No. 13-1441

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JEAN CLAUDE KODJO TOVIAVE, Defendant-Appellant.	Appeal from the United States District Court, Eastern District of Michigan CR. NO. 11-20259 HONORABLE ARTHUR J. TARNOW

BRIEF OF APPELLANT JEAN CLAUDE KODJO TOVIAVE

Christopher Keleher
The Keleher Appellate Law Group
115 South LaSalle Street, Suite 2600
Chicago, Illinois 60603
(312) 648-6164
Attorney for Appellant

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(1) and Sixth Circuit Rule 34(a), Appellant Jean Claude Kodjo Toviave respectfully requests that the Court permit oral argument. This direct criminal appeal involves complex factual and legal issues, and the decisional process is likely to be aided by oral argument.

JURISDICTIONAL STATEMENT

Jurisdiction in the Eastern District of Michigan was premised on 18 U.S.C. § 3231, as Toviave was charged with offenses against the United States committed within the Eastern District of Michigan. A second Superseding Indictment was filed charging Toviave with one count of Fraud and Misuse of Visas in violation of 18 U.S.C. § 1546; four counts of Forced Labor in violation of 18 U.S.C. § 1589; one count of Trafficking in Persons for purposes of Slavery or Peonage in violation of 18 U.S.C. § 1590; one count of Bringing in and Harboring Aliens in violation of 8 U.S.C. § 1324; and one count of Mail Fraud in violation of 18 U.S.C. § 1324. (Indictment, RE 50, Page ID # 233).

On February 24, 2012, Toviave pled guilty to Fraud and Misuse of Visas, Mail Fraud, and Harboring Aliens. (Transcript, RE 48, Page ID # 199). The Trafficking count was dismissed before the trial. (Transcript, RE 84, Page ID # 465). The jury found Toviave guilty of four counts of Forced Labor on October 30, 2012. (Verdict, RE 68, Page ID # 353). The district court sentenced Toviave on April 3, 2013, and entered its judgment of conviction that day. (Judgment, RE 76, Page ID # 444). Toviave filed a timely notice of appeal on April 3, 2013. (Notice, RE 78, Page ID # 452). The United States Court of Appeals for the Sixth Circuit has jurisdiction via 28 U.S.C. § 1291, 18 U.S.C. § 3742(a), and Rule 4(b) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE CASE

This is a direct appeal of a conviction for Forced Labor. Jean Claude Kodjo Toviave helped family members in Togo by having some of their children live with him in Michigan. Toviave's wife Helene procured false documents and brought the four children to Michigan. An investigation by Child Protective Services ("CPS") and the Sheriff's Office revealed Toviave was abusing the children. Immigration concerns prompted the involvement of federal law enforcement.

CPS removed the children. Told he had to pick up removal papers, Toviave went to the CPS office, where he was instead Mirandized and interrogated by a detective. Toviave admitted hitting the children and was eventually charged with a series of federal offenses. Toviave pled guilty to Fraud and Misuse of Visas, Mail Fraud, and Harboring Aliens. (Transcript, RE 48, Page ID # 199). A jury found him guilty of four counts of Forced Labor. (Verdict, RE 68, Page ID # 353). He was sentenced to 135 months imprisonment. (Judgment, RE 76, Page ID # 444).

ISSUES PRESENTED FOR REVIEW

I. Toviave was invited under false pretenses to a custodial interrogation. After being Mirandized, Toviave asked when he could invoke his right to an attorney. Detective Boivin instructed Toviave he had to speak with Inspector Ficklen regardless of his desire for counsel. Boivin also told Toviave he could invoke his *Miranda* rights after answering questions and that Toviave would benefit if he cooperated. Toviave signed the *Miranda* waiver and incriminated himself.

Were Toviave's statements obtained in compliance with the Fifth Amendment?

II. Toviave worked two jobs, enrolled the children in school, hired an English tutor, and provided Gaelle with a car. Toviave did the yard work and shoveling while the children did the laundry, cleaned the house, and most of the cooking. The children also did extra schoolwork at Toviave's insistence.

Did the prosecution establish Toviave was guilty beyond a reasonable doubt of forced labor when the children's "work" consisted almost exclusively of academics and household chores?

III. Toviave and Helene brought four relatives from Togo under a tradition of helping extended family members. Forced labor is a specific intent crime and Toviave sought to argue he did not act "knowingly." Yet Toviave could not present his defense because the prosecution blocked any mention of culture or custom.

Did the district court err in granting the prosecution's Motion *in limine* regarding the "culture or custom" defense?

IV. Toviave plead guilty to Fraud and Misuse of Visas, Mail Fraud, and Harboring Aliens. He sought to keep the guilty pleas from the jury because they eviscerated the presumption of innocence.

Did the district court err in denying Toviave's Motion to exclude his guilty pleas?

STATEMENT OF FACTS

Jean Claude Kodjo Toviave

Toviave came to America from Togo on February 14, 2001. (Transcript, RE 51, Page ID # 283). He entered via a one-year B-2 visitor visa. Deteriorating political circumstances in Togo forced Toviave, a political dissident, to seek asylum. (Transcript, RE 93, Page ID # 1309; PSR at 12). His request was granted on March 27, 2002.

Toviave did not learn English until he came to America, and English is his fourth language. (Transcript, RE 48, Page ID # 206). Toviave is college educated, holding the equivalent of a Master's degree. (Transcript, RE 48, Page ID # 208). Toviave held two jobs. First, Toviave worked as a janitor at the University of Michigan Hospital. (Transcript, RE 89, Page ID # 931). His shift was from 3 p.m. until midnight. (Transcript, RE 89, Page ID # 1049). He also worked as a tennis instructor. (*Id*.). As such, Toviave was rarely home. (Transcript, RE 87, Page ID # 735).

Helene Adoboe

Toviave was married to Helene Adoboe. (Transcript, RE 90, Page ID # 1051). They had a tribal marriage and a civil ceremony in Togo in 1997. (*Id*.). Two years after Toviave was granted asylum, Toviave requested that Helene and four children he claimed as his join him. (Transcript, RE 90, Page ID # 1040).

That request was granted on October 25, 2006. (*Id*.).

The four children—Gaelle, Rene, Kwami, and Kossiwa—are also from Togo. (Transcript, RE 86, Page ID # 518-21). While not Toviave's biological children, Gaelle, Rene, and Kossiwa are related to him; Kwami is related to Helene. Further, Gaelle, Rene, and Kwami are cousins. (Transcript, RE 86, Page ID # 520).

The children were sent with their parents' approval. (Transcript, RE 86, Page ID # 514). Helene, posing as the children's mother, secured forged travel documents for the children. (*Id*. at 515). The documents had fictitious names and birth dates, which the children used while living in Michigan. (*Id.*). Helene and her brother Maurin also took pictures with the children to convince immigration authorities they were a family. (*Id*. at 519-20). Helene and the children stayed together for a month in Togo. (Transcript, RE 90, Page ID # 1051). The children then returned to their homes for a month. (*Id*.). After that, the children and Helene lived in Benin for seven months until the travel visas were issued. (*Id.)*. Helene explained that it was normal for members of the same extended family to assist their relatives. (Transcript, RE 90, Page ID # 1055).

While Helene brought the four children from Africa to Michigan, she was never charged for her actions. (Transcript, RE 90, Page ID # 1057). Immigration

authorities also looked the other way because she assisted in Toviave's prosecution. (*Id*.).

Toviave and the Children

Toviave, Helene, and the four children lived together in Ypsilanti, Michigan. (Transcript, RE 87, Page ID # 702). However, Helene separated from Toviave in 2008, leaving Toviave responsible for the children and the house. (Transcript, RE 87, Page ID # 734).

Toviave enrolled the children in school and bought them school supplies. (Transcript, RE 87, Page ID # 711-12). The school bus picked the children up at 7:10 a.m. (Transcript, RE 87, Page ID # 738). Toviave required the children to be at the kitchen table at 5:30 a.m. to do homework. (*Id*. at 710). He was adamant about academics, insisting to teachers that the children "need to be working and progressing forward with their education." (Transcript, RE 90, Page ID # 1082).

Additionally, the children were responsible for laundry, dishes, and cooking. (*Id*. at 39). They vacuumed and washed Toviave's car a few times a month. (Transcript, RE 86, Page ID # 543). Toviave, who had two jobs, did the shoveling and yard work. (*Id.* at 546). Helene stated that "every Saturday they had to do their house cleaning in the apartment." (Transcript, RE 90, Page ID # 1042).

Helene admitted "the chores, the work that the children did, they would also do in Togo." (Transcript, RE 90, Page ID # 1062).

In addition to playing soccer, the children exercised with Toviave. (Transcript, RE 87, Page ID # 745). The children also visited Belle Isle, the mall, and the zoo. (Transcript, RE 87, Page ID # 747, 750, 754). Finally, all of the children had keys to the house. (Transcript, RE 86, Page ID # 619).

Gaelle Assilenou

Gaelle is a cousin of Toviave. (Transcript, RE 86, Page ID # 514, 526). Gaelle described the living arrangement as initially pleasant. (*Id*. at 531). But Toviave's demeanor changed as he began yelling and hitting the children. (*Id*. at 532-34). Using the wrong paper for homework, not allowing Helene to help with grooming, and a lit burner unattended all resulted in Gaelle being hit. (*Id*. at 532-38). Toviave used his hands, an ice scraper, or a plunger stick when he struck her. (*Id*. at 534, 538-39).

Gaelle babysat Toviave's biological son, J.C., who lived with his mother Krissy Nix. (*Id*. at 546). She also watched the children of Toviave's friend Rosalinda Fernandez, but was not given an allowance for her efforts. (Transcript, RE 86, Page ID # 549). However, Toviave gave Gaelle a bicycle. (Transcript, RE 86, Page ID # 542). He taught her how to drive a car and gave her a car that she

used every day for school. (*Id*. at 560). She also used the car to take the children to the park. (*Id*. at 756).

Gaelle expressed interest in running on the school cross-country team. (Transcript, RE 86, Page ID # 604). Toviave bought her new shoes, but she ultimately did not pursue it. (*Id*.). He also bought Gaelle a phone card to call her family in Togo. (Transcript, RE 86, Page ID # 622-23). She told her parents she was unhappy but they never brought her back. (*Id*.). Gaelle admitted the move was arranged through her father, and that coming to America benefited her family "because it would give less charge for my dad to take care of all of us, because he had an accident at the time." (*Id*. at 513-14).

Bruises on Gaelle's arms prompted concerns from teachers. (Transcript, RE 86, Page ID # 536). When Gaelle explained the cause, police and Child Protective Services ("CPS") intervened. (*Id*. at 536). In 2009, CPS spoke with Gaelle three times. (*Id*. at 572-73). She told them Toviave was hitting her, but CPS did nothing. (*Id*.). Finally, after an argument in April of 2010, Toviave told Gaelle to leave. (*Id*. at 581-82). At that point, her communications with Toviave ceased. (*Id*.). She moved in with a friend for a month, and then with Deacon Dan Foley. (*Id*.).

Kossiwa Kpandja

Kossiwa is Toviave's younger sister. (Transcript, RE 86, Page ID # 671). Like the other children, Kossiwa came to America for a better education. (*Id*. at 632). Kossiwa admitted the extra schoolwork mandated by Toviave was necessary. (*Id*. at 652-53).

Kossiwa played soccer. (Transcript, RE 86, Page ID # 615). She cleaned on the weekends, and on Saturdays, she and the other children cooked food for the upcoming week. (*Id*. at 645-46). When Toviave had company, Kossiwa prepared food for them and cleaned up afterward. (*Id*. at 550). Kossiwa stated that Toviave and Helene also cooked. (*Id*.).

Kossiwa was hit after she left her dirty clothes on the floor in her room. (Transcript, RE 86, Page ID # 643). On another occasion, Toviave became angry with Kossiwa's house cleaning. He yelled at her, but did not strike her. (*Id*. at 649). Finally, Kossiwa never did chores for Krissy Nix or Rosalinda Fernandez. (*Id.)*.

Rene Plase

Rene is a cousin of Toviave. (Transcript, RE 87, Page ID # 697-98). Rene also knew Helene in Togo, though she is not a relative. Toviave enrolled Rene in third grade, although he was fifteen. (Transcript, RE 87, Page ID # 696, 704).

Rene knew no English when he arrived in America. (*Id.* at 696). Toviave hired a private tutor who came to the home to teach Rene English. (*Id.* at 729). The tutor would bring her daughter over to the house. (*Id.*). The tutor also took the children swimming. (*Id*. at 744).

On one occasion, Rene rode a bike to the library without permission. (Transcript, RE 87, Page ID # 713-14). The bike was stolen at the library, prompting Toviave to hit Rene and limit him to one meal per day. (*Id*.). However, physical punishment "wasn't regularly" imposed. (*Id*. at 707). Household chores were done on the weekend. (*Id*. at 710). Rene felt like a "slave" but admitted Toviave gave him money. (Transcript, RE 87, Page ID # 718, 727). While he washed the car Krissy Nix drove, Nix gave Rene and the other children money. (*Id*. at 755). She also bought them jackets and took the children to the park. (*Id*. at 755-57).

Kwami Adoboe

Kwami is Helene's nephew. (Transcript, RE 87, Page ID # 767). Kwami was enrolled in the third grade, although he was older. (Transcript, RE 87, Page ID # 771-72). Still, he preferred this level "because I had to learn English. So it helped me to learn to speak more." (*Id*.). Kwami stated that Toviave assigned extra homework for the morning. (Transcript, RE 87, Page ID # 772). They also had to study after school. (*Id.*).

Kwami worked with the English tutor Toviave hired, Sylvia. (*Id*. at 793). While, the children were not allowed to have friends over, Kwami rode bikes with Magdelena, Sylvia's daughter. (Transcript, RE 87, Page ID # 773, 798).

Toviave hit Kwami for having two pairs of shoes with him. (Transcript, RE 87, Page ID # 780). On another occasion, Kwami was in his room looking at a dictionary. (Transcript, RE 87, Page ID # 777). Toviave thought he was sleeping and hit him in the eye and nose, bloodying his nose and temporarily blurring his vision. (*Id*.).

On one occasion, Kwami said that he cleaned the house of Toviave's friend, Rosalinda Fernandez. (*Id*. at 785). While Toviave was there, "he didn't really help that much." (*Id*.). Kwami also cleaned Krissy Nix's car and babysat for J.C. (*Id*. at 786). Toviave bought Kwami and the other children toiletries and hair products. (Transcript, RE 87, Page ID # 771). He also bought them coats. (*Id*. at 809).

Visitors to Toviave's Home

Family friend Michael Akojenu saw Toviave and the children multiple times. Toviave brought the children to New York for a two-week vacation where they stayed with Michael and his son Ali. (Transcript, RE 89, Page ID # 853). Michael also visited Toviave in Michigan three times. (*Id*. at 850). The children, who called Michael "grandpa," complained only once to Michael about Toviave,

specifically, his refusal to let them play basketball. (*Id*. at 864). Michael also observed that Toviave had food in the house and that both Toviave and the children cooked. (*Id*. at 856).

Michael's son, Ali, knew Toviave in Togo. (Transcript, RE 89, Page ID # 896). Ali visited Toviave and the children in Michigan for a week. He saw the children watching a movie on the computer. (Transcript, RE 89, Page ID # 905). Further, he saw nothing unusual about the children when he was with them in Michigan and New York. (*Id*. at 907).

Toviave's girlfriend Krissy Nix spent significant time with the children, and drove the children to the park. (Transcript, RE 89, Page ID # 757). The children appeared healthy. (*Id.* at 932). When the children were with Toviave, Nix said they were "fine." "We went together, and the children were happy." (Transcript, RE 89, Page ID # 927). The children never washed her car or cleaned her apartment. (Transcript, RE 89, Page ID # 932).

Medical Examinations of the Children

Dr. Lisa Markman of the University of Michigan Hospital examined three of the children. (Transcript, RE 89, Page ID # 868). She suspected physical abuse, emotional abuse, and neglect, but conceded the children "appeared physically healthy." (*Id*. at 877, 880-81). She also admitted the children's scars stemmed from events in Togo, normal childhood activity, and cooking. (*Id*. at 883).

Pediatric nurse Siobhan Gorman examined Kossiwa after Toviave hit her palm with a broom handle. (Transcript, RE 89, Page ID # 886-88). Toviave told Gorman that he hit her because she had not removed her clothes from her room. (*Id*. at 890). An x-ray revealed no fracture. (*Id*. at 893).

Toviave is Investigated

Netarsha Ficklen was a CPS Investigator with Washtenaw County. (Transcript, RE 89, Page ID # 950). She first interviewed the children in February of 2009 after allegations of abuse. (Transcript, RE 89, Page ID # 957). She saw no injuries on the children and they appeared well nourished. (*Id*. at 953, 955, 956). Ficklen interviewed the children again on January 4, 2011. (*Id*. at 957). This time, the children appeared anxious, and Ficklen became concerned for Kossiwa's safety. (*Id*. at 960-61). Ficklen called Toviave and told him he was being investigated and that any physical abuse must stop. (*Id*. at 962-63). Ficklen began drafting a petition to terminate parental rights. (*Id*. at 964).

Detective Tom Boivin works for the Washtenaw County Sheriff's Office. (Transcript, RE 51, Page ID # 271). He specializes in crimes against children and works "hand in hand" with Ficklen. (Transcript, RE 89, Page ID # 1001). He interviewed the children on January 10, 2011. (Transcript, RE 89, Page ID # 984, 987). The children appeared timid, but were not in apparent pain and Boivin noticed no injuries. (*Id*. at 985, 987).

Meanwhile, on Friday, January 7, 2011, Toviave called his pre-paid legal service to speak with an attorney. (Transcript, RE 51, Page ID # 288). He called again on Monday, January 10, 2011. (*Id*.). An attorney was assigned to Toviave but he did not have a chance to speak with counsel. (*Id*. at 289). Ficklen called Toviave at 5:00 p.m. on January 10, 2011, and told him she was removing the children. (Transcript, RE 51, Page ID # 284). Ficklen told Toviave she needed to serve him with removal papers. (*Id*.). They were to meet the following day at Toviave's home at 10 a.m., but Ficklen never arrived. (*Id*. at 286-87). She then called Toviave and asked him to come to the CPS office for the papers. (*Id*.). She did not tell Toviave that she and Boivin would question him. (Transcript, RE 89, Page ID # 973).

Toviave met Ficklen at the CPS office, entering through an electronically monitored area. (Transcript, RE 89, Page ID # 965). He was brought into what Boivin described as "a small room" with one door. (Transcript, RE 51, Page ID # 251, 272). In the room were Ficklen, Boivin, and an unnamed individual from the Department of Human Services. (Transcript, RE 89, Page ID # 975). Boivin had a tape recorder set up when Toviave arrived. (*Id*. at 998). Boivin also had his gun, handcuffs, and badge. (*Id*.). Ficklen admitted Toviave became "unsure" when he saw Boivin's recorder. (*Id*. at 976).

Toviave is Interrogated

Boivin told Toviave he was being investigated and read Toviave his *Miranda* rights. (Transcript, RE 89, Page ID # 1002). Boivin used the rights form in his capacity as a criminal investigator. (*Id*. at 1000). Boivin admitted he wanted information from Toviave to bolster his criminal investigation. (Transcript, RE 51, Page ID # 262-63).

Boivin noted Toviave's thick accent, but never asked Toviave if he could read or write English. (Transcript, RE 89, Page ID # 999). After the *Miranda* warnings, Boivin informed Toviave, "However, I stress, I stress, that the cooperation from you today, and this morning, has a huge impact on where this goes from here… Ok it's my job to listen. It's my job to do nothing but listen to people, ok?" (Transcript, RE 51, Page ID # 289; Motion, RE 21, Page ID # 78; Response, RE 25, Page ID # 107-08).

Before signing the waiver form, Toviave inquired about the third warning on the form, "You have the right to talk to a lawyer and have him present with you while you are being questioned." (Transcript, RE 51, Page ID # 288-92; Motion, RE 21 at 78-79). Toviave asked "when can this language be used, or I can use this language?" (*Id*.). Boivin responded,

> You can use it right now, you could, you're still going to talk with Ms. Ficklen, ok, but after a prosecutor would look at my paperwork, and decide whether there was something that they wanted to move

> forward with, or not, you would be able to exercise that right then, as well as now. And even if you couldn't afford a lawyer, the courts would appoint one to you, to let you know what the prosecutors have said. Today is nothing more than you and I sitting down and talking.

(*Id*.).

The interrogation lasted one hour and forty-five minutes. (Transcript, RE 89, Page ID # 1007). Boivin conceded that "I never specifically said that he was free to leave." (*Id*. at 1000). Toviave admitted hitting Rene's hands because he had dirty clothes in his room. (Transcript, RE 89, Page ID # 967). He also admitted hitting Kwami for using a calculator for his math homework. (*Id*.). He hit Kossiwa because she did not pick up dirty clothes in her room. (*Id*. at 968). He also admitted using a plunger stick and a metal broomstick. (*Id*. at 967). Toviave told Boivin he disciplined the children because that is what they did in Togo. (Transcript, RE 89, Page ID # 994). He said that "rules are not followed in his country, this is the type of discipline that occurs." (*Id*.).

Kossiwa, Rene, and Kwami were placed in a foster home. (*Id*. at 968). Gaelle had already left the home by this point. (Transcript, RE 86, Page ID # 576) A search warrant was executed on Toviave's home and the children's fictitious documents were recovered. (Transcript, RE 88, Page ID # 818-19). DHS-ICE Agent James Klawitter determined the immigration documents for the children were fraudulent because Toviave and Helene were listed as the biological parents

and the children's names and birth dates were wrong. (Transcript, RE 88, Page ID # 822-23).

The Motion to Suppress Hearing

Toviave filed a Motion to Suppress his statements to Detective Boivin and Inspector Ficklen. (Motion, RE 21, Page ID # 73). The court held a hearing on the Motion on May 18, 2012. (Transcript, RE 51, Page ID # 239). Boivin and Toviave testified. (*Id*.). The audio of Boivin's recording, along with written transcripts, were submitted to the district court. (*Id*. at 253, 273, 294).[1] The court subsequently denied Toviave's Motion to Suppress, finding Toviave was not in custody, he received a *Miranda* warning, and Toviave was not coerced. (Order, RE 64, Page ID # 345).

The Pre-Trial Motions

The prosecution also filed a Motion to Preclude Defense Based on Toviave's Culture or Custom. (Motion, RE 58, Page ID # 317). The district court granted the Motion without comment. (Order, RE 64, Page ID # 345). Finally, Toviave moved to exclude evidence of his guilty counts. (Motion, RE 36, Page ID # 160). The district court denied the Motion without comment. (Order, RE 64, Page ID # 345).

[1] The audio recording and transcript are the subject of a Motion to Supplement the Record on Appeal filed contemporaneously with this brief.

The Trial

Before trial the prosecution dismissed the Trafficking count. (Transcript, RE 84, Page ID # 465). As set forth above, the children, as well as Helene Adoboe, all testified at trial. Detective Boivin, Inspector Ficklen, Agent Klawitter, and several other witnesses also testified for the prosecution. Michael Akojenu and Ndaka Ali Katou Kouami testified for Toviave. Toviave did not testify on his own behalf.

During trial, a juror propounded a question to the court: "[w]hy is this not tried under the child abuse laws?" (Transcript, RE 87, Page ID # 762). The court answered, "[c]hild abuse laws are state laws, and there's no reason that it couldn't be tried under both." (*Id*. at 763).

Prior to the close of trial, the district court addressed jury instructions for forced labor. Toviave proposed forced labor instructions which mirrored the statutory elements. (Instructions, RE 70-1, Page ID # 363, 365; Transcript, RE 91, Page ID # 1166-67). Toviave also objected to the prosecution's proposed instructions as confusing and prejudicial. (*Id*. at 363). The district court disagreed and accepted the prosecution's 23 pages of instructions, which stated in relevant part:

> "Obtain" means to gain, acquire, or attain. "Labor" means work or the performance of any particular task or set of tasks, and it includes any form of physical or mental effort or exertion to perform such

> work or tasks. "Services" means any conduct, work, or duty performed for the benefit of another person or thing. If you find that the defendant provided or obtained the labor or services of the person named, then the first element has been satisfied.
>
> To prove forced labor, the prosecution does not need to link any particular threat or act by the defendant to any particular labor task performed by the person…… Rather, it is sufficient if the defendant's actions gave rise to a climate of fear that would compel a reasonable person in the alleged victim's situation to comply with the defendant's demands . . . .

(Instructions, RE 71-2, Page ID # 388-92).

The Verdict

After a six-day trial, the jury found Toviave guilty on four counts of forced labor. (Verdict, RE 68, Page ID # 353). Toviave filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. (Motion, RE 70, Page ID # 356). Toviave challenged the sufficiency of the evidence on the forced labor counts and renewed his jury instructions objections. (*Id*.). The district court denied Toviave's motion. (Order, RE 72, Page ID # 404).

The Sentencing

According to the presentencing report, Toviave was at Level 31, Category I. (Transcript, RE 93, Page ID # 1293). The sentencing range was 108-135 months. (Transcript, RE 93, Page ID # 1312-13). The prosecution recommended a sentence of 135 months. (*Id*.). Toviave asked for 48 months, the sentence for third degree child abuse in Michigan. (Transcript, RE 93, Page ID # 1306-07). Toviave also

objected to the grouping of offenses and argued that he should be given a credit for acceptance of responsibility. (Transcript, RE 93, Page ID # 1299). The district court sentenced Toviave to 135 months. (Transcript, RE 93, Page ID # 1317).

Additionally, two children each requested restitution of $59,981.80 while two requested nothing. (Transcript, RE 93, Page ID # 1317-18). The prosecution also sought $14,400 in future care expenses for two of the children. (Transcript, RE 93, Page ID # 1318).

SUMMARY OF THE ARGUMENT

I. In the rush to convict, constitutional corners were cut. Detective Boivin brushed aside Toviave's invocation of his right to counsel, instructing Toviave he had to speak with Inspector Ficklen first. Boivin also dangled the false promise that Toviave would benefit if he cooperated. Finally, Boivin assured Toviave he could get counsel after answering questions. Due process is undermined when a conviction is based even partly on an involuntary confession. What was innocuously billed as picking up paperwork from Ficklen became a nearly two-hour interrogation with Boivin where Toviave unwittingly signed away his rights based on a defective *Miranda* warning. Reviewed *de novo*, the Court should restore the Fifth Amendment and reverse.

II. The trial was consumed by Toviave's abuse of the four children. While Toviave's conduct was many things—extreme, outrageous, and cruel—it was not forced labor. As a juror correctly recognized, child abuse is a state offense. But blinded by Toviave's barbarism, the prosecution lost sight of the fact. Extra schoolwork is not a labor or service. Keeping one's room and house clean is not a labor or service. A ban on visitors and strict discipline is not a labor or service. Toviave derived no benefit from imposing these rules. This leaves isolated instances of babysitting for Toviave's two friends and helping with a move, none

of which Kossiwa participated in. On such slim evidence was so weighty a verdict reached.

III. A criminal defendant's right to present a defense is sacrosanct. The prosecution impeded Toviave's right to a fair trial because it prevented him from telling his story through its cultural defense exclusion. Toviave never sought to assert that forced labor was acceptable in Togo, and thus excused here. Rather, he sought to explain his actions, and his culture and life experiences frame his way of thinking. Forced labor is a specific intent crime. Forbidding Toviave from offering his logic and life experiences precluded him from presenting a defense. The Court should reverse and allow Toviave to present a defense.

IV. The prejudice of prior bad acts in indisputable. Such prejudice becomes even more corrosive when it involves acts from the same underlying charges. Toviave pled guilty to the immigration-related offenses. Permitting the prosecution to tell the jury about these pleas gutted the presumption of innocence.

ARGUMENT

I. Toviave's Conviction Rests on an Involuntary Confession.

No person shall be compelled in any criminal case to be a witness against himself. U.S. CONST. AMEND. V. Due process is subverted if a conviction is founded, in whole or part, upon an involuntary confession. *Jackson v. Denno*, 378 U.S. 368, 376 (1964).

A. Standard of review.

The Court reviews fact findings underlying a suppression motion for clear error and the district court's legal conclusions *de novo*. *United States v. Al-Cholan,* 610 F.3d 945, 953 (6th Cir. 2010).

B. Toviave asserted his right to counsel during an interrogation.

Miranda v. Arizona requires that suspects in custody be admonished of their Fifth Amendment rights before interrogation. 384 U.S. 436, 467-73 (1966). Once an accused has invoked the right to counsel, police must cease interrogation until counsel has been made available. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). The Supreme Court has defined interrogation as express questioning, or any words or actions by the police that would elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301-02 (1980). Suspects may end the interrogation by invoking their right to remain silent, and may pause the interrogation by invoking their right to counsel. *Id*.

To establish *Miranda* applied to his questioning, Toviave must show that he was in custody and interrogated. *See Miranda*, 384 U.S. at 458, 467.

1. *Miranda* applies to Boivin and Ficklen's questions because Toviave was in custody.

Suspects are entitled to pre-interrogation warnings whenever they are subjected to a custodial interrogation due to the compulsion of custodial surroundings. *Miranda*, 384 U.S. at 458. Whether a person is in custody depends on the circumstances surrounding the interrogation and whether a reasonable person would feel he could not terminate the interrogation and leave. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (*superseded on other grounds by statute*, 28 U.S.C. § 2254). A police officer's unstated intentions are not relevant; rather, the test is resolved based on the facts apparent to the suspect. *Berkemer v. McCarty*, 468 U.S. 420, 442, n.35 (1984). Custody is a mixed question of law and fact reviewed *de novo*. *United States v. Swanson*, 341 F.3d 524, 528 (6th Cir. 2003).

Custody turns on the location of the questioning, the length and manner of the questioning, restraint on the suspect's freedom of movement, and whether he was told he had to answer. *United States v. Hinojosa*, 606 F.3d 875, 883 (6th Cir. 2010). Toviave faced a situation that a reasonable person would find no different from custody at a police station. Toviave was supposed to meet Inspector Ficklen at his house for paperwork concerning the children's removal. Ficklen never came, and asked Toviave to instead meet her at the Washtenaw County CPS office.

(Transcript, RE 51, Page ID # 286-87). The trap was set. Toviave came for the paperwork, unaware he would be brought into a small room and questioned and recorded by an armed detective for almost two hours.

Boivin introduced himself and read Toviave his *Miranda* rights. Ficklen conceded Toviave appeared "unsure" when he saw the recorder. (Transcript, RE 89, Page ID # 976). Toviave also noticed that Boivin had a firearm and handcuffs on his belt. Boivin and Ficklen never told Toviave that he was free to leave during the hour and forty-five minute interrogation. (Transcript, RE 89, Page ID # 1000). And after Boivin read Toviave's *Miranda* rights, he told Toviave that he would still have to speak to Ficklen even if he asserted his right to counsel. Moreover, Boivin did not tell Toviave that he would leave the room or not record Ficklen's questions. (Transcript, RE 51, Page ID # 277-78).

The unexpected presence of an armed detective with a recorder in a small room which is reached through an electronically motioned entrance presents all the pressures of police custody. Moreover, Boivin felt he needed to administer the *Miranda* warnings to assure he could use Toviave's statements in court. (Transcript, RE 51, Page ID # 262-63). Boivin also instructed Toviave that he must talk to Inspector Ficklen. Finally, Toviave did not feel free to leave because Boivin told him that everything depended on his cooperation, and he felt if he did not cooperate, Boivin might arrest him. (Transcript, RE 51, Page ID # 289). Thus,

the nearly two hours of questioning about Toviave's abuse of the children presented a situation no reasonable person would feel free to leave.

2. *Miranda* applies to Boivin and Ficklen's questions because Toviave was interrogated.

The bases for interrogation mirror those for custody. Three government employees in a small, electronically monitored CPS office, an armed detective with a recording device, *Miranda* warnings, and never informing Toviave he was free to leave confirm an interrogation occurred. Further, Boivin and Ficklen both questioned Toviave about his interactions with the children. Even if their aim was only to discern whether Toviave was a fit guardian, which it was not since the children were already removed, they knew their questions would elicit incriminating responses. Boivin even conceded that his hope was to use Toviave's statements in the criminal investigation. (Transcript, RE 51, Page ID # 262-63). Ficklen also knew her questions would produce incriminating responses; otherwise, she would not have included Boivin, who specializes in crimes against children. (Transcript, RE 51, Page ID # 244).

Boivin instructed Toviave that he could not remain silent as to Ficklen, regardless of his desire for counsel. This statement was calculated to elicit incriminating information and was thus the equivalent of direct questioning. Under *Miranda* and its progeny, interrogation also includes officer's words or actions likely to elicit an incriminating response. *Innis*, 446 U.S. at 301, n.4, n.5.

Boivin and Ficklen worked "hand in hand," and while Boivin covers the criminal angle of child welfare cases and Ficklen the civil, the information gathered is parallel. (Transcript, RE 51, Page ID # 244, 261-62). As Boivin knew the questions Ficklen would pose, and informed Toviave that he must talk to her, the entire interview, including Ficklen's queries, was an interrogation.

That Ficklen was a CPS Inspector is of no import. The Fifth Amendment privilege against self-incrimination can be asserted in any proceeding, "civil or criminal, administrative or judicial, investigatory or adjudicatory." *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972). Additionally, the Court has held the Fourth Amendment applies to searches by social workers, regardless of police presence. *Andrews v. Hickman Cnty.*, 700 F.3d 845, 863-64 (6th Cir. 2012). Thus, in both the Fourth and Fifth Amendment context, the protection afforded is not based upon who conducts a search or inquiry, but the risks the action poses. Since the Sheriff's Office and CPS subjected Toviave to the pressures of a custodial interrogation, his Fifth Amendment rights were implicated. And just as the Court refused to distinguish between police and non-police searches in *Andrews*, it should not distinguish between police and non-police questioning in a custodial interrogation.

In sum, Boivin's admitted purpose for questioning—getting Toviave to incriminate himself—confirms a custodial interrogation occurred. Interrogation in

an "unfamiliar, police-dominated atmosphere," creates psychological pressures undermining an "individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda*, 384 U.S. at 467. That is what occurred here.

C. Boivin violated Toviave's Fifth Amendment rights because Toviave asserted his right to counsel.

To establish his Fifth Amendment rights were violated, Toviave must have made either (1) an unambiguous request for counsel and was denied this right or (2) an ambiguous request for counsel and was then discouraged from clarifying his request. *See Davis v. United States*, 512 U.S. 452, 455 (1994); *Kyger v. Carlton*, 146 F.3d 374, 379 (6th Cir. 1998).

Toviave asked Boivin about obtaining counsel. When given the waiver of rights form, Toviave asked "when can this language be used, or I can use this language?" (Transcript, RE 51, Page ID # 289; Motion, RE 21, Page ID # 78; Response, RE 25, Page ID # 107-08). Rather than determining if Toviave was asserting that right, Boivin gave a misleading and convoluted explanation that Toviave essentially could not get an attorney until he was charged:

> You can use it right now, you could, you're still going to talk with Ms. Ficklen, ok, but after a prosecutor would look at my paperwork, and decide whether there was something that they wanted to move forward with, or not, you would be able to exercise that right then, as well as now. And even if you couldn't afford a lawyer, the courts

> would appoint one to you, to let you know what the prosecutors have said. Today is nothing more than you and I sitting down and talking.

(Transcript, RE 51, Page ID # 289; Motion, RE 21, Page ID # 78; Response, RE 25, Page ID # 107-08).

Whether or not Toviave's request for representation sufficiently invoked his Fifth Amendment rights, Boivin violated them.

If a suspect in custody invokes his right to counsel, police questioning must stop. *Davis*, 512 U.S. at 455. The request must be clear such that a reasonable police officer would understand the statement to be a request for counsel. *Id*. While an officer is not required to ask the suspect to clarify an ambiguous request, the officer may not pressure him to answer questions. *Kyger*, 146 F.3d at 379. *See also Simpson v. Jackson*, 615 F.3d 421, 437-38 (6th Cir. 2010) (interpreting *Kyger* to bar any pressure to answer questions following an ambiguous request).

An invocation that uses ambiguous language can still be effective. In *Kyger*, after his *Miranda* warnings, the suspect replied he would "just as soon have an attorney." 146 F.3d at 376, 380. This was deemed an unambiguous request for counsel. *Id*. Similarly, in *Abela v. Martin*, a suspect's statement that "maybe I should talk to an attorney" and the production of an attorney's business card was a sufficient invocation. 380 F.3d 915, 925-26 (6th Cir. 2004).

Prior to Ficklen's ruse, Toviave had attempted to reach his attorney through a pre-paid legal service. (Transcript, RE 52, Page ID # 288). And when Boivin

apprised Toviave of his *Miranda* rights, he asked several questions about his right to counsel since he could not reach his attorney. Toviave's inquiries focused not on whether he was allowed to have an attorney present, but whether, and how, he could get counsel. (Transcript, RE 51, Page ID # 252-54, 277). Boivin bypassed these concerns in three ways. First, he told Toviave that he had to answer Ficklen's questions without counsel. Second, he told Toviave he could later invoke his right to counsel after answering questions. Third, he suggested Toviave could help his cause by cooperating. (*Id*.).

The circumstances here resemble *Kyger* and *Abela*. Any doubt Toviave wanted an attorney was removed by his prior attempts to secure one and his subsequent inquiry into how he could do so. A reasonable police officer would have recognized Toviave's questions as a request for counsel. Yet in the zeal to secure a confession, Toviave was lured to the CPS office under false pretenses and subjected to continued interrogation without being afforded his right to counsel. Worse, after Mirandizing Toviave, Boivin mandated that Toviave speak with Ficklen. The admission of Toviave's incriminating statements should not survive the Court's *de novo* review.

D. Alternatively, Boivin violated Toviave's Fifth Amendment rights because he told Toviave he must speak after an ambiguous request for counsel.

Even if Toviave did not make an unambiguous request for counsel, he at least made a request clear enough to trigger his constitutional protections per *Kyger* and *Simpson*. In *Simpson*, the officer told the suspect that he only needed an attorney present if he intended to lie to the police. 615 F.3d at 437-38. The Court criticized this coercive tactic as violating *Miranda*. *Id*.

Boivin's comments echo those condemned in *Simpson*. Not merely discouraging Toviave from asserting his right to counsel by suggesting cooperation would help his cause and that he could invoke his rights after talking, Boivin told Toviave that with respect to questioning by Ficklen, he had no such rights. Allowing police to use this tactic is tantamount to discarding *Miranda* when someone other than a police officer asks questions. Nothing in the Supreme Court or Sixth Circuit jurisprudence warrants this result.

Boivin violated Toviave's rights when he failed to terminate the interrogation. And even if the follow-up questions were not coercive and Toviave signed the waiver, these facts are irrelevant because they occurred after Toviave's invocation of his rights. "An accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." *Smith v. Illinois*, 469 U.S. 91, 100 (1984) (emphasis in original).

E. In the further alternative, Toviave did not voluntarily waive his Fifth Amendment rights because he was deceived.

Responses to police interrogation are not admissible unless the defendant was apprised of the constitutional right against self-incrimination and he waived that right. *United States v. Cole*, 315 F.3d 633, 636 (6th Cir. 2003). A waiver is valid if: (1) the relinquishment of the right was voluntary in that it was the product of a free choice rather than intimidation, coercion, or deception, and (2) the waiver was made knowing the nature of the right being abandoned and the consequences of abandoning it. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). *See also* 18 U.S.C. § 3501(b) (governing admissibility of statements in criminal proceedings). Whether a waiver is knowing and intelligent is determined by the particular facts and circumstances of the case, including the background, experience, and conduct of the accused. *Machacek v. Hofbauer*, 213 F.3d 947, 397 (6th Cir. 2002). The presumption against waiving constitutional rights is strong. *Michigan v. Jackson*, 475 U.S. 625, 633 (1986). The prosecution thus bears a "heavy burden" to show a waiver was voluntary. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979), *quoting Miranda*, 384 U.S. at 475.

Toviave did not waive his rights. He was from Togo and spoke Ewe and French. (Transcript, RE 51, Page ID # 283). He had been in America since 2001 and learned to speak English only after arriving. (*Id*.). He had never been to criminal court, nor been interrogated. (*Id*. at 283-84). His presence at the CPS office was secured through deception. (*Id*. at 283-84). Further, Toviave had tried

to contact counsel, and when read his *Miranda* rights, he asked how to invoke number three in the advisement of rights form—the first paragraph mentioning an attorney. Toviave was then told if he wanted counsel, "you're still going to talk with Mrs. Ficklen," but was not told Boivin would leave nor turn the tape recorder off. (Transcript, RE 51, Page ID #278). A valid waiver does not exist if the suspect does not know that he could "choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time." *Colorado v. Spring*, 479 U.S. 564, 574 (1987). Quite simply, Toviave knew none of this. He was deceived into coming to the CPS office and then coerced into speaking. Further, due to Boivin's convoluted explanation, Toviave's waiver was not made knowing the nature of the rights he was abandoning.

Based on Toviave's unfamiliarity with the criminal justice system, limited English, Ficklen's deception, and Boivin's false promise and misleading statements, Toviave thought he would not face criminal charges if he confessed. His waiver was the antithesis of voluntary, and as such, the prosecution's heavy burden becomes unsustainable.

F. Summation.

Reviewed *de novo*, the Court should find Toviave's custodial interrogation violated the Fifth Amendment and *Miranda*, and thereby remand for subsequent proceedings without the ill-gotten admissions.

II. A Forced Labor Conviction Requires More Than Household Chores and Homework.

Laws prohibiting involuntary servitude do not interfere with the rights of parents and guardians to the custody of minor children. *United States v. Kozminski*, 487 U.S. 931, 944 (1988). Ignoring that axiom, Toviave's indictment represents an unprecedented expansion of the federal government into domestic disputes.

A. Standard of review.

Reviewing a sufficiency of the evidence challenge, the Court determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Humphrey*, 279 F.3d 372, 378 (6th Cir. 2002), *quoting Jackson*, 443 U.S. at 319. The Court will reverse a conviction due to insufficient evidence when the judgment is not supported by substantial and competent evidence. *United States v. Barnett*, 398 F.3d 516, 522 (6th Cir. 2005).

B. The jury instructions guaranteed guilt.

The forced labor statute, 18 U.S.C. § 1589, is part of the Victims of Trafficking and Violence Protection Act of 2000. That Act also includes trafficking with respect to involuntary servitude, 18 U.S.C. § 1590, and sex trafficking of children, 18 U.S.C. § 1591. The forced labor statute provides: whoever knowingly provides or obtains the labor or services of a person —

(1) by threats of serious harm to, or physical restraint against, that person or another person;

(2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or

(3) by means of the abuse or threatened abuse of law or the legal process, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1589.

The statute does not define "obtain" or "labor or services." The prosecution did, defining "labor" as "any form of physical or mental effort or exertion." (Instructions, RE 71-2, Page ID # 388-92). "Services" was defined as "any conduct, work, or duty performed for the benefit of another person or thing." (*Id*.). In contrast, Toviave's instruction simply set forth the three elements of § 1589. (Instructions, RE 70-1, Page ID # 363, 365; Transcript, RE 91, Page ID # 1166-67). Toviave's instruction followed *United States v. Djoumessi*, 538 F.3d 547 (6th Cir. 2008). Ultimately, the district court permitted the prosecution to drown the jury with multiple pages of definitions addressing specific fact issues from out-of-circuit cases.

The Sixth Circuit Pattern Instructions (2.02 Definition of the Crime) indicate a preference for simplicity when there is no pattern provided. The prosecution's 23 pages defy that preference. The prosecution plied the jury with a myriad of definitions not in the statute, nor any Circuit's Pattern instruction. A judgment may be reversed for improper jury instruction if the instructions are confusing,

misleading, or prejudicial. *United States v. Harrod*, 168 F.3d 887, 892 (6th Cir. 1999). The prosecution's boundless definitions of "labor" and "services" were misleading and prejudicial, warranting reversal.

The danger of an amorphous definition prompted reversal of an involuntary servitude conviction in *United States v. Kozminski*, 487 U.S. 931 (1988). The *Kozminski* defendants were charged with abducting mentally retarded adults and forcing them to work on their farm seven days a week. *Id.* at 934-35. To keep them tethered to the farm, the defendants subjected their victims to physical and verbal abuse. *Id*. The jury was instructed that "involuntary servitude" included not only situations in which persons were physically restrained, but also other forms of coercion. *Id*. at 937. The Sixth Circuit reversed the conviction and the Supreme Court affirmed because this definition was too broad. *Id*. at 937-38, 953. The prosecution's definition encompassed "compulsion through any type of speech or conduct used to persuade a reluctant person to work. This interpretation would appear to criminalize a broad range of day to day activity." *Id.* at 949.

Toviave's conviction cannot be reconciled with *Kozminski.* As in *Kozminski*, the prosecution's definitions of "labor" and "services" envelop "a broad range of day to day activity." They would federalize every relationship marred by domestic violence or child abuse where the victim is ordered to do housework, yard work, or other chores. Every shared living arrangement contains

elements meeting the prosecution's "labor" and "services" definitions, and any imbalance of household duties results in one party "obtaining" work. This cannot be the aim of § 1589. And while Toviave's actions cannot be described as typical, neither can the conduct in *Kozminski*. Abducting mentally retarded men to work for no pay is appalling. Nevertheless, *Kozminski* recognized the broad definition of "involuntary servitude" brought within its ambit conduct which—while not innocent—went beyond the scope of conduct which the statute was designed to proscribe. The same is true here.

1. "Labor or services" requires an economic component.

Section 1589 should only reach acts that are "work" in an economic sense or where a commercial/profit backdrop exists. This position is supported by § 1584, which prohibits, but does not define "involuntary servitude." The Supreme Court analyzed § 1584 in *Kozminski*, which involved the scope of two criminal statutes enacted by Congress to enforce the Thirteenth Amendment, 18 U.S.C. § 241 and § 1584. *Kozminski* explained that when Congress enacted § 241, it borrowed "involuntary servitude" from the Thirteenth Amendment. 487 U.S. at 944-45. With Congress legislating under its authority to enforce the Thirteenth Amendment, this "makes the conclusion that Congress intended the phrase to have the same meaning in both places [§ 241 and § 1589] logical, if not inevitable." *Id.* at 945. In the Supreme Court's view, "involuntary servitude" was intended to

cover "compulsory labor akin to African slavery, which in practical operation would tend to produce like undesirable results." *Butler v. Perry*, 240 U.S. 328, 333 (1916); *United States v. Kozminski*, 487 U.S. 931, 942 (1988).

Just as the Supreme Court interpreted § 1584 in light of existing authority and the intent of the Thirteenth Amendment, so should § 1589 be interpreted. Section 1589, like § 1584, only reaches persons who obtain a benefit from labor or services that amount to a species of work. But if, as instructed here, the statute covers any activity, economic or otherwise, the law is boundless. After all, the fact a person compels something means he wanted it to occur. And any act expends "physical or mental effort." The prosecution's instruction severs § 1589 from its historical roots and criminalizes a breathtaking array of conduct. Given the context and underpinnings of § 1589, the prosecution's engulfing definitions are unworkable. "Labor or services" should instead take on their ordinary, accepted meanings of work in an economic or commercial sense.

The Tenth Circuit in *United States v. Kaufman* appeared to expand the scope of § 1589 beyond work in the economic sense. 546 F.3d 1242 (10th Cir. 2008). But in reality, it only rejected a purely commercial definition of "labor or services." In *Kaufman*, the victims performed manual labor on the defendants' farm, usually in the nude. *Id*. at 1249. The work included pulling up a tree stump, tearing down a fence, shoveling manure, and moving cement blocks. *Id*. The

defendants in *Kaufman* argued that forcing victims to be videotaped while nude and performing sexual acts did not constitute "labor or services" under § 1589. *Id*. at 1260. The defendants sought to limit the statute to "labor or services" akin to those of an antebellum plantation. *Id.* In rejecting the defendants' argument, the court noted that the statute was intended to cover coerced sexual acts, sadistic torture, and domestic servitude. *Id*. at 1261-63.

More applicable is *United States v. Marcus*, which involved a forced labor conviction. 628 F.3d 36 (2d Cir. 2010). The Second Circuit affirmed the conviction because the defendant financially profited from forcing erotic acts and torture upon his victim as part of a bondage, sadism, and masochistic ("BDSM") arrangement. *Id*. at 39-41. The defendant forced the victim "through the persistent threat of serious physical harm and actual physical harm, to create and maintain a commercial BDSM website from which only [the defendant] derived pecuniary gain." *Id*. at 43. Other cases have also included economic or commercial benefit. In *United States v. Calimlim*, 538 F.3d 706, 708-09 (7th Cir. 2008), a conviction under § 1589 was upheld where the victim was forced to work every day from six a.m. to ten p.m. as a live-in nanny and maid, and also forced to take care of the defendants' offices and investment properties. Her movement was greatly restricted and she was not allowed to be seen in public. *Id*. at 708-709. Such facts

are far removed from the occasional babysitting and cleaning done for Nix and Fernandez here.

2. Toviave did not "obtain" work from the children.

While courts have not defined "obtain" in § 1589, they have applied the ordinary meaning to other terms in the statute. *United States v. Marcus*, 628 F.3d 36, 44 (2d Cir. 2010) (applying the ordinary meaning to "labor"). Thus, any analysis of "obtain" should begin with its everyday meaning. To "obtain" means simply to "gain or attain[,] usually by planned action or effort." *Available at Merriam Webster's Online Dictionary*. There is no difficulty in applying the word to physical goods. "Obtain" is less easily applied to "labor or services." Not all instances of forcing someone to do labor results in the first party obtaining something. "Obtain," in the context of § 1589 must thus carry some connotation of hedonic benefit.

Neither the plain meaning of "obtain" nor precedent support the notion that an adult can "obtain" schoolwork from a child. Nor is there evidence that Toviave gained anything from making the children study. Thus, the schoolwork-related abuse constantly referenced at trial was a diversion.

The prosecution also failed to show Toviave "obtained" household chores from the children. Forced labor prohibitions do not preclude guardians of minors from assigning household chores. *Djoumessi,* 538 F.3d at 553, citing *Kozminski,*

487 U.S. at 944. Other cases have found sufficient evidence to support a conviction where only domestic labor was involved, but in each case, the victim's duties far outweighed the additional chores her presence necessitated. *United States v. Dann*, 652 F.3d 1160, 1164-65 (9th Cir. 2011); *Calimlim*, 538 F.3d at 708-09. The prosecution never demonstrated that Toviave "obtained" labor from the children rather than making them do their fair share of household chores. Depending on the exact date, the children constituted between two-thirds and four-fifths of the household. Toviave could only have "obtained" labor from the children to the extent that he gained some benefit from their chores, and this is only possible if their responsibilities exceeded their share or if their work only benefited Toviave.

The right of parents and guardians to require housework for the children is well established. For example, §1584 does not restrict parents' (or guardians') rights to require children to help with household chores. *Kozminski*, 487 U.S. at 944 (stating that § 1584 does not interfere with "the right of parents and guardians to the custody of their minor children or wards"). *See also Djoumessi*, 538 F.3d at 553. Toviave worked two jobs, and provided for the children. He did the outdoor chores while the children cooked and cleaned the house. A clean house benefited everyone. And as most of the cooking was done in large batches on weekends, it also benefited everyone. (Transcript, RE 86, Page ID # 85). Further, Kossiwa

testified that Toviave did some cooking. (Transcript, RE 86, Page ID #141). The household chores the children did here, especially with Toviave rarely at home, are not extraordinary.

Once the academic and housework requirements are removed from the picture, only a few minor instances of work exclusively benefited Toviave. The children cleaned Toviave's tennis clothes and suit, but they also did the rest of the children's laundry. (Transcript, RE 87, Page ID # 29). Gaelle and Kossiwa claimed the boys had cleaned Toviave's shoes, but the boys' testimony does not support this claim. In any case, such negligible tasks cannot support four forced labor counts, especially where Toviave worked two jobs and supported four children. *See Kozminski*, 487 U.S. at 944; *Djoumessi*, 538 F.3d at 553.

Finally, the children cooked, served, and cleaned up after meals when Toviave had company, but they never indicated they did not also dine with Toviave's guests. (Transcript, RE 86, Page ID # 61, 145, RE 87 at 97). On a few occasions, they watched Toviave's son, who lived with Krissy Nix. Kwami cleaned Rosalinda Fernandez's apartment with Toviave. Further, Gaelle testified that Toviave took the money that she earned from babysitting and never returned it. (RE 86 at 43-44). But he also gave Gaelle a bike, a car, and presumably gasoline. He also paid for an English tutor for the children.

Sporadically helping Nix and Fernandez was not a provision of labor under

the statute. To say that Toviave provided labor by having the children do occasional tasks for Nix and Fernandez would ignore Congress' intent to preserve the "right of parents and guardians to the custody of their minor children or wards." *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897), accord *Kozminski*, 487 U.S. at 944. These isolated instances fall well within the range of what a parent or guardian can justifiably ask his child or ward. *See Djoumessi*, 538 F.3d at 553. Indeed, the legislative history reveals that in enacting § 1589, Congress intended that the section "provide federal prosecutors with the tools to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude as defined in *Kozminski.*" H.R. Conf. Rep. No. 106-939, at 101, *as reprinted* in 2000 U.S.C.C.A.N. 1380, 1393.

Toviave's conviction also clashes with *United States v. King*, 840 F.2d 1276 (6th Cir. 1988). In *King*, defendants, members of a religious sect, violated § 1584 because they used physical force to make children at their camp perform labor. *Id*. at 1280. In turn, the defendants generated income from the sale of the products of the children's labor. *Id*. The Court affirmed the conviction not because of the work alone, but rather that the scope of work "went beyond that which would be warranted in order for them to discharge their communal responsibilities . . . ." *Id*. The Court further stressed that defendants' withdrawal of the children from school "limited the boys' contact with the outside world and entirely eliminated their

contact with outside authority figures." *Id*. at 1281. The exact opposite occurred here.

One final point bears mention. Kossiwa never did chores for people outside of the house. (Transcript, RE 86, Page ID # 649). The forced labor count against her thus fails as a matter of law. The judgment as to Kossiwa lacks not only the support of substantial and competent evidence, it lacks the support of any evidence.

C. Toviave did not use force to compel household chores.

Section 1589 requires that the defendant acted knowingly in obtaining labor. The record does not support a finding beyond a reasonable doubt that Toviave intentionally forced the children to do housework. If he intended to force the children to work as household servants, the prosecution's inability to provide at least one example of him punishing them for failing to do general chores belies that position.

While Gaelle claimed that Toviave abused others for failing to properly clean the house, she was hit for academics, driving, grooming, and kitchen safety reasons. (Transcript, RE 86 at 532, 559-60, 537, 539). While Toviave struck Kossiwa on one occasion for leaving her dirty clothes on the floor in her room, she could not specify an instance when she was abused for general housework-related reasons. (Transcript, RE 86 at 138). Toviave yelled at Kossiwa for not cleaning

properly, but she was not hit. (Transcript, RE 86 at 144). The boys also never suffered housework-related abuse. While Rene and Kwami were hit for losing a bicycle, neither could provide an instance where they were punished for not doing housework.

Since the prosecution offered no example where children were abused for failing to do housework, no reasonable jury could have found that Toviave intended to force them to do their chores through physical restraint. Additionally, the record cannot show beyond a reasonable doubt that Toviave was aware his actions compelled the children to do housework. No instances of housework-related abuse exist. The record also lacks any evidence Toviave thought of the children as slaves or knew his abuse compelled them to do housework. Indeed, Toviave's statements to Ficklen and Boivin show that he was ignorant of the effects of his abuse. Though he admitted striking the children, he did so for reasons of discipline, not labor. (Transcript, RE 89, Page ID # 966-68, 994-95). Toviave's interest in the children's diet, exercise, and academics further belies a slave master mentality. (Transcript, RE 87, Page ID # 738, 745).

Toviave's conduct toward the outside world also reveals that he was unaware of the effect of his conduct. He only concealed from public view certain aspects of his relationship with the children that could reveal their dubious immigration status. For example, Toviave retained the children's passports and

other identity documents, but provided a house key for each of them. (Transcript, RE 86, Page ID # 639, 619). He did not prevent the children from going to school, even when they were visibly injured. Though he told them not to leave home, he allowed them to go outside and participate in sports, and once took them on vacation. (Transcript, RE 86, Page ID # at 674, 635, 681-82). Finally, he kept the children in school after they had contact with CPS in 2009. (Transcript, RE 86, Page ID # at 592).

D. Domestic relations are the province of the state courts.

The fundamental flaw of this prosecution was encapsulated by a juror's question: "[w]hy is this not tried under the child abuse laws?" (Transcript, RE 87, Page ID # 762). As the juror correctly observed, this matter belongs in state court. "Family relations are a traditional area of state concern." *Moore v. Sims*, 442 U.S. 415, 435 (1979). Federal courts have no general jurisdiction over domestic relations, *Ankenbrandt v. Richards*, 504 U.S. 689, 697-701 (1992), while state courts have a special expertise and experience in family relations. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979). Thus, familial relationships are governed by state law. *Bagot v. Ashcroft*, 398 F.3d 252, 258 (3rd Cir. 2005).

Three children were related to Toviave and one to Helene. The children's parents entrusted their fellow family members to watch over them. But in a sharp blow to established principles of federalism, the prosecution morphed Toviave's

child abuse into a federal forced labor offense. Child abuse is a felony in Michigan punishable by imprisonment for life or any term of years. MICH. COMP. LAWS 750.136(b). Perhaps distrusting a state system that was warned about Toviave's behavior multiple times yet dawdled for almost two years, the prosecution took it upon themselves to target Toviave for crimes beyond those related to immigration. But this overreach resulted in a conviction that is misshapen—four counts of forced labor for, at best, a few instances of not directly reimbursed babysitting and house cleaning. Because the evidence of forced labor (not child abuse) was insufficient, reversal is needed.

E. The forced labor conviction implicates the rule of lenity.

When Congress leaves the judiciary with the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. *United States v. Bell*, 349 U.S. 81, 83 (1955). The rule of lenity ensures that criminal statutes provide fair warning about what is illegal. *Liparota v. United States*, 471 U.S. 419, 427 (1985). It does so by resolving ambiguity in a criminal statute as to apply only to conduct clearly covered, not conduct that neither the statute nor any prior judicial decision disclosed within its scope. *Id.* at 427-28.

The meaning of "labor or services" is unclear in the domestic/familial context. But even if the Court disagrees, it can go beyond the statute to the legislative history and the logic of the statutory application. For example, a

particular law's application may cast the meaning of statutory language into doubt. *Williams v. United States*, 458 U.S. 279, 287 (1982). In *Williams,* the Court construed the meaning of "false statement" in the context of 18 U.S.C. § 1014, which prohibits making false statements to federal agencies. *Id.* at 284. The defendant was convicted for depositing checks not supported by sufficient funds. The Court rejected the prosecution's reading of the statute because it would make a "surprisingly broad range of unremarkable conduct" a federal violation. *Id.* at 286. The Court concluded, "[i]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the federal government in the business of policing bad checks." *Id*. at 290.

The prosecutions' failings in *Williams* are repeated here. Under § 1589, a defendant commits forced labor when he knowingly obtains labor or services by physical restraint or the threat of such restraint. But when § 1589 is applied to a familial or domestic relationship, "labor or services" and "obtain" become ambiguous. "Labor or services" might include all forms of work covered by the broad dictionary definition or just work for which one would expect to be compensated, thereby precluding chores in an intimate living arrangement. "Obtain" could include any instance where one person gets another to act differently, or just those situations where some benefit is conferred. Like *Williams*, the prosecution's reading of § 1589 makes a "surprisingly broad range of

unremarkable conduct" a federal crime.

In sum, nothing suggests Congress intended § 1589 to proscribe child abuse where the pretext for the abuse was the failure by family members to perform household chores or homework. Affirming Toviave's conviction would thus undermine the "fair warning" component of the rule of lenity. It would also mark an unprecedented intrusion into the states' domain.

III. Granting the Prosecution's Cultural Defense Motion Foreclosed Toviave's Right to a Fair Trial.

Whether a defendant possessed the requisite *mens rea* turns on whether he acted "knowingly." 18 U.S.C. § 1589. What was in Toviave's mind was the dispositive issue, and Toviave's intent was formed and forced by his culture.

A. Standard of review.

The Court reviews for abuse of discretion whether a district court properly granted a jury instruction. *United States v. Prince*, 214 F.3d 740, 761 (6th Cir. 2000).

B. Cultural evidence is relevant and admissible.

The prosecution sought to preclude Toviave from invoking culture or custom in his defense. (Motion, RE 58, Page ID # 317). Toviave argued this stymied his right to present a defense and that he would not assert slavery or abuse of children were acceptable in Togo. (Response, RE 59, Page ID # 325). The

district court granted the prosecution's motion, (Order, RE 64, Page ID # 345), and instructed the jury that:

> As a matter of law, it is not a defense to a charge of forced labor and attempted forced labor that a defendant's actions were taken in conformity with his own cultural or moral code, or that his action would not be illegal in the country of origin or the country from where the victims traveled, or that the defendant was freely exercising his religious beliefs.

(Instruction, RE 91, Page ID # 1265).

The court's rulings were erroneous. Cultural evidence is admissible and relevant to the charge of forced labor. *Djoumessi*, 538 F.3d at 553. Yet the district court accepted the prosecution's sweeping exclusion of cultural evidence, gutting Toviave's defense. *Djoumessi* warrants reversal. There, the defendants brought a girl from Cameroon to perform housekeeping tasks and watch their two young children, in exchange for sending her to school. *Id*. at 549. But the girl worked every day from 6:00 a.m. to 10:00 p.m. for no compensation other than room and board, and was never sent to school. *Id*. Defendants were convicted of involuntary servitude, conspiracy, and harboring an alien for private financial gain. *Id*. at 550.

The *Djoumessi* defendants cited prevailing culture and conditions in Cameroon, the home country they shared with the girl. *Id*. at 553. They were permitted to argue the arrangement was a Cameroonian tradition in which a poor family entrusts its child to a wealthier one who pledges to care for the child as its

own. *Id*. "Once that tradition is accounted for, [Defendant] argues, it is clear either that [the girl] became his adopted daughter as a matter of law or that he at a minimum had the consent of [the girl's] parents, both of which would permit him to require her to perform chores around the house." *Id*. The Court rejected this argument and affirmed, but what is relevant is the *Djoumessi* defendants' ability to invoke culture and custom.

The cultural arguments permitted in *Djoumessi* were relevant to Toviave's defense. Like *Djoumessi*, here the children (related to Toviave and Helene) stated their parents placed them in Toviave's care. But unlike *Djoumessi*, Toviave was not allowed to explain the arrangement he had with his family members. If that arrangement resembled the informal adoption asserted in *Djoumessi*, Toviave's household chore requirements would be seen in a different, more acceptable light.

Additionally, Toviave was not permitted to reference Togolese culture to demonstrate that education was paramount. This was crucial as most of Toviave's objectionable conduct concerned schoolwork. Further, if children in Togo cook and clean as a matter of course, Toviave could have argued he did not know the schoolwork-related abuse induced the housework. The district court did allow the children to testify about the chores and other work they did for their parents. Yet, Toviave could not explain what he expected of the children, or how their shared cultural background impacted his state of mind.

C. The district court foreclosed evidence critical to *mens rea*.

The Sixth Amendment guarantees a criminal defendant's right to a fair trial. Toviave had a right to present his story, including his life and experiences. To the extent those experiences shaped Toviave's understanding, they form the framework for the jury's *mens rea* determination. But the district court precluded the jury from considering Toviave's life experiences in Togo, his culture, and his upbringing, all critical to evaluate the specific intent crime of forced labor. *See United States v. Sabhnani*, 539 F.Supp.2d 617, 629 (E.D.N.Y. 2008) (holding that 18 U.S.C § 1589 is a specific intent crime).

Any instructions on credibility or weight given to a defendant's witness which impose higher thresholds of credibility or give them less weight violate a defendant's right to compulsory process. *Cool v. United States*, 409 U.S. 100, 103-04 (1972). As the Supreme Court stated in *Washington v. Texas*, the right to offer testimony of witnesses implicates "the right to present the defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." 388 U.S. 14, 19 (1967). Toviave's right to present a defense is imperative for *mens rea*. Willfulness relates to a purpose to act as law forbids. This calls into question Toviave's beliefs as to the nature of his conduct. Where state of mind is an element of the offense, "forbidding the jury to consider evidence that might negate willfulness would raise a serious question

under the Sixth Amendment." *Cheek v. United States*, 498 U.S. 192, 203 (1991).

Toviave did not possess the requisite intent for forced labor. The four children were all related to Toviave and Helene, and he agreed to support them because of their parents' hardships. Toviave himself had fled to America, and along with Helene, brought relatives here with their parents' approval to secure a better future. While the arrangement failed, an individual's life experiences frame his way of thinking and this should have been considered to determine Toviave's intent. Forbidding this angle foreclosed a fair trial, requiring reversal.

IV. Telling the Jury about Toviave's Guilty Pleas Undermined the Presumption of Innocence.

The chief virtue of a fair trial is that a defendant's guilt is not preordained; more so when the defendant pleads guilty to some charges and goes to trial on others.

A. Standard of review.

Evidence admitted pursuant to Federal Rule of Evidence 404(b) is considered under a three-part test. *United States v. Bell*, 516 F.3d 432, 440 (6th Cir. 2008). The Court reviews (1) for clear error the district court's determination that the "other act" occurred; (2) *de novo* the district court's legal determination that the evidence was admissible for a proper purpose; and (3) for abuse of discretion the determination that prejudice did not outweigh the evidence's probative value was not outweighed by its prejudice. *Id*.

B. Toviave's guilty pleas were inadmissible.

Toviave pled guilty to Count One - Fraud and Misuse of Visas, 18 U.S.C. § 1546, Count Four - Mail Fraud, 18 U.S.C. § 1341; and Count Five - Bringing in and Harboring Certain Aliens, 8 U.S.C. § 1324. (Transcript, RE 48, Page ID # 199). He went to trial on Count Two - Forced Labor, 18 U.S.C. § 1589. The prosecution sought to admit the guilty pleas in its case-in-chief. Toviave moved to exclude the pleas because they evinced bad character in violation of Rule 404(b), but the district court refused. (Order, RE 64, Page ID # 345).

Rule 404(b) forbids admitting of prior bad acts "to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). However, such evidence can be admitted as proof of motive, opportunity, intent, preparation, plan, or knowledge. *Id*. The motivation behind Rule 404(b) is twofold. First, the jury may convict a person because of his prior misdeeds. *United States v. Phillips*, 599 F.2d 134, 136 (6th Cir. 1979). Second, the jury will infer that "because the accused committed other crimes, he probably committed the crime charged." *Id*. The Rule ensures a defendant is "tried for what he did, not for who he is." *United States v. Vance*, 871 F.2d 572, 575 (6th Cir. 1989).

Evidence of other acts is probative of a material issue if offered for an admissible and material purpose and probative of the purpose for which it is offered. *United States v. Rayborn*, 495 F.3d 328, 342 (6th Cir. 2007). To be

admissible under Rule 404(b), a prior bad act must be similar and near in time to the underlying offense. *United States v. Carney*, 387 F.3d 436, 451 (6th Cir. 2004). Further, the Rule does not apply to acts "inextricably intertwined" with the charged offense. *United States v. Hardy*, 228 F.3d 745, 748 (6th Cir. 2000).

The prosecution argued the guilty pleas constitute acts that are both "inextricably intertwined" with evidence of the crime charged and part of a pattern. However, none of the elements established by a guilty plea to Visa Fraud, Mail Fraud, or Harboring Aliens was needed by the prosecution to establish Forced Labor. Therefore, as such evidence was not required, the guilty pleas were nothing more than vehicles for bad character.

C. The guilty pleas epitomize unfair prejudice.

If the guilty pleas are probative of a material issue, the Court considers step three, whether the probative value is outweighed by its prejudice. Fed. R. Evid. 403. Rule 403 ensures the constitutional guarantees of a fair trial, requiring courts balance probative value with the "capacity to engender vindictive passions within the jury or to confuse the issues." *United States v. Green*, 548 F.2d 1261, 1268 (6th Cir. 1976). Any arguable probative value of the guilty pleas was dwarfed by the danger of unfair prejudice to Toviave. Once the jury heard he pled guilty to some of the indictment, it considered that as evidence of guilt on the rest.

Supporting reversal is *United States v. Stout*, 509 F.3d 796 (6th Cir. 2007).

The defendant was charged with possessing child pornography. The prosecution sought to introduce a prior offense in which the defendant videotaped a young girl showering. *Id*. at 798. The prosecution claimed it showed the defendant's intent to possess child pornography. *Id.* The district court found the prior offense "inflammatory and distracting." *Id*. at 801. The Court agreed, adopting the district court's reasoning, "[a]ny jury will be more alarmed and disgusted by the prior acts than the actual charged conduct." *Id*. The limited evidence of the underlying charges further motivated the Court. This made the "potential for distraction and unfair prejudice … greater than normal." *Id*.

Admitting Toviave's prior bad acts, especially those stemming from the same underlying facts, made it appear more likely he committed the acts in question. As this imperiled the presumption of innocence, a new trial is needed.

CONCLUSION

Forced labor cannot be established as a matter of law. The Court should thus remand for entry of a judgment of acquittal. Alternatively, a new trial is needed that omits the statements obtained in violation of the Fifth Amendment and the guilty pleas undermining the presumption of innocence, and permits reference to Toviave's custom and culture.

Respectfully submitted,

s/Christopher Keleher

Christopher Keleher
THE KELEHER APPELLATE
LAW GROUP, LLC
115 South LaSalle Street, Suite 2600
Chicago, Illinois 60603
ckeleher@appellatelawgroup.com

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

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

I hereby certify that this brief conforms to the provisions of F.R.A.P. 32(a)(7)(C) for a brief produced with a proportionally-spaced font. The length of this brief is 13,997 words according to the Microsoft word count function.

s/ Christopher Keleher

Christopher Keleher
THE KELEHER APPELLATE
LAW GROUP, LLC
115 South LaSalle Street, Suite 2600
Chicago, Illinois 60603
ckeleher@appellatelawgroup.com

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the Appellant's Brief upon the party listed herein, by mailing same on October 21, 2013 at 115 South LaSalle, Suite 2600, Chicago, Illinois 60603 to:

Mollie O'Rourke
Assistant United States Attorney
211 West Fort Street, Suite 2001
Detroit, Michigan 48226

s/ Christopher Keleher

Christopher Keleher
THE KELEHER APPELLATE
LAW GROUP, LLC
115 South LaSalle Street, Suite 2600
Chicago, Illinois 60603
ckeleher@appellatelawgroup.com