No. 07-20689

In the United States Court of Appeals for the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TYRONE MAPLETOFT WILLIAMS,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
No. 4:03-CR-221:11, Hon. Lee Rosenthal, Judge Presiding

BRIEF OF APPELLANT TYRONE MAPLETOFT WILLIAMS

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Tyrone Mapletoft Williams requests oral argument. Williams believes that oral argument would be of material assistance to the Court in evaluating, *inter alia*, certain *Batson* challenges, the scope of the Federal Death Penalty Act's undefined gateway culpable mental state term "act of violence," the proper application of the Federal Death Penalty Act's vulnerable-victim statutory aggravator, and errors in Williams's sentence on the conspiracy count.

In support of this request for oral argument, Williams notes that the district court and the prosecutor made a "joint request that the Court of Appeals, in its review, assuming that there is going to be one, would take note of the difficulty that [the Federal Death Penalty Act's gateway culpable mental state] posed." R.18258. The district court also stated that "one of the frustrations of this whole process is that there are so few cases that the statutory language really hasn't benefitted from the multiple opportunities of appellate courts to shed additional light." R.18257. Oral argument could address the district court's concerns and ameliorate the similar frustrations of other courts grappling with application of the Federal Death Penalty Act.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. §3231. The district court entered its final judgment on August 23, 2007. R.5785-5799. Williams timely filed his notice of appeal on August 29, 2007. R.5783-84; FED. R. APP. P. 4(b)(1)(A). The Court has jurisdiction over Williams' appeal under 28 U.S.C. §1291 and 18 U.S.C. §3742(a).

STATEMENT OF ISSUES FOR REVIEW

1. Whether the prosecution's exercise of peremptory strike of an African-Ameican venireman violated Williams's constitutional rights under *Batson v. Kentucky*.

2. Whether there was any evidence that Williams "intentionally and specifically engaged in an act of violence" for purposes of 18 U.S.C. §3591(a)(2)(D), which was a threshold finding required for the jury to be able to impose a sentence of life without parole.

3. Whether the district court's gave an incorrect instruction to the jury regarding the meaning of "act of violence" for purposes of the gateway intent element of the Federal Death Penalty Act.

4. Whether the omission of an intent requirement in the Federal Death Penalty Act's vulnerable victims' statutory aggravator renders the statute unconstitutional under the Eighth Amendment as applied to Williams.

5. Whether the district court's erred in the definition of "youth" it included in its jury instructions for purposes of the vulnerable victims aggravator.

6. Whether erred in determining the guidelines range applicable to Williams's conspiracy conviction because it miscalculated the number of aliens transported.

INTRODUCTION

On May 13, 2003, an immigrant smuggler named Abelardo Flores loaded seventy-four illegal aliens into Tyrone Williams's tractor-trailer in a darkened field in Harlingen, Texas. Based on Flores's instructions, Williams left Harlingen, Texas intending to drop off the occupants of the trailer in Robstown, Texas. After Williams's truck passed the immigration checkpoint in Sarita, Texas, however, Flores told Williams to take the aliens in his truck all the way to Houston. When Williams stopped to purchase bottled water for the aliens at a convenience store in Victoria, he discovered that several of the aliens had died.

Unfortunately, Williams's trial was marred by several significant errors. Before the trial began, the government violated *Batson v. Kentucky* by exercising a peremptory strike for racially motivated reasons against an African-American venireperson named Allen on the pretextual ground that Allen was too good for the prosecution. The fact that the government's explanation is pretextual is underscored by the fact that the government said that its purported concerns regarding Allen were based on certain answers he had given during voir dire. Despite the prosecution's stated concerns, however, several Caucasian venirepersons were not asked questions the same questions African-Americans venirepersons were asked. The district court's erroneous refusal to remedy the

government's improper use of a peremptory strike requires a reversal of Williams's convictions and sentence.

Additionally, the district court erred in allowing the government to seek from the jury either a sentence of life without parol or death under the Federal Death Penalty Act. Based on Williams's involvement in transporting illegal aliens, the government indicted Williams one count of conspiring to smuggle illegal aliens and fifty-eight underlying substantive counts. Additionally, as to the nineteen courts based on Williams's transportation of the nineteen aliens who died, the prosecution sought the death penalty against Williams alleging that he "intentionally and specifically engaged in an act of violence" under 18 U.S.C. §3591(a)(2)(D) against the nineteen people who died. Williams's driving of the truck, however, cannot constitute anything that could be reasonably construed to be an "act of violence." But even if there were some evidence to support such a conclusion, the jury's affirmative finding on this issue must still be reversed because the district court misconstrued the language of §3591(a)(2)(D) and incorrectly instructed the jury that any act that inherently carries a grave risk of serious bodily injury or death is an act of violence without requiring that the act actually be violent. The district court's first error in the sentencing phase instructions was exacerbated by its subsequent error with respect to its instruction

on the statutory aggravator regarding "victim vulnerability" devoid of the necessary scienter requirement or proper causation elements.

STATEMENT OF THE CASE

On March 15, 2004, Williams and thirteen co-defendants were charged in a Superseding Indictment with fifty-eight counts of violating 8 U.S.C. §1324(a)(1)(A) and (B). RE.3.[1] The government simultaneously filed a Notice of Intent to Seek the Death Penalty only against Williams; Williams's case was severed soon thereafter. RE.1.20-22 (Docket Nos. 195, 199). Count 1 charged Williams with conspiracy to conceal, harbor, shield from detection, and transport illegal aliens. RE.3.279-99. Counts 2 through 20 charged Williams, both as a principal and as an aider and abettor, with unlawful concealment of illegal aliens. *Id*. at 299-301. Counts 21 through 39 involved aliens that were allegedly injured during the unlawful transportation. *Id*. at 302-304. Counts 40 through 58 mirrored Counts 21 through 39, except that these counts involved aliens that died as a result of the transportation. *Id*. at 304-07.

[1] Docket entries 1-915 were part of the record in prior appeal from the first trial. With the exception of the superseding indictment, found at Tab 3 of the Record Excerpts, no documents are cited from this portion of the record. Documents 1-915 are in the first volume of the electronic record. Documents 928-1953 are found in the subsequent volumes of the electronic record. The pagination of the record containing documents 928-1953 begins again at page 1. Documents 928-1953 are referred to herein as R.[bates number]. Cites to the record excerpts are in the form RE.[tab number].[bates number].

Following two mandamus petitions by the government to this Court, *see In re United States*, 397 F.3d 274 (5th Cir. 2005); *United States v. Williams*, 400 F.3d 277 (5th Cir. 2005), Williams's first trial began before Judge Vanessa Gilmore in February 2005. RE.1, Docket Entry 637. With respect to Counts 1-20, no answer was returned by the jury due to self-expressed "hopeless deadlock." *United States v. Williams*, 449 F.3d 635, 642 (5th Cir. 2006) (describing in detail the jury's answers on the verdict form in the first trial). The court thus declared a mistrial as to Counts 1-20. *Id*. The jury answered some of the questions regarding Counts 21-58, but as to other questions stated it was hopelessly deadlocked. *Id.* at 642-43. This Court subsequently held that the jury's answers failed to return a verdict as to any of the charged counts and thus the government could proceed to retry Williams on all counts. *Id*. at 646-49.

After the 2006 appeal, the case was reassigned to Judge Lee Rosenthal. The guilt/innocence phase of Williams's second trial was held beginning on October, 23, 2006. RE.1.76. On December 4, after almost five days of deliberations, the jury convicted Williams on all 59 counts charged in the indictment. RE.1.91-92, RE.4. The district court later dismissed, at the government's request, Counts 2 through 20 of the superseding indictment. R.5663-65, RE.5.

Because the government sought the death penalty against Williams, the also held a punishment-phase proceeding before the jury that convicted Williams

pursuant to 18 U.S.C. §3593 on January 2, 2007. RE.1.97 (Docket No. 1638). The purpose of this proceeding was to determine if Williams was eligible for and should receive the death penalty. After five additional days of the parties presenting evidence and more than four additional days of jury deliberation, RE.1.97-100, the jury found that Williams should not receive the death penalty. RE.5.5556-60. Rather, as to the conspiracy count, the jury held that Williams should not receive either the death penalty or life sentence, but that he should be sentenced to a term of years. *Id*. at 5556, 5561, 5566. With respect to Counts 40-58, the jury found that Williams should not receive the death penalty, but that he should be sentenced to life without parole. *Id*. at 5556-64. Before reaching the questions regarding what sentence Williams should receive, however, the jury had to answer "yes" to a threshold question regarding Williams's intent. *Id*. at 5481-91. As part of this threshold intent question, the jury was asked, *inter alia*, whether Williams "intentionally and specifically engaged in an act of violence" that caused the death of a person "as a direct result of the act." *Id*. The jury answered yes as to this question as to Counts 1 and 40-58. *Id*.

But the jury also specifically and unanimously found in favor of Williams on 11 of the 12 mitigating factors that were submitted for the jury's consideration. Among the jury's unanimous findings were that Williams "was a minor participant in the events leading to the victims' deaths," *Id*. at 5539, "Williams acted under the

substantial domination of another person, namely Abelardo Flores, Jr.," *Id*. at 5551, that Williams "cooperated with the authorities," *Id*. at 5542, that he "has shown, and continues to show, remorse for his wrongs," *Id*. at 5545, that there is a "strong likelihood" that he "can be rehabilitated," *Id*. at 5546, and that the "incident that is the basis of this prosecution was out of character for Mr. Williams and was an isolated event." *Id*. at 5549.

Because the jury found that Williams should be sentenced to a term of years on Count 1 and the jury was not asked to determine William's sentence as to counts 21-39, the district court had to determine what sentence to impose based on these counts. The court ordered a Presentence Report as to Counts 1-39. R.5476. Over Williams's objections, the district court adoped the PSR in its entirety, except for some nonmaterial clarifications. R.13363-64, 13389, 13410. The district court sentenced Williams to 405 months on Count One with a concurrent 240-month sentences on each count for Counts 21-39. R.13410. All of these sentences were ordered to run concurrently with the life-without-parole sentence as to each count of Counts 40-58, which was mandatory based on the jury's recommendation of a life sentence. *Id*.

For purposes of this appeal, the district court originally appointed the same counsel who had represented Williams throughout both trials and all three previous appeals to this Court. However, that attorney withdrew before filing his brief for

health reasons. In May 2009, this Court appointed new counsel for purposes of prosecuting this appeal.

STATEMENT OF FACTS

In 2003, Karla Chavez-Joya, a Honduran national living in the United States, headed a loose organization of undocumented-alien smugglers operating in South Texas. The core function was the gathering of Latin American undocumented aliens who had already come as far as the Mexican border, bring them across the Rio Grande River into the Brownsville area, house and feed them for short periods of time, R.15293, and then hand them over to other smugglers responsible for transporting them into Texas' interior. R.4154. Chavez-Joya outsourced the job of searching for truck drivers to a convicted felon and drug user named Abel Flores. R.8163-64. Flores also coordinated the payment of the drivers' services. R.8175-78.

Flores enlisted an assistant named Fredy Giovani Garcia-Tobar, a/k/a "Jo Jo." R.8183-84. Flores and Garcia-Tobar were particularly keen to find non-Hispanic drivers. R.8170. A premium was placed on locating trucks with license plates from states other than Texas. *Id*. Drivers with these two characteristics are perceived have an easier time passing through border checkpoints with only minimal scrutiny from the guards. *Id*.

One driver who fit Flores's dual criteria was an African-American from New York, Tyrone Williams. While resting at a McAllen watermelon stand, Williams was approached by Flores and Garcia-Tobar and solicited to transport a number of aliens in his trailer for a fee. R.8183. Williams originally declined the offer, but was inveighed upon by Flores and Garcia-Tobar until he relented. R.8188.

The pickup site for the run was to be a dark field near Harlingen. R.8194. Aliens started to board the trailer immediately upon Williams' arrival R.8216. Williams and his travel companion, Fatima Holloway, remained in the truck for the entire duration of the loading process. R.8216. For this reason, Williams did not know how many aliens Flores placed in the trailer.

Williams was paid a flat fee for the transportation. R.8210. By contrast, Flores was paid a per capita fee of $450 per alien transported. R.8221, 11343. Moreover, the drivers' fees were deducted from Flores' share of the smuggling profits. R.8221-23. In this way, Flores was financially incentivized to spread the fixed costs of transportation over as many aliens as possible per driver. For example, Flores testified that he "ran back probably three times to make sure it was all loaded." R.8216.

The original plan devised by Flores and Chavez-Joya posited for "workers" (named Chris and Frank) to follow Williams' through the border checkpoint at Sarita, Texas, and later unload the aliens into private cars in Robstown, Texas.

R.8224, 11340-41. Robstown is about 120 miles from Harlingen, where the trip began. *Williams*, 449 F.3d at 639. These workers were detained at the checkpoint for a period of 30 minutes to 1 hour. R.8224, 11342. For this reason, Flores directed Williams to not offload his passengers in the trailer at Robstown, as had been planned, but to continue on to Houston. R.11341. Going on to Houston added about another 210 miles to the trip. *Williams*, 449 F.3d at 639. At the time he issued the new instructions, Flores' judgment was impaired as he was in the process of ingesting "bumps" of cocaine at a topless club in Harlingen in celebration of his newly realized smuggling profits. R.8225-26, 11354-55.

Neither Williams nor Holloway perceived danger to the people in the trailer when their truck passed through the border checkpoint. R.9703-04. But after Williams's truck left the checkpoint and Flores's plan exceeded its design, conditions inside the trailer grew more severe. R.8788. The temperature rose significantly with the amount of time on the road, R.10187, the aliens began to sweat profusely as a result, R.10181, and the ambient carbon dioxide levels reached impossibly high levels for ordinary respiration, R.16485, 16512.

Holloway testified that after the truck left the checkpoint, she could hear the occupants of the trailer begin to scream for help and that she asked Williams to investigate the cause. R.9704-05. Williams stopped his truck in Refugio to check on the people in the trailer. R.9705. Williams heard them saying "El Nino," *id.*, a

term unfamiliar to the Williams and Holloway, neither of whom spoke Spanish. R.9707, 9723. Holloway mistakenly told Williams the term referred to "a storm," R.9705, and he resumed driving.

Around 2 a.m., Williams stopped at the Chubby's Exxon Speedy Mart near Victoria, Texas. R.9714. Williams asked Holloway to purchase bottled water from the store for the people in the trailer. R.9719. Holloway initially refused, and relented only when Williams forced $20 into her hand. *Id*. Once in the store, Holloway first went to the bathroom. R.9720. Then she purchased a pack of gum, along with five bottles of water. R.9774. Before taking the water to the occupants of the trailer, Holloway chatted with the store clerk. R.9722. After Holloway returned to the truck with the water, Williams sent her back into the store to purchase more water bottles. R.9775. During Holloway's second trip inside, the trailer occupants and Williams overcame their mutual language barrier and ascertained the dangerous conditions inside the trailer. Williams unlocked the trailer and the aliens quickly exited. R.9723. Seventeen people were found dead at the scene; two more people died later at a Victoria hospital.

In a state of panic, Williams unhooked the trailer from his truck, R.9728, drove to Houston, and checked himself into the Twelve Oaks Hospital, R.9743, where he has apprehended. More specifically, Holloway testified that Williams never seemed furious, vehement, or outraged. and was able to navigate his route to

Houston on his own volition, controlled his vehicle at all times, and could shift the gears of his complex automobile system. R.9727. By contrast, Holloway fled to (and was later apprehended in) her hometown of Cleveland, Ohio. R.9765. The principal players involved in the smuggling operation made immediate efforts to flee the country. R.8233.

SUMMARY OF THE ARGUMENT

Williams is entitled to a new trial on Counts 1 and 21-58 of the superseding indictment because the district court erred in denying his *Batson* challenge to the government's exercise of a peremptory strike against venireperson Allen, who is African-American. The government's explanation essentially boiled down to the assertion that they felt that Allen was essentially too pro-prosecution. This is not a credible basis for the exercise of a peremptory strike. The pretextual nature of the government's argument is underscored by the differences in the government's questioning of venirepersons who are not African-American and that had comparable answers as those of Allen's that the government said it was concerned about expressed concern.

Additionally, during the sentencing phase of the trial, the district court misconstrued the phrase "act of violence" in 18 U.S.C. §3591(a)(2)(D). The district court erroneously instructed the jury that it could find that Williams intentionally and specifically engaged in an act of violence if it found that the act

in question "is an act, that by its nature, creates a grave risk of serious bodily injury to a person or a grave risk of death to a person." But properly construed, "act of violence" requires not only that an act inherently create a grave risk or serious injury or death, the act must involve the use of violent force. Given that the government alleged that the act of violence in this case was Williams's driving of a truck that the occupants of the trailer could not get out of on their own and there was no allegation that Williams intentionally directed any active force against them, a proper instruction would likely have led the jury to reach a different answer to this questions, which would have precluded the jury from imposing a life sentence on Williams.

The district court also erred in the jury instructions it gave regarding victim vulnerability during the sentencing phase of the trial. In particular, the district court erred in not including a scienter element in this instruction to ensure that the jury could not weigh this factor against Williams unless he knew that the victims were vulnerable. The district court also erred in effectively directing a verdict that two of the victims were vulnerable victims based solely on the age. Under a proper instruction, the jury should have been allowed to decide for itself whether the age of these two victims rendered them particularly vulnerable.

STANDARD OF REVIEW

Batson Challenges

In the context of a *Batson* challenge, this Court reviews "the Government's proffered race-neutral explanation is de novo" and "the district court's conclusion on whether the peremptory strikes were racially motivated for clear error." *United States v. Williamson*, 533 F.3d 269, 274 (5th Cir. 2008). A prosecutor's proffer of a "pretextual explanation naturally gives rise to an inference of discriminatory intent." *Snyder v. Louisiana*, 128 S.Ct. 1203, 1212 (2008). Although the district court's ruling regarding whether a strike was racially motivated is entitled to "due deference," this Court has noted that "the Supreme Court has made plain that appellate review of alleged *Batson* errors is not a hollow act." *Williamson*, 533 F.3d at 274.

Sufficiency of the Evidence

Challenges to the sufficiency of the evidence are reviewed de novo. *United States v. Wise*, 221 F.3d 140, 154 (5th Cir. 2000). In reviewing the sufficiency of the evidence, the Court examines whether "a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." *United States v. Klein*, 543 F.3d 206, 212 (5th Cir. 2008). In undertaking this review, "all reasonable inferences are drawn in the light most favorable to the prosecution." *Id.*

Jury Instructions

Whether a jury instruction "misstated an element" of a "statutory crime" is reviewed de novo. *United States v. Morales-Palacios*, 369 F.3d 442, 445 (5th Cir. 2004), and a conviction must be reversed "if the instructions do not correctly state the law." *United States v. Ahmad*, 101 F.3d 386, 389 (5th Cir. 1996). When a jury instruction is not objected to at trial, however, it is reviewed only for plain error. *United States v. Garcia*, 567 F.3d 721, 728 (5th Cir. 2009). "Plain error occurs only when the instruction, considered as a whole, was so clearly erroneous as to result in the likelihood of a grave miscarriage of justice." *Id.*

Interpretation and Application of Sentencing Guidelines

"We review a district court's interpretation or application of the Guidelines de novo and its factual findings for clear error." *United States v. Conner*, 537 F.3d 480, 489 (5th Cir. 2008).

ARGUMENT

I. THE PROSECUTOR'S USE OF A PEREMPTORY STRIKE AGAINST VENIREPERSON ALLEN VIOLATED *BATSON V. KENTUCKY*.

The use of peremptory strikes to strike prospective jurors on race and gender grounds is impermissible, and violates a defendant's right to a fair trial. *Batson v. Kentucky*, 476 U.S. 79 (1986). The proper process for a formulating a *Batson* challenge requires the defendant to make a prima facie showing that a peremptory

challenge has been exercised on the basis of race. *Snyder*, 128 S.Ct. at 1207. If that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. *Id*. Finally, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. *Id*.

Of the nine African-Americans qualified to be in the jury pool, five were struck by the prosecution. R.7957. One of these venirepersons struck by the prosecution was Lawrence Allen, a 51-year old African-American male employed as a tax-program manager at Dresser Industries. R.7959. In response to group questioning and in his juror questionnaire, Allen stated that he: (1) is in favor of the death penalty, (2) believes "the death penalty should be the punishment options for more crimes," and (3) would follow the Court's instructions to set aside any preconceived notions. This ability to set-aside "preconceived notions" is of particular significance because Allen had a preconceived belief regarding Williams's guilt based on the smuggling aspect of his offense. R.7953-54. Based only on these answers by Allen during group questioning and in his written questionnaire, and without any follow-up or individualized questioning of Allen, the prosecution offered the following four purported race-neutral bases for the strike: (1) inconsistency in Allen's views on the death penalty; (2) noncommittal

responses; (3) possible bias; and (4) a belief that the death penalty is applied unfairly to certain minority groups. R.7954-57.

"Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). Since the government offered these facially race-neutral reasons, the inquiry must focus on whether purposeful discrimination was shown. *Williamson*, 533 F.3d at 275. Naturally, the court may consider the facial plausibility to the explanation itself in determining whether a given reasons is pretextual. *See Snyder*, 128 S.Ct. at 1211. Courts, however, often find it useful to look at "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve" to determine whether a stated reason is pretextual. *Reed v. Quarterman*, 555 F.3d 364, 372 (5th Cir. 2009) (quoting *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005)). Also, relevant is whether the government acted differently with respect to questioning other venirepersons, whose answers should have raised the same concerns as Allen's answers, regardless of whether the other venirepersons eventually served on the jury. *Williamson*, 533 F.3d at 275-76 ("[T]he failure to ask non-black venire members who gave similar answers…is troubling.").

The government's primary reason for striking Allen was his purportedly "inconsistent statements," R.7955, about the death penalty and its disparate racial

impact. R.7954-55. Second, the prosecutor pointed to Allen's "presumption of guilt" towards Williams. *Id*. Underlying both rationales was the government's belief that Allen was simply 'too good' for the prosecution: "[I]f we believe that there is a juror that already has a belief that the defendant is guilty, we believe we have an affirmative duty to assure that such a juror doesn't get on the jury. . ." R.7954.

The government, however, did not seem so concerned about this issue when it to came to certain venirepersons who were not African-American. For example, Kathleen Cox, who is not African-American, explained that she had knowledge of the publicity surrounding Williams's case and "had read quite a bit of articles." R.6151. Cox's questionnaire also contained the exclamation, "It's an awful case and I do not understand how someone could treat people so cruelly." *Id*. While Cox explained at voir dire that this 'someone' was not necessarily Williams, she immediately offered the qualification that this 'someone's' role was "just different, you know, [from] the other people involved also." *Id*.

The prosecution asked Cox if she could set aside her "knowledge"; Cox answered tersely "yes." R.6151. The prosecutor did not ask any more questions about Cox's prior knowledge of Williams's case, R.6151-52, instead transitioning to a question about Cox having seen his name in the paper, R.6152. Through this quick transition from "prior knowledge" (in general) to a question about pre-trial

publicity (concerning himself), the prosecutor attempted to conceal his failure of inquiry about Cox's *a priori* tendency towards guilt. Putting aside whether Cox's statement that Williams was "just different, you know, [from] the other people involved also" shows a predisposition towards guilt, the bottom line is that the prosecutor is that Cox's responses to questions should have raised the very same concerns that Allen's answers did. Yet, the prosecution did not also strike Cox as being too good for the prosecution.

Additionally, William Selph, a Caucasian alternate juror, displayed virtually identical beliefs about Williams's guilt and the death penalty as those which the prosecution claimed were "inconsistent" when voiced by the Allen. Selph unequivocally declared his belief that "I know that the death penalty is applied unfairly against certain racial or ethnic groups." R.7838. Selph explained that his "knowledge" rather than mere "belief" was based in articles he had read in the newspaper and other media. *Id*. Selph's concern about the disparate racial impact of the death penalty is at least as great as that voiced by Allen.

In rejecting Williams's *Batson* challenge to the peremptory strike against Allen, however, the district court incorrectly failed to give adequate weight the comparator evidence. The district court explained that the law of large numbers effectively renders large venire panels impervious to any meaningful 'comparators' analysis. R.7958. The court explained the because "[t]here were so many answers

given, either to the questionnaire, to oral questions, the group, as well as individually, that you could find some basis on which to say as to everybody who was the subject of the challenge, while there was someone who was outside of that person's group who was not removed on the basis—on that basis." *Id*. If this was a proper statement of the law regarding *Batson* challenges, any case involving a large venire panel would effectively immunize racially motivated peremptory strikes from Batson challenges because the attorney exercising the improper strike could hide from any meaningful comparison analysis, simply because of the size of the pool. Because death-penalty prosecutions invariably large venire panels in order to select a jury, prosecutors would be handed a license to commit *Batson* violations if the size of the venire could preclude a meaningful comparator analysis. *See Miller-El*, 545 U.S. at 282 (98 veniremen questionnaires at issue); *Snyder*, 128 S.Ct. at 1208 (noting that the struck venireperson "was 1 of more than 50 members of the venire" affected by the pretextual question).

II. THE JURY SHOULD NOT HAVE HAD THE OPPORTUNITY TO SENTENCE WILLIAMS TO LIFE WITHOUT PAROLE BECAUSE HE DID NOT COMMIT AN ACT OF VIOLENCE.

A. A Jury Cannot Impose a Sentence of Death or Life Without Parole Under the Federal Death Penalty Act Without Making a Threshold Intent Finding Regarding Act of Violence.

Because Williams was convicted for certain offenses that authorize capital punishment and because the government sought the death penalty in this case, the

Federal Death Penalty Act required a separate "penalty phase" after the jury convicted Williams on the underlying offenses. 18 U.S.C. §§3591, 3593; *see also United States v. Jones*, 132 F.3d 232, 240 (5th Cir. 1998). The penalty phase's first step requires a jury to find beyond a reasonable doubt whether a defendant

> (A) intentionally killed the victim;
>
> (B) intentionally inflicted serious bodily injury that resulted in the death of the victim;
>
> (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or
>
> (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act.

18 U.S.C. §§3591(a)(2)(A-D), 3593(b). If a jury finds beyond a reasonable doubt that one or more of these threshold elements is satisfied, then it may proceed to consider whether one or more statutory aggravating factors exists; otherwise, the jury's sentencing role ends. *See* 18 U.S.C. §3592(c) (stating that the jury should proceed to consider the statutory aggravators only if the jury first finds that the crime satisfies one of the four standards described in §3591(a)(2)); *see also* RE.5.5491 (instructing jury not to proceed if it answered "no" as to each question submitted regarding Williams's intent).

If a jury finds that at least one statutory aggravating factor exists, then it can then proceed to weigh the evidence of any aggravating factors it finds exist against any mitigating factors to determine whether the defendant should be sentenced to a term of years, life without parole, or death. *See Jones*, 132 F.3d at 240. If the jury returns a verdict of life-without-parole or death, the district court must sentence the defendant in accordance with the jury's verdict; if the jury recommends a sentence of a term of years, the district court may impose any sentence other than death that is authorized by law. 18 U.S.C. §3594.

In this case, the district court submitted to the jury a question as to only one of the four possible threshold intent standards. In particular, the district court submitted a question as to whether Williams had "intentionally and specifically engaged in an act of violence" under §3591(a)(2)(D) because the government did not allege that Williams intentionally killed or inflicted serious bodily injury on any of the victims under §3591(a)(2)(A) or (B). RE.2.309. Nor did the government allege that Williams "intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used" under §3591(a)(2)(C). *Id*. The government alleged only that Williams "intentionally and specifically engaged in an act of violence" that he "knew would create a grave risk of death." *Id*. As explained below, however,

Williams never engaged in any act that could properly be understood to be an act of violence under §3591(a)(2)(D).

B. There Is No Evidence Williams Intentionally Engaged in an Act of Violence.

1. An Act of Violence Is an Act Using Violent Force That Created a Grave Risk of Serious Bodily Injury or Death.

Problematically, "act of violence" is not defined in §3591. R.11911-12 (district court noting that "this is obviously an area that courts have struggled with under the statutes"). While several courts have reviewed cases involving §3591(a)(2)(D), no circuit court has had the occasion to interpret the phrase "act of violence" as used in this statute. But in most cases where the government has relied on §3591(a)(2)(D), there could not be any question that the defendants alleged conduct constituted an act of violence. *See, e.g.*, *United States v. Basham*, 561 F.3d 302, 309-10 (4th Cir. 2009) (kidnapping and carjacking in which defendants ultimately murdered victim); *United States v. Bourgeois*, 423 F.3d 501, 505 (5th Cir. 2005) (defendant "grabbed [two-year old child] by her shoulders and slammed the back of her head into the front and side window area around the dashboard four times); *United States v. Higgs*, 353 F.3d 281, 299 (4th Cir. 2003) (defendant shot and killed three women); *United States v. Webster*, 162 F.3d 308, 319 (5th Cir. 1998) (defendant gagged the victim, soaked her in gasoline, and buried her alive); *Jone*s, 132 F.3d at 237 (defendant stated that "he then drove [the

victim] to a remote location where he repeatedly struck her over the head with a tire iron until she was dead"). In each of these cases, the alleged acts were unquestionably violent.

In this case, however, the government has improperly sought to extend the reach of §3591(a)(2)(D) based on a very different type of behavior that is not violent in nature; namely, driving a tractor-trailer with approximately 74 people hiding in the trailer for the purposes of entering the United States illegally and who entered the trailer voluntarily but could not exit the trailer on their own when they wanted to leave the trailer. Unlike other cases in which the government has argued that a defendant "intentionally and specifically engaged in an act of violence," §3591(a)(2)(D), Williams did not threaten the victims, force them in the truck, hit them, attack them, shoot them, or actively inflict force on them. In other words, he performed no act that would be commonly understood to constitute violence.

Thus, it is unsurprising that the district court struggled to determine how it would define act of violence in the jury instructions. As the district court acknowledged, "[t]his case has some unusual aspects . . . One of the unusual aspects is the act of violence itself." R.17795-96. The court further explained that

> other cases that talk about what an act of violence constitutes—it is not an act of violence that falls within the category of obviously and inherently, by its very nature, violence as in involving, for example, a direct application of physical force against the person of another, other than by simply preventing them from leaving.

> You don't have somebody who personally themselves intended to kill the victims, and you don't have somebody who intentionally themselves took a step that is closer to the kinds of conventional acts of violence that we think of in murder cases.

R.17795-96. After struggling to define act of violence, the district court settled on the following definition found in the jury instructions:

> An "act of violence" is an act, that by its very nature, creates a grave risk of serious injury to a person or grave risk of death to a person. An "act of violence" is one that inherently creates a grave risk of seriously injury or killing a person.

RE.10.5359; *see also* R.5381-90. As explained below, this definition is incorrect as a matter of law and misconstrues the FDPA because it encapsulates an "act" without including the necessary and required qualification that such act in fact be violent. Once "act of violence" is correctly interpreted, it is readily apparent that Williams did not intentionally and specifically engage in an act of violence.

United States v. Baskerville, 491 F.Supp.2d 516 (D.N.J. 2007) provides a detailed and persuasive analysis explaining why §3591(a)(2)(D) requires that the government produce evidence based on which a jury could find beyond a reasonable doubt both that the defendant intentionally engaged in an act he knew created a grave risk of serious bodily injury or death, that the act inherently involve the use of physical force, and that the use of force be violent in nature. As part of its analysis, *Baskerville* expressly noted its disagreement with the "act of violence"

definition employed by the district court in this case and noted that it found "that [*Williams*'s] definition, however, is not entirely complete." *Baskerville*, 491 F.Supp.2d at 521 (citing *United States v. Williams*, 2006 U.S. Dist. LEXIS 75822 (S.D. Tex. 2006)).

In *Baskerville*, the defendant was accused of conspiring to kill a confidential witness; the prosecution's argued that a co-conspirator shot and killed the witness upon Baskerville's instruction issued from his jail cell. *Baskerville*, 491 F.Supp.2d. at 517-18. The government requested that the court submit two alternative threshold intent questions to the jury: one question asking if the defendant intentional-participation standard of §3591(a)(2)(C), and, alternatively, under the act-of-violence standard under §3591(a)(2)(D). *Id*. at 519. The court concluded that Baskerville's conduct in ordering the killing easily qualified under subsection §3591(a)(2)(C). *Id*.

But *Baskerville* held that the defendant's conduct did not qualify as an act of violence under subsection (D) for several reasons based on text and structure of §3591(a). The court first noted that a comparison of §3591(a)(2)(C) with §3591(a)(2)(D) indicated that subsection (D) must be limited to a narrow class of acts because of a "key difference between subsections (C) and (D). *Baskerville*, 491 F.Supp.2d at 521. In particular *Baskerville* noted that "[t]he threshold requirement in subsection (C) is that a defendant must have intentionally

'participated in an act.' However, the threshold requirement in subsection (D) is that a defendant must have intentionally and 'specifically engaged in an act of violence.' Thus, Congress expressly narrowed subsection (D) to acts of a particular quality, namely, violent acts." *Id*.

Baskerville's holding that an act of violence must be limited to acts that are violent is consistent with the decisions of other courts construing the phrase "crime of violence." Courts construing the statutory definition of crime of violence in 18 U.S.C. §16(b), have noted that the required force needed to make a crime a crime of violence must, in fact be active, violent force. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) ("The ordinary meaning of [crime of violence], combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."); *United States v. Gonzalez-Perez*, 472 F.3d 1158, 1160 (9th Cir. 2007) ("[T]he force necessary to constitute a crime of violence must actually be violent in nature."); *cf. United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992) (observing that the term "violent felony" in 18 U.S.C. §924(e) "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence").

Additionally, for purposes of construing the "act of violence," the Court should examine the statutory text in light of the well-settled proposition that when

words in a statute are not defined, they should be given "their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Applying this fundamental principle of statutory construction, *Baskerville* noted that "[a]s defined by the Merriam-Webster Dictionary, 'violence' is the 'exertion of physical force so as to injure or abuse.'" 491 F.Supp.2d at 521. *Baskerville* further noted that Black's Law Dictionary (8th ed. 2004) defines 'violence' as the 'use of physical force, [usually] accompanied by fury, vehemence, or outrage.'" *Id*.

Next, *Baskerville* noted that "a comparison of subsection (D) to subsection (C) is helpful with regard to" Subsection (D)'s requirement that "[a defendant] 'specifically engaged' in an act of violence." *Id*. The court explained that while §3591(a)(2)(C) "requires that a defendant have 'participated' in the requisite act," §3591(a)(2)(D) provides that "mere participation is not sufficient" because "[i]n drafting subsection (D), Congress again chose to narrow subsection (D) by making it applicable only to those defendants who have 'specifically engaged' in the requisite act. *Baskerville*, 491 F.Supp.2d at 522.

Baskerville also found it helpful to examine other federal statutes to interpret act of violence. *Id*. at 521-22. In particular, *Baskerville* examined the definition of "crime of violence" in 18 U.S.C. §16(b) and noted that "the federal criminal code defines a 'crime of violence' in terms of 'physical force.'" *Id*. at 521. But the

court qualified its reliance on the definition of crime of violence under §16(b)[2] because while §16(b) refers to an "offense" that, by its nature, involves a substantial risk that physical force may be used, §3591(a)(2)(D) was limited to certain "acts." *Id.* at 522 n.6. According to *Baskerville*, this is an important distinction because in §3591 "the term 'offense' is clearly distinguished from the term 'act'" and "[b]ecause 'offense' can be more broadly construed than 'act,' the term 'crime of violence,' as defined in §16, would likely have a broader application than the term 'act of violence' in §3591." *Id.* The court further explained that "Congress could have used the defined term 'crime of violence' instead of 'act of violence' in §3591 but chose not to, indicating that §3591(a)(2)(D) should apply only in more narrowly defined circumstances." *Id.*

Based on its detailed analysis of act of violence and its application of standard principles of statutory interpretation, *Baskerville* correctly concluded that "[g]iving the relevant terms [of §3591(a)(2)(D)] their ordinary meaning" a reasonable jury could not conclude from the evidence that the defendant "specifically engaged in an act of violence" because even if the jury concluded that the defendant had ordered the witness killed, the "Defendant's act itself *lacks the element of physical force* contemplated by subsection (D)." *Id.* at 522. In other

[2] 18 U.S.C. §16(b) defines a crime of violence as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

words, as *Baskerville* concluded, "[a]t the center of all of these definitions is the use of physical force. Therefore, given its ordinary meaning, an 'act of violence' would be an act that involves the use of physical force." *Id*. at 522-23 (emphasis added). Moreover, the force must be violent in nature.

To the extent that the undefined phrase act of violence is ambiguous, the Court should apply the rule of lenity to narrow the reach of §3591(a)(2)(D) by requiring that an act of violence require an act that involves the use of violent force in a manner that creates a grave risk of death or serious bodily injury. "When there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Scheidler v. Nat'l Org. For Women*, 537 U.S. 393, 409 (2003). Because of the crucial impact §3591(a)(2)(D) can have on the sentence a defendant receives, an application of lenity is warranted if the Court finds the statute ambiguous. *See United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (lenity applies to sentencing statutes).

2. Williams Did Not Commit an Act of Violence.

Under *Baskerville*'s logic, Williams' conduct could not have constituted an "act of violence." Applying the correct interpretation of §3591(a)(2)(D), as a matter of law, Williams's conduct did not fall within the only gateway intent element the government sought to use in this case, and thus the jury should not

have been asked to determine what sentence Williams should have received. During the charge conference on the penalty-phase jury instructions, the government readily acknowledged that its case regarding the act-of-violence was based on the "transportation [of the undocumented aliens that died] in a manner that precluded escape, even when the conditions became unbearable." R.11923.

Even if Williams's conduct in driving the truck after the danger to the trailer's occupants became apparent qualified as an intentional act, it did not involve a use of force. Moreover, the physical force contemplated by §3591(a)(2)(D) must be violent—i.e., accompanied by "fury, vehemence, or outrage." *Baskerville*, 491 F.Supp.2d at 521. Williams did not apply any force, let alone violent force, against the aliens in his trailer. No force was necessary to perpetrate the offense of illegal transportation; these aliens boarded the trailer on their own volition. Nor did he have any reason to think that the people who boarded did not want to be in the truck. The bottom line is that "elements and the nature of the offense" of driving a truck loaded with undocumented aliens is categorically non-violent. Thus, as a matter of law, the jury could not have properly found that Williams intentionally and specifically engaged in an act of violence under §3591(a)(2)(D) and thus the jury never should have been allowed to sentence Williams.

C. At a Minimum, Williams Is Entitled to a New Sentencing Proceeding on Counts 40-59 Because the Jury Was Incorrectly and Misleadingly Instructed Regarding the Meaning of Act of Violence.

Because the court misinterpreted the phrase "act of violence" in §3591(a)(2)(D) to not require that the act at issue in fact be a violent act, it is unsurprising that the court provided the jury with a flawed act-of-violence instruction that erroneously omitted the element that Williams's act must involve both the actual use of violent force and that the act creates a grave risk of serious bodily injury or death.[3] *See* RE.10.5359-60 (instruction given to the jury). Given the unique nature of the facts in this case, as compared to the typical act-of-violence prosecution, it is easy to conclude that the district court's incorrect act-of-violence definition, which failed to require the jury to find that Williams's act involved the violent use of force, was likely to mislead the jury and affect their fact finding.

As explained above, even viewing the evidence in the light most favorable to the government, the evidence in this case shows that Williams did nothing to force the undocumented aliens to board his truck and never threatened or intimidated any of his passengers. The most that can be said about Williams's conduct is that he failed to let the aliens—who voluntarily boarded the truck for the purposes of

[3] RE.8.11919-20, 11926-28 (Williams's objection to instruction proposed by court and request for different instruction).

hiding from and evading law enforcement—out of the trailer once he first heard yelling from the trailer sometime after passing through the border-patrol checkpoint. R.8433 (border-patrol agent testified he heard no noise coming from the trailer), 9703-05 (Holloway testifiying that she did not hear any noise from the trailer until after leaving the border-patrol checkpoint).

The harm caused by the district court's incorrect instruction is underscored by the government's explanation of what constituted an act of violence during its closing argument. Because the instruction did not require the government to prove that Williams used force, let alone violent force, against the occupants of the trailer, the government focused the jury on Williams's failure to respond to the passenger's purported cries for help. *See* R.13057 ("The moment he walked away from those doors he began his acts of violence against those people, every step he took towards that cab, every scream he ignored, every bang he decided not to listen to, was an act of violence against those people."). In fact, according to the government, Williams engaged in an act of violence by walking away from the trailer doors immediately after the occupants had just boarded the truck voluntarily. *Id*. Thus, it is apparent that the government took full advantage of the hole left by the district court's improper instruction.

The harm from the jury's affirmative answer regarding the act-of-violence threshold issue is tangible and apparent—if the jury had answered no to this

question, the jury would not have been able to impose a life-without-parole sentence that the district court could not ignore. 18 U.S.C. §3594. A "no" answer to this threshold issue instead would have resulted in the district court determining what Williams's sentence should be for Counts 40-58, instead of the court being forced to accept the jury's life sentence. *Id*. Given that the district court chose to sentence Williams to only 405 months on the conspiracy charge even though the court could have decided to impose a life sentence for the conspiracy charges that was based, in part, on the conduct charged in Counts 40-58, it is reasonable to assume that if the district court had had the opportunity to determine Williams's sentence on Counts 40-58, it would have selected some sentence other than a term of years.

III. THE DISTRICT COURT PROVIDED INCORRECT INSTRUCTIONS TO THE JURY REGARDING THE "VULNERABILITY OF VICTIM" AGGRAVATOR.

During the penalty phase, the government sought affirmative findings on two statutory aggravating factors with respect to Counts 40-59: (1) "Knowingly Creating a Grave Risk of Death to Others" and (2) "Heinous, Cruel, or Depraved Manner of Committing the Offense." R.5364-67. On Counts 42 and 59, the government also sought a finding based on the "vulnerability of victim" statutory aggravator under 18 U.S.C. §3592(c)(11). R.5396, 5411. The vulnerable-victim aggravator applies when: "[t]he victim was particularly vulnerable due to old age,

youth, or infirmity." 18 U.S.C. §3592(c)(11). Unlike the other two alleged statutory aggravators, this statutory aggravator was presented only for the two victims who were also minors, five-year-old Marco Antonio Villasenór-Acuña for Count 42, R.5396, and 15-year old Jorge Mauricio Torres-Herrera for Count 57. R.5411.

The district court's jury instructions regarding §3592(11) were erroneous for two reasons. First, the absence of a stated scienter requirement in §3592(11) violates the Eighth Amendment because it does not require a culpable mens rea requiring that the defendant know about the victim's vulnerability.[4] Second, the district court's definitions of youth and vulnerability incorrectly suggested to the jury that because of their youth, Torres-Herrera and Villasenor-Acuña were more vulnerable than the other people in the trailer, when, in fact, they were no more nor no less vulnerable than anyone else.

A. The District Court's Vulnerable-Victim Instruction Violated the Eighth Amendment by Not Including a Mens Rea Element.

1. A Vulnerable-Victim Instruction Must Include a Knowledge Element to Avoid an Eighth Amendment Violation.

The vulnerable-victim statutory aggravator, 18 U.S.C. §3592(c)(11), requires that "[t]he victim was particularly vulnerable due to old age, youth, or

[4] Williams objected to the district court's omission of a scienter element in the victim-vulnerability instruction. R.18902-03.

infirmity." The statutory text does not expressly include a mens rea element that would require a defendant to know of his victim's putative vulnerability and the district court did not include a culpable mental state for vulnerable victims in its jury instructions RE.11.5366, or its verdict form concerning either minor alien for whom the aggravator was presented, R.5396, 5411.

In the absence of a legislative statement that no culpable mental state is required, a culpable mental state must be implied in order to avoid a violation of the Eighth Amendment. "[T]he greater the possible punishment, the more likely some fault is required; and, conversely, the lighter the possible punishment, the more likely the legislature meant to impose liability without fault." WAYNE LEFAVE, SUBSTANTIVE CRIMINAL LAW 384 (2d ed. 2003). The statutory aggravators in §3592 elicit the most serious punishment law provided by law. It follows that the necessity of a culpable mental state it at its zenith.

By contrast, strict liability is most appropriate in the context of misdemeanors with light sentences. "[T]he cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment." *Staples v. United States*, 511 U.S. 600, 616 (1994) (concluding that National Firearms Act was not strict liability offense as punishment ranged up to 10 years); *accord United States v. X-Citement Video*, 513 U.S. 64 (1994) (scienter

requirement for age of minors presumed in the transporting or receipt of sexually explicit materials, as violations punishable by up to 10 years). The Fifth Circuit entertains a presumption against strict liability. *United States v. Garrett*, 984 F.2d 1402, 1410 (5th Cir. 1993) (stating that "we will presume that Congress intended to require some degree of *mens rea* as part of a federal criminal offense absent evidence of a contrary congressional intent").

2. The Eighth Amendment Requires Proportionality As Measured By Personal Responsibility.

The Supreme Court has made clear that knowledge or moral culpability is implicit in any principled distinction between those who deserve the death penalty and those who do not. The Supreme Court has consistently recognized that "[f]or purposes of imposing the death penalty . . . [t]he defendant's punishment must be tailored to his personal responsibility and moral guilt." *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *see also id.*, at 825 (O'Connor, J., dissenting) ("proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness"); *Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender").

Recognizing the importance of a scienter requirement to ensure that vulnerable-victim provisions do not sweep so widely as to raise Eighth

Amendment concerns, the Sentencing Guidelines require a knowledge element for vulnerable victims, *see* U.S.S.G. §3A1.1(b)(1), that is lacking in the Federal Death Penalty Act's statutory aggravator. The Supreme Court's repeated statements regarding the relationship between knowledge and moral culpability would be turned on their head if juries could impose capital punishment based on a victim's particular vulnerability that is unknown to the defendant when enhancement of noncapital sentences based on the same vulnerability does require knowledge of vulnerability as to the defendant.

It is true that the First Circuit recently held that the lack of a scienter requirement in the statutory aggravator for victim vulnerability is not unconstitutional. *United States v. Sampson*, 486 F.3d 13 (1st Cir. 2007). *Sampson* explained that

> The Supreme Court has stated that an aggravating factor must satisfy two criteria in order to comport with the Eighth Amendment. First, the statutory language must be clear and specific enough to furnish guidance to the factfinder. Second, the factor must provide a principled basis for distinguishing between those who deserve capital punishment and those who do not. Viewing the Federal Death Penalty Act's vulnerable victim factor through the prism of these requirements, we agree with the Fifth Circuit's conclusion that the aggravator, even without a scienter requirement, satisfies both criteria. *See United States v. Bourgeois*, 423 F.3d 501, 510-11 (5th Cir. 2005).

Sampson, 486 F.3d at 35 (internal citations omitted). *Sampson*'s conclusory analysis is unpersuasive for the reasons explained above. Moreover, *Sampson*'s

reliance on *Bourgeois* is particularly confusing because *Bourgeois* did not even address whether the vulnerable-victim aggravator needed to have a scienter element added to avoid constitutional question. *Bourgeois* addressed only whether §3592(c)(11) were unconstitutionally overbroad or vague. 423 F.3d at 510-11.

3. Victim Vulnerability Must Be Assessed Relative to the Nature of the Alleged Offense.

Victim vulnerability arises in the related contexts of the Federal Death Penalty Act's statutory aggravator, 18 U.S.C. §3592(c)(11), as well as §3A1.1(b)(1) of the sentencing guidelines. In both situations, "[v]ictim vulnerability is relative to the nature of the crime." *United States v. Mikos*, 539 F.3d 706, 720 (7th Cir. 2008) (Posner, J., dissenting). "The determination of 'vulnerability is a complex fact dependent upon a number of characteristics which a trial court could not possibly articulate completely,' and is certainly 'not reducible to a calculation of the victim's age or to a diagnosis of the victim's disease.'" *United States v. Brown*, 7 F.3d 1155, 1160 (5th Cir. 1993) (quoting *United States v. Mejia-Orosco*, 868 F.2d 807, 809 (5th Cir. 1989)).

Writing in the specific context of the transportation of illegal aliens, this court has instructed that physical characteristic(s) of the putatively vulnerable victim must not be obscured by the conditions of that immigrant's smuggling. *United States v. Andrade-Castaneda*, 205 F. App'x 233 (5th Cir. 2006) (vacating

sentence and reversing for resentencing when "the record reflects that the conditions referenced by the district court were conditions of smuggling, not personal characteristics of a vulnerable victim."). "[I]n order for an illegally smuggled alien involved in a violation of 8 U.S.C. §1324 to be a vulnerable victim, he must be '*more unusually vulnerable* to being held captive than would be any other smuggled alien.'" *United States v. Medina-Argueta*, 454 F.3d 479, 482 (5th Cir. 2006) (quoting *United States v. Angeles-Mendoza*, 407 F.3d 742, 747-48 (5th Cir. 2005) (emphasis in original)).

Sentencing Guideline §3A1.1 sets forth enhanced punishments for defendants who target unusually vulnerable victims. The guideline states "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase [the sentence] by two levels." *Id*. Factors determining unusual vulnerability include age, physical or mental handicap, or an increased susceptibility to criminal conduct. *See, e.g., United States v. Rocha*, 916 F.2d 219, 244 (5th Cir. 1990) (noting young age of kidnapping victim helped with intimidation tactics); *see also United States v. McDermott*, 29 F.3d 404, 411 (8th Cir. 1994) (declaring factors influencing sentencing enhancement included age, physical handicap, and racial isolation of victims).

Section 3A1.1(b)(1) specifically requires scienter in order to enhance a non-capital sentence for a crime against a vulnerable victim. Prior to November 1,

1995, the commentary to U.S.S.G. §3A1.1 declared that a sentence increase applied only when a criminal purposefully targeted a vulnerable victim. Madeline Yanford, *Targeting the Criminally Depraved Mind: The Inherent Meaning of a "Vulnerable Victim" Under Federal Sentencing Guideline* §3A1.1, 9 SUFFOLK J. TRIAL & APP. ADV. 103, 104 (2004). After November 1, 1995, the amended commentary to the sentencing guideline advised that a defendant must have knowledge about a victim's unusual vulnerability. *Id.; see also United States v. Gonzales*, 436 F.3d 560, 585 (5th Cir. 2006) ("The guidelines were amended in 1995 to clarify that there is no targeting requirement."). Note 2 now states, in relevant part, "Subsection (b) applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability." *Id.* Writing in the context of undocumented-alien smuggling, this Court has explained:

> The guidelines represent Congress's determination, through the Sentencing Commission, of how much punishment a particular crime deserves, taking into account the inherent nature of the type of offense. The district court only noted general characteristics commonly held by aliens seeking to be illegally smuggled and failed to mention a characteristic the defendant knowingly took advantage of, such that the offense demonstrated the extra measure of criminal depravity which §3A1.1 intends to more severely punish.

Angeles-Mendoza, 407 F.3d at 767-47 (internal quotation marks omitted). Because the sentencing guidelines impose a scienter requirement related to victim

vulnerability to increase the offense level of a noncapital offense, the district court should have imposed the same mens rea element in the instruction it gave the jury with respect §3592(c)(11). Adding the mens rea element would have avoided a violation of the Eighth Amendment and would promote respect for the law by ensuring that a noncapital sentence enhancement was not more limited in scope than an aggravating factor that could result in capital punishment. A proper vulnerable victim instruction should have required the jury to find that Williams knew that Torres-Herrera and Villasenór-Acuña were particularly vulnerable. *See United States v. Zats*, 298 F.3d 182, 189 (3d Cir. 2001) ("What matters is not whether Zats wanted to exploit vulnerable victims, but whether he knew or should have known that he was doing so.").

B. The District Court's Definition of "Youth" Is Improper Because It Prevented the Jury from Considering Whether the Minors Were Vulnerable Victims.

The district court instructed the jury that "[t]o establish the existence of [vulnerable-victim] factor, the government must prove that the victim was particularly vulnerable due to youth." RE.11.5366. But the district court erred by going on to define youth in a way that effectively forced the jury to find that Torres-Herrera and Villasenór-Acuña were vulnerable victims as long as they were under 21. Specifically, the district court instructed the jury that "Youth means that the victim was a child, a juvenile, a young person, or a minor; that is, any person

who was, by reason of youthful immaturity or inexperience, significantly less able to avoid, resist, or withstand any attacks, persuasions, or temptations, or to recognize, judge, or discern any dangers, risks, or threats." *Id*.[5] The flaw in this definition is that if the jury concluded that the victim was a minor, then they were automatically held as a matter of law to be "significantly less able to avoid, resist, or withstand any attacks, persuasions, or temptations, or to recognize, judge, or discern any dangers, risks, or threats." *Id*. By instructing the jury that a minor was *per se* vulnerable, the district court effectively took the intensely fact-bound question of vulnerability from the jury.

A recent decision of the Seventh Circuit's highlights the flaw in the district court's instruction. *Mikos*, 539 F.3d at 706. *Mikos* is particularly instructive here because while the majority and dissenting opinions plainly disagree about the nature of the victim-vulnerability aggravator, the district court's youth instruction in this case would be found erroneous under both opinions. In *Mikos*, the defendant, who was under federal investigation for Medicare fraud, shot and killed his secretary, after she began cooperating with the federal investigators. The jury sentenced the defendant to death. *Id*. at 708. During the punishment phase, the government argued for the application of the "vulnerable victim" statutory

[5] Williams did not raise this objection in the district court. Thus, this instruction is reviewed only for plain error.

aggravator because the victim was morbidly obese and suffered substantial movement impairments because of her medical condition. *Id*. at 717. The majority opinion viewed the causal relationship between victim's obesity and her murder as arising from the fact that she "was vulnerable, not because she was especially susceptible to bullets, but because she was immobile and could neither run not fight back when an intruder broke into her apartment. She was powerless to escape, because she was unable to rise. Even a trained user of handguns has trouble hitting a moving target, so had [the victim] been able to run out of her apartment as Mikos entered, she might be alive today." *Id*.

In his dissenting opinion, Judge Posner took a diametrically opposed view of the causal relationship between the victim's obesity and the circumstances of her death:

> The fact that the victim in this case was a 5-foot 3-inch woman who weighed nearly 300 pounds might have made her particularly vulnerable to solicitations for fraudulent weight-loss programs, to mugging, and to a variety of other crimes, but not to being shot to death in her apartment.

Id. at 720. Judge Posner continued by noting that

> the defendant was able to sneak in when he knew that the victim would be alone. Once he was inside the church with a gun and determined to kill her, her death was inevitable, no matter what her physical condition. She could not have outrun his bullets even if she had been an Olympic sprinter.

Id. at 721.

In this case, a risk was created as to each alien when Abel Flores loaded them into the trailer. The government's theory of this case is that Williams imposed additional risks when he continued to drive even after purportedly greater dangers became clear. However, within this broad class of risk there was necessarily a degree of randomness as to the fifty-five aliens survived and the nineteen who did not. *See United States v. Stover*, 93 F.3d 1379, 1388 (8th Cir. 1996) (reversing special vulnerability in adoption-fraud case because defendant targeted anyone willing to pay his fees); *United States v. Wilson*, 913 F.2d 136, 138 (4th Cir. 1990) (no special vulnerability when fraudulent solicitation sent randomly to inhabitants of town struck by tornado).

Applying either the reasoning of the majority or the dissent in *Mikos* shows that the vulnerable-victim instructions in this case were improper. Judge Easterbrook concluded Brannon's "physical condition made her a sitting duck." *Mikos*, 539 F.3d at 717. If Villasenór-Acuña or Torres-Herrera were "sitting ducks" they were identically so situated along with 72 other aliens. Any disparity between their "physical condition" vis-à-vis the other people in the trailer was irrelevant. The logic of Judge Posner's conclusion that the victim "could not have outrun his bullets even if she had been an Olympic sprinter" applies with equal force to five-year-old Villasenor-Acuna or fifteen-year-old Torres-Herrera. Simply

put, neither Villasenor-Acuna nor Torres-Herrera were particularly vulnerable because of their age.

Moreover, "[e]ven though the *concepts* of victim impact and victim vulnerability may well be relevant in every case, *evidenc*e of victim vulnerability and victim impact in a particular case is inherently individualized." *Jones v. United States*, 527 U.S. 373, 401 (1999) (emphasis in original). Thus it is unsurprising, that this Court, as well as others, have unequivocally held that vulnerability aggravators cannot be reduced "to a calculation of the victim's age. *Brown*, 7 F.3d at 1160 (quoting *Mejia-Orosco*, 868 F.2d at 809); *accord Francis v. Florida*, 808 So.2d 110, 139 (Fla. 2001) ("[F]inding that this aggravator applies as a matter of law by virtue of the fact that [the victims] were 66 years old is insufficient."). In contravention of this established principle, however, the district court stated that "I gather that the law would allow us to make *no distinctions among minors* in terms of the vulnerabilities based on age differences within the category of minors." R.18081 (emphasis added). Under *Brown*, however, the district court plainly erred; in order to allow the required individualized inquiry regarding victim vulnerability, it is essential that the jury not be instructed that age is dispositive in determining vulnerability.

Moreover, and notwithstanding Williams's complete lack of knowledge regarding the particular characteristics of any of the undocumented aliens in his

truck, the district court's instructions regarding vulnerability with respect to Torres-Herrera is contrary to the well-understood physical characteristics of the teenage male. The well-known medical treatise, Oski's Pediatrics, devotes an entire subchapter to the "temporal relation between the biological, psychological, and psychologic events of adolescence." This textbook identifies the "apex of strength spurt" as occurring at age 15.3 in adolescent males. OKSI PEDIATRICS, PRINCIPLES & PRACTICE 549 (4th ed. 2006).

Similarly, Judge Posner explained in *Mikos* that "the younger and stronger the intended victim of a shooting, the more likely he is to be able to resist effectively or survive his wounds." 539 F.3d at 720 (Posner, J. dissenting). There are certain limited exceptions to this principle. An infant victim may be so reliant upon his parents that he or she is devoid of free will or conduct. *See United States v. Diaz*, 2007 U.S. Dist. LEXIS 62645, *14 (N.D. Cal. 2007) ("Baby Molex was vulnerable because, due to his age, he was necessarily attached to his parents and unable to live elsewhere."). Second, a youthful victim might also suffer specific disabilities unrelated to his age that are relevant to the circumstances of his death. *See United States v. Ealy*, 2002 U.S. Dist. LEXIS 3971, at *6 (W.D. Va. 2002) (allowing submission of the victim-vulnerability aggravator when the deceased was a fourteen-year-old male who "suffered medical problems with his legs

causing him to walk with a limp" that interfered with the teenager victim's ability to flee).

Torres-Herrera died at the age when he was most able to "avoid, resist, or withstand any attacks." Mikos, 539 F.3d at 720 (Posner, J. dissenting). And, in contrast to *Diaz*, Torres-Herrera was a teenager travelling by himself in a foreign country and thus not dependent on his parents to take care of him. The district court itself noted that the *Diaz*-type argument did not really work as to Torres-Herrera: "With a 15-year-old travelling by himself, which apparently he was, I don't think you have that argument available. You don't have a nexus." R.18171-72. Similarly, Torres-Herrera lacked any physical impediment of the type at issue in *Ealy*.

Similarly, the latter part of the district court's definition of "youth," which focuses on mentality and emotional maturity failed to capture the mental and emotional characteristics of the toddler, Villasenór-Acuña. The district court instructed the jury that "any person who was, by reason of youthful immaturity or inexperience, significantly less able to avoid, resist, or withstand any attacks, persuasions, or temptations, or to recognize, judge, or discern any dangers, risks, or threats." RE.11.5366. In the context of this case, the "persuasions" and/or "temptations" regarding "dangers, risks, or threats" can only relate to the decision to board the truck trailer in the first place.

But the government's sentencing theory was based on the premise that Williams's engaged in an act of violence by not releasing the occupants from the trailer after the trailer doors were closed in Harlingen. Given the government's theory of the case, Villasenór-Acuña was no more or less able to exit the trailer than any other occupant. Furthermore, Villasenór-Acuña was five years old. A toddler cannot identify, much less "avoid" or "resist" any matter relating to transportation. To the contrary, he or she goes where his parents instruct. For these reasons, the court's definition failed to properly guide the jury regarding victim-vulnerability as to Villasenór-Acuña's situation.

C. The District Court's Errors Harmed Williams Because They Allowed the Jury to Weigh an Improper Factor.

These two separate errors regarding the vulnerable-victim instructions each independently caused substantial harm to Williams because the impact of these improper instructions was not limited to the jury's deliberations with respect to the Counts 42 and 57 but instead infected the jury's consideration of Counts 40-58 *in toto*. Once the jury found that the victim-vulnerability aggravator applied in on these two counts, the jury (under the instructions provided by district court) could weigh any statutory aggravator in determining the sentence for any count for which it had found the threshold intent and at least one statutory aggravator (which was Count 1 and 40-58). *See* R.5370-72, 5556. In other words, once it answered yes to

the victim vulnerability questions, the jury was not prevented from including this aggravator in its weighing deliberations on what sentence to impose as to every count submitted to the jury for sentencing. As this Court has acknowledged, "the weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor." *United States v. Robinson*, 367 F.3d 278, 293 (5th Cir. 2004) (quoting *Jones v. United States*, 527 U.S. at 398).[6] The risk of such skewing is particularly pronounced when the invalid factor gives extra weight to the harm or suffering of children, which naturally touch on the most sensitive human feelings.

Moreover, the district court's plain error when it effectively instructed the jury to find that the government had established the statutory vulnerable-victim aggravator based solely on the ages of Torres-Herrera or Villasenór-Acuña, both substantially affected Williams's rights and affected the fairness of the proceeding. This significant prejudice occurred because the district court effectively added an additional aggravating factor to the jury's weighing process, without providing the jury with an effective vehicle for deciding the relevance of the victim's ages.

[6] Because sentencing in the federal system is only done by the jury in certain death-penalty cases, the decisions explaining that allowing a jury to consider an improper factor in its weighing process are death-penalty cases. But the logic of these cases is equally applicable when the jury decides to not impose a death sentence, but is still left to decide between a life sentence and sentence for a term of years as part of punishment-phase proceeding. Allowing the jury to consider an invalid factor as part of its sentencing is no different than a court that relies on an invalid factor when it imposes a sentence. *Cf. United States v. Ekanem*, 555 F.3d 172, 176-77 (5th Cir. 2009). Thus, allowing a jury to consider an invalid factor when deciding between life and a term of years is equally harmful as when weighing death or life.

When the imposer of a sentence is guided by factors that have the natural tendency to increase the sentence to a higher level that it otherwise would be, reversible plain error has occurred. *Cf. United States v. Villegas*, 404 F.3d 355, 364-65 (5th Cir. 2005) (finding prejudice where erroneous Guidelines range and correct range did not overlap). Thus, the jury's sentences on Counts 40-58 should be reversed.

IV. THE DISTRICT COURT'S SENTENCES FOR COUNTS 1 AND 21-39 SHOULD BE VACATED BECAUSE OF AN INCORRECT OFFENSE-LEVEL CALCULATION.

The district court erred when it calculated a total offense level of 31 for Counts 1 and 21-39, R.13389, because it is based a clearly erroneous fact finding. In determining the total offense level for these counts, the district court applied to the base offense level a 9-level increase based on its finding that offense involved smuggling, transporting, or harboring more than 100 aliens. RE.9.13667-70; U.S.S.G. §2L1.1(b)(2) ("If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows"); §2X1.1. The district court, however, only should have increased the offense level by six because there is no evidence that offenses involved here involved only the smuggling of seventy-four aliens.[7] U.S.S.G. §2L1.1(b)(2) (providing that smuggling between 25-99 aliens requires only a 6-level enhancement).

[7] Williams raised this objection to the fact finding and the offense-level calculation in the district court. R.5766, 13667-70.

With respect to Counts 21-39, the error is obvious. The offenses charged in these counts relate solely to Williams's ill-fated trip on May 14 with seventy-four people in the trailer. RE.3.302-04. Because the relevant conduct under §1B1.3 for counts 21-39 is limited to acts "that occurred during the commission of the offense of conviction," there was no basis for the court to apply a nine-level, rather than a six-level increase to the offense level on these counts.[8]

A very similar error affects the guideline calculation for the conspiracy charged in Count 1. Although the focus of the trial was on the May 14 trip, Abel Flores testified that Williams had performed an alien-smuggling run in late April or early May 2003. R.8193-8200. According to Flores, approximately 60 aliens were transported in this earlier run. R.8197. At the sentencing hearing, the government argued that the aliens safely transported in the prior run should be added to the seventy-four in the May 14 trip for purposes of calculating the offense level. RE.9.13368-69. But the superseding indictment's description of the conspiracy, including the manner and means thereof, never mentions the first run. RE.3.284-97. Because the conspiracy charged in Count 1 does not encompass the first run, it is not relevant conduct under 1B1.3 and the district court could not properly include the aliens transported in the prior run. *See United States v.*

[8] Williams acknowledges that this error is relevant only if the Court vacates the sentences imposed on Counts 1 and 40-58.

Crockett, 82 F.3d 722, 724 (7th Cir. 1996) (suggesting that a transaction outside the scope of the charged conspiracy cannot be considered relevant conduct for determining offense level for conspiracy).

Had the district court properly calculated Williams's total offense level as 28 instead of 31, it is quite likely that a different sentence would have been imposed on Counts 1 and 21-39. The district court calculated the sentences it imposed on these counts by starting with the incorrect offense level of 31 and then applying certain upward departures to reach an offense level of 41, which suggested a guideline range of 324-405 months. R.13408-10. The court imposed a 405-month sentence as to count 1 and the statutory maximum of 240 months as to counts 21-39. R.13410. If the court had not improperly included the extra three-level increase, the suggested range would have been much lower—235-293 months. Given that the district-court sentenced Williams at the maximum sentence in the advisory guidelines range, it is certainly probable that the court would have imposed a lower sentence if the offense level had been correctly calculated. *Ekanem*, 555 F.3d at 176-77.

CONCLUSION

For the foregoing reasons, Williams' convictions should be reversed or vacated and remanded for a new trial. In the alternative, his sentence should be vacated and remanded for resentencing.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,659 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Date: August 21, 2009

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CERTIFICATE OF SERVICE

I certify that the Brief of Appellant was filed with the Court by Federal Express, and in electronic format, on the 21st day of August, 2009, and two copies of the brief and an electronic copy of the brief were served on counsel of record, as listed below, by Federal Express on the same date:

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