No. 13-1441

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the United States District Court, Eastern District of Michigan
	)	
vs.	)	CR. NO. 11-20259
	)	
JEAN CLAUDE KODJO TOVIAVE	)	Judge Arthur J. Tarnow
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF JEAN CLAUDE KODJO TOVIAVE

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INTRODUCTION

The Opening Brief's contentions remain. Offering no explanation for the erosion of due process, the prosecution instead excuses the tactics of Boivin and Ficklen because Toviave was not in custody, and in any event, waived his *Miranda* rights. This position relies on a truncated view of the facts and Fifth Amendment. After being deceived by Ficklen, Toviave was brought into a secured area of a government building, inquired about his right to counsel, was told he must speak with Ficklen, and interrogated in a small room for nearly two hours. The prosecution's inability to reconcile these realities with due process proves that the confession should have been suppressed.

As to the sufficiency of evidence, the prosecution is plagued by the same tunnel vision exhibited at trial. This is simply not a domestic help-for-hire case. First, Kossiwa, Rene, and Gaelle are related to Toviave. Kwami is Helene's nephew. The children's parents sent them to live with a relative to gain a better education, and they did. Second, unlike the typical forced labor case, the children's *raison d'être* was not serving Toviave's whims. Education was paramount as school and homework consumed most of the children's day. Chores were relegated to the weekend, a situation common in many homes. Third, Toviave worked two jobs and was rarely home. He provided shelter, food, clothes,

a tutor, and car for the children. But not fitting the prosecution's narrative, these facts are ignored.

In sum, this case is many things—mail fraud, immigration fraud, child abuse—but forced labor it is not. The prosecution overreached and the Court should reverse.

ARGUMENT

I. Admitting the Confession From Toviave's Custodial Interrogation Violated the Fifth Amendment.

Whether a defendant was "in custody" is a mixed question of law and fact reviewed *de novo*. *United States v. Crossley*, 224 F.3d 847, 860 (6th Cir. 2000).

A. The prosecution ignores critical facts.

The prosecution disputes Toviave's description of the events as a "ruse." It claims that because Ficklen told Toviave on the phone "that CPS was in the process of removing the children," all is well. (Response Br. at 25). The testimony the prosecution disregards is staggering. The following are ignored:

1) Ficklen told Toviave she had to serve him with papers;

2) Ficklen told Toviave she would go to Toviave's home to serve the papers;

3) Ficklen did not go to Toviave's home;

4) Ficklen then told Toviave to get the papers at her office;

5) Ficklen never told Toviave she would question him;

6) Ficklen said nothing about Detective Boivin;

7) Toviave was escorted into a locked, secure area in the CPS building;

8) Toviave was put in a small room with three government employees and the door was closed;

9) Boivin read Toviave his *Miranda* rights because he wanted to use incriminating statements against Toviave;

10) Not given any paperwork, Toviave was questioned and recorded;

11) Boivin was armed and had his badge out; and

12) Toviave had attempted to secure counsel prior to going to the CPS office.

The prosecution's aversion to the facts elicited at the suppression hearing imperils its analysis. Toviave was in custody and interrogated, which is why Boivin provided (albeit defectively) *Miranda* warnings. Instead of the suppression hearing testimony, the prosecution transplants Ficklen's trial testimony. Ficklen did not testify at the suppression hearing. Thus, her after-the-fact testimony, which had no bearing on the district court's suppression ruling, is of no import.

Further, the facts the prosecution does address are depicted in an unrealistically sanguine light. It first notes Toviave "drove himself to the meeting at CPS's offices." (Response Br. at 24). In fact, Toviave went to the CPS to pick up papers, not for a meeting. (Transcript, RE 51, Page ID # 286). Ficklen said nothing about Detective Boivin. (*Id.*). For good reason: Ficklen knew her

questions would prompt incriminating responses and thus Boivin, who specializes in crimes against children, would be essential for criminal prosecution. (Transcript, RE 51, Page ID # 244). When Toviave saw Boivin in the room, he was "surprised to see him there." (Transcript, RE 51, Page ID # 286).

The prosecution next claims Toviave "was not told he couldn't leave" during the interrogation. (Response Br. at 25). This is of little consolation as Boivin admitted he "never specifically said that [Toviave] was free to leave." (Transcript, RE 89, Page ID # 1000). The prosecution also asserts Toviave was never restrained or arrested. (Response Br. at 25-26). While true, this ignores that Toviave was brought into a secured, locked area of a government facility, placed in a small room with the door closed and three government employees—one with a gun, told he must speak, and that the questioning would be recorded. And for these reasons, Toviave appeared (per Boivin) "unsure." (Transcript, RE 89, Page ID # 976). Custody thus exists because a reasonable person would not have felt free to walk out.

The prosecution also notes Toviave was told "he didn't need to answer Boivin's questions." (Response Br. at 25). The prosecution omits Ficklen's name because Boivin instructed Toviave that "you're still going to talk with Ms. Ficklen." (Transcript, RE 51, Page ID # 289). The prosecution's admission by omission captures why a custodial interrogation occurred, why the Fifth

Amendment was violated, and why the motion to suppress should have been granted. Also of critical importance (and disregarded in the Response Brief), Boivin did not tell Toviave he would leave while he spoke to Ficklen. (Transcript, RE 51, Page ID # 278). Nor did Boivin tell Toviave he would turn off the tape recorder during that conversation. (*Id.*).

Boivin was forthright that the plan was to secure incriminating statements from Toviave. (Transcript, RE 51, Page ID # 244, 262-63). Yet the prosecution disregards Boivin's intentions. The Supreme Court defines interrogation as any words or actions by the police that would elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291 (1980). An officer's intent is typically not dispositive in determining whether certain conduct amounts to custodial interrogation. *Id.* at 301. But "[t]his is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." *Id.* at 301, n.7. Boivin conceded that his hope was to use Toviave's statements in the criminal investigation. (Transcript, RE 51, Page ID # 262-63). And as Ficklen worked "hand in hand" with Boivin, she knew this when misleading Toviave about paperwork. (Transcript, RE 89, Page ID # 1001).

In sum, this questioning did not occur over the phone or at Toviave's home. Rather, Toviave was tricked into coming to a hostile and unfamiliar setting.

Ficklen did not show Toviave the paperwork before escorting him into the locked, secured area. (Transcript, RE 51, Page ID # 285). Toviave was then questioned about criminal conduct and tape recorded for nearly two hours in a small room. These are the hallmarks of custodial interrogation.

B. Toviave's confession was involuntary.

The voluntary nature of an inculpatory statement is also reviewed *de novo*. *United States v. Mahan*, 190 F.3d 416, 422 (6th Cir. 1999).

The prosecution argues Toviave's statement about his right to counsel, "when can this language be used, or I can use this language?" was not a clear and unequivocal request for counsel. In doing so, the prosecution highlights Toviave's questions about counsel while downplaying Boivin's answer. But Boivin's convoluted answer illustrates why Toviave's statement was involuntary: "You can use it right now, you could, you're still going to talk with Ms. Ficklen, ok, but after a prosecutor would look at my paperwork, and decide whether there was something that they wanted to move forward with, or not, you would be able to exercise that right then, as well as now." (Transcript, RE 51, Page ID # 288-92).

Toviave did not want to know if he could have an attorney, but when and how he could get one. Toviave's experience with law enforcement was non-existent. (Transcript, RE 51, Page ID # 283). Moreover, Toviave had contacted his prepaid legal service but did not follow up, likely lulled into thinking the matter

concerned Ficklen and removal papers—not Boivin and criminal charges. (Transcript, RE 51, Page ID # 288-89). But the interrogation was not about removal as the children had already been removed. Instead, Boivin, aided by Ficklen, was building a criminal case. Given these circumstances, a reasonable person would have felt compelled to speak, especially because Boivin told Toviave he had to speak. The danger of coercion based on this instruction is indisputable.

Toviave argued repeatedly about the impropriety of Boivin's statement. (Opening Br. at 23, 27, 28, 29, 31, 32, 33, and 35). The prosecution ignores these arguments and frames Toviave's argument in the context of *Simpson v. Jackson*, 615 F.3d 421 (6th Cir. 2010). (Response Br. at 27-28). *Simpson* was one facet of Toviave's argument, and limiting the Response Brief to that point demonstrates the frailty of the prosecution's position.

Moreover, the prosecution's discussion of *Simpson* is unavailing. It claims *Simpson* is supportive because "Boivin's response that Toviave still needed to speak with Ficklen . . . was not impermissible; it was the truth." (Response Br. at 28). And under *Simpson*, the prosecution deems this proper because true statements do not violate *Miranda*. Relying on *Simpson* for this proposition is perilous. *Simpson* was a complex habeas case involving challenges to four separate statements, three of which the Court found were improperly admitted, and two *Miranda* readings. 615 F.3d at 424. The defendant was told, *inter alia*, that if

he declined a polygraph test, he would be charged. *Id*. at 437. The Court determined "[b]ut, for the reasons stated above, this is not problematic under *Miranda* because it was essentially the truth." *Id*. The contrast between *Simpson* and telling someone "you're still going to talk" could not be greater. *Simpson* cannot save the prosecution.

The prosecution also states that if Toviave did not talk to Boivin, "he still needed to speak with Ficklen about the pending removal petition, a non-criminal matter." (Response Br. at 28-29). However, the Fifth Amendment privilege against self-incrimination can be asserted in any proceeding, "civil or criminal, administrative or judicial, investigatory or adjudicatory." *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). And the prosecution cites nothing to distinguish between police and non-police questioning in a custodial interrogation.

Finally, Boivin dangled the false promise that Toviave would benefit if he cooperated and that he could get counsel after answering questions. These contentions, coupled with the instruction that he would have to talk with Ficklen, establish Toviave's statement was involuntary. Toviave was not raised in the United States nor a hardened criminal fluent in *Miranda*-speak. Thus, based on Boivin's prompting, he could have thought he could secure counsel after first cooperating, not knowing that the damage would be done. In fact, Toviave did not feel free to leave because Boivin told him that everything depended on his

cooperation. (Transcript, RE 51, Page ID # 289). Thus, even if Toviave's request for counsel was ambiguous, he was discouraged from clarifying his request by Boivin's misleading response, in violation of the Fifth Amendment. *See Davis v. United States*, 512 U.S. 452, 455 (1994).

The prosecution downplays Boivin's promise and observation that he could get counsel after answering questions. Yet the combination of threats and promises may rise to the level sufficient to overbear an interviewee's will, rendering any confession the product of impermissible coercion. *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963). *See also Ledbetter v. Edwards*, 35 F.3d 1062, 1070 (6th Cir. 1994) (recognizing that, in the face of a powerful combination of threats and promises, even "[a] defendant who is completely innocent might well confess."). As *Miranda* stated, "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda v. Arizona*, 384 U.S. 436, 476 (1966). Due to Boivin's misleading explanation about Toviave's right to counsel, any waiver was done without Toviave knowing the rights he was abandoning.

C. An involuntary confession is not harmless.

The prosecution asserts that any error in admitting Toviave's confession was harmless. However, the Supreme Court prohibits a harmless error analysis where the right violated is so basic that it impedes the right to a fair trial. An error with

substantial influence in determining the jury's verdict is not harmless. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). "The risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless." *Arizona v. Fulminanate*, 499 U.S. 279, 296 (1991). In *United States v. Throneburg*, 921 F.2d 654 (6th Cir. 1990), since the defendant did not "claim that his statement was involuntary," any violation was reviewed for harmless error. *Id*. at 657-58. Here, since the court admitted Toviave's involuntary statement, harmless error is inapplicable.

The contrast between the above precedent and the prosecution's sole case, the unpublished *United States v. West*, 167 F. App'x 550 (6th Cir. 2006), is sharp. *West* is inapplicable because Toviave's statements were involuntary. Moreover, *West* found harmless error in admitting the defendant's videotaped statements because the incriminating evidence was overwhelming. *Id.* at 552. The same cannot be said here. Toviave's confession featured prominently at trial. Ficklen and Boivin both spoke about their interactions with Toviave, and his admissions in hitting the children and reasons for doing so. And contrary to the prosecution's cherry-picked version of events, the children's trial testimony presented a complicated, inconsistent picture. In short, Toviave's admissions substantially influenced the jury's verdict.

Since due process is undermined when a conviction is based even partly on an involuntary confession, *Jackson v. Denno*, 378 U.S. 368, 376 (1964), there is no harmless error.

D. Summation.

Not merely discouraging Toviave from asserting his right to counsel by suggesting cooperation would help his cause and that he could invoke his rights after talking, Boivin told Toviave he had no such rights as to Ficklen. Reviewed *de novo*, the Court should reverse the denial of the motion to suppress.

II. Requiring Relatives To Do Household Chores While Providing Food, Shelter, Clothing, and Transportation is Not Forced Labor.

A. Legislative history does not support the prosecution.

The prosecution claims Toviave removes domestic services from the purview of the forced labor statute. (Response Br. at 31). It also argues the Trafficking Victims Protection Act of 2000 ("TVPA") supplemented existing law by criminalizing the obtaining of domestic services. The prosecution is mistaken.

The conference report in 18 U.S.C. § 1589 established the new statutory language covered subtle forms of coercion the prior language failed to encompass. *See* H.R. Conf. Rep. 106–939, 106th Cong. (Oct. 5, 2000). The report makes limited references to domestic services, but discusses psychological and economic coercion at length. *Id.* It also cites the Supreme Court's decision in *United States v. Kozminski* as a catalyst for the legislation. *Id.*, *Kozminski*, 487 U.S. 931 (1988).

Following the report's excerpt quoted in the Response Brief, the report discusses an example of a nanny coerced by threats. H.R. Conf. Rep. 106–939, 106th Cong. (Oct. 5, 2000). However, that example only illustrates that psychological or economic coercion can be found in a domestic setting; the report does not indicate that domestic labor as a species of work was a concern. *Id*.

The report also stated that Congress intended to allow prosecution "*in certain instances* where children are brought to the United States and face extreme nonviolent and psychological coercion." *Id*. (emphasis added). Not every instance of such coercion is a crime; at the least, the defendant must obtain labor or services, and the meaning of those terms was not expanded by the TVPA. 18 U.S.C. §§ 1584, 1589. Congress was also cautious in expanding the scope of the forced labor statute. *See* H.R. Conf. Rep. 106–939, 106th Cong. (Oct. 5, 2000).

As set forth in the Opening Brief, and unchallenged in the Response Brief, Congress could not have intended to federalize every dysfunctional familial arrangement where household chores are assigned. Further, the prosecution attacks Toviave's invocation of *Kozminski* for reasons unrelated to Toviave's reliance. *Kozminski* is relevant because the Court found the prosecution's application of the involuntary servitude statute would "criminalize a broad range of day to day activity." 487 U.S. at 949; (Opening Brief at 38-39). Engaging straw men, the prosecution leaves Toviave's point intact.

B. The forced labor statute only applies where some benefit of labor or services is obtained.

The prosecution claims that Toviave limits § 1589 to work resulting in a "pecuniary" gain. (Response Br. at 45). This sidesteps Toviave's argument that the Tenth Circuit decision in *United States v. Kaufman* applied § 1589 to situations where there was no commercial gain, but did not expand the statute to cover all work. 546 F.3d 1242, 1262 (10th Cir. 2008); (Opening Br. at 47). This distinction, while subtle, is critical because it underlies Toviave's use of "economic" and "commercial" as separate terms and the prosecution's misplaced contention that Toviave limits § 1589 to "pecuniary" gain. As for the latter, Toviave made no such argument; his contention was that the statute is limited to either work within a commercial setting or work conferring a hedonic benefit. (Opening Br. at 39, 42.)

The hedonic benefit theory is rooted in *Kaufman*, which involved coerced sexual acts. 546 F.3d at 1262. In explaining that § 1589 applied in such a context, *Kaufman* cited *United States v. Udeozor*, where sexual abuse was recognized as a badge of servitude. *Id.*, citing 515 F.3d 260, 266 (4th Cir. 2008). In both *Kaufman* and *Udeozor*, the defendants obtained sexual gratification through their victims. *Kaufman*, 546 F.3d at 1262; *Udeozor*, 515 F.3d at 266. While this benefit was not "economic" within the commercial sense of the word, no such benefits inured to Toviave here. *Kaufman* is thus distinguishable.

Similarly, in *United States v. Marcus,* the defendant obtained sexual gratification, pecuniary benefits, and housework from the victim. 628 F.3d 36, 45 (2d Cir. 2010). After a consensual BDSM relationship ended, the defendant continued obtaining benefits by inserting a pin through the victim's labia, severe beatings, drugging, and rape. *Id*. at 40, 45. These acts provided the benefit of sexual gratification to the defendant. *Id*. Thus, reading "obtain" to require a benefit comports with *Kaufman, Udeozor,* and *Marcus*.

C. The forced labor statute covers domestic servitude but not chores by family members.

Cases such as *Kaufman, Udeozor,* and *Marcus* highlight how the prosecution impermissibly expands § 1589. This novel application is also underscored by the absence of analogous case law. The statute has never been applied to chores demanded by a family member. Instead, as the prosecution's cases show, it concerns instances where non-relatives are hired to work as nannies, but the situation devolves into servitude. (Response Br. at 32-33).

In *United States v. Nnaji,* the victim performed all of the defendants' household chores, was the sole caretaker of three children, and was sexually abused. 447 F. App'x 558 (5th Cir. 2011). In *United States v. Calimlim*, the victim worked 14-hour days as a nanny and sole household employee at a large mansion, and also worked in the defendant's business. 538 F.3d 706, 708-09 (7th Cir. 2008). In *United States v. Djoumessi,* the victim did all of the defendant's

housework and childcare needs for 16 hours a day, and was sexually abused. 538 F.3d 547, 549 (6th Cir. 2008). The victim in *United States v. Dann* worked 14 hours a day as a maid and sole caretaker of three children. 652 F.3d 1160, 1165 (9th Cir. 2011). These cases have no bearing on the instant facts. They also confirm the unprecedented nature of the prosecution's position.

In the Opening Brief, Toviave relied on *United States v. King,* 840 F.2d 1276 (6th Cir. 1988), in which the Court affirmed the conviction not because children worked, but rather the scope of their work "went beyond that which would be warranted in order for them to discharge their communal responsibilities…." *Id*. at 1280. The prosecution's attempt to evade *King* is unconvincing. The children did babysit for Toviave's son. But Toviave also provided shelter, food, and clothes. He gave Gaelle a car. He also hired a tutor. That the children did occasional babysitting, along with ironing Toviave's clothes, did not go beyond that which would be warranted to discharge their household responsibilities. *See* 840 F.2d at 1280.

Along with the lack of analogous precedent is the prosecution's reading of the facts. The prosecution contends Toviave "orchestrated" the entire scheme. (Response Br. at 2). The children's parents are never acknowledged. Yet the parents, related to Toviave and Helene, wanted them to take the children to America for a better education. The prosecution also whitewashes Helene's

involvement, despite the fact she procured false documents and coached the children to foil immigration controls. Thus, given that Helene is state's evidence and the children's parents are safely ensconced in Togo, along with Helene's brother, the prosecution deems Toviave responsible for everything.

The prosecution also ignores that Toviave provided the children with a home, food, clothes, bike, car, and tutor. And while providing for family members does not excuse abuse, to say Toviave did nothing but mistreat the children ignores the record. These facts are a far cry from the 14-hour workdays of *Calimlim, Djoumessi*, and *Dann*, where the victims were tethered to the home. Moreover, while not a nuclear family, the children were related to Toviave and Helene, removing the facts from the domestic help-for-hire paradigm.

The prosecution asserts Toviave did no household chores for five years. (Response Br. at 48). The only support for this sweeping proposition is Helene, who was absent for most of that period. (Transcript, RE 90, Page ID # 1046). The children were not questioned on this point. Moreover, Gaelle admitted that Toviave did the outdoor chores. (Transcript, RE 86, Page ID # 546). Most of the children's chores were done for the benefit of the entire household. Cooking was done in large batches on weekends. (Transcript, RE 87, Page ID # 772). The bathrooms the children cleaned were shared. (Transcript, RE 87, Page ID # 739-41). The children served food and cleaned when there were guests, but may have

also participated in those meals themselves. (Transcript, RE 86, Page ID # 61, 145; Transcript, RE 87, Page ID # 97).

The prosecution points to only a few tasks not performed for the general benefit of the household, including sporadic instances of babysitting, cleaning Toviave's work clothes, and assisting Toviave's friends. (Response Br. at 36-37). Even here, the evidence is questionable; for example, Gaelle testified that Rene and Kwami cleaned Toviave's shoes, but they never said as much themselves. (Transcript, RE 86, Page ID # 545, 649; Transcript, RE 87, Page ID # 709). Such limited work and speculative evidence cannot support a forced labor conviction.

In the Opening Brief, Toviave contended that since there was no evidence that Kossiwa did work outside the home, Toviave could not be convicted of obtaining her labor by force. (Opening Br. at 46). The prosecution offers no response. Nor did it identify any instances in which Kossiwa was abused for failing to do housework or work outside the home. (Response Br. at 8). She was hit for leaving dirty laundry on the floor of her room. (Response Br. at 8; Transcript, RE 86, Page ID # 643). Thus, Kossiwa was not required to do any work other than the household chores, demonstrating at the least, the evidence was insufficient as to her.

Finally, the prosecution argues "federal crimes may be committed within familial relationships and in domestic contexts." (Response Br. at 47). Yet the

only example it cites is child pornography. The difference between a parent forcing a child to do chores and child pornography is not a gap but a chasm. Additionally, while child pornography laws are an absolute prohibition on certain acts, forced labor laws have always been interpreted to preserve the preexisting right of parents and guardians to exercise a degree of control over their children. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 66 (1994) (describing federal laws against child pornography in absolute terms); *Kozminski*, 487 U.S. at 944 (forced labor laws do not interfere with parental rights). Citing child pornography as a basis for federally prosecuting child abuse is flawed and should be rejected.

D. The rule of lenity applies.

The prosecution claims the rule of lenity is inapt because " this was not a 'family' but rather a living situation similar to the victim in *Djoumessi*, where a foreign child comes to the United States and lives with another person in order to obtain a better education." (Response Br. at 49). This case is nothing like *Djoumessi* as there was no relation between the victim and the defendants. *See* 538 F.3d at 549. Moreover, the victim in *Djoumessi* was lured to the United States for a better education, but never saw a classroom. *Id*. She also worked 16 hour days and could not leave the house. *Id*. *Djoumessi* does not preclude the rule of lenity.

The prosecution also argues the rule of lenity is inapplicable because "obtaining the services of another person in a domestic context is not itself illegal;

it is illegal only when its forced." (Response Br. at 49). And this is the problem. Disputes over housework are endemic in shared living arrangements, whether of the familial variety or many other permutations. Parents forcing children to do chores happens everyday. In some instances, they threaten punishment, corporal or otherwise. This is now a federal offense.

III. Toviave's Right to Defend Himself Was Foreclosed By Excluding Cultural References.

In the Opening Brief, Toviave argued the trial court erred in refusing evidence of culture or custom as part of his defense. (Opening Br. at 51). Toviave pointed out that he did not intend to use cultural evidence to excuse his behavior. Instead, he sought to show he was acting as a guardian of the children, focused on their education (per their parents), and did not intentionally obtain work from them. The prosecution provides indirect responses to these points.

First, the prosecution claims that Toviave did not provide any specific evidence that was excluded. (Response Br. at 51). This is incorrect. The trial court's ruling prevented Toviave from testifying on his own behalf and precluded crucial lines of questioning of Helene and the children. (Response, RE 59, Page ID # 326-27). Toviave was not allowed to ask Rene about how schools in Togo compared to American schools. (Transcript, RE 87, Page ID # 753). He was also barred from asking Michael Akojenu about informal adoption practices in Togo. (Transcript, RE 89, Page ID # 859). Moreover, Toviave's response to the

prosecution's motion to exclude argued that he sought to testify on matters related to *mens rea*. (Response, RE 59, Page ID # 326-27).

The prosecution also asserts Toviave sought to introduce evidence that foreign cultural norms excused his behavior. (Response Br. at 52). This is a straw man. Toviave stated that he would not make this argument. (Response, RE 59, Page ID # 325). And as the Court explained in *Djoumessi*, cultural evidence can be relevant to matters beyond cultural relativism. 538 F.3d at 553. Such matters include whether the defendant had the consent of the children's parents or the presence of a plan to intimidate the victims. *Id*. (parental consent); *United States v. Afolabi*, No. 10-3905 at *7-8 (3d Cir. Jan. 4, 2013) (plan or scheme). Further, since forced labor is a specific intent crime, evidence related to *mens rea* is critical. *See Cheek v. United States*, 498 U.S. 192, 203 (1991).

Toviave spent two pages explaining why the district court's ruling contravened *Djoumessi*. (Opening Br. at 52-53). The prosecution makes no effort to reconcile the admission of cultural evidence in *Djoumessi* with the district court's exclusion here. Additionally, Toviave argued the district court foreclosed evidence critical to *mens rea*. (Opening Br. at 54-55). The prosecution is again silent in response, merely characterizing Toviave's position as jury nullification. (Response Br. at 52). Forced labor is a specific intent crime, and Toviave's

fundamental right to argue what he was thinking should not be precluded by the bogeyman of jury nullification.

As to the merits of the Response, the prosecution claims the cultural exclusion did not preclude Toviave from explaining his arrangement with the children's parents. (Response Br. at 53). But Toviave was only able to present basic facts concerning his relationship with the children; he was not allowed to present evidence about Togolese culture shaping these arrangements, or what he expected from the children based on their shared culture. Nor could he delve into his understanding with the children's parents. This deviates from *Djoumessi*, which allowed testimony about Cameroonian adoptions. 538 F.3d at 553.

Finally, the prosecution claims that testimony about the amount of chores the children performed in Togo is irrelevant. (Response Br. at 54). But this evidence is relevant to Toviave's *mens rea* in light of the dubious connection between the schoolwork-related abuse and the household chores.

IV. Admitting Toviave's Related Offenses Undermined The Presumption of Innocence.

A. The standard of review is *de novo*.

The prosecution cites *United States v. Hardy*, 228 F.3d 745 (6th Cir. 2000), to argue the standard of review for the admission of guilty plea evidence is abuse of discretion. The trial court's ruling is reviewed under the multipart test used for

Rule 404(b) rulings, which includes *de novo* review. *United States v. Bell*, 516 F.3d 432, 440 (6th Cir. 2008).

B. The related offenses only prejudiced Toviave.

The prosecution claims there would be significant gaps in its case if Toviave's immigration offenses were not mentioned. But the prosecution's case would be no different if, for example, Toviave had legally adopted the children in Togo, if the children were asylum seekers, or even if some third party procured their visas without Toviave's knowledge. DHS' discovery of Toviave's misconduct also had no bearing on the forced labor charge. Even if the prosecution needed to provide details of the children's immigration to make its case, the evidence could be explained via a limiting instruction.

The prosecution further asserts there was no prejudice because the related charges were referred to only twice at trial. This literal approach does not reflect reality as the charges were not referenced by name. For example, the children testified about how they arrived in the United States, lived under assumed names, pretended to be Toviave's children, and were concerned about their immigration status. (Transcript, RE 87, Page ID #699-704, 766-71, 804-06; Transcript, RE 86, Page ID # 514-26, 530-31, 568-70, 625, 631-39, 641-42, 649, 687). Throughout its case, the prosecution reminded the jury of the immigration fraud charge by referring to the children as one another's "fake siblings" or "quote, unquote

siblings." (*Id.*). The prosecution also emphasized the immigration offenses in closing arguments. (Transcript, RE 91, Page ID # 1209-1214, 1217, 1235-39). These examples eviscerate the notion that the charges were only referenced twice.

Additionally, the guilty pleas were not "more benign" than the rest of the prosecution's case. (Response Br. at 58). The other offenses enabled the prosecution to transform child abuse into calculated acts of enslavement, and were crucial to the prosecution's argument that Toviave brought the children to Michigan for servitude. (Transcript, RE 91, Page ID # 1240-41). Further, immigration offenses are linked with forced labor. Thus, the jury could conclude that Toviave enslaved the children based on the immigration offenses.

CONCLUSION

As forced labor does not exist, the Court should remand for entry of a judgment of acquittal. Alternatively, the motion to suppress was wrongly denied, warranting a new trial. Furthermore, a new trial is needed without the guilty pleas and with the opportunity for Toviave to present a full defense.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for the Appellant, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the provisions of F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionally-spaced font. The length of this brief is 6,045 words according to the Microsoft word count function.

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CERTIFICATE OF SERVICE

This is to certify that on January 2, 2014, I served a copy of the Appellant's Reply Brief upon the party listed herein, via the Sixth Circuit ECF filing system:

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