UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

C.A. # 21-10230

UNITED STATES OF AMERICA, Plaintiff vs. **LAWRENCE BLACKSHIRE,** Defendant	**U.S.D.C# 2:19-cr-01033-SMB-1**

ON APPEAL FROM JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, PHOENIX DIVISION, HONORABLE SUSAN M. BRNOVICH , PRESIDING

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

District Court Jurisdiction

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 since Mr. Blackshire was charged with a federal crime. 1-ER-142.[1]

Appellate Court Jurisdiction

This Court had jurisdiction pursuant to 28 U.S.C. § 1291 after the District Court's entry of final judgment on August 17, 2021. 1-ER-3-7.

Timeliness of Appeal

Appellant filed a timely Notice of Appeal on August 18, 2021. 4-ER-592.

Bail Status

Appellant Blackshire is in custody at USP Victorville, CA with a projected release date of April 26, 2026.

[1] Record references are designated by Volume and Page as presented in the Excerpts of Record, i.e., "1-ER-426." "AD_" denotes the Addendum page containing the referenced material. "PSR" refers to the Presentence Investigation Report submitted under seal. Currently pending is Appellant's Motion to File Physical/Documentary Evidence, presented in a USB drive containing relevant trial exhibits of photographs, recordings, and interview transcripts which were utilized at trial, but are not "electronically accessible." (Cir.R.27-14). These items are denoted: "USB [item #]," B[ates]__." (where appropriate). The USB drive enumerates each exhibit individually and includes descriptive detail.

Nature of the Case

On September 12, 2018, Salt River, Arizona, Tribal Police responded to a residence regarding a domestic violence complaint, and interviewed "C.S.", who complained that during an argument the previous night, September 11, 2018, her live-in boyfriend, Lawrence Blackshire, assaulted her outside their trailer, and did so again on the morning of September 12, 2018. Although Blackshire was not located on September 12, he was arrested for this offense on January 24, 2019 and remained in Salt River Pima Maricopa Tribal custody until July 2, 2019. (PSR ¶12) Subsequently, on 6/29/2019, the Tribe dismissed three charges against Blackshire, including one relating to this case. (PSR ¶¶ 57, 58, 59).

Because Mr. Blackshire is an Indian, the federal government charged him under the Indian Major Crimes Act, 18 U.S.C. § 1153 (AD1). On August 27, 2019, the U.S. District Court (D. Arizona) indicted Blackshire for: Count 1, Assault Resulting in Serious Bodily Injury (18 U.S.C. §§1153 and 113(a)(6)); Count 2, Assault Resulting in Substantial Bodily Injury of an Intimate Partner (18 U.S.C. §§ 1153 and 113(a)(7)); Count 3, Assault of an Intimate Partner by Strangulation (18 U.S.C. §§ 1153 and 113(a)(8)) (AD1); and Count 4, Kidnapping (18 U.S.C. §§ 1153 and 1201)(AD4). 1-ER-142-

143. On August 28, 2019, a federal arrest warrant issued for Mr. Blackshire. (PSR ¶2). He was arrested on December 1, 2019. (PSR, p.2).

Blackshire rejected the United States' offer to plead guilty to Assault of an Intimate Partner Resulting in Substantial Bodily Injury. 4-ER-597. Following a three-day trial in the U.S. District Court (Phoenix, AZ) (Brnovich, J.), the jury returned verdicts of: Guilty on Counts One and Two; Not Guilty of Assault of an Intimate Partner or its lesser-included offense, Assault by Striking, Beating, or Wounding, but Guilty *only* of a lesser-included offense of simple Misdemeanor Assault on Count Three. On Count Four, the jury found Blackshire Not Guilty of Kidnapping, and Guilty only of the lesser-included offense of Unlawful Imprisonment (Ariz.Rev.Stat. §1303(A)(AD5). 3-ER-527-530.

After a Sentencing Hearing on August 13, 2021, Mr. Blackshire was sentenced to BOP custody for: ninety−six months on Count 1; sixty months on Count 2; six months on Count 3; and eighteen months on Count 4, all concurrent, followed by Supervised Release for thirty−six months on Counts 1 and 2, and twelve months on Count 4, concurrent, plus a special assessment of $310.00. 4-ER-534-586; 1-ER-3-7.

STATEMENT OF ISSUES

I. Did the District Court Commit Prejudicial Error And Violate Mr. Blackshire's Sixth Amendment Rights By Admitting Prior Acts Evidence and Testimonial Hearsay Pursuant To The Doctrine Of Forfeiture By Wrongdoing?

II. Did The District Court Wrongly Admit Unconfronted, Testimonial Statements Over Defendant's Timely Hearsay And Crawford Objections, Since The Primary Purpose Of Nurse Rable's "Forensic" Exam Was To Gather Evidence For Use Against Blackshire At Trial, And The Statements Exceeded Any Scope Of Medical Treatment?

III. Did the Judge Wrongly Deny Both Defendant's Rule 29 Motion on Count Four, Kidnapping, and Defendant's Requested Kidnapping Instruction Containing Criteria Subsequently Promulgated In U.S. v. Jackson, Which Would Have Informed The Jury's Deliberations On Both Kidnapping And Its Lesser Included Offense, Unlawful Imprisonment?

IV. Whether the Trial Court Improperly Applied Obstruction of Justice and Strangulation Adjustments to Increase Mr. Blackshire's Sentence, In Violation of His Constitutional Rights?

STATUTORY AND CONSTITUTIONAL PROVSIONS ARE PROVIDED IN THIS VOLUME'S ADDENDUM

STATEMENT OF FACTS

Pretrial Proceedings

Pretrial motions concerned unduly prejudicial, irrelevant Fed. R. Evid.404(b) (AD11) information, including admission of recorded conversations between Blackshire and two women during his pretrial incarceration. The recordings purportedly showed Blackshire's "consciousness of guilt" and evidenced that Blackshire "procured" C.S.'s unavailability at trial. Invoking the Forfeiture by Wrongdoing Doctrine, the Government sought to admit C.S.'s unsworn, unconfronted, testimonial statements, including those made during police interviews, which alluded to prior domestic violence. (1-ER-110-116; 118-121; 124). The judge listened to the recordings and viewed excerpted transcripts. 1-ER-110-116; 125-131. Over objection, she admitted the jail recordings for evidentiary purposes, but reserved her ruling on forfeiture. 1-ER-110;124.

Jury Trial

Neither the victim, "C.S.," nor defendant Blackshire testified. At trial, the judge again heard evidence that the Government could never locate, much less subpoena C.S. to testify. No evidence suggested that C.S. ever intended to cooperate with law enforcement after September 13, 2018. Neither Det. Owens, nor his colleagues had any contact with C.S. after

Owens' September 13, 2018 meeting with C.S. 1-ER-24-28; 99-102. Nonetheless, over objection, the judge granted the Government's Forfeiture motion and admitted the three jail recordings and C.S.'s three recorded police interviews, which included prejudicial statements regarding prior domestic violence. 1-ER-19-22. [2]

Delwin Ochoa testified that C.S. and Blackshire were romantic partners who lived in a trailer approximately twenty feet away from his. 2-ER-272-273. [3] On September, 11, 2018, Blackshire approached Ochoa to discuss a shared electricity bill, then left without incident. 2-ER-273-274. Shortly after, Ochoa spoke with C.S. and observed that her eye was unbruised. 2-ER-277. About five minutes later, Ochoa heard Blackshire yelling, calling C.S. "stupid," and telling her to "hurry the F… up." 2-274-275; 278. Despite the close proximity of their trailers (USB#36), no evidence suggested that Ochoa heard anything else that night.

The following day, on September 12, 2018, at 8:21 a.m., **Salt River Police Department Detective Nicholas Daniels** was dispatched to C.S.'s residence where an incident of domestic violence had *already* occurred. 3-

[2] The recorded jail conversations and police interviews played for the jury have been submitted herewith with a Motion to File Physical Evidence.

[3] The following is a chronology of events as they actually unfolded, but not in the order presented by the Government at trial.

ER-416-419. C.S. was ambulatory and had reported that the incident began the previous day, September 11, 2018. 3-ER-430-431. Daniels unsuccessfully searched nearby for Blackshire, and C.S. remained until the Fire Department arrived and transported her to HonorHealth Osborn. 3-ER-420-421.

Officer Daniels Interviews C.S.

Afterward, Daniels traveled HonorHealth where his bodycam recorded his interview with C.S. while she received medical attention. 3-ER-421. Over previous objection, Ex. 8 (USB#4), a ten-minute video was played for the jury, which also temporarily received the accompanying transcript (Ex. 9 (USB#5), 3-ER-422-423.

C.S. told Daniels that the incident occurred between 8:00 and 9:00 p.m. the previous night, September 11, 2018. The couple argued after obtaining water from a nearby church. As they approached their trailer, they began to physically fight with each other outside. Blackshire pushed C.S., and she pushed him back. C.S. picked up a chair, and when Blackshire thought C.S. would hit him with it, he punched her. When C.S. got up and tried to leave, he wouldn't let her, and dragged her toward the trailer, using a

"choke-hold" from behind. (USB#5,B367;368).[4] Once inside the trailer, the altercation stopped; he didn't push or kick her. (USB#5;B369). They went into separate rooms; she to the living room, and he stayed in a different room. Id.

Later, the argument resumed: C.S. agreed when Daniels said: "So . . . you guys were arguing. He obviously breaks your stuff. You hit the wall with the hammer. So [you told him] I don't want to be with you. And you said that's when he started punching you and kicking you." (USB#5,B370) At that point Blackshire started slapping and punching C.S. while she covered her head with her arms and laid on the ground, except when she hit him back. (USB#5,B370-371). Blackshire kicked her while she was on the floor, trying to go out the door. (Id.,B372) He wouldn't let her get up, saying, "Don't move." Yet, when he stepped on her, she kicked him back, causing him to stagger backwards. Id. Ultimately, when C.S. asked Blackshire once not to step on her, he complied. (USB#5,B373).

Then, Blackshire "quit talking" and sat there for a couple of minutes while she cried. Id. Blackshire said he was going to the other room to "get the dog while I still have time." (USB#5,B374) C.S. continued to lay by the front door as Blackshire went to lay down, and she didn't see him until the

[4] C.S. later told Det. Owens that when reaching the trailer's stairs, she said, "Okay, I'll go inside" and walked up independently. (USB#9,B386).

next morning. Id. Despite waiting for Blackshire to go to sleep so she could unlatch the door and leave (although nothing blocked her exit), C.S. fell asleep until the next morning. Id. The following morning (September 12, 2018), they spoke, and Blackshire kicked her leg. (USB#5,B374-375) C.S. "just put on [her]shoes and [ ] walked next door," where she called the police. Id.

Officer Daniels testified that at the hospital, he took photos to document and show C.S.'s injury "as a whole." 3-ER-427-429; (USB#10-13).

On September 11, 2018 at 8:30 a.m., **Esperanza Tavena**, a crisis intervention worker for the Salt River Pima Maricopa Indian Community, responded to the Scottsdale Honor Hospital, where she was directed to C.S. 3-ER-395-399. Tavena offered emergency support services, including shelter. 3-ER-399-400. Tavena's contact with C.S. ended that day, and she contacted her organization's domestic violence advocate, who followed up with C.S. 3-ER-400.[5]

[5] Subsequently that day, **Lynda Rivers**, the Salt River Indian Community domestic violence victim advocate, met C.S., who was transported to her office. 3-ER-410-413. Rivers' agency provided temporary housing at a Motel 6 for three nights, transportation, and some food. 3-ER-414.

September 12, 2018 Medical Care

Dr. Brittany Seroy, an HonorHealth emergency physician, saw C.S. at 9:14 a.m. on September 12, 2018 and discharged her the same day at 11:33 a.m. 3-ER-432-434;436; 488. C.S. had *already been* evaluated by a crisis worker, and the police had been notified *prior to* Dr. Seroy's examination. 3-ER-439. Having no independent memory of C.S., Dr. Seroy referred to her report containing C.S.'s medical records. 3-ER-434-435. C.S. provided information which was typed by Seroy's assistant "scribe." 3-ER-436-437.

Over objection on Hearsay and Crawford grounds, Dr. Seroy testified that C.S. was at the hospital "for assault." 3-ER-438. Her report stated: "This patient is a 36-year-old female who presents to the emergency department by EMS for evaluation status post assault . . . . The patient states that she was assaulted by her boyfriend last night around 2100, and then again this morning before calling EMS. The patient reports being hit in the face and extremities by her boyfriend with a closed fist multiple times." Id. "The patient now complains of headache, neck pain, facial pain, left arm pain, and some current dizziness, but denies any loss of consciousness or visual changes. . . .nausea or vomiting." 3-ER-439. C.S. was "positive for facial

pain," had pain of her neck and left arm, but not of her back, and was positive for dizziness and headaches. 3-ER-440.

Dr. Seroy's bedside exam notes described: soft tissue swelling on the left side of head by the temple, side of skull, and right forehead; abrasions to right cheek, above right eye, and left temple; tenderness on right side of brow and cheek and over her nasal bridge, but without septal hematoma or blood; mild midline tenderness of the third through seventh cervical vertebrae; a large contusion (bruise) on upper left arm with tenderness; and a contusion (bruise) on right side of C.S's thigh just above the knee, plus an abrasion, or "scratch" on C.S.'s right knee. 3-ER-443-444.

Dr. Seroy ordered an x-ray of C.S.'s left humorous, and a CT (computer tomography) scan of her face, cervical spine, and brain. 3-ER-444-445. The CT facial scan showed "minimally displaced bilateral nasal bone fractures" and the radiology report confirmed soft tissue swelling on the left periorbital and mild swelling with contusion on the right cheek. 3-ER-445. C.S. was treated with 1000 mg. of Tylenol. 3-ER-447.[6]

[6] Radiologist **Dr. Jason Low** had interpreted diagnostic images. 2-ER-280-283. A computer tomography ("CT") of the face indicated "minimally displaced bilateral nasal bone fractures" described as "bilateral," since nasal bones are paired; periorbital (near the eye) soft tissue swelling; some swelling with contusion on the right cheek; and periodontal disease with multiple dental caries (cavities). 2-ER-284-286. Dr. Low could not be sure when the injury occurred or what caused it. 2-ER-287-288. Nor could he

Dr. Seroy's report *did not reflect*, nor did Seroy recall, that C.S. said she had been strangled, placed in a choke hold, stomped, or stepped on. 1-ER-29-30. C.S. reported negative for rhinorrhea (runny nose), had no sore throat, no eye pain, cough, shortness of breath, nor abdominal or flank plain 1-ER-33. Other than a knee abrasion, Seroy observed no fresh or dried blood on C.S.'s body. 1-ER-33-34. The x-ray of C.S's spine and CT scan of her cervical spine and brain were normal, showing no hemorrhage or fracture. 1-ER-34. The brain CT showed some bruising and swelling at the left scalp, but Dr. Seroy could not determine any injury's age or cause, although none appeared to be "old." 1-ER-35-36.

The facial CT indicated "minimally displaced nasal bone fractures" of undetermined age and origin. 1-ER-36-37. Unlike C.S.'s case, broken noses sometimes present with bruising and/or swelling and breathing difficulty; a misshapen or crooked nose would be considered "displaced." 1-ER-37. Dr. Seroy prescribed antibiotics for C.S.'s significant, potentially painful dental/periodontal disease. 1-ER-38-39. No injury required stitches, a cast, brace, or emergent surgery. Although Dr. Seroy recommended that C.S.

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comment on the presence or absence of bleeding or swelling *normally* attendant to a broken nose. Id.

follow up with her primary care physician and an ear, nose, and throat specialist, Seroy did not know if C.S. did. 1-ER-40-41.

September 13, 2018 Forensic Exam

The following day, **on September 13, 2018**, **HonorHealth Forensic Nursing Manager Jill Rable** saw C.S. at her office at the Scottsdale Family Advocacy Center, where C.S. had been transported by Det. Owens. 1-ER-58; 60; 87. Having no independent memory of C.S., Forensic Nurse Rable relied on her report (1-ER-59), which contained C.S.'s consent and authorization for Rable to perform a medical forensic examination, provide treatment, collect evidence, photograph injuries, and which expressly permitted Rable to release copies of the complete report to law enforcement for purposes of continuing an investigation. 1-ER-60-61. Rable witnessed C.S. sign the consent form *prior to* Rable performing the examination and taking any notes. 1-ER-61.

When seeing patients, Forensic Nurse Rable typically performed a "head-to-toe" physical exam, developed a care plan, and collected forensic evidence if appropriate. 1-ER-55-57. Normally, a patient's medical history would reveal preexisting conditions and/or complications. 1-ER-56. In domestic violence cases, a previous medical history and offender

identification facilitated providing safe living accommodations. 1-ER-57-58.[7]

Nurse Rable entered notes in a computerized, electronic medical form system while she questioned the patient and typed in the available fields. 1-ER-59-60. Her report contained a quotation from C.S. stating that the assault took place between "8:00 to 9:00 p.m." 1-ER-62.

Over objection by trial counsel on Hearsay and Crawford grounds, Forensic Nurse Rable was permitted to read additional quotes from C.S.:

- "He punched me all over my head and the sides. It was swollen." ;
- He slapped me and threw me to the ground." ;
- He put me in a choke hold and dragged me inside and stepped on my chest and kicked me a few times, and that was it." ;
- "I had my arms up over my face and head and he was hitting my head to the ground over and over." ;
- "All day yesterday I was dizzy and had a headache." ;
- "It is a little sore" (noting patient pointed front of neck); and
- "They did CAT scan and x-ray of my arm. I have a broken nose."

(1-ER-62-63).

[7] Notably, Lynda Rivers and Esperanza Taverna had fulfilled this function the previous day, and C.S. had already identified Blackshire as her assailant.

C.S. denied that any weapon had been used. 1-ER-63. Rable checked boxes indicating that C.S. was subject to physical contact by hands, feet, grabbing, holding, slapping, and punching, but not hair pulling. 1-ER-64. Regarding physical restraint, C.S. answered, "I was on the ground." Id. The "threat" box was checked, with the quotation: "Don't get up, he will find me and my family." 1-ER-64. Boxes denoting "strangulation," "suffocation" and "approached from behind" were checked, with the quotation: "with his arms from behind" 1-ER-64-65. Additional checked boxes listed related symptoms: "headache;" "lightheaded;" "dizzy;" and "throat pain." 1-ER-65. Continuing symptoms were "muscle pain" ("neck, back, arm") and "face and head." Id. C.S. said the assailant was "my boyfriend" whose whereabouts were currently unknown. 1-ER-65-66.

The exam began at 10:00 a.m., ended at 10:40 a.m., and C.S. was discharged at 10:50 a.m. 1-ER-67; 87-88.[8] After providing aftercare instructions, Rable transferred C.S. to the Salt River victim advocate, and C.S. was completely discharged at 10:55 a.m. 1-ER-67. Nurse Rable's "diagnosis" recited: "domestic violence by history, physical assault by history, strangulation by history, and minor and moderate physical injury by

[8] (Det. Owens recorded interview of C.S. began at 10:42 a.m. (USB#6).

examination. . . . " 1-ER-68. The report erroneously indicated that crime lab results were pending, since no samples had been collected. 1-ER-68-69.

Rable created a "body map" corresponding to photographs she took during the exam. 1-ER-69-70; 87-88. The photos, Exs.32-56 (USB#14-34), depicted various injuries. 1-ER-70-83. Exs. 45-47 (USB#24-26), which depicted C.S.'s neck from the front and both sides, showed no injuries. 1-ER-80-81.

On cross-examination, Forensic Nurse Rable confirmed that she did *not* perform her usual forensic sampling, nor did she collect clothing, blood, urine, or test C.S. for drugs or alcohol. 1-ER-85-86. She examined S.C. *after* the x-rays and CT scans were taken at HonorHealth and never saw those test results. 1-ER-86.

C.S. had never used the words "strangulation" or "suffocation," nor were those terms included in C.S.'s quotes. 1-ER-88. C.S. never suggested that her assailant attempted to make her pass out or stop her breathing. Id. Rable didn't recall C.S. recounting how many times she had been hit, or whether C.S. disclosed that she hit her boyfriend during the fight. 1-ER-89.

Rable explained that her notation, "limited visualization," indicated that by choice, C.S. didn't change into a gown during the exam. Since C.S. left her bottom clothing on, Rable did not see her buttocks, genitals, and

upper thighs. 1-ER-90. But C.S. said she had showered and did not discover any additional injuries. Id. Rable saw no lacerations, cuts, or areas requiring stitches, a cast, or a brace. 1-ER-90-91. Rable couldn't determine exactly when the injuries occurred, since she examined C.S. about 36 hours after the assault. 1-ER-91. C.S. never returned for a follow-up examination or photographs to document any injury progression. 1-ER-92-93.

The Government Failed to Contact C.S.

Salt River Police Detective Julian Owens, Sr. first met with C.S. on September 13, 2018 at the Scottsdale Advocacy Center. 2-ER-340-342. Although Exs. 20-22 were photos taken by Off. Daniels the *previous day*, Owens claimed they depicted C.S.'s appearance on September 13. 2-ER-344-345. Because C.S. had identified Blackshire as her assailant, Det. Owens unsuccessfully looked for him while performing a safety sweep of the trailer and surrounding area when he visited C.S.'s home later that day. Id.; 3-ER-383. Owens had no contact with Blackshire until his arrest in December, 2019. 1-ER-24.

Det. Owens had no further contact with C.S. after their meeting on September 13, 2018. 1-ER-24-25; 28; 102. Beginning August 29, 2019, in preparation for this case, Owens and colleagues made about 14 attempts to locate C.S. 1-ER-24-25; 99-100; 102. Yet, officers could never communicate

with C.S., much less serve her with a subpoena, even by the time of trial. 1-ER-103; 3-ER-372; 394. *At some point* after his final meeting with C.S. on September 13, 2018, Owens issued a "file stop" ("attempt to locate") bulletin because C.S.'s phone number was inoperable, nor could she be found at her home. 1-ER-25-26;100. Owens personally searched for C.S. five times and twice "instructed other officers with the service of subpoenas." 1-ER-101. He unfruitfully utilized the Mesa Fusion Center Police Agency and the Salt River Police Department Intelligence Division to locate C.S.. Id. Owens also contacted C.S.'s family members and friends, and found only two, including Delwin Ochoa (who testified, but was not questioned about C.S.'s whereabouts at trial). Id. Owens attempted to contact C.S. three times at her grandmother's residence and convey messages through her. 1-ER-101-102. The Government presented no evidence that these messages were ever conveyed or received. Despite receiving information that C.S. was living in Mesa, Arizona, Owens found no records of her there. 1-ER-101.

Detective Owens' Recorded Interviews with C.S.

Over objection, the Government introduced two bodycam interviews between C.S. and Det. Owens conducted on September 13, 2018. The first occurred at 10:42 a.m. at the Scottsdale Advocacy Center, immediately after

Rable's "forensic exam." That interview (Ex.4) was played for the jury (USB#6), and the jury temporarily received Ex. 5, a corresponding transcript (USB#7). 3-ER-372-374.

1. C.S. described an argument that occurred on September 11, 2018 at about 8:00 or 9:00 p.m., regarding a bill for electricity they shared with neighbors, after she saw Delwin Ochoa. (USB#7,B206) When returning from a nearby church where C.S. and Blackshire obtained water, they squabbled, and Blackshire seemed "mad." (USB#7,B207-208) Blackshire put his fist under her chin and pushed her head back. She responded, "Quit, don't hit me. . . " and became angry. (Id.) No one else was present. (Id.,B208) At some point Blackshire began slapping and pushing her, then started punching her when she tried to run. (Id.;B209). He punched her in the mouth, she started bleeding, then he punched her on the side of the head. (Id).

After fighting outside the trailer, C.S. agreed to go back inside. (USB#7,B205) Later, at some point, Blackshire threw C.S. to the ground; CS. tried to close the door and lock it, but Blackshire kept kicking it open. (Id.) When she tried to position her leg to get outside, Blackshire used his arms to pull her back inside, while telling her to stop. (Id.) When asked, "Did he say anything to let you know . . .that he wasn't gonna let you

leave?," C.S. replied, "No. He just said, 'You're not going anywhere. You're not getting out there.'" (USB#7,B206). They "talked," and C.S. told him it's the last time he would ever hit her because . . she wasn't going through that again . . 'cause it's when I try to leave him." (USB#7,B210).

Later, she told Owens that while she was on the ground trying to get out of his way, Blackshire kicked her twice and tried to step on her chest. (USB#7,B216) About 4 months ago, she assumed that he had fractured her ribs, and she didn't want to feel that again, so she begged him to stop, and he did, after stepping on her one time. (Id.,B216; 217) She never called the police about the previous incident nor sought medical diagnosis or care for the "fractured ribs." (USB#7,B216)

C.S. agreed when Owens suggested she had told the other officer she was punched with a closed fist in excess of 20 times. (USB#7,B213) When asked if Blackshire threatened her while punching, C.S. replied, "Why do you make me hit you?" and "Shut up." (Id.,B214) Owens pressed the issue, *again* asking if Blackshire had threatened her in any way. (Id.) C.S. answered that Blackshire said, "If the cops came, then I already know what's going to happen because he's made threats before . . because I had called the cops before on him." (Id.) She denied that Blackshire ever threatened her with a pocketknife, or any other weapon or instrument. (Id.,B215).

C.S. never lost consciousness Her vision was normal. She described any discomfort when swallowing as "[not] that bad." (USB#7,B210-211) She experienced no coughing or vomiting. Pain on the side of her head was "on a scale of ten, probably a three." (Id.,B211) Her breathing was normal. Besides slight pain on her nose, she couldn't even tell that it was broken. (Id.). Overall, she felt a little sore. (Id.,B212) No new injuries appeared. (Id.). Other than her left temple, she only experienced pain on her arm when touched. (USB#7,B213).

2. Again, over objection, Owens also authenticated, and the jury heard Exs. 6 (USB#8), his interview with C.S. at her residence later on September 13, 2018, and the jury temporarily received the accompanying transcript (Ex.7;(USB#9)). 3-ER-376-377. The couple argued when returning from getting water at the church. (USB#9,B385) They began fighting outside the trailer, and he pushed her. (Id.). When she tried to walk the other way to leave, he used a "choke-hold" to drag her to the stairs, at which point C.S. stated, "Okay, I'll go inside," and walked up independently. (USB#9,B386)

Later, they fought in the back room. Blackshire threw her down and she laid on the ground the whole time. (Id.) At some point when she tried to leave, he stood behind her and pulled her back in, just saying that she

"wasn't gonna go anywhere." (USB#9,B387) When they stopped fighting, he separated from her; went in the other room to lay down with the dog, and C.S. stayed where she was. (USB#9,B386) When they awoke the next morning, they spoke, and he kicked her. (Id.,B387) Blackshire remained inside when she put on her shoe and just walked away quickly. (USB#9,B387-388).

Exs. 55-66 were photos depicting the scene, which Owens took after C.S. signed a consent form at 12:05 p.m. on September 13, 2018. 3-ER-382. Ex.61 (USB#36) depicted C.S.'s trailer and its proximity to Delwin Ochoa's.

The Jail Recordings

1. While incarcerated, during a December 23, 2019 phone call, Blackshire consoled his distraught, sobbing girlfriend, Lucinda Wilson, by assuring her that the Government wouldn't be able to find any "victims", particularly *the one man* that Blackshire would be worried about, whom *even Blackshire* could not find. (USB#1; Ex.11);1-ER-126-127. Blackshire said he had "taken care of everything . . already…. [and] made peace with everybody . . and [they] already discussed the whole not showing up to court thing." 1-ER-127.[9]

[9] At trial, following Defendant's previous objection and the judge's adverse ruling (1-ER-103;110), the Government played excerpts of the 12/23/19 call,

2. On December 29, 2019, a second call was unexpectedly answered by "Natia," [10] who asked if Blackshire wanted to leave a message for C.S. (USB#2); 1-ER-128. At first, Blackshire declined. Id. Only when Natia solicited him *again*, did Blackshire respond, "Well, just tell her I'm in jail for the same shit from before . . . . and if the Feds get ahold of her, just play dumb or whatever, not show up, *whatever*." I-ER-129-129. Yet, when Blackshire asked, "Is there any way to get a hold of her? *No, huh*?," Natia responded, "*Nuh-uh*. She don't have her phone on." 1-ER-129. The Government neither called "Natia" as a witness nor produced evidence that any message was ever conveyed.

3. In a third recording during a jail visit on January 12, 2020,[11] Blackshire nervously asked girlfriend Lucinda Wilson to find "her" and let her know that "no matter what they tell her . . . . they can't force her to go." 1-ER-130-131. Wilson flatly refused to convey any message Id. During sentencing, the Government admitted that Blackshire's statement suggesting

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Ex.11 (USB#1), and the jury temporarily viewed the corresponding transcript previously viewed by the judge. (Ex.12;1-ER-126-127).

[10] At trial, the judge noted defendant's previous objection (3-ER-384), and permitted the jury to hear an excerpt of the 12/29/2019 call (Ex.13)(USB#2), and to temporarily view the corresponding transcript (Ex.14;1-ER-128-129). 3-ER-383-384.

[11] Again, over objection, the jury heard an excerpt of the 1/12/2020 recording. (Ex.15)(USB#3), and temporarily viewed the corresponding transcript (Ex. 16; 1-ER-130-131). 3-ER-385-388.

that "[the Government] can't force her to go [to trial]," was true. 1-ER-14. Wilson never testified, nor did the Government produce any evidence that the message was ever conveyed.

SUMMARY OF ARGUMENT

I. Like 80-90 % of domestic violence victims, C.S. never appeared for trial, nor did any evidence suggest that she intended to cooperate with the Government after September 13, 2018. Although the Government never located, contacted, or subpoenaed C.S. after that date, it blamed Blackshire for her absence at his March, 2020 trial. In an end-run around Crawford and the Confrontation Clause, the Government offered Blackshire's jail calls - purportedly to show "consciousness of guilt" - but actually to justify invoking the "Forfeiture by Wrongdoing Doctrine," so it could then admit unsworn, unconfronted, and unquestionably testimonial evidence against Blackshire. (28-31)

The judge ignored Fed.R.Evid 804(b)(6)'s three-part legal test, which this Court should clarify applies in the Ninth Circuit. (31-38) Forfeiting Mr. Blackshire's most fundamental constitutional Confrontation rights through misapplication of the law was not harmless. It permitted the Government to suffuse its case with witnesses who recited or played C.S.'s rambling,

unconfronted, out-of-court statements during which she described her assault and alluded to uncorroborated, highly prejudicial 404(b) evidence which portrayed Mr. Blackshire as a serial abuser. (38-43)

II. Over hearsay and Crawford objections, the District Court wrongly admitted C.S.'s statements to Nurse Rable during a "forensic exam" that occurred one day *after* C.S. had *already been* medically diagnosed and treated, and received victim advocate services. (44) The primary purpose of Rable's exam was not to provide *medical treatment*, during which a declarant is presumed to be truthful as required by Fed. R. Evid. 803(4). Rather, it was facilitated by law enforcement and served as a pretextual vehicle to gather testimonial evidence for use against Blackshire at trial. (45) Over objection, Forensic Nurse Rable recited C.S.'s unsworn, unconfronted, testimonial statements, which, in any case, should have been inadmissible Under Fed. R. Evid. 803(4), since they exceeded the scope of any ostensibly "medical" purpose of the visit. (46) The Government utilized certain statements regarding "threats" and "choke-holds," as a flimsy premise upon which it then bootstrapped Kidnapping charges, eviscerated Blackshire's Confrontation rights via Forfeiture by Wrongdoing, then tacked on sentencing enhancements for Obstruction of Justice and Strangulation.

Without the unconfronted statements here, and as articulated in Issue I, *supra*, the evidence would have been insufficient to convict Blackshire. (48)

III. The judge wrongly denied both defendant's Rule 29 motion re: Kidnapping (Count Four), and counsel's requested Kidnapping instruction containing criteria subsequently promulgated in U.S. v. Jackson. (49) Since as matter of law, the Government could not establish that Blackshire "Kidnapped" C.S., the charge never should have gone to the jury. (50-58) Regardless, Blackshire was entitled to receive a jury instruction reflecting the criteria set forth in Jackson, which would have guided the jury's deliberations on Kidnapping and Unlawful Imprisonment, and would have precluded a guilty verdict on the lesser-included charge. (58) Since A.R.S. § 13-1303(A) is a lesser-included offense under the federal Kidnapping statute in Arizona, this court should clarify that instructions pertaining to any of its overlapping elements should be informed by the principles articulated in Jackson. (59)

IV. The trial court improperly applied Obstruction of Justice and Strangulation adjustments to increase Mr. Blackshire's sentence, in violation of his constitutional rights. (61) A preponderance of evidence did not support applying U.S.S.G. § 3C1.1's 2-Level Obstruction Adjustment, since

Blackshire did not engage in threatening, bribing, coercive, or otherwise wrongful conduct during his jail conversations. (62)

Nor did a preponderance of evidence support the 3-level Strangulation offense adjustment. (64) After submitting several jury questions regarding strangulation, the jury expressly *rejected* the Government's Strangulation *and* Attempted Strangulation theories, and *further rejected* the lesser included offense of Assault by Striking, etc., finding Blackshire guilty only of simple Misdemeanor Assault. The record evidence refutes any conclusion that Blackshire attempted to or actually did strangle C.S. under the statutory criteria, which the court ignored. (5) The improper use of acquitted conduct to enhance Mr. Blackshire's sentence violated his Fifth and Sixth Amendment rights. (66)

ARGUMENT

I. The District Court Committed Prejudicial Error And Violated Mr. Blackshire's Sixth Amendment Rights By Admitting Prior Acts Evidence and Testimonial Hearsay Pursuant To The Forfeiture By Wrongdoing Doctrine.

A. Standard of Review

The district court's resolution of Confrontation Clause claims is reviewed *de novo*. United States v. Cazares, 788 F.3d 956, 972 (9th Cir. 2015). This Court reviews "*de novo* the district court's construction of hearsay rules, but review[s] for abuse of discretion the court's determination to admit hearsay evidence." Id., *quoting* United States v. Marguet–Pillado, 560 F.3d 1078, 1081 (9th Cir. 2009). This court reviews underlying factual determinations for clear error. United States v. Whittemore, 776 F.3d 1074, 1077 (9th Cir. 2015).

B. Background

In Crawford v. Washington, the Supreme Court struck a fatal blow to "victimless" domestic violence prosecutions when it held that the Sixth Amendment's Confrontation Clause (AD9) requires witnesses to appear in court; and for an unavailable witness's testimony to be admissible, the defendant must have had a prior opportunity for cross-examination. 541 U.S.

36, 68 (2004).[12] Here, like 80-90% of domestic violence victims, C.S. never appeared for trial, nor did any evidence suggest that she intended to cooperate with the Government after September 13, 2018.[13] Although the Government never located, contacted, or subpoenaed C.S. after September 13, 2018, it blamed her absence at the March, 2020 trial on Blackshire. 1-ER-110-116; 118-124.[14] Circumventing Crawford and the Confrontation Clause, the Government offered Blackshire's jail calls - purportedly to show "consciousness of guilt" - but actually to justify invoking the "forfeiture by wrongdoing" doctrine,[15] so it could then admit unquestionably testimonial unsworn, unconfronted evidence, including interviews between C.S. and Off. Daniels and Det. Owens on September 12 and 13, 2018, respectively, well after the primary conduct had occurred and any exigency passed. 1-ER-104-105. Although the forfeiture exception is usually used in witness intimidation contexts where a defendant has employed threats, coercion,

[12] See Lininger Yes, Virginia, There is a Confrontation Clause, 71 Brook L. Rev. 40 (2005) ("Lininger I").

[13] Lininger, Prosecuting Batterers After Crawford, 91 Vir.L.Rev. 747 at 768, and n. 103.(2005) ("Lininger II"), *citing* DeSanctis, Bridging the Gap between the Rules of Evidence and Justice for Victims of Domestic Violence, 8 Yale JL & Feminism 359, 367 (1996).

[14] The Government also contended Blackshire's statements during these calls also evidenced his "consciousness of guilt" of the charged offenses.

[15] See Lininger I, *supra* n. 1 at 407 (cautioning that prosecutors increasingly rely on Forfeiture by Wrongdoing to circumvent confrontation requirements *entirely* in the wake of Crawford).

violence, or even murder that was intended to, *and actually did* prevent a witness from testifying, [16] the jail recordings showed no such behavior, nor did they – or any other evidence - prove that Blackshire had *actually caused* C.S.'s absence at trial. 1-ER-126-131; (USB#1-3).

C. The Government neglected to contact C.S. after September 13, 2018, and its efforts to do so between August 27, 2019 and the March, 2020 trial were fruitless.

The "window of opportunity´ for cooperation between a victim and law enforcement often closes quickly after an incident in a domestic violence case. [17] Most victims do not cooperate with the Government at all.[18] C.S. had never voluntarily contacted Det. Owens or any government representative to follow-up at any time after September 13, 2018. 1-ER-24-28;99-102. Nor did she return for follow-up visits with Forensic Nurse Rable

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[16] Flanagan, Forfeiture By Wrongdoing And Those Who Acquiesce In Witness Intimidation: A Reach Exceeding Its Grasp And Other Problems With Federal Rule of Evidence 804(b)(6), 51 Drake L. Rev. 470, 469; 474, 482; 485, n. 162 (2003) (nearly all reported opinions contain direct evidence of defendant's participation by orders, threats, or actual violence against witness).

[17] See Lininger II, *supra*, n. 2, at 771.

[18] Lininger II, *supra*, n. 2; United States v. Hall, 419 F.3d 980, 988 (9th Cir. 2005) (*citing* Lininger II at 769, and stating: "The difficulty of securing the testimony of domestic violence victims . . . against their batterers is well recognized.").

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after September 13, 2018. 1-ER-92-23. Although Det. Owens was involved with this case since its inception in September, 2018 (and could reasonably expect that the Government would eventually exercise its federal jurisdiction), only in late August, 2019, *nearly a year after the offense*, did he begin attempting to locate C.S. in preparation for this case. As detailed *supra* at pp. 17-18, Owens and colleagues made about 14 attempts to contact C.S. from late August, 2019 onward; however, the officers could never communicate with C.S., much less serve her with a subpoena, even by the time of trial. 1-ER-24-25; 99-100 -103; 3-ER-372; 394. *See* Motes v. United States,178 U.S. 458, 474, 20 S.Ct. 993 (1900) (Confrontation Clause violated where trial court wrongly admitted preliminary hearing testimony of conspiracy to murder trial, where evidence was insufficient to prove the accused, rather than governmental neglect, was responsible for declarant's absence).

D. The judge misapplied the law regarding the Forfeiture By Wrongdoing Doctrine and unjustly abrogated Mr. Blackshire's Confrontation Rights.

At trial, the court failed to apply the relevant legal test, and allowed the Government's forfeiture by wrongdoing motion, merely stating:

> Mr. Blackshire acted intentionally to cause the victim's unavailability, both directly by his statements when he said he's

> taking care of it, or he has taken care of it, and indirectly by his directions to other people.

1-ER-19.

In Giles v. California, 554 U.S. 353, 128 S.Ct. 2678 (2008), the Supreme Court recognized that the forfeiture by wrongdoing doctrine, an exception to the Confrontation Clause derived from common law, allows an unconfronted out of court testimonial statement against a party if that party **wrongfully caused** the declarant's unavailability as a witness, **with the intent** to prevent the witness from testifying against them in court. Giles, *supra* at 364–69, 128 S.Ct. 2678; Carlson v. Attorney Gen. of Calif., 791 F.3d 1003,1009-10 (9th Cir. 2015) (testimonial statements by an unavailable witness permissible if a preponderance of the evidence shows that the witness is absent by defendant's affirmative, wrongful action).

In Giles, the Supreme Court observed that in 1997 it had approved Fed. R. Evid. 804(b)(6) (AD7), "which codifies the forfeiture doctrine." United States v. Cazares, 788 F.3d 956, 974 (9th Cir. 2015) (*citations omitted*). "Forfeiture by wrongdoing" applies only when the defendant engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. *See* id., *citing* Fed. Rule Evid. 804(b)(6); Giles, *supra* at 367 (2008); United States v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996) (under federal law, Confrontation Clause

protections cease to apply to a defendant who "(1) causes a potential witness's unavailability (2) by a wrongful act (3) undertaken with the intention of preventing the potential witness from testifying."). *Accord* United States v. Scott, 284 F.3d 758, 764-65;762 (7th Cir. 2002) (Fed. R. Evid 804(b)(6) requires the Government to "show by a preponderance of the evidence (1) that the defendant engaged or acquiesced in wrongdoing, (2) that the wrongdoing was intended to procure the declarant's unavailability, and (3) that the wrongdoing did procure the unavailability."); United States v. Jonassen, 759 F.3d 653, 662 (7th Cir. 2014) (reiterating 3-prong legal test). **This Court should clarify that this legal test applies in the Ninth Circuit.**

"While preponderance of the evidence is the appropriate standard, this should not mean that a defendant's right to confrontation is easily forfeited. " State v. Poole, 232 P.3d 519, 526 (Utah 2010) (adopting federal test and recognizing the "the universally adopted rule" requires that unavailability be based on a **wrongful** act of the defendant). There must be sufficient evidence to connect the defendant to the unavailability of a witness. [19] When reviewing a trial court's justification of Forfeiture By Wrongdoing, appellate courts have required a far more extensive showing of

[19] See Flanagan, n 16, *supra* at 485-86, n. 163 (*discussing cases*).

truly *wrongful* behavior that provides the *actual nexus* to a witness's absence. *See* Cazares, *supra* at 974-975 (district court recorded multiple *specific* reasons that defendant and co-conspirators directly engaged in wrongdoing that was intended to and did render a murdered witness unavailable); Houlihan, *supra* at 1280–81 (listing exhaustive facts confirming that district court's findings met preponderance of evidence standard to admit murder victims' hearsay statements); United States v. Johnson, 767 F.3d 815, 823 (9th Cir. 2014) (based on defendant's actions and timing of witness's disappearance, court reasonably inferred that defendant informed other gang members of witness's identity so they could threaten her against testifying; witness began receiving threats one day after defense attorneys gave witness lists to clients; defendant's attorney visited him that same day; and defendant previously expressed interest in receiving witness list).

1. "Wrongful," "inherently corrupt," or "inherently malign" conduct must be proven.

Federal courts recognize that Fed. R. Evid. 804(b)(6) requires that defendant actually engage in "wrongdoing" Scott, supra at, 763–64:

> [Although the] word [wrongdoing] is not defined in the text of Rule 804(b)(6), . . . the advisory committee's notes point out that "wrongdoing" need not consist of a criminal act. One thing seems clear: c**ausing a person not to testify at trial cannot be**

> **considered the "wrongdoing" itself**, otherwise the word would be redundant. So we must focus on the **actions** procuring the unavailability" Id.. . . [The Rule] contemplates application against the use of coercion, undue influence, or pressure to silence testimony and impede the truth-finding function of trials. **We think that applying pressure on a potential witness not to testify, including by threats of harm and suggestions of future retribution, is wrongdoing.**

Id, (*emphasis supplied*). *See also* Steele v. Taylor, 684 F.2d 1193, 1201 (6th Cir.1982) (noting that wrongful conduct includes use of force and threats, and "persuasion and control" by a defendant); United States v. Balano, 618 F.2d 624, 629 (10th Cir.1979) (*further citation omitted)* (defendant waives confrontation right by threatening witness's life and *actually causing* the witness's silence); United States v. Carlson, 547 F.2d 1346, 1358–60 (8th Cir.1976) (*further citation omitted)* (similar); Jonassen, *supra* at, 662 (while violating court order, defendant procured witness's unavailability by incessant pretrial manipulation, working tirelessly for seven months using tactics ranging from pleas for sympathy to bribes, and bombarding witness with phone calls, letters, and messages). *Cf.* United States v. Thomas, 916 F.2d 647, 651 (11th Cir.1990) (obstruction of justice statute, 18 U.S.C. § 1503 (AD10), requires proof that defendant's conduct was "prompted, at least in part," by requisite corrupt motive); United States v. Lonich, 23 F.4th 881, 902–03 (9th Cir. 2022), *quoting* Black's Law Dictionary 435 (11th ed.

2019) ("'As used in criminal-law statutes' the term 'corruptly' usually 'indicates a wrongful desire for pecuniary gain or other advantage.'"); Martinez-de Ryan v. Whitaker, 909 F.3d 247, 250 (9th Cir. 2018) (an act is done "corruptly" if it is performed voluntarily, deliberately, and dishonestly, for the purpose of either accomplishing an unlawful end or result or of accomplishing some otherwise lawful end or lawful result by an unlawful method or means) (*citation and quotation omitted*).

Moreover, courts have found it necessary to distinguish *wrongful* conduct, such as the use of threats, coercion, persuasion, pressure, collusion, or physical restraint, with non-culpable, permissive behaviors. Commonwealth. v. Edwards, 444 Mass. 526, 541 (2005). ("We do not suggest that merely informing a witness of the right to remain silent, guaranteed by the Fifth Amendment to the United States Constitution, will be sufficient to constitute forfeiture. Providing such publicly available information to a witness does not constitute "pressure" or "persuasion."); United States v. Ochoa, 229 F.3d 631, 639 (7th Cir. 2000) (Fed.R. Evid. 804(b)(6) requires the conduct at issue to be wrongful. Permitting a witness at one's upcoming trial to use a phone, without more, is not a culpable act.). Instructively, the Supreme Court has cautioned that judicial restraint is particularly appropriate in cases

> where the conduct underlying the conviction—"persua[sion]"—is by itself innocuous . . . "persuad[ing]" a person "with intent to ... cause" that person to "withhold" testimony or documents from a Government proceeding or Government official is not inherently malign. Consider, for instance, a mother who suggests to her son that he invoke his right against compelled self-incrimination, *see* U.S. Const., Amdt. 5, or a wife who persuades her husband not to disclose marital confidences, *see* Trammel v. United States, 445 U.S. 40, 100 S.Ct. 906, [ ] (1980). Nor is it necessarily corrupt for an attorney to "persuad[e]" a client "with intent to ... cause" that client to "withhold" documents from the Government. In Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677 [ ] (1981)

Arthur Andersen LLP v. United States, 544 U.S. 696 at 703–04; 706 (2005) (remanding where trial court's jury instruction "diluted the meaning of 'corruptly' so that it covered innocent conduct."). A*ccord*: United States v. Doss, 630 F.3d 1181, 1184, 1190) (9th Cir. 2011) (*further citation omitted*), *citing* Arthur Andersen, *supra* (there is nothing inherently corrupt under witness tampering statute about urging someone not under a compulsion to testify, to exercise their right not to testify; and trial evidence established only that Doss non-coercively appealed to his wife to exercise her marital privilege not to testify against him). *See also* United States v. Farrell, 126 F.3d 484, 488 (3d Cir.1997) (finding that corrupt persuasion *does not* include "a noncoercive attempt to persuade a co-conspirator who enjoys a

Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain from volunteering information to investigators.").

Here, C.S. was not under any compulsion to testify, since she had never been contacted by the government, much less served with a subpoena. As in Farrell, *supra*, C.S. may have had numerous, legitimate reasons to decline to pursue the matter after September 13, 2018, and it was her prerogative to exercise.[20] Indeed, considering that C.S's injuries were deemed "minor and moderate" (1-ER-68), and that she appeared to recover quickly (USB#8), *even if she had known about* the federal prosecution (there is no evidence that she did), C.S may have *disdained* being instrumental in helping the Government impose a potential LIFE sentence on her former boyfriend.

2. Each element of the Forfeiture By Wrongdoing legal test was not supported by a preponderance of evidence.

Here, the judge failed to apply the correct legal test, discussed *supra* at pp. 32-33**.** Nor did her cursory conclusions justify forfeiting Mr. Blackshire's most fundamental Constitutional rights, much less by a

[20] Linda G. Mills, Commentary: Killing Her Softly: Intimate Abuse and the Violence of State Intervention,113 Harv. L. Rev. 550, 551, 555; 558-561 (1999) (generally criticizing mandatory interventions requiring prosecutions regardless of victim's protestations as possibly retraumatizing to victim and likely to cause unwanted collateral consequences in victim's personal life).

preponderance of the evidence. The judge's finding of Blackshire's *affirmative action* relied on Blackshire's statement during the December 23, 2019, call, while incarcerated, as he tried to console his distraught and sobbing girlfriend (USB#1), by reassuring her "that he had already taken care of it" by "making peace" with unspecified people (apparently well before his arrest in the federal case). 1-ER-19. Notably, the December 23 call was ambiguous since it was uncertain to whom Blackshire was referring. He described the relevant victims in the plural, although C.S. told law enforcement that there were no witnesses. The "one individual" Blackshire was "even worried about" was a male ("he"), whose whereabouts were unknown to everyone, *even Blackshire*; yet the only witness here was female. 1-ER-26-27. Furthermore, the judge knew that three separate cases, one concerning the conduct here, had been pending against Blackshire in the Salt River Pima-Maricopa Indian Community (SRPMIC) before being dismissed in June, 2019. The other two cases involved C.S. and her brother and several non-victim witnesses. 1-CR-121-22. *Cf.* United States v. Emmert, 9 F.3d 699, 704–05 (8th Cir.1993) (*further citation omitted)* (sentencing court correctly concluded that defendant's statement *was not sufficiently unambiguous* to warrant obstruction enhancement).

But even if the December 23 call *could be* construed as referencing C.S., the fact that Blackshire *had not* actually "taken care of it" (i.e., actually procured C.S.'s absence) is evident by the 2nd and 3rd calls. During the December 29, 2019 call, Blackshire first declined to leave a message for C.S. Only when Natia solicited Blackshire *again*, did Blackshire respond, "Well, just tell her I'm in jail for the same shit from before . . . . and if the Feds get ahold of her, just play dumb or whatever, not show up, *whatever*." 1-ER-128-129. If Blackshire had "already taken care of it," it is implausible that he would feel compelled to convey even such a lukewarm message. Apparently, even by late December, 2019, Blackshire did not even know "if the Feds" had ever contacted C.S. (they had not). Most significantly, the message wasn't remotely threatening or coercive, and the Government presented no evidence that it was ever conveyed to C.S.

In fact, on January 12, 2020, Blackshire was *so nervous* that he *had not actually* "taken care of it" that he called his girlfriend; however, she flatly refused to convey his suggestion that "no matter what they do . . . they can't force her to go," which the Government conceded during sentencing was "obviously . . . a true statement." 1-ER-14; 131-132. Again, Blackshire's suggestion wasn't remotely coercive, threatening, or otherwise "wrongful." (Anderson, *supra*). Nor did any evidence suggest that C.S. ever

received any message. In sum, the December 29th and January 12th calls undermine any conclusion, even by even the *most lenient* standard of proof, that Blackshire had actually "already taken care of it," i.e., actually caused C.S.'s absence at trial, much less that he did so through "wrongful" conduct.

In a stark contrast to Blacskhire's situation, in Scott, 284 F.3d 758 at 764-765, the Sixth Circuit found that the trial court had reasonably inferred that defendant coerced the witness where the evidence showed he said he would "make sure [the witness] was not going to testify again"—after threatening that the witness should "keep his mouth shut" and "better not testify if he knew what was good for him." Id. Unlike here, in Scott, the defendant actually had the opportunity via a 20–minute conversation with the witness in the law library, where they spoke in "low" tones. Id. Afterwards, defendant's reaction was "happy" and "relieved" that the witness would not testify. Id. at 764. As for *actually procuring* the witness's unavailability, the facts showed that although the witness initially said he didn't intend to testify, the defendant was still so worried that he went to the law library to speak to him. Id. at 765. Only at this point, after which coercion was inferable, was the defendant "happy" and "relieved" that the witness would not testify. Id. In contrast, Blackshire experienced no such relief. Nor did he ever have any *real opportunity* to communicate with,

much less threaten or coerce C.S., even through third parties, who were ambivalent about even being able to locate her. *See* Perkins v. Herbert, 596 F.3d 161, 173 (2d Cir. 2010) (lower court properly found that Government *failed* to establish by preponderance of evidence that the witness's unavailability was procured, where prosecution proved defendant had motive to procure witness's silence, but failed to demonstrate how defendant *could have actually* intimidated him, or even had the opportunity to do so, since defendant had been incarcerated continuously, and the prison record logs revealed no actual contact with witness).

Although the record may have supported an inference that Blackshire *did not want* C.S. to testify at trial, arguably satisfying the 2nd "intent" prong of the Forfeiture By Wrongdoing legal test, the Government produced no evidence on the first and third prongs: that Blackshire engaged in 1) *wrongful* conduct, 2) that *actually procured* C.S.'s unavailability at trial. There is nothing inherently wrongful, threatening, or coercive about "making peace" and discussing not showing up for trial, especially in the absence of subpoenas. Nor was it "wrongful" to suggest that the Government couldn't force C.S. to show up, which even the Government *conceded* at sentencing was "obviously . . a true statement." 1-ER-14. Indeed, 80-90% of domestic violence victims do not cooperate with the

prosecution.[21] Considering that the Government had no contact with C.S. between September 14, 2018 and March, 2020, and despite its abundant resources, failed to locate or subpoena her by the time of trial, it is untenable to conclude that it was Blackshire's conduct that *actually procured* C.S.'s absence from trial.

The judge ignored the relevant legal test and wrongly abrogated Mr. Blackshire's most fundamental Constitutional Confrontation rights through misapplication of the Forfeiture By Wrongdoing Doctrine. This prejudicial error was not harmless: It allowed the Government to suffuse its case with witnesses who recited or played C.S.'s rambling, unconfronted, out-of-court statements during which she described her assault and alluded to uncorroborated, highly prejudicial R.404(b) evidence.

Reversal is required.

[21] Lininger II, *supra*, n. 2.

II. Over Hearsay And Crawford Objections, The District Court Wrongly Admitted C.S.'s Statement's to Nurse Rable, Since the Primary Purpose of Rable's "Forensic" Exam Was To Obtain Testimonial Evidence for Use Against Blackshire At Trial, and the Statements Exceeded The Scope Of Any Purported "Medical" Treatment or Diagnosis.

A. Standard of Review

A district court's construction or interpretation of the Federal Rules of Evidence, including whether particular evidence falls within the scope of a given rule, is subject to *de novo* review. United States v. Durham, 464 F.3d 976, 981 (9th Cir. 2006). When evidence falls within the scope of a given rule, the district court's decision to admit the evidence is reviewed for abuse of discretion. Id.

B. Since the primary purpose of the forensic exam was to provide testimonial and forensic evidence, C.S.'s statements should not have been admissible under Fed. R. Evid. 803(4).

Here, the primary purpose of Forensic Nurse Rable's "exam" was to gather evidence against Blackshire. 1-ER-60-61. *See* Michigan v. Bryant. 562 U.S. 344 (2010); Hartsfield v. Commonwealth, 277 S.W.3d 239, 244-45 (Ky. 2009) (statements to forensic nurse acting in cooperation with law enforcement were testimonial). At trial, counsel unsuccessfully raised hearsay and Crawford objections when Rable began to recite statements made by C.S. during the encounter. 1-ER-62-63. To the extent that Rable

provided actual medical diagnosis or treatment, C.S.'s statements exceeded any permissible scope of Fed. R. Evid. 803(4)'s hearsay exception (AD12).

To qualify for admission under Fed. R. Evid. 803(4)'a hearsay exception, a statement must have been both "made for" and "reasonably pertinent to" medical diagnosis or treatment. Fed. R. Evid. 803(4)(A). Further, the statement must "describe[ ] medical history; past or present symptoms or sensation; their inception; or their general cause." Fed. R. Evid. 803(4)(B). The burden of making this showing falls on the proponent of the challenged evidence. See United States v. Chang, 207 F.3d 1169, 1176 (9th Cir. 2000) (*citation omitted*). The government failed to meet its burden here.

Rule 803(4)'s rationale assumes that, because the declarant "will want to be diagnosed correctly and treated appropriately," she can be relied upon to be give accurate information to her doctor. Guam v. Ignacio, 10 F.3d 608, 613 (9th Cir. 1993). Critically, however, this hearsay exception requires that the declarant "understands herself to be providing information *for purposes of medical treatment*.**"** Ignacio, 10 F.3d at 613 n.3. (*emphasis supplied).* When the proponent fails to make this showing, the statement carries no greater assurance of reliability than any other out-of-court accusation. United States v. Gabe, 237 F.3d 954, 958 (8th Cir. 2001). *See* Medina v. State, 122 Nev. 346, 353-55, 143 P.3d 471 (2006) (under similar

circumstances, statements to forensic nurse would lead an objective witness to reasonably believe that statements would be available for use at a later trial.)

The facts refute that Rable provided the examination for the primary purpose of medical treatment or diagnosis, during which a declarant is presumed to be truthful as required by Fed.R.Evid. 803(4). Rather, the visit served as more of a pretextual vehicle to collect C.S's testimonial statements and evidence against Blackshire. Detective Owens was "on the scene" with C.S. - Rable identified him as the investigator who accompanied C.S. there and provided C.S.'s name to Rable. 1-ER-87. [22] *Prior to Rable beginning the exam or taking notes*, C.S. signed a formalized consent and authorization form showing that she understood that the primary purpose of the "forensic exam" was to collect evidence, photograph her injuries, and acknowledging that the completed report (including C.S.'s statements) would be provided to law enforcement for purposes of continuing an investigation. 1-ER-160-61. *See* United States v. Gardinier, 65 M.J. 60, 65-66 (2007) (statements to forensic nurse *after* witness was already treated by other medical professionals were considered testimonial; Since consent form stated that the

[22] The "exam" began at 10:00 a.m. and C.S. was discharged at 10:50 – 10:55. 1-ER-67; 87-88. Det. Owens' interview with C.S. began at 10:42 a.m. (USB#6).

form would be provided to law enforcement, statements were elicited in response to law enforcement inquiry with the primary purpose of producing evidence at trial.).

Rable, a certified forensic nurse who was admittedly tasked with documenting and photographing C.S.'s injuries, worked from a computer-generated form entitled "Medical Forensic Domestic Violence/Intimate Partner Examination Report," pre-designed to elicit incriminating evidence against assailants by checking boxes. 1-ER-59.[23] C.S. *had already* received medical examinations, diagnoses, treatment, and victim advocate services the previous day, and Nurse Rable did not even view her previous x-rays or medical reports. 1-ER-86. *See* United States v. Bordeaux, 400 F.3d 548, 555-56 (8th Cir 2005) (Since witness had a separate medical exam, statements to forensic interviewer were testimonial since the questioning collected information for law enforcement, even if the "exam" had a secondary medical purpose); State v. Cannon, 254 S.W. 3d. 287, 303-06 (Tenn.2008) (primary purpose of forensic nurse's interview was to elicit testimonial evidence potentially relevant to later prosecution, considering that ER medical professions had *previously examined* and stabilized victim).

[23] All pages of Rable's report (Exs.28, Bates 32-45) recited "Agency Name: Salt River; Agency Report # 2018-00038424" which corresponded to the same identifying number on Ex.28, Bates 31, entitled, "**Salt River Police Department Domestic Violence Case Summary**.

During the "exam," C.S. never fully disrobed or changed into an exam gown. 1-ER-90. Nor did nurse Rable take any forensic samples, blood, or urine tests, or medically treat her. 1-ER-68-69. Although Rable purported to offer "aftercare" instruction, Rable wanted to make "really sure that the patient understands the *legality* that's involved with strangulation." I-ER-66-67. Rable's conclusory "diagnosis" of "domestic violence by history" "Physical assault by history," "strangulation by history" (all "with minor and moderate physical injury by examination") (1-ER-68), belie that this exam was primarily for "medical" purposes. Moreover, there was no question about the assailant's identity, which C.S. disclosed the previous day. This case did not involve sexual assault, and C.S was not a minor. *Compare* United States v. Kootswatewa, 893 F.3d 1127, 1132 (9th Cir. 2018) (finding district court properly exercised its discretion to admit child sex abuse victim's statements made to nurse during sexual assault exam).

Even if a portion of the exam served a legitimate "medical" purpose, significant portions of C.S.'s statements should have been inadmissible since they plainly fell outside Rule 803(4)'s scope. Rable was permitted to recite C.S.'s unsworn, unconfronted testimonial statements that the Government utilized against Blackshire at trial, particularly to substantiate its assertion that Blackshire had threatened and "choked" C.S. during the assault. The

Government then used this flimsy premise to bootstrap Kidnapping and Strangulation charges, eviscerate Blackshire's Confrontation rights through forfeiture, then tacked on sentencing enhancements for Obstruction of Justice and Strangulation. The admission of C.S.'s unduly prejudicial, unconfronted statements and descriptions to Forensic Nurse Rable exceeded any permissible scope, and violated Mr. Blackshire's Confrontation Rights.

III. The Judge Wrongly Denied Both Defendant's R. 29 Motion On Count Four, Kidnapping, And Counsel's Requested Kidnapping Instruction Containing Criteria Subsequently Promulgated In U.S. v. Jackson, Which Would Have Informed The Jury's Deliberations On Both Kidnapping And Its Lesser Included Offense, Unlawful Imprisonment.

A. Standard of Review

When reviewing for sufficiency of the evidence, this court asks, "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. Jackson, 24 F.4th 1308, 1311 (9th Cir. 2022) (*cleaned up).* "When the issue of sufficiency of the evidence is preserved by making a motion for acquittal, [this court review's] the district court's denial of the motion *de novo*." Jackson, *supra*, *quoting* United States v. Shea, 493 F.3d 1110, 1114 (9th Cir. 2007).

This court reviews the formulation of jury instructions for abuse of discretion, but reviews *de novo* whether those instructions correctly state the elements of the offense and adequately cover the defendant's theory of the case. United States v. Lonich, 23 F.4th 881, 898 (9th Cir. 2022) (*cleaned up).* This court determines whether the instructions, viewed as a whole, "were misleading or inadequate to guide the jury's deliberation." Lonich, *supra*, *quoting* United States v. Kaplan, 836 F.3d 1199, 1215 (9th Cir. 2016) (*cleaned up).*

B. Where, as a matter of law, the Government failed to establish that Blackshire "Kidnapped" C.S., Defendant's R. 29 Motion should have been allowed, and the charge never should have gone to the jury.

Prior to ruling on defendant's R. 29 Motion, the record shows that the judge received and reviewed defense counsel's proposed instruction on Kidnapping, which incorporated elements of the legal test recently promulgated in United States v. Jackson, *supra* at 1314, decided February 3, 2022, after Blackshire's trial. 1-ER-134-135; 3-ER-463-466. Defendant requested a Kidnapping instruction that (in addition to the standard instruction), stated that "defendant held or detained [C.S.] for **an appreciable period** of time against her will, for any benefit" and that "the kidnapping **was not merely incidental** to the commission of an assault." Id.

Citing supporting authority which presciently echoed authority and reasoning subsequently relied on in Jackson, *supra* at 1314, she specifically referenced the four-factor Berry[24] test utilized to distinguish Kidnapping from other offenses. 1-ER-134-135.

At the close of the Government's case, defendant moved for judgment of acquittal under R. 29(a), arguing that, "The evidence that the government has produced is not sufficient to sustain a conviction as to any of these four counts that have been charged against Mr. Blackshire." 1-ER-42. Regarding the Kidnapping charge, the Government recited that Blackshire told C.S. to "stay down . . he was threatening her" by saying "you know what's going to happen if you call the police." He was pulling her into the trailer while she was trying to run . . .and he wouldn't let her leave the trailer." 1-ER-43. Without comment, the judge denied the motion. 1-ER-43.[25]

In Jackson, *supra*, this Court defined the limits of Kidnapping under 18 U.S.C. §1201(a)(2) and acknowledged that the broad language of Kidnapping statutes requires an "abundance of judicial discretion to limit its

[24] Government of the Virgin Islands v. Berry, 604 F.2d 221, 224 (3d Cir. 1979)

[25] Unlike in Jackson, *supra* at 1314, n. 9, here, defense counsel *did* cite Berry. 1-ER-134-135. Nonetheless, Jackson had sufficiently preserved his core argument—that kidnapping requires more than a brief holding incidental to assault—in his motion for acquittal. Id. (*citation omitted*).

application to appropriate circumstances." Id. at 1311 (*citation omitted*). *See also* Id., *supra at*, n. 6, *quoting* Model Penal Code & Comments. § 212.1 cmt. 2 (Am. L. Inst. 1980) ("Experience reveals numerous instances of abusive prosecution under expansive kidnapping statutes for conduct that a rational and mature penal law would have treated as another crime."). Here, as in Jackson, the Government overcharged Kidnapping to encourage a plea agreement. Likewise, when Blackshire rejected the Government's plea offer, (4-ER-597), the Government proceeded to trial on all counts, potentially subjecting Blackshire to a sentence of up to life in prison.

Defendant Jackson was charged with Kidnapping under 18 U.S.C. § 1201(a)(2) after violently assaulting his then-girlfriend. Jackson, *supra.* at 1309-10. Jackson moved for acquittal because the facts could not support a kidnapping conviction without a "seizure" of the victim, and whatever "seizure" occurred "didn't occur beyond whatever beating there was." Id. at 1310. The attack lasted about six or seven minutes, during which the defendant "dragged her around by her hair, yanked her arms, punched her, and tried to pull her into" a small dwelling. Id. The Jackson court noted Judge Kleinfeld's "powerful concurrence" in United States v. Etsitty,[26]

[26] United States v. Etsitty, 130 F.3d 420, at 428 (9th Cir. 1997), *opinion amended on denial of reh'g*, 140 F.3d 1274 (9th Cir. 1998),

which recognized that since the Federal Kidnapping Statute dispensed with requiring asportation, holding a victim in her own home or office by force for an extended period could constitute kidnapping; thus, he clarified that:

> Kidnapping, punishable by life imprisonment, is not committed whenever someone is held against their will, as when one person grabs another to do harm, and the victim says, "Let me go."
>
> Jackson, *supra, citing* Etsitty, *supra*, at 428.

Citing Supreme Court and Ninth Circuit precedent, the Jackson court reasoned that "kidnapping requires more than a transitory holding, and more than a simple mugging or assault" because "the facts must reflect the 'essence of the crime of kidnaping.'" Id. at 1312 (*quoting* Chatwin v. United States, 326 U.S. 455, 464 (1946)).

Consequently, this court held that four factors require evaluation when determining whether charged conduct constitutes Kidnapping. Id. at 1312. This "factual inquiry" may be taken up by a court in response to a Rule 29 motion, or incorporated into jury instructions. Id. at 1314. The factors, derived from the Third Circuit's opinion in Government of the Virgin Islands v. Berry, 604 F.2d 221, 224 (3d Cir. 1979), are:

> (1) the duration of the detention or asportation;
>
> (2) whether the detention or asportation occurred during the commission of a separate offense;
>
> (3) whether the detention or asportation which occurred is inherent in the separate offense; and

> (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense.

Id. at 1312, *quoting* Berry, 604 F.2d at 227. Pursuant to this court's direction, the Berry factors instructions were recently incorporated into M.J. 17.2, to distinguish Kidnapping from other offenses. *See* Jackson, *supra* at 1314; Comment to revised MJ instruction 17.2, Kidnapping (revised March, 2022, published May, 2022) (AD13-15).

Although Jackson was decided after Blackshire's trial, reviewing courts apply the law as it stands at the time of appeal, rather than as it stood at the time of trial. Henderson v. United States, 568 U.S. 266, 279, 133 S.Ct. 1121 (2013). Here, defendant's objections regarding the Kidnapping instruction, which the judge evidently read prior to ruling on defendant's R. 29 motion, not only specifically mentioned the Berry test, but also presciently tracked this court's reasoning in Jackson, *supra*. 1-ER-134-135.

C. Applying the Berry factors, the Government's Kidnapping charge could have not survived a R. 29 motion.

Here**, the first factor, the duration** of any "detention" or seizure that occurred was not "substantial."[27] Although perhaps slightly longer than the seven minutes held insubstantial in Jackson, it hardly rose to the level of seizure or detention required for Kidnapping. *See* Jackson, *supra* at 1314. C.S. consistently described that the incident occurred the *previous* night (September 11, 2018), between 8:00 and 9:00 p.m..[28] The couple had a continuing argument punctuated by episodes of physical fighting, during which, *at discreet and limited times*, Blackshire prevented her from leaving their home.[29] The incident *ended* that night, when Blackshire left to get the dog in another room and fell asleep. Laying by the front door, C.S. also fell asleep (despite claiming she wanted to leave), with nothing obstructing her exit. She didn't see Blackshire until the next morning when they awoke.

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[27] In closing, the government wrongly argued that the Kidnapping offense had "**no time element. There is no time requirement. It doesn't mean for** 10 minutes or 2 hours. It basically means when a person wants to leave, is trying to leave, is trying to get away, that it is against the law to keep them from moving or being able to leave . . . And, in this case, the restraint was evidence **throughout the assault**." 3-ER-494-495.

[28] 1-ER-91; 162; 3-ER-430-431; 438; (USB#7,B206).

[29] (USB#5;B369-373); (USB#7,B205-210;216); (USB#9,B386-388).

Another argument ensued, Blackshire kicked C.S's leg, then C.S. freely exited the trailer, walked away, and called the police.[30] (USB#5,B374-375).

The second and third factors—the presence of a separate offense and the degree to which the holding was inherent in the other offense—refute that any kidnapping or unlawful restraint occurred apart from the assaults. The primary conduct for which the jury convicted Blackshire was assault causing serious bodily injury, assault causing substantial bodily injury, and simple misdemeanor assault. Assault inherently requires the defendant to keep the victim in close enough proximity to inflict any injury. Jackson, *supra* at 1314, *citing* Berry, 604 F.2d at 228 ("Necessarily implicit in [assault] is some limited confinement or asportation."). As in Jackson, *supra*, the conduct here did not exceed that. There was no additional holding, asportation, external restraint, planned detention, nor any meaningful restriction on movement beyond the assaults. Id. Any pulling or dragging was inseparable from the overall assault, or at least attendant to the misdemeanor assault charge for which Blackshire was *also* convicted (in lieu of strangulation). *See* Id, *citing* United States v. Corralez, 61 M.J. 737 at 749 (2005) (finding confinement inherent in assaults where defendant hit

[30] (USB#5,B374-375); (USB#9,B386-388).

and choked victim, pulled her hair, held her seatbelt to prevent her from leaving, and pushed her from room to room). *See also*: Weber v. State, 547 A.2d 948, 959 (Del. 1988) (defendant's grabbing of escaping victim by hair or neck and dragging her back were only incidental to assault and insufficient for kidnapping).

As to the **fourth** factor, no evidence showed that any detention created a significant danger to C.S. independent of that posed by the separate assaults, for which Blackshire was convicted and sentenced. During her first interview with Det. Owens, C.S. said that when she tried to run, Blackshire punched her in the mouth, she started bleeding, then he punched her on the side of the head and continued punching her. (USB#7,B209). Consistently, the photos (USB#19-23) and medical evidence demonstrate bruising on C.S.'s head and a "minimally displaced" nasal fracture (which C.S. "couldn't even tell" was broken). (USB#7,B211).

When the fighting recurred intermittently inside the trailer, C.S. covered her head with her arms, sustaining, at most, a bruise. 1-ER-62-63; (USB#27-32). Blackshire kicked, and stepped on her one time,[31] but medical reports contained no notation or photographic evidence of injuries to C.S.'s ribs or chest. 1-ER-90; (USB#10-34). Her lower leg sustained an abrasion,

[31] (USB#5,B372-373; (USB#7,B216; 217).

or "scratch" measured in 1.4 x .3 cm.[32] A thorough physical exam showed no bleeding, no cuts, laceration, stitches, need for a cast or brace, nor surgical intervention, and C.S. averred that she had showered and saw no further injuries. 1-ER-90-91. Nor did C.S. ever return for follow-medical visits. 1-ER-92-93.

In sum, applying the Berry factors, the court should have directed a dismissal on the Kidnapping charges. Had it done so, the Unlawful Imprisonment charge would have never gone to the jury as a lesser-included offense.

D. Blackshire was entitled to receive a jury instruction reflecting the criteria set forth in Jackson, which would have guided jury's deliberations on the lesser included offense of Unlawful Imprisonment, and precluded a guilty verdict on that charge.

Although defendant requested a Kidnapping instruction similar to that later adopted pursuant to Jackson, *supra*, the judge declined, and gave a bare Kidnapping instruction nearly identical to the instruction later found deficient in Jackson, *supra* at 1311, n. 4. 1-ER-47. Defendant also requested, and the judge also instructed the jury as to Unlawful Imprisonment in accordance with Ariz. Rev. MJ Instructions 13.031 (AD7) (based on A.R.S. § 13-1303, defining "unlawful imprisonment") (AD6), and 13-01 (based on

[32] 1-ER-33-34; 40-41; 83; (USB#33-34); 3-ER-443-444.

A.R.S. § 13-1301, defining "restraint.") (AD6; 7). 1-ER-49-50. *See* United States v. Abeyta, 27 F.3d 470 (10th Cir. 1994) (A lesser-included offense may be a state-defined offense pursuant to the Assimilative Crimes Act (AD16), which also applies on Indian Reservations when there is no federal offense proscribing the same conduct that might be read to the jury). Ultimately, the jury acquitted Blackshire of Kidnapping, finding him guilty only the lesser-included offense of Unlawful Imprisonment, violating 18 US.C. § 1153 and A.R.S. § 13-1303(A).

Elements of Unlawful Imprisonment substantially overlap those of Kidnapping. *See* American Law Reports, False Imprisonment as Included Offense Within Charge of Kidnapping, 68 A.L.R.3d 828 (Originally published in 1976) (*collecting cases* and noting general agreement among state courts that their crimes of unlawful imprisonment, false imprisonment, and unlawful restraint are generally lesser-included offenses of kidnapping). Here, both the Kidnapping and the Unlawful Imprisonment instructions as given suffered from the same maladies as the Kidnapping instruction later found to be deficient in Jackson, *supra.*

E. This court should clarify that a Jackson-type instruction should also apply to Unlawful Imprisonment when it is charged as a lesser included offense of Kidnapping in Arizona.

The jury's deliberations on both Kidnapping *and* Unlawful Imprisonment should have been informed by the criteria promulgated in Jackson, particularly regarding whether any restraint was inherent underlying offenses, and of sufficient duration, apart from the underlying assaults (for which Blackshire was convicted and sentenced). Had the jury received an adequate Kidnapping instruction, it is unlikely it could have found: that any actual restraint was of sufficient duration; independent of the assault; *not* an inherent part of the assaults; or that any restraint occasioned further serious harm to C.S. independent of the assaults.

This issue is likely to recur. Arizona has the second largest American Indian population in the country, and the western states which comprise the Ninth Circuit have among the highest incarceration rates of American Indians in the nation.[33] Given the Government's zealous proclivity to charge Kidnapping along with assault crimes, especially to encourage plea bargains (Jackson, *supra* at 1313), it is foreseeable that future defendants will also be entitled to instruction on the lesser-included offense of Unlawful

[33] G.F.Steel, Constructing The Trident Of The Reasonable Person. Vol. 12: 1 Elon Law Journal, 65, at 87, n. 15 (2020).

Imprisonment. The instructions modeled after A.R.S. §§ 13-1303(A) and 13-1301 pose infirmities similar to the deficient Kidnapping instruction utilized in Jackson. Since A.R.S. § 13-1303(A) is considered a lesser-included offense under the federal Kidnapping statute in Arizona, this court should clarify that a jury's evaluation of any overlapping elements should be informed by the principles articulated in Jackson.

IV. The Trial Court Wrongly Applied Obstruction of Justice and Strangulation Adjustments to Increase Mr. Blackshire's Sentence, In Violation Of His Constitutional Rights.

A. Standard of Review

This Court reviews the district court's interpretation of the Sentencing Guidelines *de novo* and its factual findings for clear error. United States v. Harrington, 946 F.3d 485, 487 (9th Cir. 2019) (*citation omitted*). A district court's application of the Sentencing Guidelines to the facts of a case is reviewed for abuse of discretion. United States v. Gagarin, 950 F.3d 596, 606 (9th Cir. 2020) (*further citation omitted)*. Sufficient record evidence must support a sentencing enhancement. Gagarin, *supra*, (*further citation omitted*). The claim that a sentence is unconstitutional is reviewed *de novo*. United States v. Mercado, 474 F.3d 654, 656 (9th Cir. 2007).

B. Where a preponderance of evidence did not support applying a 2-Level Obstruction of Justice adjustment under U.S.S.G. § 3C1.1., Mr. Blackshire's Fifth Amendment rights were violated.

U.S.S.G. § 3C1.1 provides a 2-point offense level increase if : "(1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense. . . " Id. (AD17).

Defendant objected to the 2-level addition for Obstruction of Justice (PSR ¶ 28) pertaining to jail calls suggesting that C.S. did not have to appear at trial. 1-ER-9-13. The Government argued that the enhancement was "based on the defendant making numerous calls to try to influence the outcome of the trial." 1-ER-13-15. Ultimately, the judge abused her discretion and violated Blackshire's Fifth Amendment rights by applying the adjustment, because, as discussed *supra* at pp. 28-53, a preponderance of evidence failed to show that Blackshire's conduct wrongly or unlawfully influenced C.S. United States v. Watts, 519 U.S. 148, 156 (1997). 1-ER-16.

U.S.S.G. § 3C1.1. Application Note 4(A) (AD17-21) provides examples of obstruction, which include "threatening, intimidating, or

otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so." United States v. Perez, 962 F.3d 420, 451-452 (9th Cir. 2020) (*further citation omitted*) (sufficient evidence of threatening conduct where co-conspirator testified that defendant effectively identified him during lockup as a government "snitch"). Likewise, federal courts have found that the "obstruction-of-justice enhancement is warranted ... when the defendant threatens, intimidates, or otherwise unlawfully influences a potential witness with the intent to obstruct justice." United States v. Archer, 671 F.3d 149, 166-167 (2d Cir. 2011) (noting that cases upholding this provision usually involve clear and direct threats against cooperating witnesses or government agents, and reversing enhancement where defendant, via text, accused a frightened friend who might testify against him, of being a "pussy"). *Compare* United States v. Gershman, 31 F.4th 80, 89, 104 (2d Cir. 2022) (enhancement appropriate for twenty-six RICO counts charging extortion, illegal gambling, firearms offenses, drug distribution, and wire-fraud conspiracy).

Here, no evidence showed that Mr. Blackshire threatened, intimidated, coerced, bribed, or *wrongfully acted* by suggesting that C.S. could not be forced to "show up" for trial, which even the government conceded was "obviously . . . a true statement." 1-ER-12. *See* United States v. Emmert, 9

F.3d 699, 704–05 (8th Cir.1993) (*further citation omitted)* (trial court *appropriately denied* obstruction adjustment when defendant admonished a government witness, just outside of courtroom, to "stay strong" and "be quiet," because defendant's statement was *not sufficiently unambiguous* to warrant adjustment). *See also* United States v. Castro-Ponce, 770 F.3d 819, 823 (9th Cir. 2014) ("Obstruction of justice is a serious charge, and requires serious proof . . [of which] district court must make explicit findings . . . " of wrongful behavior).

C. The Judge Wrongly Applied A 3-Level (Strangulation) Offense Adjustment Under U.S.S.G. § 2A2.2(b)(4), in violation Blackshire's Fifth Amendments Rights; and Mr. Blackshire Preserves His Fifth And Sixth Amendment Rights By Contesting The Use Of This Acquitted Conduct To Enhance His Sentence.

1. A preponderance of evidence did not support the 3-point Offense Level adjustment on Count Three.

During sentencing, counsel appropriately disputed the strangulation enhancement, citing insufficient evidence and the jury's clear rejection of any finding except simple misdemeanor assault on Count Three. 1-ER-15-16. Notably, after submitting several jury questions regarding strangulation, the jury expressly *rejected* the Government's Strangulation *and* Attempted Strangulation theories, and *further rejected* the lesser included offense of

Assault by Striking, etc., finding Blackshire guilty only of simple Misdemeanor Assault. [34] Because the jury rejected any suggestion that Count Three constituted "Aggravated Assault," much less "Strangulation," the Aggravated Assault Guideline should not have been applied.

Yet, the Government argued that there was an *attempt* of strangulation based on the "choke-hold" C.S. described while being dragged into the trailer. 1-ER-16. The judge vaguely echoed that "this enhancement also includes attempt," and appeared to rely on "the different burden of proof at sentencing." 1-ER-16-17. Over objection, she applied a three-level strangling enhancement under U.S.S.G. § 2A2.2(b)(4) (AD21). 1-ER-16-17.

§ 2A2.2(b)(4) provides a 3-level offense increase to the Aggravated Assault Guideline "If the offense involved strangling, suffocating, or attempting to strangle or suffocate a spouse, intimate partner, or dating partner. . .." Id. U.S.S.G. § 2A2.2(b)(4), Application Note 1, Definitions (AD23-24), explains: ""Strangling" and "suffocating" have the meaning given those terms in 18 U.S.C. § 113." Id. (AD3). Not even a preponderance of evidence supported the judge's finding here. There was no finding or evidence that Blackshire's conduct impeded C.S.'s breathing or circulation, as required by § 113(b)(4), nor did the government ever present any

[34] 3-ER-525-527; 4-ER-587-591.

evidence of suffocation under § 113(b)(5). Although C.S. told Nurse Rable and the officers that she was placed in a "choke hold," C.S. never used the words "strangulation" or "suffocation." Those terms were *not* contained in the quotations of C.S's descriptions, nor did C.S. ever suggest her assailant attempted to make her pass out or stop her breathing. [35] Notably, Ex. 45-47, which depicted C.S.'s neck from the front and both sides, showed no injuries there. 1-ER-80-81; (USB#24-26). Rable never recited any injuries regarding C.S.'s mouth, under her chin, neck, or breasts. 1-ER-52-98. Furthermore, Dr. Seroy's report *did not include*, nor did Seroy recall, that C.S. said she was strangled or placed in a "choke-hold." 1-ER-29-30. No diagnostic image from September 12, 2018 supported any suggestion of strangulation. 3-ER-444-445. By applying this enhancement, the court abused its discretion and violated Mr. Blackshire's Fifth Amendment rights, since the conduct could not be proven by even a preponderance of the evidence. United States v. Watts, 519 U.S. 148, 156 (1997).

2. The improper use of acquitted conduct to enhance Mr. Blackshire's sentence violated his Fifth And Sixth Amendment rights.

Mr. Blackshire preserves his rights for further review, contending that his Fifth and Sixth Amendment rights were violated when the trial court

[35] 1-ER-88; (USB#5,B367-68); (USB#9,B386).

enhanced his sentence based on conduct for which the jury had clearly acquitted him. During sentencing, defense counsel preserved the issue by arguing:

> . . .I believe that there is new case law coming – and I will preserve my argument on this point . . .and [despite the standard of review applied at sentencing] it's acquitted conduct, and I think that any acquitted conduct should not be used to form an enhancement in the guidelines and I just raise that.

1-ER-16.

Appellant acknowledges that a claim that the use of acquitted conduct to enhance sentencing violated the Sixth Amendment is currently foreclosed by Circuit precedent. United States v. Shaw, No. 18-50384, 2022 WL 636639, at *1 (9th Cir. Mar. 4, 2022), *citing* Mercado, *supra* at 655-58. A Fifth Amendment claim is foreclosed because the Supreme Court has stated using acquitted conduct at sentencing "generally satisfies due process" if the conduct was proven by a preponderance of evidence. Shaw, *supra*, *citing* United States v. Watts, 519 U.S. 148, 156 (1997) (although as discussed *supra*, appellant disputes that it was so proven).

In United States v. McClinton, 423 F.4th 732, 735 (7th Cir. 2022), the Seventh Circuit ruled consistently with Shaw, *supra*. However, the court made clear that appellant's constitutional claims were "not frivolous" and "preserve[d] for Supreme Court review an argument that has garnered

increasing support among many circuit court judges and Supreme Court Justices, who in dissenting and concurring opinions, have questioned the fairness and constitutionality of allowing courts to factor acquitted conduct into sentencing calculations" Id. (*citing cases*). McClinton recently filed a Petition for Writ of Certiorari, Dayonta McClinton v. United States, U.S. Supreme Court Docket # 21-1557, June 14, 2022, asking: "Whether the Fifth and Sixth Amendments prohibit a federal court from basing a criminal defendant's sentence on conduct for which a jury has acquitted the defendant." Id. Like McClinton, Mr. Blackshire preserves his claim that the improper use of acquitted conduct to enhance his sentence violated his Fifth and Sixth Amendment rights.

CONCLUSION

For the foregoing reasons, this court should reverse the convictions against Mr. Blackshire, or alternatively, remand for resentencing.

Respectfully submitted,
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Dated: July 11, 2022

STATEMENT OF RELATED CASES

Undersigned counsel is unaware of any cases related to this matter.

Respectfully submitted,
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Dated: July 11, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Respectfully submitted,
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ADDENDUM

18 U.S.C.A. § 1153 - Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

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18 U.S.C.A. § 113 - Assaults within maritime and territorial jurisdiction

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

> **(1)** Assault with intent to commit murder or a violation of section 2241 or 2242, by a fine under this title, imprisonment for not more than 20 years, or both.
>
> **(2)** Assault with intent to commit any felony, except murder or a violation of section 2241 or 2242, by a fine under this title or imprisonment for not more than ten years, or both.
>
> **(3)** Assault with a dangerous weapon, with intent to do bodily harm, by a fine under this title or imprisonment for not more than ten years, or both.
>
> **(4)** Assault by striking, beating, or wounding, by a fine under this title or imprisonment for not more than 1 year, or both.
>
> **(5)** Simple assault, by a fine under this title or imprisonment for not more than six months, or both, or if the victim of the assault is an

individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 1 year, or both.

(6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.

(7) Assault resulting in substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual who has not attained the age of 16 years, by a fine under this title or imprisonment for not more than 5 years, or both.

(8) Assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate, by a fine under this title, imprisonment for not more than 10 years, or both.

(b) Definitions.--In this section--

(1) the term "substantial bodily injury" means bodily injury which involves--

(A) a temporary but substantial disfigurement; or

(B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty;

(2) the term "serious bodily injury" has the meaning given that term in section 1365 of this title;

(3) the terms "dating partner" and "spouse or intimate partner" have the meanings[1] given those terms in section 2266;

(4) the term "strangling" means intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim; and

(5) the term "suffocating" means intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth of the person, the nose of the person, or both, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.

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18 U.S. Code § 1365 - Tampering with consumer products

(a) Whoever, with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk, tampers with any consumer product that affects interstate or foreign commerce, or the labeling of, or container for, any such product, or attempts to do so, shall— . . . .

(h) As used in this section—

(3) the term "serious bodily injury" means bodily injury which involves—

(A) a substantial risk of death;

(B) extreme physical pain;

(C) protracted and obvious disfigurement; or

(D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty; and

(4) the term "bodily injury" means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary.

18 U.S.C.A. § 1201 - Kidnapping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when--

> **(1)** the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense;
>
> **(2)** any such act against the person is done within the special maritime and territorial jurisdiction of the United States;
>
> **(3)** any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 46501 of title 49;
>
> **(4)** the person is a foreign official, an internationally protected person, or an official guest as those terms are defined in section 1116(b) of this title; or
>
> **(5)** the person is among those officers and employees described in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of official duties,

shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

(b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce. Notwithstanding the preceding sentence, the fact that the presumption under this section has not yet taken effect does not preclude a Federal investigation of a possible violation of this section before the 24-hour period has ended.

(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

(d) Whoever attempts to violate subsection (a) shall be punished by imprisonment for not more than twenty years.

(e) If the victim of an offense under subsection (a) is an internationally protected person outside the United States, the United States may exercise jurisdiction over the offense if (1) the victim is a representative, officer, employee, or agent of the United States, (2) an offender is a national of the United States, or (3) an offender is afterwards found in the United States. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places within the provisions of sections 5 and 7 of this title and section 46501(2) of title 49. For purposes of this subsection, the term "national of the United States" has the meaning prescribed in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

(f) In the course of enforcement of subsection (a)(4) and any other sections prohibiting a conspiracy or attempt to violate subsection (a)(4), the Attorney General may request assistance from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.

Arizona Revised Statutes

A.R.S. §13-1303. Unlawful imprisonment; classification; definition

A. A person commits unlawful imprisonment by knowingly restraining another person.

B. In any prosecution for unlawful imprisonment, it is a defense that:

1. The restraint was accomplished by a peace officer or detention officer acting in good faith in the lawful performance of his duty; or

2. The defendant is a relative of the person restrained and the defendant's sole intent is to assume lawful custody of that person and the restraint was accomplished without physical injury.

C. Unlawful imprisonment is a class 6 felony unless the victim is released voluntarily by the defendant without physical injury in a safe place before arrest in which case it is a class 1 misdemeanor.

D. For the purposes of this section, "detention officer" means a person other than an elected official who is employed by a county, city or town and who is responsible for the supervision, protection, care, custody or control of inmates in a county or municipal correctional institution. Detention officer does not include counselors or secretarial, clerical or professionally trained personnel.

A.R.S. §13-1301. Definitions

In this chapter, unless the context otherwise requires:

1. "Relative" means a parent or stepparent, ancestor, descendant, sibling, uncle or aunt, including an adoptive relative of the same degree through marriage or adoption, or a spouse.

2. "Restrain" means to restrict a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person. Restraint is without consent if it is accomplished by:

(a) Physical force, intimidation or deception; or

(b) Any means including acquiescence of the victim if the victim is a child less than eighteen years old or an incompetent person and the victim's lawful custodian has not acquiesced in the movement or confinement.

REVISED ARIZONA CRIMINAL JURY INSTRUCTIONS – 5Th Ed. 2019

13.031 − Unlawful Imprisonment (source A.R.S. § 13-1303)

The crime of unlawful imprisonment requires proof that the defendant knowingly restrained another person.

13-01 – Definition of "Restrain" (source A.R.S. § 13-1301(2))

Restrain" means to restrict a person's movements without consent, without legal authority, and in a manner that interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person. Restraint is without consent if it is accomplished by [(physical force) (intimidation) (or) (deception)] [any means including acquiescence of the victim if the victim is a child less than eighteen years old or an incompetent person and victim's lawful custodian has not acquiesced in the movement or confinement.]

Fed. R. Evid 804. - Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of Personal or Family History. A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [Other Exceptions.] [Transferred to Rule 807.]

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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18 U.S.C.A. § 1503 - Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is--

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

Federal Rules of Evidence Rule 404, 28 U.S.C.A.

Rule 404. Character Evidence; Other Crimes, Wrongs or Acts

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts.

(1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial--or in any form during trial if the court, for good cause, excuses lack of pretrial notice

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Federal Rules of Evidence Rule 803, 28 U.S.C.A. – Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) Then-Existing Mental, Emotional, or Physical Condition. 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.

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for--and is reasonably pertinent to--medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

Revised Ninth Circuit Model Jury Instruction, Kidnapping (2022)

17.2 Kidnapping—Within Special Maritime and Territorial Jurisdiction of United States

(18 U.S.C. § 1201(a)(2))

The defendant is charged in [Count _____ of] the indictment with kidnapping [*name of kidnapped person*] within the special maritime and territorial jurisdiction of the United States in violation of Section 1201(a)(2) of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [seized] [confined] [inveigled] [decoyed] [kidnapped] [abducted] [carried away] [*name of kidnapped person*] within [*specify place of federal jurisdiction*]; and

Second, the defendant [held] [detained] [*name of kidnapped person*] against [his][her] will.

[The government is not required to prove that the defendant kidnapped [*name of kidnapped person*] for reward or ransom, or for any other purpose.]

[The fact that [*name of kidnapped person*] [may have] initially voluntarily accompanied the defendant does not necessarily [prevent the occurrence] [negate the existence] of a later kidnapping.]

[Not every seizure of a person against his or her will is a kidnapping. To decide whether such a seizure in this case amounts to a [seizure] [confinement] [detention] [asportation], you should consider the following factors:

First, the duration of the [seizure] [confinement] [detention] [asportation],

Second, whether the [seizure] [confinement] [detention] [asportation] occurred during the commission of a separate offense,

Third, whether the [seizure] [confinement] [detention] [asportation] which occurred is an essential part of in the separate offense, and

Fourth, whether the [seizure] [confinement] [detention] [asportation] created a significant danger to the victim independent of that posed by the separate offense.]

Comment

See Comment to Instruction 17.1 (Kidnapping—Interstate Transportation).

"Special maritime and territorial jurisdiction of the United States" is defined in 18 U.S.C. § 7. While federal jurisdiction over the place may be determined as a matter of law, the locus of the offense within that place is an issue for the jury. *United States v. Gipe*, 672 F.2d 777, 779 (9th Cir. 1982).

The bracketed language beginning with "To distinguish kidnapping from other offenses" is derived from *United States v. Jackson*, 24 F.4th 1308 (9th Cir. 2022), which also illustrates when such an instruction would be appropriate.

In *Jackson*, the defendant was charged with kidnapping under 18 U.S.C. § 1028(a)(2) after he violently assaulted his then-girlfriend. *Id.* at 1309-10. The defendant moved for acquittal under Federal Rule of Criminal Procedure 29, arguing that the facts could not support a kidnapping conviction because there was no "seizure" of the victim, and whatever "seizure" occurred "didn't occur beyond whatever beating there was." *Id.* at 1310. The attack on the victim lasted about six or seven minutes, during which the defendant "dragged her around by her hair, yanked her arms, punched her, and tried to pull her into" a small dwelling. *Id.*

Citing Supreme Court and Ninth Circuit precedent, the court reasoned that "kidnapping requires more than a transitory holding, and more than a simple mugging or assault" because "the facts must reflect the 'essence of the crime of kidnaping.'" *Id.* at 1312 (quoting *Chatwin v. United States*, 326 U.S. 455, 464 (1946)); *see also id.* at 1311-12 (discussing *United States v. Etsitty*, 130 F.3d 420 (9th Cir. 1997)). Accordingly, in *Jackson* the court

held that four factors should be evaluated when determining whether charged conduct constitutes kidnapping. *Id.* at 1312. This "factual inquiry" may be taken up by a court in response to a Rule 29 motion, or "if appropriate based on the circumstances of the case, incorporated into jury instructions." *Id.* at 1314. The factors, derived from the Third Circuit's opinion in *Government of the Virgin Islands v. Berry*, 604 F.2d 221, 224 (3d Cir. 1979), are:

> (1) the duration of the detention or asportation;
>
> (2) whether the detention or asportation occurred during the commission of a separate offense;
>
> (3) whether the detention or asportation which occurred is inherent in the separate offense; and
>
> (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense.

Id. at 1312 (quoting *Berry*, 604 F.2d at 227)). The *Berry* factors are the basis for the proposed optional jury instruction, to be applied when appropriate, to distinguish kidnapping from other offenses.

Fed. R. Crim. Pro. 29 - Motion for a Judgment of Acquittal

(a) 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.

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8 U.S.C.A. § 13 (Assimilative Crimes Act) -

§ 13. Laws of States adopted for areas within Federal jurisdiction

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(b)(1) Subject to paragraph (2) and for purposes of subsection (a) of this section, that which may or shall be imposed through judicial or administrative action under the law of a State, territory, possession, or district, for a conviction for operating a motor vehicle under the influence of a drug or alcohol, shall be considered to be a punishment provided by that law. Any limitation on the right or privilege to operate a motor vehicle imposed under this subsection shall apply only to the special maritime and territorial jurisdiction of the United States.

(2) (A) In addition to any term of imprisonment provided for operating a motor vehicle under the influence of a drug or alcohol imposed under the law of a State, territory, possession, or district, the punishment for such an offense under this section shall include an additional term of imprisonment of not more than 1 year, or if serious bodily injury of a minor is caused, not

more than 5 years, or if death of a minor is caused, not more than 10 years, and an additional fine under this title, or both, if--

(i) a minor (other than the offender) was present in the motor vehicle when the offense was committed; and

(ii) the law of the State, territory, possession, or district in which the offense occurred does not provide an additional term of imprisonment under the circumstances described in clause (i).

(B) For the purposes of subparagraph (A), the term "minor" means a person less than 18 years of age.

(c) Whenever any waters of the territorial sea of the United States lie outside the territory of any State, Commonwealth, territory, possession, or district, such waters (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) shall be deemed, for purposes of subsection (a), to lie within the area of the State, Commonwealth, territory, possession, or district that it would lie within if the boundaries of such State, Commonwealth, territory, possession, or district were extended seaward to the outer limit of the territorial sea of the United States.

U.S.S.G., § 3C1.1, 18 U.S.C.A. - Obstructing or Impeding the Administration of Justice

If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and

(2) the obstructive conduct related to

(A) the defendant's offense of conviction and any relevant conduct; or

(B) a closely related offense, increase the offense level by 2 levels.

U.S.S.G., § 3C1.1, 18 U.S.C.A Application Notes

1. In General.--This adjustment applies if the defendant's obstructive conduct

(A) occurred with respect to the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and

(B) related to

(i) the defendant's offense of conviction and any relevant conduct; or

(ii) an otherwise closely related case, such as that of a co-defendant. Obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction may be covered by this guideline if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction.

2. Limitations on Applicability of Adjustment.--This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

Covered Conduct Generally.--Obstructive conduct can vary widely in nature, degree of planning, and seriousness. **Application Note 4 sets forth examples of the types of conduct to which this adjustment is intended to apply**. Application Note 5 sets forth examples of less serious forms of conduct to which this adjustment is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this enhancement applies is not subject to precise definition, comparison of the examples set forth in Application Notes 4 and 5 should assist the court in determining whether application of this adjustment is warranted in a particular case.

4. Examples of Covered Conduct.--The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:

(A) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

(B) committing, suborning, or attempting to suborn perjury, including during the course of a civil proceeding if such perjury pertains to conduct that forms the basis of the offense of conviction;

(C) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;

(D) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it results in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

(E) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;

(F) providing materially false information to a judge or magistrate judge;

(G) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

(H) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;

(I) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511);

(J) failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p);

(K) threatening the victim of the offense in an attempt to prevent the victim from reporting the conduct constituting the offense of conviction.

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

5. Examples of Conduct Ordinarily Not Covered.--Some types of conduct ordinarily do not warrant application of this adjustment but may warrant a greater sentence within the otherwise applicable guideline range or affect the determination of whether other guideline adjustments apply (e.g., § 3E1.1 (Acceptance of Responsibility)). However, if the defendant is convicted of a separate count for such conduct, this adjustment will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 8, below.

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:

(A) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;

(B) making false statements, not under oath, to law enforcement officers, unless Application Note 4(G) above applies;

(C) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;

(D) avoiding or fleeing from arrest (see, however, § 3C1.2 (Reckless Endangerment During Flight));

(E) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1 (Acceptance of Responsibility).

6. "Material" Evidence Defined.--"Material" evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination.

7. Inapplicability of Adjustment in Certain Circumstances.--If the defendant is convicted for an offense covered by § 2J1.1 (Contempt), § 2J1.2 (Obstruction of Justice), § 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), § 2J1.5 (Failure to Appear by Material Witness), § 2J1.6 (Failure to Appear by Defendant), § 2J1.9 (Payment to Witness), § 2X3.1 (Accessory After the Fact), or § 2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., if the defendant threatened a witness during the course of the prosecution for the obstruction offense).

Similarly, if the defendant receives an enhancement under § 2D1.1(b)(16)(D), do not apply this adjustment.

8. Grouping Under § 3D1.2(c).--If the defendant is convicted both of an obstruction offense (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1621 (Perjury generally)) and an underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of § 3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level

for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

9. Accountability for § 1B1.3(a)(1)(A) Conduct.--Under this section, the defendant is accountable for the defendant's own conduct and for conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

U.S.S.G., § 2A2.2, 18 U.S.C.A. - Aggravated Assault

(a) Base Offense Level: 14

(b) Specific Offense Characteristics

(1) If the assault involved more than minimal planning, increase by 2 levels.

(2) If (A) a firearm was discharged, increase by 5 levels; (B) a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by 3 levels.

(3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of Bodily Injury	Increase in Level
(A) Bodily Injury	add 3
(B) Serious Bodily Injury	add 5
(C) Permanent or Life-Threatening Bodily Injury	add 7
(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 4 levels; or	
(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 6 levels.	

However, the cumulative adjustments from application of subdivisions (2) and (3) shall not exceed 10 levels.

(4) If the offense involved strangling, suffocating, or attempting to strangle or suffocate a spouse, intimate partner, or dating partner, increase by 3 levels However, the cumulative adjustments from application of subdivisions (2), (3), and (4) shall not exceed 12 levels.

(5) If the assault was motivated by a payment or offer of money or other thing of value, increase by 2 levels.

(6) If the offense involved the violation of a court protection order, increase by 2 levels.

(7) If the defendant was convicted under 18 U.S.C. § 111(b) or § 115, increase by 2 levels.

U.S.S.G., § 2A2.2, 18 U.S.C.A. - Aggravated Assault Application Notes:

1. **Definitions.—**For purposes of this guideline:

"***Aggravated assault***" means a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon; (B) serious bodily injury; (C) strangling, suffocating, or attempting to strangle or suffocate; or (D) an intent to commit another felony.

"***Brandished***," "***bodily injury***," "***firearm***," "***otherwise used***," "***permanent or life-threatening bodily injury***," and "***serious bodily injury***," have the meaning given those terms in §1B1.1 (Application Instructions), Application Note 1.

"***Dangerous weapon***" has the meaning given that term in §1B1.1, Application Note 1, and includes any instrument that is not ordinarily used as a weapon (*e.g.*, a car, a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury.

"***Strangling***" and "***suffocating***" have the meaning given those terms in 18 U.S.C. § 113.

"***Spouse***," "***intimate partner***," and "***dating partner***" have the meaning given those terms in 18 U.S.C. § 2266.

2. **Application of Subsection (b)(1).—**For purposes of subsection (b)(1), "***more than minimal planning***" means more planning than is typical for commission of the offense in a simple form. "More than minimal planning" also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies. For example, waiting to commit the offense when no witnesses were present would not alone constitute more

than minimal planning. By contrast, luring the victim to a specific location or wearing a ski mask to prevent identification would constitute more than minimal planning.

3. **Application of Subsection (b)(2).—**In a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).

4. **Application of Official Victim Adjustment.—**If subsection (b)(7) applies, §3A1.2 (Official Victim) also shall apply.

Background: This guideline covers felonious assaults that are more serious than other assaults because of the presence of an aggravating factor, *i.e.*, serious bodily injury; the involvement of a dangerous weapon with intent to cause bodily injury; strangling, suffocating, or attempting to strangle or suffocate; or the intent to commit another felony. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder). This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1. Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

An assault that involves the presence of a dangerous weapon is aggravated in form when the presence of the dangerous weapon is coupled with the intent to cause bodily injury. In such a case, the base offense level and the weapon enhancement in subsection (b)(2) take into account different aspects of the offense, even if application of the base offense level and the weapon enhancement is based on the same conduct.

Subsection (b)(7) implements the directive to the Commission in subsection 11008(e) of the 21st Century Department of Justice Appropriations Act (the "Act"), Public Law 107–273. The enhancement in subsection (b)(7) is cumulative to the adjustment in §3A1.2 (Official Victim) in order to address adequately the directive in section 11008(e)(2)(D) of the Act, which provides that the Commission shall consider "the extent to which sentencing enhancements within the Federal guidelines and the authority of the court to impose a sentence in excess of the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by" 18 U.S.C. §§ 111 and 115.