No. 17-2132

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SARAH M. NIXON,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois
Case No. 15-CR-20057
The Honorable Colin S. Bruce

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT SARAH M. NIXON

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DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, Sarah M. Nixon, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: Sarah M. Nixon.

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court:

Sarah O'Rourke Schrup (attorney of record), Kayla H. Doyle (senior law student), Armando R. Méndez (senior law student) and John L. Wolf (senior law student), of the Bluhm Legal Clinic at the Northwestern Pritzker School of Law.

4. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

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Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d): **Yes**

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JURISDICTIONAL STATEMENT

The United States District Court for the Central District of Illinois had jurisdiction over Appellant Sarah M. Nixon's federal criminal prosecution pursuant to 18 U.S.C. § 3231, which states that the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." This jurisdiction was based on a single-count indictment charging Nixon with a violation of 18 U.S.C. § 1204.

The government filed an indictment on October 20, 2015, charging Nixon with one count of international parental kidnapping. (R.7)[1] Nixon's trial took place between December 13 and 20, 2016, and the jury convicted Nixon on December 20, 2016. (A.79.) The district court sentenced Nixon on May 19, 2017, (5/19/17 Trial Tr.), and docketed the final judgment on May 22, 2017 (A.80). Nixon filed her timely notice of appeal on May 30, 2017. (R.123.)

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, which grants jurisdiction of "all final decisions of the district courts of the United States" to its courts of appeal.

[1] References to the trial transcripts shall be denoted as ([DATE] Trial Tr. ___) and references to pretrial status hearings as ([Date] Hr'g Tr. ___). All other references to the Record shall be denoted with the appropriate docket number as (R.___). References to the material in the Appendix shall be denoted as (A.___).

STATEMENT OF THE ISSUES

I. Whether the affirmative defense of "fleeing an incidence or pattern of domestic violence" contained in the federal international parental kidnapping statute includes emotional, psychological, and financial abuse.

II. Whether the district court erred when it failed to provide the jury with a unanimity instruction in order to cure the duplicitous indictment, and when it denied the defendant's Rule 29 motion given the intact state court no-contact order, which restricted her ex-husband's parental rights under the statute.

III. The district court held that the statute's domestic violence affirmative defense turned on the fleeing parent's "reasonable belief" that abuse had occurred or would continue to occur. Did the court err in excluding evidence establishing not only the defendant's mental state at the time, but also evidence that medical experts who had examined her child had concluded that there was evidence of abuse and conveyed that opinion to the defendant.

IV. Whether the cumulative effect of these errors is so prejudicial that it deprived the defendant of her right to a fair trial.

STATEMENT OF THE CASE

In the middle of the night on July 13, 2015, Appellant Sarah Nixon packed up her daughter, her dog, and her belongings and drove through the night from Urbana, Illinois with the hopes of reaching her home in Montreal, Canada. After several hours she crossed the border, memorializing the moment in a photo. (12/14/16 Trial Tr. 144.)

Nixon has always maintained that she was fleeing a pattern of domestic violence by her ex-husband, G.G., and from state court custody proceedings that she perceived to be jurisdictionally infirm. (12/14/16 Trial Tr. 102–03.) Specifically, Nixon had been subjected to years of physical, emotional, psychological, and financial abuse by her ex-husband and believed that he had repeatedly abused their daughter, S.N.-G. On no less than three occasions, Nixon reported to others that her ex-husband had engaged in inappropriate sexual contact with her daughter. (12/16/16 Trial Tr. 32, 52, 75–76.) Pediatrician Kathleen Buetow, Kindergarten counselor Debra Poblano, and child sexual assault counselor Meghan Murphy all spoke to S.N.-G. and concluded that she had been the victim of sexual abuse. (A.18–20.) Nixon was aware of these conclusions. (A.18–22.)

At the time of her flight, Nixon operated under extreme stress and anxiety, much of it due to the abuse allegations and custody battle. Nixon had been diagnosed with PTSD, which she intended to argue impacted her reasonable belief that S.N.-G. had been abused. (R.34.) The district court prohibited her PTSD evidence at trial. (R.66; R.80.)

Nixon was not always this way, though. Before Nixon and G.G.'s separation, divorce and subsequent custody battle, the couple was mostly happy. They were married in Quebec and spent the early years of their marriage in Canada, where Nixon's family lived. (12/14/16 Trial Tr. 179; 12/16/16 Trial Tr. 8.) While G.G. pursued his Ph.D., Nixon supported them, working for an insurance brokerage. (12/16/16 Trial Tr. 9.) The couple moved to Urbana, Illinois when the University offered G.G. a teaching job. (12/16/16 Trial Tr. 10–11.) They owned a home in Urbana and had their daughter. (12/16/16 Trial Tr. 11.) By all accounts, Nixon was a devoted mother. She put her career on hold, setting aside her own dissertation, to stay home with S.N.-G. (12/16/16 Trial Tr. 197.)

Eventually, though, the marriage fell apart. When Nixon and G.G. decided to separate, Nixon and S.N.-G. moved back to Canada to stay with family. (12/16/16 Trial Tr. 11–12.) Because G.G. was up for tenure and hoped to preserve his reputation in the community, he and Nixon told friends, neighbors, and coworkers that Nixon was in Canada to be with her sick mother. (12/16/16 Trial Tr. 12–13.) Nixon hoped that this arrangement was temporary, and that the two would reconcile. (12/16/16 Trial Tr. 13.) However, while Nixon and S.N.-G. were in Canada, G.G. filed divorce papers (12/16/16 Trial Tr. 14–15), and started a relationship and a family with another woman. (12/14/16 Trial Tr. 177). Post-divorce, G.G. and Nixon mutually agreed in written, annual contracts that G.G. would visit Canada to spend time with S.N.-G., continuing from spring or summer 2012 through August 2014. (12/16/16 Trial Tr. 19–20.) From the beginning, Nixon

was amicable and wanted S.N.-G. to have a relationship with G.G., even paying for his travel. (12/16/16 Trial Tr. 16–17.)

That changed when S.N.-G. began reporting to Nixon that G.G. had touched her in what seemed like a sexual way. In January 2014, S.N.-G. told Nixon, "Daddy touched my 'gina'." (12/16/16 Trial Tr. 25.) According to Nixon, S.N.-G. began to cry and said that G.G. had taken her underpants and would not return them. (12/16/16 Trial Tr. 26.) Nixon testified at trial that she hoped S.N.-G. was misinterpreting what had happened and that the incident was an accidental touching. (12/16/16 Trial Tr. 30.) But because of the nature of what S.N.-G. had disclosed, Nixon asked her to repeat the story and recorded it. (12/16/16 Trial Tr. 27.) When Nixon confronted G.G. about the incident, he accused her of being drunk and threatened to file a harassment claim against her. (12/16/16 Trial Tr. 31.) Afterwards, Nixon consulted with an attorney about changing G.G.'s visits from unsupervised to supervised. (12/16/16 Trial Tr. 32.)

In August 2014, Nixon moved back to Urbana with S.N.-G. (12/16/16 Trial Tr. 34.) Nixon believed that S.N.-G. would be safer during visits with G.G. if they happened at his home with his new family, rather than unsupervised at hotels. (12/16/16 Trial Tr. 38–39.) She also wanted to move back into her home, which she loved. (12/16/16 Trial Tr. 34.) G.G., however, after orally agreeing that Nixon and S.N.-G. would live there, sold it. (12/16/16 Trial Tr. 42.) Nixon and S.N.-G. moved in with friends. (12/16/16 Trial Tr. 43.)

Another abuse allegation arose shortly after their return to Urbana, on September 17, 2014. Nixon testified that S.N.-G. reported to her that G.G. had come into the bathroom while she was using it, ignored her request that he "go away," once again touched her vagina, and said that it was "fun to touch everybody's vaginas." (12/16/16 Trial Tr. 46–48.) Afraid that no one would believe her, Nixon decided to videotape S.N.-G.'s statements on her phone. (12/16/16 Trial Tr. 49.) Nixon then called the police and showed them the video. (12/16/16 Trial Tr. 52–54.) Although one of the officers, Cortez Gardner, testified that it appeared to him that Nixon was mouthing S.N.-G.'s words along with the recording, (12/19/16 Trial Tr. 131), he also testified that Nixon seemed upset when he arrived, that reticence was common with these kinds of allegations, and that he had no training in lip-reading (12/19/16 Trial Tr. 134–35). Nixon maintained that she was repeatedly saying, "Oh, my God. Unbelievable." (12/16/16 Trial Tr. 54.)

Nixon testified that S.N.-G. reported other forms of physical abuse as well. In Fall 2014, for example, S.N.-G. told Nixon that G.G. had hit her in the arm right where she had received a booster shot, (12/16/16 Trial Tr. 59), and that G.G. had squeezed a rock into her hand, cutting her because she had told Nixon that he had touched her (12/16/16 Trial Tr. 61). Finally, at Christmas 2014, Nixon observed a scratch on S.N.-G.'s face, bruising in S.N.-G.'s ears, and earwax leaking onto her hair and neck immediately after a visit at her father's. (12/16/16 Trial Tr. 64–65.) When S.N.-G. would not say what happened, Nixon photographed the injuries and took S.N.-G. to the hospital for an evaluation. (12/16/16 Trial Tr. 66–69.) As a result

of Nixon's allegation, G.G. sought to have the court transfer custody of S.N.-G. to him in November 2014. (12/15/16 Trial Tr. 31.)

In January 2015, S.N.-G. reportedly told Nixon that, while in G.G.'s office, G.G. had again touched her vagina and also forced her to touch his penis. (12/16/16 Trial Tr. 74.) S.N.-G.'s pediatrician documented these reports and the documentation was presented to the state court. (12/16/16 Trial Tr. 76–77.) As a result, the judge issued a no-contact order restricting G.G.'s access to S.N.-G. (12/15/16 Trial Tr. 9.)

Pursuant to this order, G.G. did not interact with S.N.-G. from January 2015 through May 22, 2015, outside of supervised interviews with Dr. Helen Appleton, who was conducting a home and background study for the custody case. (12/15/16 Trial Tr. 10.) On May 22, 2015, Appleton produced her report, recommending custody for G.G. but also that G.G. not be alone in a closed room with S.N.-G., that G.G. install cameras in his home, and that G.G. not be alone with S.N.-G. in her bedroom or bathroom; Appleton further concluded that Nixon did believe S.N.-G. was being abused. (12/15/16 Trial Tr. 16–17; 12/19/16 Trial Tr. 91.) After reviewing the report and without consulting the court, the Department of Children and Family Services ("DCFS") gave S.N.-G. to G.G. (12/15/16 Trial Tr. 12–13.) The state court reversed the DCFS decision four days later, returned S.N.-G. to Nixon, and continued to enforce the no-contact order. (12/15/16 Trial Tr. 12–13.)

While the abuse allegations piled up, the custody battle grew more acrimonious. Nixon became more anxious and distressed throughout the proceedings, which culminated in a six-day trial in July 2015. (12/13/16 Trial Tr. 101.) Throughout this

time, she feared the court was not being fair and did not take her allegations seriously. (12/16/16 Trial Tr. 102.) Suspecting that the custody court, which she believed lacked jurisdiction over her case,[2] was about to give her daughter to the man she believed was sexually abusing her, Nixon fled to Canada, to her family, and to a court system she hoped would protect S.N.-G. (12/16/16 Trial Tr. 108, 112.)

Nixon drove straight through the night, crossing into Canada around 10:30 a.m. on July 13. (12/16/16 Trial Tr. 115.) Once in Canada, Nixon used McDonald's wi-fi to send messages to friends and family requesting a place to stay; they ultimately spent the night with her father's cousin in a Toronto suburb. (12/16/16 Trial Tr. 118–19.) The next day, July 14, they continued their journey to Montreal. (12/16/16 Trial Tr. 122.) Only then, when Nixon was again able to access wi-fi, did she first learn through a Facebook message from her friend that the court may have granted G.G. custody. (12/14/16 Trial Tr. 148–49.) Around 8:30 p.m., mindful of the long ride's impact on S.N.-G., Nixon stopped at a friend's home, about an hour outside of Montreal. (12/16/16 Trial Tr. 125–26.) It was there that she learned definitively through an email from her lawyer that the state court had given G.G. custody.

[2] Based on conversations with her friend, Veronica, a third-year law student and fellow member of a support group whom Nixon had begun corresponding with in late Winter 2015 (12/19/16 Trial Tr. 62–63), Nixon believed that Illinois did not have jurisdiction over the custody case. Veronica shared with Nixon her finding that custody claims cannot be maintained in Illinois unless the parties have resided in Illinois for six months. At the time G.G. filed for custody, Nixon and S.N.-G. had been living in Canada for two years, and had only been back in Urbana for about three months. (12/19/16 Trial Tr. 68.) The district court prohibited Nixon from introducing Veronica's testimony as evidence of her understanding of G.G.'s parental rights. (R.80 at 4–5.)

(12/16/16 Trial Tr. 128–129.) She immediately began searching for a Canadian lawyer to help her in her custody battle. (12/16/16 Trial Tr. 128.)

Nixon, unable to sleep because she feared that G.G. would find her, contemplated driving through the night. (12/16/16 Trial Tr. 129–30.) Her friend suggested instead that she move her car to a neighbor's driveway so that G.G. would not spot it. (12/16/16 Trial Tr. 130–31.) After tucking her daughter in bed, Nixon, tired and scared, moved her car (ultimately to the wrong driveway) and left an explanatory note on the windshield. (12/16/16 Trial Tr. 132.) Later that morning, on July 15, Nixon continued searching for an attorney and was on the phone with one when the Canadian police arrived at her friends' home. (12/16/16 Trial Tr. 135.)

Having received a call from the neighbor where Nixon mistakenly left her car, Canadian police then ran the plates and learned the car was connected to an Illinois child abduction case. (12/14/16 Trial Tr. 19–21.) They spoke to U.S. authorities, and immediately began a large-scale search for Nixon and S.N.-G. (12/14/16 Trial Tr. 21, 31) (Canadian officer describing deployment of entire local police force and its canine unit). Nixon's note on her windshield, however, gave them all the information they needed to easily find her and S.N.-G. (12/14/16 Trial Tr. 29–30.)

Although frightened and anxious, Nixon fully cooperated with the police. (12/16/16 Trial Tr. 135.) Officers removed S.N.-G. from Nixon's care, but released Nixon herself without charges. (12/14/16 Trial Tr. 139.) Nixon continually reiterated her fear of G.G. to the authorities, desperate for them to hear the whole story. (12/16/16 Trial Tr. 138–39.)

On September 20, 2015, Nixon returned to the United States to attend another custody hearing. (12/16/16 Trial Tr. 140–41.) The authorities stopped Nixon as she crossed the border in New York, and the FBI arrived to arrest and transport her to court. (12/19/16 Trial Tr. 143.)

Over the next nine days, Nixon wended her way through five separate penal institutions before ultimately arriving in Illinois. (R.14 at 2.) Joined by a Department of Justice lawyer from Washington, D.C., prosecutors secured an indictment against Nixon on one count under 18 U.S.C. § 1204, The International Parental Kidnapping Crime Act ("IPKCA"). (R.7.) The government sought pretrial detention, (10/30/16 Hr'g Tr. 17), even though Nixon had no criminal history, had surrendered her passport, and had no access to S.N.-G. (11/23/16 Hr'g Tr. 42–44). The district court granted the government's request, (11/23/16 Hr'g Tr. 44), and Nixon remained in jail throughout the nearly two years it took to complete her trial. By the time of Nixon's sentencing—May 2017—she had already served twenty months of her twenty-six-month sentence. (5/19/17 Hr'g Tr. 61.)

Section 1204 is rarely used and few cases interpret it; thus, the parties and the district court struggled as the case progressed. (*See* R.25.) The parties filed scores of motions that directly or indirectly implicated the scope of the IPKCA. (*See, e.g.,* R.21; R.22; R.23; R.24.) The district court, for its part, relied heavily on state court cases—in particular the underlying state court custody ruling—and dicta in federal cases as it attempted to resolve the parties' many motions. (*See* R.25.) Further complicating the case was the messy custody battle at the heart of both the

underlying offense and the statute's affirmative defense for those fleeing an incidence or pattern of domestic violence. The district court repeatedly expressed concerns with "re-litigating the custody battle" and holding "a trial within a trial." (*See* A.35; R.29 at 1–2; 9/9/16 Hr'g. Tr. 28; 12/13/16 Trial Tr. 4, 13.) As a result, the vast majority of the district court's rulings adopted whole cloth the state court's findings. (*See, e.g.,* A.46–47 n.5) (not applying collateral estoppel to the state court's custody findings, but nonetheless finding the state courts judge's rulings "worthy of attention.")

The district court admitted on several occasions that it was navigating uncharted waters with the IPKCA, and that it might be interpreting the statute incorrectly. (*See, e.g.*, A.102 ("[W]ith the right panel, I'm sure I committed egregious reversible error."); A.115 ("the Seventh Circuit can go through and rake me over the coals . . . "); 12/16/16 Trial Tr. 153–54 ("I've already had so many opportunities in here to insert reversible error . . . . And maybe this is just one more example of reversible error.").)

The district court's allegiance to the state court's findings impacted the progression of Nixon's criminal case. Defaulting again to its position that it did not want to "relitigate" the abuse and custody issues that had already been decided in state court, the district court excluded most of Nixon's evidence on her mental state, including expert witnesses Dr. Virginia Chow and Dr. Marti Loring, who would have testified as to Nixon's post-traumatic stress disorder ("PTSD") and its effect on her reasonable belief that she was fleeing a pattern of abuse. (R.66; R.80.) The

district court also severely limited the testimony of Teri McKean, Nixon's therapist. (R.80.) In contrast, the district court allowed the government to intermittently invoke Nixon's mental state. (12/15/16 Trial Tr. 28, 33, 47) (questions eliciting repeated remarks by G.G. regarding Nixon's "serious issues," "delusion," and "voices in [her] head").

Further, the district court completely excluded the lay witness testimony of Dr. Kathleen Buetow, counselor Debra Poblano, and counselor Meghan Murphy and seriously truncated the expert testimony of Murphy and Buetow regarding the sexual abuse allegations. (A.34–55.) As a result, neither Murphy nor Buetow testified. Each would have stated that they independently interacted with S.N.-G. and concluded that she had been sexually abused by G.G. (A.18–20.) Buetow and Poblano would have additionally testified that they had reported this to both DCFS and the University of Illinois Police. (A.18–19.) In contrast, the government presented five witnesses rebutting Nixon's credibility regarding the abuse allegations.[3] (12/14/16 Trial Tr. 175–76; 12/15/16 Trial Tr. 8; 12/19/16 Trial Tr. 127, 150, 163, 178.) The government called S.N.-G. as a rebuttal witness. (12/19/16 Trial Tr. 163.). At the time of her testimony, S.N.-G. had been living with G.G. for two years and had been seeing a therapist whom the state court ordered to treat S.N.-G. as though the abuse had not occurred. (A.30.) Nixon was left with only her own testimony to counter these claims.

[3] Specifically, the government called two police officers, G.G., G.G.'s new wife, and S.N.-G. to rebut Nixon's testimony. During its closing argument, the government called the defense "cowards" because they decided against cross-examining S.N.-G. (12/20/16 Trial Tr. 90.)

At the close of the government's case and again at the close of evidence, the defense moved for a judgment of acquittal. (12/19/16 Trial Tr. 254; R.98.) The defense argued that the government failed to prove Nixon knowingly intended to obstruct G.G.'s parental rights when she left for Canada because G.G. did not have parental rights under the IPKCA as a matter of law. (R.98 at 7) (noting that § 1204 defines "parental rights" as "physical custody" and arguing that the state court's January 2015 no-contact order governed when Nixon left for Canada). The district court rejected this argument, although it was a "close call," (12/19/16 Trial Tr. 214), and then affirmatively instructed the jury that G.G. possessed parental rights as a matter of law over defense objection (R.106 at 21). The district court also instructed the jury that it need not be unanimous on whether Nixon had "removed" or "retained" S.N.-G., or both, in order to find her guilty. (12/19/16 Trial Tr. 244–51.) The jury found Nixon guilty, and the district court sentenced her to twenty-six months' imprisonment. (5/19/17 Hr'g Tr. 61.)

SUMMARY OF THE ARGUMENT

Although the International Parental Kidnapping Crime Act ("IPKCA") generally prohibits parents from absconding with their children, it does not expect victims of domestic violence to stay put, offering an affirmative defense for those "fleeing an incidence or pattern of domestic violence." 18 U.S.C. § 1204(c)(2). Here, Nixon fled with her young daughter after years of emotional, psychological and financial abuse by her ex-husband and a series of allegations that he had sexually abused her daughter, which her pediatrician and two counselors had found credible. Yet she was not able to present most of this defense. The district court, by its own admission, struggled to interpret this rarely used statute, which primarily serves as a gap-filler when the civil remedies in place under a treaty are insufficient. The court's unfamiliarity with the statute led to a multitude of errors which severely handicapped Nixon's affirmative defense, essentially depriving her of it altogether.

First, the district court erroneously found "domestic violence" included only acts of physical force and not acts of emotional, psychological, and financial abuse. Not only is this contrary to the statute's structure and congressional intent, it circumvents Supreme Court precedent and runs afoul of the rule of lenity. As a result, Nixon was unable to present any evidence on the years of abuse she had suffered, immediately jettisoning half of her affirmative defense.

Second, the district court failed to accurately instruct the jury, twice. The IPKCA criminalizes, with the intent of obstructing another person's parental rights, (1) the removal of a child from the United States (or attempts to do so); *or* (2) retaining a child abroad. Over defense objection, the district court instructed the jury that it

need not unanimously decide whether Nixon had removed or retained her daughter. Because these are two separate crimes with separate elements, the district court's instructions allowed the jury to convict without unanimity, thereby violating Nixon's due process rights. Additionally, although "parental rights" are statutorily limited to "physical custody," the district court instructed the jury, over further defense objections, that Nixon's ex-husband had parental rights as a matter of law. It did so in the face of a state court's months-long no-contact order against G.G., in place at the time of Nixon's flight. Because the child's father had no parental rights under the statute, she cannot have intended to obstruct another's parental rights—indeed, no one besides Nixon had those rights at the time of her flight.

Third, the district court erroneously excluded or severely limited all of Nixon's lay and expert witness testimony, which she offered to demonstrate the reasonableness of her belief that her ex-husband had sexually abused her daughter. The validity of this belief was the crux of Nixon's defense. The district court's decisions to exclude these witnesses deprived Nixon not only of her best evidence, but almost all of it—ultimately undermining her defense so severely as to render it impotent.

These errors combined to simultaneously undercut Nixon's defense while lightening the government's burden. As such, they are independently and cumulatively reversible.

ARGUMENT

I. The district court erroneously defined "domestic violence" to exclude emotional, psychological, and financial abuse, truncating Nixon's affirmative defense.

The district court refused to admit evidence of the years of emotional, psychological, and financial abuse Nixon suffered—a decision at odds with the affirmative defense pronounced plainly in the statute's text. The IPKCA criminalizes the removal or retention of a child outside the United States with intent to obstruct another's parental rights. 18 U.S.C. § 1204. Nixon asserted one of its affirmative defenses: she was "fleeing an incidence or pattern of domestic violence." 18 U.S.C. § 1204(c)(2). As the Supreme Court has recognized, "domestic violence" is a term of art, not a mere sum of its individual words. *See United States v. Castleman*, 134 S. Ct. 1405, 1411–12 (2014). *See also* Emily J. Sack, United States v. Castleman*: The Meaning of Domestic Violence*, 20 Roger Williams U. L. Rev. 128, 141 (2015) ("Instead of viewing 'domestic' simply as a descriptive term modifying the noun violence, the [*Castleman*] majority opinion understood 'domestic violence' as an independent concept[.]").

Below, everyone acknowledged that the term is subject to more than one meaning depending on its context and that the statute left the term undefined. (A.3–6) (district court acknowledging that domestic violence is undefined in the Act, recognizing that there is a dearth of case law on the statute, citing conflicting interpretations of the term "domestic violence," and noting Nixon's argument that Congress has defined "domestic violence with actions just short of physical force" in other instances). *See also* (R.22, R.23, R.24) (parties' filings suggesting various

interpretations). Throughout its Order, the district court cited no less than six sources defining "domestic violence"; no two definitions are the same. (A.3–7.) Although the government conceded that the term could include emotional, psychological, and financial abuse, (R.23 at 10), the district court limited it to instances of physical force (A.9). In short, the term is ambiguous. *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 233 F.3d 981, 989 (7th Cir. 2000) ("'The existence of alternative dictionary definitions of' a word, 'each making some sense under the statute, itself indicates that the statute is open to interpretation' and the word is ambiguous as between the two meanings.") (quoting *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992)).

When faced with ambiguous statutory language, courts look to other indicia of congressional intent, including the statutory structure, companion provisions, legislative history, and analogous statutes. *Emergency Servs. Billing Corp. v. Allstate Ins. Co.*, 668 F.3d 459, 465 (7th Cir. 2012). Each of these show that "domestic violence" should be construed broadly to include emotional, psychological, and financial abuses. At a minimum, if the term remains ambiguous, the rule of lenity applies in Nixon's favor. Thus, the district court erred in narrowly construing the affirmative defense. This Court reviews statutory interpretation questions *de novo*. *United States v. Rosenbohm*, 564 F.3d 820, 822 (7th Cir. 2009).

A. The statute's structure and Congress's stated purpose in enacting it show that "domestic violence" should be interpreted broadly.

The purpose and structure of § 1204 support a narrow reading of the criminal offense and a broad application of its affirmative defenses. Congress enacted § 1204

with two goals in mind: (1) protecting victims of international parental kidnapping; and (2) ensuring that there is a mechanism in place effectuating this purpose. First, Congress envisioned the victims as not only the child, but also abused parents. *International Parental Child Abduction Act of 1989: Hearing on H.R. 3759 Before the Subcomm. on Criminal Justice*, 101st Cong. 3-9 (1990) (statement of Sen. Alan J. Dixon) (characterizing parental kidnapping as part of an ongoing pattern of abuse against the child and left-behind parent). The overarching goal of § 1204 is to protect vulnerable parties; an extra-textual restriction does not comport with this critical purpose. The affirmative defense shields parents who, like Nixon, are victims of abuse.

Second, Congress sought to fill limited gaps in the pre-existing civil remedy scheme. Congress passed the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9001, as the enacting legislation following the United States' accession to The Hague Convention on the Civil Aspects of International Parental Child Abduction ("The Hague Convention"). The ICARA has always been the remedy of first resort when a child is removed from the United States. 18 U.S.C. § 1204(d) ("This section does not detract from The Hague Convention"); *see also* International Parental Kidnapping Crime Act, Pub. L. No. 103–173, § 2, 107 Stat. 1998 (1993) (codified as amended at 18 U.S.C. § 1204) (congressional note accompanying legislation stating "[The Hague Convention] should be the option of first choice for a parent who seeks the return of a child"). The Hague Convention is a civil remedy where signatory countries agree to return improperly removed

children. When Congress enacted the IPKCA, however, few countries had ratified or acceded and, thus, the United States had no effective means of reaching and repatriating children removed to non-signatory countries.[4] Congress filled this gap with the IPKCA. The international-law background speaks to the narrowness of the IPKCA's criminal offense and the concomitant broadness of its affirmative defenses.

Not only do Congress's stated objectives inform the best interpretation of "domestic violence," the statute's text and structure also reflect Congress's circumspect approach. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . ."). For example, Congress defined only two terms in the statute: "child" and "parental rights," both narrowly. 18 U.S.C. § 1204(b) (defining "child" as only those under age 16 and defining "parental rights" as only physical custody). Notably, many state definitions of these terms—including Illinois's—are demonstrably broader, categorizing a child as anyone under 18 years of age and "parental rights" as any status short of full legal termination. 705 ILCS 405/1–1 *et seq.* (Illinois Juvenile Court Act of 1987 defining dependent minor as under 18); 750 ILCS 50/0.01 et seq. (Illinois Adoption Act prescribing the scope of involuntary termination of parental

[4] In his testimony, Senator Dixon listed the 15 countries that had ratified the convention, including Canada. *International Parental Child Abduction Act of 1989: Hearing on H.R. 3759 Before the Subcomm. on Criminal Justice*, 101st Cong. 6 (1990) (remarking that The Hague Convention only works among signatories, signaling the IPKCA's role in gap-filling). That number has now grown to 98. Hague Conference on Private International Law, *Status Table: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, https://www.hcch.net/en/instruments/conventions/status-table/?cid=24 (updated Sept. 2, 2017) (visited Oct. 20, 2017).

rights); *see also In re E.B.*, 899 N.E.2d 218, 221 (Ill. 2008) ("In Illinois, the authority to involuntarily terminate parental rights . . . is defined by the Juvenile Court Act and the Adoption Act."). Prior legislative drafts, which drew the line of childhood at age 18, further demonstrate Congress's deliberate choice to narrow the scope of this statute. International Parental Child Abduction Act of 1989, H.R. 3759, 101st Cong. § 2 (1989). That Congress did not similarly limit "domestic violence" contextualizes its deliberate intent to construe "domestic violence" broadly. *See also infra* § I.C (arguing that Congress did not limit "domestic violence" with further statutory language as it has done elsewhere).

B. Analogous laws and the cases interpreting them likewise support a broad interpretation of "domestic violence."

When interpreting ambiguous statutory language, courts frequently turn to analogous statutes for aid. *Emergency Servs.*, 668 F.3d at 465. Because the IPKCA supplements the ICARA and the two statutes address the same problem in concert, the ICARA is the most obvious place to start.

The ICARA drew from The Hague Convention in crafting its affirmative defenses, including the defense that there is "grave risk" that returning the child "would expose the child to physical or *psychological harm* or otherwise place the child in an intolerable situation." Art. 13(b) of The Hague Convention (emphasis added). Because Congress intended for the IPKCA to supplement the ICARA and because the ICARA contemplates psychological harm as an affirmative defense, it is sensible to construe § 1204(c)(2) as contemplating the same.

In addition to the ICARA, the Interstate Domestic Violence Act ("IDVA") criminalizes behavior that "causes . . . substantial emotional distress to a person." 18 U.S.C. § 2261A(1)(B). The lower court set this language aside because "Chapter 110A is entitled 'Domestic Violence *and Stalking*,'" and it could not discern "whether stalking is encompassed within 'domestic violence,' or if stalking is its own separate offense." (R.25 at 6.) The court never explained why it distinguished "domestic violence and stalking" from "domestic violence," while failing to make similar distinctions with other laws, ultimately arriving at a conclusion favorable to the government. *See infra* § I.C (noting the court's failure to distinguish "misdemeanor crime of domestic violence").

Instead of relying on the ICARA or the IDVA, the district court quoted the Violence Against Women Act ("VAWA"), which reads, *inter alia*: "[t]he term 'domestic violence' includes felony or misdemeanor crimes of violence." (A.5) (citing 42 U.S.C. § 13925(8) (transferred to 34 U.S.C. § 12291)). The court concluded, without explanation, that the VAWA supports a definition of "domestic violence" that "includes a requirement of force." (A.5.) The court was wrong for three reasons. First, "felony or misdemeanor crimes of violence" constitute a wholly separate term of art from "domestic violence." Second, the VAWA quote on which the court relied never mentions "force." Third, use of the word "includes" indicates that "felony or misdemeanor crimes of violence" are sufficient rather than necessary elements, even if they do require force.

C. The district court's piecemeal analytical approach, which conflated "domestic violence" with "violence," was wrong as a matter of law.

Although the district court acknowledged the ambiguity of "domestic violence," it failed to engage in a comprehensive statutory interpretation. The district court never once mentioned the purpose, context or legislative history discussed above. Instead, the district court relied heavily on a dictionary definition, dicta from another jurisdiction, and a misreading of Supreme Court precedent.

After acknowledging § 1204 does not define "domestic violence" and the wealth of definitions cited by the parties, (A.3), the district court defaulted to a dictionary, a source that is hardly useful once the parties concede ambiguity. *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) ("Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things."). Thus, the district court unduly weighted a 1999 edition of Black's Law Dictionary in concluding that "'domestic violence' would seem to be limited to physical acts of violence, not . . . emotional, psychological, or financial acts . . . ." (A.3.)[5]

Next, recognizing the scarcity of case law, the district court turned to "dicta in a footnote" from a "recent, unpublished case" in another circuit. (A.7) (citing *United*

[5] The edition of Black's current when Congress passed the IPKCA did not define "domestic violence." Black's Law Dictionary 484 (6th ed. 1990). The 1999 edition defines it as "[v]iolence between members of a household, usu. spouses; an assault *or other violent act* committed by one member of a household against another." Black's Law Dictionary 1574 (7th ed. 1999) (emphasis added). Today's edition simply says, "See violence" (where it repeats the 1999 definition and a new one referring to physical injury). Black's Law Dictionary 592 (10th ed. 2014). The Supreme Court instructs us to do precisely the opposite. *Castleman*, 134 S. Ct. at 1411 ("'Domestic violence' is not merely a type of 'violence . . . .").

States v. Huong Thi Kim Ly, 507 F. App'x 12, 13 n.1 (2d Cir. 2013) (hereafter "*Huong*") (questioning whether Congress intended to include "purely emotional abuse" in § 1204 when "violence" means physical harm in "other statutes")).

Although courts are free to cite non-binding authority as persuasive, it only carries weight if it is analytically compelling. *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987). Moreover, courts must exercise caution with dicta. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (reversing the Ninth Circuit's reliance on "a footnoted dictum devoid of supporting citation"). Here, the district court adopted dicta from *Huong* without analyzing its merits. (A.7–8.) It is true that a footnote in *Huong* refers to "other statutes" defining "violence" to include physical force, 507 Fed. Appx. at 13 n.1, but the lower court here never bridged the gap between the word "violence" and the term of art "domestic violence." Significantly, the Supreme Court expressly rejected the idea that "domestic violence" and "violence" are interchangeable. *Castleman*, 134 S. Ct. at 1411. The Supreme Court's acknowledgement of "domestic violence" as a term of art post-dates the unpublished *Huong* opinion and should have guided the district court's decision below.

Not only did the district court ignore the one salient point in *Castleman*, it relied on other distinguishable aspects of the case. The *Castleman* Court was not tasked with interpreting the term "domestic violence," as is the case here, but rather a wholly separate term of art, "misdemeanor crime of domestic violence." Moreover, *Castleman* considered how to interpret this term alongside another element in the felon-in-possession statute, "the use . . . of physical force." *See* 18 U.S.C.

§ 921(a)(33)(A) (listing as a necessary element to the offense "the use or attempted use of physical force."); *see also Castleman*, 134 S. Ct. at 1409 ("This case concerns the meaning of one phrase in this definition: 'the use . . . of physical force.'"). Whereas in the *Castleman* statute Congress expressly modified the meaning of "misdemeanor crime of domestic violence" by tethering it to the concept of "physical force," in § 1204 Congress pointedly did not. Thus, the district court's blanket assertion that *Castleman* "did not endorse a definition of domestic violence that includes purely emotional, psychological, or financial abuse," (A.8), is simply wrong considering the differing language and purposes of the two statutes. The *Castleman* Court focused on physical force because the statute expressly called for it, not because it is a necessary part of "domestic violence." When the Court did consider "domestic violence" it found that it includes "acts that one might not characterize as 'violent' in a nondomestic context" such as "acts [that] over time can subject one intimate partner to the other's control." *Castleman*, 134 S. Ct. at 1411–12 (crediting "social science definitions" because they are "most directly engaged with the problem and thus most aware of its dimensions").

The district court's tunneled methodology ignored abundant sources affirming that "domestic violence" is and should be defined expansively. The United States Department of Justice's (a prosecuting party in this case) Office on Violence Against Women states that "[d]omestic violence can be physical, sexual, emotional, economic, or psychological action or threats of action that influence another person." United States Dep't of Justice Office on Violence Against Women, *Domestic*

Violence, at https://www.justice.gov/ovw/domestic-violence (visited October 12, 2017). "Social science definitions" read harmoniously with the DOJ's. *See, e.g.*, The National Domestic Violence Hotline, *What Is Domestic Violence?*, http://www.thehotline.org/is-this-abuse/abuse-defined (visited Oct. 19, 2017) ("Domestic violence" includes "physical and sexual violence, threats and intimidation, emotional abuse and economic deprivation" used to maintain power and control); National Resource Center on Domestic Violence, *About DV*, https://nrcdv.org/dvam/about-dv (visited Oct. 27, 2017) ("Domestic violence" includes "physical, sexual, and psychological attacks as well as economic coercion" used by one partner to control another). Legal scholars agree. (*See* R.22 at 4–6); (A.3) (noting but not discussing Nixon's citing of law review articles). *See, e.g.*, Julia Alanen, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 U. Miami Inter-Am. L. Rev. 49, 64 (2008) (discussing domestic violence defenses in international parental kidnapping cases and defining "domestic violence" to include "physical, sexual, psychological, emotional, or even financial abuse").

D. The district court failed to consider the rule of lenity.

In the face of acknowledged, competing definitions of "domestic violence," the district court erroneously chose one favoring the prosecution over one favoring the criminal defendant. The rule of lenity requires a different result.

If traditional tools of statutory construction leave "any doubt" about the meaning of a statutory term, courts must "invoke the rule that 'ambiguity . . . should be

resolved in favor of lenity.'" *Yates*, 135 S. Ct. at 1088 (citing *Cleveland v. United States*, 531 U.S. 12, 25 (2000)). This rule is a manifestation of the fair warning requirement of criminal law and intersects with a defendant's constitutional right to due process. *United States v. Lanier*, 520 U.S. 259, 266 (1997).

The text, structure, history, and purpose of the statute all favor a broad reading of "domestic violence." If, however, this Court is unable to resolve § 1204(c)(2)'s ambiguity using these sources, the rule of lenity applies. The government must prove that the text, structure, history, and purpose of § 1204 unmistakably support a narrow reading of "domestic violence"; a tie goes to Nixon.

II. The district court incorrectly instructed the jury and because of its inaccurate view of the law as reflected in those instructions, the district court also erroneously denied Nixon's motion for a judgment of acquittal.

In order to garner a conviction under § 1204, the government needed to prove that Nixon either "removed" her child from the United States or "retained" her child in Canada (or both) with the intent to obstruct G.G.'s parental rights. 18 U.S.C. § 1204(a). In interpreting this statute, the district court erred with respect to two elements-based instructions. First, the government offered, (R.63 at 43), and the district court accepted an instruction suggesting that the jury did not need to unanimously agree on whether Nixon "removed" or "retained" S.N.-G. (or both), (R.106 at 30). Because the single count of Nixon's indictment bundled multiple, separate offenses under the statute, the district court erred in not issuing a specific unanimity instruction. Second, the district court instructed the jury, over defense objection, that G.G. had parental rights as a matter of law at the time of the

incident. (12/19/16 Trial Tr. 234.) In so doing, the district court released the government from its obligation of having to prove each element beyond a reasonable doubt. The government did not, in fact, meet its burden. As Nixon's Rule 29 motion noted, the government failed to prove that Nixon had knowingly intended to obstruct G.G.'s parental rights at the time of the offense. (R.98 at 7.)

A. The district court erred when it failed to provide a specific unanimity instruction to the jury when the indictment charged two discrete and duplicitous offenses in one count.

Without a specific unanimity instruction, no one knows what drove the jury to convict Nixon. Half of the jury may have voted to convict based on a belief that Nixon "removed" S.N.-G. from the United States whereas the other half may have believed that Nixon had "retained" S.N.-G. in Canada. In short, though they all seemingly agreed that Nixon did *something* to violate the statute, they may not have agreed on what specific crime she committed. The district court's ruling abridged Nixon's right to a unanimous verdict. This Court reviews jury instruction errors *de novo. United States v. DiSantis*, 565 F.3d 354, 359 (7th Cir. 2009).

Overruling Nixon's request for a unanimity instruction (12/19/16 Trial Tr. 244–51), the district court specifically instructed the jury that it need not agree on whether Nixon removed S.N.-G., retained her in Canada, or both (R.106 at 30).[6] The general verdict form echoed and reinforced this message. (R.106 at 31.) A duplicitous indictment combines two or more offenses in a single count, *United States v. Marshall,* 75 F.3d 1097, 1111 (7th Cir. 1996), and these indictments

[6] The defense also objected to the elements instruction based on its Rule 29 motion (R.106 at 4, 12/19/16 Trial Tr. 222–23.)

prejudice defendants by creating risks of non-unanimous verdicts and potential double-jeopardy concerns, *United States v. Davis,* 471 F.3d 783, 790 (7th Cir. 2006); *see also Richardson v. United States,* 526 U.S. 813, 819 (1999) (cautioning that "permitting a jury to avoid discussion of the specific factual details of each violation[ ] will cover up wide disagreement among the jurors about just what the defendant did, or did not, do"). Although a duplicitous indictment can be cured by a unanimity instruction, failing to so instruct renders the verdict faulty and the resulting conviction reversible error. *United States v. Beros*, 833 F.2d 455, 458 (3d Cir. 1987) (holding that because jurors could differ as to which act supported a defendant's guilt, the district court's failure to give a specific unanimity instruction was reversible error); *United States v. Payseno*, 782 F.2d 832, 837 (9th Cir. 1986) (holding that the district court's failure to issue a specific unanimity instruction warranted reversal due to the possibility of jury confusion).

The Supreme Court requires jurors to unanimously agree on the precise incidences of a crime before convicting; an "either/or" approach is insufficient. *See, e.g.*, *Schad v. Arizona*, 501 U.S. 624, 651 (1991) (Scalia, J., concurring) ("We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the 'moral equivalence' of those two acts."). Fundamentally, the government may not define a crime "in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition."

Richardson, 526 U.S. at 820. Courts look to the statutory text, applicable legislative history, and any other cases interpreting the statute to decide this question.

The plain language and structure of § 1204 supports the conclusion that removal and retention are separate crimes and thus Nixon's indictment was duplicitous. Here, the statute provides that "[w]hoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both." 18 U.S.C. § 1204(a). The "attempts to do so" clause of the statute only modifies the "removes" offense of the statute. The "attempts" clause was added by an amendment nearly ten years after the IPKCA's enactment, further indicating that its modification of only one of the two statutory terms was a deliberate choice by Congress. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (Protect Act), Pub. L. No. 108–21, 117 Stat. 650 (2003) ("[§ 1204] is amended . . . by inserting ', or attempts to do so,' before 'or retains'."). Attempts are themselves separate crimes with different elements from the substantive crime. *See James v. United States*, 550 U.S. 192, 197 (2007), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2251 (2015). Congress sandwiched a stand-alone crime in between two other methods of committing it, signaling that "remove" and "retain" should be treated as separate offenses.

Finally, while the legislative history and lack of cases interpreting § 1204 do not shed light on whether Congress affirmatively intended removal and retention to

constitute one crime or two, there is no indication from any source that history or tradition would permit juries to convict in the absence of unanimous agreement as to what the defendant actually did. *Richardson*, 526 U.S. at 820. Construing the statute as the district court did here not only risked, but effected, grave unfairness to Nixon who is entitled to a unanimous verdict. In such situations, even if the statutory construction did not yield two separate crimes, due process nonetheless would warrant reversal. *Id.* (noting that arguments in favor of interpreting the statute as means rather than elements do not outweigh due process concerns).

B. The district court's erroneous interpretation of the IPKCA caused it to improperly instruct the jury and deny Nixon's motion for a judgment of acquittal.

The district court erred in affirmatively telling the jury that G.G. had parental rights as a matter of law, (R.106 at 21), and, as a result, the government failed to prove every element of the crime beyond a reasonable doubt. *Mullaney v. Wilbur*, 421 U.S. 684, 698–99 (1975) (holding that a state may not release the prosecution of its burden of proving the elements of a crime by creating a presumption as to an element of a crime). As noted above, this Court reviews jury instruction questions *de novo*; it also reviews challenges to the sufficiency of the evidence *de novo*, viewing the evidence in the light most favorable to the government. *United States v. Peterson*, 823 F.3d 1113, 1120 (7th Cir. 2016). Notwithstanding this substantial burden, however, this Court will vacate a conviction when no rational jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Johns*, 686 F.3d 438, 446 (7th Cir. 2012).

The state no-contact order against G.G. in place at the time of Nixon's flight meant that G.G. did not have parental rights as defined by the IPKCA. *See* 18 U.S.C. § 1204(b)(2). Specifically, the IPKCA defines "parental rights" as "the right to *physical custody* of the child*." Id.* (emphasis added). Although the statute also provides that those custody rights may arise in a variety of ways (by contract, by operation of law, or by court order) and may be joint or sole, it does not waver from the threshold requirement that the parent have the right to physical custody.

The government argued that because parental rights may arise by operation of law and because in its view Illinois state law confers "parental rights" on a parent until they are formally, permanently, and fully terminated, the defense misplaced reliance on the definition of the term that Congress affirmatively chose. (R.99 at 3) (referring to Illinois law generally without citing to any specific statute). The district court agreed with the government, stating that it did not "equate barring contact with revoking or restricting parental rights," (12/14/16 Trial Tr. 162), and that it believed that the state court's no-contact order fell "outside the scope" of § 1204. (12/14/16 Trial Tr. 168–69).

This was a flawed result for at least four reasons. First, it ignores the IPKCA's unequivocal language, which permits "parental rights" to be defined by "court order." Far from being "outside the scope" of the § 1204(b) definition, court orders were an express source of determining these rights, and such an order was in place in Nixon's case at the time she fled to Canada. Second, the government and district court's reasoning ignores that Congress decided to define "parental rights" as

"physical custody." Congress would not choose a narrow definition of the term only to have it gutted by one of the means of establishing it (i.e., by operation of law via a state statute). Third, and relatedly, it gives absolute priority to one of the methods Congress identified ("operation of law"), another unintended result of the district court's approach. State law would then always trump federal law and would render the federal definition superfluous. Fourth, the district court's interpretation leads to absurd and unfair results. The government could prosecute a woman even when her ex-husband was a "deadbeat dad" who had never been involved in the child's life. Given that this absentee father still technically had parental rights under state law, this woman could be prosecuted and imprisoned, a result directly at odds with the express language in the IPKCA and its underlying intent to be a remedy of last resort.

By instructing the jury that, as a matter of law, G.G. had parental rights at the time Nixon fled to Canada, (R.106 at 21), the district court told the jury to decide the case in a legally incorrect way. And, because the district court misinterpreted the statute, it denied (though as a "close call" (12/19/16 Trial Tr. 214)), Nixon's motion for a judgment of acquittal. Nixon could not have *knowingly* "removed" S.N.-G. with the intent to obstruct G.G.'s parental rights under the statute because they did not exist at the time.[7] Obstruction does not occur even if the fleeing party

[7] Additionally, Nixon did not believe that Illinois was the proper jurisdictional forum for the custody case, which also ties to her lack of knowing intent. (12/19/16 Trial Tr. 36–38.) Nixon had learned that custody claims cannot lie in Illinois unless the parties have resided in there for six months. At the time of flight, Nixon and S.N.-G. had been living in Canada for two years and had only returned to the Urbana two to three months before the custody issues arose in the state proceedings. (12/19/16 Trial Tr. 68–69.)

anticipates a future court order will grant parental rights to another. *See, e.g.*, *United States v. Miller*, No. 2:11-CR-161-1, 2012 WL 3192739, at *2 (D. Vt. Aug. 7, 2012) ("While it is likely that many if not most parental kidnapping cases will affect the exercise of future or anticipated parental rights . . . the statute criminalizes the intent generally to obstruct the lawful exercise of those *existing* parental rights.") (emphasis added). An impending order cannot "possibly be probative of [the father's] rights 'at the time that [the defendant] went to Canada with her [child].'" *United States v. Miller*, 626 F.3d 682, 688 (2d Cir. 2010). Because the government did not even endeavor to prove that G.G. had parental rights at the time of removal—a crucial element of the offense—it failed to prove its case beyond a reasonable doubt. Therefore, the district court should have granted Nixon's Rule 29 motion.

III. The district court improperly excluded lay and expert witness testimony crucial to Nixon's reasonable belief that S.N.-G. had been abused, effectively depriving her of her affirmative defense.

The district court completely excluded five of the defense's proposed eight witnesses and severely limited the other three; consequently, only one testified. All would have testified to facts pertinent to a key issue: whether Nixon reasonably believed she was fleeing an incidence or pattern of domestic abuse. The wholesale absence of these witnesses crippled Nixon's ability to assert her affirmative defense, essentially depriving her of her right to present her defense and her right to a fair trial. *See Chambers v. Mississippi*, 410 U.S. 284, 302–03 (1973) (holding the exclusion of critical evidence could so fundamentally impact a defendant's ability to

assert their defense as to deny them the constitutional right to a fair trial); *see also Washington v. Texas*, 388 U.S. 14, 19 (1967) (characterizing the "right to offer the testimony of witnesses" as the "right to present a defense" and a "fundamental element of due process."). Although the standard of review for evidentiary rulings is typically for abuse of discretion, this Court reviews them *de novo* where they impact constitutional rights. *See United States v. Saunders*, 973 F.2d 1354, 1358 (7th Cir. 1992) (*de novo* review of whether evidence impacted Sixth Amendment confrontation rights); *United States v. Gentile*, 816 F.2d 1157, 1161 (7th Cir. 1987) (*de novo* review applicable when an evidentiary ruling impacts Fifth Amendment rights).

A. The district court erroneously barred the testimony of Nixon's expert witnesses regarding the impact of her post-traumatic stress disorder on the reasonableness of her belief regarding domestic violence.

The standard for the affirmative defense was whether Nixon reasonably believed she was fleeing domestic violence. (R.91 at 4; R.52 at 30.) Nixon had significant evidence showing she suffered from ongoing post-traumatic stress disorder ("PTSD") during the relevant time frame, which the district court excluded: completely barring testimony by Drs. Virginia Chow and Marti Loring and severely limiting that of Terri McKean, Nixon's therapist at the time. (R.80 1–4; R.66 at 1.) If allowed, all three would have testified to Nixon's chronic PTSD and its effect on her perception of domestic violence.

In its brief analysis of this proposed testimony, the district court erred in three ways: (1) it mistakenly viewed it as an attempt to sneak in a diminished capacity

defense, rather than as an attempt to contextualize her reasonable belief, an element of her affirmative defense; (2) it found it irrelevant to Nixon's defense, even though courts routinely admit PTSD evidence when a person's reasonable belief is at issue; and (3) it overweighed the potential for juror confusion and overcorrected by completely excluding the evidence rather than implementing prophylactic measures such as limiting instructions.

1. The district court mistakenly characterized Nixon's expert witnesses as a backdoor attempt to introduce a diminished capacity defense.

Nixon offered her witnesses to contextualize the reasonableness of her belief that G.G. sexually abused S.N.-G., not to establish a diminished capacity defense. The two inquiries are different. *Com. v. Pitts*, 740 A.2d 726, 734 (Pa. Super. Ct. 1999) (holding although PTSD is not a defense to attempted murder, it speaks to the reasonable belief requirement of self-defense); *see also State v. Hines*, 696 A.2d 780, 787 (N.J. Super. Ct. App. Div. 1997) (holding that an expert's testimony regarding the defendant's PTSD would lend credibility to the reasonableness of her belief); *see also People v. Hadnot*, No. D055164, 2010 WL 2053365, at *25 (Cal. Ct. App. May 25, 2010) (finding psychological evidence of PTSD relevant in "the determination of both the subjective existence and objective reasonableness of a defendant's belief in the need to defend herself").

2. Because courts routinely address the effect of past abuse on reasonable belief in analogous contexts, the district court erred in finding Nixon's proposed evidence irrelevant.

Courts routinely admit proof of PTSD in cases involving a party's reasonable belief, easily surpassing the minimal evidentiary standard for relevance. Fed. R.

Evid. 401; *see supra* Part III.A.1.[8] Loring and Chow would have testified that Nixon suffered from chronic PTSD when Nixon removed S.N.-G. to Canada. Not only does this evidence directly impact her reasonable belief, it also increases the probability that she, as a past victim of abuse with PTSD, would perceive abuse differently than someone without PTSD. (10/31/16 Hr'g Tr. 13–14, 35.)

Underlying the district court's relevance ruling was its belief that these experts had worked with Nixon before or after July 2015, when she fled to Canada. (R.66 at 8–10) (excluding Loring because she worked with Nixon in April 2016); (R.80 at 1–2) (excluding Chow for the same reasoning). This Court has held, however, that experts may testify based on the opinions of other experts who examined the subject. *Walker v. Soo Line R. Co.*, 208 F.3d 581, 589 (7th Cir. 2000). A district court commits reversible error when it bars an expert "who reasonably relied on the expert opinions of specialists who also examined [the subject]" and when the expert's conclusion that the subject suffered from PTSD "was a professional opinion that the jury had the right to consider." *Id.* Here, Loring testified that she relied on accounts from others who had evaluated Nixon prior to the alleged offense, and prior to her criminal trial. (R.53 at 14–15.) For example, Loring relied in part on her interview of Teri McKean, a therapist, who diagnosed Nixon with PTSD in May 2015, just months before her custody trial. (R.53 at 14.) The government's expert

[8] Similarly, courts often admit evidence of Battered Woman's Syndrome to contextualize reasonable belief. *See, e.g., Nixon v. United States*, 728 A.2d 582, 589 (D.C. 1999), *adhered to on denial of reh'g*, 736 A.2d 1031 (D.C. 1999); *State v. Allery*, 682 P.2d 312, 316 (Wash. 1984) (en banc); *Smith v. State*, 277 S.E.2d 678, 683 (Ga. 1981); *Ibn-Tamas v. United States*, 407 A.2d 626, 639 (D.C. 1979).

even agreed that such evidence corroborating Nixon's PTSD before the criminal trial gave credence to its genuineness because it obviates an incentive to malinger. (11/7/16 Hr'g Tr. 83–84.) Essential to her affirmative defense, Nixon's PTSD was far from irrelevant.

The district court further conflated expert credibility with relevance. Despite finding Loring a qualified expert who had used a reliable methodology (R.66 at 3, 6), the district court found Loring's testimony irrelevant because she had conducted clinical interviews, which relied on self-reporting (R.66 at 8–10). Given the trial setting, the district court believed a forensic interview was required to ferret out any motivation to "manipulate or skew the evaluation in a way which benefits" her. (R.66 at 8–10.) But having deemed Loring a qualified expert with sound methodologies, the district court should have recognized Loring's ability to separate the wheat from the chaff in this regard. And, in fact, she had. Loring's testimony demonstrated she had accounted for malingering. She not only confronted Nixon with inconsistencies in her statements during her sessions with her, she also interviewed collateral witnesses before ultimately diagnosing Nixon with PTSD. (10/31/16 Hr'g Tr. 77, 83.) Additionally, Loring was an experienced expert witness in diagnosing trauma for the purposes of a trial; she had testified approximately 165 times before. (10/31/16 Hr'g Tr. 50–51.) Given the district court's own findings regarding Loring's qualifications, her extensive experience, and the obvious relevance of PTSD to Nixon's reasonable belief, the district court should have permitted this evidence.

3. The district court's concerns regarding jury confusion were misplaced and, even if pertinent, should have been addressed through less drastic means.

The district court's fallback position was its concern over "jury confusion," which it used as a catch-all for the sorts of perceived maladies addressed elsewhere in this brief: (1) back-dooring evidence of S.N.-G.'s sexual abuse, which it considered hearsay, *see infra* Section III.B; and (2) back-dooring a diminished capacity defense through "irrelevant" PTSD evidence, (R.66 at 11); *see supra* Section III.A.1–2. In truth, far from fomenting confusion, evidence regarding S.N.-G.'s abuse and Nixon's past trauma would have provided important context for the jury, without which it could not fully understand the nature of Nixon's affirmative defense.

But even had the court's fears of juror confusion been well-founded, it used an axe when it should have used a scalpel. Prophylactic measures like limiting instructions or tailored-examination inquiries go a long way to eliminating concerns about juror confusion. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) (reasoning that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction" rather than "wholesale exclusion" are "the appropriate safeguards"). The district court should have trusted the two experienced prosecutors to ably cross-examine these witnesses, or chosen to limit Loring and Chow's testimony through an instruction. Instead, it stymied the jury's fact-finding role, choosing to completely exclude two crucial defense experts.

B. The district court improperly excluded Nixon's lay and expert witness testimony regarding S.N.-G.'s claims of abuse, which was vital to her affirmative defense.

The district court excluded nearly all of Nixon's evidence regarding S.N.-G.'s abuse allegations, leaving Nixon with only her own testimony to establish the reason for her flight. The district court fully excluded the lay witness testimony of S.N.-G.'s pediatrician, Dr. Kathleen Buetow; S.N.-G.'s kindergarten counselor, Debra Poblano; and the counselor to whom S.N.-G. was referred post-allegation, Meghan Murphy. The district court erred in excluding these witnesses for four reasons. First, Nixon's lay witnesses' testimony served non-hearsay purposes. Second, Buetow's testimony should have at least been admitted under the Rule 803(4) hearsay exception for medical diagnosis or treatment because her conversations with S.N.-G. were directly probative of her treatment and diagnosis of a victim of sexual abuse. Third, the district court never conducted a true Rule 403 balancing test in finding the testimony prejudicial due to its potential for jury confusion—by itself reversible error. Fourth, and finally, the district court erred in completely excluding these witnesses.

In addition to completely barring the *lay* witness testimony, the court severely limited the *expert* testimony of Buetow and Murphy regarding S.N.-G.'s alleged abuse, to the point where neither expert testified. First, the district court mistakenly viewed this testimony as a circumvention of its prior hearsay rulings. (A.51.) Second, as with the lay witness testimony, the district court failed to conduct any Rule 403 balancing before excluding it. Finally, the district court misapplied the standard used for expert witness limitations in similar cases.

1. **The district court improperly excluded three of Nixon's essential lay witnesses.**

    a. **The witnesses should not have been excluded on hearsay grounds because their testimony was not offered for the truth of the matter asserted.**

Nixon's witnesses' testimony was not offered to prove that S.N.-G. had actually been abused. Rather, Nixon offered this testimony to show that a similarly situated person would have reasonably believed that abuse occurred, *see* Fed. R. Evid. 801(c)(2), and that there existed a basis for the authorities' subsequent investigations, which courts have found to be another non-hearsay purpose. *See, e.g., United States v. Running Horse,* 175 F.3d 635, 638 (8th Cir. 1999) (testimony offered to assist the jury in understanding the origin of an abuse investigation); *United States v. Espinosa*, 585 F.3d 418, 433 (8th Cir. 2009) (testimony offered to show that the conversations happened and to show a witness's subsequent actions).

Each of the excluded witnesses had engaged in conversations with S.N.-G. and formed a belief that she had been sexually abused by G.G., and at least two had reported their findings to others. (*See* A.19–20) (Murphy's proposed testimony that she had counseled S.N.-G. on two occasions and found S.N.-G.'s abuse allegations to be credible); (A.18) (Poblano's proposed testimony that she had met with S.N.-G. on two occasions and found S.N.-G. had been the victim of sexual abuse, which she reported to DCFS); (A.18–19) (Buetow's proposed testimony that she examined S.N.-G. on two separate occasions and found S.N.-G. had been sexually abused, which she reported to DCFS and the University of Illinois police). Because these witnesses reported that, in their professional assessments, S.N.-G. had suffered

abuse, and because both Buetow and Poblano had alerted authorities to the abuse, it would have been just one small evidentiary step for Nixon to call these witnesses to show that Nixon herself was aware of these assessments and reports. If she was aware of the reports, then she could have more easily established the reasonableness of her belief that abuse happened.

In short, whether the abuse actually occurred was irrelevant. What mattered most to Nixon's defense was that she was on notice that three separate medical and psychological professionals determined that S.N.-G. had been abused and two had reported this to the authorities. Her awareness proves that she was fleeing what she reasonably believed was an incidence or pattern of domestic violence.

b. Even if the testimony was hearsay, Dr. Buetow's testimony should have been allowed under the Rule 803(4) exception for medical diagnosis or treatment.

Alternatively, Buetow's testimony should have been admitted under the Rule 803(4) hearsay exception for statements made for medical diagnosis or treatment, an argument the district court discounted because it could not discern the diagnosis or treatment involved in Buetow's examination. (A.46); *see* Fed. R. Evid. 803(4). However, this Court has found that treatment may require "attention not only to the physical manifestations of trauma but to the psychological ones as well," in allowing the testimony of a physician regarding a victim's identification of her abuser. *United States v. Cherry*, 938 F.2d 748, 757 (7th Cir. 1991) (noting that other circuits admit such testimony concerning child sexual abuse victims' descriptions of their abuse).

Courts that have closely examined this issue have acknowledged that the logical first step in treating sexual abuse is identifying the abuser, removing the victim from that person, and executing state-mandated reporting requirements. *United States v. Tome*, 61 F.3d 1446, 1450 (10th Cir. 1995) (finding a doctor's treatment of sexual abuse may include "special therapy or counseling and instruct[ing] the victim to remove herself from the dangerous environment by leaving the home and seeking shelter elsewhere."); *United States v. Peneaux*, 432 F.3d 882, 893–94 (8th Cir. 2005) (finding that statements of a child victim identifying a family member as the abuser "'are reasonably pertinent' to treatment or diagnosis" in part because "such a statement may be relevant to prevent future occurrences of abuse and to the medical safety of the child."). Additionally, the Eighth Circuit explicitly highlighted how central a doctor's reporting of abuse is to a child's treatment plan, noting the state's need "to prevent an abused child from being returned to an environment where the child cannot be adequately protected from recurrent abuse." *Peneaux,* 432 F.3d 882 at 894.[9]

Because Buetow's conversations with S.N.-G. were relevant to her diagnosing S.N.-G. as a victim of sexual abuse, and because her reporting these allegations to the requisite authorities ensured that S.N.-G. was removed from the abusive

[9] Perplexingly, the district court devoted more than a page of its opinion quoting the *Peneaux* decision, including its recitation of the many ways that identifying an abuser aids in diagnosis in treatment, but then abruptly concluded that it "agree[d] with the government that it is questionable whether such statements were pertinent to any treatment." (A.46–47) (opining that "Defendant had [S.N.-G.] make the statements [to Buetow] to get another mandated reporter on the record.").

environment, her testimony on these matters should have been allowed under Rule 803(4).

c. The district court erred in finding the testimony of Nixon's lay witnesses more prejudicial than probative by misapplying the Rule 403 balancing test.

In the alternative, the district court held that even if the evidence were not inadmissible hearsay, it should be excluded under Rule 403 as more prejudicial than probative. The district court, however, never weighed the potential probative value of the evidence for Nixon and never considered alternatives to fully excluding the evidence where it found prejudice. (A.42; A.47.) This Court has repeatedly held that "a district court commits error by not clearly articulating its Rule 403 rationale." *United States v. Miller*, 688 F.3d 322, 327 (7th Cir. 2012). Even "[a] pro-forma recitation of the Rule 403 balancing test" is not sufficient as it "does not allow an appellate court to conduct a proper review of the district court's analysis." *United States v. Loughry*, 660 F.3d 965, 972 (7th Cir. 2011). In fact, conducting only a "perfunctory" analysis "may in itself be grounds for reversal." *United States v. Ciesiolka*, 614 F.3d 347, 357 (7th Cir. 2010). Here, the district court considered Rule 403 on several occasions, but each time performed no more than a "perfunctory" analysis.

The sum total of the district court's Rule 403 analysis with respect to three critical witnesses—Poblano, Murphy, and Buetow—was that their statements "would be more prejudicial than probative under Rule 403 because it would needlessly confuse the issues and mislead the jury, along with potentially

presenting cumulative evidence." (A.42); *but cf.* Fed. R. Evid. 403 (requiring evidence to be *substantially* more prejudicial than probative before it may be excluded). The district court did not elaborate on what aspects of the testimony might confuse a jury and nowhere did it consider the probative value of this testimony for Nixon's defense. It likewise did not consider the weight of Nixon's excluded evidence, especially in contrast to the few bits of evidence it allowed. The testimony of professional adults with experience in both childcare and, specifically, sexual abuse cases, has significant probative value and could not be replaced by testimony from the defendant or the child victim, which is all that remained of Nixon's case after the district court's rulings. (A.42, n.4.) Worse, the district court then curtailed Nixon's own testimony, forbidding her to testify as to her conversations with these professionals that directly informed her belief that S.N.-G. was being abused. (A.41–42.)

When Nixon opted not to call her daughter to the stand during her case-in-chief, the government called her as a rebuttal witness. There, as anticipated before trial (A.30), S.N.-G. testified that she had not suffered abuse and that her mother had told her to say that she had (12/19/16 Trial Tr. 163–175). Here, again, the testimony of witnesses such as Buetow, Poblano, and Murphy would have been vital. Specifically, S.N.-G.'s original reporting of abuse happened when she was very young but was found credible by three separate treatment professionals; this testimony would have contextualized S.N.-G.'s testimony, especially given her age. *Nelson v. Farrey*, 874 F.2d 1222, 1230 (7th Cir. 1989) (noting that cross-

examination of a child is not "a more effective method of discovering the truth than listening to and weighing the testimony of a competent psychologist who interviewed the child"). Finally, it is worth emphasizing that the applicable standard was one of reasonable belief; the testimony of qualified adult witnesses to the fact that they also believed abuse occurred and had informed Nixon of this, would have been extremely relevant to establishing Nixon's own belief.

Not only did the district court wholly fail to evaluate the probative value of this evidence, it overstated and misapplied the prejudice analysis. Relying primarily on the state custody court's analysis of prejudice arising from Buetow's testimony, the district court failed to recognize the patent differences between Buetow's testimony in that custody case, (*see, e.g.*, A.49), versus her proposed testimony in Nixon's criminal trial.

At Nixon's criminal trial, Buetow would have offered lay testimony. (*See* A.34) (examining Buetow's potential testimony separately in lay and expert capacities). As such, the jury should have been the arbiters of her credibility. *United States v. Bileck*, 776 F.2d 195, 197 (7th Cir. 1985). What is more, Buetow's role was not to show abuse occurred, but rather to shed light on Nixon's reasonable belief. (R.91 at 5.) In contrast, the state court proceedings served a very different role—ascertaining whether abuse actually occurred for custody purposes—with a very different factfinder, a judge. Over and over, the district court erroneously accorded near-dispositive weight to a state court's findings on a completely different question,

animated only by its intent to avoid a "trial within a trial."[10] (A.46–47, n.5) (district court stating that "Judge Arnold Blockman is a well-respected and esteemed jurist in the State of Illinois, particularly on matters concerning family law," citing Blockman's faculty profile, and finding his rulings "worthy of attention"); (*see also* 12/13/16 Trial Tr. 4, 13, 64–65.) ("We're not going to review the child custody battle"; "We're not retrying the custody fight"; "the Court has specifically, time and time again, said it does not want to have a trial within a trial."). The district court not only failed to properly apply the Rule 403 balancing test, it misunderstood both the nature of the affirmative defense and its own role as a gatekeeper.

d. The district court should have considered alternatives to complete exclusion, a drastic measure that irreparably harmed Nixon's defense.

The district court never considered alternatives to outright exclusion of the evidence, such as a limiting instruction. Both this Court and the Supreme Court have emphasized the utility of limiting instructions in countering potential prejudice and advocated their use. *Huddleston v. United States,* 485 U.S. 681, 691–92 (1988); *United States v. Jackson,* 886 F.2d 838, 848 (7th Cir. 1989). Here, the district court could have remedied its concerns about jury confusion and a "trial within a trial" through a limiting instruction, informing the jury that it may only consider the testimony of Nixon's witnesses for the purposes of assessing her

[10] One particularly pertinent example is the district court's use and misunderstanding of Dr. Appleton's report. The district court cited Appleton's finding that Nixon "appear[ed] to have developed a shared psychosis [with S.N.-G.] where G.G. is believed to have abused [S.N.-G]." as a reason to exclude Nixon's witnesses as incredible. (A.49.) Whereas Appleton's report hurt Nixon in the custody case, it should only have helped her criminal case, where the essential question was whether Nixon believed abuse occurred.

affirmative defense. Instructions like this, which both this Court and the Supreme Court have endorsed, are reasonable measures that courts often take to allow relevant evidence while avoiding undue prejudice. However, the district court failed to even consider such a measure in its barebones application of the Rule 403 balancing test.

2. The district court wrongly curtailed the scope of Nixon's expert witnesses' testimony based on its prior rulings and misapplied the accepted standards for limiting such expert testimony.

In addition to excluding Nixon's lay witnesses regarding abuse, the district court severely truncated the expert testimony of Buetow and Murphy, finding their testimony would be an impermissible "circumvention" of the court's prior evidentiary rulings and confusing to the jury. (A.51.) Both women were qualified in the area of child sexual abuse and disclosures, and would have testified to their 2014–2015 diagnoses of S.N.-G. as an abuse victim. (A.50.) The district court first found their testimony to be hearsay. Second, the district court found that permitting their testimony would be an improper end-run around its prior rulings excluding similar testimony on hearsay grounds. Finally, the district court again mentioned—but never applied—the Rule 403 balancing test.

a. The proposed evidence was neither hearsay nor an improper circumvention of prior hearsay rulings.

First, this testimony was not hearsay or, at a minimum, fell within the hearsay exception under Rule 804(3), as discussed above. *See supra* Part II.B.1.a-b. Second, permitting Nixon's experts to testify in this context was not an improper "circumvention" of the court's earlier rulings. The court's circumvention rationale

was directly at odds with the en banc decision it cited. (A.51) (citing *Boim v. Holy Lands Found. For Relief & Dev.,* 549 F.3d 685, 704 (7th Cir. 2008)). The snippet from *Boim* the district court referenced was actually language from the *vacated* panel opinion, which the en banc Court had quoted in order to expressly retreat from it. *Id.* (quoting the vacated panel opinion and finding the panel's approach of narrowing expert testimony to only that which would otherwise be admissible "would be a crippling limitation because experts don't characteristically base their expert judgments on legally admissible evidence"; thus "the rules of evidence are not intended for the guidance of experts.").

Here, Buetow and Murphy's conversations with S.N.-G. were precisely the type of evidence contemplated by Rule 703 and this Court's en banc opinion in *Boim*. *See* Fed. R. Evid. 703 Adv. Notes. ("[A] physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives."); *Boim*, 549 F.3d at 704.

b. The district court failed to properly apply the Rule 403 balancing test in excluding the expert testimony.

Although the district court recognized that expert testimony is subject to the Rule 403 balancing test, it never actually performed it. (A.50–51.) Presumably referencing the prejudice prong of Rule 403, the district court mentioned in passing that it agreed with the state court judge's concern with perceived incredulity and lack of trustworthiness of S.N.-G.'s claims of abuse. (A.51.) But assessing credibility and trustworthiness is a jury's core competency and duty, and these are tasks a district court may not assume in its stead. *Smith v. Ford Motor Co.*, 215 F.3d 713,

719 (7th Cir. 2000) (finding that "the question of whether the expert is credible or whether his or her theories are correct" is a factual question for the jury and that the judge may determine only "whether expert testimony is pertinent" and whether the expert's methodology is sound). Rule 403 exists to exclude evidence that foments confusion or encourages emotionally charged decision making, criteria the court never expressly considered when ruling on the admissibility of Nixon's experts. (A.51.) Given that the district court found both experts qualified to testify, their testimony should have been allowed. (A.51.)

Finally, the district court was obligated to examine the probative value of this evidence and did not. Whether experts such as a doctor and counselor believed the abuse allegations was obviously relevant to whether Nixon could have reasonably believed it as well.

c. The court's limitations were overly restrictive and did not conform to accepted expert limitations.

In the end, the district court held that these experts could testify only about their general knowledge of abuse victims but prevented them from expressing any conclusions or testifying as to any specifics regarding S.N.-G. (A.51.) As it had in other instances, *see supra* pages 24 and 48, the district court in ruling relied on case law that counseled a very different result. *See United States v. Johns*, 15 F.3d 740, 743 (8th Cir. 1994) (allowing the expert to "inform the jury of characteristics of sexually abused children and describe the characteristics exhibited by the alleged victim."). At a minimum, Buetow and Murphy should have been allowed to testify regarding S.N.-G.'s demeanor and compare it to their generalized knowledge about

abuse victims. Murphy in particular relied on exactly the kind of evidence contemplated by the Eighth Circuit in *Johns*, using S.N.-G.'s characteristics and behavior (finding her demeanor fearful and scared) to diagnose her as a sexual abuse victim (concluding S.N.-G. was being "back to that moment"). (A.20.) This restriction essentially made the expert testimony worthless for Nixon's defense and she ultimately called neither witness.

IV. Even if the above errors are individually harmless, taken together they deprived Nixon of her statutorily provided affirmative defense and should therefore be reversed as cumulative error.

The district court committed errors that significantly undercut Nixon's ability to present her affirmative defense, essentially depriving her of it altogether. These errors, taken together, denied Nixon a fair trial. *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001) (finding that "[c]umulative errors, while individually harmless, when taken together can prejudice a defendant as much as a single reversible error and violate a defendant's right to due process of law"). A defendant need only show: (1) at least two errors were committed during trial; and (2) these errors undermined the fairness of the trial. *United States v. Adams*, 628 F.3d 407, 419 (7th Cir. 2010). In conducting this analysis, this Court examines the "nature and number of errors committed, the interrelationship and combined effect of the errors, how the trial court handled the errors, and the strength of the prosecution's case." *Id.*

These factors weigh in Nixon's favor. The district court continually misunderstood the nature of the affirmative defense and misinterpreted the statute,

resulting in error after error that severely limited Nixon's ability to substantively assert that defense. First, the district court misdefined "domestic violence," depriving Nixon of the ability to fully demonstrate the reasons for her flight with S.N.-G. Second, in misinterpreting the statute's "remove" and "retain" elements and its definition of "parental rights," the district court: (1) failed to provide a specific unanimity instruction to cure Nixon's duplicitous charge; (2) erroneously asserted that G.G. had parental rights as a matter of law; and (3) wrongly denied Nixon's Rule 29 motion, in turn lowering the prosecution's burden. Third, the district court excluded much of Nixon's evidence, including evidence that proved her reasonable belief that she was fleeing domestic violence and evidence of her PTSD that contextualized the reasonableness of this belief.

These errors, taken together, deprived Nixon of her affirmative defense and lowered the government's burden, stripping Nixon of her right to a fair trial.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court vacate her conviction and remand with instructions to enter a judgment of acquittal or, at a minimum, remand for a new trial.

Respectfully Submitted,

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No. 17-2132

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Sarah M. Nixon, Defendant-Appellant.	Appeal from the United States District Court for the Central District of Illinois Case No. 15-CR-20057 The Honorable Colin S. Bruce

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 13,780 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in 12 point Century Schoolbook font with footnotes in 11 point Century Schoolbook font.

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Dated: January 19, 2018

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Plaintiff-Appellant, Sarah M. Nixon, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on January 19, 2018, which will send notice of the filing to counsel of record.

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CIRCUIT RULE 30(d) STATEMENT

I, the undersigned, counsel for Appellant Sarah M. Nixon, hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the Appendix to this brief.

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RULE 30(a) SHORT APPENDIX TABLE OF CONTENTS

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 15-CR-20057**
	)	
SARAH NIXON,	)	
	)	
Defendant.	)	

ORDER

Defendant, Sarah Nixon, was indicted on one count of international parental kidnapping, in that she removed a child outside the United States and retained that child outside of the United States with the intent to obstruct the lawful exercise of another person's parental rights, in violation of 18 U.S.C. § 1204 (International Parental Kidnapping Crime Act). Defendant has filed this Motion to Conditionally Admit Evidence of Domestic Violence Under 18 U.S.C. § 1204(c)(2) (#21). The government has filed its Response (#23) and Defendant has filed her Reply (#24).

BACKGROUND

Defendant, a Canadian citizen, was charged by indictment with removing her child, S.G., to Canada, with the intent to obstruct the lawful exercise of parental rights of G.G., Defendant's ex-husband and S.G.'s father, in violation of the International Parental Kidnapping Crime Act (the Act). Defendant and G.G. were married in 1997 and divorced in 2012.

ANALYSIS

The Act criminalizes the removal or retention of a child outside the United States with the intent to obstruct the lawful exercise of parental rights. 18 U.S.C. § 1204(a). The Act allows for three types of affirmative defenses:

> (c) It shall be an affirmative defense under this section that--
> (1) the defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction and Enforcement Act and was in effect at the time of the offense;
> (2) the defendant was fleeing an incidence or pattern of domestic violence; or
> (3) the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant's control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances within 24 hours after the visitation period had expired and returned the child as soon as possible. 18 U.S.C. § 1204(c)(2).

In the instant case, Defendant seeks to introduce evidence under subsection (2) of § 1204(c), in that she was "fleeing from an incidence or pattern of domestic violence." 18 U.S.C. § 1204(c)(2). Defendant seeks to introduce evidence of the following:

(1) Her daughter, S.G., was sexually abused by G.G., her ex-husband, on at least three different occasions in the 18 months prior to the custody decision and physically abused on others;

(2) Defendant herself was subject to emotional, psychological, and financial abuse by G.G. leading up to and during the pendency of the custody proceedings in Champaign County.

G.G.'s Alleged Emotional, Psychological, and Financial Abuse of Defendant

The court will first address whether G.G.'s alleged emotional, psychological, and financial abuse of Defendant qualifies as "domestic violence" under § 1204(c)(2). As noted by the parties, "domestic violence" is not defined in the Act or by Chapter 55 of Title 18 of the United States Code. Defendant urges the court to adopt a very broad definition of domestic violence, so as to include emotional, psychological, and financial abuse. In support of her argument, Defendant cites to the U.S. Department of Justice's definition as stated on the Department's website as well as a number of law review articles. In response, the government argues that nowhere in federal law, either statutory law or case law, is domestic violence defined so broadly. The government argues that the court should restrict domestic violence to physical acts of violence.

The parties do not cite to, and the court could not find, any federal case law specifically defining "domestic violence" in the context of § 1204(c)(2). Because the statute does not define "domestic violence," the court must look first to the word's ordinary meaning. *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 407 (2011). Black's Law Dictionary defines "domestic violence" as "[v]iolence between members of a household, usu. spouses; an assault or other violent act committed by one member of a household against another." Black's Law Dictionary 1564 (7th ed. 1999). Under this definition, "domestic violence" would seem to be limited to physical acts of violence, not the emotional, psychological, or financial acts to which G.G. allegedly subjected Defendant.

In *United States v. Castleman*, 134 S.Ct. 1405 (2014), the U.S. Supreme Court held that the common law meaning of force applied to the meaning of "force" in the definition of "misdemeanor crime of domestic violence." The Court discussed "domestic violence" in the context of a conviction for being in possession of a firearm after being convicted of a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9):

> Second, whereas the word "violent" or "violence" standing alone "connotes a substantial degree of force," id., at 140, 130 S.Ct. 1265, that is not true of "domestic violence." "Domestic violence" is not merely a type of "violence"; it is a term of art encompassing acts that one might not characterize as "violent" in a nondomestic context. See Brief for National Network to End Domestic Violence et al. as Amici Curiae 4–9; DOJ, Office on Violence Against Women, Domestic Violence (defining physical forms of domestic violence to include "[h]itting, slapping, shoving, grabbing, pinching, biting, [and] hair pulling"), online at http://www.ovw.usdoj.gov/domviolence.htm. Indeed, "most physical assaults committed against women and men by intimates are relatively minor and consist of pushing, grabbing, shoving, slapping, and hitting." DOJ, P. Tjaden & N. Thoennes, Extent, Nature and Consequences of Intimate Partner Violence 11 (2000).
>
> Minor uses of force may not constitute "violence" in the generic sense. For example, in an opinion that we cited with approval in Johnson, the Seventh Circuit noted that it was "hard to describe ... as 'violence' " "a squeeze of the arm [that] causes a bruise." *Flores v. Ashcroft*, 350 F.3d 666, 670 (2003). But an act of this nature is easy to describe as "domestic violence," when the accumulation of such acts over time can subject one intimate partner to the other's control. If a seemingly minor act like this draws the attention of authorities and leads to a successful prosecution for a misdemeanor offense, it does not offend common sense or the English language to characterize the resulting conviction as a "misdemeanor crime of domestic violence."

Castleman, 134 S.Ct. at 1411-12.

As noted in *Castleman*, the definitions section of the firearms chapter of the United States Code, Chapter 44, defines "misdemeanor crime of domestic violence" as follows:

> Except as provided in subparagraph (C),2 the term "misdemeanor crime of domestic violence" means an offense that--
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, *the use or attempted use of physical force, or the threatened use of a deadly weapon*, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(a)(33)(A) (emphasis added).

This court would further note that domestic violence, in the context of other federal statutes, usually includes a requirement of force. Chapter 136 of Title 42 of the United States Code, Violence Against Women Act, defines domestic violence thusly:

> The term "domestic violence" includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

42 U.S.C. § 13925(8).

Defendant in her Reply, argues that Congress has, in other instances, defined domestic violence with actions just short of actual physical force. Citing to the Interstate Domestic Violence Act (18 U.S.C. § 2261, et seq), Defendant notes that Chapter 110A, entitled "Domestic Violence", counts among its offenses "stalking", which is defined thusly:

> Whoever--
> (1) travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that--
> (A) places that person in reasonable fear of the death of, or serious bodily injury to--
> (i) that person;
> (ii) an immediate family member (as defined in section 115) of that person; or
> (iii) a spouse or intimate partner of that person; or
> (B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A)[.]

18 U.S.C. §2261A(1).

However, Chapter 110A is entitled "Domestic Violence *and Stalking*", and it is not quite clear whether stalking is encompassed within "domestic violence," or if stalking is its own separate offense. Defendant cites to § 2262, but that section deals strictly with interstate travel that violates orders of protection.

Case law on § 1204(c)(2) is relatively scarce. Most appellate cases addressing § 1204(c)(2) come from the Second Circuit. A recent, unpublished case concerned a defendant who attempted to use flight from domestic violence as an affirmative defense in a prosecution under the Act. In *United States v. Huong Thi Kim Ly*, 507 Fed.Appx. 12 (2nd Cir. Jan. 3, 2013), the court affirmed a district court's decision to grant the defendant a new trial because it had failed to give the jury appropriate guidance in response to the jury's request for a more helpful definition of domestic violence. The appeals court wrote that "the defendant testified to several incidences of conduct, which constitute domestic violence within the meaning of the statute, such as a slap in the face, but which the jury might erroneously have believed to too trivial to be considered violence." *Huong Thi Kim Ly*, 507 Fed.Appx. at 13. In dicta in a footnote, the appeals court noted that the district court appeared to believe that the jury should have been instructed that purely emotional abuse, involving neither incidence nor threat nor attempt of physical harm or force, also qualified as domestic violence. The appeals court appeared inclined to reject that approach, writing:

> It is by no means clear to us that Congress intended by § 1204 to make a spouse's flight from purely emotional abuse (such as, calling one's spouse "stupid," for example), unaccompanied by any incidence or threat of physical force, a defense to kidnapping. Domestic violence must include the use of physical force and any threats, explicit or implicit, including gestures and psychological means, that create a reasonable fear of harm in the victim. In other statutes, Congress has repeatedly used the term "violence" to mean physical harm or threatened or attempted physical harm.

Huong Thi Kim Ly, 507 Fed.Appx. at 13, n.1.

Still, the court noted that it had no need to rule definitively on that issue at the present time, and did not do so, and urged the district court to request full briefing of the issue before instructing the jury in the new trial.

The court finds persuasive the Second Circuit dicta and Black's Law Dictionary definition that domestic violence include at least *some* use of physical force by one party against another. Further, even though the Supreme Court in *Castleman* cited to the Department of Justice website which contains the expansive definition of domestic violence, the Court, in discussing domestic violence, focused only on domestic violence involving a physical component, stressing how the "violence" of domestic violence could encompass acts of physical force that, outside of a domestic setting, would not usually be considered "violent," such as grabbing, hair pulling, etc. Nonetheless, the Court did not endorse a definition of domestic violence that included purely emotional, psychological, or financial abuse.[1]

The Supreme Court may, one day, go so far as to categorize purely emotional, psychological, or financial abuse as "domestic violence." Likewise, Congress may provide an amendment to the existing law, or pass a new law, which clarifies and encompasses all of the domestic interactions which may be legally considered to be

---

[1]"In Castleman, the Court interpreted the phrase "use of physical force" in a misdemeanor crime of domestic violence as encompassing all offenses that involve even the slightest offensive touching." Bethany A. Corbin, Goodbye Earl: Domestic Abusers and Guns In the Wake of *United States v. Castleman*- Can the Supreme Court Save Domestic Violence Victims?, 94 Neb.L.Rev. 101, 149 (2015).

"domestic violence." Neither the Supreme Court nor Congress have done so yet, however. Absent such guidance, this court will not interpret § 1204(c)(2) to include allegations of emotional, psychological, or financial abuse. The court finds that, based on the above, Congress did not intend the affirmative defense of flight from domestic violence in § 1204 to include allegations of domestic violence that do not include the use of at least some physical force.

Defendant may not use as an affirmative defense under § 1204(c)(2) her allegations that G.G. abused her financially, psychologically, or emotionally.

The court will now address Defendant's proposed affirmative defense that her daughter, S.G., was sexually abused by G.G., her ex-husband, on at least three different occasions in the 18 months prior to the custody decision and physically abused on others. Here, clearly, physical and sexual abuse would constitute domestic violence under § 1204(c)(2) in its plain meaning. They are both allegations of the use of force, physical and/or sexual, against someone. The government does not take issue with categorizing an allegation of physical or sexual abuse as "domestic violence." What the government does take issue with, however, is whether, under the narrow federal definition of domestic violence, S.G., as G.G.'s daughter, can be a victim of domestic violence. Defendant argues that the affirmative defense should extend to cover S.G. as a victim of domestic violence.

Again, "domestic violence" is not defined specifically in the Act. Other definitions of domestic violence in the federal statutes, such as § 13925(8) of the

Violence Against Women Act, do appear to encompass children living in the home with an abuser as victims of domestic violence: "***or by any other person against an adult or *youth victim* who is protected from that person's acts under the domestic or family violence laws of the jurisdiction." 42 U.S.C. § 13925(8) (emphasis added). Further, the Black's Law Dictionary definition refers to "violence between members of a household," albeit "usually" between "spouses."

Further, 18 U.S.C. § 921(a)(33)(A), discussed above, defines "misdemeanor crime of domestic violence" to include violence committed "by a person who is cohabiting with or has cohabited with the victim as a spouse, *parent, or guardian*, or by a person similarly situated to a spouse, parent, or guardian of the victim." 18 U.S.C. § 921(a)(33)(A) (emphasis added). Based on these definitions, the court concludes that a child who suffers abuse at the hands of a parent or guardian, is a victim of "domestic violence," and, thus, flight from domestic violence would an available affirmative defense to a Defendant charged under the Act who claims they were escaping because the child victim had been or was at risk of domestic violence.

The court must now determine the availability of such an affirmative defense to Defendant in this particular case. This was addressed somewhat in the government's response, where the government argues that, even if there is a "scintilla" of relevancy in Defendant's allegations that S.G. was abused by G.G., that relevancy is substantially outweighed by the danger of unfair prejudice under Federal Rule of Evidence 403. The government goes on to discuss, in depth, many factual issues related to allegations

made by Defendant against G.G. regarding G.G.'s alleged abuse of S.G., and how those factual issues were resolved in the state court. Defendant's motion did not discuss those facts. The court, at this point, does not feel it has enough information before it to make a fully informed and reasoned decision on whether to allow these particular allegations by Defendant against G.G. to be presented as an affirmative defense under § 1204(c)(2). Therefore, the court is going to direct the parties to brief the following:

(1) Defendant is to file a brief by May 27, 2016, detailing what Defendant intends to present related to her allegations against G.G. regarding his alleged abuse of S.G. Defendant is to address the following legal issues: (a) what effect the state court proceedings have on any presentation of such an affirmative defense in this court (for example, can allegations found to have no merit in state court later be presented as the basis for an affirmative defense in federal court?); (b) the application of Rule 403 to the proposed affirmative defense; and (c) if the defense is allowed, through what manner of presentation does the defendant intend to present such evidence

(2) The government is to file a responsive brief to the above by June 10, 2016.

(3) The government has detailed numerous facts about the state court resolution of Defendant's claims against G.G. Defendant, in this court, has not indicated whether those facts are accurate. The parties, if in agreement, are to stipulate, as part of Defendant's brief due May 27, 2016,

to the facts of what occurred in state court regarding the custody battle and claims by Defendant against G.G., and the resolution of those claims. If the parties cannot agree on the facts, they are to alert the court to their disagreement before May 27, 2016, so that an evidentiary hearing can be scheduled.

IT IS THEREFORE ORDERED:

Defendant's Motion to Conditionally Admit Evidence of Domestic Violence Under 18 U.S.C. § 1204(c)(2) (#21) is DENIED in part. It is denied as to an affirmative defense based on Defendant's allegations against G.G. of emotional, psychological, and financial abuse. The motion remains open and pending as to her claims about G.G.'s abuse of S.G., and is to be further briefed in accordance with this order.

ENTERED this 3rd day of May, 2016.

s/ COLIN S. BRUCE
U.S. DISTRICT JUDGE

E-FILED
Thursday, 23 June, 2016 10:45:52 AM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 15-CR-20057**
	)	
SARAH NIXON,	)	
	)	
Defendant.	)	

ORDER

Defendant's proposed affirmative defense turns on the testimony of a young child. There are realistically four different possible answers if the child is called to the stand and asked about prior sexual abuse: (1) she could say the abuse did occur, which neither party seems to expect; (2) she could deny it occurred, which both parties do seem to expect, to a certain degree; (3) she could answer one way when being questioned by Defendant, and another way when being questioned by the government, thereby giving conflicting answers; or (4) she could, being a young child, give ambiguous or confusing answers. This is not an abstract law school problem. The court and parties are dealing with a seven year old girl, who has suffered through state court hearings, court required therapy, being in the middle of a vicious custody fight in a very hostile divorce, and, regardless of the reason, being transported to a foreign country without warning and then transported back to the United States following the intervention of Canadian authorities.

The court does not want to conduct a "trial within a trial" on the issue of whether

or not S.G. was abused by G.G., an issue that was already litigated in state court. However, a trial within a trial is exactly where the court would be if it allowed Defendant to present, once again, all of the evidence she presented in state court, with all the expected objections from the government and argument from Defendant as to the admissibility of the evidence. At a bare minimum, the court needs time in advance to review the alleged impeachment material to which defense counsel has offered many hearsay exceptions. Therefore, the court is ordering Defendant to produce such material to the court in seven days.

IT IS THEREFORE ORDERED:

Defendant is to produce to this court within seven (7) days of the date of this order all of her proposed extrinsic impeachment evidence. Defendant is required to label each separate piece of evidence she intends to introduce for impeachment purposes, consistent with how she referred to it in her brief (#27). Each item shall also have a separate exhibit number or letter attached to it for identification purposes. Defendant shall also include an exhibit list, as would be required before trial, listing all the separate exhibits, so the court can make sure it has all the exhibits Defendant wishes the court to have.

ENTERED this 23rd day of June, 2016

s/ COLIN S. BRUCE
U.S. DISTRICT JUDGE

E-FILED
Friday, 12 August, 2016 02:51:25 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 15-CR-20057**
	)	
SARAH NIXON,	)	
	)	
Defendant.	)	

ORDER

Defendant, Sarah Nixon, was indicted on one count of international parental kidnapping, in that she removed a child outside the United States and retained that child outside of the United States with the intent to obstruct the lawful exercise of another person's parental rights, in violation of 18 U.S.C. § 1204 (International Parental Kidnapping Crime Act).

Defendant filed this Motion to Conditionally Admit Evidence of Domestic Violence Under 18 U.S.C. § 1204(c)(2) (#21). The government filed its Response (#23) and Defendant filed her Reply (#24).

On May 3, 2016, this court entered an Order (#25) denying Defendant's motion as to presenting evidence of mental or emotional abuse of Defendant by her ex-husband G.G., but requesting further briefing from the parties on the issue of G.G.'s alleged sexual and physical abuse of their daughter, S.G. Defendant filed her brief (#27) on May 27, 2016, and the government filed its Response (#28) on June 10, 2016.

BACKGROUND

The offense with which Defendant is charged, international parent kidnapping, allows a defendant an affirmative defense to the crime if the defendant was "fleeing from an incidence or pattern of domestic violence." 18 U.S.C. § 1204(c)(2). Defendant, in her motion, seeks to introduce evidence of two allegations of domestic violence: (1) her daughter, S.G., was sexually abused by G.G., her ex-husband, on at least three different occasions in the 18 months prior to the custody decision and physically abused on others; and (2) Defendant herself was subject to emotional, psychological, and financial abuse by G.G. leading up to and during the pendency of the custody proceedings in Champaign County.

In the court's Order (#25) of May 3, 2016, the court denied Defendant's motion concerning her own alleged "emotional, psychological, and financial abuse." However, the court found that, as alleged, the sexual and physical abuse of S.G. would qualify as "domestic violence" under the statute's affirmative defense. The court then ordered further briefing by the parties as to the facts behind the allegations of S.G.'s abuse and the state court proceedings and argument on whether such a defense is permissible in this case.

The Background Abuse Allegations: 2014-2015[1]

S.G. was born in late 2008 to Defendant and G.G. Defendant and G.G. separated in fall of 2010, with Defendant moving to Canada with S.G., pursuant to a mutual "trial separation" agreement between Defendant and G.G. Defendant was S.G.'s primary custodian during this time. In January 2014, G.G. came to Canada for an unsupervised visit with S.G., and during that visit, G.G. allegedly "confiscated" S.G.'s underwear because, according to G.G., she had an "accident." Defendant did not disclose her concerns of potential abuse because she feared it would be used against her in family court.

Defendant returned to Urbana with S.G. in August 2014, and established a visitation schedule in which G.G. would have visits on Wednesday evenings and overnights every other weekend. At the time G.G. was living with his new partner, A.L., and their then-two year old daughter, E.L. According to S.G., on September 17, 2014, during a visit with G.G., G.G. entered the bathroom, where S.G. was using the toilet, and inappropriately touched her vagina. S.G. reported the touching to Defendant the next day. After this disclosure, Defendant retrieved her phone and recorded S.G.'s account of the alleged abuse. S.G. demonstrated how G.G. had touched her. Defendant called the Urbana Police Department. The reporting officer, Cortez Gardner, listened to the recording and felt that Defendant was mouthing the words to the recording, "as if

[1]The following facts are taken from the briefs of the parties and the transcript of proceedings in front of Champaign County Circuit Court Judge Arnold F. Blockman in case 2012-D-2 on July 13, 2015, attached to Defendant's brief (#27) as Exhibit 1.

she had rehearsed them previously." Defendant denied any rehearsal. Gardner forwarded the case to DCFS. DCFS interviewed S.G. at the Children's Advocacy Center (CAC) on September 23, 2014, but S.G. did not affirmatively allege or deny any abuse, and, as a result of the investigation, no charges were filed or action taken by DCFS.

In November 2014, S.G. allegedly told Defendant that G.G. had hit her on the arm and leg. Defendant then had contact with staff at Carle Hospital and took S.G. to the emergency room, where she disclosed the hitting to a nurse and doctor. Given these alleged disclosures to Defendant, S.G. was referred to a counselor at her kindergarten, Debra Poblano. S.G. told Poblano that "daddy" made her feel uncomfortable. S.G. told her that G.G. sometimes took her into rooms where others were not present and locked the doors. On November 10, 2014, S.G. told Poblano that she had recently gotten a flu shot and that G.G. had hit her on the arm and it hurt. Poblano called DCFS, but the investigation did not result in any action on either allegation.

On December 26, 2014, when picking S.G. up from G.G., Defendant allegedly noticed signs of physical abuse on S.G., including scratches, bruising, and broken blood vessels. S.G. would not say how it happened, and Defendant took her to the emergency room.

Three days later, Defendant took S.G. to see her pediatrician at Carle Clinic, Dr. Kathleen Buetow. S.G. met with Buetow alone, and disclosed various incidents of abuse at the hands of G.G., including G.G. touching her vagina in the bathroom and jamming a sharp stone into her palm. Buetow concluded S.G. had been the victim of

some physical abuse by her father, that S.G. had perceived that she was the victim of sexual abuse by her father, and that S.G. was being emotionally abused as the pawn in marital problems between both parents. Buetow reported these findings to DCFS.

On January 14, 2015, S.G. allegedly told Defendant that, while at G.G.'s work office that day at the University of Illinois, G.G. had sexually abused her in retaliation for reporting previous abuse to the doctors.

S.G. was seen by Buetow the following day, where she detailed the alleged abuse. Buetow found S.G.'s account credible and she did not believe that S.G. had been coached. S.G. told Buetow that, while in G.G.'s office, her father had pulled down her pants and underwear and touched her vagina with his fingers, and then pulled down his own pants and underwear and had her touch his penis. She "touched it with her index finger and toes" and reported feeling "bored" and "mad at daddy" for doing it. Buetow reported her findings to the University of Illinois Police Department and DCFS, which both launched investigations.

One week later, S.G. was interviewed at the CAC by Heather Forrest, and repeated the details she had given to Dr. Buetow. S.G. was able to demonstrate what happened through the use of anatomically correct dolls. She said G.G.'s penis was soft at first, then became hard.

Following these disclosures, Dr. Buetow diagnosed S.G. as the victim of sexual assault by G.G. The CAC referred S.G. to counseling with Megan Murphy of ABC Counseling in Champaign. During the counseling S.G. drew a picture of her father in

bed with her and said that G.G. was "mean." When asked to draw a touch that "made her feel good", S.G. drew Defendant hugging her, but when asked to draw a touch that "made her feel bad", she drew G.G. touching her. Murphy was unable to determine where G.G. was touching her on the picture and S.G. did not want to say, becoming visibly upset. Murphy found S.G.'s demeanor to be fearful and scared, and determined that S.G.'s memory was "taking her back to that moment" and was "overwhelming" her.

At a subsequent session with Murphy, S.G. detailed the alleged abuse when G.G. touched her vagina and made her touch his penis. Murphy found the disclosure credible, and formed an opinion that S.G. had been a victim of sexual abuse.

In March 2015, S.G. was interviewed by Dr. Helen Appleton on two occasions as part of a custody evaluation for family court. Dr. Appleton did not perform a forensic review because of the pending UIPD investigation. However, in an exercise where S.G. was required to finish prompted sentences, she said her father "always acts nice and mean," she is not afraid of anything except "her dad, because he says I tell lies and he hurts me and touches my girl parts," that she likes it most "when there is another grown up at Dad's house," that she needs most "another grown up to be with Daddy so Daddy will always be nice and never be mean," that her father always "be's nice and mean," and that what children need most is "protection." She also repeated her accounts of the September 17, 2014 bathroom incident. S.G. also told Appleton of the

January 14, 2015, sexual assault in G.G.'s campus office, in a manner consistent with earlier disclosures. She also told about G.G. "stealing her underwear" during the January 2014 visit.

S.G. was interviewed on April 15, 2015, by University of Illinois Police Department Detective Rachael Ahart. Following the interview, Ahart spoke with Defendant. Defendant and S.G. told Ahart that Defendant had not coached S.G., but that S.G. was telling the truth about G.G. Ahart, however, concluded that Defendant had coached S.G.

The Custody Case

G.G. filed for divorce on January 3, 2012, and alleged "extreme and repeated physical or mental cruelty" against Defendant as grounds for divorce. Defendant did not contest. Various settlement conferences and negotiations produced the temporary visitation schedule alluded to above.

On December 17, 2014, Poblano, Officer Gardner, and Officer Tim McNaught, along with the parties, testified to the September allegations. The parties reached an agreement as to temporary visitation measures. Judge Blockman denied Defendant's request for a finding of serious endangerment and denied her request that visits with G.G. be supervised. He also ordered that neither party could leave Illinois without permission from the court.

Following the alleged December 2014 and January 2015 assaults, Defendant filed a petition for supervised visitation on January 20, 2015. G.G. responded by filing for an order of protection against Defendant. Judge Blockman later determined that the order of protection was an improper attempt to obtain some kind of advantage in the custody proceeding.

On January 26, 2015, Judge Blockman held a hearing at which Dr. Buetow testified about her findings and Defendant testified about the alleged disclosures. After a recess, the parties entered into an agreement as to a temporary order prohibiting contact between G.G. and S.G. under further order of the court.

On June 4, 2015, Dr. Appleton's report, recommending custody to G.G., was submitted to Judge Blockman.

A trial was held the week of July 6, 2015. Dr. Appleton and Murphy testified to their findings during that trial. Judge Blockman took the matter under advisement over the weekend and rendered his judgment awarding custody to G.G. on July 13, 2015.

Judge Blockman's Judgment

Judge Blockman began his ruling by noting that this was a *de novo* analysis under the Illinois Marriage and Dissolution of Marriage Act (750 Ill. Comp. Stat. 5/602 (West 2014)) in order to determine custody, taking into account the best interests of the child. Under that statute, the relevant factors in determining the best interests of the child include: (1) the wishes of the child's parent(s); (2) the wishes of the child; (3) the interaction and interrelationship of the child with the parent(s), siblings, and any other

person who may significantly affect the child's best interests; (4) the child's adjustment to his or her home, school, and community; (5) the mental and physical health of the involved individuals; (6) the potential for violence or threat of violence; (7) the occurrence of ongoing or repeated abuse; (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child; (9) whether one of the parents is a sex offender; and (10) military obligations. *In re Parentage of J.W.*, 990 N.E.2d 698, 710 (Ill. 2013).

First, regarding wishes of the parents, Judge Blockman found this factor to "slightly favor" Defendant, as G.G. testified that he considered foster care for S.G. after DCFS took temporary custody of the child.

Second, regarding the wishes of the child, Judge Blockman found that this factor was a draw. He noted that there was "no question" S.G. was "very closely bonded" with Defendant. However, he also noted that, as a six year old, S.G. was "way too young for this court to consider any kind of preference," so he did not accord much weight to this factor.

Third, regarding the child's adjustment to her home, school, and community, Judge Blockman found this factor favored Defendant. S.G. had spent most of her time since the 2010 separation with Defendant, and lived with her in Canada. S.G. had lived with Defendant in Urbana since they moved back to the area in August 2014. S.G. had completed kindergarten, adjusted well to the school and community, and appeared to be developing well.

Fourth, regarding the interaction with the parents and significant others, Judge Blockman found this factor slightly favored G.G. While it was a plus that Defendant had been S.G.'s primary custodial parent, it was also a minus in that she had been "totally enmeshed" in S.G. and Dr. Appleton "felt that was a problem" and that Defendant's "life was on hold." Judge Blockman found the relationship of S.G. to G.G. to be good, and the relationship to A.L. and E.L. to be good.

Fifth, regarding the mental and physical health of the parents, Judge Blockman found this factor strongly favored G.G. While there was "no question" G.G. had a number of psychological issues, "he seems to have primarily dealt with those issues." The court was impressed with how honest G.G. was, and G.G. "at least admitted" that he had these issues. Since his new relationship started in 2012, Judge Blockman noted that many of G.G.'s problems have subsided. G.G. had worked on his depression and, despite having Asperger's Syndrome, neither the court nor Dr. Appleton noticed anything that would keep him from being an appropriate parent for S.G.

Judge Blockman noted that Defendant had a severe case of post-traumatic stress syndrome stemming from some type of prior trauma. Dr. Appleton, quoting from a Dr. Hirschberg who had assessed Defendant for the custody court in Canada, noted that Defendant "showed flights of ideas and digressions during the interviews" and "her behavior suggested she needed to be controlling, hypervigilant, and emotionally labile." Dr. Buetow noted that people had "serious concerns" about Defendant and that

Defendant was stressed and anxious. Judge Blockman found that Defendant was so controlling, that she believed she "owned" S.G. and was the only person capable of making any kind of parenting decisions for S.G.

Judge Blockman also noted that a report from one of the officers that investigated many of the allegations said Defendant was "crazy" and "weird." The court noted that Defendant was very suspicious of the system, including Dr. Appleton, as she refused to bring S.G. to her first appointment with Appleton and questioned Appleton about the psychologist's credentials and procedures, including writing up a lengthy list of questions. Despite being invited by Dr. Appleton for an appointment to discuss the questions, Defendant cancelled, requesting the information instead be provided by telephone. Defendant then cancelled that appointment, now insisting Appleton's responses be in writing. The court was concerned that Defendant was interrogating the evaluator about the evaluator's own credentials.

Regarding the next factor, physical violence and abuse, Judge Blockman stated "I simply don't believe the allegations of physical and sexual abuse." First, the court believed the allegations of physical abuse to be "preposterous." The court did not believe the allegations of hitting S.G. in the stomach or banging her head against the wall, nor did he believe Defendant's claim about G.G. trying to run her off of I-90. The court was also impressed that G.G. volunteered to take a lie detector test.

Concerning the January 2014 sexual abuse allegation, when G.G. allegedly touched S.G.'s vagina, the court found that could arise out of a normal parenting situation, noting, as did Dr. Appleton, "that most of the particular allegations of sexual abuse were unusual and not one that typically leads to sexual gratification of a perpetrator[.]" The court also noted that S.G. did not report this abuse during her CAC interview in the fall of 2014.

Judge Blockman also focused on how Defendant seemed to help, or coach, S.G. with her abuse allegations. Defendant provided hours of videotapes and audiotapes of herself repeatedly asking S.G. about sexual abuse using leading and other inappropriate questions. S.G. explained to one officer how she practiced with Defendant to help her remember. The court thought it extraordinary that Defendant sent visual aids with S.G. to the interview with Dr. Appleton, including pictures S.G. had drawn of sexual abuse and a stuffed owl family, which S.G. used to demonstrate the sexual abuse.

Judge Blockman noted that A.L., who was at home when some of the abuse allegedly occurred, saw no evidence of abuse. The court also cited to Dr. Appleton's report that S.G.'s interactions with G.G. were appropriate and that the child had a good relationship with G.G., observations that would not typically be made when a child has been sexually or physically abused in the fashion alleged in the case.

Judge Blockman believed there was mental and verbal abuse between the parties, and in the end, found this factor to be a draw.

Judge Blockman found that the final relevant statutory factor, the willingness to facilitate a relationship with the other parent, strongly favored G.G. The court found that Defendant had engaged in a four year campaign to "alienate and brainwash" S.G. from her father and, in all the court's years of experience, possibly the "worst case in terms of having clear evidence of alienation" that the court had ever seen. The court then listed all the problems with the videotapes, finding them filled with leading questions. Still, even with all of Defendant's leading questions to S.G. about G.G.'s abuse, S.G. said the solution was to be a "whole family," something you would not see in a sexually abused child. The court found the same to be true of the pictures Defendant had S.G. draw. The court noted that Dr. Appleton found it highly unusual and unprecedented in her years doing child custody investigations that Defendant brought in drawings of the alleged sexual abuse along with a statement as to "what the child meant."

The court also noted that S.G. told University of Illinois police detective Rachael Ahart that "her mother helps her remember by rehearsing her statements," which the court found to be direct evidence of coaching. Dr. Appleton found that Defendant was "pushing the idea" that S.G. was sexually abused onto S.G.

Judge Blockman then considered non-statutory factors, such as that Defendant has been the primary custodial parent of S.G. and that G.G. has a girlfriend with whom he has a daughter. The court favored S.G. being able to have a relationship with her half-sister.

Another non-statutory factor in Judge Blockman's decision was the testimony of Dr. Buetow and counselor Megan Murphy, both of whom believed S.G. to be credible and that the alleged physical and sexual abuse occurred. The court did not put a lot of weight in Murphy because he thought she just believed S.G. "because the child said it and she thought the child was credible." The court also discounted Buetow because (1) Dr. Appleton thought Buetow's failure to record S.G.'s statements was against custom and practice; (2) Buetow thought things were suggested to the child that were not disclosed; (3) incidents were asked about that were not alleged; and (4) Buetow did not fully consider the coaching issue. Still, the court found that Buetow and Murphy did believe the allegations of abuse, so that factor would favor Defendant. The court also found G.G.'s filing of the protective order was improper, and that favored Defendant.

Stability favored G.G. as well, due to his steady employment at the University of Illinois versus Defendant's erratic history of moving around and failing to complete her Ph.D., pending since 2003.

Judge Blockman also noted as a factor Defendant's penchant to blame everyone but herself, from G.G. to the Quebec family court, to Dr. Hirschberg, DCFS, the Urbana Police Department, Dr. Appleton, her former attorney in Illinois, and Judge Blockman himself. Judge Blockman did say, however, that he did not take Defendant's criticism of him into account in rendering his decision.

Judge Blockman found that nothing in the case would change until Defendant accepted that she shared some of the responsibility for the problems caused to S.G. and that her toxic relationship with G.G. was partly her fault. The court also considered what looked to be forum shopping on Defendant's part against her.

Finally, the most important piece of evidence Judge Blockman considered was Dr. Appleton's report. The court noted that the report found it was impossible to determine with 100% accuracy whether or not sexual abuse occurred, but further found that there was substantial evidence Defendant coached S.G. to report and believe that she was sexually abused. The court then, again, thoroughly went through the reasons why Dr. Appleton believed that G.G. did not abuse S.G. Dr. Appleton recommended full custody of S.G. to G.G.

Judge Blockman then found that, after weighing all the factors, it was in the best interests of S.G. that full custody be awarded to G.G.

The court discussed counseling for the parties and S.G., ordering that S.G. not have the same counselor she had at ABC Counseling, Megan Murphy, noting that he had concerns about ABC Counseling in general and Murphy in particular, in that Murphy was solely focused on sexual abuse, and would likely not be able to have a changed mindset that would comport with the court's findings. The court also found that there had been a showing of serious endangerment, based on the Dr. Appleton's findings.

The court also ordered that S.G. should be seen by counselor Trevor Kendrick, who was to assume that S.G. was not sexually abused by G.G. The written order ordered Kendrick to tell S.G. that she had not been sexually or physically abused, however the government here states that Kendrick denies complying with that order.

Defendant was not present in state court on July 13, 2015, having fled with S.G. to Canada the previous day.

ANALYSIS

Defendant seeks to introduce evidence of S.G.'s allegations of physical and sexual abuse against G.G. from state court as part of her affirmative defense to the crime charged against her in this case. This would necessitate calling S.G. as a witness to describe the alleged abuse.

However, anticipating that S.G. may now testify that the abuse never occurred, Defendant also seeks to introduce the testimony of doctors and therapists as to what they were told by S.G., using hearsay exceptions under the Federal Rules of Evidence. Before the court may consider those arguments, however, it must first determine if the doctrine of collateral estoppel applies to bar Defendant's proposed affirmative defense.

Collateral Estoppel

Because Judge Blockman, in state court, found the claims of sexual and physical abuse to be unsubstantiated, the government argues that the doctrine of collateral estoppel should apply to bar Defendant from using those claims as part of her

affirmative defense to the charge in this court. Defendant responds that collateral estoppel cannot, and should not, apply to bar a criminal defendant from using an affirmative defense in federal court.

"Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). "Allowing the same issue to be decided more than once wastes litigants' resources and adjudicators' time, and it encourages parties who lose before one tribunal to shop around for another." *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S.Ct. 1293, 1298-99 (2015). Collateral estoppel has been applied in federal cases and state cases, and has been used to bar relitigation in federal court of issues already decided in a state court. *Allen*, 449 U.S. at 94-95.

Although first developed in civil cases, collateral estoppel has been an established rule of federal criminal law since the U.S. Supreme Court's decision in *United States v. Oppenheimer*, 242 U.S. 85 (1916). *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). Collateral estoppel, in the criminal sense, is often applied in matters of double jeopardy. *United States v. Bailin*, 977 F.2d 270, 273-74 (7th Cir. 1992). "Collateral estoppel in the criminal context means that 'when an issue of ultimate fact has once been determined by a valid and final judgment [i.e., an acquittal], that issue cannot again be litigated between the same parties in any future lawsuit [i.e., a prosecution].'" *Bailin*, 977 F.2d at 274, quoting *Ashe*, 397 U.S. at 445-46. However, the Seventh Circuit

has recently noted that, while the doctrine operates much like the rule against double jeopardy, and indeed is a component of the Constitutional protection against double jeopardy, it is also a common law principal, and thus is applicable in a criminal proceeding without reference to the double jeopardy clause, though of course in a federal prosecution the applicable version of collateral estoppel is the federal version. *Lorea v. United States*, 714 F.3d 1025, 1029 (7th Cir. 2013). However, the use of collateral estoppel *against* a defendant in a criminal case is severely limited. *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006, 1021 (7th Cir. 2006), citing *People v. Mordican*, 356 N.E.2d 71, 73 (Ill. 1976). As noted by Chief Justice Burger in his dissent in *Ashe,* "courts that have applied the collateral estoppel concept to criminal actions would certainly not apply it to both parties, as is true in civil cases[.]" *Ashe*, 397 U.S. at 464-65 (Burger, C.J., dissenting).

In *Allen*, the Supreme Court held that state criminal proceedings may serve to estop federal § 1983 civil rights actions. *Allen*, 449 U.S. at 104. Further, "[t]he Supreme Court has stated that 'the doctrine of collateral estoppel is not made inapplicable by the fact that this is a criminal case, whereas the prior proceedings were civil in nature.'" *United States v. Alexander*, 743 F.2d 472, 476 (7th Cir. 1984), quoting *Yates v. United States*, 354 U.S. 298, 335 (1957), overruled on other grounds by *Burks v. United States*, 437 U.S. 1 (1978). However, courts have been reluctant to apply collateral estoppel against a defendant in a criminal case based on a prior civil adjudication when the government is the proponent. See *People v. Trakhtenberg*, 826 N.W.2d 136, 142-43 (Mich. 2012). Courts

have also been reluctant to apply collateral estoppel in such situations where the stakes of the litigation are starkly different, such as the loss of a driver's license in a civil situation versus the loss of liberty in a criminal prosecution, which could mean the litigation strategies employed were different or of a differing intensity. *State v. Wagner*, 637 N.W.2d 330, 337-39 (Minn. App. Ct. 2001).

Likewise in the instant case, custody of S.G. was at stake in the civil case, whereas here Defendant's liberty is on the line, along with being a convicted federal felon subject to supervised release provisions. It is far from clear how collateral estoppel works when the government is the proponent of using collateral estoppel against a criminal defendant, particularly where the government wishes to collaterally estop a federal criminal defendant from presenting an affirmative defense due to an adverse adjudication of an issue in a state court civil proceeding.

The government, in its brief, wrote that "it recognizes that the existing case law does not provide this court with much guidance to determine this issue with comfort, particularly in weighing Defendant's Constitutional rights." The government is correct in its assessment of this court's comfort level in applying collateral estoppel to bar an affirmative defense in a criminal case without clear guidance on the issue from the Seventh Circuit or Supreme Court. "[B]ecause the consequences of collateral estoppel are so drastic, the requirements for its application are 'strict.'" *National Union Fire Insurance Co. of Pittsburgh v. Mason, Perrin, & Kanovsky*, 765 F.Supp. 15, 18 (D.D.C. 1991), quoting *Gramatan Home Investors Corp. v. Lopez*, 386 N.E.2d 1328 (N.Y. 1979). Therefore,

collateral estoppel will *not* be applied to bar Defendant from presenting her affirmative defense. The court agrees with Defendant that she should be allowed to prove her affirmative defense.

Impeachment and Hearsay Exceptions

While the court finds that Defendant must be allowed to present her affirmative defense, the evidence in support of the defense is still subject to the traditional requirements of relevancy, probative value versus prejudicial value, and hearsay. The right to introduce relevant evidence can be curtailed if there is good reason to do so. Further, while the Constitution prohibits the exclusion of evidence under rules that serve no legitimate purpose, well established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. *Clark v. Arizona*, 548 U.S. 735, 770 (2006).

In her brief, Defendant indicated that she wishes to present three types of evidence to prove physical and sexual abuse of S.G. by G.G.: (1) S.G.'s own direct testimony; (2) S.G.'s prior statements to Defendant, Poblano, Murphy, and Buetow; and (3) expert witness testimony by Buetow and Murphy. Defendant argues that S.G.'s prior inconsistent statements would only be used to impeach S.G. if S.G., on the witness stand, denies the abuse occurred.

The government does not argue that S.G. herself should be barred from testifying as to whether the abuse occurred. The government does argue, however, that: (1) the prior statements should be barred as inadmissible hearsay; (2) even if the prior statements qualify under any of the many hearsay exceptions, they should still be barred under Rule 403 of the Federal Rules of Evidence; and (3) the court should not allow Buetow and Murphy to testify as expert witnesses, and, if it does, their testimony should be limited to generalizations about sexual abuse victims, and they should be limited from testifying as to any legal conclusions regarding the alleged abuse.

There is a marked absence of case law concerning this affirmative defense.[2] The court does not want to conduct a "trial within a trial" on the issue of whether or not S.G. was abused by G.G., an issue that was already litigated in state court. However, a trial within a trial is exactly where the court would be if it simply allowed Defendant to present, once again, all of the evidence she presented in state court in support of her affirmative defense. Therefore, on June 23, 2016, this court entered an order (#29) requiring Defendant to submit all the impeachment evidence she wished to present. That evidence was filed with the court on June 30, 2016.

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[2]As was noted in this court's Order (#25) of May 3, 2016. The unpublished Second Circuit decision involving this affirmative defense cited by the court in that order is distinguishable from this present case. There, the defendant was the actual victim of the domestic violence at issue in the affirmative defense, and simply testified on her own behalf, apparently without resort to otherwise inadmissible extrinsic evidence sought to be introduced for impeachment purposes. See *United States v. Huong Thy Kim Ly*, 507 Fed.Appx. 12 (2nd Cir. Jan. 3, 2013).

The court will group the evidence into categories and analyze them based on the various hearsay exceptions through which Defendant seeks to impeach S.G. at trial.

Hearsay

Defendant argues that, regardless of impeachment of S.G. under Rule 613(b), S.G.'s statements alleging abuse can be admissible as substantive evidence under a multitude of exceptions to the hearsay rule. The court will address each argued exception in turn, and the particular hearsay Defendant seeks to introduce under the corresponding hearsay exceptions.

As a preliminary matter, the court agrees with the government that, if the government does not cross examine S.G., none of her statements can come in under Rule 801(d)(1)(A), as none of S.G.'s statements were given under penalty of perjury at a trial, hearing, or other proceeding in a deposition. See Fed.R.Evid. 801(d)(1)(A).

Rule 803(3)

Defendant argues that Poblano's and Murphy's testimony relating to what S.G. told her about the alleged abuse should be admissible under Rule 803(3) to impeach S.G. if S.G. denies abuse because they concern S.G.'s then-existing emotional and mental condition. The government responds that S.G.'s statements to Poblano and Murphy were too long after the alleged abuse, allowing plenty of time for Defendant to coach her and diminishing their reliability. The government further argues the statements do not relate to S.G.'s state of mind, but rather to actions allegedly perpetrated by another person.

Federal Rule of Evidence 803(3) allows for "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will." Fed.R.Evid. 803(3). "Three requirements must be satisfied for a statement to be admissible under the state of mind exception to the hearsay rule: (1) the statement must be contemporaneous with the mental state sought to be proven; (2) it must be shown that declarant had no time to reflect, that is, no time to fabricate or misrepresent his thoughts; and (3) the declarant's state of mind must be relevant to an issue in the case." *United States v. Neely*, 980 F.2d 1074, 1080 (7th Cir. 1992); *United States v. Rucker*, 2015 WL 9478216, at *6 (N.D. Ill. Dec. 29, 2015).

Debra Poblano

Defendant stated that she will seek to introduce, as possible impeachment evidence of S.G., the testimony of Debra Poblano under Federal Rule of Evidence 803(3) and Rule 807. Poblano is a social worker at S.G.'s elementary school. Poblano testified at the state court temporary visitation hearing on December 17, 2014. Poblano testified that she met with S.G. in a one on one session in her office at the school on October 27, 2014, S.G. having been referred to Poblano by classroom teacher Lisa Lund and Defendant. S.G. told Poblano that being in a locked room with her father made her

uncomfortable. Poblano noticed that S.G. had a different demeanor when the subject came up, more upset and rocking back and forth. Poblano, as a mandated reporter, contacted DCFS.

On November 10, 2014, at a different session, S.G. told Poblano that she had recently gotten a flu shot, and that G.G. had hit her on the same spot where she got the shot, and it hurt. Poblano admitted that she had met with Defendant before her sessions with S.G., and that Defendant told her she suspected G.G. of sexually abusing S.G. and DCFS had gotten involved. Poblano has no training in how to question children who have been sexually abused.

The court agrees with the argument put forward by the government that the statements are not contemporaneous with the mental state sought to be proven and that S.G. had too much time for her thoughts to be fabricated or misrepresented, thus diminishing their reliability. The alleged sexual abuse happened more than a month before S.G. told Poblano, and courts have found that a month delay in between the alleged event and statement is enough time for the declarant to reflect and possibly fabricate their thoughts.[3] See *Neely*, 980 F.2d at 1083. Indeed, the Seventh Circuit has even found it was proper to exclude a statement of the declarant's state of mind made

[3] When using the phrase, "the declarant to reflect and possibly fabricate their thoughts" the court encompasses the real possibility that Defendant coached and manipulated S.G. as to how she should answer questions and what statements to make concerning allegations of sexual abuse by G.G.. The court only reaches this conclusion after it personally engaged in a careful review of all of the evidence at issue submitted by Defendant.

only one hour after the event to which the statement pertained. *Neely*, 980 F.2d at 1083, citing *United States v. Carter*, 910 F.2d 1524, 1530-31 (7th Cir. 1990); see also *United States v. Fourstar*, 75 F.App'x. 603, 606 (9th Cir. 2003) (statement of child victim describing what occurred earlier the day inadmissible under rule). Therefore, the same would hold true for S.G.'s statement to Poblano about the flu shot incident, as it was clearly made, at the very least, more than a day prior to her statement. Further, the statements would be offered to prove that S.G. had been abused by G.G., not to show S.G.'s state of mind, and thus would be a statement of belief used to prove the fact remembered or believed," and would not fit within Rule 803(3)'s hearsay exception. See *United States v. Stallworth*, 656 F.3d 721, 727-28 (7th Cir. 2011).

Megan Murphy

Defendant next argues that the hearsay statements S.G. told ABC Counseling sexual abuse therapist Megan Murphy should be admissible under Rule 803(3). Murphy testified that she had been employed at ABC as a therapist for one year, and received her masters in social work in 2014. She is not a licensed clinical social worker. S.G. was referred to Murphy by the Children's Advocacy Center on January 28, 2015. The referral stated S.G. had previously disclosed sexual abuse. Murphy met with S.G. three times in March without any sexual abuse allegations being made.

She met again with S.G. on March 30, 2015, and had S.G. draw her feelings. Murphy asked S.G. to draw a picture of a time she felt scared, and S.G. drew a picture of her father lying on a bed and said he was mean to her. S.G. also told Murphy that

when G.G.'s girlfriend Anna or another grownup were not present, G.G. was mean, but was nice when other grownups were around.

At the next session on April 8, 2015, despite working on a book about bad and good touches, S.G. made no disclosures to Murphy.

At the next session on April 15, 2015, S.G. drew a picture of her mom hugging her, a touch that made her feel "good," and a picture of her dad hugging her, a touch that made her feel "sad." Based on her shifting demeanor, Murphy determined that there was something going on between S.G. and G.G. that made S.G. feel scared.

At the next session on April 27, 2015, S.G. told Murphy G.G. had touched her vagina and wanted her to touch his penis. Murphy found S.G. to be credible due to her consistent and natural demeanor when relating the alleged abuse.

She next saw S.G. on May 4, 2015, but S.G. did not disclose additional sexual abuse. Murphy believes that S.G. was a victim of sexual abuse because S.G. consistently appeared fearful of G.G. and made statements that he was mean. She did not believe S.G. or Defendant were fabricating the allegations of abuse.

The abuse reportedly happened in September 2014 through January 2015. On cross-examination, Murphy admitted she never read a CAC report, police report, or spoke with G.G. about the abuse. To determine S.G. was abused, Murphy relied only on the three page history compiled by Defendant's counselor and S.G.'s own statements.

For the same reasons cited above concerning Poblano, Rule 803(3) does not apply to the hearsay statements S.G. made to Murphy. The statements were made months after the alleged events, giving enough time for S.G. to reflect and possibly fabricate her thoughts. See *Neely*, 980 F.2d at 1083.

Effect of the Court Hearings on Defendant's State of Mind - Rule 801(c)(2)

Defendant also argues that, because the affirmative defense focuses on Defendant's state of mind, the defense should be able to admit S.G.'s prior disclosures and the testimony of the witnesses from the family court proceeding as nonhearsay to show their effect on the listener under Federal Rule of Evidence 801(c)(2). Specifically, Defendant argues that she sat through the family court proceeding and listened to medical professional Dr. Buetow declare her belief that S.G. had been sexually abused.

The government responds that this is an attempt to veil double hearsay statements as substantive evidence in order to affirmatively prove a sexual assault occurred.

The court agrees with the government's argument. This would constitute double hearsay and is unreliable in establishing an effect on Defendant, and outside the spirit and purpose of the Rule 801(c)(2) exception. Such an allowance would open up *any* statement *any person* made about S.G.'s statements to being admissible under this exception.

Statements made by S.G. directly to Defendant, however, will be admissible under this exception, should Defendant choose to testify to them.[4]

Further, the court finds that even if admissible under Rule 801(c)(2), the allowance of statements made by Poblano, Murphy, and Buetow about what S.G. told them would be more prejudicial than probative under Rule 403 because it would needlessly confuse the issues and mislead the jury, along with potentially presenting cumulative evidence as to what S.G. told Defendant directly.

Medical Diagnoses- Rule 803(4)

Defendant next argues that several statements made by S.G. to Dr. Buetow (Defendant claims "potentially other Carle doctors" as well, but does not identify any, so they will not be considered) were made for medical diagnoses or treatment, and thus would be admissible under Federal Rule of Evidence 803(4).

The government responds that the statements S.G. made to Buetow lack the reliability required to be admissible under the exception because there is no evidence that S.G. believed she was ill, injured, or appreciated the nature of her visit to Buetow.

[4] The Court, however, will carefully monitor any testimony in this regard. Such testimony should be strictly limited to any alleged statements directly from S.G. to Defendant concerning abuse. The Court will not permit Defendant, should she choose to testify, to circumvent the Court's ruling by attempting to insert otherwise inadmissible evidence by disguising it as prefatory or explanatory commentary regarding any statements made to her directly by S.G..

To be admissible under Rule 803(4), a statement must meet two criteria. First, the declarant's motive in making the statement must be for "purposes of medical diagnosis or treatment." *United States v. Gabe*, 237 F.3d 954, 957–58 (8th Cir.2001). Second, the content of the statement must be "pertinent" such that it is the kind of statement reasonably relied upon by health care providers in treatment or diagnosis. See *Lovejoy v. United States*, 92 F.3d 628, 632 (8th Cir.1996); *United States v. Wright*, 340 F.3d 724, 732 (8th Cir. 2003).

The Seventh Circuit has stated:

> The rationale behind Rule 803(4) is that a patient's self-interest in promoting the cure of his own medical ailments guarantees the reliability of statements the patient makes for purposes of diagnosis or treatment. See *United States v. Iron Shell*, 633 F.2d 77, 83–84 (8th Cir.1980), cert. denied, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981). In *Cook v. Hoppin*, 783 F.2d 684, 690 (7th Cir.1986), this court stated that the test for determining whether statements relating to the cause of an injury are admissible under Rule 803(4) is "whether such statements are of the type reasonably pertinent to a physician in providing treatment." In his treatise, Judge Weinstein suggests that the test for admissibility of statements under Rule 803(4) should be the same as under Rule 703—whether an expert in the field would be justified in relying upon this statement in rendering his opinion. See 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(4)[01], at 803–146 to 803–147 (1988).

Gong v. Hirsch, 913 F.2d 1269, 1273-74 (7th Cir. 1990).

The Seventh Circuit has allowed statements of sexual abuse victims made to treating physicians about that sexual abuse to be allowed if the statements were pertinent to the treatment of the physical and mental/emotional trauma. See *United States v. Cherry*, 938 F.2d 748, 756-57 (7th Cir. 1991).

In *United States v. Peneaux*, 432 F.3d 882 (8th Cir. 2005), the Eighth Circuit allowed statements made to a medical provider in the course of treatment that identified a defendant abuser. The court stated:

> Peneaux contends that Dr. Strong's testimony about what T.P. told her was inadmissible under Rule 803(4), which requires that hearsay statements be reasonably pertinent to medical diagnosis or treatment. Because Peneaux did not preserve this alleged error, we review for plain error. [citation omitted] Under this rule the proponent of the evidence must show that the statement is of the type reasonably relied on by a physician in treatment or diagnosis and that the declarant's motive in making the statement was consistent with promoting treatment. [citation omtted] While a declarant's statements identifying the party allegedly responsible for her injuries may normally not be reasonably pertinent to treatment or diagnosis, we have consistently found that "a statement by a child abuse victim that the abuser is a member of the victim's immediate household presents a sufficiently different case from that envisaged by the drafters of Rule 803(4) that it should not fall under the general rule" and that such statements "are reasonably pertinent" to treatment or diagnosis. [citations omitted]
>
> T.P.'s statements identifying Peneaux as the abuser are of the type reasonably relied upon by a physician for treatment or diagnosis. [citation omitted] Due to the nature of child sexual abuse, a doctor must be able to identify and treat not only physical injury, but also the emotional and psychological problems that typically accompany sexual abuse by a family member. Moreover, such a statement may be relevant to prevent future occurrences of abuse and to the medical safety of the child. Dr. Strong explained that identification of the abuser is a matter of great concern because if the person who brought the child to the clinic is the abuser, the child should not leave with that individual. She also testified about her need to report problem relationships to the state as mandated by a South Dakota law requiring physicians to prevent an abused child from being returned to an environment where the child cannot be adequately protected from recurrent abuse. S.D. Codified Laws § 26–8A–3 (2005).

Peneaux, 432 F.3d at 893-94.

The *Peneaux* court also discussed the next component in the 803(4) analysis:

> The more difficult Rule 803(4) question relates to T.P.'s motive. The motive requirement means that the victim must have had a "selfish subjective motive of receiving proper medical treatment" or the state of mind of someone seeking medical treatment. [citations omitted] To satisfy this rule, a proponent must show that a child understands "the medical significance of being truthful."[citation omitted] This requirement is especially important in sexual abuse cases since "not even an adult necessarily understands the connection between a sex abuser's identity and her medical treatment." [citation omitted]

Peneaux, 432 F.3d at 894.

The court has thoroughly read Dr. Buetow's testimony regarding the statements alleging physical and sexual abuse made to her by S.G. Dr. Buetow practiced medicine at Carle Clinic. On December 29, 2014, Defendant came into the clinic requesting to be seen because she believed S.G. had been abused. Buetow testified that S.G. said that, when she spent the night with G.G. on December 25, 2014, her father shook her head and banged it against the table or desk. S.G. said that on another occasion G.G. jammed a stone into her hand. S.G. also said that G.G. told her that she should hurt herself and throw herself down the stairs. S.G. also told Buetow that, sometime in the week prior to December 29, G.G. had touched her vagina in the bathroom, and that despite her asking him to stop, he did not stop. Buetow did not, at the time, ascertain if S.G. understood the difference between telling the truth and a lie. Based on what she was told by S.G. on December 29, Buetow concluded that S.G. had been the victim of some physical

abuse (perpetrated by G.G.), "that she at least perceived she was the victim of sexual abuse," (perpetrated by G.G.) and that S.G. was the victim of emotional abuse (perpetrated by both parties). Buetow contacted DCFS after this examination.

Buetow next examined S.G. on January 15, 2015. Buetow ascertained this time that S.G. understood the difference between telling truth and telling lies. S.G. told Buetow that she was at her father's office on January 14 when he pulled down her pants and touched her vagina. S.G. said he then pulled down his pants and asked her touch his penis, she did not want to, but G.G. was insistent, so she did. S.G. said the penis was soft. Buetow found no evidence the child was coached.

Examining the statements made by S.G. to Buetow under the Rule 803(4) standard, the court agrees with the government that it is questionable whether such statements were pertinent to any treatment for physical and/or mental trauma provided by Dr. Buetow. See *Cherry*, 938 F.2d at 956-57. From the record, it is unclear what exact treatment was necessary or provided. Rather, it appears Defendant had S.G. make the statements to get another mandated reporter on record as having heard of the abuse.

While it appears that Buetow did ascertain that S.G. understood the importance of being truthful, the court has similar concerns about the veracity of the allegations as did Judge Blockman.[5] Allowing these statements would unnecessarily mislead or

[5]This court would note that Illinois Sixth Circuit Judge Arnold F. Blockman is a well-respected and esteemed jurist in the State of Illinois, particularly on matters concerning family law. Judge Blockman, who is due to retire in September 2016, has

confuse the jury. Judge Blockman found multiple problems with Buetow's testimony: (1) Dr. Appleton thought Buetow's failure to record S.G.'s statements was against custom and practice; (2) Buetow thought things were suggested to the child that were not disclosed; (3) incidents were asked about that were not alleged; and (4) Buetow did not fully consider the coaching issue.

Having read Buetow's testimony, and that of Dr. Appleton (and Appleton's report), the court must agree with Judge Blockman's learned assessment. Thus, even if the court were to find the statements qualify under the hearsay exception in Rule 803(4), the prejudice from admitting such evidence would outweigh its probative value under Rule 403.

Videotaped Disclosure- Rule 803(5)

Defendant next argues that S.G.'s recorded interviews with the CAC should be admitted under the hearsay exception in Rule 803(5) for recorded recollections.

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been on the bench for nearly twenty years, primarily handling family law matters. He has served as an adjunct law professor at the University of Illinois College of Law teaching family practice law. He is frequently invited to speak at Illinois State Bar Association seminars on various family law issues and has published family law related articles in the Illinois Bar Journal and the Southern Illinois Law Journal. Some family law practitioners may consider him an expert on family law matters. *See* https://www.law.illinois.edu/faculty/profile/arnoldblockman ; *See also, for example*, Mary Schenk, *'Statewide Expert' With a 'Remarkable Disposition'*, The News-Gazette, Jan. 21, 2016, http://www.news-gazette.com/news/local/2016-01-21/statewide-expert-remarkable-disposition.html

Although the court has *not* found his ruling to have preclusive or controlling effect in terms of collateral estoppel, the court has found Judge Blockman's ruling in this case to be typically thorough, well-reasoned, and worthy of attention.

The government responds that, if Defendant calls S.G. to testify, they may not also admit her recorded interviews as substantive evidence. Further, the government argues that allowing in such a recording under the circumstances of this case would be unprecedented.

Federal Rule of Evidence 803(5) allows the admission into evidence an otherwise hearsay recorded recollection if that record: (1) is on a matter the witness once knew about but cannot recall well enough to testify fully and accurately; and (2) was made or adopted by the witness when the matter was fresh in the witnesses' memory; and (3) accurately reflects the witnesses' knowledge. Fed.R.Evid. 803(5); *United States v. Cash,* 394 F.3d 560, 564 (7th Cir. 2005). If admitted, the record may be read into evidence but may be received as an exhibit only if offered by the adverse party. Fed.R.Evid. 803(5).

Here, obviously, the statements are only admissible if S.G. testifies, and then may only be read into evidence, not received as an exhibit, because S.G. will presumably be Defendant's witness. First, as it pertains to the recorded interview with University of Illinois Police Department Detective Rachael Ahart, the court has reviewed the interview and Detective Ahart's report and summary of the interview. Detective Ahart concluded from the interview that S.G. was coached by Defendant. Upon review, the court agrees that S.G. was coached by Defendant. The court has serious concerns about S.G.'s credibility in this interview. S.G.'s answers at times could be equivocal and uncertain, and deferring to the judgment of the law enforcement professional who

conducted the interview, the court finds that its admission under Rule 403 would be unduly prejudicial, and run the risk of confusing or misleading the jury as to the actual issues pertinent to this case.

Next, concerning the CAC interview, even if the court found the interview to be admissible under 803(5), the Rule 403 analysis would preclude the court from admitting this evidence under the hearsay exception. For the same reasons articulated by Judge Blockman in his ruling, the court is deeply concerned about the credibility and trustworthiness of S.G.'s hearsay statements. Dr. Appleton and the police investigators all found that S.G. was likely coached by Defendant in reporting the abuse, and that, in all likelihood, the abuse did not occur. Particularly persuasive is the testimony and report of Dr. Appleton, which found that S.G. was likely not abused by G.G. and that Defendant coached S.G. to believe and report that she was sexually abused by G.G. and that, while Defendant likely believed G.G. did abuse S.G., her attempts to gather evidence involved interviewing and working with S.G. to the extent that they appear to have developed a shared psychosis where G.G is believed to have abused S.G. For those reasons, the court finds that admission of the recording under 803(5) would be more prejudicial than probative.

Residual Clause- Rule 807

Defendant next argues that all of the proposed hearsay evidence can be admitted under the residual clause in Rule 807. A proponent of hearsay evidence must establish five elements in order to satisfy Rule 807: (1) circumstantial guarantees of

trustworthiness; (2) materiality; (3) probative value; (4) the interests of justice; and (5) notice. *United States v. Moore*, — F.3d —, 2016 WL 3031047, at *2 (7th Cir. May 27, 2016). The court will get right to the heart of the matter: for the reasons stated above about the court's concerns with the credibility of S.G.'s hearsay statements, as expressed by Dr. Appleton, the state investigators, and Judge Blockman, and adopted by this court after thorough and comprehensive review of the offered state court evidence and the state court proceedings, the court believes the statements do not have the circumstantial guarantees of trustworthiness to be admissible under Rule 807, and thus are not admissible under this rule

Expert Witnesses - Buetow and Murphy

Defendant argues that Dr. Buetow and Murphy may be qualified as expert witnesses in the area of child sexual abuse and disclosures, and thus they may rely on S.G.'s prior statements as a basis for their opinion under Rule 704 that S.G. was sexually abused by her father.

Under Federal Rule of Evidence 702, a court may allow an expert witness to testify in the form of an opinion if the expert's specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue. Fed.R.Evid. 702(a). Whether to allow the testimony, however, is still subject to the Rule 403 probative value versus prejudice analysis. See *White v. United States*, 148 F.3d 787, 792-93 (7th Cir. 1998).

Defendant seeks to introduce, through the expert witnesses' testifying as to the bases for their opinions, the hearsay statements of S.G. alleging abuse. The court agrees with the government that this would be an improper circumvention of the court's prior evidentiary rulings finding that the admission of those hearsay statements would be improper due to concerns surrounding the statements' credibility and trustworthiness. See *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 703 (7th Cir. 2005).

Dr. Buetow and Murphy could testify as general experts in the field of child abuse, however, their testimony must be limited to generalizations about sexual abuse victims, and they may *not* testify as to any statements told to them by S.G. or reach any legal conclusion about the alleged abuse, including whether S.G. was in fact abused by G.G. See *United States v. Johns*, 15 F.3d 740, 743 (8th Cir. 1994) (qualified expert may inform the jury of characteristics of sexually abused children and describe the characteristics exhibited by the alleged victim but may not state an opinion that sexual abuse has in fact occurred). Further, without the hearsay statements of S.G., Buetow and Murphy have no support for their conclusions that S.G. was abused by G.G., and thus any statement to that effect would not be admissible in any matter.

Dr. Appleton's Report

Defendant has not cited a specific hearsay exception for the admission of Dr. Appleton's report, which she attached as Exhibit 10 to the filing. The court finds, however, that this report is credible, as was noted by Judge Blockman, and may be admissible by Defendant at trial if she so chooses.

Impeachment Under 613(b)

Defendant argues that if S.G., when on the witness stand, denies abuse occurred, Defendant would be entitled under Federal Rule of Evidence 613(b) to prove up, through extrinsic evidence of prior inconsistent statements, that abuse did occur. The government counters that, in so doing, the defense would be using S.G.'s prior out-of-court statements to prove the truth of the matter asserted, and thus would be impermissible hearsay.

As argued by the government, it is well established that a party may not call a witness for the sole purpose of impeaching her. *United States v. Kielar*, 791 F.3d 733, 744-45 (7th Cir. 2015). Defendant cannot simply call S.G. to the stand to impeach her with evidence that is otherwise inadmissible. In the government's brief, there is a presumption, and Defendant concedes that this is a real possibility, that S.G. is likely to deny that she was abused by G.G. However, merely because Defendant concedes there is a possibility that S.G. will deny abuse, does not mean that Defendant *knows* that S.G. will testify no abuse occurred and is therefore only calling S.G. to the stand to get before the jury the otherwise inadmissible impeachment evidence.

Here, S.G. will be Defendant's witness. If S.G. denies the abuse occurred, she will then for all intents and purposes be a hostile witness to Defendant who may be cross-examined and impeached with prior inconsistent statements. While the right to cross-examine an adverse witness is enshrined in the Sixth Amendment, such a right is not absolute, and the district court retains wide latitude to impose reasonable limits on the scope and extent of cross-examination based on concerns about problems such as harassment, prejudice, confusion of the issues, or interrogation that is repetitive or only marginally relevant. *United States v. Cavender*, 228 F.3d 792, 798 (7th Cir. 2000), citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *Dunlap v. Hepp*, 436 F.3d 739, 741-42 (7th Cir. 2006). "The Confrontation Clause guarantees only an opportunity to conduct a thorough and effective cross-examination during which the defense has a chance to discredit the witness, 'not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Cavender*, 228 F.3d at 798, quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

S.G. will be seven years old at trial, and was six when she made the statements with which Defendant will seek to impeach her. The court is going to exercise its discretion in imposing reasonable limitations on the scope and extent of the impeachment so as not to harass S.G., confuse the jury, or result in repetitive interrogation. As a guideline, the court will limit impeachment to general, as opposed to specific, questions. If S.G. testifies that she was not abused, counsel will be allowed to inquire, for example, if she reported to a doctor at Carle Clinic that she was indeed

abused. However, counsel will be instructed to move on once S.G. has answered the question to the court's satisfaction, and will not be allowed to inquire into details about what S.G. told the doctor. Further, the court will carefully monitor the cumulative nature of the impeachment, and once S.G. is impeached with what she told Defendant, or a doctor or police officer, defense counsel may not repeat the question in reference to what she told the CAC, Megan Murphy, etc. The court would note that the same restrictions will apply to the government on redirect examination, as it will similarly be limited to questions of a general nature in terms of rehabilitating S.G.

The court will endeavor to be flexible and is possibly willing to clarify the scope of permitted questioning if requested. While the court understands and appreciates Defendant's rights under the Confrontation Clause, the court also takes its role as gatekeeper seriously, especially when considering the witness in question is a mere seven years old; repetitive, prejudicial, confusing, or harassing impeachment will not be allowed.

IT IS THEREFORE ORDERED:

(1) Defendant's Motion to Conditionally Admit Evidence of Domestic Violence Under 18 U.S.C. § 1204(c)(2) (#21) is GRANTED in part and DENIED in part. Limited impeachment of the alleged physical and sexual abuse of S.G. by G.G. will be allowed by the court under Rule 613(b) as note in this Order. However, the evidence submitted by Defendant for substantive admission under the hearsay exceptions will

not be allowed. Defendant may have Dr. Buetow and Murphy testify as experts, but only in the manner proscribed in this order. Dr. Appleton's report will be admissible at trial.

(2) The parties are directed to file with the court, ten days from the entry of this order, briefs on whether or not it would be advisable for S.G. to testify via closed circuit television.

(3) This case remains scheduled for a final pretrial conference before this court on Friday, September 23, 2016, at 11:00 a.m.

ENTERED this 12th day of August, 2016.

s/ COLIN S. BRUCE
U.S. DISTRICT JUDGE

E-FILED
Wednesday, 30 November, 2016 03:00:16 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 15-CR-20057**
	)	
SARAH NIXON,	)	
	)	
Defendant.	)	

ORDER

Defendant, Sarah Nixon, was indicted on one count of international parental kidnapping, in that she removed a child outside the United States and retained that child outside of the United States with the intent to obstruct the lawful exercise of another person's parental rights, in violation of 18 U.S.C. § 1204 (International Parental Kidnapping Crime Act).

On August 18, 2016, Defendant filed a Notice of Expert Testimony (#34) regarding the testimony of Dr. Marti Loring for trial. On August 24, 2016, the government filed its Motion in Limine to Exclude Defendant's Expert or in the Alternative Request a *Daubert* Hearing (#39). A hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) was held October 31 and November 7, 2016.

For the following reasons, the government's Motion in Limine to Exclude Defendant's Expert (#39) is GRANTED and Dr. Loring is barred from presenting testimony in this case.

ANALYSIS

Defendant argues that Dr. Loring should be allowed to testify at trial that (1) Defendant suffers from chronic post-traumatic stress disorder (PTSD) that was present at the time of the offense and stemmed from events preceding the offense and (2) Defendant's actions were consistent with the actions of a hypothetical person in her situation who suffers from PTSD.

The government argues that (1) Loring's testimony lacks the necessary reliability of expert testimony; (2) her testimony is irrelevant; and (3) it is inadmissible under the Federal Rules of Evidence.

The Seventh Circuit has written:

> The admissibility of expert testimony is governed by Federal Rule of Evidence 702 and the framework established by the Supreme Court in *Daubert*. *Winters v. Fru–Con Inc.*, 498 F.3d 734, 741 (7th Cir.2007). Rule 702 allows the admission of expert testimony if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702. The district court, however, must act as the gatekeeper to ensure that the proffered testimony is both relevant and reliable. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147–49, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); Daubert, 509 U.S. at 589, 113 S.Ct. 2786; *Jenkins v. Bartlett*, 487 F.3d 482, 488–89 (7th Cir.2007). To determine reliability, the court should consider the proposed expert's full range of experience and training, as well as the methodology used to arrive a particular conclusion. *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir.2000). We give the court great latitude in determining not only how to measure the reliability of the proposed expert testimony but also whether the testimony is, in fact, reliable, *Jenkins*, 487 F.3d at 489, but the court must provide more than just conclusory statements of admissibility to show that it adequately performed the Daubert analysis, *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 608 (7th Cir.2006).

United States v. Pansier, 576 F.3d 726, 737 (7th Cir. 2009).

The court further stated:

> Under Federal Rule of Evidence 702 and *Daubert*, the district court must engage in a three-step analysis before admitting expert testimony. It must determine whether the witness is qualified; whether the expert's methodology is scientifically reliable; and whether the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue."

Myers v. Illinois Central Railroad Co., 629 F.3d 639, 644 (7th Cir. 2010), quoting *Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904 (7th Cir. 2007).

The Sixth Circuit has noted that "[r]ed flags that caution against certifying an expert include reliance on anecdotal evidence, improper extrapolation, failure to consider other possible causes, lack of testing, and subjectivity." *Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521, 527 (6th Cir. 2012).

As it pertains specifically to expert opinion on mental state in criminal cases, the expert can set out her medical and psychological knowledge regarding the mental disease or defect that may affect the defendant because this information helps the jury understand mental illness and its symptoms and effects, but she cannot say or give an obvious inference that she thinks that the mental illness clouded the defendant's ability to distinguish right from wrong because this kind of testimony would involve a legal conclusion (or more accurately a fact-law conclusion), and experts cannot make those. *United States v. Diekhoff*, 535 F.3d 611, 619 (7th Cir. 2008).

Qualifications

The court finds Dr. Loring is qualified in her field of traumatology. Dr. Loring's *curriculum vitae* indicates she received her Ph.D in sociology from Emory University in

1985 and that she is a Board Certified Expert in Traumatic Stress. Loring has been the director of the Center for Mental Health and Human Development in Atlanta, Georgia, since 1980, and has been a "forensic consultant" since 1990. She has also authored and presented numerous papers on trauma and abuse. During the *Daubert* hearing, Loring testified that she consulted with the United States Army in relation to trauma issues.

Based on Dr. Loring's CV, and her testimony at the hearing, the court finds that she is a qualified expert in the field of "traumatology" and diagnosing and counseling people with trauma-related issues.

Methodology

The court must now determine whether Dr. Loring's methodology is scientifically reliable. In her report, Dr. Loring stated that she used the following "trauma tools" to diagnose Defendant with PTSD: a Trauma Symptoms Checklist, the Impact of Event Scale-Revised, the Trauma Belief Inventory, and the clinician-administered PTSD Scale for DSM-5 known as "CAPS." Dr. Loring stated she also reviewed statements made to the police, by Defendant, G.G., A.G., and two forensic interviews done with S.G. Dr. Loring also interviewed "collateral witnesses," including domestic violence professional Lisa Little, Defendant's therapist Teri McKean, Defendant's father Dr. Lawrence Nixon, Defendant's aunt Pam Martin, Defendant's sister Anna Nixon, and Defendants' friends Monica Whalley, Georgia Kalavritinos, and Sheena McKenna.

Dr. Loring testified at the hearing that she relied upon the CAPS scale to assess

Defendant's PTSD. She testified that it is widely accepted and researched in the mental health profession. The court finds this to be true, as the National Center for PTSD at the Department of Veteran's Affairs website refers to CAPS as the "gold standard in PTSD assessment." See http://www.ptsd.va.gov/professional/assessment/adult-int/caps.asp (last visited November 29, 2016); see also *Boone v. Shinseki*, 2013 WL 344867, at *7, n.1 (Vet. App. Jan. 30, 2013). The court, therefore, finds that CAPS is a reliable methodology for assessing PTSD. However, the question still remains as to whether the methodology was properly applied. See *Daubert*, 509 U.S. at 593.

The government argues that Dr. Loring did not apply her own traumatology methods correctly. The government claims that Loring's methods are subjective and conclusory rather than the objective standards required for forensic evaluation, and notes that her techniques have not been subject to peer review and publication for use in a forensic context. Specifically, the government notes that Loring, at the hearing, could not identify the tools she employed or how she used them. Loring further testified that for an "excellent" psychosocial report she needs to hear from "all" the collateral witnesses, but the government points out that, according to Loring's own report, she only interviewed a few favorable witnesses and did not review relevant comprehensive psychological reports, such as those by Drs. Appleton or Herschberg.

The government further argues that Loring did not rely on third-party data, and as a result, acted as a "mouthpiece" for Defendant's "self-serving" story. Dr. Loring's interview, the government posits, was too subjective to produce accurate results.

Defendant responds that Dr. Loring's conclusions were supported by sufficient facts and data, based on the CAPS testing and the collateral witnesses consulted. The government's objections, Defendant argues, go more to weight of the evidence than admissibility, and can be addressed on cross-examination.

The court finds that, as it relates to traumatology and a clinical diagnosis of PTSD based on traumatology, Dr. Loring properly applied the CAPS test and trauma tools. Much of the government's criticism of Loring's methods focus on the subjectivity of the report, because it was based mostly on Defendant's self-reporting and the failure to interview contrary witnesses and take into consideration the psychological evaluations done by Drs. Appleton and Herschberg. However, as noted by Defendant, the Seventh Circuit has found that such concerns go more to the weight of the evidence rather than admissibility, and such shortcomings may be subjected to vigorous cross-examination. See *Walker v. Soo Line Railroad Co.*, 208 F.3d 581, 586-87 (7th Cir. 2000). Therefore, as Dr. Loring did use the CAPS test, the "gold standard" in diagnosing PTSD, and the government's criticism of the application of the test go more towards the limited facts upon which the conclusion is based, the court finds the methodology was properly applied such that it should be admissible. How much weight to give the assessment is up to the trier of fact.

Assisting the Trier of Fact

Having determined that Dr. Loring's assessment was based on an acceptable methodology, the court must still consider whether it assists the jury with the issues

involved in this case. See *Walker*, 208 F.3d at 587; *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000). However, the court is limited in this analysis to determining whether the expert testimony is pertinent to a relevant issue. *Smith*, 215 F.3d at 719.

The court finds that, even though Dr. Loring's testimony is based on an acceptable methodology as it relates to traumatology counseling and therapy, it is not relevant to the specific issues to be determined in this case.

The court finds deeply problematic the nature of the "theory of defense" being propounded by Defendant in the context of the nature of an affirmative defense. The court agrees with the government that, despite the best efforts of defense counsel in his argument, Defendant is advancing a defense that her mental state was altered and impacted at the time of her flight. Defendant claims she is not asserting a defense that she did not have the requisite mental state for an element of the offense. However, this "theory of defense" does just that. Ultimately, Dr. Loring would testify that Defendant was so mentally impacted by her PTSD that she felt she "had no choice" but to flee with S.G. to Canada to escape the Illinois family court's order awarding custody to G.G.[1] This would appear to negate the offense element of having "intent to obstruct the lawful exercise of parental rights." See 18 U.S.C. § 1204(a). Accordingly, Defendant has not followed the proper procedures for advancing an insanity or diminished capacity

[1] Moreover, the court wonders if Defendant is not advancing a diminished capacity defense, how Dr. Loring's testimony as to Defendant's purported mental state at the time of the offense is relevant.

defense. See Federal Rule of Criminal Procedure 12.2; see *United States v. Rinaldi*, 351 F.3d 285, 288-89 (7th Cir. 2003) ("Federal Rule 12.2 was developed to require a defendant who intended to present a defense of mental illness, insanity, incompetence or diminished capacity to provide notice to the government before trial.").

In either event, Defendant denies she is doing so. However, regardless of the manner in which Defendant attempts to characterize it, the court finds Defendant is advancing a diminished capacity/insanity defense.[2] Accordingly, even if she were allowed to advance this defense, Dr. Loring's testimony will not aid the trier of fact because Loring's analysis was focused on a different, unrelated mental aspect, that of recognizing a current mental state (at the time of the evaluation) amenable to treatment and therapy. Thus, Loring's testimony answers a fundamentally different question than the one at issue.

The court finds persuasive the testimony of Dr. Christofer Cooper, the government's expert in forensic psychology, at the *Daubert* hearing. Dr. Cooper is a licensed clinical psychologist and a board-certified forensic psychologist who has performed close to 2,000 forensic psychology exams. Cooper testified that Dr. Loring's assessment and diagnosis were done in the nature of a clinical diagnosis, more appropriate for use in a clinical or treatment setting, whereas a forensic evaluation

[2] Despite Defendant's claims to the contrary, the court could inject itself into Defendant's trial strategy and find that the Defendant's pleadings, including her notification as to Dr. Loring (#34), constituted a notification under Fed.R.Crim.P. 12.2. Nevertheless, for the reasons stated below, the Court would still prohibit Dr. Loring's testimony even if proper notice was provided.

combines the legal system and behavioral health science, and is an objective attempt to answer or help the court answer a very specific psycho-legal issue, such as sanity at the time of the offense.

Dr. Cooper testified that the forensic setting is different from the clinical setting. Dr. Cooper noted that in the clinical setting the focus is generally on treatment or to assist the patient in some fashion, such as through counseling or therapy and, while there could be a diagnosis, it would be for a clinical purpose. In the clinical setting the primary focus is on self-reported information by the patient, and the patient does not have much to gain beyond getting help or treatment for a specific issue. In comparison, in a forensic setting, the individual may have much to gain by being perceived in a certain way clinically or to be given a certain diagnosis or to have a clinical conclusion such as insanity proffered on their behalf. The same methodology might be used, but it is a fundamentally different assessment.

Further, Dr. Cooper testified that there is also a difference between a forensic psychological exam and a clinical evaluation in terms of drawing conclusions in a legal case. In a case like the instant case, the examiner should be performing a forensic evaluation, an objective assessment providing the most objective conclusions, while the trier of fact makes the ultimate determination.

In a clinical setting, the examiner focuses on the individual patient's worldview, the individual patient's experiences, and tries to find the best way to help and understand the individual patient.

In contrast, for forensic purposes, the examiner should specifically seek out information and go about methods that will assist the examiner in answering the court's questions.

The court finds that, based on the testimony of Dr. Cooper, Dr. Loring's testimony would not assist the jury with the facts at issue in this case. As noted above, Defendant is essentially attempting to advance a diminished capacity *defense*, not a "theory of defense." The "psychosocial" evaluation used by Loring to diagnose Defendant with PTSD, as explained by Dr. Cooper, is much better suited to a clinical setting. While Loring's testimony might help the jury decide if Defendant was suffering from PTSD on the date of Loring's evaluation, it would not help the jury determine the fact at issue, which is whether Defendant was suffering from PTSD on the date of the flight to Canada such that she could not appreciate the nature of her actions and form the intent to obstruct the lawful exercise of G.G.'s parental rights.

Dr. Loring's evaluation also did not take into account that this criminal trial will be a forensic setting, where an individual patient may have a strong motivation to manipulate or skew the evaluation in a way which benefits the patient. Rather than aide the jury, with the evaluation's underpinnings focused upon treatment and therapy, Dr. Loring's testimony will only serve to confuse the jury as to the pertinent facts at issue.[3]

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[3] By way of a home construction analogy, Dr. Loring is a fully competent electrician, well capable of correctly wiring a house in a workmanlike fashion. However, the construction task in question is the *plumbing* of the house, and thus, Dr. Loring's experience is of no use.

The court also agrees with the government that, if Dr. Loring were allowed to testify, much of the government's necessary cross-examination must focus on testimony and evidence that has already been barred by the court, such as allegations of abuse made by S.G. to health care providers, others, etc. This will further serve to confuse the jury as to the issues in the case and will place before the jury substantive evidence deemed unreliable by the court in its earlier rulings.

Even further compounding the likelihood of jury confusion, there is the danger of irrelevant, prejudicial information in the form allegations of abuse that are years, even decades, old being used to draw a connection with Defendant's mental state at the time of the alleged offense.

The court also agrees with the government that Defendant is confusing the nature of the affirmative defense available under 18 U.S.C. § 1204(c)(2) by intermingling this affirmative defense with the mental state of the crime itself, which will make it impossible for this court to properly charge the jury.

A justification defense, like the one asserted here by Defendant under § 1204(c)(2), excuses conduct otherwise criminal without controverting the evidentiary sufficiency of the government's proof of the elements of the underlying offense, and does not negate criminal intent when the required mental state is that the defendant acted knowingly. *United States v. Jumah*, 493 F.3d 868, 874 (7th Cir. 2007). On the other hand, an insanity or diminished capacity defense goes explicitly to the required mental state when the elements of the offense require the defendant to have acted with intent.

See *United States v. Madoch*, 935 F.Supp. 965, 969-70 (N.D. Ill. 1996).

Further, as part of her affirmative defense, Defendant must concede that she had intent to obstruct the law by fleeing with S.G., but that she only did so because she had a *reasonable belief* (as stated by Defendant on pages 3 and 10 of her Response (#40)) that S.G. was being abused by G.G. and only flight to Canada could protect her daughter. Dr. Loring's testimony, as stated at the hearing, completely muddies the waters in this regard, as she appeared to state that Defendant's PTSD made her act in a state of panic and irrationality, *i.e.* without a reasonable belief. Therefore, any testimony to this effect by Dr. Loring would be irrelevant (and contrary) to the affirmative defense and rather than assist the jury, would only serve to confuse the jury.

IT IS THEREFORE ORDERED:

The government's Motion in Limine to Exclude Defendant's Expert (#39) is GRANTED and Dr. Loring is barred from presenting testimony in this case.

ENTERED this 30th day of November, 2016.

S/ COLIN S. BRUCE
U.S. DISTRICT JUDGE

E-FILED
Thursday, 08 December, 2016 04:38:37 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 15-CR-20057**
	)	
SARAH NIXON,	)	
	)	
Defendant.	)	

ORDER

The government filed this Motion in Limine to Exclude the Testimony of Certain Proposed Defense Witnesses (#70) on December 5, 2016. Defendant filed her Response (#74) on December 7, 2016, followed by the government's Reply (#76) the next day. For the following reasons, the government's Motion (#70) is GRANTED in part and DENIED in part.

ANALYSIS

Dr. Virginia Chow

Dr. Virginia Chow is a Montreal psychologist who treated Defendant from December 2013 to February 2014, and diagnosed Defendant, based on Defendant's taking an online Web-Based Depression and Anxiety Test, with PTSD and depression. Defendant sought help from Chow in dealing with her stress over the divorce and anxiety over her daughter's revelations of abuse at the hands of G.G. Defendant acknowledges that, based on the court's prior rulings, Dr. Chow's testimony about Defendant's suffering from PTSD in 2013-2014 is inadmissible. Defendant is correct.

The court bars testimony from Dr. Virginia Chow for many of the same reasons that it barred the testimony of Dr. Loring.

Teri McKean

Defendant next seeks to present the testimony of Teri McKean. McKean is a licensed clinical social worker and met Defendant while employed as a counselor at ABC Counseling. McKean began providing mental health services to Defendant in May 2015, and, at the first session, diagnosed Defendant with PTSD. Throughout the Spring of 2015, McKean observed Defendant's mannerisms, including her hyperverbal tendencies and exhaustion due to family court proceedings.

Defendant seeks to introduce the testimony of McKean to counter the testimony of Cortez Gardner, who will testify that Defendant was "mouthing" the words on a recording in support of the government's position that Defendant coached S.G. on what to say. Defendant seeks to use McKean to show that Defendant truly believed and was incredibly anxious about and fearful of the allegations of abuse. Defendant claims that McKean will only testify to her observations as a lay person as to Defendant's stress and anxiety. McKean is different from Trevor Kendrick and Loring, Defendant asserts, because she observed Defendant in the months before her flight to Canada, and the testimony is relevant in that it will show that Defendant was not calmly accepting the progression of the family court case, but rather was upset and deeply concerned over the abuse allegations.

The court agrees with the government and Defendant that McKean cannot present any expert testimony in her capacity as a clinical social worker, which would include any sort of diagnosis of Defendant related to PTSD. The government also argues that McKean should not be allow to testify for the same reason that Kendrick was barred, namely that McKean, due to her status as an expert, cannot separate her "expert" testimony from "lay" testimony in the minds of the jury, which will know that she met and interacted with Defendant because of her status as a clinical social worker. The court has less concern with McKean than it does with Kendrick. First, there is more relevance to McKean's testimony, in that she observed Defendant *before* she fled to Canada, and it was very close in time to that flight. Further, the court found that, with Kendrick, the purpose of the testimony was to improperly bolster the testimony of S.G. Those concerns do not apply in McKean's case. However, the court will issue a limiting instruction to the jury that it is to consider McKean's testimony only as a lay person who observed and interacted with Defendant at that time. The court will also keep a very close eye on McKean's testimony to ensure that it is strictly limited to her observations of Defendant's demeanor and behavior, and it is not based on hearsay or other evidence previously excluded by this court's orders.

The court agrees with the assertions made by defense counsel in the Response that he will be able to craft direct examination questions that are proper, so that McKean's testimony does not go to the ultimate issue of the case. Further, as stated above, the court finds the subject matter of the testimony, as proffered by Defendant in

the Response, to be relevant to the issue of whether, at the time she fled with S.G., Defendant had a reasonable belief that S.G. had been the victim of abuse at the hands of G.G.

Victoria Fitzpatrick

Following the withdrawal of her counsel from the family court case in May 2015, Defendant reached out online for legal advice to a Facebook group called "One Mom's Battle," who suggested she contact Victoria Fitzpatrick, who may have advice based on similar family court experiences. Fitzpatrick told Defendant that she had just graduated from law school, although she may have still been finishing at the time of the conversations. Fitzpatrick provided legal advice to Defendant, such as the mistaken concept that Illinois did not have jurisdiction for the custody case. Specifically, Fitzpatrick consulted 750 Ill.Comp.Stat. 36/201 (West 2014), which provides:

> (a) [A] court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) this State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State.

Defendant argues that she believed that, based on Fitzpatrick's advice, because G.G. filed for divorce and custody in January 2012, Illinois lacked jurisdiction to hear custody case because S.G. was then living and had lived for more than six months in Quebec. Defendant argues that she reasonably believed Fitzpatrick's advice was accurate and thereafter consistently maintained that Illinois lacked jurisdiction.

The government argues that Defendant's belief is that of a "mistake of law," essentially that the Illinois family court did not have jurisdiction to adjudicate custody of S.G., and that mistake of law is no defense to criminal prosecution. Further, the government argues that it does not negate her intent to obstruct G.G.'s parental rights, which is an element of the offense.

Defendant responds that her belief is not mistake of law, but rather mistake of fact, in that she had a reasonable good faith belief, based upon Fitzpatrick's advice, that Judge Blockman could not confer lawful parental rights upon G.G., and that this belief negates the intent to obstruct lawful parental rights.

The court agrees with the government. While Defendant may have been "factually mistaken" as to whether the Illinois family court had jurisdiction over the custody case, that mistake, at its root, is clearly one of *law*. Fitzpatrick told her that, under Illinois law, Judge Blockman could not determine custody of S.G. Defendant believed her. She believed she was not interfering in a lawful court order because, under her mistaken belief, the law did not confer jurisdiction on the Illinois family court to decide the custody case. This is mistake of law, and generally, is not a defense in a criminal case. *Cheek v. United States*, 498 U.S. 192, 199-200 (1991); *Domanus v. United States*, 961 F.2d 1323, 1326 (7th Cir. 1992). Further, this is not even a situation where Defendant was relying on the advice of legal counsel, but, rather, someone she met over Facebook who was a law student, and not a licensed attorney. It is akin to getting legal advice from a gardener or plumber. Reliance on such legal advice is not a defense.

Attorneys Scott Dempsey and Anne Martinkus

Defendant states that Dempsey and Martinkus, who represented Defendant and G.G. in the family court proceeding, will be called to testify as to matters that occurred during the proceeding. Defendant states that neither will be called to testify to matters that fall within the attorney-client privilege, and that hearsay or other impermissible testimony will not be elicited.

The court is concerned about the propriety of calling these attorney witnesses, especially because, according to the government, Martinkus still represents G.G. Obviously, there are questions about privilege and strategy that would bar a significant amount of their testimony. Further, the court does not know what relevance their testimony would contain for this case. Defendant states that the attorneys are needed to testify "as to matters that occurred" during the state court proceeding, but does not identify what those matters are, nor their relevance to this case. Therefore, the court will not at this point bar Dempsey and Martinkus from testifying, but rather will reserve ruling until trial, when Defendant can make a proffer as to their testimony.

IT IS THEREFORE ORDERED:

(1) Motion in Limine to Exclude the Testimony of Certain Proposed Defense Witnesses (#70) is GRANTED in part and DENIED in part.

(2) This case remains set for a telephone status conference on Friday, December 9, 2016, at 1:30 pm.

ENTERED this 8th day of December, 2016.

s/ COLIN S. BRUCE
U.S. DISTRICT JUDGE

E-FILED
Monday, 19 December, 2016 02:52:30 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 15-CR-20057**
	)	
SARAH NIXON,	)	
	)	
Defendant.	)	

ORDER

Defendant has moved for Judgment of Acquittal (#98), asking the court to enter a judgment of acquittal as to the sole count in the Indictment (#7) pursuant to Federal Rule of Criminal Procedure 29(a). Rule 29(a) states:

> Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

Fed.R.Crim.P. 29(a).

Under Rule 29(a), the adduced facts are taken in the light most favorable to the government. *United States v. Chambers*, 642 F.3d 588, 592 (7th Cir. 2011). Motions for judgment of acquittal should only be granted where the evidence is insufficient to sustain a conviction. *United States v. Jones*, 222 F.3d 349, 351-52 (7th Cir. 2000).

Defendant's motion argues that the government failed to prove she removed a child from the United States with the intent to obstruct the lawful exercise of G.G.'s

parental rights. Defendant argues that, at the time she fled, G.G. did not have any "parental rights" with S.G., because he did not have the "right to physical custody" required under 18 U.S.C. § 1204(b)(2). Specifically, Defendant points to Judge Blockman's order of January 26, 2015, barring contact between G.G. and S.G. Thus, Defendant argues, because G.G. did not have the right to contact, let alone take custody of S.G., he could not have had "parental rights" under the statute that could have been obstructed by Defendant's flight to Canada. Defendant further argues that the statute envisions removal with an eye toward *future* rights in the retention provision, in that if a defendant flees prior to losing exclusive physical custody of the child, she is prohibited from retaining the child outside the U.S. once a new custody order has been entered. Thus, in order to violate § 1204's *removal* provision, Defendant argues, a person must remove the child with the intent to obstruct the lawful exercise of *then-existing* parental rights.

The government responds that the statute clearly defines parental rights as physical custody, including visitation rights, arising by operation of law, court order, or legally binding agreement. The government argues that examining Defendant's Exhibit 1 based only on the four corners of the document, it is clear that G.G. would continue to have visitation rights through Dr. Appleton. The government also notes that the custody case was in such a state of flux in the first half of 2015 that DCFS removed the child from Defendant's care and placed her with G.G. The government argues that the only impact of this temporary order was to temporarily limit G.G.'s access to S.G., by

agreement. The government argues the order did nothing to address G.G.'s lawful parental rights and, further, shows that G.G. still had lawful rights because it references visits with Dr. Appleton.

The court agrees with the government. The court has read the January 2015 temporary order by Judge Blockman, and finds that it is very limited in nature, concerning only an agreement to limit G.G.'s contact with S.G. in a certain way. The order clearly does not terminate or impact G.G.'s parental rights with regard to S.G. under the Illinois statute or the federal kidnapping statute at issue in this case. Indeed, as noted by the government, § 1204(b)(2) includes visitation rights in "parental rights," and Judge Blockman's January 2015 specifically contemplates G.G.'s visitation with S.G. in the presence of Dr. Appleton. The court notes and finds that Judge Blockman's order represents an extremely short *agreed* order between the parties to temporarily limit G.G.'s contact with S.G. for a brief period of time while another issue was addressed. It is not an order that terminates G.G.'s parental rights in any fashion.

Further, the court would note that, under the statute, the government has produced enough evidence for a reasonable trier of fact to find Defendant guilty of illegally *retaining* S.G. outside the U.S. with the intent to obstruct G.G.'s lawful parental rights. The evidence, taken in the light most favorable to the government, shows that, even after Defendant became aware of Judge Blockman's ruling awarding sole custody to G.G., she continued to remain in Canada with S.G., preventing G.G.'s access to her.

IT IS THEREFORE ORDERED:

Defendant's Motion for Judgment of Acquittal (#98) is DENIED.

ENTERED this 19th day of December, 2016.

S/ COLIN S. BRUCE
U.S. DISTRICT JUDGE

12

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

URBANA DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. SARAH M. NIXON, Defendant.	Case No. 15-CR-20057 IN VIOLATION OF: 18 U.S.C. § 1204

VERDICT

WE, THE JURY, FIND THE DEFENDANT, SARAH M. NIXON,

GUILTY OF INTERNATIONAL PARENTAL KIDNAPPING AS
(GUILTY/NOT GUILTY)

CHARGED IN THE INDICTMENT.

DATE: 12/20/16

s/Juror

s/Juror

s/Juror

s/Juror

s/Juror

s/Juror

s/Juror

s/Juror

s/Juror

s/Juror

s/Foreperson

FOREPERSON

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Central District of Illinois

UNITED STATES OF AMERICA
v.
SARAH M. NIXON

JUDGMENT IN A CRIMINAL CASE

Case Number: 15-20057-001

USM Number: 22121-052

AFPD Peter Henderson
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) 1 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1204	International Parental Kidnapping	7/13/2015	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/19/2017
Date of Imposition of Judgment

s/Colin S. Bruce
Signature of Judge

COLIN S. BRUCE, US DISTRICT JUDGE
Name and Title of Judge

5/22/2017
Date

DEFENDANT: SARAH M. NIXON
CASE NUMBER: 15-20057-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

26 Months

☑ The court makes the following recommendations to the Bureau of Prisons:

1. It is recommended that the defendant serve her sentence in a facility as close to her family as possible (by remaining at her current facility of incarceration in Moultrie County, Illinois), as determined by the Bureau of Prisons. 2. It is recommended that she serve her sentence in a facility that will allow her to receive psychiatric and psychological services.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: SARAH M. NIXON
CASE NUMBER: 15-20057-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

One Year

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☑ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the following conditions:

1. The defendant shall report to the probation officer in a reasonable manner and frequency directed by the court or probation officer.

2. The defendant shall follow the instructions of the probation officer as they relate to the defendant's conditions of supervision. Any answers the defendant gives in response to the probation officer's inquiries as they relate to the defendant's conditions of supervision must be truthful. This condition does not prevent the defendant from invoking her Fifth Amendment privilege against self-incrimination

3. The defendant shall permit a probation officer to visit the defendant at home or elsewhere between the hours of 6:00 a.m. and 11:00 p.m., unless investigating a violation or in case of an emergency. The defendant shall permit confiscation of any contraband observed in plain view by the probation officer.

4. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

DEFENDANT: SARAH M. NIXON
CASE NUMBER: 15-20057-001

ADDITIONAL SUPERVISED RELEASE TERMS

5. The defendant shall notify the probation officer at least ten days prior, or as soon as knowledge is gained, to any change of residence or employment which would include both the change from one position to another as well as a change of workplace.

6. The defendant shall comply with all orders, terms and conditions issued by Champaign County Court regarding matters of divorce or matters concerning your minor child, [redacted].

DEFENDANT: SARAH M. NIXON
CASE NUMBER: 15-20057-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$	$ 2,000.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☑ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
[redacted]		$2,000.00	

TOTALS	$ 0.00	$ 2,000.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: SARAH M. NIXON
CASE NUMBER: 15-20057-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 2,100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

argument that --

THE COURT: I'll tell you what. I'm going to give you about five minutes to look at it. I'm going to have to look up something back in chambers, and then I'll come back. So be back in five.

(Recess, 1:57 p.m. to 2:03 p.m.)

THE COURT: All right. We're back on the record.

Mr. Henderson, can I see a copy of Defendant's Exhibit 1?

MR. HENDERSON: Sure.

And, Judge, let me clarify. We asked for certified copies of a number of documents; and what the Circuit Clerk of Champaign did was she gave us all the documents, and then the certification is in the back.

THE COURT: That's fine.

MR. HENDERSON: I will give you the document.

THE COURT: We've looked online at most of these documents anyway --

MR. HENDERSON: That's right.

THE COURT: -- previously, so I know what they are; but if you had a hard copy, that would make it easier on me.

All right. And while I'm looking at this -- yeah, I recognize this -- you can go ahead and respond to

the government's motion.

MR. HENDERSON: So, I guess I'm confused by one of the things the government says -- and perhaps they can explain -- that they'll make an offer of proof that this order was made specifically for different purposes than what, what we've said.

But I think at the base of the disagreement on the law about what lawful parental rights are, "parental rights" are defined in the federal criminal statute. It's in Section 1204(b), and it says, "Parental rights, with respect to a child, means the right to physical custody of the child." And that can be -- that includes visitation rights, but it's "the right to physical custody of the child, whether joint or sole; and whether arising by operation of law, court order, or legally binding agreement of the parties."

So it doesn't mean, I think, as the government is suggesting, that all -- all parental rights, the right to decide where your child goes to school, what their religion is, et cetera. It means the right to physical custody of a child. That's what federal law says.

This order establishes a no-contact between [redacted] and [redacted] until further order of the Court. The -- our view of state law -- and I will confess: I'm not an expert on Illinois family law -- but our view of

the state order is that Judge Blockman is entitled to enter temporary orders, like the one that is entered there, pending the resolution of a custody case.

We are not claiming that Sarah was granted custody, that this in any way has do with Sarah's legal custody. But under federal law, what that document represents is that [redacted] did not have parental rights after that order was entered until the order of July 13th was entered because he did not have the right to physical custody of [redacted]. In fact, he was barred from having physical custody of [redacted].

So this is becoming a Rule 29 argument with regard to the removal; but the, in terms of the legal --

THE COURT: Wait, wait. Stop, stop. I'm trying to think about what you just said.

So are you arguing to me that this temporary agreed order by, between -- are you saying -- are you trying to tell me that you think this order limited or restricted G.G.'s, [redacted]'s, parental rights?

MR. HENDERSON: Under, under this federal statute, because the word "parental rights" is defined in the federal statute -- so I'm not talking about Illinois parental rights. That's a different matter. It's his -- I, I agree his parental rights were not terminated.

But, under the federal statute, he did not have

the right to physical custody of the child.

THE COURT: But that certainly could not have been Judge Blockman's intent. You're not trying to tell me that, are you?

MR. HENDERSON: But that's what, that's what he ordered. I mean, that -- and what frustrates me, I suppose, a little bit is part of the defense we have explained to the Court -- and the Court has barred and we're trying to respect that -- is that we cannot show that, for example, his December order was unlawful. Right? We're not going to get into that.

This order, I don't want to get into it, what his intent was; what, you know, what he was thinking when he, when he imposed it.

The order bars contact between [redacted] and his daughter. I don't see how --

THE COURT: I don't, I don't equate barring contact with revoking or restricting parental rights.

MR. HENDERSON: Well, it restricts the right to physical custody of the child, I think, as a matter of common sense.

THE COURT: Well, I disagree. But, okay, I understand what you're saying now.

MR. HENDERSON: So, so that's the legal argument.

You know, if you disagree on that, there are other uses for this exhibit. For example, we need to explain to the jury why Sarah remained in the United States for all that time.

THE COURT: Yeah, I --

MR. HENDERSON: We need to --

THE COURT: Let me cut to the chase.

MR. HENDERSON: Yeah.

THE COURT: I'm not -- I recognize this order. This is the order I thought it was. I'm not concerned with you using this exhibit; so, as far as it being totally banned, I'm going to deny the government's motion. I -- it's a part of -- it's a fact that took place in the case, et cetera.

My concern is more that I don't want the jury to be under the impression that somehow this order terminated, or restricted, [redacted]'s parental rights, because that's not the case.

And I understand what you're trying to do. You're trying to bootstrap what Judge Blockman did and say, "Yeah, but now because he did this activity, as far as federal law is concerned, he restricted [redacted]'s parental rights; so, therefore, it was all right for Mrs. Nixon to take off with [redacted]."

I don't think that's what the intent of this

was. There were other orders in place at the time, so it would be misleading; and for us to then start going through the other orders that Judge Blockman entered, we're now getting into exactly where I didn't want to be, which is two things. We're retrying the custody fight, which I am going to absolutely, once again, refuse to place before the jury; and we are, sort of, falling backwards into having the jury decide who is the better parent -- which one, who should have had custody -- which we're also not going to do.

I don't have a problem with you using this. But -- did I read that -- did you suggest a limiting instruction, Mrs. Peirson?

MS. PEIRSON: Your Honor, yes. And we can draft that and, and tender that to the Court.

But, basically, what we would -- you know, off the cuff, it would say something --

THE COURT: I see it. Let me read this real quick.

MS. PEIRSON: We also talked to Judge Blockman over the lunch hour. He's willing to come in to court in rebuttal and explain exactly what the circumstances of this order was and that it did not terminate or restrict it.

THE COURT: It seems like both sides are just

absolutely determined to bulldoze over me and head straight for a fight about -- you know, get back into the custody fight in State Court. That's not an issue. We're not going to have the jury decide matters of who should have been the better parent, who should have had custody when, et cetera.

I think -- well, number one, Mr. Henderson, I'm going to let you use this. But, number two, have you had a chance to read the government's motion? I should have asked you that right at the beginning. I'm sorry.

MR. HENDERSON: Basically, yes. I've read it quickly, but I did read through it. If there's a particular part --

THE COURT: All right. Do you take -- well, you probably do, now that I'm reading it and thinking about what you said earlier -- but do you take issue with that limiting instruction?

MR. HENDERSON: What page are we on?

THE COURT: I'm on page 4, and it reads, "The government respectfully requests a limiting instruction that states, as a matter of law, that Defendant Exhibit 1 does not terminate or restrict the lawful parental rights of G.G. from the time of this order through the award of custody, including on July 12th and July 13th."

As I read this order, I think that that is an

accurate statement of the law; and to the extent you're trying to bootstrap that order and then shoehorn it into federal law and say that this order, this temporary order, federally suspended G.G.'s parental rights, I'm not going along with it.

Well, tell me your part. I mean, I'm willing to give this limiting instruction and let you use the exhibit, because that way the jury will not be confused as to the scope of the order. But are you going to take issue if I use that limiting instruction?

MR. HENDERSON: I do object. I think that is a misstatement of the law.

And, again, when we're talking parental rights, there are two types of parental rights: the state parental rights and the federal parental rights. And I think we're in Federal Court. We're not relitigating the state case. We ought not to use terminology about state parental rights.

What we are talking about is: Did Ms. Nixon act with the intent to obstruct parental rights, as defined in federal law, which is the right to physical custody of the child?

So I do think that that would be a misleading instruction to the jury, and I think that it would not accurately explain the law.

THE COURT: All right. Mrs. Peirson, I haven't let you talk yet, and I know you're probably dying to say something.

MS. PEIRSON: Well, Your Honor, I think that counsel's argument is not persuasive to the Court because he ignores the rest of the definition of parental rights within the federal statute, which includes that parental rights with respect to the child means physical custody of the child, correct; whether it's joint or sole, including visitation rights. But the right to physical custody includes visiting rights and can rise by operation of law, court order, or legally binding agreement.

And so this "operation of law" definition has been defined by all of the international parental kidnapping law as referring to the state law that confers and determines parental rights, and that's -- that's our concern here.

That state law that defines what "operation of law" is was not implicated by this temporary order of January 26, 2015. It wasn't intended to be, and that -- the statutes that Mr. Henderson cites are not cited in the order. The order is completely silent as to custody. It is a restriction of [redacted]'s access by agreement based on a situation that Ms. Nixon created in this, in this

custody hearing that was, as the Court knows, highly contested.

So, that -- to argue that that order then became a custodi-- an order that determines custody of the child is just incorrect. You can look at the entirety of the docket and know that there was a trial pending to determine custody. You can look at the entirety -- that the orders that preceded it in December where the judge says, "Permanent custody is at issue, and I'm ordering Dr. Appleton to do a custody evaluation." That order, the temporary order, contemplates that the evaluation is still pending because it says that George can have visitation with Sophie in Dr. Appleton's presence.

So, it's clear that this ongoing decision as to custody is pending before the Court, and the Court is making a, a temporary decision by agreement of the parties. But it has nothing to do with custody. It just has to do with a cooling off period so that another allegation is not trumped up by Ms. Nixon.

THE COURT: All right. Well, I'm going to rule as follows. I think 18 USC Section 1204(b), as we're using the definitions that are applicable, I think that it does not contemplate, and does not include, the matters within this temporary order. They're outside the

scope of that definition in 1204.

I think that it is -- it was a temporary order entered in order to provide for an evaluation. It does not restrict his parental rights. It does not restrict his custody in terms of deciding who will have custody of the child. It simply restricts his ability to have contact with her outside the presence of Dr. Appleton. It's Helen Appleton. I think that's her name. I'm sure it is. I know Dr. Appleton. Helen Appleton.

And I think to overstate this would cause confusion to the jury. It would mislead the jury; and frankly, we'd be back in, then, having to draw out everything that happened leading up to this order and then after this order, which I don't want to do.

On the other hand, it is a piece of evidence which may have impacted activity taken by Mrs. Nixon -- excuse me, Ms. Nixon -- as part of her -- it could be a part of her defense if she decides to present evidence, or support the defense she's already raised a little bit in her opening statement.

So I'm not going to prohibit its use; but I will give a limiting instruction, should it be brought up to the father, that it in no way -- I'm going to follow the suggestion of the -- now I can't find it -- I'm going to follow the suggestion of the -- I'll draft something

up real quick, or I'll cut and paste something.

But I'm just going to tell the jury that, as a matter of law, this exhibit doesn't terminate or restrict the lawful parental rights of G.G. However, it does restrict his right to have temporary contact with -- it temporarily restricts the right for G.G. to have contact with S.G.

So that should address the issues and should, hopefully, mean we don't have to call Judge Blockman. Because I fear if we call Judge Blockman to start explaining law, then we're, once again -- like I said, everybody's -- both sides seem to be determined to get us into, back into the divorce proceedings and back into the custody fight, which we're not going to do.

Mrs. Pollock.

MS. POLLOCK: I just want to say one thing. I'm cross-examining [redacted], and I'm going to ask him, "There was an order entered where you couldn't see [redacted] in January of 2015." That's it. I'm not even going to enter the exhibit. I'm just going to ask him -- unless he denies it, in which case I'll show it to him.

But the other thing, I want to make sure that I make --

THE COURT: That's all you're going to ask him?

MS. POLLOCK: Yeah.

THE COURT: Where were you five minutes ago?

MS. POLLOCK: Being second chair.

What I wanted to make clear to the Court and the government is, you know, there's two story lines here. There's the allegations of abuse going all throughout the custody battle. And then there's --

THE COURT: Sure.

MS. POLLOCK: -- court proceedings going through the custody battle.

THE COURT: Well, you notice: I didn't say I adopt Ms. Peirson's argument because I don't know that -- she very quickly said "on trumped-up charges." I don't know if they were trumped-up allegations --

MS. POLLOCK: I know.

THE COURT: -- or not.

MS. POLLOCK: I know. So, but I want to let everybody know: I'm going to ask him questions about the reports that were disclosed; what happened after those reports; and, in certain cases, what was filed in response to those reports.

I am not making an argument, nor do we intend to argue, that he was abusing Ms. Nixon through litigation. I am simply asking about the incidents and what happened afterwards; and I'm only going to ask him, "And you couldn't contact her?" And then we could be

done, without all those limiting instruction garbage, if that's okay with everyone.

THE COURT: I wouldn't characterize it as "garbage."

MS. POLLOCK: Without the suggestion. We're not going to make that argument. If the Court ruled that, we're not going to make that argument.

THE COURT: Okay.

MS. POLLOCK: That's all I have to say. Thanks.

THE COURT: Ms. Peirson, are you satisfied, based on what Mrs. Pollock just said?

MS. PEIRSON: That's fine. If they're not going to make the argument that that temporary order, as a matter of law, terminated or restricted his parental rights, then we're satisfied with that. We'll just hold them to it, and we'll see what happens at closing arguments.

THE COURT: Well, I -- Mrs. Pollock appears in front of me almost weekly, so I trust her. When she tells me she's not going to do something, she typically doesn't do it.

MS. POLLOCK: And I will ask Mr. Henderson to, also, please not do it.

THE COURT: All right. Well, that solves that

issue, so let's --

MR. HENDERSON: Judge, can I, can I raise one more issue, just based on that ruling? I only raise it so that I know whether I need to think about it more or not.

The Government's Exhibit Number 2 is the December 2014 order prohibiting Ms. Nixon and [redacted] from leaving Illinois. I do not know if the government intends to argue that that is -- violating that order contributes to violating this statute. I would ask the Court to preclude that sort of argument. If the government is going to make that argument, I'll submit it in a written filing. I don't want to take up time --

THE COURT: I don't think they're going to argue that. That's not -- you're not going to argue that, are you?

MS. PEIRSON: I'm not even sure what the argument is, Your Honor. The only purpose of that order is that it goes to Ms. Nixon's knowledge and intent --

MR. HENDERSON: Okay.

MS. PEIRSON: -- that she was not supposed to leave, take the child out of the country.

MR. HENDERSON: Fine with me.

THE COURT: Does that answer your question?

MR. HENDERSON: That answered my question.

(Jury absent, 2:59 p.m.)

THE COURT: All right. Please be seated.

(Brief pause in proceedings.)

THE COURT: All right. Government's rested.

Mr. Henderson -- or I should have asked: Do you have any surrebuttal?

MR. HENDERSON: No, Your Honor.

THE COURT: All right. I don't know if it's been entered yet.

MS. POLLOCK: It just was about five minutes ago.

THE COURT: All right. So I have reviewed -- I reviewed the statutes. This is in regard to the defendant's Rule 29 motion. I decided this was important enough I was not going to simply rule orally, so I did a written motion -- or excuse me, a written order in response to the motion.

Let me add that, throughout this case, anytime there has been a tie, or even a suggestion of a tie, I have endeavored to rule in favor of the defendant. I'm doing everything I can to give, bend over backwards, basically, for the defense.

But not in this instance.

I don't -- I think that there is enough -- well, there is a lack of any case law. And I've said it

before: Between the two sides litigating this matter, we've already entered over 100 pages worth of orders. So I'm sure someone scurrying through the record could argue somewhere I've committed reversible error; and with the right panel, I'm sure I committed egregious reversible error. But I've endeavored to do things in favor of the defendant.

But in this case, in this motion, I really believe that it was not -- it was not a situation where I felt as though using the plain meaning of the statute and also the intent of the State Court proceedings, of which I'm aware through all of the previous pleadings and filings, that Mr. Henderson's motion was well taken. I continue to say that Mr. Henderson's been doing an outstandingly good job in his defense; but I'm sorry, Mr. Henderson, but this one, it was -- I think it's one of the few that you've lost so far during this trial. It was a close call.

All right. Now, are there any more jury instructions coming from the government?

MS. PEIRSON: No, Your Honor. We, we submitted those as directed on Friday and emailed those to Mr. Kelly on Friday evening.

THE COURT: Right.

MS. PEIRSON: That's it.

THE COURT: Nothing else has come up that you're going to add supplement, based on the evidence we've heard?

MS. PEIRSON: I could come up with something if Your Honor --

THE COURT: No, no. Thank you.

MS. PEIRSON: Okay.

THE COURT: How about you, Mr. Henderson?

MR. HENDERSON: No, Your Honor.

THE COURT: All right. Here's what I propose to do. We're going to finalize the jury instructions in chambers, and I will get those on file promptly. Why don't we try to have our -- I'm going to ask everybody to be back at 9:00 tomorrow morning. We'll do the jury instruction conference. We can probably get it done in 30 to 45 minutes. And then it takes time to make the copies, so I'll tell the jury to come back about 10:10 and argue about 10:15.

That being said -- let me check my notes. All right. The two of you in your openings took roughly a half an hour. We're looking at closings, probably, about an hour total?

MR. HENDERSON: With both of us?

THE COURT: Both of you.

MS. POLLOCK: For each of them.

MR. HENDERSON: For each.

THE COURT: Well, I'll start with you.

Mrs. Peirson, how long do you think your closing and rebuttal will take?

MS. PEIRSON: Your Honor, I think that, for both the first close and rebuttal, it will be somewhere between 45 minutes to an hour all together.

THE COURT: Okay. That's what I thought.

So, Mr. Henderson, you would take about?

MR. HENDERSON: 45 minutes, I would think.

THE COURT: All right. So an hour and 45. Takes me about 15, 20 minutes to read the instructions. So --

(Brief pause in proceedings.)

THE COURT: -- 12:30, that's fine. They can take a late lunch; but that way, we're all done in the morning. All right.

So what I'm going to do is bring them back in here. Tell the jury to come back here at 10:10. We'll start the arguments at 10:15 with me reading the instructions. I'd like everybody here to be back at 9:00 for us to do the jury instruction conference.

You're standing, Mrs. Peirson.

MS. PEIRSON: Just a point of -- if I could ask a question. Is it possible at all to preliminarily

discuss the jury instructions? I think it's going to impact how we prepare our closing arguments, which we'll be doing tonight. And I don't know if there's any instructions that, maybe, the Court has held on reserve or that are at issue.

I don't want to pull them into a PowerPoint presentation to present to the jury because I'm assuming we'll go from jury instruction conference to instructing the jury to closings, and I'd like to be able to make those preparations tonight. And if there's anything that's controversial, I'll pull it out of my presentation.

THE COURT: That's fine. Let me talk to my law clerk, Mr. Kelly, and find out how far along we are.

The only instruction of which I know -- because most of the -- I'll term them as "controversial instructions." Most of them, the two sides have now agreed, in going through the instructions. I haven't seen any that should be that, that much in controversy.

(Brief pause in proceedings.)

THE COURT: All right. Well, Mr. Kelly has just advised me that we'll probably have copies made in about ten minutes for all the attorneys, so we can do the jury instruction conference then.

If you want to be thinking, Ms. Peirson, in

response to your inquiry -- and, Mr. Henderson, in response to what Ms. Peirson just asked me -- the only instruction that I'm concerned about is probably nothing that either one of you were thinking about, which is -- there's a discussion in there; it's been renumbered; all of them have been renumbered as Court's instructions, but I'll point it out to you -- concerning what defines "custody" and "parental rights."

And as I thought how to craft that instruction appropriately, it occurred to me: That's not a question for the jury. That's -- as Mr. Henderson correctly pointed out, that's a question of law. And I'm not sure why both sides wanted that instruction in there because it's only going to confuse the jury. If they ask me questions about whether or not he had custody or not, that's not for them to decide. That's a matter of law. If Mr. Henderson would have prevailed, we'd be done. So I'm not sure why that instruction was added. It's, it's a legal question that I decide, and I've decided in this instance to let that matter go on to the jury. I did not direct a verdict based upon that.

So be thinking about that because I thought about it all over lunch, and I couldn't figure out why that instruction would be included other than to create confusion. And if you talk -- either side talks me into

leaving that instruction in there, as soon as we get a question from the jury, you will get this stern look from me, and you can write me an apology later saying, "Yes, we shouldn't have sent that in there. All we did was create confusion for the jury."

So, anyway, we're making copies. We'll do the jury instruction conference, I guess, now; and I'll tell the jury to be back at the regular time tomorrow.

Any objection to that, Mrs. Peirson?

MS. PEIRSON: No, Your Honor.

THE COURT: Mr. Henderson?

MR. HENDERSON: No. That's fine.

THE COURT: All right. Let's bring them back.

(Brief pause in proceedings.)

(Jury present, 3:10 p.m.)

THE COURT: Please be seated.

All right. The government's rested. I have to go through the exhibits with the parties in your presence. So let's -- we're going to do that really quickly.

The exhibits I have admitted on behalf of the United States are Exhibits 1, 2, 3, 4, 5, 6, 6A, 6B, 8A, 8E1, 8E2, 8F1, 8F2, 8F3, 8G, 8B-1, 9A, 9B, 9C, 9D, 10, 10A, 11, 12A, 12B, 12C, 12D, 12E, 12F, 12G, 13, 13A, 14, 15, 16, 18, and 19.

Is that correct, Mrs. Peirson?

MS. PEIRSON: Yes, Your Honor.

THE COURT: Mr. Henderson.

MR. HENDERSON: Yes.

THE COURT: Okay. We'll give that as modified.

MS. PEIRSON: And, Your Honor, just noting for the record the government's particular objection to this particular instruction as far as the prior pleadings that we filed with, regarding the analysis that the words "reasonable belief" should be inserted into the statute and "would occur."

THE COURT: Yeah. For the reasons the Court already entered, that objection is overruled; and this instruction will be given as modified.

All right. So now we're up to 27? Yes. We're in the 7 series of pattern instructions, so these are all pretty routine. I'm more looking for typographical errors.

Any ob-- you did not object to 26, Mr. Henderson?

MR. HENDERSON: That's correct.

THE COURT: Mrs. Peirson, you didn't either?

MS. PEIRSON: No, Your Honor.

THE COURT: All right.

27.

MS. PEIRSON: No objection.
MR. HENDERSON: No objection.
THE COURT: Given.
28.
MS. PEIRSON: No objection.
MR. HENDERSON: No objection.
THE COURT: Any objection?
MR. HENDERSON: No objection.
THE COURT: 29.
MS. PEIRSON: No, Your Honor. No objection.
MR. HENDERSON: Well, there's -- I suppose we've got a tricky issue because the indictment charges either -- two means of committing this offense. "Removing" or "retaining" are two separate elements -- I think they're probably elements -- and so we may need an instruction on unanimity as to which of the elements the jury finds beyond a reasonable doubt.
(Brief pause in proceedings.)
THE COURT: Well, there's no pattern instruction that I can see that would address that. Do you have a particular instruction in mind, Mr. Henderson?
MR. HENDERSON: Well, here's --
MS. PEIRSON: Your Honor, if I may respond to Mr. Henderson.
THE COURT: Sure.

MS. PEIRSON: The indictment charges two different theories of proving the first element. The first element is either the defendant removed or retained the child. And so there's two different theories here. And this instruction, supported by the case law cited, tells the jury that they don't have to agree unanimously on which theory they go to, just that the element is satisfied as a whole.

So the first element is either she removed or she retained the child. That is the first element of the offense. And there can be multiple different factual reasons that support that. They don't have to be unanimous as to all of those factual issues or unanimous as to those theories, just that the first element is satisfied. That's the state of the law.

Just like in a fraud case, there can be multiple different fraudulent acts as long as they believe that the scheme to defraud has been satisfied.

MR. HENDERSON: Your Honor, --

THE COURT: Go ahead.

MR. HENDERSON: -- our position is these are elements. These are alternate elements, meaning they consist of different crimes.

For example, you might have problems, for example, in proving venue, depending on whether you talk

about removing a child from a particular place or retaining a child outside of the United States.

So I don't think they charge the same crime. Certainly, the government's entitled to charge alternative elements in an indictment. But my sense is that -- and this -- you know, again, it's important because of the Rule 29 argument that we've made that we think there's no evidence that they removed the child. And so if the jury, half the jury thinks, "well, we think she removed the child" and half thinks, "well, she retained the child," then I think, you know, if we're right on Rule 29, this is going to come right back down here because we won't have unanimity as to a particular element.

So, but, no, Ms. Peirson's absolutely right. If these are means, then that instruction is just fine. It's just our position these are elements given the wording in the statute that it's "knowingly removed the child from the United States" or different act, "knowingly retained the child outside of the United States." Then crafting -- so after we make that threshold decision, we can figure out if we need to craft an instruction or not.

(Brief pause in proceedings.)

MS. PEIRSON: Your Honor, if I may.

THE COURT: Give me a second. I'm reading.

(Brief pause in proceedings.)

THE COURT: Well, if this was a fraud case, I would be very comfortable giving this instruction. I've handled many fraud cases in the past, and I know that this is correct.

Does either side have any authority as to whether or not those are elements?

MR. HENDERSON: No. Because this is Section 1204.

THE COURT: And I certainly appreciate that. Thank you very much. Like I said before --

MR. HENDERSON: So, so I think their analogy as to fraud cases and, you know, for example, aiding and abetting or attempts, you know, substantial steps, et cetera -- "elements" versus "means" is featured prominently in the sort of Johnson cases and --

THE COURT: Correct.

MR. HENDERSON: -- Mathis and everything.

To me, this seems like an Illinois aggravated battery statute, for example, where the government or the state could charge "on this day, so-and-so made contact of a provoking and insulting nature and caused bodily harm to this person."

And that, those are means -- we know that -- in

the Seventh Circuit. I'm sorry, I don't mean means. Those are elements.

THE COURT: Those are elements, not means.

MR. HENDERSON: Yes, exactly.

And so you can charge them together, but you would need unanimity on them. I see those as separate acts, just as I see these as separate acts. They are separated by an "or."

So as opposed to, for example, the kidnapping statute, 1201, which has, you know, "abducts, kidnaps, inveigles," et cetera, although I suppose there's probably an "or" there as well.

THE COURT: There is.

MR. HENDERSON: So --

MS. PEIRSON: I can give the Court another example. In, for example, in a production of child pornography case, which the Court has dealt with plenty of those, the statute under 2251 gives three options for jurisdiction. And when we instruct the jury, we say that the Court -- the jury has to determine that there was a connection to interstate commerce.

And there's three ways that they can determine that. They can determine that because the material that was used traveled in interstate commerce, or that the defendant reasonably knew that the images would be

transmitted in interstate commerce, or that the images actually did -- were transmitted in interstate commerce. There's three different ways jurisdiction can be established; and each of those ways are outlined in the jury instruction and given an "or." And that's a pattern instruction that the Seventh Circuit gives.

In this case, there are two different ways that the defendant can cross an international border affecting the interstate commerce element that brings us here to Federal Court. Either she removes the child and takes the child outside of the United States, or she retains the child outside of the United States who had been in the United States.

So it's a jurisdictional hook. It's the first element of the statute. There's two different ways that it can be accomplished, two different means of accomplishing the jurisdictional aspect. It's not two separate elements that the government has to prove separately. Two different theories; and they can all decide that both of them were, were accomplished or one or the other.

THE COURT: I -- all right. Once again, we're in uncharted territory. I have to go based on what I know from Johnson and some other cases recently talking about "means" versus "elements."

I am persuaded by Ms. Peirson's argument. I was waffling on the fraud analogy; but now reading the, the example she just gave related to child pornography, I'm persuaded by that. I think these are -- I think this instruction is correct.

But as you pointed out, Mr. Henderson, it's 1204; and we have, really -- the Seventh Circuit can go through and rake me over the coals and explain why it was obvious that it wasn't, but I think it's -- no, they don't do that; they're usually pretty nice to me.

MR. HENDERSON: We're on the record, Your Honor.

THE COURT: Yeah, I know. I don't mind saying that. I've been up there before, and I had a really nice time. So I -- even when I've been reversed by some people in opinions authored by some of the judges who are known for being harsh, I've actually thought that the opinions were pretty well written; and I didn't feel like I was being subject to any kind of a personal attack. So I don't know. Maybe they like me up there. I don't know. I don't mind. If I've made a mistake here, I've made a mistake.

I think for, like, the fifth time so far this trial to say, look, this -- there's so little case law on this; I've been having to fall back on all of -- on

analogies, on other appropriate cases, and case law on how to analyze and determine things. And a lot of the previous rulings I made, they were abuse of discretion standards. And as all of us know from several cases, you can have the same -- you can have two different judges looking at the same facts come up with exact opposite conclusions. And they can both be reasonable and not abuses of discretion, as long as they're explained as to why the judge is doing it.

That's why in this case, more than any I've -- more than any criminal case, I've had so many written orders. I want the record to be clear as to the logic behind what I'm doing so I'm not just flippantly doing things.

Like I said before, this time I'm ruling in favor of the defendant when it's a close call.

This one, hey, once again, like Mr. Henderson says, 1204, we're in unchartered territory, I like that -- I'm persuaded by that child pornography example of Mrs. Peirson, so we're going to go with -- Court's 29 will be given over objection of Mr. Henderson, or the defendant.

All right. The last one is the verdict form. Everything on there looks correct.

Any objection?

MS. PEIRSON: No objection.
THE COURT: Mr. Henderson.
MR. HENDERSON: No. I have no objection.
THE COURT: All right. Given.
MR. HENDERSON: Well, no, wait a second.
THE COURT: Is there an error?
MR. HENDERSON: It should be "charged in the indictment," not "charged the indictment."
MS. PEIRSON: Oh, sorry.
THE COURT: I commend Mr. Henderson, once again, for being a very sharp attorney. "Charged in the indictment." We'll add the word "in" to that.
So given as modified.
All right. Any instructions the government's has proposed that I have left out? Or anything else I need to address with the instructions?
MS. PEIRSON: Nothing from the government, Your Honor.
THE COURT: Mr. Henderson, preserving -- I think we can call your Rule 29-related arguments, preserving those as to these instructions, anything else you think I've not given?
MR. HENDERSON: No, no. Thank you, Your Honor.
THE COURT: Okay. All right.
Anything further on behalf of the

United States?

MS. PEIRSON: Just a question. Will the instructions be numbered in this way when they're given to the jury as, you know, Court's Instruction 10 or -- I guess we did take one out.

THE COURT: I have no idea what you're asking me.

MS. PEIRSON: Well, I'm just wondering if, if -- for example, as we're preparing our closing arguments, if we're referring to the Court's instructions, or the instructions of law that they're given, can we refer to them by the number that's on there? Or will they not be numbered for the jury?

THE COURT: Will the jury see the marked copy of the instructions?

MS. PEIRSON: No, no, no.

Will -- the copy that the jury gets, will it have the instruction numbers at the bottom.

THE COURT: No. It doesn't say Court's Instruction Number anything. It doesn't say -- there's --

MS. PEIRSON: So they're unnumbered. They're just instructions.

THE COURT: There's page numbers on some of them. I mean, usually we put page numbers at the bottom.

MS. PEIRSON: Okay.

THE COURT: Oh no, we don't. I've actually been told that we do not. The clean copies are totally clean. There are no page numbers at the bottom.

MS. PEIRSON: Understood, Your Honor. Thank you.

THE COURT: That question was so out of left field you totally threw me.

Anything else?

MS. PEIRSON: No.

THE COURT: Mr. Henderson? Want to renew your Rule 29 motion for the umpteenth time?

MR. HENDERSON: I do, actually, just to make it clear, because I'm not sure that I have done at the close of all the evidence. I can renew that motion for the reasons I've already given. Thank you, Your Honor.

THE COURT: I just wanted to make sure it was on there, and it's correct; it has been made multiple times, and I entered a written order on that now. And as I said, we'll -- it's always nice being the first court in the circuit to address a statute with an affirmative defense where the plain meaning of the statute isn't much help for a lot of these issues.

All right. I'll see everybody back here at 9:10 tomorrow morning. Have a good night.