation omitted), cert. denied, 464 U.S. 936 (1983). Here, P.I.'s departure from defendants' home does not mean that defendants' conspiracy or harboring or attempted harboring came to an end. At most, P.I.'s departure simply left defendants without her services until Mary could attempt to retrieve P.I. Further, as noted above, see pp. 23-25, *supra*, Mary's request that P.I. return to defendants' home with its isolating conditions, followed by their continued possession of P.I.'s belongings and decision not to report her to immigration authorities, constituted a continuation of the substantive harboring offense because it tended to substantially facilitate P.I.'s unlawful presence in the United States and prevent her detection by government authorities, for defendants' private financial gain. See *Ozcelik*, 527 F.3d at 100.

In arguing otherwise, defendants rely on a single case addressing the federal kidnapping statute, in which the Supreme Court held that a kidnapping offense ends for venue purposes when the victim is freed. See Michael Br. 30; Mary Br.

51 (citing *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 281 (1999)). But the argument that P.I.'s escape from defendants' home is akin to freedom, and thus ends the offense, does not apply in the harboring context because, unlike the kidnapping statute (18 U.S.C. 1201), the harboring statute (8 U.S.C. 1324) does not require that the victim be seized or restrained. Rather, the harboring statute requires only that the defendant, for private financial gain, conceal, harbor, or shield, or attempt to conceal, harbor, or shield, an alien from detection with knowledge or reckless disregard of the alien's unlawful presence in the United States. See 8 U.S.C. 1324(a)(1)(A)(iii) and (a)(1)(B)(i). Mary's attempt to persuade P.I. to return to defendants' home for their benefit, taken together with defendants' retention of her possessions and their choice not to report her continued presence to immigration authorities, did just that.

b. Defendants next argue that no reasonable jury could infer that Mary's conversation with P.I. constituted a continuation of criminal activity because P.I.'s testimony showed that the purpose of Mary's visit was to pick up her kids, not to persuade P.I. to return to defendants' home. Michael Br. 29-30; see Mary Br. 28-31.

But the evidence amply supports the conclusion that the purpose of Mary's visit was to convince P.I. to return to defendants' home to continue working for them. P.I. testified that Mary asked her to return to defendants' home and she

responded that she "wasn't coming with her," which upset Mary. J.A. 401. Adoyo testified that he heard what sounded like a heated argument between Mary and P.I., and that Mary told P.I. that "the kids miss [her]." J.A. 235-238. Viewed in the light most favorable to the government, this evidence could lead a reasonable jury to conclude that Mary sought to bring P.I. back to defendants' home, and that defendants' criminal conduct had not yet ceased. See *Coleman* v. *Johnson*, 566 U.S. 650, 655-656 (2012) (per curiam) (coercive nature of defendants' conduct "could be inferred from other circumstances not involving the direct use of force" and did not require specific testimony to that effect). The government is not required to eliminate other possible explanations for Mary's visit to sustain the jury's verdict. See *Caraballo-Rodriguez*, 726 F.3d at 431-432.

c. Mary also asserts (Br. 26-27, 40-46) that there was no evidence that her attempt to retrieve P.I. was within the scope of the conspiratorial agreement, or that she intended to facilitate P.I.'s unlawful presence in the United States. Relatedly, Michael contends (Br. 15-16, 28) that he was not involved in criminal activity on or after June 9, 2006, because he was in Japan for work. These arguments are meritless.

First, Mary's attempt to retrieve P.I. for defendants' benefit was part of their continuing conspiracy to procure low-cost household help. See pp. 23-25, *supra*. Mary's suggestion (Br. 42) that defendants would simply cut ties with P.I. upon

her departure, as they had with their previous nanny, is belied by defendants' failure to return P.I.'s personal effects following Mary's conversation with P.I., which, as the district court recognized, incentivized P.I. to return to defendants' home. J.A. 650. In addition, defendants' choice not to report P.I.'s illegal presence in the country to immigration authorities evinced their continued interest and intent in having P.I. return to their home to provide low-cost childcare and household help. And because P.I.'s departure did not terminate the continuing conspiracy, see pp. 26-28, *supra*, there is no dispute over whether Mary "had a meeting of the minds with any of her co-conspirators about the goal of bringing P.I. back to the Woods' home." Mary Br. 44-45.

Second, as a co-conspirator, Michael is responsible for Mary's conduct. See *Smith*, 568 U.S. at 111. As this Court has recognized, "a defendant is liable for his own and his co-conspirators' acts for as long as the conspiracy continues unless he withdraws prior to the conspiracy's termination." *United States* v. *Kushner*, 305 F.3d 194, 198 (3d Cir. 2002). Accordingly, to avoid liability for Mary's conduct, Michael must provide "evidence of complete withdrawal," *e.g.*, "a full confession to the authorities or communication to his co-conspirators that he has abandoned the enterprise and its goals." *United States* v. *Detelich*, 351 F. App'x 616, 620 (3d Cir. 2009) (citation omitted). Because "[w]ithdrawal takes more than cessation of criminal activity," *Kushner*, 305 F.3d at 198, Michael's travels outside the United

States do not suffice, and he is responsible for Mary's ongoing harboring activity of trying to get P.I. to provide low-cost childcare and household help. Indeed, if anything, Michael's regular travels to Japan, which left him unable to assist Mary in caring for their children, evince his interest in Mary's success at retrieving P.I. As the district court easily concluded, "Michael Wood never withdrew from the conspiracy as is required under the law, and, therefore, he is responsible for the substantive acts of Mary Wood." J.A. 946.[6]

## II

## THERE WAS NO CONSTRUCTIVE AMENDMENT OF THE INDICTMENT, PREJUDICIAL VARIANCE, OR DUPLICITOUS CHARGE

### *A. Standard Of Review*

This Court reviews de novo properly preserved claims that the government constructively amended the indictment or that there was a variance between the indictment and the proof at trial. *United States* v. *Vosburgh*, 602 F.3d 512, 531 (3d Cir. 2010), cert. denied, 563 U.S. 905 (2011). This Court reviews de novo a claim

[6] As to Count Two, the court properly instructed the jury that it could convict Mary or Michael of that offense either by proving that the defendant "personally committed it," or "based on the legal rule that each member of a conspiracy is responsible for crimes and other acts committed by the other members as long as those crimes and acts were committed to help further or achieve the objectives of the conspiracy, and were reasonably foreseeable to the defendant as a necessary or natural consequence of the agreement." J.A. 727. Accordingly, as the district court recognized, Michael would be liable for Mary's conduct even if he did not "personally participate" in that conduct. J.A. 727.

that an indictment's charge is duplicitous. *United States* v. *Root*, 585 F.3d 145, 150 (3d Cir. 2009).

*B. The Evidence Of Mary's Conversation With P.I. After P.I. Left Defendants' Home Did Not Constructively Amend The Indictment Or Create A Prejudicial Variance*

Defendants argue that the government's evidence of her conversation with P.I. after P.I. left defendants' home, coupled with the jury instructions, constructively amended the indictment by broadening the basis for conviction, requiring a judgment of acquittal on both the conspiracy and substantive harboring counts. Mary Br. 25-27; Michael Br. 31 (adopting this argument). In the alternative, they contend that the proof adduced at trial varied from the indictment's allegations to such an extent that it constituted a prejudicial variance from the indictment. Mary Br. 27-31; Michael Br. 31 (adopting this argument). Neither argument has merit.

1. A constructive amendment of an indictment occurs where "the evidence and jury instructions at trial modify essential terms of the charged offense in such a way that there is a substantial likelihood that the jury may have convicted the defendant for an offense differing from the offense the indictment returned by the grand jury actually charged." *United States* v. *Daraio*, 445 F.3d 253, 259-260 (3d Cir. 2006), cert. denied, 549 U.S. 1111 (2007). "An indictment can be constructively amended through evidence, arguments, or the district court's jury

instructions, if they effectively amend the indictment by broadening the possible bases for conviction from that which appeared in the indictment." *Vosburgh*, 602 F.3d at 532 (internal quotation marks and citation omitted). A constructive amendment is "per se reversible under harmless error review." *Ibid.* (citation omitted). "If a defendant is convicted of the same offense that was charged in the indictment, there is no constructive amendment." *Ibid.*

A variance occurs "where the charging terms of the indictment are not changed but when the evidence at the trial proves facts materially different from those alleged in the indictment." *Daraio*, 445 F.3d at 259. "Unlike a constructive amendment, a variance can result in a reversible error only if it is likely to have surprised or otherwise has prejudiced the defense." *Id.* at 262. To prove prejudice, a defendant must show that the "variance between the indictment and the proof adduced at trial * * * prejudiced some substantial right." *Ibid.* (citation omitted). "A variance that sufficiently informs the defendant of the charges against him and allows him to prepare his defense without being misled or surprised at trial does not prejudice the defendant's substantial rights." *Vosburgh*, 602 F.3d at 532.

2. There was no constructive amendment in this case. The indictment charged that "[f]rom in or about August 2005 and continuing through on or about June 28, 2006, in Burlington County and Gloucester County, in the District of New

Jersey, and elsewhere," defendants engaged in a conspiracy to violate Section 1324(a)'s encouraging and inducing, transporting, and harboring provisions for the purpose of private financial gain in violation of 8 U.S.C. 1324(a)(1)(A)(v)(I), and concealed, harbored, or shielded P.I. from detection and attempted to do so for the purpose of private financial gain in violation of 8 U.S.C. 1324(a)(1)(A)(iii), (v)(II) and 1324(a)(1)(B)(i)-(ii). J.A. 35-38. In its opening statement, the government told the jury that Mary went to the Murunga-Adoyo home several weeks after P.I.'s departure to plead with P.I. to return, demonstrating that defendants had a financial interest in having P.I. back in their home taking care of their kids. J.A. 156. The government then introduced evidence that Mary's relatives removed P.I. from defendants' home in June 2006 and that Mary attempted to retrieve P.I. from the Murunga-Adoyo home a few weeks later. J.A. 235-236, 399-402. And the government argued in closing that Mary's conversation with P.I. at the Murunga-Adoyo residence was a continuation of defendants' criminal activity. J.A. 756-760, 835-836. Finally, the district court instructed the jury that to convict defendants on Counts One and Two, it must find beyond a reasonable doubt that the conspiracy alleged in Count One continued on or after June 9, 2006, and that some element of the alien harboring alleged in Count Two took place on or after June 9, 2006. J.A. 705, 723, 728-729.

The indictment's factual theory accords with the government's evidence and arguments, and the court's jury instructions—*i.e.*, that from approximately August 2005 and continuing through on or about June 28, 2006, defendants conspired to harbor, and harbored, P.I. The government argued and presented evidence that Mary attempted to retrieve P.I. from the Murunga-Adoyo home only a few weeks after her surprise departure in June 2006. This latter act involved the same victim and the same reasons that defendants had kept P.I. at their home for almost a year, and was close in time to P.I.'s departure from their home, and thus constituted a continuation of defendants' criminal activity. The district court instructed the jury that it could convict defendants of Counts One and Two only if it found beyond a reasonable doubt that defendants' criminal activity continued and took place on or after June 9, 2006. Accordingly, as the district court concluded, defendants were convicted as charged and there was no constructive amendment. See J.A. 945 ("I find there's no constructive amendment whatsoever. The indictment explicitly charges * * * these crimes continued up through June 28, 2006 and [that] was the evidence that was presented to the jury in this case.").[7]

[7] Contrary to Mary's assertions (Br. 22-24), the grand jury did hear about the post-departure conversation between Mary and P.I. and Mary's attempt to bring P.I. back for defendants' benefit. See J.A. 1073; Doc. 133, at 21-25; Doc. 88, at 5-6.

Nor was there a variance, much less a prejudicial one. On this point, Mary argues (Br. 28-31) that defense counsel's decisions about investigation, trial preparation, and the questioning of witnesses would have differed had defendants known pretrial that the government would offer Mary's post-departure conversation with P.I. as offense conduct. But Mary offers no authority recognizing prejudice or surprise where, as here, the indictment's plain language charged that the alleged crimes ended on or about a particular *date* rather than with a particular *event*. Indeed, Mary acknowledges (Br. 22-23) that Agent Scott Bishop testified to the grand jury about the post-departure conversation between Mary and P.I., which hardly supports a claim of prejudice or surprise. Accordingly, the facts the government proved at trial did not materially differ from those the indictment alleged, and the district court correctly concluded that "[t]here's no surprise to the defendants that there was going to be evidence in this case of events that occurred after the victim moved from the Woods' home, so they can't allege surprise." J.A. 667.

*C. Count Two Of The Indictment Was Not Duplicitous*

Defendants also argue that Count Two, the substantive harboring count, was duplicitous if it includes Mary's attempt to bring P.I. back to defendants' home. Mary Br. 51-52; Michael Br. 31 (adopting this argument). "Duplicity is the joining of two or more distinct offenses in a single count, so that a general verdict does not

reveal exactly which crimes the jury found the defendant had committed." *United States* v. *Moyer*, 674 F.3d 192, 204 (3d Cir.) (citation omitted), cert. denied, 568 U.S. 846 (2012) and 568 U.S. 1143 (2013). Mary contends that this precise danger came to pass here. She asserts that, unbeknownst to the jury, Count Two charged two separate crimes—namely, the initial harboring offense and Mary's attempt shortly thereafter to retrieve P.I.—and that it was impossible to tell on the record whether the jury reached a unanimous verdict as to the offenses. Mary cites nothing beyond general boilerplate principles to support her claim of duplicity, which is meritless in light of the indictment, the jury instructions, and the government's arguments.

Count Two alleged that from approximately "August 2005 and continuing through on or about June 28, 2006," defendants knowingly and in reckless disregard of P.I.'s illegal presence in the United States concealed, harbored, or shielded P.I. from detection, and attempted to do so, for the purpose of private financial gain in violation of Sections 1324(a)(1)(A)(iii), (v)(II) and 1324(a)(1)(B)(i)-(ii). J.A. 38. The district court reiterated to the jury that Count Two charged that the substantive harboring offense occurred from approximately "August 2005 and continuing through on or about June 28th, 2006," and instructed the jury that to find defendants guilty of this Count, the government must prove beyond a reasonable doubt each of the required elements of alien harboring. J.A.

724-726. And the government argued to the jury that Mary's attempt to bring P.I. back to defendants' home was a continuation of their alien harboring, and occurred a few weeks following P.I.'s departure in June 2006 and after June 9, 2006. J.A. 758-760, 836. Following the jury verdict, the district court polled the jury and each individual juror confirmed the guilty verdict on Count Two. J.A. 892.

Based on the language of the indictment, the jury instructions, and the government's argument, a reasonable jury would have understood that Mary was charged with *one* continuing course of conduct of alien harboring that started in 2005 and lasted until around June 28, 2006 and included Mary's attempt to retrieve P.I. The jury would not reasonably have understood Count Two to allege two separate harboring offenses. Accordingly, Count Two was not duplicitous. See *Moyer*, 674 F.3d at 205 (rejecting defendant's argument that count was duplicitous because "the jurors may have relied on different acts in concluding that he was guilty of obstructing justice" where jury instructions and poll following verdict made clear that the jury concluded that he engaged in a continuing course of conduct).

## III

## NONE OF THE OBJECTS OF THE CONSPIRACY WERE LEGALLY INVALID AS TIME-BARRED, AND EVEN IF THEY WERE, THAT WOULD NOT WARRANT VACATUR OF DEFENDANTS' CONSPIRACY CONVICTIONS UNDER SUPREME COURT PRECEDENT

### *A. Standard Of Review*

A district court's conclusion that a conspiracy's objects are not time-barred is a legal one that this Court reviews de novo. See *United States* v. *Georgiou*, 777 F.3d 125, 138 (3d Cir.), cert. denied, 136 S. Ct. 401 (2015). The applicability of Supreme Court precedent to this case is also a legal issue over which this Court exercises plenary review. See *United States* v. *Barbosa*, 271 F.3d 438, 452 (3d Cir. 2001), cert. denied, 537 U.S. 1049 (2002).

### *B. Defendants' Conspiracy Convictions Should Stand Because The Conspiracy's Objects Were Not Time-Barred, And Even If They Were, That Would Not Require Vacatur Under Supreme Court Precedent*

Mary argues (Br. 32-37) that all three of the objects of the charged conspiracy—(1) encouraging and inducing P.I. to enter or reside in the United States, (2) transporting or attempting to transport her, and (3) concealing, harboring, and shielding her from detection, all with knowledge or reckless disregard of P.I.'s illegal presence—were time-barred as a matter of law. Michael presses this argument (Br. 11-12) only as to the transporting object, but adopts Mary's argument as to all three objects (Br. 16). Defendants further contend that because the district court submitted all three objects to the jury, and the jury

returned only a general verdict that does not reflect the theory or theories upon which it based its convictions, the convictions must be vacated under *Yates* v. *United States*, 354 U.S. 298 (1957). Michael Br. 12-16; Mary Br. 37-38. These arguments are not correct.

*1. None Of The Conspiracy's Objects Were Time-Barred As A Matter Of Law Under Section 1324's Plain Language*

Mary first argues (Br. 33, 45-46) that all three objects of the conspiracy were legally time-barred, and thus invalid, because they require a nexus to facilitating an alien's presence in the United States, and thus do not encompass Mary's attempt to bring P.I. back to defendants' home in New Jersey. But Mary's argument ignores the breadth of Section 1324(a)'s prohibitions. Properly understood, all three objects cover Mary's attempt to retrieve P.I. after June 9, 2006, less than ten years prior to defendants' indictment, and thus the objects are not time-barred.

a. First, Mary contends (Br. 34-35) that the first object of the conspiracy—namely, "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of" the alien's illegal entry or residence, 8 U.S.C. 1324(a)(1)(A)(iv)—does not apply to her attempt to bring P.I. back to her home because her actions did not make P.I. any more likely to remain in the United States. But the statute plainly reaches Mary's conduct. Mary's attempt to retrieve P.I. a few weeks after P.I. moved to the Murunga-Adoyo residence in June 2006, followed by defendants' withholding of P.I.'s possessions

and choice not to report P.I.'s illegal presence in the country to government authorities, see pp. 23-25, *supra*, violated this statutory provision. Because these actions sought to induce P.I. to return to defendants' home to continue working for them, they constituted "affirmative assistance" that encouraged or induced P.I. to "reside" in the United States illegally for the purpose of advancing the conspiracy's objective, *i.e.*, providing low-cost childcare and household help to defendants. See *DelRio-Mocci* v. *Connolly Properties Inc.*, 672 F.3d 241, 248 (3d Cir.) (distinguishing "affirmative assistance" from giving mere "general advice"), cert. denied, 568 U.S. 821 (2012). That P.I. was living elsewhere at the time Mary took these actions is irrelevant, as courts have recognized that the statute applies even where "the illegal alien[] in question already resided in the United States at the time * * * the alleged wrongful encouragement or inducement occurred." *United States* v. *Martinez*, 900 F.3d 721, 731 n.8 (5th Cir. 2018) (collecting cases).

b. The same flaw infects Mary and Michael's argument as to the conspiracy's second object—namely, "transport[ing], or mov[ing] or attempt[ing] to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of [the alien's illegal presence]," 8 U.S.C. 1324(a)(1)(A)(ii). Defendants argue that any transportation scheme ended when Mary brought P.I. from the airport to defendants' home in August 2005, because no attempt to transport P.I. back to their home in June 2006 would further her

illegal presence in the United States. Thus, according to defendants, a five-year limitations period (that they assert ended, at the latest, in 2010) applies because 18 U.S.C. 3298's ten-year limitations period took effect after any arguable transporting conduct already had concluded. Michael Br. 11-12; Mary Br. 35-36. But Mary's attempt to retrieve P.I. and defendants' withholding of P.I.'s possessions, which incentivized P.I. to return to defendants' home, advanced this object well into June 2006 because Mary was trying to "transport or move" P.I. from the Murunga-Adoyo residence back to defendants' household. See 8 U.S.C. 1324(a)(1)(A)(ii). The goal of such transportation was not merely incidental to P.I.'s legal status or the goals of the conspiracy, but rather was central to assuring defendants had P.I. to perform their childcare and household work, *i.e.*, the reason P.I. was in the country illegally. Courts have recognized that an employer's transportation of aliens whom they know are working for them illegally is not "incidental." See *United States* v. *One 1982 Chevrolet Crew-Cab Truck VIN 1GCHK33M9C143129*, 810 F.2d 178, 182 (8th Cir. 1987).

c. Finally, Mary's attempt to retrieve P.I. from the Murunga-Adoyo home at least a few weeks into June 2006, and defendants' continued possession of P.I.'s belongings and choice not to report her continued presence in the country to immigration authorities, advanced the object of "conceal[ing], harbor[ing], or shield[ing] [P.I.] from detection, or attempt[ing] to conceal, harbor, or shield [her]

from detection," with knowledge or in reckless disregard of P.I.'s unlawful presence. 8 U.S.C. 1324(a)(1)(A)(iii). Mary argues (Br. 36-37) that bringing P.I. back to defendants' home from the Murunga-Adoyo home would not substantially facilitate her unlawful presence because P.I. would remain in the United States regardless, but she cites no authority requiring that the government show that defendants' actions made it *more* likely than not that P.I. would remain in the United States illegally. Instead, all the government needed to show, and in fact did show, was that Mary's attempt to retrieve P.I. for defendants' benefit, combined with defendants' failure to return P.I.'s personal effects and choice not to report her continued presence in the country to immigration authorities, tended to substantially facilitate P.I.'s unlawful presence and prevent her detection by government authorities. See pp. 23-25, *supra*.

In sum, because defendants' scheme to encourage P.I. to reside in the United States, transport P.I. within the United States, and harbor P.I. from detection all persisted at least a few weeks into June 2006, less than ten years prior to defendants' indictment, the conspiratorial objects were not time-barred.[8]

[8] This conclusion also forecloses defendants' argument (Mary Br. 47-50; Michael Br. 31 (adopting this argument)) that a conspiracy conviction based on Mary's post-departure conduct is barred by legal impossibility, a claim Mary acknowledges she failed to assert below (Br. 5) and admits has no support in this Court's precedents (Br. 48).

*2. Even If The Conspiratorial Objects Were Time-Barred, Supreme Court Precedent Does Not Require Vacatur Of Defendants' Conspiracy Convictions*

Even if defendants' narrow interpretation of the statute were correct and the three conspiratorial objects were time-barred, their challenge to their conspiracy convictions under *Yates* (Michael Br. 12-17; Mary Br. 37-38) still would fail for two reasons.

a. First, *Yates* does not apply where, as here, the conspiracy statute does not require the jury to find that specific objects of the conspiracy happened during the limitations period. In *Yates*, the Supreme Court vacated a conspiracy conviction where the defendants had been convicted of conspiring (1) to advocate for the overthrow of the government, and (2) to organize the Communist Party. See 354 U.S. at 300-301. Importantly, *Yates* concerned the general federal conspiracy statute, 18 U.S.C. 371, which requires an overt act. See 18 U.S.C. 371 (criminalizing conspiracy to commit any offense against the United States, or to defraud the United States, and requiring "any act to effect the object of the conspiracy"). After concluding that the organizing object should be construed narrowly and that it therefore did not encompass the defendants' conduct during the limitations period, the Court vacated the defendants' convictions because it was not clear whether the jury relied on the overt act of advocacy—which would have been permissible—or the overt act of organizing the Communist Party—

which was time-barred and legally invalid. See *Yates*, 354 U.S. at 311-312 ("[W]e have no way of knowing whether the overt act found by the jury was one which it believed to be in furtherance of the 'advocacy' rather than the 'organizing' objective of the alleged conspiracy.").

Unlike the general conspiracy statute, the plain text of other conspiracy statutes, such as the provision here, does not require any overt act. See *United States* v. *Bey*, 736 F.2d 891, 893-894 (3d Cir. 1984); see also 8 U.S.C. 1324(a)(1)(A)(v)(I). Therefore, the reasoning of *Yates* does not apply. For a statute that does not require an overt act, the crime is the agreement to violate the law, not the underlying object or overt acts. That is, defendants violated Section 1324(a)(1)(A)(v)(I) as soon as they made an agreement to engage in any of the conduct prohibited under Sections 1324(a)(1)(A)(i) to (iv). While the conspiracy must continue into the limitations period for the jury to convict, no particular legal violation or overt act in furtherance of the conspiracy must occur during the limitations period. As this Court has explained, "[t]he Government satisfies the requirements of the statute of limitations for a non-overt act conspiracy if it alleges and proves that the conspiracy continued into the limitations period." *United States* v. *Allen*, 492 F. App'x 273, 277 (3d Cir. 2012). That is precisely what the jury found. The district court instructed the jury that it could convict only if the United States proved beyond a reasonable doubt that there was an agreement to

engage in one or more of the objects of the conspiracy *and* that the conspiracy extended to on or after June 9, 2006. J.A. 705, 718-719, 723, 728-729. The jury found both.

b. *Yates* also does not apply when the defendant's challenge is to the evidentiary support, rather than legal validity, for some objects of a conspiracy. That is, where a defendant is convicted of a conspiracy that charged multiple objects, the verdict must be upheld as long as there is sufficient evidence on one object, even if there is insufficient evidence on another. See *Griffin* v. *United States*, 502 U.S. 46, 56 (1991) (distinguishing *Yates*).

Here, to the extent defendants contend that there was a defect in the evidence as it pertains to some objects of the charged conspiracy, they are alleging a factual rather than legal flaw. At bottom, their argument is not that there was some legal defect in the conspiracy charge, but rather that the evidence was insufficient that three of the objects of the conspiracy continued into the limitations period. While statute of limitations is sometimes a question of law as it was in *Yates* (where it was undisputed that organization of the Communist Party fell outside the limitations period), the limitations issue in this case was a factual question for the jury. Because the issue here is one of factual sufficiency, rather than legal validity, the Court must affirm if there is sufficient evidence for *any* of the objects of the conspiracy. See *Griffin*, 502 U.S. at 60. Because the jury's

guilty verdict on the substantive alien-harboring conviction makes clear that the jury found beyond a reasonable doubt that the harboring object of the conspiracy continued into the limitations period, there is no basis to disturb defendants' conspiracy convictions.[9]

## IV

## THE DISTRICT COURT DID NOT PLAINLY ERR IN SUBMITTING THE ENCOURAGING-AND-INDUCING OBJECT TO THE JURY WHERE DEFENDANTS DID NOT ARGUE BELOW THAT 8 U.S.C. 1324(A)(1)(A)(IV) WAS FACIALLY OVERBROAD AND NO PRECEDENT HAD REACHED THAT CONCLUSION AT THE TIME OF THE VERDICT

### *A. Standard Of Review*

This Court reviews a constitutional challenge to a statute raised for the first time on appeal for plain error. See *Government of Virgin Islands* v. *Vanterpool*, 767 F.3d 157, 162 (3d Cir. 2014). Under this standard, this Court may correct an error where (1) an error occurred; (2) the error was "clear or obvious"; (3) the error "affected the appellant's substantial rights," *i.e.*, "affected the outcome of the

[9] Michael relies (Br. 16-17) on *United States* v. *Riley*, 621 F.3d 312 (3d Cir. 2010), to argue that because the jury may have based its guilty verdict on the allegedly invalid transportation object, defendants' conspiracy convictions must be vacated despite the jury's guilty verdict on the substantive harboring count. *Riley* is readily distinguishable, however, because the legally erroneous definition of honest services fraud in that case was "interwoven throughout" the jury charge on conspiracy to commit such fraud, thus making it "highly probable" that the error contributed to the conspiracy conviction. *Id.* at 324. In this case, the district court instructed the jury that proof beyond a reasonable doubt on one object of the conspiracy was sufficient to convict on Count One so long as the jury agreed that the same object was proved. J.A. 718-719.

district court proceedings"; and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Ibid.* (citation omitted). An error is "clear or obvious" only if it is "clear under current law." *Ibid.* (citation omitted).

### B. *This Court Need Not Reach Defendants' Overbreadth Challenge Because It Was Not Error, Let Alone Plain Error, To Submit The Encouraging-And-Inducing Object To The Jury And Because Defendants Cannot Establish Prejudice Where Any Error Would Be Harmless Beyond A Reasonable Doubt Even If They Had Raised Their Challenge Below*

Defendants argue that 8 U.S.C. 1324(a)(1)(A)(iv), which makes it a felony to "encourage" or "induce" an alien "to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that" such action "is or will be in violation of law," is a content-based, criminal prohibition of protected speech that violates the First Amendment. Michael Br. 18; Mary Br. 53 (adopting this argument). Michael cites *United States* v. *Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018), petition for cert. pending, No. 19-67 (filed July 12, 2019), which held that Section 1324(a)(1)(A)(iv) is facially overbroad. Br. 19. Michael contends that because this provision fails to define "encourages" or "[i]nduces," it impermissibly "criminalizes almost every form of guidance, advice, comfort, or reassurance given to an alien" and inviting selective and arbitrary prosecution. Br. 21-26.

But the district court did not err, much less plainly err, in submitting the encouraging-and-inducing object of the conspiracy to the jury. This Court's

precedent strongly suggests that Section 1324(a)'s prohibition on encouraging or inducing an alien to enter or reside unlawfully in the United States is not facially overbroad in violation of the First Amendment. In *DelRio-Mocci* v. *Connolly Properties Inc.*, this Court concluded that a conviction under Section 1324(a)(1)(A)(iv) requires that the defendant provide more than "general advice." 672 F.3d 241, 248 (3d Cir.), cert. denied, 568 U.S. 821 (2012). Instead, the defendant must provide "some affirmative assistance that makes an alien lacking lawful immigration status more likely to enter or remain in the United States than she otherwise might have been." *Ibid.* Applying this standard, this Court concluded that providing aliens not lawfully present with rental housing did not violate Section 1324(a)(1)(A)(iv). See *id.* at 249.[10] Moreover, even if this Court did not have existing precedent limiting Section 1324(a)'s reach, any overbreadth concern would not be "clear under current law" for purposes of plain-error analysis merely because *Sineneng-Smith*, a decision from another federal court of appeals rendered after the jury verdict in this case, found the provision unconstitutional. See *United States* v. *Walker*, 392 F. App'x 919, 928 (3d Cir.) (no plain error where "there is no governing precedent resolving this issue"), cert. denied, 562 U.S. 1018

[10] Michael's examples (Br. 22-24) of the provision's alleged "incredibl[e]" breadth, none of which are at issue here, all constitute general advice that would not satisfy this Court's interpretation of Section 1324(a)'s reach. See Petition for Writ of Certiorari, *United States* v. *Sineneng-Smith*, No. 19-67, at 17-18 (filed July 12, 2019).

(2010). Indeed, the only federal court of appeals decision addressing the issue that existed at the time of defendants' trial had concluded that Section 1324(a)'s encouraging-or-inducing language was *not* facially overbroad. See *United States* v. *Tracy*, 456 F. App'x 267, 272 (4th Cir. 2011), cert. denied, 566 U.S. 980 (2012). Because there was no error, let alone plain error, for the district court to submit the encouraging-and-inducing object to the jury, this Court should not reach the merits of defendants' challenge or await the Supreme Court's resolution of the issue in *Sineneng-Smith*.

In any event, even if the encouraging-and-inducing object were legally invalid, and the district court committed plain error in submitting this object to the jury, there would be no basis for vacating or reversing defendants' conspiracy convictions. Unlike *Sineneng-Smith*, which involved a substantive violation of Section 1324(a)'s encouraging-and-inducing provision, that provision was only one object of the conspiracy for which defendants here were convicted. J.A. 35-36. Even under *Yates* v. *United States*, 354 U.S. 298 (1957), a conviction for a conspiracy that charges multiple objects will stand so long as the record is clear that the jury would have convicted based on a valid theory absent the invalid theory. Indeed, Michael concedes as much. Br. 14 (citing *United States* v. *Coniglio*, 417 F. App'x 146, 149 (3d Cir. 2011)). Here, the jury's conviction of defendants on the substantive harboring count obviates any concern about

submitting the encouraging-and-inducing object to the jury because it makes clear that the jury would have convicted defendants of conspiracy based on the third object (concealing-and-harboring) regardless of the legal validity of the encouraging-and-inducing object.

## CONCLUSION

This Court should affirm defendants' convictions.

Respectfully submitted,

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## CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rules 28.3(d) and 46.1(a), I hereby certify that I am exempt from the Third Circuit's bar admission requirement as counsel representing the United States.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Date: August 14, 2019

## CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 11,858 words.

2. This brief 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Times New Roman, 14-point font.

I also certify, pursuant to Local Rule 31.1(c), the text of the electronic brief is identical to the text in the paper copies of this brief. I further certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with Symantec Endpoint Protection (version 12.14112.4156) and is virus-free.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Date: August 14, 2019

## CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2019, I electronically filed the foregoing CONSOLIDATED BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I also certify that on August 14, 2019, seven (7) paper copies, identical to the brief filed electronically, were sent to the Clerk of the Court by Federal Express.

I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

# ADDENDUM

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## 8 U.S.C. 1324: Bringing in and harboring certain aliens

**(a)** Criminal penalties

**(1)(A)** Any person who—

**(i)** knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

**(ii)** knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

**(iii)** knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

**(iv**) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

**(v)(I)** engages in any conspiracy to commit any of the preceding acts, or

**(II)** aids or abets the commission of any of the preceding acts,
shall be punished as provided in subparagraph (B).

**(B)** A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—

**(i)** in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under Title 18, imprisoned not more than 10 years, or both;

**(ii)** in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under Title 18, imprisoned not more than 5 years, or both;