

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT**

JANET JENKINS, et al.,

Plaintiffs,

v.

No. 2:12-cv-184-WKS

KENNETH L. MILLER, et al.,

Defendants.

**PLAINTIFF JANET JENKINS'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT ONE AGAINST  
DEFENDANTS PHILIP ZODHIATES, KENNETH MILLER, AND TIMOTHY MILLER**

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, Plaintiff Janet Jenkins, through undersigned counsel, moves for partial summary judgment on Count 1 of the Revised Second Amended Complaint, ECF 223, against Defendants Philip Zodhiates, Kenneth Miller, and Timothy Miller for the reasons set forth in the accompanying memorandum in support.

In summary, Zodhiates's convictions for international parental kidnapping, conspiracy to commit international parental kidnapping, and aiding and abetting parental kidnapping in violation of 18 U.S.C. §§ 2, 371, and 1204, and Timothy Miller's conviction for conspiracy to commit international parental kidnapping in violation of 18 U.S.C. § 371, preclude them from relitigating all issues presented by Count 1, which claims that they are liable to Jenkins for the tort of intentional interference with parental rights under theories of civil conspiracy and civil aiding and abetting. Therefore, there is no genuine dispute as to any material fact and Plaintiff is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a).

In the alternative, Plaintiff moves for partial summary judgment on all elements of Count 1 that Zodhiates and Timothy Miller are precluded from relitigating because of their criminal convictions. *See id.* ("A party may move for summary judgment, identifying each claim

or defense—*or the part of each claim* or defense—on which summary judgment is sought.”  
(emphasis added)).

Kenneth Miller’s conviction for aiding and abetting international parental kidnapping in violation of 18 U.S.C. §§ 2 and 1204 precludes him from relitigating the first two elements of Count 1, which claims that he is liable to Jenkins for the tort of intentional interference with parental rights under theories of civil conspiracy and civil aiding and abetting. Therefore, there is no genuine dispute as to any material fact and Plaintiff is entitled to judgment as a matter of law on the first two elements. *See id.*

### CONCLUSION

Plaintiff’s motion for partial summary judgment should be granted.

December 13, 2019

Respectfully submitted.

/s/ Frank H. Langrock

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*Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that, on this date, the foregoing document was served on the following counsel of record through the Court's CM/ECF system:

Brooks G. McArthur  
Jarvis, McArthur & Williams, LLC  
*Counsel for Defendant Kenneth L. Miller*

Horatio G. Mihet  
Roger K. Gannam  
Daniel Joseph Schmid  
Liberty Counsel  
*Counsel for Defendants Liberty Counsel, Inc. and  
Rena M. Lindevaldsen*

Anthony R. Duprey  
Neuse, Duprey & Putnam, PC  
*Counsel for Defendants Liberty Counsel, Inc. and  
Rena M. Lindevaldsen*

Norman C. Smith  
Norman C. Smith, PC  
*Counsel for Defendant Linda M. Wall*

Adam S. Hochschild  
Hochschild Law Firm, LLC  
*Counsel for Defendant Linda M. Wall*

Robert B. Hemley  
Gravel & Shea PC  
*Counsel for Defendants Philip Zodiates, Victoria  
Hyden, and Response Unlimited, Inc.*

Michael J. Tierney  
Wadleigh, Starr & Peters, PLLC  
*Counsel for Defendant Timothy D. Miller*

December 13, 2019

/s/ Diego A. Soto \_\_\_\_\_  
Diego A. Soto  
*Counsel for Plaintiffs*

CONFORMED COPY

STATE OF VERMONT  
RUTLAND COUNTY, SS.

RUTLAND FAMILY COURT  
DOCKET NO. F454-11-03Rddm

LISA MILLER-JENKINS, )  
Plaintiff )  
 )  
v. )  
 )  
JANET MILLER-JENKINS, )  
Defendant )

FILED  
JUN 17 2004  
RUTLAND FAMILY COURT

TEMPORARY ORDER RE: PARENTAL RIGHTS & RESPONSIBILITIES

This matter came on for hearing before the Family Court on March 15, 2004, and again on May 26, 2004, the Honorable William D. Cohen presiding. The Plaintiff was present in Court and represented by her attorney, Judy G. Barone, and the Defendant was present in Court and represented by her attorney, Theodore A. Parisi, Jr. Based on the pleadings and papers on file in this matter, the representations of counsel and the evidence adduced at said hearing, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The Plaintiff is awarded temporary legal and physical responsibility for the minor child of the parties, to wit: Isabella Ruth Miller-Jenkins, DOB 04/16/02.
2. The Defendant is awarded, on a temporary basis, parent-child contact with the minor child as follows:

- a) JUNE 2004: From 06/04/04 through 06/06/04, and again on 06/18/04 through 06/20/04. Both visitations shall occur in Virginia and the Defendant shall be responsible for transporting the child from the Plaintiff's residence to the situs of parent-child contact, and the Plaintiff shall be responsible for transporting the child at the end of parent-child contact period from the situs of Defendant's parent-child contact to

EXHIBIT  
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GOVERNMENT  
EXHIBIT  
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LAW OFFICES  
THEODORE A. PARISI, JR.  
RD. BOX 297  
STLETON,  
VONT 05735

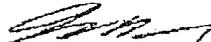
Plaintiff's residence.

- b) JULY 2004: From 07/25/04 through 07/31/04. Visitation shall occur in Virginia and the Defendant shall be responsible for transporting the child from the Plaintiff's residence to the situs of parent-child contact and the Plaintiff shall be responsible for transporting the child at the end of parent-child contact period from the situs of Defendant's parent-child contact to Plaintiff's residence.
- c) AUGUST 2004 and THEREAFTER: The Defendant shall have parent-child contact with Isabella in Vermont for the third full week of each month, beginning in August of 2004. Said visitation shall begin on a Saturday morning and end on Sunday evening. The Defendant shall be responsible for transporting the child from the Plaintiff's home in Winchester, Virginia, to her home in Fair Haven, Vermont, and the Plaintiff shall be responsible for transporting the child at the end of the parent-child contact period from Defendant's residence in Fair Haven, Vermont, to her residence in Winchester, Virginia.
- d) OTHER TRANSPORTATION ARRANGEMENTS: Other transportation arrangements may be made by the parties provided that each parent shall equally share the burden of such transportation. This Court has no preference for the mode of transportation and the parties may agree that travel by automobile, plane or train may be appropriate.

e) **TELEPHONE CONTACT:** The Plaintiff shall be permitted to have telephone contact with Isabella while she is with the Defendant once-per day. The Plaintiff and Defendant will work out an appropriate time for such telephone contact having in mind Isabella's schedule. The Defendant shall have telephone contact with Isabella on a per-day basis when the child is with the Plaintiff. Similarly, the Plaintiff and Defendant shall work out a time when such contact shall take place and be appropriate considering Isabella's schedule.

3. This Order shall remain in effect until superceded by another Order of this Court dealing with parental rights and responsibilities.

Dated at Rutland, Vermont, this 17 day of June, 2004.

  
\_\_\_\_\_  
Judge(s) - Rutland Family Court

a-m:millerjenkins.to

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EDDORE A. PARISI, JR.  
RD. BOX 297  
FLETON,  
ONT 05735

FCSO  
C # 51374  
REC'D 6-24-04

STATE OF VERMONT  
RUTLAND COUNTY, SS.

RUTLAND FAMILY COURT  
DOCKET NO. F454-11-03Rddm

LISA MILLER-JENKINS, <sup>0:21</sup> <sub>6/23/04</sub> )  
Plaintiff )  
 )  
v. )  
 )  
JANET MILLER-JENKINS, )  
Defendant )

RETURN OF SERVICE

On the 25<sup>th</sup> day of June, 2004, I made service of the within Temporary Order Re:

Parental Rights & Responsibilities by delivering to:

Lisa Miller-Jenkins

101 Covington Ln.

Winchester VA. 22601

(Insert name of person to whom delivery is made and address of place of delivery and relationship of such person to person(s) served.)

Service \$  
Attachment \$  
Travel \$  
\_\_\_\_\_ miles one way  
Postage \_\_\_\_\_  
Amount \$

W. R. [Signature]  
Deputy Sheriff  
for R.T. Williamson  
Sheriff

STATE OF VIRGINIA  
COUNTY OF Virginia SS.

Subscribed and sworn to before me this 28<sup>th</sup> June, 2004.

Before me: [Signature]  
Notary Public  
My commission expires: 3/31/05

LAW OFFICES  
ODORE A. PARISI, JR.  
P.O. BOX 297  
ETON,  
VT 05735

a-m: millerjenkins.ros

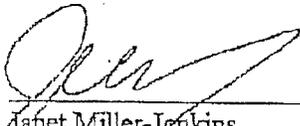
STATE OF VERMONT  
RUTLAND COUNTY, SS.

RUTLAND FAMILY COURT  
DOCKET NO. F454-11-03Rddm

LISA MILLER-JENKINS, )  
Plaintiff )  
 )  
v. )  
 )  
JANET MILLER-JENKINS, )  
Defendant )

ACCEPTANCE OF SERVICE

At Fair Haven, Vermont, this 23 day of June, 2004, I accepted service of the foregoing Temporary Order Re: Parental Rights & Responsibilities dated June 17, 2004, by accepting a true copy thereof with the same force and effect as though served upon me by a duly qualified officer, and all further and more particular service is hereby expressly waived.

  
\_\_\_\_\_  
Janet Miller-Jenkins

a-m:millerjenkins.ros

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DOORE A. PARISI, JR.  
BOX 297  
LETON,  
VERMONT 05735

**CONFORMED COPY**

STATE OF VERMONT  
RUTLAND COUNTY, SS.

RUTLAND FAMILY COURT  
DOCKET NO. F454-11-03Rddm

LISA MILLER-JENKINS, )  
Plaintiff )  
 )  
v. )  
 )  
JANET MILLER-JENKINS, )  
Defendant )

**FILED**  
**JUN 18 2004**  
RUTLAND FAMILY  
COURT

**TEMPORARY ORDER RE: PARENTAL RIGHTS & RESPONSIBILITIES**

This matter came on for hearing before the Family Court on March 15, 2004, and again on May 26, 2004, the Honorable William D. Cohen presiding. The Plaintiff was present in Court and represented by her attorney, Judy G. Barone, and the Defendant was present in Court and represented by her attorney, Theodore A. Parisi, Jr. Based on the pleadings and papers on file in this matter, the representations of counsel and the evidence adduced at said hearing, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The Plaintiff is awarded temporary legal and physical responsibility for the minor child of the parties, to wit: Isabella Ruth Miller-Jenkins, DOB 04/16/02.
2. The Defendant is awarded, on a temporary basis, parent-child contact with the minor child as follows:
  - a) **JUNE 2004:** From 06/04/04 through 06/06/04, and again on 06/18/04 through 06/20/04. Both visitations shall occur in Virginia and the Defendant shall be responsible for transporting the child from the Plaintiff's residence to the situs of parent-child contact, and the Plaintiff shall be responsible for transporting the child at the end of parent-child contact period from the situs of Defendant's parent-child contact to

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STURTON,  
VERMONT 05735

**EXHIBIT**  
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**Government**  
**Exhibit**  
**013**

Plaintiff's residence.

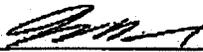
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- d) **OTHER TRANSPORTATION ARRANGEMENTS:** Other transportation arrangements may be made by the parties provided that each parent shall equally share the burden of such transportation. This Court has no preference for the mode of transportation and the parties may agree that travel by automobile, plane or train may be appropriate.

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P.O. BOX 287  
STILETON,  
MONT 05785

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3. This Order shall remain in effect until superceded by another Order of this Court dealing with parental rights and responsibilities.

Dated at Rutland, Vermont, this 17 day of June, 2004.

  
\_\_\_\_\_  
Judge(s) - Rutland Family Court

a-m:millerjenkins,to

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THEODORE A. PARISI, JR.  
RD. BOX 297  
TILETON,  
Vermont 05783

FCSO  
C# 51374  
REC'D 6-24-04

STATE OF VERMONT  
RUTLAND COUNTY, SS.

RUTLAND FAMILY COURT  
DOCKET NO. F454-11-03Rddm

LISA MILLER-JENKINS, <sup>tr. J. 24/04</sup> )  
Plaintiff )  
 )  
v. )  
 )  
JANET MILLER-JENKINS, )  
Defendant )

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Parental Rights & Responsibilities by delivering to:

Lisa Miller-Jenkins  
101 Covington Ln.  
Winchester VA. 22601

(Insert name of person to whom delivery is made and address of place of delivery and relationship of such person to person(s) served.)

Service \$  
Attachment  
Travel  
\_\_\_\_\_ miles one way  
Postage \_\_\_\_\_

Amount \$  
W. R. ...  
Deputy Sheriff  
for R.T. Williamsou  
Sheriff

STATE OF VIRGINIA  
COUNTY OF Virginia, SS.

Subscribed and sworn to before me this 28<sup>th</sup> June, 2004.

Before me: Angela Newlin  
Notary Public  
My commission expires: 3/31/05

LAW OFFICES  
ODORE A. PARISI, JR.  
P.O. BOX 297  
ETON,  
VT 05785

a-m:millerjenkins.ros

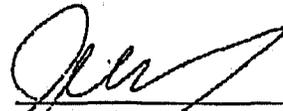
STATE OF VERMONT  
RUTLAND COUNTY, SS.

RUTLAND FAMILY COURT  
DOCKET NO. F454-11-03Rddm

LISA MILLER-JENKINS, )  
Plaintiff )  
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v. )  
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JANET MILLER-JENKINS, )  
Defendant )

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\_\_\_\_\_  
Janet Miller-Jenkins

a-m:millerjenkins.ros

LAW OFFICES  
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LETON,  
Vermont 05725

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STATE OF VERMONT  
RUTLAND COUNTY, SS.

RUTLAND FAMILY COURT  
DOCKET NO. 454-11-03 Rddm

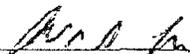
LISA MILLER-JENKINS, )  
 Individually, )  
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 Plaintiff, )  
 v. )  
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 JANET MILLER-JENKINS, )  
 Individually, )  
 )  
 Defendant. )  
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**INTERIM ORDER REGARDING PARENT-CHILD CONTACT**

WHEREAS, a Motion to Modify Parental Rights and Responsibilities is under consideration by the Court in this matter, the following interim parent-child contact is hereby ordered:

1. Parent child contact between IMJ and Janet Jenkins will occur in Virginia starting at 9:00 am on Friday September 25, 2009 and ending at 3:00 p.m. on Sunday September 27, 2009. Ruth Jenkins will be responsible for picking up IMJ at her home in Forest, Virginia at the start of the visit and Lisa Miller will be responsible for picking up IMJ at the home of Ruth Jenkins in Falls Church, Virginia at the conclusion of the visit.
2. Lisa Miller will provide confirmation to Janet Jenkins via counsel of her intent to comply with the ordered visit no later than 48 hours prior to the start of the visit.

Dated at Rutland, Vermont this 11<sup>th</sup> day of September, 2009.

  
 \_\_\_\_\_  
 Honorable William Cohen  
 Judge, Rutland Family Court

**EXHIBIT**  
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**GOVERNMENT**  
**EXHIBIT**  
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STATE OF VERMONT  
RUTLAND COUNTY, SS.

RUTLAND FAMILY COURT  
DOCKET NO. 454-11-03 Rddm

LISA MILLER-JENKINS, )  
 Individually, )  
 )  
 Plaintiff, )  
 v. )  
 )  
 JANET MILLER-JENKINS, )  
 Individually, )  
 )  
 Defendant. )

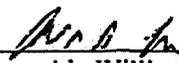
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Dated at Rutland, Vermont this 11<sup>th</sup> day of September, 2009.

  
 \_\_\_\_\_  
 Honorable William Cohen  
 Judge, Rutland Family Court

<b>EXHIBIT'</b>
<b>4</b>

<b>Government Exhibit</b>
<b>020</b>

STATE OF VERMONT  
RUTLAND COUNTY

LISA MILLER-JENKINS,

Plaintiff,

v.

JANET MILLER-JENKINS,

Defendant

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Rutland Family Court  
Docket No. 454-11-03Rddm

**FILED**

NOV 20 2009

Rutland Family Court

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter came on before the Court on defendant Janet Jenkins's Motion to Modify Parental Rights and Responsibilities, filed May 28, 2009. A hearing was held on August 21, 2009. Both parties filed post-hearing memoranda.

Plaintiff Lisa Miller was not present at the hearing and was represented by Stephen Crampton, Esq. Defendant Janet Jenkins was present and represented by Sarah Star, Esq. and Lisa Chalidze, Esq. The minor child ("IMJ") was not present and was represented by her attorney Michelle Kenny, Esq. and guardian ad litem Tara Devine.

At the conclusion of the hearing the Court found plaintiff Lisa Miller in willful contempt of the orders of the Rutland Family Court regarding visitation between IMJ and defendant Janet Jenkins. The Court also ruled that based on the evidence presented there had been a real, substantial and unanticipated change in circumstances based on plaintiff Lisa Miller's continued interference with defendant Janet Jenkins's right to parent child contact with IMJ.

FINDINGS OF FACT

1. Lisa Miller is currently a resident of the Commonwealth of Virginia.

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GOVERNMENT  
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14 *adlm*

2. Janet Jenkins is currently a resident of Fair Haven in Rutland County, Vermont.
3. In December 2000, while Ms. Miller and Ms. Jenkins were residents of Virginia, they traveled to Vermont and obtained a civil union pursuant to Vermont law.
4. Ms. Miller and Ms. Jenkins both changed their last name to "Miller-Jenkins."
5. In June 2007, the Court decreed that both parties were permitted to retake their pre-union names, "Lisa Miller" and "Janet Jenkins."
6. Ms. Miller and Ms. Jenkins have one minor child, IMJ, born April 16, 2002.
7. In August 2002, the Miller-Jenkins family moved to Fair Haven, Vermont.
8. In September 2003, Ms. Miller moved with IMJ to Virginia. Ms. Jenkins helped Ms. Miller and IMJ make the move, and then returned to the home in Vermont.
9. On or about November 8, 2003, Ms. Miller filed a complaint to dissolve the civil union in Rutland Vermont Family Court.
10. On June 17, 2004, this Court awarded temporary legal and physical responsibility for IMJ to Ms. Miller, and granted parent-child contact with IMJ to Ms. Jenkins on a specific schedule.
11. After initially complying with the Contact Order, Ms. Miller refused to allow Ms. Jenkins her court-ordered parent-child contact with IMJ. Ms. Miller was held in contempt of that order, and, after remand from the Vermont Supreme Court, on December 8, 2006, was ordered to pay Ms. Jenkins compensatory sanctions. The Order included an on-going fine for further non-compliance.
12. A trial on the merits was held April 2-5, 2007.

13. At the time of trial in April 2007, Ms. Miller continued to refuse to allow Ms. Jenkins contact with IMJ, although Ms. Miller testified that she would comply with such an order after trial.
14. At the time of trial in April 2007, Ms. Miller had made statements to IMJ critical of Ms. Jenkins's lifestyle, sexual orientation, and religious persuasion. The Court found in its Order of June 15, 2007, that these statements were likely to have an adverse effect on IMJ's relationship with Ms. Jenkins.
15. In the June 2007 Order, the Court found that Ms. Miller had good parenting skills and demonstrated her ability to care for IMJ.
16. The Court also found that Ms. Jenkins had extensive experience and training in caring for children. She demonstrated this ability through her care of IMJ and of other children in her daycare.
17. The Court found that Ms. Jenkins had a commitment to IMJ as demonstrated through her ongoing efforts to exercise her rights to parent-child contact with IMJ in the face of Ms. Miller's obstruction of such contact. Ms. Jenkins incurred substantial expenses in her attempts to visit IMJ and continued to incur such expenses. Her testimony with respect to her attachment to IMJ and commitment to parenting IMJ was credible.
18. The Court found that Ms. Jenkins demonstrated an ability to foster a relationship between Ms. Miller and herself, and Ms. Miller and IMJ. Ms. Jenkins refrained from accusatory statements with respect to Ms. Miller's parenting abilities and indicated a willingness to respect Ms. Miller's religious and moral instruction of IMJ.

19. Pursuant to 15 V.S.A. § 665(b)(4), the Court found that the factor of the quality of IMJ's adjustment to her present housing, school and community and the potential effect of any change, weighed in favor of Ms. Miller. The Court was mindful, however, "of the danger of creating an incentive for one parent to remove a child from her former home and community and to deny parenting time to another parent in order to weight this factor in the moving parent's favor."
20. Pursuant to 15 V.S.A. § 665(b)(5), the Court found that Ms. Jenkins had the ability to foster a positive relationship and frequent and continuing contact between Ms. Miller and herself, and IMJ and Ms. Miller, including physical contact. However, Ms. Miller had demonstrated through her contemptuous refusal to permit to permit parent-child contact and her statements to IMJ regarding Ms. Jenkins that she was not able to foster such a relationship with Ms. Jenkins.
21. The Court found that all other factors weighed evenly between Ms. Miller and Ms. Jenkins.
22. The Conclusions of Law regarding Parental Rights and Responsibilities, issued on June 15, 2007, stated: "The Court concludes that it is in the best interest of IMJ that Ms. Miller exercise parental rights and responsibilities. In the Court's view, the potential harm that would result from uprooting IMJ from the environment to which she has adjusted outweighs the potential harm from Ms. Miller's inability to foster a relationship with Ms. Jenkins. Nevertheless, this is a close case. Continued interference with the relationship between IMJ and Ms. Jenkins could

lead to a change of circumstances and outweigh the disruption that would occur if a change of custody were ordered.”

23. In the June 2007 Order, the Court set forth a reunification plan involving liberal visitation between IMJ and Ms. Jenkins. This plan included initial parenting time in Virginia on June 30, 2007 and July 7, 2007; parent-child contact in Virginia, July 13-15, 2007 and July 27-29, 2007; parent-child contact in Vermont, August 19-25, 2007; after August 25, 2007, parent-child contact every other weekend, alternating between Virginia and Vermont; and parent-child contact during Thanksgiving 2007 in Vermont.
24. Parent-child contact between IMJ and Ms. Jenkins occurred in accordance with the June 2007 Order until August 25, 2007.
25. The parenting time ordered every other weekend, alternating between Virginia and Vermont, did not occur.
26. Ms. Miller was found in contempt for her refusal to allow the alternating contact to occur.
27. On December 31, 2007, the Court issued an Order regarding Modification of the Visitation Schedule. The Court ordered parent-child contact between IMJ and Ms. Jenkins in Vermont, March 28 - April 5, 2008; contact in Vermont, May 31 - June 7, 2008; contact in Vermont, June 14-21, 2008; contact in Vermont, July 5-19, 2008; and contact in Vermont, August 2-9, 2008.
28. None of the parent-child contact ordered by the Court in the December 31, 2007 Order occurred.

29. In its Contempt Order issued April 30, 2008, the Court found that Ms. Miller was not in contempt for the missed contact which was to occur March 28 – April 5, 2008.
30. The Court later found Ms. Miller in contempt for her refusal to allow contact between IMJ and Ms. Jenkins for the periods May 31 – June 7, 2008, and June 14-21, 2008.
31. In the Contempt Order issued April 30, 2008, the Court ordered one week of make up time between IMJ and Ms. Jenkins for the missed days March 28 – April 5, 2008. This contact was to be in Vermont, within 60 days of the Order, in addition to visitations set forth in the December 31, 2007 Order.
32. The one week of make-up time ordered on April 30, 2008, did not occur.
33. On November, 7, 2008, the Court issued an Order regarding Contempt and Parent-Child Contact.
34. In that Order, the Court found Ms. Miller in contempt for her refusal to comply with the ordered make-up time from the April 30, 2008 Contempt Order.
35. The Court also ordered parent-child contact between IMJ and Ms. Jenkins in Virginia for the Thanksgiving holiday, November 26-29, 2008; contact in Vermont, December 27 – January 2, 2009; contact in Virginia, January 17-19, 2009; and contact in Vermont, March 7-14, 2009.
36. The only parent-child contact from the November 7, 2008 Order which occurred between IMJ and Ms. Jenkins was approximately 24 hours of contact in Virginia during the January 17-19, 2009 visitation.

37. The Court found Ms. Miller in contempt for her refusal to allow parent-child contact over Thanksgiving 2008.
38. A hearing regarding parent-child contact was held on January 28, 2009.
39. At the hearing, the Court explicitly warned Ms. Miller that failure to comply with the ordered visits could lead to a transfer of custody. Ms. Miller testified that she would comply with the ordered visits.
40. Subsequently, the Court issued an Order regarding Parent-Child Contact on February 10, 2009. The Court ordered contact between IMJ and Ms. Jenkins to occur as provided in the November 7, 2008 Order regarding the contact in Vermont, March 7-14, 2009.
41. The Court further ordered parent-child contact at Ms. Jenkins's parents' home (IMJ's grandparents, "The Jenkins") in Virginia, May 22-25, 2009, and contact in Vermont for five weeks during the summer, from July 10, 2009 – August 8, 2009.
42. The March 7-14, 2009 parent-child contact did not occur because IMJ was ill.
43. On April 9, 2009, the Court issued an Order regarding Make-Up Parent-Child Contact Time.
44. The Court ordered make-up time for the missed March 2009 visit to occur in Vermont, April 9-13, 2009.
45. The make-up time ordered in Vermont, April 9-13, 2009, did not occur.
46. On May 8, 2009, the Court issued an Order regarding Make-Up Parent-Child Contact Time for the missed March 2009 and April 2009 visits.
47. The Court ordered parent-child contact between IMJ and Ms. Jenkins in Vermont, May 23-29, 2009, in anticipation of the five week visit during the summer, from

- July 10 – August 8, 2009. This ordered visitation superseded the original order for contact in Virginia at Ms. Jenkins's parents' home, May 22-25, 2009
48. The Court also ordered parent-child contact between LMJ and Ms. Jenkins in Virginia, June 6-8, 2009.
49. The parent-child contact ordered from May 23-29, 2009, did not occur.
50. At the hearing held on August 21, 2009, on the record, the Court found Ms. Miller in contempt for her refusal to comply with the ordered parent-child contact from May 23-29, 2009.
51. The parent-child contact ordered from June 6-8, 2009, did not occur.
52. At the hearing held on August 21, 2009, on the record, the Court found Ms. Miller in contempt for her refusal to comply with the ordered parent-child contact from June 6-8, 2009.
53. The parent child contact ordered for five weeks from July 10 – August 8, 2009, did not occur.
54. At the hearing held on August 21, 2009, on the record, the Court found Ms. Miller in contempt for her refusal to comply with the ordered parent-child contact from July 10 – August 8, 2009.
55. At the Status Conference held on September 4, 2009, the Court ordered a three day visit in Virginia the weekend of September 25, 2009.
56. On October 7, 2009, the Court received a letter from Ms. Jenkins's counsel indicating that the visit ordered for the weekend of September 25, 2009, did not occur.

57. In 2008, IMJ and Ms. Jenkins had parent-child contact for approximately 24 hours.
58. Thus far, in 2009, IMJ and Ms. Jenkins have had parent-child contact for approximately 24 hours.
59. Ms. Jenkins has made numerous trips to Virginia to visit IMJ, only to have the ordered parent-child contact not occur due to contemptuous non-compliance by Ms. Miller.
60. Ms. Miller has no justification for denying parent-child contact between Ms. Jenkins and IMJ.
61. Ms. Miller has asked Ruth Jenkins, Ms. Jenkins's mother, to stop referring to herself and Ms. Jenkins's father ("The Jenkins") as "Mom-mom" and "Pop-pop" in front of IMJ.
62. Ms. Miller has also instructed the Jenkins to refrain from contact with IMJ.
63. The Jenkins have seen IMJ a total of four times in 2008 and 2009, despite living nearby in Virginia.
64. Prior to the break-up of the relationship between Ms. Miller and Ms. Jenkins, the Jenkins saw IMJ regularly.
65. IMJ's middle name is Ruth. She was named for Ruth Jenkins, Ms. Jenkins's mother.
66. Ms. Miller changed IMJ's name to eliminate the word "Jenkins." No notice of the name change was provided to Ms. Jenkins.
67. There is no evidence that if Ms. Jenkins were to have primary custody of IMJ, that she would block Ms. Miller or Ms. Miller's family out of IMJ's life.

68. Ms. Jenkins testified that she would allow IMJ to continue to attend church events with Ms. Miller, in addition to regularly scheduled contact.
69. Ms. Jenkins testified that if she were to have primary custody of IMJ, she would continue to allow Ms. Miller to make decisions regarding IMJ's religious education to the greatest extent possible; including making sure IMJ could attend a Baptist Church in the area, even if Ms. Jenkins, herself, was not welcome there.
70. Ms. Jenkins runs a licensed daycare program from her home. She cares for two twin girls in her daycare that are IMJ's age. The girls met IMJ during IMJ's one visit to Vermont.
71. Ms. Jenkins is involved in activities at the local elementary school as a result of her work, and she has knowledge and experience with activities and education of children IMJ's age.
72. Ms. Jenkins's employment arrangement allows her to be available as a full-time parent.
73. Ms. Jenkins has the parenting skills to be able to care for IMJ's educational and developmental needs.
74. Ms. Jenkins has the ability to foster a positive relationship and frequent and continuing contact between IMJ and Ms. Miller, including physical contact.
75. Ms. Miller has demonstrated time and time again, by her willful refusal to comply with parent-child contact ordered between IMJ and Ms. Jenkins, that she does not have the ability to foster a positive relationship between herself and Ms. Jenkins, and IMJ and Ms. Jenkins.

76. At the present time, Ms. Miller has provided no assurances to the Court that she intends to comply with future visitation orders.
77. At the hearing regarding Modification of Parental Rights and Responsibilities, held August 21, 2009, Ms. Miller chose not to testify. Ms. Miller did not appear in person or by phone.
78. There is currently no evidence before the Court regarding Ms. Miller's employment, schedule, or her present ability to meet IMJ's educational or developmental needs.
79. There is no evidence of abuse of IMJ by either Ms. Miller or Ms. Jenkins.
80. IMJ is currently 7 years old.
81. There is no evidence that IMJ's adjustment to a new town and a new school would present any difficulties which are out of the ordinary for a 7 year old.
82. The ongoing constant non-compliance is extremely harmful to IMJ, and is not in IMJ's best interest, as it deprives IMJ of the opportunity for maximum continuing physical and emotional contact with both parents.

### CONCLUSIONS OF LAW

#### *I. Real, Substantial and Unanticipated Change of Circumstances*

The Court may modify a parental rights and responsibilities order upon a showing of real, substantial and unanticipated change of circumstances where the modification is in the child's best interest. *Sundstrom v. Sundstrom*, 2004 VT 106, ¶ 28, 177 Vt. 577 (mem.) (citing 15 V.S.A. § 668). "The Court must make a threshold finding of a real, substantial and unanticipated change of circumstances before it can examine the merits of the parties' claims and reconsider the best interest of the child." *Id.* (citing *Wells v.*

*Wells*, 150 Vt. 1, 4 (1988)) (internal quotations omitted). There are no fixed standards to determine what constitutes a substantial change in circumstances; the Court is guided by a rule of very general application that the welfare and best interests of the child is the primary concern in determining whether the order should be changed. *Id.* (citing *Wells*, 150 Vt. at 4).

“The moving party bears a heavy burden to prove changed circumstances, and the court must consider the evidence carefully before making the threshold finding that a real, substantial and unanticipated change of circumstances exists.” *Sundstrom*, 2004 VT 106, ¶ 29 (quoting *Spaulding v. Butler*, 172 Vt. 467, 476 (2001)). “Willful, repeated interference with visitation rights may constitute a legally significant change of circumstances.” *Id.* (quoting *Wells*, 150 Vt. at 4).

Ms. Miller has repeatedly interfered with the visitation rights of Ms. Jenkins to the point where Ms. Jenkins is no longer a part of her daughter IMJ’s life. The non-compliance by Ms. Miller has been willful and calculated, and the Court has found her in contempt of numerous orders which set forth specific dates and locations for parent-child contact between Ms. Jenkins and IMJ. There is no justification for Ms. Miller’s interference with Ms. Jenkins’s visitations rights.

Ms. Miller’s willful non-compliance comes in the face of a warning by the Court in its Order of June 15, 2007, that continued interference with the relationship between IMJ and Ms. Jenkins could lead to a change of circumstances, and an explicit warning at the January 2009 hearing that failure to comply with the ordered visits could lead to a transfer of custody. At that hearing, Ms. Miller testified that she would comply with the ordered visits. Ms. Miller has proven this testimony to be wholly untrue; she has

willfully disobeyed every subsequent Court order regarding visitation and there has not been parent-child contact between Ms. Jenkins and IMJ since that hearing date. Also, this issue of non-compliance first appeared as far back as 2004 and has been discussed with both parents, Ms. Miller and Ms. Jenkins, on numerous occasions.

Over ten months have passed since Ms. Miller has complied with an order regarding visitation between Ms. Jenkins and IMJ. During the year 2009, over eight weeks of visitation between IMJ and Ms. Jenkins have been willfully interfered with by Ms. Miller. In calculating this time period, the Court does not count the March visit which was cancelled due to IMJ's illness. As was the case in 2008, Ms. Jenkins and IMJ have had approximately 24 hours of parent-child contact this year.

By her repeated willful non-compliance with Court orders, even in the face of explicit warnings from the Court and her own testimony promising compliance, Ms. Miller has demonstrated that she will not comply with court orders regarding parent-child contact between Ms. Jenkins and IMJ. Thus, the Court finds that it is Ms. Miller's intent to cease all parent-child contact between Ms. Jenkins and IMJ. Ms. Jenkins has carried her burden in showing that a real, substantial and unanticipated change in circumstances exists. See *Sundstrom*, 2004 VT 106, ¶ 29.

#### II. Parental Rights and Responsibilities

When the Court finds that there has been a real, substantial and unanticipated change of circumstances, it must consider if a change in parental responsibilities is in the child's best interest. *Sundstrom*, 2004 VT 106, ¶ 37 (citing 15 V.S.A. § 668). The Court must consider the statutory factors set forth in 15 V.S.A. § 665(b). *Id.* "The moving party bears the burden of showing that a transfer of custody is in a child's best interest,

and due to the value of stability in a child's life, it is a heavy one." *Sundstrom*, 2004 VT 106, ¶ 37 (quoting *Habecker v. Glard*, 2003 VT 18, ¶ 5, 175 Vt. 489 (mem.)) (internal quotations omitted). The Court has broad discretion in determining a child's best interests. *Id.* (citing *Spaulding*, 172 Vt. at 475).

Obstruction of visitation and attempts at parental alienation are not in a child's best interests, and they may form the basis for a change of custody; however, willful interference with court ordered visitations, no matter how deplorable, cannot be made the basis for an "automatic" change of custody. *Id.* at ¶ 38 (citations omitted). "The primary consideration is a child's best interests, and in making its determination, the court must consider all of the relevant evidence, including whether the harm caused by one parent's obstruction of visitation outweighs the harm that could be caused by a change in custody." *Id.* (citing *Wells*, 150 Vt. at 4-5). The relevant factors to guide the Court's analysis of a child's best interests are set forth in 15 V.S.A. § 665(b).

The relationship of the child with each parent and the ability and disposition of each parent to provide the child with love, affection, and guidance;

IMJ has a good relationship with Ms. Miller and Ms. Jenkins. In the June 15, 2007 Order, the Court found that the relationship between IMJ and Ms. Jenkins had been significantly affected by Ms. Miller's refusal to allow parent-child contact. This situation has only become worse since that time. As the Court did in its previous Order, it views the evidence of Ms. Jenkins's relationship with IMJ from the perspective of the time preceding Ms. Miller's initial termination of parent-child contact.

The evidence indicates that both Ms. Miller and Ms. Jenkins have a loving and nurturing relationship with IMJ. Both cared for her extensively in her infancy and after. Both parents have the ability and disposition to provide her with love and affection. Both

parents have extensive training and experience in child development and care, and have cared for children through their daycare ventures.

However, as the Court noted in the June 2007 Order, Ms. Miller did have issues with enmeshed parenting which could later prove detrimental to the relationship. This concern by the Court has proven to be true. In particular, the Court is concerned with the ability and disposition of Ms. Miller to provide IMJ with guidance in light of her willful and calculated non-compliance with orders which this Court deemed to be in IMJ's best interests, and her willingness to provide false promises of compliance under oath to this Court. As the Vermont Supreme Court has noted, "[t]o deliberately sabotage visitation rights calculated to serve the best interests of children bears adversely on the fitness of the custodial parent, whose conduct most certainly does not go unnoticed by the children." *Wells v. Wells*, 150 Vt. 1, 4 (1988) (quoting *Rosenberg v. Rosenberg*, 504 A.2d 350, 352 (Pa. Super Ct. 1986)). Due to her superior ability to provide guidance for IMJ, this factor weighs in favor of Ms. Jenkins.

The ability and disposition of each parent to assure that the child receives adequate food, clothing, medical care, and other material needs and a safe environment;

Both parents have the ability and disposition to assure that IMJ receives adequate food, clothing, medical care, other material needs and a safe environment. The evidence supporting this conclusion is essentially the same as that supporting the previous factor. This factor is evenly weighed between the parents.

The ability and disposition of each parent to meet the child's present and future developmental needs;

Both parents have the ability and disposition to meet IMJ's present and future developmental needs. Both parties have extensive training in caring for children and

meeting their developmental needs. Both parents are disposed to do so. This factor is evenly weighed between the parents.

The quality of the child's adjustment to the child's present housing, school and community and potential effect of any change;

IMJ is well adjusted to her present housing, school and community. Potentially, a change of custody would have an uprooting effect on her. While IMJ may experience difficulties in the short term that any 7 year old would experience with a change in housing, school and community, the Court does not find that such uprooting would cause great harm. This includes a potential change in custody in the mid-point of the school year.

The Court is mindful of the danger of creating an incentive for one parent to entrench a child in that parent's home and community and to deny parenting time to the other parent in order to weight this factor in her favor. Nevertheless, viewing the best interests of IMJ, this factor weighs in favor of Ms. Miller, but only to the same extent it did in the Court's June 2007 Order.

The ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact, except where contact will result in harm to the child or to a parent;

Ms. Jenkins has the ability and disposition to foster a positive relationship and frequent and continuing contact with Ms. Miller, including physical contact. Ms. Jenkins would not block Ms. Miller or Ms. Miller's family out of IMJ's life. Furthermore, there is no evidence Ms. Jenkins would not comply with orders that this Court deems to be in IMJ's best interests. Neither Ms. Miller nor Ms. Jenkins has abused or harmed IMJ

Ms. Miller does not have the ability and disposition to foster a positive relationship and frequent and continuing contact with Ms. Jenkins, including physical

contact. Ms. Miller intends that there be no relationship between IMJ and Ms. Jenkins. This is evidenced by Ms. Miller's constant contemptuous refusal to permit parent-child contact. IMJ and Ms. Jenkins have had approximately 48 hours of parent-child contact over the past two years. They have not seen each other in over ten months. Ms. Miller has made no assurances to this Court that she intends to comply with any further orders regarding visitation which this Court deems to be in IMJ's best interests.

The Vermont Supreme Court has repeatedly observed that "a child's best interests are plainly furthered by nurturing the child's relationship with *both* parents, and a sustained course of conduct by one parent designed to interfere in the child's relationship with the other casts serious doubt upon the fitness of the offending party to be the custodial parent." *Bell v. Squires*, 2003 VT 109, ¶ 18, 176 Vt. 557 (mem.) (quoting *Begins v. Begins*, 168 Vt. 298, 301 (1998)) (emphasis in original). Accordingly, this factor weighs heavily in favor of Ms. Jenkins.

The quality of the child's relationship with the primary care provider, if appropriate given the child's age and development;

As the Court found in the June 2007 Order, Ms. Miller and Ms. Jenkins are equally IMJ's primary care provider for purposes of this criterion. Prior to their separation, both parents cared for IMJ on an equal basis. Since the separation, Ms. Miller has cared for IMJ almost exclusively.

However, mere custody of the child during the time the parents are separated to satisfy the "living apart" requirement for a divorce does not bestow the status of primary care giver on one parent. *Nickerson v. Nickerson*, 158 Vt. 85, 89-90 (1992). The *Nickerson* Court stated as a rationale for this rule that the opposite holding would encourage primary care givers to uproot the children from the home for strategic

purposes inimical to their best interest. *Id.* at 90. Here, as the Court found in the June 2007 Order, Ms. Jenkins's opportunity to care for IMJ again has been limited by Ms. Miller's contemptuous refusal to allow parent-child contact. Therefore, in keeping with the rationale set forth in *Nickerson*, the Court views this factor from a pre-separation standpoint in regards to Ms. Jenkins.

The Vermont Supreme Court has held that if one parent is the primary caregiver, the additional weight to be accorded to that factor depends on the "likely effect of a change of custodian on the child." *Porcaro v. Drop*, 175 Vt. 13, 17 (2002) (citing *Payrits v. Payrits*, 171 Vt. 50, 55 (2000)). As the Court previously noted, a change in custody may produce difficulties for IMJ in the short term consistent with those that any 7 year old would experience with a change in housing, school and community. However, viewed from a pre-separation standpoint, both Ms. Miller and Ms. Jenkins acted as primary caregivers. This factor is equally weighed between the parents.

The relationship of the child with any other person who may significantly affect the child:

In the June 2007 Order, the Court found that there was no reason to think that IMJ would have more contact with Ms. Jenkins's family if IMJ resided with one party rather than the other. This finding is no longer the case.

IMJ's grandparents, the Jenkins, have seen IMJ four times in the past two years, despite also living in Virginia. Prior to their daughter's separation from Ms. Miller, the Jenkins saw IMJ regularly. Ms. Miller requested that the Jenkins stop referring to themselves as "Mom-mom" and "Pop-pop" in front of IMJ. Ms. Miller then further requested the Jenkins to refrain from contact with IMJ. It is the intent of Ms. Miller to cease all contact between IMJ and her grandparents, the Jenkins.

If Ms. Jenkins were to have custody of IMJ, she would not block IMJ from seeing Ms. Miller's family. This factor weighs heavily in favor of Ms. Jenkins.

The ability and disposition of the parents to communicate, cooperate with each other and make joint decisions concerning the children where parental rights and responsibilities are to be shared or divided;

Neither party has requested shared parental rights and responsibilities. This factor bears no weight in this case.

Evidence of abuse as defined in section 1101 of 15 V.S.A. and the impact of abuse on the child and on the relationship between the child and the abusing parent;

There has been no abuse in the family and the Court does not weight this factor to either parent.

#### Conclusion

Taking into consideration each of the above factors, the Court concludes that it is in the best interest of IMJ that Ms. Jenkins exercise parental rights and responsibilities. In the June 2007 Order, this Court stated that continued interference by Ms. Miller with the relationship between IMJ and Ms. Jenkins could lead to a change of circumstances and outweigh the disruption that would occur if a change of custody were ordered. Ms. Miller's interference with the relationship between IMJ and Ms. Jenkins has become so pervasive that it now outweighs the potential harm that could occur to IMJ by a change of custody.

The Court does not take this change of custody lightly and it is not intended to punish Ms. Miller. See *Renaud v. Renaud*, 168 Vt. 306, 309 (1998) (stating "[c]hildren are not responsible for the misconduct of their parents toward each other, and will not be uprooted from their home merely to punish a wayward parent."). As always, "[t]he best interests of the child remains the paramount consideration." *Id.* at 310. As previously

noted, "a child's best interests are plainly furthered by nurturing the child's relationship with *both* parents, and a sustained course of conduct by one parent designed to interfere with the child's relationship with the other casts serious doubts upon the fitness of the offending party to be the custodial parent." *Bell*, 2003 VT 109, ¶ 18.

Both parents are primary care providers. Both are capable of providing love and affection to IMJ. Both can provide a safe environment with proper food, clothing, and medical care for IMJ. Both are able to meet IMJ's present and future developmental needs. However, Ms. Miller no longer has the ability or disposition to foster a positive relationship with Ms. Jenkins, including physical contact. Parent-child contact between Ms. Jenkins and IMJ has ceased to exist and there is no evidence that it will resume while Ms. Miller has custody of IMJ. Contact between IMJ and her grandparents, the Jenkins, has also ceased to exist. Furthermore, Ms. Miller's non-compliance with court orders and willingness to provide false promises under oath, cast doubt upon her ability to provide proper guidance for IMJ. To the contrary, Ms. Jenkins will be able to foster a positive relationship with Ms. Miller and Ms. Miller's family.

The change in custody will affect IMJ as she is well adjusted to her present housing, school and community. However, this disruption will not provide any short term difficulties out of the norm for a 7 year old. As the Vermont Supreme Court has stated, "although stability is undoubtedly important, the short term disruption occasioned by a change of custody may be more than compensated by the long-term benefits of a healthy relationship with both parents." *Renaud*, 168 VT at 310. In the long term, the change in custody will be in IMJ's best interests as she will have the opportunity for maximum continuing physical and emotional contact with both parents. See 15 V.S.A.

noted, "a child's best interests are plainly furthered by nurturing the child's relationship with *both* parents, and a sustained course of conduct by one parent designed to interfere with the child's relationship with the other casts serious doubts upon the fitness of the offending party to be the custodial parent." *Bell*, 2003 VT 109, ¶ 18.

Both parents are primary care providers. Both are capable of providing love and affection to IMJ. Both can provide a safe environment with proper food, clothing, and medical care for IMJ. Both are able to meet IMJ's present and future developmental needs. However, Ms. Miller no longer has the ability or disposition to foster a positive relationship with Ms. Jenkins, including physical contact. Parent-child contact between Ms. Jenkins and IMJ has ceased to exist and there is no evidence that it will resume while Ms. Miller has custody of IMJ. Contact between IMJ and her grandparents, the Jenkins, has also ceased to exist. Furthermore, Ms. Miller's non-compliance with court orders and willingness to provide false promises under oath, cast doubt upon her ability to provide proper guidance for IMJ. To the contrary, Ms. Jenkins will be able to foster a positive relationship with Ms. Miller and Ms. Miller's family.

The change in custody will affect IMJ as she is well adjusted to her present housing, school and community. However, this disruption will not provide any short term difficulties out of the norm for a 7 year old. As the Vermont Supreme Court has stated, "although stability is undoubtedly important, the short term disruption occasioned by a change of custody may be more than compensated by the long-term benefits of a healthy relationship with both parents." *Renaud*, 168 Vt. at 310. In the long term, the change in custody will be in IMJ's best interests as she will have the opportunity for maximum continuing physical and emotional contact with both parents. See 15 V.S.A.

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RUTLAND DISTRICT COURT

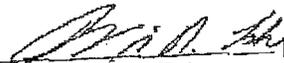
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ORDER

- 1) Defendant Janet Jenkins's Motion to Modify Parental Rights and Responsibilities, filed May 28, 2009, is GRANTED.
- 2) Janet Jenkins SHALL have sole physical and legal custody of the minor child IMJ.
- 3) Transfer of the minor child IMJ SHALL occur at the home of Janet Jenkins's parents in Virginia on January 1, 2010, at 1:00 P.M. The attorney and guardian ad litem for the minor child IMJ shall assist in making an orderly transition.
- 4) Janet Jenkins SHALL submit a plan within 90 days, with the assistance of the attorney and the guardian ad litem for the minor child IMJ, contemplating education, religious and health needs of the minor child IMJ. This plan SHALL include appropriate visitation time for Lisa Miller.

Dated at Rutland, Vermont this 20th day of Nov, 2009.

  
 Hon. William Cohen  
 Superior Court Judge



2. Janet Jenkins is currently a resident of Fair Haven in Rutland County, Vermont.
3. In December 2000, while Ms. Miller and Ms. Jenkins were residents of Virginia, they traveled to Vermont and obtained a civil union pursuant to Vermont law.
4. Ms. Miller and Ms. Jenkins both changed their last name to "Miller-Jenkins."
5. In June 2007, the Court decreed that both parties were permitted to retake their pre-union names, "Lisa Miller" and "Janet Jenkins."
6. Ms. Miller and Ms. Jenkins have one minor child, IMJ, born April 16, 2002.
7. In August 2002, the Miller-Jenkins family moved to Fair Haven, Vermont.
8. In September 2003, Ms. Miller moved with IMJ to Virginia. Ms. Jenkins helped Ms. Miller and IMJ make the move, and then returned to the home in Vermont.
9. On or about November 8, 2003, Ms. Miller filed a complaint to dissolve the civil union in Rutland Vermont Family Court.
10. On June 17, 2004, this Court awarded temporary legal and physical responsibility for IMJ to Ms. Miller, and granted parent-child contact with IMJ to Ms. Jenkins on a specific schedule.
11. After initially complying with the Contact Order, Ms. Miller refused to allow Ms. Jenkins her court-ordered parent-child contact with IMJ. Ms. Miller was held in contempt of that order, and, after remand from the Vermont Supreme Court, on December 8, 2006, was ordered to pay Ms. Jenkins compensatory sanctions. The Order included an on-going fine for further non-compliance.
12. A trial on the merits was held April 2-5, 2007.

13. At the time of trial in April 2007, Ms. Miller continued to refuse to allow Ms. Jenkins contact with IMJ, although Ms. Miller testified that she would comply with such an order after trial.
14. At the time of trial in April 2007, Ms. Miller had made statements to IMJ critical of Ms. Jenkins's lifestyle, sexual orientation, and religious persuasion. The Court found in its Order of June 15, 2007, that these statements were likely to have an adverse effect on IMJ's relationship with Ms. Jenkins.
15. In the June 2007 Order, the Court found that Ms. Miller had good parenting skills and demonstrated her ability to care for IMJ.
16. The Court also found that Ms. Jenkins had extensive experience and training in caring for children. She demonstrated this ability through her care of IMJ and of other children in her daycare.
17. The Court found that Ms. Jenkins had a commitment to IMJ as demonstrated through her ongoing efforts to exercise her rights to parent-child contact with IMJ in the face of Ms. Miller's obstruction of such contact. Ms. Jenkins incurred substantial expenses in her attempts to visit IMJ and continued to incur such expenses. Her testimony with respect to her attachment to IMJ and commitment to parenting IMJ was credible.
18. The Court found that Ms. Jenkins demonstrated an ability to foster a relationship between Ms. Miller and herself, and Ms. Miller and IMJ. Ms. Jenkins refrained from accusatory statements with respect to Ms. Miller's parenting abilities and indicated a willingness to respect Ms. Miller's religious and moral instruction of IMJ.

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RUTLAND DISTRICT COURT

005

19. Pursuant to 15 V.S.A. § 665(b)(4), the Court found that the factor of the quality of IMJ's adjustment to her present housing, school and community and the potential effect of any change, weighed in favor of Ms. Miller. The Court was mindful, however, "of the danger of creating an incentive for one parent to remove a child from her former home and community and to deny parenting time to another parent in order to weight this factor in the moving parent's favor."
20. Pursuant to 15 V.S.A. § 665(b)(5), the Court found that Ms. Jenkins had the ability to foster a positive relationship and frequent and continuing contact between Ms. Miller and herself, and IMJ and Ms. Miller, including physical contact. However, Ms. Miller had demonstrated through her contemptuous refusal to permit to permit parent-child contact and her statements to IMJ regarding Ms. Jenkins that she was not able to foster such a relationship with Ms. Jenkins.
21. The Court found that all other factors weighed evenly between Ms. Miller and Ms. Jenkins.
22. The Conclusions of Law regarding Parental Rights and Responsibilities, issued on June 15, 2007, stated: "The Court concludes that it is in the best interest of IMJ that Ms. Miller exercise parental rights and responsibilities. In the Court's view, the potential harm that would result from uprooting IMJ from the environment to which she has adjusted outweighs the potential harm from Ms. Miller's inability to foster a relationship with Ms. Jenkins. Nevertheless, this is a close case. Continued interference with the relationship between IMJ and Ms. Jenkins could

lead to a change of circumstances and outweigh the disruption that would occur if a change of custody were ordered.”

23. In the June 2007 Order, the Court set forth a reunification plan involving liberal visitation between IMJ and Ms. Jenkins. This plan included initial parenting time in Virginia on June 30, 2007 and July 7, 2007; parent-child contact in Virginia, July 13-15, 2007 and July 27-29, 2007; parent-child contact in Vermont, August 19-25, 2007; after August 25, 2007, parent-child contact every other weekend, alternating between Virginia and Vermont; and parent-child contact during Thanksgiving 2007 in Vermont.
24. Parent-child contact between IMJ and Ms. Jenkins occurred in accordance with the June 2007 Order until August 25, 2007.
25. The parenting time ordered every other weekend, alternating between Virginia and Vermont, did not occur.
26. Ms. Miller was found in contempt for her refusal to allow the alternating contact to occur.
27. On December 31, 2007, the Court issued an Order regarding Modification of the Visitation Schedule. The Court ordered parent-child contact between IMJ and Ms. Jenkins in Vermont, March 28 - April 5, 2008; contact in Vermont, May 31 - June 7, 2008; contact in Vermont, June 14-21, 2008; contact in Vermont, July 5-19, 2008; and contact in Vermont, August 2-9, 2008.
28. None of the parent-child contact ordered by the Court in the December 31, 2007 Order occurred.

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RUTLAND DISTRICT COURT

007

29. In its Contempt Order issued April 30, 2008, the Court found that Ms. Miller was not in contempt for the missed contact which was to occur March 28 – April 5, 2008.
30. The Court later found Ms. Miller in contempt for her refusal to allow contact between IMJ and Ms. Jenkins for the periods May 31 – June 7, 2008, and June 14-21, 2008.
31. In the Contempt Order issued April 30, 2008, the Court ordered one week of make up time between IMJ and Ms. Jenkins for the missed days March 28 – April 5, 2008. This contact was to be in Vermont, within 60 days of the Order, in addition to visitations set forth in the December 31, 2007 Order.
32. The one week of make-up time ordered on April 30, 2008, did not occur.
33. On November, 7, 2008, the Court issued an Order regarding Contempt and Parent-Child Contact.
34. In that Order, the Court found Ms. Miller in contempt for her refusal to comply with the ordered make-up time from the April 30, 2008 Contempt Order.
35. The Court also ordered parent-child contact between IMJ and Ms. Jenkins in Virginia for the Thanksgiving holiday, November 26-29, 2008; contact in Vermont, December 27 – January 2, 2009; contact in Virginia, January 17-19, 2009; and contact in Vermont, March 7-14, 2009.
36. The only parent-child contact from the November 7, 2008 Order which occurred between IMJ and Ms. Jenkins was approximately 24 hours of contact in Virginia during the January 17-19, 2009 visitation.

11/20/08 FRI 14:18 FAX 802 786 5888

RUTLAND DISTRICT COURT

008

37. The Court found Ms. Miller in contempt for her refusal to allow parent-child contact over Thanksgiving 2008.
38. A hearing regarding parent-child contact was held on January 28, 2009.
39. At the hearing, the Court explicitly warned Ms. Miller that failure to comply with the ordered visits could lead to a transfer of custody. Ms. Miller testified that she would comply with the ordered visits.
40. Subsequently, the Court issued an Order regarding Parent-Child Contact on February 10, 2009. The Court ordered contact between IMJ and Ms. Jenkins to occur as provided in the November 7, 2008 Order regarding the contact in Vermont, March 7-14, 2009.
41. The Court further ordered parent-child contact at Ms. Jenkins's parents' home (IMJ's grandparents, "The Jenkins") in Virginia, May 22-25, 2009, and contact in Vermont for five weeks during the summer, from July 10, 2009 – August 8, 2009.
42. The March 7-14, 2009 parent-child contact did not occur because IMJ was ill.
43. On April 9, 2009, the Court issued an Order regarding Make-Up Parent-Child Contact Time.
44. The Court ordered make-up time for the missed March 2009 visit to occur in Vermont, April 9-13, 2009.
45. The make-up time ordered in Vermont, April 9-13, 2009, did not occur.
46. On May 8, 2009, the Court issued an Order regarding Make-Up Parent-Child Contact Time for the missed March 2009 and April 2009 visits.
47. The Court ordered parent-child contact between IMJ and Ms. Jenkins in Vermont, May 23-29, 2009, in anticipation of the five week visit during the summer, from

July 10 – August 8, 2009. This ordered visitation superseded the original order for contact in Virginia at Ms. Jenkins's parents' home, May 22-25, 2009

48. The Court also ordered parent-child contact between IMJ and Ms. Jenkins in Virginia, June 6-8, 2009.
49. The parent-child contact ordered from May 23-29, 2009, did not occur.
50. At the hearing held on August 21, 2009, on the record, the Court found Ms. Miller in contempt for her refusal to comply with the ordered parent-child contact from May 23-29, 2009.
51. The parent-child contact ordered from June 6-8, 2009, did not occur.
52. At the hearing held on August 21, 2009, on the record, the Court found Ms. Miller in contempt for her refusal to comply with the ordered parent-child contact from June 6-8, 2009.
53. The parent child contact ordered for five weeks from July 10 – August 8, 2009, did not occur.
54. At the hearing held on August 21, 2009, on the record, the Court found Ms. Miller in contempt for her refusal to comply with the ordered parent-child contact from July 10 – August 8, 2009.
55. At the Status Conference held on September 4, 2009, the Court ordered a three day visit in Virginia the weekend of September 25, 2009.
56. On October 7, 2009, the Court received a letter from Ms. Jenkins's counsel indicating that the visit ordered for the weekend of September 25, 2009, did not occur.

57. In 2008, IMJ and Ms. Jenkins had parent-child contact for approximately 24 hours.
58. Thus far, in 2009, IMJ and Ms. Jenkins have had parent-child contact for approximately 24 hours.
59. Ms. Jenkins has made numerous trips to Virginia to visit IMJ, only to have the ordered parent-child contact not occur due to contemptuous non-compliance by Ms. Miller.
60. Ms. Miller has no justification for denying parent-child contact between Ms. Jenkins and IMJ.
61. Ms. Miller has asked Ruth Jenkins, Ms. Jenkins's mother, to stop referring to herself and Ms. Jenkins's father ("The Jenkins") as "Mom-mom" and "Pop-pop" in front of IMJ.
62. Ms. Miller has also instructed the Jenkins to refrain from contact with IMJ.
63. The Jenkins have seen IMJ a total of four times in 2008 and 2009, despite living nearby in Virginia.
64. Prior to the break-up of the relationship between Ms. Miller and Ms. Jenkins, the Jenkins saw IMJ regularly.
65. IMJ's middle name is Ruth. She was named for Ruth Jenkins, Ms. Jenkins's mother.
66. Ms. Miller changed IMJ's name to eliminate the word "Jenkins." No notice of the name change was provided to Ms. Jenkins.
67. There is no evidence that if Ms. Jenkins were to have primary custody of IMJ, that she would block Ms. Miller or Ms. Miller's family out of IMJ's life.

68. Ms. Jenkins testified that she would allow IMJ to continue to attend church events with Ms. Miller, in addition to regularly scheduled contact.
69. Ms. Jenkins testified that if she were to have primary custody of IMJ, she would continue to allow Ms. Miller to make decisions regarding IMJ's religious education to the greatest extent possible; including making sure IMJ could attend a Baptist Church in the area, even if Ms. Jenkins, herself, was not welcome there.
70. Ms. Jenkins runs a licensed daycare program from her home. She cares for two twin girls in her daycare that are IMJ's age. The girls met IMJ during IMJ's one visit to Vermont.
71. Ms. Jenkins is involved in activities at the local elementary school as a result of her work, and she has knowledge and experience with activities and education of children IMJ's age.
72. Ms. Jenkins's employment arrangement allows her to be available as a full-time parent.
73. Ms. Jenkins has the parenting skills to be able to care for IMJ's educational and developmental needs.
74. Ms. Jenkins has the ability to foster a positive relationship and frequent and continuing contact between IMJ and Ms. Miller, including physical contact.
75. Ms. Miller has demonstrated time and time again, by her willful refusal to comply with parent-child contact ordered between IMJ and Ms. Jenkins, that she does not have the ability to foster a positive relationship between herself and Ms. Jenkins, and IMJ and Ms. Jenkins.

11/20/09 FRI 14:19 FAX 802 788 5888

RUTLAND DISTRICT COURT

012

76. At the present time, Ms. Miller has provided no assurances to the Court that she intends to comply with future visitation orders.
77. At the hearing regarding Modification of Parental Rights and Responsibilities, held August 21, 2009, Ms. Miller chose not to testify. Ms. Miller did not appear in person or by phone.
78. There is currently no evidence before the Court regarding Ms. Miller's employment, schedule, or her present ability to meet IMJ's educational or developmental needs.
79. There is no evidence of abuse of IMJ by either Ms. Miller or Ms. Jenkins.
80. IMJ is currently 7 years old.
81. There is no evidence that IMJ's adjustment to a new town and a new school would present any difficulties which are out of the ordinary for a 7 year old.
82. The ongoing constant non-compliance is extremely harmful to IMJ, and is not in IMJ's best interest, as it deprives IMJ of the opportunity for maximum continuing physical and emotional contact with both parents.

#### CONCLUSIONS OF LAW

##### I. Real, Substantial and Unanticipated Change of Circumstances

The Court may modify a parental rights and responsibilities order upon a showing of real, substantial and unanticipated change of circumstances where the modification is in the child's best interest. *Sundstrom v. Sundstrom*, 2004 VT 106, ¶ 28, 177 Vt. 577 (mem.) (citing 15 V.S.A. § 668). "The Court must make a threshold finding of a real, substantial and unanticipated change of circumstances before it can examine the merits of the parties' claims and reconsider the best interest of the child." *Id.* (citing *Wells v.*

*Wells*, 150 Vt. 1, 4 (1988)) (internal quotations omitted). There are no fixed standards to determine what constitutes a substantial change in circumstances; the Court is guided by a rule of very general application that the welfare and best interests of the child is the primary concern in determining whether the order should be changed. *Id.* (citing *Wells*, 150 Vt. at 4).

“The moving party bears a heavy burden to prove changed circumstances, and the court must consider the evidence carefully before making the threshold finding that a real, substantial and unanticipated change of circumstances exists.” *Sundstrom*, 2004 VT 106, ¶ 29 (quoting *Spaulding v. Butler*, 172 Vt. 467, 476 (2001)). “Willful, repeated interference with visitation rights may constitute a legally significant change of circumstances.” *Id.* (quoting *Wells*, 150 Vt. at 4).

Ms. Miller has repeatedly interfered with the visitation rights of Ms. Jenkins to the point where Ms. Jenkins is no longer a part of her daughter LMJ's life. The non-compliance by Ms. Miller has been willful and calculated, and the Court has found her in contempt of numerous orders which set forth specific dates and locations for parent-child contact between Ms. Jenkins and LMJ. There is no justification for Ms. Miller's interference with Ms. Jenkins's visitations rights.

Ms. Miller's willful non-compliance comes in the face of a warning by the Court in its Order of June 15, 2007, that continued interference with the relationship between LMJ and Ms. Jenkins could lead to a change of circumstances, and an explicit warning at the January 2009 hearing that failure to comply with the ordered visits could lead to a transfer of custody. At that hearing, Ms. Miller testified that she would comply with the ordered visits. Ms. Miller has proven this testimony to be wholly untrue; she has

11/20/09 FRI 14:20 FAX 802 786 5888

RUTLAND DISTRICT COURT

014

willfully disobeyed every subsequent Court order regarding visitation and there has not been parent-child contact between Ms. Jenkins and IMJ since that hearing date. Also, this issue of non-compliance first appeared as far back as 2004 and has been discussed with both parents, Ms. Miller and Ms. Jenkins, on numerous occasions.

Over ten months have passed since Ms. Miller has complied with an order regarding visitation between Ms. Jenkins and IMJ. During the year 2009, over eight weeks of visitation between IMJ and Ms. Jenkins have been willfully interfered with by Ms. Miller. In calculating this time period, the Court does not count the March visit which was cancelled due to IMJ's illness. As was the case in 2008, Ms. Jenkins and IMJ have had approximately 24 hours of parent-child contact this year.

By her repeated willful non-compliance with Court orders, even in the face of explicit warnings from the Court and her own testimony promising compliance, Ms. Miller has demonstrated that she will not comply with court orders regarding parent-child contact between Ms. Jenkins and IMJ. Thus, the Court finds that it is Ms. Miller's intent to cease all parent-child contact between Ms. Jenkins and IMJ. Ms. Jenkins has carried her burden in showing that a real, substantial and unanticipated change in circumstances exists. See *Sundstrom*, 2004 VT 106, ¶29.

#### II. Parental Rights and Responsibilities

When the Court finds that there has been a real, substantial and unanticipated change of circumstances, it must consider if a change in parental responsibilities is in the child's best interest. *Sundstrom*, 2004 VT 106, ¶ 37 (citing 15 V.S.A. § 668). The Court must consider the statutory factors set forth in 15 V.S.A. § 665(b). *Id.* "The moving party bears the burden of showing that a transfer of custody is in a child's best interest,

11/20/09 FRI 14:20 FAX 802 788 5888

RUTLAND DISTRICT COURT

015

and due to the value of stability in a child's life, it is a heavy one." *Sundstrom*, 2004 VT 106, ¶ 37 (quoting *Habecker v. Glard*, 2003 VT 18, ¶ 5, 175 Vt. 489 (mem.)) (internal quotations omitted). The Court has broad discretion in determining a child's best interests. *Id.* (citing *Spaulding*, 172 Vt. at 475).

Obstruction of visitation and attempts at parental alienation are not in a child's best interests, and they may form the basis for a change of custody; however, willful interference with court ordered visitations, no matter how deplorable, cannot be made the basis for an "automatic" change of custody. *Id.* at ¶ 38 (citations omitted). "The primary consideration is a child's best interests, and in making its determination, the court must consider all of the relevant evidence, including whether the harm caused by one parent's obstruction of visitation outweighs the harm that could be caused by a change in custody." *Id.* (citing *Wells*, 150 Vt. at 4-5). The relevant factors to guide the Court's analysis of a child's best interests are set forth in 15 V.S.A. § 665(b).

The relationship of the child with each parent and the ability and disposition of each parent to provide the child with love, affection, and guidance;

IMJ has a good relationship with Ms. Miller and Ms. Jenkins. In the June 15, 2007 Order, the Court found that the relationship between IMJ and Ms. Jenkins had been significantly affected by Ms. Miller's refusal to allow parent-child contact. This situation has only become worse since that time. As the Court did in its previous Order, it views the evidence of Ms. Jenkins's relationship with IMJ from the perspective of the time preceding Ms. Miller's initial termination of parent-child contact.

The evidence indicates that both Ms. Miller and Ms. Jenkins have a loving and nurturing relationship with IMJ. Both cared for her extensively in her infancy and after. Both parents have the ability and disposition to provide her with love and affection. Both

parents have extensive training and experience in child development and care, and have cared for children through their daycare ventures.

However, as the Court noted in the June 2007 Order, Ms. Miller did have issues with enmeshed parenting which could later prove detrimental to the relationship. This concern by the Court has proven to be true. In particular, the Court is concerned with the ability and disposition of Ms. Miller to provide IMJ with guidance in light of her willful and calculated non-compliance with orders which this Court deemed to be in IMJ's best interests, and her willingness to provide false promises of compliance under oath to this Court. As the Vermont Supreme Court has noted, "[t]o deliberately sabotage visitation rights calculated to serve the best interests of children bears adversely on the fitness of the custodial parent, whose conduct most certainly does not go unnoticed by the children." *Wells v. Wells*, 150 Vt. 1, 4 (1988) (quoting *Rosenberg v. Rosenberg*, 514 A.2d 350, 352 (Pa. Super Ct. 1986)). Due to her superior ability to provide guidance for IMJ, this factor weighs in favor of Ms. Jenkins.

The ability and disposition of each parent to assure that the child receives adequate food, clothing, medical care, and other material needs and a safe environment;

Both parents have the ability and disposition to assure that IMJ receives adequate food, clothing, medical care, other material needs and a safe environment. The evidence supporting this conclusion is essentially the same as that supporting the previous factor. This factor is evenly weighed between the parents.

The ability and disposition of each parent to meet the child's present and future developmental needs;

Both parents have the ability and disposition to meet IMJ's present and future developmental needs. Both parties have extensive training in caring for children and

meeting their developmental needs. Both parents are disposed to do so. This factor is evenly weighed between the parents.

The quality of the child's adjustment to the child's present housing, school and community and potential effect of any change:

IMJ is well adjusted to her present housing, school and community. Potentially, a change of custody would have an uprooting effect on her. While IMJ may experience difficulties in the short term that any 7 year old would experience with a change in housing, school and community, the Court does not find that such uprooting would cause great harm. This includes a potential change in custody in the mid-point of the school year.

The Court is mindful of the danger of creating an incentive for one parent to entrench a child in that parent's home and community and to deny parenting time to the other parent in order to weight this factor in her favor. Nevertheless, viewing the best interests of IMJ, this factor weighs in favor of Ms. Miller, but only to the same extent it did in the Court's June 2007 Order.

The ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact, except where contact will result in harm to the child or to a parent:

Ms. Jenkins has the ability and disposition to foster a positive relationship and frequent and continuing contact with Ms. Miller, including physical contact. Ms. Jenkins would not block Ms. Miller or Ms. Miller's family out of IMJ's life. Furthermore, there is no evidence Ms. Jenkins would not comply with orders that this Court deems to be in IMJ's best interests. Neither Ms. Miller nor Ms. Jenkins has abused or harmed IMJ

Ms. Miller does not have the ability and disposition to foster a positive relationship and frequent and continuing contact with Ms. Jenkins, including physical

contact. Ms. Miller intends that there be no relationship between IMJ and Ms. Jenkins. This is evidenced by Ms. Miller's constant contemptuous refusal to permit parent-child contact. IMJ and Ms. Jenkins have had approximately 48 hours of parent-child contact over the past two years. They have not seen each other in over ten months. Ms. Miller has made no assurances to this Court that she intends to comply with any further orders regarding visitation which this Court deems to be in IMJ's best interests.

The Vermont Supreme Court has repeatedly observed that "a child's best interests are plainly furthered by nurturing the child's relationship with *both* parents, and a sustained course of conduct by one parent designed to interfere in the child's relationship with the other casts serious doubt upon the fitness of the offending party to be the custodial parent." *Bell v. Squires*, 2003 VT 109, ¶ 18, 176 Vt. 557 (mem.) (quoting *Begins v. Begins*, 168 Vt. 298, 301 (1998)) (emphasis in original). Accordingly, this factor weighs heavily in favor of Ms. Jenkins.

The quality of the child's relationship with the primary care provider, if appropriate given the child's age and development:

As the Court found in the June 2007 Order, Ms. Miller and Ms. Jenkins are equally IMJ's primary care provider for purposes of this criterion. Prior to their separation, both parents cared for IMJ on an equal basis. Since the separation, Ms. Miller has cared for IMJ almost exclusively.

However, mere custody of the child during the time the parents are separated to satisfy the "living apart" requirement for a divorce does not bestow the status of primary care giver on one parent. *Nickerson v. Nickerson*, 158 Vt. 85, 89-90 (1992). The *Nickerson* Court stated as a rationale for this rule that the opposite holding would encourage primary care givers to uproot the children from the home for strategic

purposes inimical to the their best intercost. *Id.* at 90. Here, as the Court found in the June 2007 Order, Ms. Jenkins's opportunity to care for IMJ again has been limited by Ms. Miller's contemptuous refusal to allow parent-child contact. Therefore, in keeping with the rationale set forth in *Nickerson*, the Court views this factor from a pre-separation standpoint in regards to Ms. Jenkins.

The Vermont Supreme Court has held that if one parent is the primary caregiver, the additional weight to be accorded to that factor depends on the "likely effect of a change of custodian on the child." *Porcaro v. Drop*, 175 Vt. 13, 17 (2002) (citing *Payrits v. Payrits*, 171 Vt. 50, 55 (2000)). As the Court previously noted, a change in custody may produce difficulties for IMJ in the short term consistent with those that any 7 year old would experience with a change in housing, school and community. However, viewed from a pre-separation standpoint, both Ms. Miller and Ms. Jenkins acted as primary caregivers. This factor is equally weighed between the parents.

The relationship of the child with any other person who may significantly affect the child:

In the June 2007 Order, the Court found that there was no reason to think that IMJ would have more contact with Ms. Jenkins's family if IMJ resided with one party rather than the other. This finding is no longer the case.

IMJ's grandparents, the Jenkins, have seen IMJ four times in the past two years, despite also living in Virginia. Prior to their daughter's separation from Ms. Miller, the Jenkins saw IMJ regularly. Ms. Miller requested that the Jenkins stop referring to themselves as "Mom-mom" and "Pop-pop" in front of IMJ. Ms. Miller then further requested the Jenkins to refrain from contact with IMJ. It is the intent of Ms. Miller to cease all contact between IMJ and her grandparents, the Jenkins.

If Ms. Jenkins were to have custody of IMJ, she would not block IMJ from seeing Ms. Miller's family. This factor weighs heavily in favor of Ms. Jenkins.

The ability and disposition of the parents to communicate, cooperate with each other and make joint decisions concerning the children where parental rights and responsibilities are to be shared or divided;

Neither party has requested shared parental rights and responsibilities. This factor bears no weight in this case.

Evidence of abuse as defined in section 1101 of 15 V.S.A. and the impact of abuse on the child and on the relationship between the child and the abusing parent;

There has been no abuse in the family and the Court does not weight this factor to either parent.

#### Conclusion

Taking into consideration each of the above factors, the Court concludes that it is in the best interest of IMJ that Ms. Jenkins exercise parental rights and responsibilities. In the June 2007 Order, this Court stated that continued interference by Ms. Miller with the relationship between IMJ and Ms. Jenkins could lead to a change of circumstances and outweigh the disruption that would occur if a change of custody were ordered. Ms. Miller's interference with the relationship between IMJ and Ms. Jenkins has become so pervasive that it now outweighs the potential harm that could occur to IMJ by a change of custody.

The Court does not take this change of custody lightly and it is not intended to punish Ms. Miller. See *Renaud v. Renaud*, 168 Vt. 306, 309 (1998) (stating "[c]hildren are not responsible for the misconduct of their parents toward each other, and will not be uprooted from their home merely to punish a wayward parent."). As always, "[t]he best interests of the child remains the paramount consideration." *Id.* at 310. As previously

noted, "a child's best interests are plainly furthered by nurturing the child's relationship with *both* parents, and a sustained course of conduct by one parent designed to interfere with the child's relationship with the other casts serious doubts upon the fitness of the offending party to be the custodial parent." *Bell*, 2003 VT 109, ¶ 18.

Both parents are primary care providers. Both are capable of providing love and affection to IMJ. Both can provide a safe environment with proper food, clothing, and medical care for IMJ. Both are able to meet IMJ's present and future developmental needs. However, Ms. Miller no longer has the ability or disposition to foster a positive relationship with Ms. Jenkins, including physical contact. Parent-child contact between Ms. Jenkins and IMJ has ceased to exist and there is no evidence that it will resume while Ms. Miller has custody of IMJ. Contact between IMJ and her grandparents, the Jenkins, has also ceased to exist. Furthermore, Ms. Miller's non-compliance with court orders and willingness to provide false promises under oath, cast doubt upon her ability to provide proper guidance for IMJ. To the contrary, Ms. Jenkins will be able to foster a positive relationship with Ms. Miller and Ms. Miller's family.

The change in custody will affect IMJ as she is well adjusted to her present housing, school and community. However, this disruption will not provide any short term difficulties out of the norm for a 7 year old. As the Vermont Supreme Court has stated, "although stability is undoubtedly important, the short term disruption occasioned by a change of custody may be more than compensated by the long-term benefits of a healthy relationship with both parents." *Renaud*, 168 VL at 310. In the long term, the change in custody will be in IMJ's best interests as she will have the opportunity for maximum continuing physical and emotional contact with both parents. See 15 V.S.A.

11/20/09 FRI 14:22 FAX 802 788 5888

RUTLAND DISTRICT COURT

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noted, "a child's best interests are plainly furthered by nurturing the child's relationship with *both* parents, and a sustained course of conduct by one parent designed to interfere with the child's relationship with the other casts serious doubts upon the fitness of the offending party to be the custodial parent." *Bell*, 2003 VT 109, ¶ 18.

Both parents are primary care providers. Both are capable of providing love and affection to IMJ. Both can provide a safe environment with proper food, clothing, and medical care for IMJ. Both are able to meet IMJ's present and future developmental needs. However, Ms. Miller no longer has the ability or disposition to foster a positive relationship with Ms. Jenkins, including physical contact. Parent-child contact between Ms. Jenkins and IMJ has ceased to exist and there is no evidence that it will resume while Ms. Miller has custody of IMJ. Contact between IMJ and her grandparents, the Jenkins, has also ceased to exist. Furthermore, Ms. Miller's non-compliance with court orders and willingness to provide false promises under oath, cast doubt upon her ability to provide proper guidance for IMJ. To the contrary, Ms. Jenkins will be able to foster a positive relationship with Ms. Miller and Ms. Miller's family.

The change in custody will affect IMJ as she is well adjusted to her present housing, school and community. However, this disruption will not provide any short term difficulties out of the norm for a 7 year old. As the Vermont Supreme Court has stated, "although stability is undoubtedly important, the short term disruption occasioned by a change of custody may be more than compensated by the long-term benefits of a healthy relationship with both parents." *Renaud*, 168 Vt. at 310. In the long term, the change in custody will be in IMJ's best interests as she will have the opportunity for maximum continuing physical and emotional contact with both parents. See 15 V.S.A.

§ 650.

**ORDER**

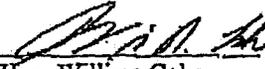
1) Defendant Janet Jenkins's Motion to Modify Parental Rights and Responsibilities, filed May 28, 2009, is GRANTED.

2) Janet Jenkins SHALL have sole physical and legal custody of the minor child IMJ.

3) Transfer of the minor child IMJ SHALL occur at the home of Janet Jenkins's parents in Virginia on January 1, 2010, at 1:00 P.M. The attorney and guardian ad litem for the minor child IMJ shall assist in making an orderly transition.

4) Janet Jenkins SHALL submit a plan within 90 days, with the assistance of the attorney and the guardian ad litem for the minor child IMJ, contemplating education, religious and health needs of the minor child IMJ. This plan SHALL include appropriate visitation time for Lisa Miller.

Dated at Rutland, Vermont this 20th day of Nov, 2009.

  
Hon. William Cohen  
Superior Court Judge

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

U.S. DISTRICT COURT  
DISTRICT OF VERMONT  
FILED

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BY   
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UNITED STATES OF AMERICA )  
 )  
 v. )  
 )  
 KENNETH L. MILLER )

NO. 2:11-CR-161  
18 U.S.C. §§ 1204 and 2

**INDICTMENT**

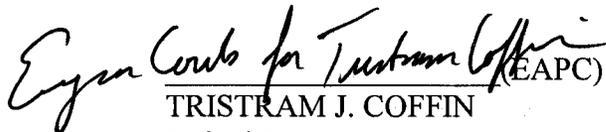
The Grand Jury charges:

COUNT 1

From on or about September 21, 2009 to on or about September 23, 2009, in the District of Vermont and elsewhere, defendant KENNETH L. MILLER aided and abetted Lisa Miller in the removal of a child from the United States with the intent to obstruct the lawful exercise of parental rights.

(18 U.S.C. §§ 1204 and 2)

A TRUE BILL

  
TRISTRAM J. COFFIN  
United States Attorney  
Burlington, Vermont  
December 15, 2011

**EXHIBIT**  
**7**

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

UNITED STATES OF AMERICA :  
 :  
 v. :  
 :  
 KENNETH L. MILLER, : Case No. 2:11-cr-161  
 :  
 Defendant. :

Jury Charge

Members of the Jury:

Now that you have heard the evidence and the arguments, it is my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them.

On these legal matters, you must take the law as I give it to you. If any attorney has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow.

You should not single out any instruction as alone stating the law, but you should consider my instructions as a whole when you retire to deliberate in the jury room.

You should not, any of you, be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be—or ought to be—it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.

This case is a criminal prosecution brought by the United

**EXHIBIT**  
**8**

States against the defendant, Kenneth L. Miller. The Indictment charges Kenneth Miller in Count One with aiding and abetting Lisa Miller in the international parental kidnapping of a child, in violation of Title 18 of the United States Code, sections 1204 and 2.

#### **ROLE OF INDICTMENT**

At this time, I would like to remind you of the function of a grand jury indictment. An indictment is merely a formal way to accuse a defendant of a crime prior to trial. An indictment is not evidence. The indictment does not create any presumption of guilt or permit an inference of guilt. It should not influence your verdict in any way. It simply describes the charges against the Kenneth Miller. Kenneth Miller is not on trial for any act or any conduct not specifically charged in the indictment.

You have been chosen and sworn as jurors in this case to determine the issues of fact that have been raised by the allegations of the superseding indictment and the denial made by Kenneth Miller's not guilty plea. You are to perform this duty without bias or prejudice against the defendant or the prosecution.

#### **PRESUMPTION OF INNOCENCE, REASONABLE DOUBT AND BURDEN OF PROOF**

The law presumes that the defendant, Kenneth Miller, is innocent of the charges against him. The presumption of innocence lasts throughout the trial and during your

deliberations. The presumption of innocence ends only if you, the jury, find beyond a reasonable doubt that Kenneth Miller is guilty. Should the government fail to prove the guilt of Kenneth Miller beyond a reasonable doubt, you must find him not guilty.

The question naturally is what is a reasonable doubt? The words almost define themselves. It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. A reasonable doubt is not a caprice or whim; it is not a speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. And it is not sympathy. However, reasonable doubt may arise from a lack of evidence.

In a criminal case, the burden is upon the government to prove guilt beyond a reasonable doubt. The law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict. This burden never shifts to the defendant, which means that it is always the government's burden to prove each of the elements of the crimes charged beyond a reasonable doubt. The law never imposes upon a

defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. A defendant is not even obligated to produce any evidence by cross-examining the witnesses for the government. For the offense charged in the indictment, if after fair and impartial consideration of all the evidence you have a reasonable doubt, you must find Kenneth Miller not guilty of the offense. If you view the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—you must find Kenneth Miller not guilty. If, however, after fair and impartial consideration of all the evidence you are satisfied of Kenneth Miller's guilt of the offense beyond a reasonable doubt, you should vote to convict.

**FAILURE TO NAME A DEFENDANT**

You may not draw any inference, favorable or unfavorable, towards the government or the defendant on trial, from the fact that certain persons were not named as defendants in the indictment. The circumstances that these persons were not indicted must play no part in your deliberations.

Whether a person should be indicted as a defendant is a matter within the sole discretion of the United States Attorney and the grand jury. Therefore, you may not consider it in any way in reaching your verdict as to Kenneth Miller.

### **EVIDENCE**

You have seen and heard the evidence produced in this trial and it is the sole responsibility of the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits that have been received in evidence, and all the facts which may have been admitted or stipulated. I would now like to call to your attention certain guidelines by which you are to evaluate the evidence. There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of her or his own senses—something she or he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is its present existence or condition. Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact. Circumstantial evidence is of no less value than direct evidence.

You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of Kenneth Miller beyond a reasonable doubt, you must find him not guilty.

I caution you that you should entirely disregard any testimony that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. By the rulings I have made in the course of the trial, I did not intend to indicate to you any of my own views, or to influence you in any manner regarding how you should decide the case. The attorneys have a duty to object to evidence they believe is not admissible.

The evidence that you will consider in reaching your verdict consists, as I have said, only of the sworn testimony of witnesses, the stipulations made by the parties, and all the exhibits that have been received in evidence. Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your consideration of the evidence, you do not leave behind your common sense and life experiences. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proven, such reasonable inferences as you feel are justified in light of your experiences. However, if any juror has specialized knowledge, expertise, or information with regard to the facts and circumstances of this case, he or she may not rely upon it in deliberations or communicate it to other jurors.

### **STIPULATION OF FACTS**

When the attorneys on both sides stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proven.

### **CHARTS & SUMMARIES**

Charts or summaries have been prepared by the government and shown to you during the trial to aid you in considering the evidence. They are no better than the testimony or the documents upon which they are based, and are not themselves independent evidence. Therefore, you are to give no greater consideration to these charts and summaries than you would give to the evidence upon which they are based.

It is for you to decide whether the charts or summaries correctly present the information contained in the testimony and in the exhibits on which they were based. You are entitled to consider the charts and summaries if you find that they are of assistance to you in analyzing the evidence and understanding the evidence.

### **CREDIBILITY OF WITNESSES**

You, as jurors, are the sole judges of the credibility of the witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility or believability of each witness. You do not have to give the

same weight to the testimony of each witness, because you may accept or reject the testimony of any witness, in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger toward the defendant, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently, or may have a different point of view regarding various occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. It is for you to weigh the effect of any

discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

In this case you have heard testimony from a number of witnesses. I am now going to give you some guidelines for your determinations regarding the testimony of the various types of witnesses presented in this case.

#### **INTEREST IN OUTCOME**

As a general matter, in evaluating the credibility of each witness, you should take into account any evidence that the witness who testified may benefit in some way from the outcome of this case. Such an interest in the outcome creates a motive to testify falsely and may sway the witness to testify in a way that advances his or her own interests. Therefore, if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of his or her testimony and accept it with great care.

This is not to suggest that every witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness's

interest has affected or colored his or her testimony.

**ADMISSION OF DEFENDANT**

There has been evidence that Kenneth Miller made certain statements in which the government claims he admitted certain facts charged in the indictment.

In deciding what weight to give Kenneth Miller's statements, you should first examine with great care whether each statement was made and whether, in fact, it was voluntarily and understandingly made. You should give the statements such weight as you feel they deserve in light of all the evidence.

**DEFENDANT NOT TESTIFYING**

You may have observed that Kenneth Miller did not testify in this case. In a criminal case a defendant has a constitutional right not to testify, and the government may not call him as a witness. Whether or not a defendant testifies is a matter of his own choosing. A defendant has no obligation to testify or to present evidence, because it is the government's burden to prove a defendant guilty beyond a reasonable doubt. A defendant is never required to prove that he is innocent. A defendant's decision not to testify raises no presumption of guilt and does not permit you to draw any unfavorable inference. Therefore, in determining Kenneth Miller's guilt or innocence of the crimes charged, you are not to consider, in any manner, the fact that he did not testify. Do not even discuss it

in your deliberations.

#### **ACCOMPLICE TESTIMONY**

You have heard from witnesses who testified that they were actually involved in planning and carrying out the crime charged in the indictment. The testimony of accomplices may be enough in itself for conviction, if the jury finds that the testimony establishes guilt beyond a reasonable doubt.

However, it is also the case that accomplice testimony must be scrutinized with great care and viewed with particular caution when you decide how much of that testimony to believe.

You should ask yourselves whether these so-called accomplices would benefit more by lying, or by telling the truth. If you believe that a witness was motivated by self-interest, or by an agreement with the government, was the motivation one that would cause the witness to lie, or was it one that would cause him to tell the truth? Did this motivation color the witness's testimony?

In sum, you should look at all of the evidence in deciding what credence and what weight, if any, you will want to give to any accomplice witnesses.

#### **RACE, RELIGION, NATIONAL ORIGIN, SEX, OR AGE**

You may not consider the race, religion, national origin, sex, or age of Kenneth Miller or of any of the witnesses in your deliberations over the verdict or in the weight given to any

evidence.

**GOVERNMENT AS A PARTY**

You are to perform the duty of finding the facts without bias or prejudice toward any party. You are to perform this duty in an attitude of complete fairness and impartiality. This case is important to the government, for the enforcement of criminal laws is a matter of prime concern to the community. Equally, this case is important to Kenneth Miller, who is charged with a serious crime.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a case. By the same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals before the Court.

**INSTRUCTIONS ON THE SUBSTANTIVE LAW OF THE CASE**

Having explained the general guidelines by which you will evaluate the evidence in this case, I will now instruct you with regard to the law that applies to your determinations in this case. It is your duty as jurors to follow the law as stated to you in these instructions and to apply the rules of law to the facts that you find from the evidence. You will not be faithful to your oath as jurors if you find a verdict that is contrary to the law that I give to you. However, it is the sole

responsibility of the jury to determine the facts in this case. I do not, by any instructions I give to you, intend to persuade you in any way as to any question of fact.

**COUNT ONE OF THE INDICTMENT**

The indictment reads:

From on or about September 21, 2009, to on or about September 23, 2009, in the District of Vermont and elsewhere, defendant KENNETH L. MILLER aided and abetted Lisa Miller in the removal of a child from the United States with the intent to obstruct the lawful exercise of parental rights.

Kenneth Miller has pleaded not guilty to this charge.

The relevant statutes are Title 18 of the United States Code, sections 1204 and 2. Section 1204 provides, as relevant to this case:

Whoever removes a child from the United States, or attempts to do so . . . with intent to obstruct the lawful exercise of parental rights" commits an offense.

Section 2 provides that

Whoever commits an offense against the United States or aids or abets or counsels, commands or induces, or procures its commission, is punishable as a principal.

**ELEMENTS OF THE OFFENSE**

In order to prove Kenneth Miller guilty of aiding and abetting international parental kidnapping, the government must prove beyond a reasonable doubt:

First, that the child was in the United States;

Second, that Lisa Miller took the child from the United States to another country;

Third, that Lisa Miller acted with the intent to obstruct the lawful exercise of parental rights of Janet Jenkins; and

Fourth, that Kenneth Miller aided and abetted Lisa Miller in committing this crime.

#### **CHILD PREVIOUSLY RESIDED IN UNITED STATES**

The first element the government must prove beyond a reasonable doubt is that the child was previously in the United States.

#### **TAKING CHILD FROM UNITED STATES**

The second element the government must prove beyond a reasonable doubt is that Lisa Miller took the child from the United States to another country. In order to prove this element, the government must establish that Lisa Miller moved the child from the United States to another country. This had to occur before the child reached the age of sixteen.

#### **INTENT TO OBSTRUCT PARENTAL RIGHTS**

The third element the government must prove beyond a reasonable doubt is that Lisa Miller acted with the intent to obstruct the lawful exercise of parental rights of Janet Jenkins. The term "parental rights" means the right to physical custody of the child. This includes the right to sole custody of the child, the right to joint custody of the child, and the right to

visitation with the child. Those rights may arise by court order, legally binding agreements of the parties, or by the operation of law. In this case, the Rutland Vermont family court's orders regarding custody and visitation defined the parental rights of Lisa Miller and Janet Jenkins.

The term "obstruct" means to hinder or impede.

To find that Lisa Miller acted with the intent to obstruct the lawful exercise of parental rights, you must find that she acted deliberately with the purpose of interfering with the parental rights of Janet Jenkins, specifically her visitation rights. You may consider all of the evidence of Lisa Miller's acts in determining whether the government has proven beyond a reasonable doubt that Lisa Miller acted with this intent.

#### **AIDING AND ABETTING**

To prove someone guilty of aiding and abetting a crime, it is not necessary for the government to show that Kenneth Miller himself physically committed the crime. A person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself.

Accordingly, you may find Kenneth Miller guilty of the offense charged if you find beyond a reasonable doubt that the government has proven that another person, in this case Lisa Miller, actually committed the offense of international parental kidnapping, and that Kenneth Miller aided or abetted Lisa Miller

in the commission of the offense.

As you can see, the first requirement is that you find that another person, in this case Lisa Miller, has committed the crime of international parental kidnapping. Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether Kenneth Miller aided or abetted the commission of that crime.

In order to aid or abet another to commit a crime, it is necessary that a defendant knowingly associate himself in some way with the crime, and that he participate in the crime by doing some act to help make the crime succeed. A defendant need not know all of the details of the crime committed by the other person.

To establish that Kenneth Miller knowingly associated himself with the crime of international parental kidnapping, the government must establish that he intended to obstruct the lawful exercise of parental rights. Kenneth Miller need not have specific knowledge of the particular federal or state law that he is charged with violating, however. The government must prove beyond a reasonable doubt that Kenneth Miller had knowledge of the facts that constitute the offense, i.e., that Janet Jenkins had parental rights—specifically visitation rights—and that Lisa

Miller intended to obstruct the lawful exercise of those rights by removing the child from the country. The government need not prove that Kenneth Miller knew that he was breaking a particular law, or that he knew or had reason to know the details of a particular court order.

To establish that Kenneth Miller participated in the commission of the crime of international parental kidnapping, the government must prove that he engaged in some affirmative conduct or overt act for the specific purpose of bringing about the crime.

The mere presence of a defendant where a crime is being committed, even coupled with his knowledge that a crime is being committed, or merely associating with others who were committing a crime is not sufficient to establish aiding and abetting. One who has no knowledge that a crime is being committed or is about to be committed but inadvertently does something that aids in the commission of that crime is not an aider and abettor. An aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture.

To determine whether Kenneth Miller aided or abetted the commission of the crime of international parental kidnapping, ask yourself these questions:

Did he participate in the crime charged as something he

wished to bring about?

Did he knowingly associate himself with the criminal venture?

Did he seek by his actions to make the criminal venture succeed?

If he did, then Kenneth Miller is an aider and abettor and therefore guilty of the offense. If, however, your answer to any one of these questions is "no," then Kenneth Miller is not an aider and abettor, and you must find him not guilty.

**KNOWINGLY**

You have been instructed that in order to sustain its burden of proof, the government must prove that Kenneth Miller acted knowingly. A person acts knowingly if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. Whether Kenneth Miller acted knowingly may be proven by his conduct, by all of the facts and circumstances surrounding this case, and by the reasonable inferences to be drawn from them.

**INTENTIONALLY**

To act intentionally means to act deliberately and purposefully. That is, the act must have been the product of the actor's conscious objective rather than the product of a mistake or accident.

### **CONSCIOUS AVOIDANCE**

In determining whether Kenneth Miller acted knowingly, you may consider whether he deliberately closed his eyes to what would otherwise have been obvious to him. If you find beyond a reasonable doubt that Kenneth Miller acted with, or that his ignorance was solely and entirely the result of, a conscious purpose to avoid learning the truth—in this case that Janet Jenkins had parental rights—then this element may be satisfied. However, guilty knowledge may not be established by demonstrating that Kenneth Miller was merely negligent, foolish or mistaken.

If you find that Kenneth Miller was aware of a high probability that Janet Jenkins had parental rights, and that he acted with deliberate disregard of the facts, you may find that he acted knowingly. However, if you find that Kenneth Miller actually believed that Janet Jenkins did not have parental rights, he may not be convicted.

### **GUILTY KNOWLEDGE FROM CLANDESTINE BEHAVIOR**

Willful intent or guilty knowledge may be inferred from the secretive or irregular manner in which a transaction is carried out.

### **CUSTODY NOT AT ISSUE**

In making your determination in this case, you are not to concern yourselves with the future custody of the child. It is not your role to decide what custody arrangement is or was in her

best interest. You should also not consider whom you believe to be the better parent of the child.

#### **DATE OF CRIME CHARGED**

The indictment charges that the offense alleged was committed "on or about" specific dates. The government must prove that the offense happened on substantially similar dates, but is not required to prove that the alleged offense happened on those exact dates.

#### **VENUE**

If you find that the government has proved beyond a reasonable doubt all of the elements of the offense that I have described for you, you must also determine whether venue is appropriate in the District of Vermont. In this regard, the government must show by a preponderance of the evidence that the essential conduct of removing a child from the United States took place at least in an essential part outside the United States. The government must also show by a preponderance of the evidence that Kenneth Miller was first arrested in the District of Vermont. The District of Vermont includes the entire territory of the state.

#### **CONCLUSION**

I caution you, members of the jury, that you are here to determine the guilt or innocence of Kenneth Miller before you today solely from the evidence in this case. I remind you that

the mere fact that he has been indicted is not evidence against him.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the responsibility of the judge, and should never be considered by the jury in any way in arriving at an impartial verdict.

It is your duty as jurors to consult with one another and to deliberate. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your other jurors. Do not hesitate to re-examine your own views and change your opinion if you think that you were wrong. Do not, however, surrender your honest convictions about the case solely because of the opinion of your other jurors, or for the mere purpose of returning a verdict.

To return a verdict, it is necessary that every juror agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room, your foreperson will preside over your deliberations and will be your spokesperson here in court. A verdict form has been prepared for your convenience. After you have reached agreement as to the count contained in the indictment, you will have your foreperson record a verdict of guilty or not guilty. Your foreperson will then sign and date the verdict form and you will then return to the courtroom.

If, during your deliberations you should desire to

communicate with the Court, please put your message or question in writing signed by the foreperson, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can speak with you. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

You have been permitted to take notes during the trial for use in your deliberations. You may take these notes with you when you retire to deliberate. They may be used to assist your recollection of the evidence, but your memory, as jurors, controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence. The notes that you took are strictly confidential. Do not disclose your notes to anyone other than the other jurors. Your notes should remain in the jury room and will be collected at the end of the case.

A copy of this charge will go with you into the jury room for your use.

I appoint \_\_\_\_\_ as your foreperson.

Dated at Burlington, Vermont this 14<sup>th</sup> day of August, 2012.

/s/ William K. Sessions III  
William K. Sessions III  
District Court Judge

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

U. S. DISTRICT COURT  
DISTRICT OF VERMONT  
FILED  
8-14-12  
BY *[Signature]*  
DEPUTY CLERK

UNITED STATES OF AMERICA  
  
v.  
  
KENNETH L. MILLER,  
  
Defendant.

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No. 2:10-cr-161  
11 CR 161-1

VERDICT FORM

Taking into account the facts of this case and the specific legal instructions given, indicate whether you find Kenneth L. Miller guilty or not guilty.

Count 1:

Guilty X Not Guilty \_\_\_\_\_

Taking into account the facts of this case and the specific legal instructions given, indicate whether you find that venue is appropriate in the District of Vermont.

Count 1:

Venue appropriate: Yes X No \_\_\_\_\_

*[Signature]*  
\_\_\_\_\_  
Signature of the Foreperson

8-14-2012  
\_\_\_\_\_  
Date

EXHIBIT  
9

UNITED STATES DISTRICT COURT

District of Vermont

UNITED STATES OF AMERICA
v.
KENNETH L. MILLER

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:11-CR-161-1

USM Number: 08464-082

Brooks G. McArthur, Esq.
Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to count(s)
pleaded nolo contendere to count(s) which was accepted by the court.
was found guilty on count(s) 1 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Table with 4 columns: Title & Section, Nature of Offense, Offense Ended, Count. Row 1: 18:1204, Aiding & Abetting International Kidnapping, 9/23/2009, 1.

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s)
Count(s) is are dismissed on the motion of the United States.

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

JUDGMENT ENTERED ON DOCKET
DATE: 3-6-2013

3/4/2013
Date of Imposition of Judgment

/s/ William K. Sessions III
Signature of Judge

William K. Sessions III U.S. District Judge
Name and Title of Judge

3/5/2013
Date

EXHIBIT
10

DEFENDANT: KENNETH L. MILLER  
CASE NUMBER: 2:11-CR-161-1

**IMPRISONMENT**

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

27 months (STAYED PENDING APPEAL)

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

that the defendant be placed in a camp setting in Virginia or as close to his place of residence as possible.

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

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

at \_\_\_\_\_  a.m.  p.m. on \_\_\_\_\_ .

as notified by the United States Marshal.

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

before 2 p.m. on \_\_\_\_\_ .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

a \_\_\_\_\_ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: KENNETH L. MILLER

CASE NUMBER: 2:11-CR-161-1

**SUPERVISED RELEASE**

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

1 year

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

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

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

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

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

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

**STANDARD CONDITIONS OF SUPERVISION**

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.



DEFENDANT: KENNETH L. MILLER  
CASE NUMBER: 2:11-CR-161-1

### SCHEDULE OF PAYMENTS

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

- A  Lump sum payment of \$ 100.00 due immediately, balance due
  - not later than \_\_\_\_\_, or
  - in accordance  C,  D,  E, or  F below; or
- B  Payment to begin immediately (may be combined with  C,  D, or  F below); or
- C  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after the date of this judgment; or
- D  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E  Payment during the term of supervised release will commence within \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F  Special instructions regarding the payment of criminal monetary penalties:

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

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

Joint and Several

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

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

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

13-822-cr  
*United States v. Miller*

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**In the  
United States Court of Appeals  
For the Second Circuit**

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August Term, 2013

(Argued: January 27, 2014      Decided: December 16, 2015)

No. 13-822-cr

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UNITED STATES OF AMERICA,

*Appellee,*

-v.-

KENNETH L. MILLER,

*Defendant-Appellant.*

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**B e f o r e :**

CABRANES, CARNEY, and DRONEY, *Circuit Judges.*

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Appeal from a final judgment of the United States District Court for the District of Vermont (William K. Sessions, III, *Judge*) convicting Defendant-Appellant Kenneth Miller, following a jury trial, of aiding and abetting an international parental kidnapping in violation of the International Parental Kidnapping Crime Act. *See* 18 U.S.C. §§ 1204, 2. Appellant contends that venue

1 was not properly laid in the District of Vermont under the “high seas” venue  
2 statute, 18 U.S.C. § 3238, because certain offense conduct was committed within  
3 the United States and none was committed in the State of Vermont. We reject  
4 that argument and conclude that venue in Vermont was proper under § 3238  
5 because the crime took place in its essence outside the jurisdiction of the United  
6 States and an offender, Kenneth Miller, was arrested in Vermont. Accordingly,  
7 we affirm the judgment of conviction.

8 AFFIRMED.

9  
10 \_\_\_\_\_  
11 DAVID J. WILLIAMS (Brooks G. McArthur, *on*  
12 *the brief*), Jarvis, McArthur & Williams,  
13 LLC, Burlington, VT, *for Defendant-*  
*Appellant Kenneth Miller.*

14 EUGENIA A.P. COWLES, Assistant United  
15 States Attorney (Paul Van De Graaf and  
16 Gregory L. Waples, Assistant United States  
17 Attorneys, *on the brief*), for Tristram J. Coffin,  
18 United States Attorney for the District of  
19 Vermont, Burlington, VT, *for Appellee the*  
20 *United States of America.*

21 \_\_\_\_\_  
22  
23 SUSAN L. CARNEY, *Circuit Judge:*

24 In this appeal, we consider whether venue for a criminal prosecution may  
25 lie pursuant to 18 U.S.C. § 3238, the “high seas” venue statute, when certain

1 essential offense conduct is committed outside of the jurisdiction of the United  
2 States, but other offense conduct is committed within. We answer that it may.

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4

## BACKGROUND

5 Defendant-Appellant Kenneth Miller (“Kenneth”),<sup>1</sup> an Amish Mennonite  
6 minister and resident of Virginia, was convicted by a jury sitting in the United  
7 States District Court for the District of Vermont (William K. Sessions III, *Judge*) of  
8 one count of aiding and abetting the removal of a child from the United States  
9 with the intent to obstruct the lawful exercise of parental rights, in violation of  
10 the International Parental Kidnapping Crime Act (the “Act”), *see* 18 U.S.C.  
11 §§ 1204, 2. The child in question was the daughter of one of Kenneth’s  
12 acquaintances, Lisa Miller (“Lisa”), and Janet Jenkins (“Janet”), Lisa’s former civil  
13 union partner under Vermont law. The statement of facts set forth below is  
14 drawn principally from the evidence presented at Kenneth’s criminal trial in  
15 August 2012. The material facts are not disputed.

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<sup>1</sup> Three individuals bearing the surname “Miller” — none related to any other — are involved in this narrative. To avoid confusion, we use primarily their first names here.

1           **A. Lisa and Janet’s Civil Union, Separation, and Custody Dispute**

2           In 2000, while residing in Virginia, Lisa and Janet entered into a civil union  
3           in Vermont. In April 2002, while both were still residing in Virginia, Lisa gave  
4           birth in Virginia to a daughter, “IMJ.” Under Vermont law, both Lisa and Janet  
5           are IMJ’s lawful parents. A few months after IMJ’s birth, in the summer of 2002,  
6           Lisa, Janet, and IMJ moved from Virginia to Fair Haven, Vermont.

7           In the fall of 2003, Lisa and Janet separated. Lisa left Vermont and  
8           returned to Virginia, taking IMJ with her. Janet remained in Vermont.

9           In November 2003, Lisa filed a petition for divorce in Family Court in  
10          Rutland, Vermont, seeking formal dissolution of her civil union with Janet and  
11          custodial rights over IMJ. In June 2004, that court granted Lisa temporary  
12          physical and legal rights, subject to certain visitation rights in Janet.

13          In July 2004, Lisa petitioned the Circuit Court of Frederick County,  
14          Virginia, seeking a decree that she was “the sole parent of” and had “sole  
15          parental rights over” IMJ and that any parental rights claimed by Janet were  
16          “nugatory, void, illegal and/or unenforceable.” *See Miller-Jenkins v. Miller-Jenkins*,  
17          637 S.E.2d 330, 332 (Va. Ct. App. 2006) (internal quotation marks omitted). In  
18          2008, after protracted litigation in the Virginia courts, the Supreme Court of

1 Virginia affirmed that Vermont’s courts—and not Virginia’s— had jurisdiction  
2 over Lisa and Janet’s custody dispute. *See Miller-Jenkins v. Miller-Jenkins*, 661  
3 S.E.2d 822, 825, 827 (Va. 2008).

4 Meanwhile, in September 2004, after Janet reported to the Vermont Family  
5 Court that Lisa had failed to allow Janet her scheduled contact with IMJ, that  
6 court held Lisa in contempt. Two years later, in December 2006, the court again  
7 held Lisa in contempt for failing to comply with its visitation orders.

8 In June 2007, the Family Court entered a final order dissolving Lisa and  
9 Janet’s civil union, in resolution of Lisa’s 2003 petition. In conjunction with the  
10 dissolution order, and calling the matter a “close case” in light of the “continued  
11 interference with the relationship between IMJ and Janet,” the court assigned  
12 Lisa sole physical and legal custody of IMJ, subject to limited visitation rights in  
13 Janet. Transcript of Criminal Trial, *United States v. Miller* (Aug. 8, 2012) at 65-66,  
14 68; *see Miller-Jenkins v. Miller-Jenkins*, 12 A.3d 768, 772 (Vt. 2010). After their civil  
15 union was dissolved, Lisa continued to disregard the court’s visitation orders:  
16 As the Vermont Supreme Court later noted, the Family Court held Lisa in  
17 contempt on a total of seven occasions between 2007 and 2010 for violating the  
18 court’s parent-child contact orders. *Id.* at 773.

1 Citing the repeated contempt rulings entered by then, in August 2009 Janet  
2 returned to Vermont Family Court seeking transfer from Lisa to herself of  
3 primary parental rights and responsibilities for IMJ. Janet's motion was pending  
4 in Vermont when, in the fall of 2009, and without warning to Janet, Lisa  
5 absconded from the United States with IMJ.

6

7 **B. Lisa's Removal of IMJ from the United States**

8 On September 21, 2009, accompanied by a person identified only as  
9 "Philip," Lisa and IMJ traveled by car from their home in Lynchburg, Virginia,  
10 through Maryland and Pennsylvania, to Buffalo, New York. On September 22,  
11 Lisa and IMJ crossed the international border from Buffalo into Canada by taxi.  
12 Later that day, Ervin Horst, a Mennonite pastor from Ontario, Canada, drove  
13 Lisa and IMJ to the Toronto airport. From there, Lisa and IMJ flew to Mexico  
14 City, proceeding next by air from Mexico through El Salvador, and then to  
15 Managua, Nicaragua. The record before us does not reflect any subsequent re-  
16 entry by them into the United States.

17

1           **C.     Proceedings in the District Court**

2           On November 18, 2011, a little over two years after Lisa and IMJ quit the  
3 United States, the government filed a criminal complaint in the District of  
4 Vermont, charging Kenneth with aiding and abetting Lisa’s alleged violation of  
5 the Act.<sup>2</sup> The government’s theory was that Kenneth organized Lisa’s departure  
6 from the United States with IMJ by arranging for their travel from Lynchburg,  
7 Virginia, to Nicaragua; engaging the individuals who accompanied and assisted  
8 them in their travels; and planning for their reception in Nicaragua.

9           When he was charged, Kenneth had been serving as a missionary in  
10 Ireland since the summer of 2010. Kenneth voluntarily returned from Ireland to  
11 Vermont to face the charges filed there. He was arrested in Vermont on  
12 December 6, 2011.

13           On December 15, 2011, a federal grand jury sitting in Burlington, Vermont,  
14 returned a one-count indictment against him. The Grand Jury charged as  
15 follows:

16                     From on or about September 21, 2009 to on or about  
17                     September 23, 2009, in the District of Vermont and elsewhere,  
18                     defendant KENNETH L. MILLER aided and abetted Lisa Miller in

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<sup>2</sup> Earlier, on April 27, 2010, the government filed a criminal complaint in the District of Vermont charging Lisa as a principal in the same crime. The record before us does not reflect any appearance by Lisa in the United States in response to that complaint.

1 the removal of a child from the United States with the intent to  
2 obstruct the lawful exercise of parental rights.

3  
4 (18 U.S.C. §§ 1204 and 2)

5  
6 J.A. 23. Kenneth entered a plea of not guilty.

7 Kenneth then moved to dismiss the indictment for, *inter alia*, improper  
8 venue. As to venue, he contended principally that venue in Vermont was  
9 improper because he personally was not alleged to have committed any criminal  
10 act there. The government opposed the motion, maintaining that venue was  
11 proper by reference either to where he acted or to where Lisa acted, and that the  
12 evidence at trial would establish that venue in Vermont was proper under either  
13 of two venue statutes: § 3237 or § 3238 of title 18.

14 Section 3237, “Offenses begun in one district and completed in another,”  
15 allows venue to be set “in any district in which such offense was begun,  
16 continued, or completed.” 18 U.S.C. § 3237(a). The government submitted that  
17 § 3237 could support venue in Vermont because the act that it cast as the “most  
18 significant” of the international kidnapping that Kenneth was alleged to have  
19 aided and abetted—Lisa’s removal of IMJ from the jurisdiction of the Vermont  
20 Family Court, in obstruction of Janet’s parental rights as established by that  
21 court—took place in Vermont. J.A. 90.

1           The government also asserted that venue in Vermont would lie under 18  
2 U.S.C. § 3238. Section 3238, “Offenses not committed in any district” (and  
3 sometimes referred to as the “high seas” statute, *see, e.g., United States v. Pace*, 314  
4 F.3d 344, 349 (9th Cir. 2002)), lays venue for “trial of all offenses begun or  
5 committed upon the high seas, or elsewhere out of the jurisdiction of any  
6 particular State or district, . . . in the district in which the offender, or any one of  
7 two or more joint offenders, is arrested or is first brought.” As to § 3238, the  
8 government argued that, because the crux of the underlying offense conduct  
9 —that is, Lisa’s removal of IMJ from the United States and into Canada—  
10 occurred outside of the jurisdiction of any particular State or district, venue lay in  
11 Vermont, where Kenneth was arrested.

12           The District Court denied Kenneth’s motion to dismiss, concluding  
13 preliminarily that the government might prove venue at trial under either  
14 theory. *See United States v. Miller*, No. 2:11-cr-161-1 (WKS), 2012 WL 1435310, at  
15 \*6-9 (D. Vt. Apr. 25, 2012). After the court’s ruling, the government informed the  
16 court that, at trial, it would seek to establish venue in Vermont under § 3238  
17 only.

1 Kenneth's trial began in August 2012 and lasted four days. The  
2 government presented the following evidence bearing on Kenneth's guilt as well  
3 as on the question of venue. It adduced cell phone records showing that, on  
4 September 21, 2009, Kenneth's cell phone was in regular contact with that of the  
5 person escorting Lisa and IMJ by car from Virginia to the Buffalo area. It  
6 introduced testimony that Kenneth arranged for Ervin Horst (in Canada) to take  
7 Lisa and IMJ from the Canadian border to the Toronto airport and for Timothy  
8 Miller ("Timothy"), a Mennonite pastor living in Nicaragua, to purchase  
9 international airline tickets for Lisa and IMJ for their flights from Canada  
10 through Mexico and El Salvador to Nicaragua, and to pick them up at the airport  
11 in Nicaragua.<sup>3</sup> Phone records presented by the government also showed that  
12 Kenneth and Timothy were in frequent contact in the lead-up to Lisa and IMJ's  
13 arrival in Nicaragua. In addition, trial testimony reflected that, after Lisa arrived  
14 in Nicaragua with IMJ, Kenneth sent money to her and called her at Timothy's  
15 home, remaining in contact and supporting her in her retention of IMJ abroad.  
16 No evidence adduced at trial, however, suggested that Kenneth himself entered

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<sup>3</sup> The government also charged Timothy in Vermont with aiding and abetting IMJ's kidnapping. The charge against him was later dropped in return for his agreement to cooperate with the investigation and to provide his testimony, if needed.

1 Vermont or even left Virginia at any point during his aiding and abetting Lisa's  
2 flight.

3 After the close of the evidence, the District Court delivered the following  
4 instructions to the jury about venue under § 3238 and the jury's obligation to  
5 make a determination in that regard:

6 If you find that the government has proved beyond a  
7 reasonable doubt all of the elements of the offense that I have  
8 described for you, you must also determine whether venue is  
9 appropriate in the District of Vermont. In this regard, the  
10 government must show by a preponderance of the evidence that the  
11 essential conduct of removing a child from the United States took  
12 place at least in an essential part outside the United States. The  
13 government must also show by a preponderance of the evidence  
14 that Kenneth Miller was first arrested in the District of Vermont.  
15 The District of Vermont includes the entire territory of the state.

16  
17 J.A. 206.<sup>4</sup>

18 The jury found Kenneth guilty of aiding and abetting Lisa in her unlawful  
19 removal of IMJ from the United States. Completing a printed jury verdict form,  
20 it also determined that venue in the District of Vermont was "appropriate,"  
21 "[t]aking into account the facts of this case and the specific legal instructions  
22 given." J.A. 209.

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<sup>4</sup> These jury instructions closely tracked those proposed by the government in a pre-trial motion for clarification, to which Kenneth objected, reiterating the grounds cited in his motion to dismiss the indictment.

1           The District Court sentenced Kenneth to a term of imprisonment of 27  
2 months, to be followed by a one-year term of supervised release. It then stayed  
3 the sentence and entered an order releasing Kenneth pending this appeal.

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## DISCUSSION

6           On appeal, Kenneth renews much of his challenge to the indictment and  
7 his conviction, arguing that venue was not proper in the District of Vermont  
8 under 18 U.S.C. § 3238. He contends in main part that venue cannot properly be  
9 set under § 3238 unless an offense is wholly committed outside the United States.  
10 Kenneth submits that, because substantial offense conduct (by both Lisa and  
11 Kenneth) occurred in the United States, § 3238 does not apply, and accordingly  
12 the District of Vermont, as the district of arrest only, was not the proper venue  
13 for his trial. The government opposes this view, arguing that § 3238 is not so  
14 limited and serves to set venue even when some offense conduct occurs within  
15 the United States, so long as essential offense conduct occurred outside the  
16 United States.

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1           **A. Legal Framework**

2           “The Constitution twice safeguards the defendant’s venue right . . . .”  
3           *United States v. Cabrales*, 524 U.S. 1, 6 (1998). Article III provides that “[t]he Trial  
4           of all Crimes . . . shall be held in the State where the said Crimes shall have been  
5           committed; but when not committed within any State, the Trial shall be at such  
6           Place or Places as the Congress may by Law have directed.” U.S. Const. art. III,  
7           § 2, cl. 3. And the Sixth Amendment directs that, “[i]n all criminal prosecutions,  
8           the accused shall enjoy the right to . . . trial[] by an impartial jury of the State  
9           and district wherein the crime shall have been committed . . . .” U.S. Const.  
10          amend. VI. These constitutional guarantees are reinforced by Rule 18 of the  
11          Federal Rules of Criminal Procedure, which directs that, “[u]nless a statute or  
12          these rules permit otherwise, the government must prosecute an offense in a  
13          district where the offense was committed.” Fed. R. Crim. P. 18.<sup>5</sup>

14          The Republic’s Founders instituted these requirements at the level of our  
15          fundamental law, historians tell us, in response to years in which colonists were  
16          haled to England to stand trial for treason and other charges based on acts

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<sup>5</sup> Rule 18 provides in full: “Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.”

1 undertaken on this side of the Atlantic. See Lester B. Orfield, *Venue of Federal*  
2 *Criminal Cases*, 17 U. Pitt. L. Rev. 375, 379 (1956) (“Some acts of Parliament  
3 provided for transfer of crimes committed in the Thirteen Colonies to England  
4 for trial. The inhabitants of the Colonies objected strenuously, especially as to  
5 cases involving charges of treason.”). Trial at such a distance from both their  
6 homes and actions posed obvious hardships and risked unfairness to defendants,  
7 who were then forced to mount a defense without ready access to witnesses who  
8 might exonerate them, and who stood to be judged by jurors foreign to them. In  
9 *United States v. Johnson*, 323 U.S. 273 (1944), Justice Frankfurter, writing for the  
10 Court, observed that the Framers adopted the two constitutional venue  
11 provisions “[a]ware of the unfairness and hardship to which trial in an  
12 environment alien to the accused exposes him,” and that these concerns, in  
13 addition to the appearance of and potential for prosecutorial abuse, “are matters  
14 that touch closely the fair administration of criminal justice and public  
15 confidence in it, on which it ultimately rests.” *Id.* at 275-76. Constitutionally  
16 mandating that a trial be held in the state where the wrong was committed —the  
17 *locus delicti* —worked to alleviate these concerns.

1           In some cases, the identity of “the State and district wherein the crime shall  
2 have been committed” may be easy to determine and compliance with the  
3 constitutional mandate not subject to reasonable dispute. For example, the *locus*  
4 *delicti* will be obvious when, in a single place within a single United States  
5 district, a lone defendant has begun and completed a single offense in a readily  
6 identifiable location. “When a crime consists of a single, non-continuing act, the  
7 proper venue is clear: The crime is ‘committed’ in the district where the act is  
8 performed.” *United States v. Ramirez*, 420 F.3d 134, 139 (2d Cir. 2005) ( some  
9 internal quotation marks omitted). But when criminal acts continue across  
10 boundaries, or when other special circumstances are at play, closer analysis is  
11 required. Congress has set venue both by appending specific venue provisions  
12 to statutes creating substantive federal crimes and by enacting more generic  
13 venue-laying statutes, such as § 3237 and § 3238, at issue here. *See* Fed. R. Crim.  
14 P. 18 advisory committee’s note to 1944 adoption (cataloguing venue  
15 provisions).<sup>6</sup> Along with Rule 18 of the Federal Rules of Criminal Procedure, the  
16 latter serve in some measure to provide a default basis for setting venue.

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<sup>6</sup> Congress has also enacted provisions addressing venue in capital cases, 18 U.S.C. § 3235; venue in cases of murder or manslaughter, 18 U.S.C. § 3236; and made provision for optional venue in cases of espionage and related offenses, 18 U.S.C. § 3239. Rule 18 itself is codified in 18 U.S.C. § 3232.

1           As we have explained, although the constitutional venue provisions may  
2 “establish certain rights, they are often of precious little aid in explaining how  
3 the locus of a crime is to be determined.” *United States v. Reed*, 773 F.2d 477, 480  
4 (2d Cir. 1985). Congress may “append[] a venue provision to [a] criminal  
5 statute[], which provides a method of fixing the place or places of prosecution.”  
6 *Id.* The International Parental Kidnapping Crime Act, however, contains no such  
7 helpful venue provision. We turn, then, to more general principles for  
8 determining where the crime was committed.

9           In *United States v. Anderson*, 328 U.S. 699 (1946), the Supreme Court  
10 articulated the standard that still undergirds our analysis: When a criminal  
11 statute “does not indicate where Congress considered the place of committing  
12 the crime to be, the locus delicti must be determined from the nature of the crime  
13 alleged and the location of the act or acts constituting it.” *Id.* at 703 (citations  
14 omitted). More recently, in *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999),  
15 the Court built on *Anderson* and articulated a two-part analysis for determining  
16 where the wrong was committed and where venue may properly be set.  
17 *Rodriguez-Moreno* directs that we first examine the “nature of the crime alleged,”  
18 seeking to identify the crime’s “essential conduct elements.” 526 U.S. at 279-80.

1 Second, we identify the locations where the criminal acts were committed. *Id.* at  
2 279; *see also Cabrales*, 524 U.S. at 6-7. Having made those determinations, we then  
3 apply the statutes governing venue to identify where venue may properly lie.

4 In our Circuit, we have also examined the results of our initial venue  
5 analysis to ensure that venue does not rest merely on acts that are only  
6 “preparatory to the offense,” *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d  
7 1181, 1190 (2d Cir. 1989), and that the criminal conduct has “substantial contacts”  
8 with the venue, *Reed*, 773 F.2d at 481; *see also United States v. Coplan*, 703 F.3d 46,  
9 80 (2d Cir. 2012) (discussing the factors of the substantial-contacts test and  
10 clarifying that it may be appropriate to use when a defendant argues that  
11 prosecution in a particular venue will cause him hardship, prejudice, or  
12 undermine the fairness of his trial). More recently, we have also assessed  
13 whether prosecution in the chosen venue would be in some way “reasonably  
14 foreseeable” to the accused. *United States v. Rommy*, 506 F.3d 108, 123 (2d Cir.  
15 2007); *see United States v. Davis*, 689 F.3d 179, 187-88 (2d Cir. 2012) (observing that  
16 “we have recognized in the context of conspiracy . . . [that] venue may lie in a  
17 district where the defendant knows or reasonably should foresee that acts in  
18 furtherance of the criminal enterprise would take place”).

1           With regard to the first step of the *Rodriguez-Moreno* inquiry, we pause  
2 here to stress its focus on the “essential *conduct* element[s]”—not simply the  
3 “essential elements”—of the crime: The determination of criminal venue is  
4 informed by where “physical *conduct*” occurred, and not where criminal intent  
5 was formed. *Ramirez*, 420 F.3d at 144-46 (internal quotation marks omitted).  
6 Formation of the mens rea of the crime, essential as it is to criminal culpability, is  
7 not sufficient “conduct” to support venue. *See Rodriguez-Moreno*, 526 U.S. at 279-  
8 80 (identifying the place of the “act or acts” and the “conduct” of the accused as  
9 crucial to the venue inquiry). In certain cases, whether effects of the conduct are  
10 sustained in another candidate district and are material to the crime—that is,  
11 bear on the nature of the crime—may also enter into the analysis of the conduct  
12 elements. *See, e.g., Coplan*, 703 F.3d at 79. The dispositive elements, however, do  
13 not include where the criminal intent may have been formed.

14           We turn, then, to the place of the relevant physical acts. As noted above,  
15 “[w]hen a crime consists of a single, non-continuing act, the proper venue is  
16 clear: The crime is ‘committed’ in the district where the act is performed,” and  
17 the defendant may be prosecuted in that district only. *Ramirez*, 420 F.3d at 139  
18 (some internal quotation marks omitted). But when “the acts constituting the

1 crime and the nature of the crime charged implicate more than one location, the  
2 [C]onstitution does not command a single exclusive venue. The [C]onstitution  
3 requires only that the venue chosen be determined from the nature of the crime  
4 charged as well as from the location of the act or acts constituting it, and that it  
5 not be contrary to an explicit policy underlying venue law.” *Reed*, 773 F.2d at  
6 480; accord *United States v. Magassouba*, 619 F.3d 202, 205 (2d Cir. 2010).

7 Accordingly, § 3237 authorizes venue for continuing offenses, whose commission  
8 spans more than one United States district, to be set in more than one location: It  
9 provides that “any offense . . . begun in one district and completed in another, or  
10 committed in more than one district, may be . . . prosecuted in any district in  
11 which such offense was begun, continued, or completed.” 18 U.S.C. § 3237(a).

12 Section 3238 has a different cast, as its colloquial name—the “high seas”  
13 venue statute—suggests. Its origins in the Act of April 30, 1790, 1 Stat. 112, 114  
14 (1790), are distinctive: As the First Circuit has described, “[I]t was a clause  
15 tacked on to a section defining certain offenses committed ‘upon the high seas, or  
16 in any river, haven, basin or bay, out of the jurisdiction of any particular State’,  
17 for which offenses the offender was to be adjudged to be ‘a pirate and felon’, and  
18 sentenced to death.” *Chandler v. United States*, 171 F.2d 921, 931 (1st Cir. 1948).

1 Noting its presence on the statute books in a subsequent version for many years  
2 since its first enactment, the court opined that it “ought . . . to be given its broad  
3 literal meaning,” *id.* at 932, and indeed, the provision has been used in cases  
4 other than piracy—which, of course, is not mentioned in its text, *see, e.g., United*  
5 *States v. Yousef*, 327 F.3d 56, 114-15 (2d Cir. 2003) (conspiracy to bomb United  
6 States commercial airliners); *United States v. Catino*, 735 F.2d 718, 723-24 (2d Cir.  
7 1984) (using a falsely secured American passport).

8 An additional wrinkle, important here, concerns venue considerations in  
9 the prosecution of an aider and abettor, under 18 U.S.C. § 2. “Aiding and  
10 abetting” is not a stand-alone criminal offense, of course, but rather “serves as a  
11 more particularized way of identifying the persons involved in the commission  
12 of the substantive offense.” *United States v. Oates*, 560 F.2d 45, 54 (2d Cir. 1977)  
13 (citation and internal quotation marks omitted). In such a prosecution, venue  
14 may be determined by reference either to the defendant’s own accessorial acts or  
15 to the acts of the principal in committing the underlying substantive crime. *See*  
16 *United States v. Smith*, 198 F.3d 377, 383 (2d Cir. 1999); *United States v. Gillette*, 189  
17 F.2d 449, 451-52 (2d Cir. 1951) (“[18 U.S.C. § 2] makes an accessory a principal so  
18 that it is now possible to try him where the substantive offense was committed[.]

1 . . . provid[ing] an additional venue [to that provided by the common law].”); *see*  
2 *also United States v. Bowens*, 224 F.3d 302, 311 n.4 (4th Cir. 2000); *Eley v. United*  
3 *States*, 117 F.2d 526, 528 (6th Cir. 1941); Wayne R. LaFave et al., 4 Criminal  
4 Procedure § 16.2(g) (3d ed. 2014) (“As to accomplices, the acts of the accomplice  
5 constituting the aiding and abetting may have occurred in a different district  
6 than the commission of the crime. In such a case, the prosecutor can choose  
7 between those districts in the prosecution of the accomplice.”).

8 A similar rule has long applied to co-conspirators. *See* Armistead M.  
9 Dobie, *Venue in Criminal Cases in the United States District Court*, 12 Va. L. Rev.  
10 287, 291 (1925) (“It has been held that, as to all the conspirators, the trial may be  
11 in any district in which an overt act in furtherance of the conspiracy is performed  
12 by one conspirator, though it was not the district of the conspiracy and even  
13 though the particular conspirator being tried has never been in the district of the  
14 trial.”); *see also* Lester B. Orfield, *Venue of Federal Criminal Cases*, 17 U. Pitt. L. Rev.  
15 375, 384 (1956) (“The old broad rule as to venue in conspiracy cases continues  
16 under Rule 18. . . . There is no right to trial at the place of residence of the  
17 conspirator.”). Accordingly, we have held that “venue may lie in any district in  
18 which the conspiracy was formed or in any district in which a conspirator

1 committed an overt act in furtherance of the criminal scheme.” *Rommy*, 506 F.3d  
2 at 119. In cases of both conspiracy and aiding and abetting, then, “a defendant  
3 need not himself have ever been physically present in a district for a conspiracy  
4 [or aiding and abetting] charge against him to be venued there.” *Id.* at 120.

5         These well-established rules represent a deep-rooted concern to serve a  
6 variety of goals in establishing venue, including accommodating both defense,  
7 prosecution, and judicial interests (for example, by permitting a single trial of all  
8 co-conspirators) and that tend to promote the efficient administration of justice,  
9 so long as the constitutional limits are observed. The convenience of the  
10 defendant is not the dispositive factor: “A foreign courier attempting to import  
11 illegal drugs through Kennedy Airport will not find the Eastern District of New  
12 York particularly convenient nor would a co-conspirator in Miami who never set  
13 foot in New York.” *Reed*, 773 F.2d at 481.

14         Thus, here, as Kenneth concedes, the government is permitted to lay venue  
15 by reference to Lisa’s actions in removing IMJ, and not solely by reference to  
16 Kenneth’s actions in aiding and abetting her. Appellant’s Br. at 50 (“Venue for  
17 this prosecution would have been proper in any judicial district where the  
18 principal, i.e. Lisa Miller, could have been charged.”). The place of Kenneth’s

1 own physical actions, then, does not unduly constrain our venue inquiry, except  
2 in two respects: first, insofar as his arrest in Vermont is necessary to any § 3238  
3 analysis, and second, insofar as he seeks to challenge the result we reach as in  
4 conflict with the constitutional goals animating criminal venue strictures.

5

### 6 **B. Section 3238 and Lisa’s Offense Conduct**

7 As described above, the jury was instructed that, to find that venue in  
8 Vermont was appropriate, it had to conclude (as it did) that the government had  
9 adequately demonstrated that “the essential conduct of removing a child from  
10 the United States took place at least in an essential part outside the United  
11 States,” and that “Kenneth Miller was first arrested in the District of Vermont.”  
12 J.A. 206, 209. On appeal, Kenneth challenges neither of these predicate findings,  
13 but rather argues principally that venue was nonetheless improper under § 3238  
14 because certain of Lisa’s offense conduct occurred within the United States: that  
15 is, she traveled from Virginia through Maryland, Pennsylvania, and New York,  
16 to reach the border with Canada, which she then crossed, completing the crime.  
17 Because § 3238 governs venue for crimes “begun or committed upon the high  
18 seas, or elsewhere out of the jurisdiction of any particular State or district,” he

1 urges us to conclude that Lisa’s movements toward the Canada-United States  
2 border, in her travels from Virginia to Buffalo by car, preclude the government’s  
3 reliance on § 3238 to set venue.

4 Applying the *Rodriguez-Moreno* mode of analysis, we first consider the  
5 nature of the offense and in that context we identify the conduct that constitutes  
6 the essence of the crime that Kenneth was charged with aiding and abetting. We  
7 have observed that in this process, “it is often helpful to look to the verbs of a  
8 statute in identifying the conduct that constitutes an offense.” *Ramirez*, 420 F.3d  
9 at 138. We do so cautiously, however, mindful that myopic focus on verbs can  
10 lead to overlooking important statutory language that communicates the “nature  
11 of the crime alleged,” which is the core of the inquiry. *Id.* (quoting *Cabrales*, 524  
12 U.S. at 6-7).

13 The statute that Lisa (and Kenneth, derivatively, for venue purposes) is  
14 charged with violating provides as follows: “Whoever removes a child from the  
15 United States, or attempts to do so, or retains a child (who has been in the United  
16 States) outside the United States with intent to obstruct the lawful exercise of  
17 parental rights shall be fined under this title or imprisoned not more than 3  
18 years, or both.” 18 U.S.C. § 1204(a). To establish a removal violating the Act, the

1 government thus had to prove that (1) IMJ had previously been in the United  
2 States; (2) Lisa took IMJ from the United States to another country; and (3) Lisa  
3 did so with the intent to obstruct the lawful exercise of Janet’s parental rights.  
4 *See United States v. Miller*, 626 F.3d 682, 688 (2d Cir. 2010) (describing the  
5 elements required to prove a violation of § 1204(a)).<sup>7</sup> Focusing first on the  
6 conduct identified by a verb, we see that in a case such as this, “remov[ing] a  
7 child” is the proscribed physical act, and the removal must be from within the  
8 United States to outside the United States to violate this statute. The Act is  
9 focused on combatting the special problems posed by the crime of international  
10 parental kidnapping, not on addressing domestic custody disputes that are  
11 played out within the jurisdictions of the various states. Following *Rodriguez-*  
12 *Moreno*, therefore, we conclude that *removing IMJ from the United States*—leaving  
13 the jurisdiction of the federal government and crossing the international  
14 boundary of the United States—is the essential conduct element of Lisa’s crime.  
15 *See Miller*, 626 F.3d at 692 (Straub, J., dissenting on other grounds) (identifying  
16 “[a]n essential element” of § 1204(a) as “remov[ing] [a child] from the United

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<sup>7</sup> Michelle Miller, the defendant in the cited opinion, is not related to Kenneth, Lisa, or Timothy Miller.

1 States” or “retain[ing] him outside of the United States” with intent to obstruct  
2 the lawful exercise of the other parent’s rights).

3 As to the second part of the *Rodriguez-Moreno* analysis, in which we  
4 identify *where* the offense conduct took place, it seems to us that the act of  
5 removal occurred in part on both sides of the Canada-United States border:  
6 beginning in the United States, from which IMJ was taken, and completed only  
7 once IMJ arrived in Canada and thus had been “remove[d]” from the United  
8 States, with the border crossing itself constituting the crux of the crime of  
9 removal.

10 Kenneth argues that even if certain offense conduct occurred outside of the  
11 United States, § 3238 does not apply when, as here, the acts comprising the crime  
12 were not *wholly* committed outside of the United States. In support, Kenneth  
13 points out first that the section is entitled, “Offenses not committed in any  
14 district.” We cannot agree. We are not persuaded by Kenneth’s contention that  
15 the title and plain language of § 3238 command such a result. “The title of a  
16 statute cannot limit the plain meaning of the text.” *Pa. Dep’t of Corr. v. Yeskey*, 524  
17 U.S. 206, 212 (1998) (alterations and internal quotation marks omitted). And  
18 here, the text of § 3238 invites a broader application than its title might suggest.

1 In particular, the text addresses “offenses *begun or committed* upon the high seas,  
2 or elsewhere out of the jurisdiction of any particular State or district.” 18 U.S.C.  
3 § 3238 (emphasis added). This language makes apparent that § 3238’s  
4 application is not restricted to offenses *wholly* committed outside the jurisdiction  
5 of the United States: The use of the word “begun” in addition to the word  
6 “committed” suggests that the statute encompasses offenses “begun” outside the  
7 borders of the United States—but ending within our country’s borders.

8       Insofar as Miller can be understood to argue, in the alternative, that § 3238  
9 applies to offenses begun outside of the United States and completed in the  
10 United States, but not to offenses begun within the United States and completed  
11 without, we do not accept this view either. The statute’s text is opaque. A report  
12 of the House Judiciary Committee notes that the words “begun or” were added  
13 to the statute in 1948 “to clarify [the] scope of this section and section 3237 of this  
14 title.” Revision of Title 18, United States Code, H.R. Rep. No. 304, at A161 (1947).  
15 But unfortunately, we are able to derive little clarification as to the scope of  
16 § 3238 from the amendment. See *United States v. Levy Auto Parts of Canada*, 787  
17 F.2d 946, 950 (4th Cir. 1986) (describing the Revisor’s Note as “cryptic”). To give  
18 each of the words “begun” and “committed” independent meaning, one might

1 read “committed” to mean “wholly committed,” and the word “begun” to refer  
2 only to offenses begun outside the United States but completed within the  
3 United States. See Megan O’Neill, Comment, *Extra Venues for Extraterritorial*  
4 *Crimes? 18 USC § 3238 and Cross-Border Criminal Activity*, 80 U. Chi. L. Rev. 1425,  
5 1445 (2013). Or, as the Third Circuit concluded in *United States v. Pendleton*, 658  
6 F.3d 299 (3d Cir. 2011), the word “committed” must “refer to crimes that begin  
7 inside the United States but that are in their essence committed abroad,” *id.* at  
8 305 (emphasis omitted), while the word “begun” might refer to crimes begun  
9 outside the United States—wherever completed.

10 All of this having been said, the history and text of § 3238 do make clear, at  
11 the very least, that the statute focuses on offense conduct outside of the United  
12 States. And we can discern no respect in which § 3238’s venue-setting provisions  
13 fit more naturally when the United States conduct constitutes the completion  
14 rather than the beginning of an offense; indeed, for those offenses begun abroad  
15 but completed in the United States, one could argue that it is more awkward to  
16 set venue based on the district in which the offender—who will more recently  
17 have committed offense conduct in the United States—“is arrested or first  
18 brought.” We thus agree with the *Pendleton* court that the word “committed” in

1 § 3238 encompasses crimes like Lisa’s, “that begin inside the United States but  
2 that are in their essence committed abroad.” 658 F.3d at 305 (emphasis omitted).

3 In *Pendleton*, the court considered the question of venue in the context of 18  
4 U.S.C. § 2423(c), which makes a federal crime of traveling in foreign commerce  
5 and engaging in illicit sexual conduct with another person. Pursuant to § 3238,  
6 the defendant was tried in the district of his arrest. *See id.* at 301, 304. The  
7 defendant argued, however, that venue was governed only by § 3237(a), and lay  
8 only in the United States district in which he boarded the plane to travel abroad  
9 to engage in the proscribed conduct. *See id.* at 303. Although the court agreed  
10 that his offense began when he initiated travel in the United States by boarding a  
11 plane bound for Germany, it concluded that, because the “crux” of the  
12 defendant’s offense—the illicit sexual conduct—was “committed” outside of the  
13 jurisdiction of any state or district, the crime was “essentially foreign” and § 3238  
14 applied to set venue in the district of his arrest. *Id.* at 304-05 (quoting *Levy*, 787  
15 F.2d at 952).

16 Here, similarly, the crux of Lisa’s crime was the removal of the child from  
17 the United States. It was not, for example, simply violating a state court custody  
18 order and crossing a state line: Its international nature endowed it with a

1 different character and consequences.<sup>8</sup> Thus, the offense conduct occurred “in its  
2 essence,” and the crime was committed and complete, when the child was  
3 removed to a jurisdiction outside a state or district. For these reasons, we  
4 conclude that Lisa’s criminal conduct here, which entailed the crossing of an  
5 international boundary with IMJ, was “essentially foreign.” Because the  
6 underlying offense occurred in its essence abroad—that is, was “committed . . .  
7 out of the jurisdiction of any particular State or district”—§ 3238 may be used to  
8 establish venue in the district of arrest even though certain offense conduct  
9 occurred in the United States.

10 Further, we do not think that venue becomes improper under § 3238  
11 simply because it might also have been properly laid elsewhere pursuant to  
12 § 3237(a).<sup>9</sup> A “suggestion that venue is proper under § 3237(a) will not serve to

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<sup>8</sup> Among the notable consequences can be, for example, the triggering, for resolution of the custody dispute, of the International Child Abduction Remedies Act, 22 U.S.C. §§ 9001-11, with its extensive procedures for managing competing judicial systems of different sovereigns in which separated parents and children are located.

<sup>9</sup> Kenneth argues that venue would have been proper under § 3237(a) in the districts in which his or Lisa’s acts took place, including Virginia, Maryland, Pennsylvania, and New York. We do not foreclose the possibility that venue might also have been proper in any or all of those districts under § 3237(a). See *United States v. Clenney*, 434 F.3d 780, 781 (5th Cir. 2005) (noting that the parties agreed that venue for the defendant’s prosecution for removal in violation of 18 U.S.C. § 1204, “a single, continuing offense,” was appropriate under 18 U.S.C. § 3237(a) “in any district in which the offense was

1 divest venue from another judicial district if venue is [also] proper in that district  
2 under [§] 3238.” *United States v. Williams*, 589 F.2d 210, 213 (5th Cir. 1979),  
3 *adopted in pertinent part*, 617 F.2d 1063, 1071 (5th Cir. 1980) (en banc); *see also Levy*,  
4 787 F.2d at 951.<sup>10</sup> Instead, where “more than one location” is “implicate[d] . . . ,  
5 [t]he [C]onstitution requires only that the venue chosen be determined from the  
6 nature of the crime charged as well as from the location of the act or acts  
7 constituting it, and that it not be contrary to an explicit policy underlying venue  
8 law.” *Reed*, 773 F.2d at 480.

9 Our holding today is at odds, we acknowledge, with a passing comment in  
10 *United States v. Gilboe*, 684 F.2d 235 (2d Cir. 1982), but it is not a comment that we  
11 believe binds us. In *Gilboe*, after suggesting that the accused had waived his  
12 argument that venue lay only in one state and only under § 3238, we rejected the  
13 argument summarily and on the basis of the statute’s title alone, explaining

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begun, continued or completed”). Nor do we reach the government’s argument on appeal that venue may have been properly laid *in the District of Vermont* pursuant to § 3237(a), a position that, according to Kenneth, has been waived and, he argues, is erroneous in any event.

<sup>10</sup> Moreover, as the Third Circuit observed in *Pendleton*, § 3237(a) “does not include a mandatory venue provision.” 658 F.3d at 303. Rather, the statute directs that offenses whose commission spans more than one district “*may* be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.” 18 U.S.C. § 3237(a) (emphasis added).

1 briefly that § 3238 “applies only to offenses ‘not committed in any district,’ as its  
2 title indicates.” *Id.* at 238-39. Our holding, however, was that venue was  
3 appropriate under § 3237(a). Our reasoning rested on a detailed analysis of the  
4 wire fraud prosecution of a foreign defendant—a Norwegian citizen and resident  
5 of Hong Kong. *See id.* at 237, 239. Looking to the defendant’s telephonic  
6 communications between New York City and overseas locations and observing  
7 that the proceeds of the fraud were transferred through New York City, we  
8 found that the defendant was properly tried in the Southern District of New  
9 York under § 3237(a), since the offense had been in part carried out there. *See id.*  
10 at 239. With that conclusion, our passing comments regarding § 3238, whose  
11 applicability the defendant had urged as an exclusive alternative to § 3237, were  
12 rendered dicta.

13 Our Court has never since relied on or favorably cited *Gilboe’s* comments  
14 regarding § 3238. Moreover, our decision in *Gilboe* was issued before the  
15 Supreme Court’s decision in *Rodriguez-Moreno*, in which (as we have observed  
16 above) the Court directed that we must look to the “essential conduct elements”  
17 of an offense to determine where venue properly lies. 526 U.S. at 280-81. We  
18 conducted no such analysis in *Gilboe*. Accordingly, our dicta in *Gilboe* do not

1 control our decision here.<sup>11</sup> Section 3238 may apply even when certain offense  
2 conduct occurs in the United States, if the criminal acts are nonetheless  
3 “essentially foreign.”

4

### 5 **C. Other Considerations**

6 To complete our application of § 3238 to Kenneth’s venue challenge, we  
7 recall that Kenneth was arrested in Vermont, as required to establish venue  
8 under the statute. Addressing a concern that might be raised with respect to an  
9 aiding and abetting charge, § 3238 in its current form provides for venue in the  
10 district “in which the offender, or any one of two or more joint offenders, is  
11 arrested or is first brought.” The statute thus seems to contemplate establishing  
12 venue under the principles of sharing venue for principal and aider-or-abettor, or  
13 co-conspirators, that we have discussed above, and there is no disjunction  
14 between using Lisa’s acts to establish venue for Kenneth in applying the first

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<sup>11</sup> At least one district court within our Circuit has characterized the *Gilboe* comments as dicta. See *United States v. Bin Laden*, 146 F. Supp. 2d 373, 381 n. 17 (S.D.N.Y. 2001); cf. *Levy*, 787 F.2d at 950 (discussing “the dictum in *Gilboe*”).

1 component of § 3238 while using Kenneth’s arrest in Vermont to complete the  
2 package.<sup>12</sup>

3 As we have explained elsewhere in the context of considering venue under  
4 § 3237(a), when a defendant argues that his prosecution in the contested district  
5 will result “in a hardship to him, prejudice[ ] him, or undermine[ ] the fairness of  
6 his trial,” we supplement our venue analysis with the “substantial contacts”  
7 inquiry, which “takes into account a number of factors—the site of the  
8 defendant’s acts, the elements and nature of the crime, the locus of the effect of  
9 the criminal conduct, and the suitability of each district for accurate factfinding.”  
10 *Coplan*, 703 F.3d at 80 (alterations and internal quotation marks omitted); *see also*  
11 *Ramirez*, 420 F.3d at 139 (“[W]hen venue may properly lie in more than one  
12 district under a continuing offense theory, we should also ask whether the  
13 criminal acts in question bear substantial contacts with any given venue.”  
14 (internal quotation marks omitted)). “The outer limits on how broadly Congress  
15 may define a continuing offense and thereby create multiple venues [are]

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<sup>12</sup> Nor are we troubled by Kenneth’s complaint that, upon his return from Ireland to address these charges, he first landed elsewhere in the United States, but the government chose not to arrest him until he arrived in Vermont. Vermont as a state has a substantial interest in these proceedings, as we have discussed, and we have been directed to no authority requiring the government to make an arrest at its first opportunity.

1 unclear,” we have observed, and “although the venue requirement is principally  
2 a protection for the defendant, other policy considerations are relevant to the  
3 proper venue in particular cases.” *United States v. Saavedra*, 223 F.3d 85, 92 (2d  
4 Cir. 2000) (citation and internal quotation marks omitted). A substantial contacts  
5 inquiry—in which we examine the offense’s contacts with the forum district—  
6 “offers guidance on how to determine whether the location of venue is  
7 constitutional, especially in those cases where the defendant’s acts did not take  
8 place within the district selected as the venue for trial.” *Id.* at 93. And the special  
9 circumstances of venue as applied to an aider and abettor, in which the aider and  
10 abettor’s own contacts with a forum district may recede in importance to those of  
11 the primary actor, adds a layer of complexity to the inquiry.

12 But Kenneth does not renew on appeal the argument that he made below,  
13 in his pre-trial motion to dismiss, that the offense with which he is charged lacks  
14 substantial contacts with Vermont. To the extent that this argument may not be  
15 waived, or a substantial contacts analysis is required when venue is laid  
16 pursuant to § 3238, we discern several sources of constitutional comfort for our  
17 ruling in this matter: that Lisa and Janet sought civil union status under  
18 Vermont law; that they sought the refuge and adjudication of the Vermont

1 courts; that IMJ’s removal directly affected ongoing custody proceedings in  
2 Vermont courts and Janet’s Vermont-rooted parental rights; and that the Virginia  
3 courts, before Kenneth and Lisa acted, recognized the priority that federal law  
4 ascribed to Vermont courts in adjudicating Lisa and Janet’s—and IMJ’s—rights.  
5 The international parental kidnapping that Kenneth was found to have aided  
6 and abetted thus had many, and substantial, connections with the Green  
7 Mountain State. These observations also suggest that the strong interest in the  
8 dispute maintained by Vermont, as the home of Janet and the courts vested with  
9 relevant authority, and the possibility of some form of legal proceedings there,  
10 were foreseeable to Kenneth.

11 We note, too, that at no time did Kenneth seek to transfer venue out of  
12 Vermont, and, for example, to the Western District of Virginia, where he and Lisa  
13 both formerly resided. Pursuant to Rule 21(b) of the Federal Rules of Criminal  
14 Procedure, he might have done so. *See* Fed. R. Crim. P. 21(b) (providing for  
15 transfer of venue “for the convenience of the parties, any victim, and the  
16 witnesses, and in the interest of justice”). In any event, it seems likely that there  
17 was little significant or unforeseeable hardship for Kenneth who, after all, had  
18 been living in Ireland for over a year by the time of trial. Indeed, the government

1 points out that “[o]f the 20 witnesses called by the government in its case-in-  
2 chief, four were from Vermont and four were from Virginia. The remaining 12  
3 ranged from Washington state, Kansas, and Tennessee, to Canada and  
4 Nicaragua. Of the two witnesses called by the defense, 1 was from Virginia and  
5 1 was from Kansas.” Appellee’s Br. at 30 n.7. We have been provided no basis  
6 for concluding that Kenneth was prejudiced in his defense by being subjected to  
7 prosecution in the District of Vermont.

8 Kenneth’s arguments that the government has more typically relied on  
9 § 3237 instead of § 3238 do not persuade us that § 3238 is unavailable to support  
10 venue for his crime. As the government notes, many of the cases listed by  
11 Kenneth arose in very different circumstances: an unsuccessful attempt, for  
12 example, to conduct an international parental kidnapping, with the absconding  
13 parent him- or herself arrested at an airport, which subsequently provided the  
14 basis for venue. Nor does the specter drawn by Kenneth of a decision  
15 supporting the use of § 3238 as unraveling many previously concluded  
16 prosecutions convince us that our conclusion is erroneous. Our reasoning does  
17 not necessarily affect convictions in which venue has been laid under § 3237.

18

1 **CONCLUSION**

2 We conclude that venue for the prosecution of Kenneth Miller on charges  
3 of aiding and abetting Lisa Miller in the removal of a child from the United  
4 States, in violation of 18 U.S.C. §§ 1204 and 2, properly lay in the District of  
5 Vermont, his place of arrest, pursuant to 18 U.S.C. § 3238. The conduct  
6 comprising the crime of removal of a child from the United States in violation of  
7 the International Parental Kidnapping Crime Act occurred in its essence outside  
8 the United States such that § 3238 provides a basis for laying venue in the district  
9 of arrest. We do not foreclose that, in an appropriate case, venue might also be  
10 set under § 3237; we express no opinion about that statute's applicability.

11 The judgment of the District Court is **AFFIRMED**.

**United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

**ROBERT A. KATZMANN**  
CHIEF JUDGE

Date: December 16, 2015

Docket #: 13-822cr

Short Title: United States of America v. Miller

**CATHERINE O'HAGAN WOLFE**  
CLERK OF COURT

DC Docket #: 2:11-cr-161-1

DC Court: VT (BURLINGTON)

DC Judge: Sessions

**BILL OF COSTS INSTRUCTIONS**

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- \* be filed within 14 days after the entry of judgment;
- \* be verified;
- \* be served on all adversaries;
- \* not include charges for postage, delivery, service, overtime and the filers edits;
- \* identify the number of copies which comprise the printer's unit;
- \* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- \* state only the number of necessary copies inserted in enclosed form;
- \* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- \* be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

**ROBERT A. KATZMANN**  
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DC Docket #: 2:11-cr-161-1  
DC Court: VT (BURLINGTON)  
DC Judge: Sessions

**VERIFIED ITEMIZED BILL OF COSTS**

Counsel for

\_\_\_\_\_

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

\_\_\_\_\_

and in favor of

\_\_\_\_\_

for insertion in the mandate.

Docketing Fee \_\_\_\_\_

Costs of printing appendix (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

Costs of printing brief (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

Costs of printing reply brief (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

**(VERIFICATION HERE)**

\_\_\_\_\_  
Signature

UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

**MANDATE**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16<sup>th</sup> day of December, two thousand and fifteen.

Before: José A. Cabranes,  
Susan L. Carney,  
Christopher F. Droney,  
*Circuit Judges.*

United States of America,

Appellee,

v.

Kenneth L. Miller,

Defendant - Appellant.

**JUDGMENT**  
Docket No. 13-822

The appeal in the above captioned case from a final judgment of the United States District Court for the District of Vermont was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED.

For The Court:

Catherine O'Hagan Wolfe,  
Clerk of Court


A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


**EXHIBIT**  
**12**

**MANDATE ISSUED ON 02/01/2016**

**General Docket  
Court of Appeals, 2nd Circuit**

<b>Court of Appeals Docket #:</b> 13-822 United States of America v. Miller <b>Appeal From:</b> DISTRICT OF VERMONT (BURLINGTON) <b>Fee Status:</b> Paid	<b>Docketed:</b> 03/07/2013 <b>Termed:</b> 12/16/2015
<b>Case Type Information:</b> 1) Criminal 2) Direct Criminal 3) none	
<b>Originating Court Information:</b> <b>District:</b> 0210-2 : <a href="#">2:11-cr-161-1</a> <b>Trial Judge:</b> William K. Sessions, U.S. District Judge <b>Date Filed:</b> 12/15/2011 <b>Date Order/Judgment:</b> 03/06/2013 <span style="float: right;"><b>Date NOA Filed:</b> 03/07/2013</span>	
<b>Prior Cases:</b> <a href="#">12-4190</a> <b>Date Filed:</b> 10/17/2012 <b>Date Disposed:</b> 01/03/2013 <b>Disposition:</b> Lack of appellate jurisdiction	
<b>Current Cases:</b> None	
<b>Panel Assignment:</b> Not available	

United States of America Appellee USA           -----  Kenneth L. Miller Defendant - Appellant	Eugenia Cowles, Assistant U.S. Attorney Direct: 802-951-6725 [COR NTC US Attorney] United States Attorney's Office for the District of Vermont 3rd Floor 11 Elmwood Avenue P.O. Box 570 Burlington, VT 05401   Brooks G. McArthur, Esq., - Direct: 802-658-9411 [COR NTC Retained] Jarvis, McArthur & Williams LLC P.O. Box 902 Burlington, VT 05402  Lawrence Rosenberg, Esq., - Direct: 202-879-3939 [NTC Attorney] Jones Day 51 Louisiana Avenue, NW Washington, DC 20001  David J. Williams, Esq., - Direct: 802-658-9411 [COR NTC Retained] Jarvis, McArthur & Williams LLC Suite 2E P.O. Box 902 Burlington, VT 05402
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**EXHIBIT  
13**

United States of America,

Appellee,

v.

Kenneth L. Miller,

Defendant - Appellant.

- 03/07/2013  [1](#) NOTICE OF CRIMINAL APPEAL, with district court docket, on behalf of Appellant Kenneth L. Miller, FILED. [868168] [13-822] [Entered: 03/07/2013 03:53 PM]  
14 pg, 1003.96 KB
- 03/07/2013  [2](#) DISTRICT COURT JUDGMENT, dated 03/06/2013, RECEIVED.[868175] [13-822] [Entered: 03/07/2013 03:55 PM]  
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- 03/07/2013  [3](#) PAYMENT OF DOCKETING FEE, on behalf of Appellant Kenneth L. Miller, district court receipt # 4682008525, FILED.[868180] [13-822] [Entered: 03/07/2013 03:57 PM]
- 03/12/2013  [4](#) FORM B, on behalf of Appellant Kenneth L. Miller , FILED. Service date 03/12/2013 by CM/ECF.[872443] [13-822] [Entered: 03/12/2013 01:54 PM]
- 03/12/2013  [5](#) ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellant Kenneth L. Miller, FILED. Service date 03/12/2013 by CM/ECF.[872446] [13-822] [Entered: 03/12/2013 01:56 PM]
- 03/12/2013  [6](#) CERTIFICATE OF SERVICE, for Criminal Appeal Transcript Information - Form B with attached Supplement and Acknowledgment and Notice of Appearance, on behalf of Appellant Kenneth L. Miller, FILED. Service date 03/12/2013 by CM/ECF.[872452] [13-822] [Entered: 03/12/2013 02:00 PM]
- 03/12/2013  [7](#) NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellant Kenneth L. Miller, FILED. Service date 03/12/2013 by CM/ECF. [872460] [13-822] [Entered: 03/12/2013 02:04 PM]
- 03/12/2013  [8](#) DEFECTIVE DOCUMENT, Form B, Acknowledgment/Appearance Form, Certificate of Service [4], [5], [6], on behalf of Appellant Kenneth L. Miller, FILED.[872694] [13-822] [Entered: 03/12/2013 03:08 PM]  
2 pg, 68.05 KB
- 03/12/2013  [9](#) DEFECTIVE DOCUMENT, Notice of Appearance as Additional Counsel [7], on behalf of Appellant Kenneth L. Miller, FILED.[872730] [13-822] [Entered: 03/12/2013 03:16 PM]  
2 pg, 67.54 KB
- 03/12/2013  [10](#) FORM B, on behalf of Appellant Kenneth L. Miller , FILED. Service date 03/12/2013 by CM/ECF.[872754] [13-822] [Entered: 03/12/2013 03:23 PM]  
2 pg, 58.3 KB
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1 pg, 28.52 KB
- 03/12/2013  [13](#) NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellant Kenneth L. Miller, FILED. Service date 03/12/2013 by CM/ECF. [872773] [13-822] [Entered: 03/12/2013 03:28 PM]  
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- 03/12/2013  [15](#) CURED DEFECTIVE, Notice of Appearance as Additional Counsel [[13](#)], on behalf of Appellant Kenneth L. Miller, FILED.[872796] [13-822] [Entered: 03/12/2013 03:34 PM]
- 03/12/2013  [16](#) ATTORNEY, David J. Williams for Kenneth L. Miller, in case 13-822 , [[13](#)], ADDED.[872825] [13-822] [Entered: 03/12/2013 03:42 PM]
- 03/12/2013  [18](#) ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee USA United States of America, FILED. Service date 03/12/2013 by CM/ECF.[872842] [13-822] [Entered: 03/12/2013 03:46 PM]  
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- 04/22/2013  [26](#) SO-ORDERED SCHEDULING NOTIFICATION, setting Appellant Kenneth L. Miller Brief due date as 07/22/2013; Joint Appendix due date as 07/22/2013, FILED.[915081] [13-822] [Entered: 04/22/2013 03:01 PM]  
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- 10/24/2013  48 ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Eugenia Cowles for Appellee USA United States of America, FILED. Service date 10/24/2013 by CM/ECF. [1074616] [13-822] [Entered: 10/24/2013 03:02 PM]
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- 11/04/2013  [55](#) REPLY BRIEF, on behalf of Appellant Kenneth L. Miller, FILED. Service date 11/04/2013 by US mail, CM/ECF. [1083389] [13-822] [Entered: 11/04/2013 04:00 PM]  
19 pg, 635.7 KB
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- 11/22/2013  64 CASE CALENDARING, for argument on 01/27/2014, SET.[1099348] [13-822] [Entered: 11/22/2013 11:38 AM]
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***IN THE DISTRICT COURT OF THE UNITED STATES***

***for the Western District of New York***

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**May 2014 GRAND JURY  
(Impaneled 5/9/2014)**

**THE UNITED STATES OF AMERICA**

**-vs-**

**LISA MILLER**  
(Counts 1, 2),  
**PHILIP ZODHIATES**  
(Counts 1, 2), and  
**TIMOTHY MILLER**  
(Counts 1, 2)

**SUPERSEDING INDICTMENT  
14-CR-175-A**

**Violations:**  
Title 18, United States Code,  
Sections 2, 371 and 1204  
(2 Counts)

**COUNT 1**

**(Conspiracy)**

**The Grand Jury Charges That:**

From in or about September 2009 to on or about the date of the return of this Superseding Indictment, in the Western District of New York, and elsewhere, the defendants, LISA MILLER, PHILIP ZODHIATES, and TIMOTHY MILLER, did knowingly, willfully and unlawfully combine, conspire and agree together and with Kenneth Miller and others, known and unknown to the Grand Jury, to commit an offense against the United States, that is, to remove a child, J1, from the United States and to retain that child, who had been in the United States, outside the United States, with intent to obstruct the lawful exercise of parental rights, in violation of Title 18, United States Code, Section 1204.

<b>EXHIBIT 14</b>
-----------------------

### **Overt Acts**

In order to effect the object of the conspiracy, the following acts were committed by the defendants and others in the Western District of New York and elsewhere:

1. On or about September 21, 2009, defendant LISA MILLER, J1, and defendant PHILIP ZODHIATES travelled from Virginia to the Buffalo, New York, area.

2. On or about September 21, 2009, defendant PHILIP ZODHIATES had telephone contact from the Buffalo, New York area with Kenneth Miller.

3. On or about September 21, 2009, defendant PHILIP ZODIATES had telephone contact from the Buffalo, New York area with an individual in Canada who had agreed to help transport defendant LISA MILLER in Canada.

4. On or about September 22, 2009, defendant LISA MILLER and J1 travelled across the Rainbow Bridge from Niagara Falls, New York, to Canada.

5. On or about September 22, 2009, defendant PHILIP ZODIATES had telephone contact from the Buffalo, New York area with an individual in Canada who helped transport defendant LISA MILLER in Canada.

6. On or about September 22, 2009, defendant PHILIP ZODHIATES had telephone contact from the Buffalo, New York area with Kenneth Miller.

**All in violation of Title 18, United States Code, Section 371.**

**COUNT 2**

**(International Parental Kidnapping)**

**The Grand Jury Further Charges That:**

On or about September 22, 2009, in the Western District of New York, and elsewhere, the defendants, LISA MILLER, PHILIP ZODHIATES, and TIMOTHY MILLER, with intent to obstruct the lawful exercise of parental rights, did knowingly remove, and aid and abet the removal of, a child, J1, a person known to the Grand Jury, from the United States.

**All in violation of Title 18, United States Code, Sections 1204 and 2.**

DATED: Buffalo, New York, April 24, 2015.

WILLIAM J. HOCHUL, JR.  
United States Attorney

BY: S/KATHLEEN A. LYNCH for  
PAUL J. VAN DE GRAAF  
Special Assistant United States Attorney  
United States Attorney's Office  
Western District of New York  
138 Delaware Avenue  
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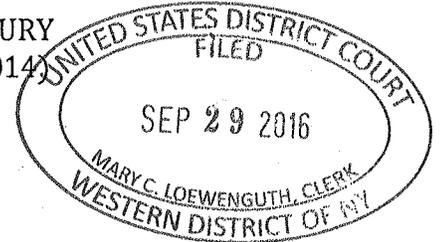
A TRUE BILL:

S/FOREPERSON

***IN THE DISTRICT COURT OF THE UNITED STATES***

***for the Western District of New York***

May 2014 GRAND JURY  
(Impaneled 5/9/2014)



**THE UNITED STATES OF AMERICA**

**INDICTMENT  
14-CR-175-A**

**-VS-**

Violations:  
Title 18, United States Code,  
Sections 2, 371 and 1204  
(2 Counts)

**PHILIP ZODHIATES  
(Counts 1, 2)**

**COUNT 1**

**(Conspiracy)**

**The Grand Jury Charges That:**

From in or about September 2009 to on or about the date of the return of this Superseding Indictment, in the Western District of New York, and elsewhere, the defendant, PHILIP ZODHIATES did knowingly, willfully and unlawfully combine, conspire and agree with others, known and unknown to the Grand Jury, to commit an offense against the United States, that is, to remove a child, J1, from the United States and to retain that child, who had been in the United States, outside the United States, with intent to obstruct the lawful exercise of parental rights, in violation of Title 18, United States Code, Section 1204.

### Overt Acts

In order to effect the object of the conspiracy, the following acts were committed by the defendant and others in the Western District of New York and elsewhere:

1. On or about September 21, 2009, Lisa Miller, J1, and defendant PHILIP ZODHIATES travelled from Virginia to the Buffalo, New York, area.
2. On or about September 21, 2009, defendant PHILIP ZODHIATES had telephone contact from the Buffalo, New York area with Kenneth Miller.
3. On or about September 21, 2009, defendant PHILIP ZODHIATES had telephone contact from the Buffalo, New York area with an individual in Canada who had agreed to help transport Lisa Miller in Canada.
4. On or about September 22, 2009, Lisa Miller and J1 travelled across the Rainbow Bridge from Niagara Falls, New York, to Canada.
5. On or about September 22, 2009, defendant PHILIP ZODHIATES had telephone contact from the Buffalo, New York area with an individual in Canada who helped transport Lisa Miller in Canada.
6. On or about September 22, 2009, defendant PHILIP ZODHIATES had telephone contact from the Buffalo, New York area with Kenneth Miller.

All in violation of Title 18, United States Code, Section 371.

COUNT 2

(International Parental Kidnapping)

The Grand Jury Further Charges That:

On or about September 22, 2009, in the Western District of New York, and elsewhere, the defendant PHILIP ZODHIATES, with intent to obstruct the lawful exercise of parental rights, did knowingly remove, and aid and abet the removal of, a child, J1, a person known to the Grand Jury, from the United States.

All in violation of Title 18, United States Code, Sections 1204 and 2.

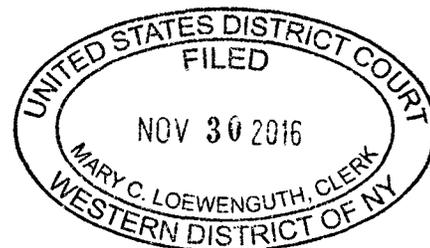
DATED: Buffalo, New York, April 24, 2015.

WILLIAM J. HOCHUL, JR.  
United States Attorney

BY: /s/  
KATHLEEN A. LYNCH for  
PAUL J. VAN DE GRAAF  
Special Assistant United States Attorney  
United States Attorney's Office  
Western District of New York  
138 Delaware Avenue  
Buffalo, New York 14202  
paul.van.de.graaf@usdoj.gov

A TRUE BILL:

/s/  
FOREPERSON



IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

---

UNITED STATES OF AMERICA,

v.

14-CR-175-A

TIMOTHY MILLER,

Defendant.

---

**PLEA AGREEMENT**

The defendant, Timothy Miller, and the United States Attorney for the Western District of New York (hereinafter "the government") hereby enter into a plea agreement with the terms and conditions as set out below.

**I. THE PLEA AND POSSIBLE SENTENCE**

1. The defendant agrees to plead guilty to Count 1 of the Superseding Indictment which charges a violation of Title 18, United States Code, Section 371 [conspiracy to commit international parental kidnapping] for which the maximum possible sentence is a term of imprisonment of 5 years, a fine of \$ 250,000, a mandatory \$100 special assessment and a term of supervised release of 3 years. The defendant understands that the penalties set forth in this paragraph are the maximum penalties that can be imposed by the Court at sentencing.

2. The defendant understands that the Court may require restitution in the amount not to exceed \$50,000 as part of the sentence, pursuant to Sentencing Guidelines § 5E1.1 and Title 18, United States Code, Section 3663. The defendant understands that

**EXHIBIT**  
**16**

defendant will not be entitled to withdraw the plea of guilty based upon any restitution amount ordered by the Court.

3. The defendant understands that, if it is determined that the defendant has violated any of the terms or conditions of supervised release, the defendant may be required to serve in prison all or part of the term of supervised release, up to 2 years, without credit for time previously served on supervised release. As a consequence, in the event the defendant is sentenced to the maximum term of incarceration, a prison term imposed for a violation of supervised release may result in the defendant serving a sentence of imprisonment longer than the statutory maximum set forth in ¶ 1 of this agreement.

## **II. ELEMENTS AND FACTUAL BASIS**

4. The defendant understands the nature of the offense] set forth in ¶ 1 of this agreement and understands that if this case proceeded to trial, the government would be required to prove beyond a reasonable doubt the following elements of the crime:

- a. That Isabella Miller Jenkins was previously in the United States;
- b. that the defendant agreed with others including Lisa Miller and Ken Miller to assist the taking of Isabella Miller Jenkins from the United States and retaining the child outside the United States; and
- c. the defendant acted with the intent to obstruct the lawful exercise of parental rights of Janet Jenkins.

## **FACTUAL BASIS**

5. The defendant and the government agree to the following facts, which form the basis for the entry of the plea of guilty including relevant conduct:

- a. That Isabella Miller Jenkins is the daughter of Lisa Miller and Janet Jenkins. Prior to September 22, 2009, Isabelle Miller Jenkins lived in the United States and Janet Jenkins had the parental right to visit Isabella Miller.
- b. That on or about September 21, 2009, the defendant was a Mennonite minister in Managua, Nicaragua when he was contacted by Kenneth Miller. Kenneth Miller told the defendant that Lisa Miller was looking to leave the United States with her daughter Isabella Miller Jenkins as she could lose custody of Isabella to Janet Jenkins.
- c. Based on this information, the defendant agreed to assist in arranging Lisa's and Isabella's departure from the United States. The defendant did also purchase one-way airline tickets on September 21, 2009, for Lisa and Isabella to travel from Canada to Managua, Nicaragua on September 22, 2009.
- d. Lisa and Isabella departed Canada on or about September 22, 2009, and arrived in Managua, Nicaragua. The defendant learned in November 2009 that Janet Jenkins was award custody of Isabella Miller Jenkins. The defendant continued to assist Lisa Miller with assistance up to and including May 2010 when he accepted and provided Lisa Miller with money.

### **III. SENTENCING GUIDELINES**

6. The defendant understands that the Court must consider but is not bound by the Sentencing Guidelines (Sentencing Reform Act of 1984).

#### **BASE OFFENSE LEVEL**

7. The government and the defendant agree that Guidelines § 2J1.2(a) applies to the offense of conviction and provides for a base offense level of 14.

**SPECIFIC OFFENSE CHARACTERISTICS**  
**U.S.S.G. CHAPTER 2 ADJUSTMENTS**

8. The government and the defendant agree that the following specific offense characteristics do apply:

- a. the 3 level increase pursuant to Guidelines § 2J1.2(b)(2) [the offense involved a substantial interference with the administration of justice].
- b. The 2 level increase pursuant to Guideline §2J1.2(b)(3)(C) [extensive in scope preparation or planning]

**ADJUSTED OFFENSE LEVEL**

9. Based on the foregoing, it is the understanding of the government and the defendant that the adjusted offense level for the offense of conviction is 19.

**ACCEPTANCE OF RESPONSIBILITY**

10. At sentencing, the government agrees not to oppose the recommendation that the Court apply the two (2) level downward adjustment of Guidelines § 3E1.1(a) (acceptance of responsibility) and further agrees to move the Court to apply the additional one (1) level downward adjustment of Guidelines § 3E1.1(b), which would result in a total offense level of 16.

**CRIMINAL HISTORY CATEGORY**

11. It is the understanding of the government and the defendant that the defendant's criminal history category is I. The defendant understands that if the defendant is sentenced for, or convicted of, any other charges prior to sentencing in this action the defendant's criminal history category may increase. The defendant understands that the

defendant has no right to withdraw the plea of guilty based on the Court's determination of the defendant's criminal history category.

**GUIDELINES' APPLICATION, CALCULATIONS AND IMPACT**

12. It is the understanding of the government and the defendant that, with a total offense level of 16 and criminal history category of I, the defendant's sentencing range would be a term of imprisonment of 21 to 27 months, a fine of \$5,000 to \$50,000, and a period of supervised release of 1 to 3 years. Notwithstanding this, the defendant understands that at sentencing the defendant is subject to maximum penalties set forth in ¶ 1 of this agreement.

13. The government and the defendant agree to the correctness of the calculation of the Sentencing Guidelines range set forth above. The government and the defendant, however, reserve the right to recommend a sentence outside the Sentencing Guidelines range. This paragraph reserves the right to the government and the defendant to bring to the attention of the Court all information deemed relevant to a determination of the proper sentence in this action.

14. The defendant understands that the Court is not bound to accept any Sentencing Guidelines calculations set forth in this agreement and the defendant will not be entitled to withdraw the plea of guilty based on the sentence imposed by the Court.

#### **IV. STATUTE OF LIMITATIONS**

15. In the event the defendant's plea of guilty is withdrawn, or conviction vacated, either pre- or post-sentence, by way of appeal, motion, post-conviction proceeding, collateral attack or otherwise, the defendant agrees that any charges dismissed pursuant to this agreement shall be automatically reinstated upon motion of the government and further agrees not to assert the statute of limitations as a defense to any other criminal offense involving or related to international parental kidnapping which is not time barred as of the date of this agreement. This waiver shall be effective for a period of six months following the date upon which the withdrawal of the guilty plea or vacating of the conviction becomes final.

#### **V. GOVERNMENT RIGHTS AND RESERVATIONS**

16. At sentencing, the government agrees not to oppose the recommendation that the Court sentence the defendant at the lowest point of the Guidelines range determined by the Court.

17. The defendant understands that the government has reserved the right to:
- a. provide to the Probation Office and the Court all the information and evidence in its possession that the government deems relevant concerning the defendant's background, character and involvement in the offense charged, the circumstances surrounding the charge and the defendant's criminal history;
  - b. respond at sentencing to any statements made by the defendant or on the defendant's behalf that are inconsistent with the information and evidence available to the government;
  - c. advocate for a specific sentence consistent with the terms of this agreement including the amount of restitution and/or a fine and the method of payment;

- d. modify its position with respect to any sentencing recommendation or sentencing factor under the Guidelines including criminal history category, in the event that subsequent to this agreement the government receives previously unknown information, including conduct and statements by the defendant subsequent to this agreement, regarding the recommendation or factor;
- e. oppose any application for a downward departure and/or sentence outside the Guidelines range made by the defendant.

18. At sentencing, the government will move to dismiss the open count of the Superseding Indictment in this action as against the defendant.

19. The defendant agrees that any financial records and information provided by the defendant to the Probation Office, before or after sentencing, may be disclosed to the United States Attorney's Office for use in the collection of any unpaid financial obligation.

## VI. APPEAL RIGHTS

20. The defendant understands that Title 18, United States Code, Section 3742 affords a defendant a limited right to appeal the sentence imposed. The defendant, however, knowingly waives the right to appeal and collaterally attack any component of a sentence imposed by the Court which falls within or is less than the sentencing range for imprisonment, a fine and supervised release set forth in Section III, ¶12, above, notwithstanding the manner in which the Court determines the sentence. In the event of an appeal of the defendant's sentence by the government, the defendant reserves the right to argue the correctness of the defendant's sentence. The defendant further agrees not to appeal a restitution order which does not exceed the amount set forth in Section I of this agreement.

21. The defendant understands that by agreeing not to collaterally attack the sentence, the defendant is waiving the right to challenge the sentence in the event that in the future the defendant becomes aware of previously unknown facts or a change in the law which the defendant believes would justify a decrease in the defendant's sentence.

22. The government waives its right to appeal any component of a sentence imposed by the Court which falls within or is greater than the sentencing range for imprisonment, a fine and supervised release set forth in Section III, ¶12, above, notwithstanding the manner in which the Court determines the sentence. However, in the event of an appeal from the defendant's sentence by the defendant, the government reserves its right to argue the correctness of the defendant's sentence.

## VII. COOPERATION

23. The defendant will cooperate with the government by providing complete and truthful information regarding the defendant's knowledge of any and all criminal activity, whether undertaken by the defendant or others, in any way involving or related to international parental kidnapping. The defendant's cooperation shall also include submitting to interviews by government attorneys and agents, as well as testifying truthfully and completely before grand juries and at such other proceedings as the government shall deem necessary, including, but not limited to pre-trial hearings, trials, sentencing hearings and forfeiture proceedings, and returning to the United States to testify is so requested.

24. The defendant's cooperation shall also be provided to any local, state or federal authorities designated by the government and who have agreed to abide by the terms of the "Cooperation" section of this agreement. The defendant's obligation to testify truthfully and completely shall extend to proceedings in local, state and federal courts in jurisdictions which have agreed to abide by this agreement.

25. In exchange for the defendant's plea of guilty and cooperation as set forth in this agreement, the defendant will not be prosecuted by the Office of the United States Attorney for the Western District of New York for any other federal criminal offenses committed in the Western District of New York in any way involving or related to international parental kidnapping, committed up to the date of this agreement and about which the defendant provides complete and truthful information.

26. Further, no testimony, statements or tangible objects provided by the defendant in compliance with this agreement (or any information directly or indirectly derived therefrom) will be used against the defendant in any criminal case, except a prosecution for perjury or making false statements.

27. Upon condition that the defendant has fully complied with all terms and conditions of this agreement, should the government determine that the defendant has provided substantial assistance in the investigation or prosecution of other persons who have committed offenses, the government will move the Court at sentencing to depart downward from the Guidelines 3 levels as provided for in Guidelines § 5K1.1, which, if granted by the

Court, would result in a total offense level of 13 and a sentencing range of 12 to 18 months imprisonment. The defendant understands that the decision to make such a motion is within the sole discretion of the government and that the decision to grant such a motion, and the extent of any downward departure, are matters solely within the discretion of the Court.

28. This agreement does not preclude the prosecution of the defendant for perjury or making false statements in the event the defendant testifies falsely or provides false information to the government. This agreement is not contingent upon the filing of charges against, the return of an Indictment against, or the successful prosecution of, any person or entity.

29. It is a condition of this agreement that, up through the date of the defendant's sentencing, the defendant shall commit no further crimes. It is also a condition of this agreement that the defendant must, at all times, give complete, truthful and accurate information and testimony and not withhold information from the government or refuse to testify truthfully and completely. Should the defendant be sentenced prior to the completion of the defendant's cooperation with the government, the defendant's obligation to comply with the cooperation provisions of this agreement extends past sentencing.

30. In the event the government believes the defendant has violated any of the conditions of the "Cooperation" section of this agreement, the government, in addition to its other rights as set forth in the "Cooperation" section of this agreement, reserves the right: (a) to modify any recommendation the government agreed to make in a motion pursuant to

Guidelines § 5K1.1 and/or Title 18, United States Code, Section 3553(e); and (b) to petition the Court, before or after sentencing, for an order declaring that the defendant has breached the “Cooperation” section and relieving the government of its obligations under this section.

31. In the event the government petitions the Court to declare that the defendant has breached the “Cooperation” section of this agreement, whether the defendant has violated any of the conditions of the “Cooperation” section shall be determined by the Court in an appropriate proceeding at which any disclosures and documents provided by the defendant shall be admissible and at which the government shall be required to establish any violation by a preponderance of the evidence. In order to establish any violation by the defendant, the government is entitled to rely on statements and information given by the defendant pursuant to this agreement.

32. If the “Cooperation” section of this agreement is declared breached by the Court:

- a. the defendant shall thereafter be subject to prosecution for any federal criminal violations of which the government has knowledge, including but not limited to, perjury and obstruction of justice;
- b. the government may withdraw any motion filed pursuant to Sentencing Guidelines § 5K1.1, Title 18, United States Code, Section 3553(e) and/or Rule 35(b);
- c. the defendant has no right to withdraw the plea of guilty;
- d. the defendant shall waive all rights under Fed. R. Crim. P. 11(f), Fed. R. Evid. 410 and Sentencing Guidelines § 1B1.8 and the defendant expressly agrees that all statements, testimony and tangible objects provided by the defendant (with the exception of statements made in open court during guilty plea proceedings), whether prior or subsequent to this agreement,

can be used directly and indirectly in any and all criminal proceedings against the defendant; and

- e. the defendant agrees that any charges that were dismissed pursuant to this agreement shall be automatically reinstated upon motion of the government. Furthermore, the defendant agrees not to assert the statute of limitations as a defense to any criminal offense involving or related to international parental kidnapping which is not time barred as of the date of this agreement. This waiver shall be effective for a period of six months following the date upon which the Court's order declaring the agreement breached by the defendant becomes final.

33. At the time of sentencing, the government will make the nature and extent of the defendant's compliance with this agreement known to the Court. The government and the defendant will request that sentencing be adjourned until full satisfaction by the defendant of the terms of this agreement. In the event the defendant is sentenced prior to the completion of the defendant's cooperation with the government, the government reserves the right to modify any recommendation to be made by the government at sentencing pursuant to Guidelines § 5K1.1.

34. The defendant's attorney is permitted to be present at any time the defendant is questioned or interviewed by government agents regarding the matters set forth in this agreement.

#### **VIII. TOTAL AGREEMENT AND AFFIRMATIONS**

35. This plea agreement represents the total agreement between the defendant, Timothy Miller, and the government. There are no promises made by anyone other than

those contained in this agreement. This agreement supersedes any other prior agreements, written or oral, entered into between the government and the defendant.

JAMES P. KENNEDY, JR.  
Acting United States Attorney  
Western District of New York

BY:   
MICHAEL DIGIACOMO  
Assistant United States Attorney

Dated: November 30<sup>th</sup>, 2016

I have read this agreement, which consists of 14 pages. I have had a full opportunity to discuss this agreement with my attorney, Jeffrey A. Conrad, Esq. I agree that it represents the total agreement reached between myself and the government. No promises or representations have been made to me other than what is contained in this agreement. I understand all of the consequences of my plea of guilty. I fully agree with the contents of this agreement. I am signing this agreement voluntarily and of my own free will.

  
\_\_\_\_\_  
TIMOTHY MILLER  
Defendant

Dated: November 30, 2016

  
\_\_\_\_\_  
JEFFREY A. CONRAD, ESQ.  
Attorney for the Defendant

Dated: November 30, 2016

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA, )  
 ) Case No. 1:14-CR-00175-3  
 ) (RJA) (JJM)  
 Plaintiff, )  
 )  
 vs. ) November 30th, 2016  
 )  
 TIMOTHY MILLER, )  
 )  
 Defendant. )

**TRANSCRIPT OF PLEA  
BEFORE THE HONORABLE RICHARD J. ARCARA  
SENIOR UNITED STATES DISTRICT JUDGE**

APPEARANCES:

For the Plaintiff: U.S. ATTORNEY'S OFFICE  
BY: PAUL J. VAN DE GRAAF, ESQ.  
11 Elmwood Avenue, 3rd Floor  
Burlington, VT 05401  
  
JAMES P. KENNEDY, JR.  
UNITED STATES ATTORNEY  
BY: MICHAEL DiGIACOMO, ESQ.  
ASSISTANT UNITED STATES ATTORNEY  
138 Delaware Avenue  
Buffalo, NY 14202  
  
For the Defendant: CLYMER MUSSER & CONRAD, PC  
BY: JEFFREY CONRAD, ESQ.  
408 W. Chestnut Street  
Lancaster, PA 17603  
  
Court Reporter: MEGAN E. PELKA, RPR  
Robert H. Jackson Courthouse  
2 Niagara Square  
Buffalo, NY 14202

**EXHIBIT  
17**

12:14PM 1 THE CLERK: Criminal action 2014-175A. United States  
12:41PM 2 v. Timothy Miller. Status conference. Counsel, please state  
12:41PM 3 your name and the party you represent for the record.

12:41PM 4 MR. DIGIACOMO: Good afternoon, Your Honor. Michael  
12:41PM 5 DiGiacomo and Paul Van de Graaf for the United States of  
12:41PM 6 America.

12:41PM 7 MR. CONRAD: Good morning, Your Honor. Attorney Jeff  
12:41PM 8 Conrad on behalf of Timothy Miller.

12:41PM 9 THE COURT: I guess it's afternoon.

12:41PM 10 MR. CONRAD: I guess it is, Your Honor. I'm sorry.  
12:41PM 11 I got up at 4 o'clock to catch a plane this morning, Your  
12:41PM 12 Honor.

12:41PM 13 THE COURT: All right. Well, sorry to keep you  
12:41PM 14 waiting. I had matters I couldn't get out here any sooner. I  
12:41PM 15 don't like to be late. Mr. DiGiacomo?

12:41PM 16 MR. DIGIACOMO: Yeah, Your honor. Today's status  
12:41PM 17 conference, we'd like to report to the Court that the parties  
12:41PM 18 have, since the last time we were here, reached a plea  
12:41PM 19 agreement. And if the Court is amenable, it's my  
12:41PM 20 understanding, having talked to both Mr. Conrad and his  
12:41PM 21 client, if the Court is amenable, we would be able to enter  
12:41PM 22 into that plea early this afternoon.

12:41PM 23 THE COURT: Do it right now. We can do it right now.  
12:41PM 24 Is it all --

12:41PM 25 (An off-the-record discussion was held.)

12:42PM 1 THE COURT: I don't think the sentencing will take  
12:42PM 2 long.

12:42PM 3 MR. DIGIACOMO: We can wait, Your Honor.

12:42PM 4 THE COURT: Yeah. Get everything all signed and all  
12:42PM 5 that. And as soon as we complete the sentencing, we can take  
12:42PM 6 the plea. Okay?

12:42PM 7 MR. CONRAD: Yes, sir.

12:42PM 8 (Brief recess.)

12:59PM 9 THE CLERK: Criminal action 2014-175A. United States  
12:59PM 10 v. Timothy Miller. Change of plea. Counsel, please state  
12:59PM 11 your name and the party you represent for the record.

12:59PM 12 MR. DIGIACOMO: Michael DiGiacomo and Paul  
12:59PM 13 Van de Graaf for the United States of America.

12:59PM 14 MR. CONRAD: Your Honor, attorney Jeff Conrad on  
12:59PM 15 behalf of the defendant, Timothy Miller.

12:59PM 16 THE COURT: Mr. DiGiacomo?

12:59PM 17 MR. DIGIACOMO: Yes, Your Honor. Your Honor, this  
12:59PM 18 afternoon, Mr. Miller has agreed to plead guilty to Count 1 of  
12:59PM 19 the superseding indictment that charges conspiracy to commit  
12:59PM 20 international parental kidnapping, in violation of Title 18,  
12:59PM 21 United States Code, Section 371 and Section 1204.

12:59PM 22 THE COURT: That's your understanding, sir?

12:59PM 23 THE DEFENDANT: Yes, Your Honor.

12:59PM 24 MR. CONRAD: Yes, Your Honor.

12:59PM 25 THE COURT: Okay. Would you please administer the

12:59PM 1 oath to Mr. Miller?

01:00PM 2 (The defendant was affirmed at 1:00 p.m.)

01:00PM 3 THE COURT: Sir, I'm going to be asking you some  
01:00PM 4 questions. You're going to have to answer those questions  
01:00PM 5 honestly and truthfully. If you were to give me any false  
01:00PM 6 answer, that false answer may be used against you in a further  
01:00PM 7 prosecution brought by the government on a charge of perjury  
01:00PM 8 or making a false statement while under oath. Do you  
01:00PM 9 understand that, sir?

01:00PM 10 THE DEFENDANT: Yes, Your Honor.

01:00PM 11 THE COURT: It's also very important you understand  
01:00PM 12 what your rights are. At any time during the course of these  
01:00PM 13 proceedings, there is something you don't understand, you want  
01:00PM 14 to ask me a question, you want to consult with your attorney,  
01:00PM 15 you want something more fully explained to you, you're free to  
01:00PM 16 do so. You're encouraged to do so.

01:00PM 17 It's not important that we get this over with as  
01:00PM 18 quickly as possible. What's important is that I am satisfied  
01:00PM 19 that you fully understand what your rights are. Do you  
01:00PM 20 understand that, sir?

01:00PM 21 THE DEFENDANT: Yes, Your Honor.

01:00PM 22 THE COURT: Now, it's my understanding you're here  
01:00PM 23 today to waive certain rights and to plead guilty to Count 1  
01:01PM 24 of the superseding indictment. Do you understand this charge,  
01:01PM 25 sir?



01:01PM 1 THE COURT: Any complaints?

01:01PM 2 THE DEFENDANT: No.

01:01PM 3 THE COURT: Okay. Let's proceed to the plea  
01:01PM 4 agreement, Mr. DiGiacomo.

01:01PM 5 MR. DIGIACOMO: Yes, Your Honor. Your Honor, the  
01:01PM 6 plea agreement begins with the opening paragraph which states,  
01:02PM 7 the defendant, Timothy Miller and the United States Attorney  
01:02PM 8 for the Western District of New York, hereinafter the  
01:02PM 9 government, hereby enter into a plea agreement with the terms  
01:02PM 10 and conditions as set out below.

01:02PM 11 Paragraph 1. Plea and possible sentence. The  
01:02PM 12 defendant agrees to plead guilty to Count 1 of the superseding  
01:02PM 13 indictment, which charges a violation of Title 18,  
01:02PM 14 United States Code, Section 371, conspiracy to commit  
01:02PM 15 international parental kidnapping, for which the maximum  
01:02PM 16 possible sentence is a term of imprisonment of five years, a  
01:02PM 17 fine of \$250,000, a mandatory \$100 special assessment and a  
01:02PM 18 term of supervised release of three years.

01:02PM 19 The defendant understands that the penalties set  
01:02PM 20 forth in this paragraph are the maximum penalties that can be  
01:02PM 21 imposed by the Court at sentencing.

01:02PM 22 THE COURT: Do you understand that, sir?

01:02PM 23 THE DEFENDANT: Yes, Your Honor.

01:02PM 24 THE COURT: Did you explain to him the importance of  
01:02PM 25 this paragraph?



01:03PM 1 state its reasons for doing so pursuant to Title 18, United  
01:03PM 2 States Code, Section 3553.

01:04PM 3 THE COURT: Do you understand everything he just  
01:04PM 4 said, sir?

01:04PM 5 THE DEFENDANT: Yes, Your Honor.

01:04PM 6 THE COURT: Now, we're going to go through the  
01:04PM 7 guidelines in a few minutes. I know your attorney spent a lot  
01:04PM 8 of time explaining them to you. If you have any questions,  
01:04PM 9 you let me know. Okay?

01:04PM 10 THE DEFENDANT: Okay. Thank you.

01:04PM 11 MR. DIGIACOMO: Paragraph 2, Your Honor, states that,  
01:04PM 12 the defendant understands that the Court may require  
01:04PM 13 restitution in an amount not to exceed \$50,000 as part of the  
01:04PM 14 sentence, pursuant to the Sentencing Guidelines Section 5E1.1  
01:04PM 15 and Title 18, United States Code, Section 3663. The defendant  
01:04PM 16 understands that he will not be entitled to withdraw his plea  
01:04PM 17 of guilty based upon any restitution amount ordered by this  
01:04PM 18 Court.

01:04PM 19 THE COURT: What is the restitution involved here?

01:04PM 20 MR. DIGIACOMO: Your Honor, the restitution would be  
01:04PM 21 involved with that with respect to Janet Jenkins. As the  
01:04PM 22 Court is familiar with the Zodhiates trial, Ms. Jenkins has  
01:04PM 23 gone through numerous legal battles in attempts to get her  
01:04PM 24 daughter, Isabella, back from Nicaragua, from the last place  
01:04PM 25 that we believe she's at. She's incurred significant expenses

01:04PM 1 associated with that.

01:05PM 2 As I sit here today, Your Honor, the government is  
01:05PM 3 not aware of any specific restitution request. However, we  
01:05PM 4 believe, Your Honor, that a cap number of \$50,000 is  
01:05PM 5 sufficient, so that the defendant is fully aware that if the  
01:05PM 6 restitution claim is set forth, again which we don't believe  
01:05PM 7 or know if there will be one, that he has a number that he's  
01:05PM 8 comfortable with as he sits here this afternoon.

01:05PM 9 THE COURT: Do you understand that, sir?

01:05PM 10 THE DEFENDANT: Yes.

01:05PM 11 MR. DIGIACOMO: Your Honor, paragraph 3 talks  
01:05PM 12 about -- it says that: The defendant understands that if it's  
01:05PM 13 determined that he has violated any terms and conditions of  
01:05PM 14 supervised release, that the defendant may be required to  
01:05PM 15 serve in prison all or part of the supervised release, up to  
01:05PM 16 two years, without credit for time previously served on  
01:05PM 17 supervised release.

01:05PM 18 As a consequence, in the event the defendant is  
01:05PM 19 sentenced to the maximum term of incarceration, a prison term  
01:05PM 20 imposed for a violation of supervised release may result in  
01:05PM 21 the defendant serving a sentence of imprisonment longer than  
01:05PM 22 the statutory maximum set forth in paragraph 1 of the  
01:05PM 23 agreement.

01:05PM 24 THE COURT: Do you understand that, sir?

01:06PM 25 THE DEFENDANT: Yes.

01:06PM 1 THE COURT: Okay. Basically, for that to happen, I'd  
01:06PM 2 have to put you in prison for five years. I'm not suggesting  
01:06PM 3 I'm going to do that. Then, you would serve the five years.  
01:06PM 4 You would come out of prison. You'd be on supervised release,  
01:06PM 5 which is like parole. If you violate any of the terms of  
01:06PM 6 parole, you are entitled to a hearing. And if I were to find  
01:06PM 7 that you did, then I could put you in prison for an additional  
01:06PM 8 two more years. That's what that basically means. Do you  
01:06PM 9 understand all that?

01:06PM 10 THE DEFENDANT: Yes.

01:06PM 11 THE COURT: Okay.

01:06PM 12 MR. DIGIACOMO: Your Honor, Section 2, paragraph 4,  
01:06PM 13 we get into the elements and factual basis. In the  
01:06PM 14 paragraph 4, the defendant understands the nature of the  
01:06PM 15 offense set forth in paragraph 1 of the agreement and  
01:06PM 16 understands if this case proceeded to trial, the government  
01:06PM 17 would be required to prove beyond a reasonable doubt the  
01:06PM 18 following elements of the crime: A, that Isabella Miller-  
01:06PM 19 Jenkins was previously in the United States; B, that the  
01:06PM 20 defendant agreed with others including Lisa Miller and Ken  
01:06PM 21 Miller to assist in the taking of Isabella Miller-Jenkins from  
01:07PM 22 the United States and retaining her -- or the child outside  
01:07PM 23 the United States and that the defendant acted with the intent  
01:07PM 24 to obstruct the lawful exercise of parental rights of Janet  
01:07PM 25 Jenkins.

01:07PM 1 Factual basis begins at paragraph 5 and reads that,  
01:07PM 2 the defendant and the government agree to the following facts,  
01:07PM 3 which form the basis for the entry of the plea of guilty  
01:07PM 4 including relevant conduct; A, that Isabella Miller-Jenkins is  
01:07PM 5 the daughter of Lisa Miller and Janet Jenkins. Prior to  
01:07PM 6 September 22nd, 2009, Isabella Miller-Jenkins lived in the  
01:07PM 7 United States and Janet Jenkins had the parental rights to  
01:07PM 8 visit Isabella Miller.

01:07PM 9 That on or about September 21st, 2009, the defendant  
01:07PM 10 was a Mennonite minister in Managua, Nicaragua when he was  
01:07PM 11 contacted by Kenneth Miller. Kenneth Miller told the  
01:07PM 12 defendant that Lisa Miller was looking to leave the  
01:07PM 13 United States with her daughter, Isabella Miller-Jenkins, as  
01:07PM 14 she could lose custody of Isabella to Janet Jenkins.

01:07PM 15 Based on this information, the defendant agreed to  
01:08PM 16 assist in arranging Lisa and Isabella's departure from the  
01:08PM 17 United States. The defendant did also purchase a one-way  
01:08PM 18 airline ticket on September 21st, 2009 for Lisa and Isabella  
01:08PM 19 to travel from Canada to Managua, Nicaragua on September 22nd,  
01:08PM 20 2009. Lisa and Isabella departed Canada on or about  
01:08PM 21 September 22nd, 2009 and arrived in Managua, Nicaragua.

01:08PM 22 The defendant learned, in November 2009, that Janet  
01:08PM 23 Jenkins was awarded custody of Isabella Miller-Jenkins and the  
01:08PM 24 defendant continued to assist Lisa Miller with the assistance,  
01:08PM 25 up to and including May of 2010, when he accepted and provided

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Lisa Miller with money.

THE COURT: Do you understand all that, sir?

THE DEFENDANT: Yes, Your Honor.

THE COURT: How would you prove all this, Mr. DiGiacomo?

MR. DIGIACOMO: Well, Your Honor, we would prove this case started out by offering testimony of Janet Jenkins, who would testify regarding the parental rights that she had with her daughter, Isabella Miller-Jenkins.

We would also introduce evidence consistent with what we offered in the Philip Zodhiates trial, which was banking records, telephone records establishing communication between this defendant and Kenneth Miller. We would also introduce banking records with respect to money that was sent down from the United States down to Mr. Miller.

And in addition, Your Honor, to the phone records and the testimony of the various witnesses who helped Lisa Miller depart, there was also admissions by this defendant in the form of a video deposition whereby he admitted to his involvement and his role into the facts that I just laid out.

THE COURT: Do you understand all that, sir?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay.

MR. DIGIACOMO: Your Honor, now we get into the guideline calculation section and it begins, paragraph 6. The

01:09PM 1 defendant understands that the Court must consider but is not  
01:09PM 2 bound by the sentencing guidelines of the Sentencing Reform  
01:09PM 3 Act of 1984.

01:09PM 4 Paragraph 7 we begin with the calculations and it  
01:09PM 5 says that the government and the defendant agree that  
01:09PM 6 Guideline Section 2J1.2(a) applies to the offense of  
01:10PM 7 conviction and provides for a base offense level of 14.

01:10PM 8 THE COURT: Do you understand that, sir?

01:10PM 9 THE DEFENDANT: Yes, sir.

01:10PM 10 THE COURT: You saw this table with all these numbers  
01:10PM 11 on it?

01:10PM 12 THE DEFENDANT: I haven't, but I believe we talked  
01:10PM 13 about the sentencing guidelines.

01:10PM 14 THE COURT: Do you have a copy of the table?

01:10PM 15 MR. CONRAD: I have a copy of my guideline book, Your  
01:10PM 16 Honor. I actually wrote them out for him, Your Honor. I  
01:10PM 17 actually wrote them out.

01:10PM 18 THE COURT: I want him to see the actual table. See  
01:10PM 19 all those numbers on that table?

01:10PM 20 THE DEFENDANT: Yes.

01:10PM 21 THE COURT: This table is very important. You are  
01:10PM 22 going to end up somewhere on this table. And where you end up  
01:10PM 23 on the table, that's a range of months that are being  
01:10PM 24 recommended to the Court as to what the sentence should be.  
01:10PM 25 I'm not bound by it, but I am going to carefully consider it.

01:10PM 1 You want to end up as far from the top of this table as you  
01:10PM 2 can and as far away from the bottom, because as you go down  
01:10PM 3 that page, those numbers get pretty high.

01:10PM 4 Now, these numbers didn't come out of the air. They  
01:11PM 5 came out of -- let me back up. In 1984, Congress was very  
01:11PM 6 concerned about what they determined was an unwarranted  
01:11PM 7 disparity in sentencing. What does that mean? That means  
01:11PM 8 that individuals committing similar crimes under similar  
01:11PM 9 circumstances many times may receive very different sentences,  
01:11PM 10 yet all the facts and circumstances were basically the same.

01:11PM 11 So, what Congress did is they formed a commission.  
01:11PM 12 It's called the United States Sentencing Commission. And they  
01:11PM 13 spent -- well, they still exist today. And they spent years  
01:11PM 14 analyzing all the federal violations to try to establish a  
01:11PM 15 system that would be fairer than just a judge imposing any  
01:11PM 16 sentence he or she wanted to up to the maximum.

01:11PM 17 You can imagine what it would feel like, let's say,  
01:11PM 18 that certain circumstances would make -- we'll make a  
01:11PM 19 hypothetical. We'll make this up. That if someone were to  
01:12PM 20 plead guilty to this offense and I gave that person probation,  
01:12PM 21 then you said, well, Judge Arcara is a nice fellow, he'll  
01:12PM 22 probably give me the same. He'll give me probation because he  
01:12PM 23 gave the other guy probation and everything is the same. Then  
01:12PM 24 you pleaded guilty in front of me and I put you in jail for  
01:12PM 25 five years because I didn't like your mustache or I didn't

01:12PM 1 like something about you. Okay?

01:12PM 2 So, that's what they were concerned about. It just  
01:12PM 3 seemed to be unfair. And there were situations where judges  
01:12PM 4 were giving very different sentences in the circumstances and  
01:12PM 5 it didn't seem to be a fair way to do it. Judges should have  
01:12PM 6 a little more, let's say, fairness in administering justice  
01:12PM 7 throughout the United States. And this applies throughout the  
01:12PM 8 United States, no matter who you are.

01:12PM 9 So, before the guidelines went into effect, the judge  
01:12PM 10 could give you probation, he could give you five years,  
01:12PM 11 whatever. So, the new rules -- now, originally, these things  
01:12PM 12 were mandatory. Now, they're not mandatory. The Supreme  
01:12PM 13 Court says, no, they are -- I give you -- they're guidelines  
01:13PM 14 to give you an idea. And it's -- overall, it's worked out  
01:13PM 15 fairly well, because individuals have a better idea what the  
01:13PM 16 sentence would be. Before, they really didn't have any idea.

01:13PM 17 Before, there was a lot of opposition to these when  
01:13PM 18 they went into effect. Judges didn't like that idea. Well,  
01:13PM 19 most of the judges today accepted it and like it because it  
01:13PM 20 does seem to be a little bit fairer. It's fairer for the  
01:13PM 21 lawyer, because the lawyer gets a little better idea as to  
01:13PM 22 what the range may be that the judge may impose at sentence.  
01:13PM 23 Before, he didn't have the foggiest idea.

01:13PM 24 So, what they did is they ran these hearings all  
01:13PM 25 throughout the United States. They heard from lawyers. They

01:13PM 1 heard from police. They heard from social workers. They  
01:13PM 2 heard from the religious community. They heard from everyone  
01:13PM 3 imaginable and everyday citizens.

01:13PM 4 They came up with these guidelines. And the  
01:13PM 5 guidelines they came up with, this went into in effect in  
01:13PM 6 1988, okay? So, they ended up with this book. This is like a  
01:13PM 7 Bible, you might say. It's a road map as to how we get a  
01:14PM 8 number that will fit your situation, because everybody is  
01:14PM 9 different. You can't just come up and say, you did this, you  
01:14PM 10 go to jail for X amount of time. So, this was a long, very  
01:14PM 11 complicated process. Okay?

01:14PM 12 So, what they did is they heard all this testimony  
01:14PM 13 and they took every violation of every federal statute and  
01:14PM 14 gave it a number, 1 to 43. That's those numbers in the left-  
01:14PM 15 hand margin. Okay? The more serious the offense, the higher  
01:14PM 16 the number. Okay? And no matter who your lawyer is, no  
01:14PM 17 matter where you are in the United States, these are the rules  
01:14PM 18 that apply.

01:14PM 19 Let's make a hypothetical situation. Let's assume  
01:14PM 20 that, hypothetically, that a person violates a particular  
01:14PM 21 statute. Let's say the number was 25. Okay? This is all  
01:14PM 22 hypothetical. And you look at the right-hand margin and it  
01:14PM 23 says 57 to 71. Those are the months that are being  
01:14PM 24 recommended.

01:14PM 25 Now, things are very different involving different

01:14PM 1 individuals. Let's say a gun was used. Okay? That would  
01:15PM 2 raise the number up. Let's assume you were an organizer, a  
01:15PM 3 leader of a big group of people. That would probably make the  
01:15PM 4 number go up higher. Let's assume you had a minor role, the  
01:15PM 5 number would probably come down.

01:15PM 6 So, in other words, they tried to set up a system  
01:15PM 7 where they looked at an individual and they try to factor in  
01:15PM 8 all the mitigating and aggravating circumstances to fit your  
01:15PM 9 situation. It's kind of like your lawyer with a tailor-made  
01:15PM 10 suit. They're trying to make this a tailor-made situation.  
01:15PM 11 Okay.

01:15PM 12 So, then they decided, once you get there, then they  
01:15PM 13 said, all right. Does the person have a prior record? If the  
01:15PM 14 person has a prior record -- well, if he doesn't have a prior  
01:15PM 15 record -- or she -- you stay in the first column. If you have  
01:15PM 16 a prior record, you then go into column 2, 3, 4, 5, or 6,  
01:15PM 17 depending upon how serious your record is. If you have, you  
01:15PM 18 know, a public enemy number one, he would probably be in 6.

01:15PM 19 In your situation, I think it's going to be 1. So,  
01:15PM 20 you'd be in the first column. And that's important to your  
01:15PM 21 benefit that you'd be -- you're a first-time offender. You  
01:15PM 22 shouldn't be treated, say, as someone who has violated the law  
01:16PM 23 all his or her life. Then, there's some other factors, which  
01:16PM 24 we're going to get into in a minute and let's go from there.

01:16PM 25 So, we started off with the number that -- let me

01:16PM 1 make sure I've got the right number here -- number 14. That's  
01:16PM 2 where you are. Okay. Right about there (indicating). So,  
01:16PM 3 now we're going to make some adjustments to fit your  
01:16PM 4 situation. I know your lawyer has done a much better job than  
01:16PM 5 I just did explaining it to you, but I want to make sure you  
01:16PM 6 understand it because this is important that you understand  
01:16PM 7 this, okay? All right.

01:16PM 8 MR. DIGIACOMO: Yes, Your Honor. Your Honor, to go  
01:16PM 9 off the Court's explanation of the adjustments. Paragraph 8  
01:16PM 10 begins to believe two adjustments that the government and the  
01:16PM 11 defendant agree that the following specific offense  
01:16PM 12 characteristics do apply: A being the three-level increase  
01:16PM 13 pursuant to Guideline Section 2J1.2(b)(2), the offense  
01:17PM 14 involved a substantial interference with the administration of  
01:17PM 15 justice and B, the two-level increase pursuant to Guideline  
01:17PM 16 Section 2J1.2(b)(3)(C), extensive in-scope preparation or  
01:17PM 17 planning.

01:17PM 18 And based on the adding of those two adjustments at  
01:17PM 19 paragraph 9, the defendant's adjusted offense level based upon  
01:17PM 20 the foregoing would be an adjusted offense level for this  
01:17PM 21 conviction is 19.

01:17PM 22 THE COURT: Do you understand that, sir?

01:17PM 23 THE DEFENDANT: Yes.

01:17PM 24 THE COURT: Okay.

01:17PM 25 MR. DIGIACOMO: Now, Your Honor, because the

01:17PM 1 defendant has agreed to plead guilty, he receives a benefit in  
01:17PM 2 paragraph 10 for acceptance of responsibility, which provides  
01:17PM 3 that, at sentencing, the government agrees not to oppose the  
01:17PM 4 recommendation that the Court apply the two-level downward  
01:17PM 5 adjustment of Guideline Section 3E1.1(a), acceptance of  
01:17PM 6 responsibility and further agrees to move the Court to apply  
01:17PM 7 for an additional one-level downward adjustment of Guideline  
01:17PM 8 Section 3E1.1(b), which would result in a total offense level  
01:17PM 9 of 16.

01:18PM 10 THE COURT: That provision is there that if someone  
01:18PM 11 is guilty of the offense and you are willing to accept  
01:18PM 12 responsibility for it, then you should get a reduction of  
01:18PM 13 three levels, which works to your benefit. By pleading  
01:18PM 14 guilty, it's evidence that you are accepting responsibility.  
01:18PM 15 The theory being, you save the government the time and expense  
01:18PM 16 of a trial, you should get a lower recommended sentence. If  
01:18PM 17 you went to trial and if you were convicted, in all  
01:18PM 18 likelihood, you would not get this benefit. Do you understand  
01:18PM 19 that, sir?

01:18PM 20 THE DEFENDANT: Yes.

01:18PM 21 THE COURT: And if you look at 16 at the low end  
01:18PM 22 versus 19 at the high end, you can see there's quite a bit of  
01:18PM 23 difference there in the range. Okay. There's no guarantee  
01:18PM 24 you'll get the lower end, but it gives you and your lawyer a  
01:18PM 25 chance to argue for a lower sentence than would otherwise be

01:18PM 1 available to you. Do you understand that, sir?

01:18PM 2 THE DEFENDANT: Yes.

01:18PM 3 THE COURT: Okay.

01:18PM 4 MR. DIGIACOMO: Your Honor, we now get into the  
01:18PM 5 criminal history category. It's the understanding of the  
01:18PM 6 government and the defendant that the defendant's criminal  
01:18PM 7 history category is 1 and the defendant understands that if  
01:18PM 8 the defendant is sentenced for or convicted of any other  
01:18PM 9 charges prior to the sentencing in this action, that his  
01:18PM 10 criminal history category may increase. And the defendant  
01:19PM 11 understands that he has no right to withdraw his plea of  
01:19PM 12 guilty based upon the Court's determination of his criminal  
01:19PM 13 history category.

01:19PM 14 THE COURT: All right.

01:19PM 15 MR. DIGIACOMO: Paragraph 12, Your Honor, is the  
01:19PM 16 calculations section and it says that, it's the understanding  
01:19PM 17 of the government and the defendant that with a total offense  
01:19PM 18 level of 16 and a criminal history category of 1, the  
01:19PM 19 defendant's sentencing range would be a term of imprisonment  
01:19PM 20 of 21 to 27 months, a fine of 5,000 to 50,000 and a period of  
01:19PM 21 supervised release of one to three years. Notwithstanding  
01:19PM 22 this, the defendant understands that, at sentencing, the  
01:19PM 23 defendant is subject to the maximum penalties set forth in  
01:19PM 24 paragraph 1 of the agreement.

01:19PM 25 THE COURT: Do you understand this, sir?



01:20PM 1 THE COURT: Okay. Let's go to the appeals section.

01:20PM 2 MR. DIGIACOMO: Your Honor, it begins at paragraph  
01:20PM 3 20. The defendant understands that Title 18, United States  
01:20PM 4 Code, Section 3742 affords the defendant a limited right to  
01:20PM 5 appeal the sentence imposed. The defendant, however,  
01:20PM 6 knowingly waives his right to appeal and collaterally attack  
01:20PM 7 any competent of the sentence imposed by the Court which falls  
01:20PM 8 within or is less than the sentencing range for imprisonment  
01:20PM 9 or fine and supervised release set forth in Section 3,  
01:20PM 10 paragraph 12 above, notwithstanding the manner in which the  
01:21PM 11 Court determines the sentence.

01:21PM 12 In the event of an appeal of the defendant's sentence  
01:21PM 13 by the government, the defendant reserves the right to argue  
01:21PM 14 the correctness of his sentence. The defendant further agrees  
01:21PM 15 not to appeal any restitution order which does not exceed the  
01:21PM 16 amount set forth in paragraph 1 of the agreement.

01:21PM 17 THE COURT: Do you understand all that, sir?

01:21PM 18 THE DEFENDANT: Yes.

01:21PM 19 THE COURT: Okay.

01:21PM 20 MR. DIGIACOMO: Paragraph 21. The defendant  
01:21PM 21 understands that by agreeing to not collaterally attack the  
01:21PM 22 sentence, he's waiving his right to challenge the sentence in  
01:21PM 23 the event that in the future he becomes aware of a previously  
01:21PM 24 unknown fact or a change in the law which the defendant  
01:21PM 25 believes would justify a decrease in his sentence.

01:21PM 1 The government also waives their right to appeal any  
01:21PM 2 component of the sentence imposed by the Court which falls  
01:21PM 3 within or is greater than the sentencing range for  
01:21PM 4 imprisonment, fine and supervised release set forth in  
01:21PM 5 Section 3, paragraph 12 above, again, notwithstanding the  
01:21PM 6 manner in which the Court determine the sentence. However, in  
01:21PM 7 the event of an appeal from the defendant's sentence by the  
01:22PM 8 defendant, the government reserves the right to argue the  
01:22PM 9 correctness of the defendant's sentence.

01:22PM 10 THE COURT: Do you understand all that, sir?

01:22PM 11 THE DEFENDANT: Yes, sir.

01:22PM 12 THE COURT: Summarize the cooperation.

01:22PM 13 MR. DIGIACOMO: Yes, Your Honor. The defendant will  
01:22PM 14 cooperate with the government by providing complete and  
01:22PM 15 truthful information regarding his knowledge of any and all  
01:22PM 16 criminal activity, whether undertaken by the defendant or  
01:22PM 17 others, involving or related to international parental  
01:22PM 18 kidnapping.

01:22PM 19 The defendant's cooperation shall include submitting  
01:22PM 20 to interviews by the government's attorneys and their agents,  
01:22PM 21 as well as testifying truthfully and completely before Grand  
01:22PM 22 Juries and at such other proceedings the government shall deem  
01:22PM 23 necessary, including but not limited to pretrial hearings,  
01:22PM 24 trials, sentencing hearings, forfeiture proceedings and  
01:22PM 25 returning to the United States to testify if so requested.

01:22PM 1 Your Honor, the defendant will also cooperate with  
01:22PM 2 any local, state or federal authorities who agree to abide by  
01:22PM 3 the terms of this cooperation section of this agreement.

01:22PM 4 In exchange for the defendant's plea of guilty and  
01:23PM 5 his cooperation in this agreement, the defendant will not be  
01:23PM 6 prosecuted by the Office of the United States Attorney for any  
01:23PM 7 other federal criminal offense committed in this district in  
01:23PM 8 any way involving or related to international parental  
01:23PM 9 kidnapping that the defendant has provided complete and  
01:23PM 10 truthful information.

01:23PM 11 If, upon the condition, the defendant has fully  
01:23PM 12 complied with all the terms and conditions of this agreement  
01:23PM 13 and the government determines that he has provided substantial  
01:23PM 14 assistance in the investigation or prosecution of other  
01:23PM 15 persons who have committed offenses, the government will move  
01:23PM 16 this Court, at sentencing, to depart downward from the  
01:23PM 17 guidelines three levels, as provided for in the Guideline  
01:23PM 18 Section 5K1.1, which, if granted by this Court, would result  
01:23PM 19 in a total offense level of 13 and a sentencing range of 12 to  
01:23PM 20 18 months of imprisonment.

01:23PM 21 However, the defendant understands the government's  
01:23PM 22 decision to make the motion is within the sole discretion of  
01:23PM 23 the government and the decision to grant the motion and the  
01:23PM 24 extent of any downward departure are matters solely within the  
01:24PM 25 discretion of the Court.

01:24PM 1 THE COURT: Do you understand that, sir?

01:24PM 2 THE DEFENDANT: Yes, Your Honor.

01:24PM 3 THE COURT: This provision in the guidelines is there  
01:24PM 4 to encourage people to help the government enforce the laws of  
01:24PM 5 the United States. Obviously, it's a good thing to do. As a  
01:24PM 6 country, this has been determined that it's a good thing to  
01:24PM 7 help the government enforce the laws. Of course it's a good  
01:24PM 8 thing to do.

01:24PM 9 And if you're willing to do that -- in this case  
01:24PM 10 apparently you are -- you can get a benefit; another three-  
01:24PM 11 level reduction, which again, puts you in a much better  
01:24PM 12 position than you would be if you had not agreed to cooperate  
01:24PM 13 with the government. Do you understand all that, providing  
01:24PM 14 this assistance?

01:24PM 15 THE DEFENDANT: Yes.

01:24PM 16 MR. DIGIACOMO: Your Honor, just to finish up the  
01:24PM 17 cooperation section, the defendant understands that this  
01:24PM 18 provision of the cooperation section does not preclude the  
01:24PM 19 prosecution of the defendant for perjury or making false  
01:24PM 20 statements in the event that he testifies falsely or provides  
01:24PM 21 false information to the government. It's also a condition  
01:24PM 22 that the defendant not commit any further crimes during the  
01:25PM 23 terms and condition of this agreement.

01:25PM 24 In the event the government believes that the  
01:25PM 25 defendant violated any conditions of the cooperation section,

01:25PM 1 the government, in addition to its other rights set forth in  
01:25PM 2 this section of the agreement, reserves the right to; A,  
01:25PM 3 modify any recommendation the government agreed to make in a  
01:25PM 4 motion pursuant to Guideline section 5K1.1 or Title 18,  
01:25PM 5 United States Code, Section 3553 and we can petition the  
01:25PM 6 Court, before or after sentencing, for an order declaring that  
01:25PM 7 the defendant breached the cooperation section of this  
01:25PM 8 agreement.

01:25PM 9 Your Honor, if the cooperation section is declared  
01:25PM 10 breached, there's various rights. The defendant shall  
01:25PM 11 thereafter be subject to prosecution for any federal criminal  
01:25PM 12 violations which the government has knowledge, including but  
01:25PM 13 not limited to perjury or obstruction of justice. The  
01:25PM 14 government may withdraw any motion filed pursuant to Guideline  
01:25PM 15 Section 5K1.1 or Title 18, United States Code, Section 3553,  
01:26PM 16 or Rule 35(b) of the Federal Rules of Criminal Procedure.

01:26PM 17 And the defendant will have no right to withdraw his  
01:26PM 18 plea of guilty that he has entered into today. And the  
01:26PM 19 defendant shall also waive all of his rights under Federal  
01:26PM 20 Rules of Criminal Procedure 11(f) and the sentencing  
01:26PM 21 guidelines, which expressly agree that all statements,  
01:26PM 22 testimony and tangible objects provided by the defendant could  
01:26PM 23 be used against him.

01:26PM 24 At the time of sentencing, Your Honor, of course the  
01:26PM 25 government will make the nature of the defendant's compliance

01:26PM 1 with this agreement known to the Court and the government may  
01:26PM 2 request that the sentencing be adjourned until full  
01:26PM 3 satisfaction of the terms and conditions of this cooperation  
01:26PM 4 section. In the event the defendant is sentenced prior to his  
01:26PM 5 completion of the cooperation section, the government reserves  
01:26PM 6 the right to modify any recommendations to be made by the  
01:26PM 7 government at sentencing.

01:26PM 8 And lastly, Your Honor, the defendant's attorney is  
01:26PM 9 permitted to be present at any of the questions or interviews  
01:26PM 10 by the government agents regarding the matters set forth in  
01:26PM 11 this agreement. That completes the summation of the  
01:27PM 12 cooperation section, Your Honor and then lastly, we get into  
01:27PM 13 the total agreements provision of the agreement.

01:27PM 14 THE COURT: All right.

01:27PM 15 MR. DIGIACOMO: May I proceed?

01:27PM 16 THE COURT: Yes, you may.

01:27PM 17 MR. DIGIACOMO: Your Honor, paragraph 35 reads that,  
01:27PM 18 this plea agreement represents the total agreement between the  
01:27PM 19 defendant, Timothy Miller and the government. No promises  
01:27PM 20 have been made by anyone other than those contained in this  
01:27PM 21 agreement. This agreement supercedes any other prior  
01:27PM 22 agreements, written or oral, entered into between the  
01:27PM 23 government and the defendant.

01:27PM 24 Below that is my signature with today's date, with  
01:27PM 25 the authorization on behalf of the Acting U.S. Attorney.

01:27PM 1 Finally paragraph -- page 14 reads, I have read this  
01:27PM 2 agreement, which consists of 14 pages. I have had a full  
01:27PM 3 opportunity to discuss this agreement with my attorney,  
01:27PM 4 Jeffrey A. Conrad. I agree that it represents the total  
01:27PM 5 agreement reached between myself and the government. No  
01:27PM 6 promises or representations have been made to me, other than  
01:27PM 7 what's contained in this agreement. I understand all of the  
01:27PM 8 consequences of my plea of guilty. I fully agree with the  
01:27PM 9 contents of this agreement and I am signing this agreement  
01:27PM 10 voluntarily and of my own free will.

01:28PM 11 And below that is the signature -- it would be  
01:28PM 12 Mr. Miller, with today's date. And next to that is his  
01:28PM 13 attorney, Mr. Conrad, also with today's date. And that's the  
01:28PM 14 completed agreement.

01:28PM 15 THE COURT: Now, Mr. Miller, we have gone over the  
01:28PM 16 agreement in court. You indicated you understand it. Your  
01:28PM 17 lawyer says that he's gone over it with you. He's satisfied  
01:28PM 18 you understand it. You signed it, indicating you understand  
01:28PM 19 it. Any questions?

01:28PM 20 THE DEFENDANT: No, Your Honor.

01:28PM 21 THE COURT: Are these all the terms and conditions of  
01:28PM 22 the plea agreement which we just read here in court?

01:28PM 23 THE DEFENDANT: Yes, Your Honor.

01:28PM 24 THE COURT: No one has made any other promises to  
01:28PM 25 you, have they?

01:28PM 1 THE DEFENDANT: No, Your Honor.

01:28PM 2 THE COURT: How old are you, sir?

01:28PM 3 THE DEFENDANT: I am 40.

01:28PM 4 THE COURT: And you were born and raised where?

01:28PM 5 THE DEFENDANT: I was born and raised in Honduras. I

01:28PM 6 have been living for the last 17 years -- or most of the

01:28PM 7 time -- in Nicaragua.

01:28PM 8 THE COURT: Okay. And what is the extent of your

01:28PM 9 education?

01:28PM 10 THE DEFENDANT: Excuse me?

01:28PM 11 THE COURT: How much schooling have you had?

01:28PM 12 THE DEFENDANT: Eighth grade.

01:28PM 13 THE COURT: Okay. And what kind of work do you do?

01:28PM 14 THE DEFENDANT: I do various things. I do computer

01:28PM 15 work, repair, as well as other repairs. I'm an electrician.

01:29PM 16 I do -- we do baking at home, various things that -- we're

01:29PM 17 self-employed.

01:29PM 18 THE COURT: Are you married?

01:29PM 19 THE DEFENDANT: Excuse me?

01:29PM 20 THE COURT: Are you married?

01:29PM 21 THE DEFENDANT: Yes.

01:29PM 22 THE COURT: Do you have children?

01:29PM 23 THE DEFENDANT: Yes. I have five that are in court

01:29PM 24 and my wife is here as well.

01:29PM 25 THE COURT: And what kind of hobbies do you have?

01:29PM 1 What do you like to do when you're not working and doing all  
01:29PM 2 the things that you want to do? What did you do in your spare  
01:29PM 3 time?

01:29PM 4 THE DEFENDANT: Well, I like to be with my family.  
01:29PM 5 That's one of the first things. I like to read. I like to  
01:29PM 6 learn new things. I don't know, I have interest in learning  
01:29PM 7 more, especially in the line of medical. I'm sure there's  
01:29PM 8 still a lot of things I haven't learned yet, that I'd like to  
01:29PM 9 do.

01:29PM 10 THE COURT: How many languages do you speak?

01:29PM 11 THE DEFENDANT: Three.

01:29PM 12 THE COURT: English, Spanish --

01:29PM 13 THE DEFENDANT: And Pennsylvania Dutch.

01:29PM 14 THE COURT: Pennsylvania Dutch. Okay. So, say  
01:30PM 15 something in Pennsylvania Dutch for us.

01:30PM 16 THE DEFENDANT: (Speaking in Pennsylvania Dutch.)

01:30PM 17 THE COURT: What does that mean?

01:30PM 18 THE DEFENDANT: How are you doing?

01:30PM 19 THE COURT: I'm doing okay. How are you doing?

01:30PM 20 THE DEFENDANT: (Speaking Pennsylvania Dutch).

01:30PM 21 THE COURT: Are you seeing a doctor for any reason?

01:30PM 22 THE DEFENDANT: No.

01:30PM 23 THE COURT: A psychiatrist?

01:30PM 24 THE DEFENDANT: No.

01:30PM 25 THE COURT: Have you ever been hospitalized or

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treated for narcotic addiction?

THE DEFENDANT: No. No, Your Honor.

THE COURT: Are you today under the influence of any drug, medicine or alcohol?

THE DEFENDANT: No. I have never touched any of that.

THE COURT: Mr. Conrad, your client's obviously intelligent, alert, focused, attentive. He clearly understands everything I'm saying. He does not appear to be under the influence of any drug, medicine or alcohol. Is that consistent with your observations?

MR. CONRAD: Absolutely. Yes, Your Honor.

THE COURT: Now, sir, has anyone forced you to plead guilty?

THE DEFENDANT: No.

THE COURT: Anyone threaten you in any way at all?

THE DEFENDANT: No.

THE COURT: Your willingness to plead guilty, you discussed the matter with your lawyer, he discussed it with the government's lawyer. And based on those discussions, this plea agreement was prepared and that's how this all came about, true?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you understand the offense which you are pleading guilty to is a serious offense? And if it's

01:31PM 1 accepted by the Court, you'll be found guilty and there will  
01:31PM 2 be no appeal, as long as the sentence is consistent with the  
01:31PM 3 terms and conditions of the plea agreement.

01:31PM 4 If, for some reason, the Court decided to go to a  
01:31PM 5 higher sentence -- I'm not suggesting I'm going to -- but if I  
01:31PM 6 decided it would be more reasonable to go higher, you could  
01:31PM 7 say, well, Judge I disagree with you. I don't think it is  
01:31PM 8 reasonable. And if I still did it, then you could say well,  
01:31PM 9 I'm going to take you to a higher court. You could appeal  
01:31PM 10 that. Okay? Otherwise, no appeal. This is your day in  
01:31PM 11 court. Do you understand that?

01:31PM 12 THE DEFENDANT: Yes.

01:31PM 13 THE COURT: Now, you have -- being deprived of  
01:31PM 14 this -- you are a citizen of Nicaragua?

01:31PM 15 THE DEFENDANT: No. I have dual citizenship with  
01:31PM 16 Honduras, as well as the United States.

01:31PM 17 THE COURT: And in the United States, you can vote?

01:31PM 18 THE DEFENDANT: I don't vote, but yes.

01:31PM 19 THE COURT: Okay. Well, you may lose some rights and  
01:31PM 20 that would be one of the rights you would lose, the right to  
01:31PM 21 vote. You may lose the right to -- in the United States to  
01:31PM 22 serve on a jury, the right to maybe public office. You'd have  
01:32PM 23 the right -- you'd lose the right maybe to possess a firearm  
01:32PM 24 if you were in the United States. Do you understand that?

01:32PM 25 THE DEFENDANT: Yes, Your Honor.

01:32PM 1 THE COURT: And do you understand all the possible  
01:32PM 2 consequences? We talked about paragraph 1 of the plea  
01:32PM 3 agreement. We talked about the guidelines. We talked about  
01:32PM 4 the possible restitution. We talked about the penalty  
01:32PM 5 assessment of \$100; the possible fine, the cost. Do you  
01:32PM 6 understand all that, sir?

01:32PM 7 THE DEFENDANT: Yes, sir.

01:32PM 8 THE COURT: Now, do you understand that you have a  
01:32PM 9 right to plead not guilty to this offense, which you've done  
01:32PM 10 up to the present time and you have a right to persist in that  
01:32PM 11 plea of not guilty and you have a right to a fair trial in  
01:32PM 12 this courtroom where a jury of 12 people will decide whether  
01:32PM 13 you're guilty or not guilty based upon the evidence and the  
01:32PM 14 law.

01:32PM 15 First of all, I'd be the judge and to the best of my  
01:32PM 16 ability, I would conduct the trial fairly and impartially. I  
01:32PM 17 have no interest in this case, other than to make sure you and  
01:32PM 18 the government get a fair trial.

01:32PM 19 In selecting that jury, we would have in the  
01:32PM 20 courtroom somewhere around 50 to 75 people, people who live in  
01:32PM 21 this area, people who are in our jury pool. They'd be in the  
01:33PM 22 courtroom. You'd be in the courtroom. Your attorney would be  
01:33PM 23 with you. They'd all be put under oath to answer all my  
01:33PM 24 questions honestly and truthfully.

01:33PM 25 If there were anyone in that group that would not be

01:33PM 1 fair and impartial, that person would be removed. And you'd  
01:33PM 2 have input on that through your lawyer and say, hey, Judge,  
01:33PM 3 that guy's already made up his mind. And if I agree with  
01:33PM 4 you -- and there's no reason why I wouldn't if it makes  
01:33PM 5 sense -- that person would be gone.

01:33PM 6 Also, you know, in life, Mr. Miller, you meet a lot  
01:33PM 7 of people that have a lot of opinions about a lot of things.  
01:33PM 8 And a lot of those people that have opinions about things,  
01:33PM 9 haven't got the foggiest idea what they're talking about. But  
01:33PM 10 they're so smart, they're going to give you their opinion  
01:33PM 11 whether you want to hear it or not. Those type of people  
01:33PM 12 would be gone because they don't need a trial. They've  
01:33PM 13 already decided that you're guilty. Do you understand all  
01:33PM 14 that, sir, that they would not be allowed to serve?

01:33PM 15 THE DEFENDANT: Yes, sir.

01:33PM 16 THE COURT: Also, that you could remove up to  
01:33PM 17 10 people for any reason, other than race or gender. You  
01:33PM 18 couldn't say, well, I don't want any women on my jury or I  
01:33PM 19 don't want any men on my jury or I don't want a particular  
01:33PM 20 race of people. You can't discriminate in that sense. Do you  
01:33PM 21 understand that, sir?

01:33PM 22 THE DEFENDANT: Yes.

01:34PM 23 THE COURT: Mr. Conrad would represent you. You'd  
01:34PM 24 have a right to see and to hear all the witnesses and have him  
01:34PM 25 cross-examine the witnesses. And after the government has

01:34PM 1 rested its case, you could put on a defense. You can subpoena  
01:34PM 2 witnesses or any records that have any information that would  
01:34PM 3 be relevant to your defense, but you don't have to do a thing.

01:34PM 4 You are presumed not guilty. You don't have to prove  
01:34PM 5 a thing to anyone in this courtroom. You're presumed not  
01:34PM 6 guilty. You could sit there and say you prove it,  
01:34PM 7 Mr. DiGiacomo. I don't have to prove anything and the jury  
01:34PM 8 could not hold that against you if you chose not to do that.  
01:34PM 9 And we'll have gone over that principle, as well as the  
01:34PM 10 principle that the indictment is no evidence, that you're  
01:34PM 11 presumed not guilty, the government has the burden of  
01:34PM 12 convincing all 12 jurors that you are guilty beyond a  
01:34PM 13 reasonable doubt before you could be found guilty.

01:34PM 14 These are all principles that we'll talk about during  
01:34PM 15 jury selection. These are principles that the jury will be  
01:34PM 16 informed of at the beginning of the trial and at the end of  
01:34PM 17 the trial. They'll be under oath to follow those  
01:34PM 18 instructions. Do you understand all that, sir?

01:34PM 19 THE DEFENDANT: Yes.

01:34PM 20 THE COURT: This is all our effort to make sure that  
01:35PM 21 you get a fair trial. Do you understand that?

01:35PM 22 THE DEFENDANT: Yes.

01:35PM 23 THE COURT: Now, by entering a plea of guilty, if  
01:35PM 24 accepted by the Court, there will be no trial. You'll have  
01:35PM 25 waived your right to trial and as well as all the other rights

01:35PM 1 we talked about. Do you understand that?

01:35PM 2 THE DEFENDANT: Yes.

01:35PM 3 THE COURT: Any questions, sir?

01:35PM 4 THE DEFENDANT: No, sir.

01:35PM 5 THE COURT: Counsel, do you know any reason why I  
01:35PM 6 should not accept the plea?

01:35PM 7 MR. DIGIACOMO: No, Your Honor.

01:35PM 8 THE COURT: Mr. Conrad, any reason I should not  
01:35PM 9 accept the plea?

01:35PM 10 MR. CONRAD: No, sir.

01:35PM 11 THE COURT: You're both satisfied I complied with all  
01:35PM 12 the requirements of Rule 11?

01:35PM 13 MR. DIGIACOMO: Yes, Your Honor.

01:35PM 14 MR. CONRAD: Yes, Your Honor.

01:35PM 15 THE COURT: Sir, how do you plead to Count 1, guilty  
01:35PM 16 or not guilty?

01:35PM 17 THE DEFENDANT: Guilty.

01:35PM 18 THE COURT: It is the finding of the Court that the  
01:35PM 19 defendant is fully competent and capable of entering an  
01:35PM 20 informed plea. His plea of guilty is a knowing and voluntary  
01:35PM 21 plea supported by an independent basis of fact containing each  
01:35PM 22 of the essential elements of the offense charged. His plea is  
01:35PM 23 therefore accepted and he is now judged guilty of Count 1.

01:35PM 24 Sentencing will be scheduled for March 23rd at 12:30.

01:35PM 25 A written presentence report will be prepared by the probation

01:35PM 1 office to assist the Court in imposing sentence. You'll be  
01:35PM 2 afforded an opportunity to meet with the probation officer to  
01:35PM 3 provide information in the report. Your attorney should be  
01:36PM 4 present. You'll receive a copy of the report, as well as your  
01:36PM 5 attorney.

01:36PM 6 You will be able to file any additional information  
01:36PM 7 or any motions or objections that are consistent with the  
01:36PM 8 terms and conditions of the plea agreement and both you and  
01:36PM 9 your attorney will have an opportunity to address the Court at  
01:36PM 10 time of sentencing and say anything you wish to say in  
01:36PM 11 mitigation of the sentence. The schedule for filing all  
01:36PM 12 papers will be as follows.

01:36PM 13 THE CLERK: The initial presentence report will be  
01:36PM 14 due February 6th. The statement of the parties with respect  
01:36PM 15 to sentencing factors and objections, if any and motions, if  
01:36PM 16 any, including the government's 5K1.1 motion, any notice by  
01:36PM 17 the government not to file a 5K1.1 motion or any motion by the  
01:36PM 18 government for an extension of time to file a 5K1.1 motion  
01:36PM 19 will be due March 2nd. The defense notice of the government's  
01:36PM 20 failure to file a 5K1.1 motion will be due March 7th.

01:36PM 21 Responses to any objections or responses to any  
01:36PM 22 motions will be due March 9th. A sentencing memorandum and/or  
01:37PM 23 character letter in support of the defendant will be due  
01:37PM 24 March 9th. Any motion to adjourn the sentencing date will be  
01:37PM 25 due no later than March 13th. The final presentence report

01:37PM 1 will be due March 16th and the government's response to any  
01:37PM 2 legal arguments in defendant's sentencing memorandum will be  
01:37PM 3 due March 16th.

01:37PM 4 THE COURT: Mr. Conrad, you're here today. Do you  
01:37PM 5 have an arrangement to meet with the probation officer?

01:37PM 6 MR. CONRAD: I do not have that today, Your Honor.

01:37PM 7 THE COURT: Could you do that today, because you're  
01:37PM 8 here?

01:37PM 9 MR. CONRAD: Yes, sir.

01:37PM 10 MR. DIGIACOMO: Your Honor, just for the Court's  
01:37PM 11 awareness, Ms. Blackman is present and she's also handling  
01:37PM 12 Mr. Zodhiates's, so she's --

01:37PM 13 THE COURT: It's a miracle that she's present.

01:37PM 14 MR. DIGIACOMO: Judge, I don't know how you pulled it  
01:37PM 15 off.

01:37PM 16 MR. CONRAD: We can do that today.

01:37PM 17 THE COURT: Yeah. Do it today, please. You're here  
01:37PM 18 and it takes about an hour or so.

01:37PM 19 MR. CONRAD: Yes, sir.

01:37PM 20 THE COURT: And your client's here and get it all  
01:37PM 21 wrapped up.

01:37PM 22 MR. CONRAD: Yes, sir.

01:37PM 23 THE COURT: Okay. Anything further?

01:37PM 24 MR. DIGIACOMO: We just said that the defendant  
01:38PM 25 continues to be remanded, Your Honor.

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THE COURT: Yeah. He'll be remanded pending his next court appearance.

MR. DIGIACOMO: Thank you, Your Honor.

MR. CONRAD: Thank you.

THE COURT: Court will be in recess.

THE CLERK: All rise.

(Proceedings ended at 1:38 p.m.)

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\* \* \* \* \*

I certify that the foregoing is a  
correct transcription of the proceedings  
recorded by me in this matter.

s/ Megan E. Pelka, RPR

Court Reporter,

# UNITED STATES DISTRICT COURT

Western District Of New York

UNITED STATES OF AMERICA

v.

Timothy Miller

## JUDGMENT IN A CRIMINAL CASE

Case Number: 1:14CR00175-003

USM Number: 78268-083

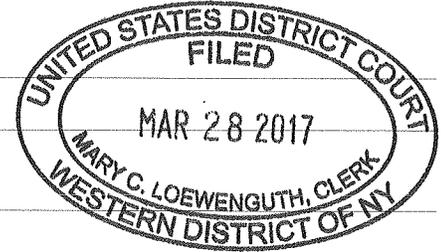
Jeffrey A. Conrad  
Defendant's Attorney

### THE DEFENDANT:

pleaded guilty to count 1 of the Superseding Indictment

pleaded nolo contendere to count(s) \_\_\_\_\_ which was accepted by the court.

was found guilty on count(s) \_\_\_\_\_ after a plea of not guilty.



The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §371 as it relates to 18 U.S.C. §1204	Conspiracy to Commit International Parental Kidnapping	09/2009	1

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

The defendant has been found not guilty on count(s) \_\_\_\_\_

Count 2 of the Superseding Indictment  is  are dismissed on the motion of the United States.

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

March 23, 2017  
Date of Imposition of Judgment

*Richard J. Arcara*  
Signature of Judge

Honorable Richard J. Arcara, Senior U.S. District Judge  
Name and Title of Judge

March 27, 2017  
Date

**EXHIBIT**  
**18**

DEFENDANT: Timothy Miller  
CASE NUMBER: 1:14CR00175-003

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:  
Time Served  
*The cost of incarceration fee is waived.*

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

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

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

at \_\_\_\_\_  a.m.  p.m. on \_\_\_\_\_

as notified by the United States Marshal.

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

before 2 p.m. on \_\_\_\_\_

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

### RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

at \_\_\_\_\_, with a certified copy of this judgment.

UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Timothy Miller  
CASE NUMBER: 1:14CR00175-003

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : One (1) year

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

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

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

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

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

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

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

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

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

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

### STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Timothy Miller  
CASE NUMBER: 1:14CR00175-003

### SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit to a search of his person, property, vehicle, place of residence or any other property under his control, based upon reasonable suspicion, and permit confiscation of any evidence or contraband discovered.

Travel restriction to the State of Pennsylvania.



DEFENDANT: Timothy Miller  
 CASE NUMBER: 1:14CR00175-003

**SCHEDULE OF PAYMENTS**

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

- A  Lump sum payment of \$ \_\_\_\_\_ due immediately, balance due
  - not later than \_\_\_\_\_, or
  - in accordance  C,  D,  E, or  F below; or
- B  Payment to begin immediately (may be combined with  C,  D, or  F below); or
- C  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after the date of this judgment; or
- D  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E  Payment during the term of supervised release will commence within \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F  Special instructions regarding the payment of criminal monetary penalties:  
 The defendant shall pay a special assessment of \$100, which shall be due immediately. If incarcerated, payment shall begin under the Bureau of Prisons Inmate Financial Responsibility Program. Payments shall be made to the Clerk, U.S. District Court (WD/NY), 2 Niagara Square, Buffalo, New York 14202.

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

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

Joint and Several

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

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

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

**U.S. DISTRICT COURT**  
**U.S. District Court, Western District of New York (Buffalo)**  
**CRIMINAL DOCKET FOR CASE #: 1:14-cr-00175-RJA-JJM-3**

Case title: USA v. Miller et al

Date Filed: 09/19/2014  
Date Terminated: 03/28/2017

Assigned to: Hon. Richard J.  
Arcara  
Referred to: Hon. Jeremiah J.  
McCarthy

**Defendant (3)**

**Timothy Miller**  
*TERMINATED: 03/28/2017*

represented by **Jeffrey A. Conrad**  
Clymer Musser & Conrad, P.C.  
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Lancaster, PA 17603  
717-299-7101  
Fax: 717-299-5115  
Email: [jeff.conrad@clymerlaw.com](mailto:jeff.conrad@clymerlaw.com)  
*PRO HAC VICE*  
*ATTORNEY TO BE NOTICED*  
*Designation: Retained*

**Laurence D. Behr**  
Barth, Sullivan & Behr  
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716-856-1300  
Fax: 716-856-1494  
Email: [lbeh@barthbehr.com](mailto:lbeh@barthbehr.com)  
*ATTORNEY TO BE NOTICED*

**Pending Counts**

CONSPIRACY TO DEFRAUD  
THE UNITED STATES  
(1)

18:371.F CONSPIRACY TO  
DEFRAUD THE UNITED  
STATES  
(1s)

18:1204.F INTERNATIONAL  
PARENTAL KIDNAPPING

**Disposition**

Deft is committed to the custody of the Bureau of Prisons for a term of time served; the cost of incarceration fee is waived. Upon release from imprisonment, Deft shall be placed on supervised release for a term of 1 year with standard and special conditions. Since the instant offense occurred after 9/13/1994, and it is not related to illegal substances, and Deft does not have a history of substance abuse problems, the mandatory requirement for drug testing is waived. Deft shall cooperate in the collection of a DNA sample as required by the Justice for All Act of 2004. While on supervised release, Deft's travel is restricted to the State of Pennsylvania. No fine. Deft to pay \$100.00 mandatory assessment, due immediately. The Court grants the Govt's oral motion to dismiss Count 2 of the Superseding Indictment in 14-CR-175 as to this Deft.

**EXHIBIT**  
**19**

(2)

**Highest Offense Level (Opening)**

Felony

**Terminated Counts**

18:1204.F INTERNATIONAL PARENTAL KIDNAPPING and 2 (2s)

**Disposition**

**Highest Offense Level (Terminated)**

Felony

**Complaints**

None

**Disposition**

**Plaintiff**

USA

represented by **Michael DiGiacomo**  
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Buffalo, NY 14202  
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Fax: 716-551-3146  
Email: [michael.digiacomo@usdoj.gov](mailto:michael.digiacomo@usdoj.gov)  
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**ATTORNEY TO BE NOTICED**  
*Designation: government attorney*

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**TERMINATED: 07/20/2016**  
*Designation: government attorney*

Date Filed	#	Docket Text
09/19/2014	<u>1</u>	INDICTMENT as to Lisa Miller (1) count(s) 1, 2, Philip Zodhiates (2) count(s) 1, 2, Timothy Miller (3) count(s) 1, 2. (DZ) (Entered: 09/19/2014)

09/19/2014	<u>2</u>	TEXT ORDER OF REFERRAL Hon. Jeremiah J. McCarthy, United States Magistrate Judge, is hereby designated to act in this case as follows: All pre-trial matters in this case are referred to the above-named United States Magistrate Judge, including all pre-trial matters that a Magistrate Judge may hear and determine pursuant to 28 U.S.C. Section 636(b)(1)(A), and those which a Magistrate Judge may hear and thereafter file a report and recommendation for disposition pursuant to Section 636(b)(1)(B). All procedural aspects of matters properly before the Magistrate Judge under this Order, including scheduling and the filing of briefs or other supporting material, shall be determined by the Magistrate Judge. All motions or applications shall be filed with the Clerk and made returnable before the Magistrate Judge. IT IS SO ORDERED. Signed by Hon. Richard J. Arcara on 9/19/14.(DZ) (Entered: 09/19/2014)
11/13/2014	<u>7</u>	NOTICE OF ATTORNEY APPEARANCE: Laurence D. Behr appearing for Timothy Miller <i>as local counsel to Jeffrey Conrad, Esq.</i> (Behr, Laurence) (Entered: 11/13/2014)
11/14/2014	<u>8</u>	MOTION for Leave to Appear Pro Hac Vice Pro Hac Vice Attorney: Jeffrey Conrad. by Timothy Miller as to Lisa Miller, Philip Zodhiates, Timothy Miller. (Pro Hac Admission Fee Paid – Receipt No. 0209–2146585) (Attachments: # <u>1</u> Affidavit Sponsor affidavit, # <u>2</u> Exhibit Attorney's Oath, # <u>3</u> Errata Oath of Office, # <u>4</u> Exhibit ECF data form)(Behr, Laurence) Modified to add receipt number on 12/4/2014 (CMD). (Entered: 11/14/2014)
11/17/2014	<u>9</u>	Sponsoring Affidavit of Laurence D. Behr in support of <u>8</u> Motion for Leave to Appear Pro Hac Vice : Attorney Jeffrey Conrad as to defendants Lisa Miller, Philip Zodhiates, Timothy Miller. (DAZ) (Entered: 11/17/2014)
11/17/2014	<u>11</u>	NOTICE OF ATTORNEY APPEARANCE Kathleen Ann Lynch appearing for USA. <i>NOTICE OF ATTORNEY APPEARANCE Paul J. Van de Graaf</i> (Lynch, Kathleen) (Entered: 11/17/2014)
11/17/2014	<u>12</u>	TEXT ORDER as to Philip Zodhiates (2) : With good cause shown and the consent of all parties, the Motion 10 to Adjourn the March 17, 2015 Oral Argument is granted. Oral Argument is rescheduled for March 24, 2015 at 2:00 p.m. SO ORDERED. Issued by Hon. Jeremiah J. McCarthy on 11/6/13.(DAZ) (Entered: 11/17/2014)
12/03/2014	<u>15</u>	NOTICE OF ATTORNEY APPEARANCE Paul J. Van De Graaf appearing for USA. (Van De Graaf, Paul) (Entered: 12/03/2014)
12/04/2014		E-Filing Notification as to Defendant, Timothy Miller: <u>8</u> MOTION for Leave to Appear Pro Hac Vice. ACTION REQUIRED: Please file an Attorney Database Form for Jeffrey A. Conrad, Esq. which can be found on our website at: <a href="http://www.nywd.uscourts.gov">http://www.nywd.uscourts.gov</a> . Filer please use the "continuation of exhibit" event to file this document and link it to the motion. (CMD) (Entered: 12/04/2014)
12/04/2014		Attorney update in case as to Timothy Miller. Attorney Jeffrey A. Conrad for Timothy Miller added. (CMD) (Entered: 12/04/2014)
12/04/2014	<u>16</u>	CONTINUATION OF EXHIBITS by Lisa Miller, Philip Zodhiates, Timothy Miller to <u>8</u> MOTION for Leave to Appear Pro Hac Vice Pro Hac Vice Attorney: Jeffrey Conrad. (Behr, Laurence) (Entered: 12/04/2014)
12/05/2014	<u>17</u>	TEXT ORDER as to Lisa Miller (1), Philip Zodhiates (2), Timothy Miller (3): The motion <u>8</u> of Jeffrey A. Conrad, Esq. for <i>pro hac vice</i> admission is granted. SO ORDERED. Issued by Hon. Jeremiah J. McCarthy on 12/5/14.(DAZ) (Entered: 12/05/2014)
04/24/2015	<u>41</u>	SUPERSEDING INDICTMENT as to Lisa Miller (1) count(s) 1s, 2s, Philip Zodhiates (2) count(s) 1s, 2s, Timothy Miller (3) count(s) 1s, 2s. (DLC) (Entered: 04/27/2015)
05/29/2015	<u>47</u>	MOTION for Hearing by Timothy Miller. (Attachments: # <u>1</u> Certificate of Service, # <u>2</u> Text of Proposed Order, # <u>3</u> Memorandum in Support)(Conrad, Jeffrey) (Entered: 05/29/2015)
05/29/2015	<u>48</u>	MOTION to Dismiss by Timothy Miller. (Attachments: # <u>1</u> Certificate of Service, # <u>2</u> Text of Proposed Order, # <u>3</u> Memorandum in Support, # <u>4</u> Exhibit 1, # <u>5</u> Exhibit 2, # <u>6</u> Exhibit 3, # <u>7</u> Exhibit 4, # <u>8</u> Exhibit 5, # <u>9</u> Exhibit 5.1, # <u>10</u> Exhibit 6, # <u>11</u> Exhibit 7, # <u>12</u> Exhibit 8, # <u>13</u> Exhibit 9, # <u>14</u> Exhibit 10, # <u>15</u> Exhibit 11, # <u>16</u> Exhibit 12.1, #

		<u>17</u> Exhibit 12.2, # <u>18</u> Exhibit 12.3)(Conrad, Jeffrey) (Entered: 05/29/2015)
06/01/2015	49	TEXT ORDER as to Timothy Miller: A conference to discuss a briefing schedule for defendant Timothy Miller's pending motions [47, 48] is scheduled for June 4, 2015 at 11:00 a.m. Out-of-town counsel may participate by telephone upon advance notice to chambers. The court will initiate the call. SO ORDERED. Issued by Hon. Jeremiah J. McCarthy on 6/1/15.(DAZ) (Entered: 06/01/2015)
06/04/2015	50	Minute Entry for proceedings held before Hon. Jeremiah J. McCarthy:Status Conference as to Timothy Miller held on 6/4/2015. Briefing schedule set for pending motions [47, 48]. Government's response to both motions shall be filed by 7/20/15; any reply by 8/31/15. Oral argument set for 9/9/15 at 2:00 P.M. Out-of-town counsel may participate by telephone upon advance notice to chambers. APPEARANCES: AUSA K. Lynch, P. Van De Graaf (via telephone); L. Behr (via telephone) and J. Conrad (via telephone) for deft Miller; Miller not present; J. Grable for co-deft P. Zodhiates. (FTR GOLD) (DAZ) (Entered: 06/04/2015)
06/04/2015		CALENDAR EVENT as to Timothy Miller: Oral Argument set for 9/9/2015 at 02:00 PM before Hon. Jeremiah J. McCarthy. (DAZ) (Entered: 06/04/2015)
07/20/2015	<u>60</u>	RESPONSE to Motion by USA as to Timothy Miller re <u>48</u> MOTION to Dismiss ( <i>Government's Response to Defendant's Notice of Motion</i> ) (Lynch, Kathleen) (Entered: 07/20/2015)
08/31/2015	<u>64</u>	REPLY TO RESPONSE to Motion by Timothy Miller re <u>48</u> MOTION to Dismiss (Attachments: # <u>1</u> Certificate of Service)(Conrad, Jeffrey) (Entered: 08/31/2015)
09/09/2015	65	Minute Entry for proceedings held before Hon. Jeremiah J. McCarthy:Oral Argument held on 9/9/2015 re <u>47</u> MOTION for a Hearing by Timothy Miller and <u>48</u> MOTION to Dismiss by Timothy Miller. Decision in due course. APPEARANCES: AUSA Kathleen A. Lynch; Jeffrey A. Conrad for defendant. Defendant waives his appearance. (FTR GOLD) (DAZ) (Entered: 09/09/2015)
09/15/2015	<u>66</u>	REPORT AND RECOMMENDATION as to Philip Zodhiates re 19 MOTION to Suppress and 51 Supplemental MOTION to Suppress <i>and Dismiss the Indictment</i> . Objections to R&R due by 10/2/2015. Signed by Hon. Jeremiah J. McCarthy on 9/15/15.(DAZ) (Entered: 09/15/2015)
09/17/2015	<u>67</u>	Consent MOTION for Extension of Time to File <i>Objections to Report and Recommendation</i> by Philip Zodhiates as to Lisa Miller, Philip Zodhiates, Timothy Miller. (Grable, James) (Entered: 09/17/2015)
10/06/2015	<u>69</u>	REPORT AND RECOMMENDATION as to Timothy Miller re <u>47</u> MOTION for Hearing , <u>48</u> MOTION to Dismiss . Objections to R&R due by 10/23/2015. Signed by Hon. Jeremiah J. McCarthy on 10/6/15.(DAZ) (Entered: 10/06/2015)
10/23/2015	<u>71</u>	RESPONSE in Opposition by Timothy Miller re <u>69</u> REPORT AND RECOMMENDATIONS as to Timothy Miller re <u>48</u> MOTION to Dismiss , <u>47</u> MOTION for Hearing Objections due fourteen days from receipt. (Attachments: # <u>1</u> Memorandum in Support, # <u>2</u> Affidavit Re: Argument, # <u>3</u> Certificate of Service)(Conrad, Jeffrey) (Entered: 10/23/2015)
11/02/2015	<u>73</u>	MEMORANDUM/BRIEF ( <i>Government's Response to Defendant's Objections to Magistrate Judge McCarthy's Report and Recommendation</i> ) by USA as to Timothy Miller (Lynch, Kathleen) (Entered: 11/02/2015)
11/05/2015	74	TEXT ORDER as to Timothy Miller: Defendant has filed objections (docketed as "Response in Opposition") <u>71</u> to Magistrate Judge McCarthy's Report and Recommendation <u>69</u> . Response papers <u>73</u> have been filed. Reply papers shall be filed on or before November 17, 2015. Oral argument is scheduled for December 10, 2015 at 9:00 AM before Hon. Richard J. Arcara. SO ORDERED. Issued by Hon. Richard J. Arcara on 11/5/15.(LAS) (Entered: 11/05/2015)
11/18/2015	<u>77</u>	MOTION to Adjourn Oral Argument by Timothy Miller. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Text of Proposed Order)(Conrad, Jeffrey) (Entered: 11/18/2015)
11/25/2015	78	TEXT ORDER as to defendants, Philip Zodhiates (2) and Timothy Miller (3). Defendant Miller filed <u>77</u> Motion to Adjourn Oral Argument scheduled for December

		10, 2015 as to Objections filed by defendant Miller to Report and Recommendation. The motion is granted. Oral Argument is adjourned to December 21, 2015 at 2:30 PM before Hon. Richard J. Arcara. The December 10, 2015 Oral Argument of defendant Zodhiates is also adjourned by the Court to December 21, 2015 at 2:30 PM as to the Objections filed by defendant Zodhiates to the Report and Recommendation. SO ORDERED. Issued by Hon. Richard J. Arcara on November 25, 2015.(DJD) (Entered: 11/25/2015)
01/20/2016	<u>79</u>	ORDER as to Timothy Miller: Magistrate Judge Jeremiah J. McCarthy's Report and Recommendation <u>69</u> is adopted in its entirety. The Court will not entertain defendant Miller's pretrial motions until he returns to the United States and is arraigned in this case. SO ORDERED. Signed by Hon. Richard J. Arcara on 1/20/16.(LAS) (Entered: 01/20/2016)
07/20/2016	<u>83</u>	NOTICE OF ATTORNEY APPEARANCE Michael DiGiacomo appearing for USA. (DiGiacomo, Michael) (Entered: 07/20/2016)
07/20/2016		Attorney update in case as to Lisa Miller, Philip Zodhiates, Timothy Miller. Attorney Kathleen Ann Lynch terminated. (KLH) (Entered: 07/21/2016)
08/31/2016		Minute Entry for proceedings held 8/31/2016 before Hon. Richard J. Arcara as to Defts, Philip Zodhiates (2) and Timothy Miller (3). Status Conference is held as to the extradition of defendant Timothy Miller and the impact on the 9/20/2016 trial date of defendant Philip Zodhiates. The Govt reports that Deft, Timothy Miller was arrested in Nicaragua based on the Red Notice warrant that was filed. The Govt further reports that Deft Timothy Miller could be brought to the United States as early as within 10 days. Nicaragua would deport Timothy Miller as soon as the U.S. Marshals Service is prepared to take Mr. Miller. The Govt raises the issue as to whether Deft Timothy Miller would proceed to trial with Deft Zodhiates or whether a severance would be filed. The Court holds these issues in abeyance pending a further Status Conference on 9/15/2016 at 9:00 AM. The Govt anticipates its proof to last four or five days. The Zodhiates defense anticipates three days and 17 defense witnesses to present its case. Appearances: Govt – Michael DiGiacomo (in person) and Paul Van De Graaf (by telephone); Deft (Zodhiates) – James Grable (in person) and Robert Hemley (by telephone); Deft (Timothy Miller) – Jeffrey Conrad (by telephone) (Court Reporter Megan Pelka.)(DJD) (Entered: 09/13/2016)
09/15/2016		Minute Entry for proceedings held 9/15/2016 before Hon. Richard J. Arcara as to Defts, Philip Zodhiates (2) and Timothy Miller (3). Status Conference is held. The Govt reports that Deft Timothy Miller has not yet arrived in the United States from Nicaragua. As this week has been a holiday week in Nicaragua, the Govt does not anticipate Deft Miller's arrival in the United States this week. The Govt suggests to the Court that there would be efficiencies if Defts Zodhiates and Timothy Miller proceeded to trial together, however, the Govt projects that it would be months before both Defts would be trial ready given Deft, Miller's pretrial posture. The Govt understands Deft, Zodhiates' desire to proceed to trial alone as previously scheduled for 9/20/2016. Deft Zodhiates orally moves for severance. Oral Argument is held. The Court orally grants Deft Zodhiates' oral motion for severance. Appearances: Govt – Michael DiGiacomo and Paul Van De Graaf; Deft (Zodhiates) – James Grable and Robert Hemley (via telephone) (without Deft); Deft (Timothy Miller) – No Appearance (Court Reporter Megan Pelka.)(DJD) (Entered: 09/15/2016)
09/15/2016	103	TEXT ORDER as to Defendants Lisa Miller (1), Philip Zodhiates (2) and Timothy Miller (3). Pursuant to Federal Rule of Criminal Procedure 14(a), and for the reasons stated on the record during proceedings held on September 15, 2016, the Court severs Defendant Philip Zodhiates from Defendant Timothy Miller. Further, pursuant to Rule 14(a), the Court sua sponte severs Defendant Philip Zodhiates from Defendant Lisa Miller. Given the possibility that Defendant Lisa Miller is a fugitive who might never be arrested and extradited, postponing Defendant Zodhiates' trial until Defendant Lisa Miller's trial (if Lisa Miller's trial were to ever occur) would substantially prejudice Defendant Zodhiates. SO ORDERED. Issued by Hon. Richard J. Arcara on September 15, 2016.(DJD) (Entered: 09/15/2016)
09/26/2016	<u>121</u>	Rule 5(c)(3) Documents Received as to Timothy Miller. (KM) (Entered: 09/27/2016)

09/27/2016		*** MOTIONS TERMINATED *** [20, 27, 32, 47, 48, 66, 67, 69] as to Lisa Miller (1), Timothy Miller (3), Philip Zodhiates (2) resolved. (DAZ) (Entered: 09/27/2016)
09/28/2016	<u>122</u>	Proposed Jury Instructions by Philip Zodhiates as to Lisa Miller, Philip Zodhiates, Timothy Miller (Grable, James) (Entered: 09/28/2016)
09/29/2016	<u>123</u>	MOTION to Exclude <i>NOTICE OF MOTION WITH AFFIDAVIT</i> by USA as to Timothy Miller. (DiGiacomo, Michael) (Entered: 09/29/2016)
09/30/2016	124	TEXT ORDER as to Timothy Miller : Consideration of the government's motion to exclude time <u>123</u> will be deferred until defendant's arraignment to give his counsel (either retained or appointed) an opportunity to be heard. To the extent that time is not otherwise currently excluded from Speedy Trial Act calendar, it remains excluded pursuant to 18 U.S.C. Sections 3161(h)(1)(D) and 3161(h)(1)(H) pending resolution of the government's motion <u>123</u> . SO ORDERED. Issued by Hon. Jeremiah J. McCarthy on 9/30/16.(DAZ) (Entered: 09/30/2016)
10/12/2016	126	TEXT ORDER: the arraignment of defendant Timothy Miller is scheduled for October 12, 2016, at 2:00 p.m., in U.S. Courthouse, 2 Niagara Square, Buffalo, N.Y. 14202 before Hon. Richard J. Arcara. Local counsel for defendant shall appear in person. Counsel shall be prepared to discuss entry of a schedule regarding pending motions, and whether additional motions will be filed, as well as any other matters that will permit an earlier trial. SO ORDERED by Hon. Richard J. Arcara on October 12, 2016. (WJG) (Entered: 10/12/2016)
10/14/2016		Set/Reset Hearings as to Timothy Miller: Status Conference set for 11/30/2016 12:30 PM before Hon. Richard J. Arcara. (DJD) (Entered: 11/23/2016)
10/14/2016		Minute Entry for proceedings held 10/14/2016 before Hon. Richard J. Arcara as to Deft, Timothy Miller (3). Arraignment is held as to the Superseding Indictment. Retained counsel, Jeffrey Conrad appears with Deft. The Deft waives the reading of the Superseding Indictment. The Govt summarizes the Superseding Indictment charges. The Court enters a plea of not guilty from the Deft as to all counts of the Superseding Indictment. Deft Timothy Miller waives a detention hearing and consents to be detained, however, he reserves the filing of possible motion for bail in the future. Deft's motion to dismiss remains pending. The parties request a status conference 30 days out to allow time to engage in voluntary discovery and explore a possible pretrial disposition. The Govt will provide the defense with the discovery on disk by next week. USMS informs the Court that Deft will be housed at the Niagara County Jail over the weekend and then transported to the Northeast Ohio Correctional Center. Defense counsel requests that Deft be detained closer to his office. The Court recommends that USMS detain Deft in the Steuben County Jail, if possible. Status Conference is scheduled for 11/30/2016 at 12:30 PM. Time is excluded; Govt to submit a Speedy Trial Act Order. Appearances: Govt – Michael DiGiacomo; Deft – Jeffrey Conrad (with Deft); USPO – Melissa Linton appearing for Brian Mamizuka (Court Reporter Megan Pelka.)(DJD) (Entered: 11/29/2016)
10/17/2016	<u>129</u>	ORDER OF DETENTION as to Timothy Miller. Signed by Hon. Richard J. Arcara on 10/14/16.(LAS) (Entered: 10/17/2016)
11/30/2016	<u>140</u>	PLEA AGREEMENT as to Timothy Miller. (KM) (Entered: 12/01/2016)
11/30/2016		Set/Reset Hearings as to Timothy Miller: Sentencing set for 3/23/2017 12:30 PM before Hon. Richard J. Arcara. (DJD) (Entered: 12/06/2016)
11/30/2016		Minute Entry for proceedings held 11/30/2016 before Hon. Richard J. Arcara as to Deft, Timothy Miller (3). Change of Plea proceeding is held. Deft pleads guilty to Count 1 of the Superseding Indictment. Deft is remanded to the custody of the U.S. Marshals Service pending sentencing. The following schedule is established for the submission of sentencing papers: initial Presentence Investigation Report due by 2/6/2017; Statement with Respect to Sentencing Factors, objections and/or motions, including 5K1.1 motion, government notice not to file 5K1.1 motion, or government motion for extension of time to file 5K1.1 motion if applicable, due by 3/2/2017; notice by the defendant of government failure to file 5K1.1 motion, if applicable, due by 3/7/2017 ; responses to objections and/or motions due by 3/9/2017; character letters and/or sentencing memorandum in support of the defendant due by 3/9/2017; motions to adjourn sentencing due by 3/13/2017; final Presentence Investigation Report due by 3/16/2017; government's response papers to legal arguments in defendant's sentencing

		memorandum due by 3/16/2017. <b>Sentencing is scheduled for 3/23/2017 at 12:30 PM before Hon. Richard J. Arcara.</b> Appearances: Govt – Michael DiGiacomo and Paul Van De Graaf; Deft – Jeffrey Conrad; USPO – No appearance –PROBATION NOTIFIED OF PLEA– (Court Reporter Megan Pelka.)(DJD) (Entered: 12/06/2016)
11/30/2016	<u>141</u>	TEXT ORDER as to defendant, Timothy Miller (3). The following schedule is established for the submission of sentencing papers: initial Presentence Investigation Report due by 2/6/2017; Statement with Respect to Sentencing Factors, objections and/or motions, including 5K1.1 motion, government notice not to file 5K1.1 motion, or government motion for extension of time to file 5K1.1 motion if applicable, due by 3/2/2017; notice by the defendant of government failure to file 5K1.1 motion, if applicable, due by 3/7/2017 ; responses to objections and/or motions due by 3/9/2017; character letters and/or sentencing memorandum in support of the defendant due by 3/9/2017; motions to adjourn sentencing due by 3/13/2017; final Presentence Investigation Report due by 3/16/2017; government's response papers to legal arguments in defendant's sentencing memorandum due by 3/16/2017. SO ORDERED. Issued by Hon. Richard J. Arcara on November 30, 2016.(DJD) (Entered: 12/06/2016)
12/16/2016	<u>143</u>	Sealed Document as to Lisa Miller, Philip Zodiates, Timothy Miller. (KM) (Entered: 12/20/2016)
01/19/2017	<u>149</u>	Arrest Warrant Returned Executed on 10/14/2016 in case as to Timothy Miller. (KM) (Entered: 01/19/2017)
03/02/2017	<u>165</u>	MOTION by USA as to Timothy Miller. (DiGiacomo, Michael) (Entered: 03/02/2017)
03/02/2017	<u>166</u>	STATEMENT WITH RESPECT TO SENTENCING FACTORS by USA as to Timothy Miller (DiGiacomo, Michael) (Entered: 03/02/2017)
03/17/2017	<u>180</u>	SENTENCING MEMORANDUM by Timothy Miller (Conrad, Jeffrey) (Entered: 03/17/2017)
03/21/2017	<u>181</u>	MEMORANDUM/BRIEF <i>GOVERNMENT'S RESPONSE TO TIMOTHY MILLER'S SENTENCING MEMORANDUM</i> by USA as to Timothy Miller (Attachments: # <u>1</u> Exhibit Attachment A)(DiGiacomo, Michael) (Entered: 03/21/2017)
03/23/2017		Minute Entry for proceedings held 3/23/2017 before Hon. Richard J. Arcara as to Deft, Timothy Miller (3), Count(s) 1 (Superseding Indictment). Sentencing is held. The Court accepts the terms and conditions of the plea agreement and the plea of guilty. The Presentence Investigation Report is placed in the record under seal. If an appeal is filed, counsel on appeal will be permitted access to the sealed report, except that counsel on appeal will not be permitted access to the recommendation section. Deft is committed to the custody of the Bureau of Prisons for a term of time served; the cost of incarceration fee is waived. Upon release from imprisonment, Deft shall be placed on supervised release for a term of 1 year with standard and special conditions. Since the instant offense occurred after 9/13/1994, and it is not related to illegal substances, and Deft does not have a history of substance abuse problems, the mandatory requirement for drug testing is waived. Deft shall cooperate in the collection of a DNA sample as required by the Justice for All Act of 2004. While on supervised release, Deft's travel is restricted to the State of Pennsylvania. No fine. Deft to pay \$100.00 mandatory assessment, due immediately. The Court grants the Govt's oral motion to dismiss Count 2 of the Superseding Indictment in 14–CR–175 as to this Deft. Appearances: Govt – Paul Van De Graaf; Deft – Jeffrey Conrad (with Deft); USPO – Tina Blackman (Court Reporter Megan Pelka.)(DJD) (Entered: 03/27/2017)
03/27/2017	<u>189</u>	Sealed Document (KM) (Entered: 03/31/2017)
03/27/2017	<u>190</u>	PRESENTENCE INVESTIGATION REPORT (Sealed) as to Timothy Miller. (KM) (Entered: 03/31/2017)
03/28/2017	<u>191</u>	JUDGMENT as to Timothy Miller (3), Additional certified copies forwarded to USPO, USM, US Attorney, Debt Collection, Financial Department. Signed by Hon. Richard J. Arcara on 3/27/2017.(KM) (Entered: 03/31/2017)

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

VOL. VII

UNITED STATES OF AMERICA, )  
) Case No. 1:14-CR-00175  
) (RJA)(JJM)  
Plaintiff, )  
)  
vs. ) September 29th, 2016  
)  
PHILIP ZODHIATES, )  
)  
Defendant. )

TRANSCRIPT OF JURY TRIAL PROCEEDINGS  
BEFORE THE HONORABLE RICHARD J. ARCARA  
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: U.S. ATTORNEY'S OFFICE  
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GRAVEL & SHEA PC  
BY: ROBERT B. HEMLEY, ESQ.  
DAVID A. BOYD, ESQ.  
76 St. Paul Street  
P.O. Box 369  
Burlington, VT 05402

**EXHIBIT**  
**20**

1 APPEARANCES CONTINUED:

2 Court Reporter: MEGAN E. PELKA, RPR  
3 Robert H. Jackson Courthouse  
4 2 Niagara Square  
5 Buffalo, NY 14202  
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1 THE CLERK: All rise. The United States District  
2 Court is now in session. The Honorable Richard J. Arcara  
3 presiding. You may be seated. Criminal Action 2014-175A,  
4 United States vs. Philip Zodhiates. Objection to charge.  
5 Counsel, please state your name and the party you represent  
6 for the record.

7 MR. VAN DE GRAAF: Paul Van De Graaf for the  
8 United States, Your Honor.

9 MR. DIGIACOMO: Michael DiGiacomo for the  
10 United States.

11 MR. HEMLEY: Good morning, Your Honor. Robert Hemley  
12 for Mr. Zodhiates.

13 THE COURT: Good morning, Mr. Hemley.

14 MR. GRABLE: James Grable for Mr. Zodhiates. Good  
15 morning, Your Honor.

16 THE COURT: Good morning, gentlemen.

17 MR. BOYD: David Boyd for Mr. Zodhiates.

18 THE COURT: Mr. Boyd, your voice is always so soft,  
19 it's hard to hear you sometimes.

20 MR. BOYD: I'll make sure to speak up today.

21 THE COURT: There we go. We've got -- now, I hear  
22 you. We've got some -- I don't know, maybe one or two  
23 unresolved issues here on the charge. Mr. Hemley, I guess  
24 you're going to go first or Mr. Boyd or whoever?

25 MR. HEMLEY: Mr. Boyd, please, Your Honor.

1 THE COURT: All right, Mr. Boyd.

2 MR. BOYD: Good morning.

3 THE COURT: Good morning.

4 MR. BOYD: I just wanted to start by making sure I  
5 had clearly explained the basis for the curative instruction  
6 that we efiled and requested. During the summation, the  
7 prosecution said that Virginia law does not matter to intent,  
8 only Vermont law. That's incorrect as a matter of law under  
9 the --

10 THE COURT: Oh, by the way, have you seen my other  
11 proposed charge that I have?

12 MR. BOYD: With respect to the importance of --

13 THE COURT: There was some -- I made some changes. I  
14 think you were provided with them last night?

15 MR. BOYD: Yes. We did see those.

16 THE COURT: Oh, okay. All right. Just so you saw  
17 that. That's the way I'm going to charge up to that point.  
18 Okay.

19 MR. BOYD: Yes.

20 THE COURT: You have this additional one? All right.

21 MR. BOYD: Yes. This was the additional issue. We  
22 had efiled a revised proposed curative instruction --

23 THE COURT: Yes.

24 MR. BOYD: -- last night.

25 THE COURT: Yeah, this is it right here. I have it.

1 MR. BOYD: Yes. And the reason we requested that is  
2 the statement that Virginia law does not matter to intent,  
3 only Vermont law, is incorrect as a matter of law under the  
4 International Parental Kidnapping Act statute.

5 It provides that parental rights are defined by --  
6 and here I'm quoting from *Amer*, Second Circuit case, "the law  
7 of the state in which the child was habitually a resident  
8 immediately before the removal or detention." That quotes at  
9 110 F. 3d at 873. That state, in this case, was Virginia.  
10 Isabella Miller-Jenkins had lived in Virginia for six years  
11 before her departure. Her departure was in 2009. She had  
12 moved to Virginia in 2003.

13 Vermont law matters to this case only because  
14 Virginia ultimately deferred to the parental determinations in  
15 Vermont. But, strictly speaking, Virginia law was  
16 controlling. And if Virginia law had applied on the merits,  
17 Janet Jenkins would not have had parental rights.

18 And you can see that two ways. First, you can see  
19 the initial circuit court ruling, at the trial court level in  
20 Virginia, which declared that Janet Jenkins had no parental  
21 rights. And you can see that that still would have been true  
22 as of 2009 from the Virginia Court of Appeals' opinions  
23 entered in other cases at that time.

24 And one example of that would be *Damon v. York*, which  
25 is 54 Va. App. 544. That was a case that considered a number

1 of different issues, but one of them was the importance in  
2 Virginia of a Canadian same-sex marriage between two women.  
3 With respect to that marriage, the Court stated, "the marriage  
4 was void in all respects under Virginia law."

5 THE COURT: But that's not -- they used the word  
6 state in that decision?

7 MR. BOYD: In the *Amer* decision, yes.

8 THE COURT: Does that mean state or does that mean  
9 country?

10 MR. BOYD: It means state, specifically.

11 THE COURT: Why do you say that?

12 MR. BOYD: It's described in the *Amer* case. It's  
13 also described in some other cases, but it's all under the  
14 Hague Convention. And what it ultimately points to is the  
15 individual --

16 THE COURT: They were quoting an international  
17 treaty, the Second Circuit was?

18 MR. BOYD: Yes.

19 THE COURT: So, they were referring to a state. They  
20 were referring to a state like United States' states or  
21 they're referring to a country?

22 MR. BOYD: They are referring to an individual state  
23 within the United States. That --

24 THE COURT: You're sure of that?

25 MR. BOYD: Yes. It's --

1 THE COURT: Why are you so sure of that?

2 MR. BOYD: There's a First Circuit case that  
3 discusses it in more detail. The citation for that escapes  
4 me, although I have it with me. I can grab it. But the  
5 answer is, yes, they did it -- the law of a specific  
6 individual United States' state.

7 THE COURT: All right.

8 MR. BOYD: That controls.

9 THE COURT: That's your argument?

10 MR. BOYD: I think that's clear as a matter of Second  
11 Circuit --

12 THE COURT: Well, I don't know if it's as clear as  
13 you say it is, but --

14 MR. BOYD: That's my --

15 THE COURT: -- that's all right. Go ahead.

16 MR BOYD: -- argument.

17 THE COURT: All right. I didn't mean to throw you  
18 off, but I just -- I looked at that and I thought there may be  
19 a significant difference on that.

20 MR. BOYD: I don't believe there is. I think the  
21 First Circuit discussed it in more detail than the Second  
22 Circuit, but I do think it's clear, as a matter of circuit-  
23 level precedent, if not in the Second Circuit, certainly in  
24 the First, that it's individual state law rather than  
25 United States law. So, Virginia law ultimately determines

1 what the parental rights were for purposes of this case.

2 Now, Vermont law matters because Virginia ultimately  
3 deferred, but it's important that the jury understand that  
4 Virginia law is relevant to intent, because one of the  
5 critical elements of the defense is the distinction between  
6 parental rights and understanding parental rights.

7 That's an issue that should come as no surprise to  
8 the government, based on the previous trial of Kenneth Miller,  
9 when there was a colloquy about the importance of the Virginia  
10 litigation.

11 And Judge Sessions noted -- and here I'm quoting from  
12 a transcript page: "There are two separate issues that you  
13 are raising. The first is whether, in fact, the parental  
14 rights existed and obviously, Vermont law has been applied.  
15 The second is whether someone could read the Virginia  
16 decisions of the circuit court as raised on cross-examination  
17 and be confused. And that goes to the intent element and the  
18 knowledge in the intent element and that's why they would be  
19 generally admissible."

20 So, here, to intend to obstruct parental rights,  
21 Philip Zodhiates needed to understand that Janet Jenkins had  
22 parental rights under Virginia law and intend to obstruct  
23 those rights. That's what the government needs to prove  
24 beyond a reasonable doubt to prove intent. If the jury has a  
25 doubt that he understood -- a reasonable doubt that he

1 understood that Janet Jenkins had parental rights as a matter  
2 of Virginia law, which could come from the communications with  
3 Liberty Counsel -- there were phone calls around the time of  
4 the alleged removal -- it could come from emails throughout  
5 the time of the alleged retention; it could come from the  
6 complexity of the orders, most of which were admitted without  
7 objection or it could come from the many emails that  
8 summarized Virginia law and the Virginia proceedings.

9           On any of those bases, the jury could find a  
10 reasonable doubt that Mr. Zodhiates understood that Janet  
11 Jenkins had parental rights in Virginia.

12           And if the statement by the government during the  
13 summation is not specifically cured, the jury will be left  
14 with the assumption that the government stated correctly that  
15 Virginia law does not matter and that would remove entirely  
16 from the case a critical element of the defense, which is why  
17 we requested the proposed curative instruction that we did.

18           And I'd be happy to grab that First Circuit case on  
19 the state versus states issue if the Court could just give me  
20 a moment. I have it here with me. I just didn't --

21           THE COURT: All right. In the meantime, we'll hear  
22 from Mr. Van De Graaf.

23           MR. VAN DE GRAAF: Your Honor, the Court should not  
24 provide this supplemental curative instruction for four  
25 different reasons. First of all, the government's position is

1 that the defense is incorrect in their interpretation of law.  
2 The law here, in this case, clearly established that by 2009,  
3 when the conspiracy was alleged to have occurred, that the  
4 Vermont courts had jurisdiction over parental rights.  
5 Virginia law was not controlling parental rights. Vermont was  
6 controlling parental rights.

7           The *Amer* case is distinguishable on multiple grounds  
8 in this case. The *Amer* case is a case that I think, as Your  
9 Honor says, it's talking about a treaty and it's a case that  
10 involves issues about international law, not law between two  
11 states. And that's a case that didn't involve court orders  
12 that had already established parental rights.

13           THE COURT: What about this First Circuit case  
14 he's --

15           MR. VAN DE GRAAF: I don't know which First Circuit  
16 case he's talking about.

17           THE COURT: I don't either.

18           MR. VAN DE GRAAF: So, the government's first  
19 position is that they're legally incorrect.

20           The second position is we litigated these issues  
21 substantially before trial and talked about these issues with  
22 the Court. The Court made rulings about these issues before  
23 trial and we shouldn't be relitigating the Court's earlier  
24 decisions after closing arguments. That's not the time to  
25 relitigate positions.

1 Third, the defense and the government took positions  
2 on the charge of this Court in a charge conference before the  
3 closing arguments and this issue was never raised.

4 Fourth, I've been doing this for 30 years as a public  
5 prosecutor. I've never heard of a defense attorney asking for  
6 the Court to comment on the parties' closing arguments and the  
7 application of the facts of the law. That's all this is.

8 The parties made arguments about how intent could --  
9 how his knowledge of what was going on in Virginia could  
10 influence his intent and the defense never objected to the  
11 government's closing during it. This shouldn't be -- there's  
12 no need for the Court to give a curative instruction  
13 commenting on the parties' closings.

14 THE COURT: All right.

15 MR. BOYD: Your Honor, I think the case --

16 THE COURT: Could you provide Mr. Van De Graaf a copy  
17 of that decision? So -- well, we'll take a five-minute break.

18 THE CLERK: All rise.

19 THE COURT: How long is that First Circuit case? Is  
20 it very lengthy?

21 MR. BOYD: It is -- it is 19 Lexis pages.

22 THE COURT: It's what, sir?

23 MR. BOYD: It's 19 pages printed out from Lexis.

24 THE COURT: Could you underline the key part of it  
25 so --

1 MR. BOYD: Yes.

2 THE COURT: -- we don't have to read all 19 pages?

3 Okay. We'll take a short break and Mr. Van De Graaf, will you  
4 familiarize yourself as best you can? Denise, we'll bring the  
5 jury in at 10:00. Tell them to have a cup of coffee and  
6 relax.

7 (Brief recess)

8 THE CLERK: All rise. You may be seated.

9 MR. BOYD: I'd wanted to just begin by quickly  
10 responding to what the government said a moment ago. The  
11 suggestion that the -- that by 2009, Vermont courts had  
12 jurisdiction and that was established, ignores the  
13 distinction, again, between what parental rights are and what  
14 was understood about parental rights and that's the key  
15 distinction here.

16 We are also not seeking to relitigate anything that's  
17 previously been decided. You can see that from the Virginia  
18 opinions being admitted without objection and also from the  
19 government submitting a motive for intent instructions. The  
20 previous positions of the parties have been that the Virginia  
21 litigation is admissible and is relevant as to understanding  
22 and as to intent. The statement that it was -- Virginia law  
23 was irrelevant as to intent, that's a new position and that's  
24 what we're responding to with the proposed instructions.

25 Then, to address the Court's question about what

1 state means for state law purposes, in the *Amer* case, the  
2 Second Circuit case, the Second Circuit stated, "Article 3 of  
3 the Hague Convention provides that parental rights are to be  
4 defined by the law of the state in which the child was  
5 habitually a resident immediately before the removal or  
6 retention."

7           Skipping some citations, the Court goes on to state:  
8 "Although the concept of the state of habitual residence might  
9 be unclear at the margins, there is no doubt that in this case  
10 New York is that place." And it talks about the child in that  
11 case residing in New York.

12           The First Circuit case I had mentioned is  
13 *United States v. Fazal Ur Raheman Fazal*. It's 355 F. 3d 40.  
14 And in that case, the First Circuit stated, quote: "That  
15 IPKCA looks to state family law for purposes of defining  
16 parental rights" citing the statute and the house report which  
17 it quotes for the statement: "Parental rights are to be  
18 determined by reference to state law...does not in any way  
19 suggest that the statute depends on state criminal law to  
20 delineate the realm of circumstances through which such rights  
21 are transgressed."

22           So, the issue in the First Circuit case was whether  
23 you look to state family law, state criminal law or both and  
24 the answer in that case was state family law.

25           More recently than both of those cases, the District

1 Court for the District of Columbia considered where these  
2 rights come from and it stated: "The parties, in accord with  
3 every Court that has opined on the issue, agreed that these  
4 parental rights arise from the state where the child lived  
5 before leaving the United States." Here, Virginia.

6 And that cited the First Circuit case and the Second  
7 Circuit case before going on to state: So, the question here  
8 is whether Homaune could obstruct Reed's rights to physical  
9 custody under Virginia law by retaining M.H." -- the child in  
10 that case -- "in Iran."

11 So, the answer here is the law of the specific  
12 individual state, within the United States, where the child  
13 was habitually a resident is what defines parental rights for  
14 purposes of the statute and that's what makes Virginia law  
15 relevant to this case.

16 THE COURT: All right. Mr. Van De Graaf?

17 MR. VAN DE GRAAF: Your Honor, I believe Mr. Boyd is  
18 misreading the case. First of all, the Hague Convention, as  
19 Your Honor pointed out, doesn't address states within the  
20 United States at all. It's talking about what law controls  
21 the -- under the Hague Convention, by the way which isn't even  
22 a statute that is directly relevant.

23 In *Amer*, the Court says that you have to look to the  
24 International Parental Kidnapping Statute. The Hague  
25 Convention doesn't trump the International Parental Kidnapping

1 Statute. That's what Amer's about is a holding that a  
2 defendant can't rely on the Hague Convention to -- as a  
3 defense to the International Parental Kidnapping Statute --  
4 international parental kidnapping case.

5 Your Honor, the issue here is this first sentence in  
6 their supplemental instructions. It's just wrong. Parental  
7 rights, for the purposes of this case, are not defined by  
8 reference to the law of the state where the child lived before  
9 leaving the United States. That's just an incorrect statement  
10 of law.

11 In this case, Your Honor, the -- Lisa Miller filed a  
12 dissolution in Vermont in 2003. The Vermont court took  
13 jurisdiction over the child in 2003. Lisa Miller tried --  
14 tried to have that decision undermined in Virginia in 2004.  
15 But by 2007, the Virginia courts had recognized that Vermont  
16 had jurisdiction over all the custody issues.

17 That is a matter of law that the Court should and can  
18 decide, but I believe that the Court's already ruled that, by  
19 2009, the law was clear that Vermont had -- was the law that  
20 was defining parental rights for Isabella Miller-Jenkins.  
21 Your Honor's got that included in the draft instructions.  
22 It's just a false -- it's an incorrect statement to say that.

23 All these other cases, by the way, Your Honor, all  
24 these other cases that Mr. Boyd are citing are cases involving  
25 removals before courts have been involved, where the court has

1 to look to state law before judges have entered decisions  
2 about what state law controls. And so, I believe all these  
3 cases are distinguishable; *Amer*, the First Circuit case,  
4 they're all cases involving how to interpret what's -- when --  
5 the government agrees that state law governs parental rights.  
6 That's what -- that's what the International Parental  
7 Kidnapping Statute says.

8 But it can arise by state law or it can arise by  
9 court order. And here, Your Honor, I think as your amended  
10 jury instructions say, the parental rights were based on court  
11 orders. And those court orders are clear about what the law  
12 was on parental rights. And so, Mr. Boyd, I believe, is just  
13 wrong about what these cases say, wrong about the law and we  
14 shouldn't be litigating this after the charge conference and  
15 after the closing arguments.

16 THE COURT: All right. Gentlemen, I'll just take a  
17 short break and consider the admissions from both parties and  
18 I'll render a decision from the bench.

19 THE CLERK: All rise.

20 (Brief recess)

21 THE CLERK: All rise. You may be seated.

22 THE COURT: Because we're in a post-summation  
23 posture, the Court doesn't have enough time to have a jury  
24 out, waiting to be charged. We're already a half hour late.  
25 I'll have to render my decision orally.

1           Following summations on September 27th, 2016, the  
2 defendant requested a supplemental jury charge based on  
3 comments the government made in its summation regarding the  
4 relevance of Virginia law to the defendant's intent.

5           Specifically, the defense has requested that, at  
6 Docket 122, that the Court instruct the jury that, "if, as  
7 Lisa Miller requested, Virginia had found that Janet Jenkins  
8 had no parental rights, it would have been impossible for Lisa  
9 Miller to obstruct parental rights for purposes of the  
10 International Parental Kidnapping Statute because Janet  
11 Jenkins would have no parental rights that could be  
12 obstructed."

13           The defendant further argues a request that the Court  
14 instruct the jury that it may consider, "evidence about the  
15 litigation in both Vermont and Virginia."

16           When deciding whether defendant intended to obstruct  
17 Janet Jenkins' parental rights, the Court has considered the  
18 defendant's request, but the Court concludes that, in its  
19 current form, the Court's intended charge gives the jury a  
20 properly balanced instruction on what evidence it may consider  
21 with regard to the issue of intent. The Court's revised  
22 charge instructs the jury that the parental rights at issue  
23 arise under the law of Vermont at particular times.

24           At the defendant's request, the Court also added  
25 language to the charge instructing the jury that, to convict,

1 it must find beyond a reasonable doubt that the defendant knew  
2 of and intended to obstruct Vermont parental rights.

3 In its summation, the government urged the jury to  
4 deem the Virginia litigation irrelevant to whether the  
5 defendant had knowledge of and therefore intended to obstruct  
6 Vermont rights. Defense counsel, by contrast, urged the jury  
7 to consider Virginia litigation in its deliberations.

8 Nothing in the Court's current charge precludes the  
9 jury from considering both the Virginia and the Vermont  
10 litigation when it decides whether the defendant knew about  
11 and intended to obstruct Vermont rights. To the contrary, the  
12 Court's current charge mentions neither Virginia litigation  
13 nor the Vermont litigation. The jury heard considerable  
14 evidence about litigation in both states and nothing in the  
15 Court's intended instructions suggest that the jury may not  
16 properly consider evidence from both Vermont and Virginia.

17 The Court also believes that expressly instructing  
18 the jury that it may consider a Virginia litigation when  
19 deciding whether the defendant intended to obstruct Vermont  
20 rights runs the risk of unnecessarily confusing the jury as to  
21 what parental rights exactly are at issue in the indictment.  
22 Put differently, the Court has previously decided and will  
23 instruct the jury, that parental rights at issue in this  
24 document arise under Vermont law.

25 Instructing the jury that it may consider Virginia

1 litigation in its deliberation runs the unnecessary risk that  
2 the jury will incorrectly think either that Virginia parental  
3 rights are at issue or that the jury's being called upon to  
4 decide which state had jurisdiction over the custody dispute.

5 To support its argument, the defendant relies on the  
6 Second Circuit decision in *U.S. v. Amer*, 110 F. 3d 873. In  
7 the First Circuit's decision, *United States v. Fazal Ur*  
8 *Raheman Fazal*, at 355 F. 3d at page 40.

9 *Amer* states that: "Parental rights are defined by  
10 reference to the law of the state in which the child had  
11 habitually resided before the removal or retention." *Amer*  
12 also states, however, that "parental rights are to be  
13 determined by reference to state law."

14 It is unclear why the Second Circuit referred to both  
15 state and the state of habitual residence and to that extent  
16 *Amer* appears to provide unclear guidance.

17 The Court notes, however, that unlike this case, the  
18 child in *Amer* had been a resident of New York for a number of  
19 years and therefore, had no reason why the law of the state of  
20 the child's habitual residence, New York State, would not  
21 define parental rights. The Court also notes that in *Amer* no  
22 court order defined parental rights. Instead, the New York  
23 State law defined parental rights.

24 In this case, of course, Isabella's state of habitual  
25 residence is not necessarily the state whose law defined

1 parental rights. The First Circuit's decision in *Fazal* makes  
2 clear that, "the international parental kidnapping crime looks  
3 to the state family law for purposes of defining parental  
4 rights."

5 It is clear in this case that, as a matter of state  
6 family law, Vermont family law and not Virginia family law  
7 defined parental rights, regardless of where Isabella resided.  
8 See *Miller v. Jenkins* and *Miller v. Jenkins* at 637 S.E. 2d  
9 330, 337, Virginia Court of Appeals (2006).

10 Thus, after due consideration, the Court finds the  
11 government's reference to the Virginia law does not require a  
12 curative instruction. The Court, therefore, declines to  
13 include the defendant's proposed curative instruction at  
14 Docket 122 in the jury instructions. Bring the jury in in  
15 five minutes.

16 MR. HEMLEY: Your Honor, may I make a --

17 THE COURT: No. I think we've heard enough on this  
18 issue. I don't want to hear --

19 MR. HEMLEY: It's a different issue.

20 THE COURT: A different issue?

21 MR. HEMLEY: Yes, sir.

22 THE COURT: All right.

23 MR. HEMLEY: Two minutes, not even. I'm going to ask  
24 for a curative instruction as well, Your Honor, with regards  
25 to the remarks made in the rebuttal summation as improperly

1 shifting the burden to the defense. I would ask the Court,  
2 specifically, to tell the jury that the suggestion that we had  
3 some obligation to comment on a particular email is improper  
4 and that we did -- had no such obligation. Thank you, Your  
5 Honor.

6 THE COURT: Mr. Van De Graaf?

7 MR. VAN DE GRAAF: Your Honor, I think it was a  
8 proper comment on a response to the defense closing. The  
9 defense tried to list the government's evidence and I think  
10 it's a proper comment to say that they didn't mention some of  
11 my evidence.

12 THE COURT: Your request is denied. All right.

13 Bring the jury in.

14 (Brief recess)

15 (The jury entered the courtroom at 10:15 a.m.)

16 THE CLERK: All rise. The United States District  
17 Court is now in session. The Honorable Richard J. Arcara  
18 presiding. You may be seated. Criminal Action 2014-175A,  
19 United States v. Philip Zodhiates. Jury trial. Counsel,  
20 please state your name and the party you represent for the  
21 record.

22 MR. VAN DE GRAAF: Paul Van De Graaf for the  
23 United States, Your Honor.

24 MR. DiGIACOMO: Good morning, Your Honor. Michael  
25 DiGiacomo for the United States.

1 MR. HEMLEY: Robert Hemley for Mr. Zodhiates, Your  
2 Honor.

3 MR. GRABLE: James Grable for Mr. Zodhiates.

4 MR. BOYD: David Boyd for Mr. Zodhiates.

5 THE COURT: Good morning, everyone. We're very late.  
6 We were not out just sitting around having coffee. We were  
7 working very hard. How is everybody today?

8 (An off-the-record discussion was held.)

9 THE COURT: Okay. Ladies and gentlemen, you're about  
10 to enter your final duty, which is to decide the fact issues  
11 in this case. Before you do that, I will instruct you on the  
12 law. You must pay very careful and close attention to me now.  
13 I will go as slowly as I can and I will be as clear as  
14 possible.

15 I told you at the start of the trial that your  
16 principal function in this case would be to listen carefully  
17 and observe each witness who testified. It's obvious to me  
18 and to counsel that you have faithfully discharged this duty.  
19 You remained interested throughout the trial and it's evident  
20 that you followed testimony with close attention. I ask you  
21 to give me that same careful attention as I instruct you on  
22 the law.

23 You have now heard all the evidence in the case, as  
24 well as the final arguments from the lawyers for each side.  
25 My duty at this point is to instruct you on the law. It is

1 your duty to accept these instructions on the law and apply  
2 them to the facts as you have determined them to be, just as  
3 it's been my duty to preside over the trial and to decide what  
4 testimony and evidence is relevant under the law for your  
5 consideration.

6 As I emphasized several times during this trial --  
7 began, on these legal matters, you must accept the law as I  
8 give it to you. If a lawyer has stated a legal principle  
9 different from any that I state to you in my instructions, it  
10 is my instructions that you must follow.

11 You should not single out any instruction alone as  
12 stating the law, but you should consider my instructions as a  
13 whole when you return to deliberate in the jury room. You  
14 should not, any of you, be concerned about the wisdom of any  
15 rule that I state, regardless of any opinion you may have as  
16 to what the law may be or ought to be. It would violate your  
17 sworn duty to base a verdict upon any other view of the law  
18 from that which I give to you.

19 Your final role is to pass upon and decide the  
20 factual issues in this case. You, as members of the jury, are  
21 the sole and exclusive judges of the facts. In carrying out  
22 this duty, you pass upon the weight of the evidence. You  
23 determine the credibility of the witnesses. You resolve such  
24 conflicts as there may be in the testimony and you draw  
25 whatever reasonable inferences you decide to draw from the

1 facts as you have determined them. I will later discuss with  
2 you how to pass upon the credibility or the believability of  
3 the witnesses.

4 In determining the facts, you must rely upon your own  
5 recollection of the evidence. What the lawyers have said in  
6 their opening statements and their closing arguments, in their  
7 objections or in their questions is not evidence. In this  
8 regard, you should bear in mind a question put to a witness is  
9 never evidence. It is the answer which is in evidence. Nor  
10 is anything I may have said during the trial or may say during  
11 these instructions, with respect to a factual matter, to be  
12 taken as a substitute for your independent recollection. What  
13 I say is not evidence.

14 The evidence before you consists of the answers given  
15 by witnesses, obviously in conjunction with the question; the  
16 testimony they gave as you recall it and the exhibits that  
17 were received in evidence. The evidence does not include the  
18 attorneys' questions. Only the witnesses' answers are  
19 evidence. However, you may not consider any answer that I  
20 directed you to disregard or that I directed to be struck from  
21 the record. You simply are not to consider those answers.

22 Because you are the sole and exclusive judges of the  
23 facts, I do not mean to indicate any opinion as to the facts  
24 or what your verdict should be. The rulings that I have made  
25 during the trial are not any indication of my views of what

1 your decision should be as to whether or not the guilt of the  
2 defendant has been proven beyond a reasonable doubt.

3 I also instruct you not to draw any inference from  
4 the fact that upon occasion, I asked questions of certain  
5 witnesses. These questions were only intended for  
6 clarification or to expedite matters. They certainly were not  
7 intended to suggest any opinions on my part as to the verdict  
8 that you should render or whether any of the witnesses may  
9 have been more credible than other witnesses. You are  
10 expressly to understand that the Court has no opinion as to  
11 the verdict that you should render.

12 As to the facts, ladies and gentlemen, you are  
13 exclusive judges. You are to perform the duty of finding the  
14 facts without bias or prejudice as to any party. In  
15 determining the facts, I would like to remind you that before  
16 each of you were accepted and sworn to act as jurors, you were  
17 asked questions concerning competency, qualifications,  
18 fairness and freedom from prejudice and bias.

19 On the faith of those answers, each of you were  
20 accepted by the parties as a juror in this case. Therefore,  
21 those answers are as binding on each of you now as they were  
22 then and should remain so until you are discharged from  
23 consideration of this case. You are to perform the duty of  
24 finding the facts without bias or prejudice as to any party.  
25 You are to perform your duty with an attitude towards complete

1 fairness and impartiality.

2           The case is important to the government for the  
3 enforcement of criminal laws as a matter of prime concern to  
4 the community. Equally, it's important to a defendant -- to  
5 the defendant who is charged with serious crimes. The fact  
6 that the prosecution is brought in the name of the  
7 United States of America entitles the government to no greater  
8 consideration than that accorded to any other party to a  
9 litigation. By the same taken, it is entitled to no less  
10 consideration. All parties, whether the government or  
11 individuals, are equal before the law.

12           It is the duty of the attorneys for each side of the  
13 case to object when the other side offers testimony or other  
14 evidence which the attorney believes is not properly  
15 admissible. Counsel also have a right and a duty to ask the  
16 Court to make rulings of law and to request conferences out of  
17 the hearing of the jury. All those questions of law must be  
18 decided by me, the Court.

19           You should not show any prejudice against an attorney  
20 or his client because the attorney objected to the  
21 admissibility of evidence or asked for a conference out of the  
22 hearing of the jury or asked for the Court for a ruling on the  
23 law.

24           As I have already indicated, my rulings on the  
25 admissibility of evidence do not indicate any opinion about

1 the weight or effect of such evidence. You are the sole  
2 judges of the credibility of all the witnesses and the weight  
3 and effect of all the evidence. Your verdict --

4 Oh, by the way, it sounds like I'm repeating myself  
5 over and over and it will sound like that as I continue during  
6 these instructions, but -- I am repeating myself a lot, but  
7 it's also in a different context. It isn't all the exact same  
8 thing I just said. It sounds like it is, because I'm using  
9 the same words, but then it's also in a different context,  
10 okay? So, keep that in mind.

11 Your verdict must be based solely upon the evidence  
12 developed at trial or the lack of evidence. It would be  
13 improper for you to consider, in reaching your decision as to  
14 whether the government has sustained its burden of proof, any  
15 personal feelings that you may have about the defendant's  
16 race, religion, national origin, sex or age.

17 It would equally be improper for you to allow any  
18 feelings that you may have about the nature of the crimes to  
19 interfere with your decision-making process. To repeat, your  
20 verdict must be based exclusively upon the evidence or lack of  
21 evidence in the case as to both counts that are set forth in  
22 the indictment.

23 Under your oath as jurors, you are not to be swayed  
24 by sympathy. You are to be guided solely by the evidence in  
25 the case and the crucial question that you must ask yourselves

1 as you sift through the evidence is, has the government proven  
2 the guilt of the defendant beyond a reasonable doubt? It is  
3 for you alone to decide whether the government has proven that  
4 the defendant is guilty of the crimes charged, solely on the  
5 basis of the evidence and subject to the law as I am  
6 instructing you.

7 It must be clear to you that once you let fear or  
8 prejudice or bias or sympathy interfere with your thinking,  
9 there is a risk that you will not arrive at a true and just  
10 verdict. If you have a reasonable doubt as to the defendant's  
11 guilt, you should not hesitate, for any reason, to find a  
12 verdict of not guilty on the count or counts that you are  
13 considering.

14 But on the other hand, if you should find the  
15 government has met its burden of proving the defendant's guilt  
16 beyond a reasonable doubt, you should not hesitate, because of  
17 sympathy for the defendant or any other reason, to render a  
18 verdict of guilty on the count or counts that you are  
19 considering.

20 In a moment, I will instruct you on the evidence that  
21 you may consider in your deliberations. Before I do that,  
22 however, I must first remind you that, as I've stated  
23 throughout the course of the trial, that your verdict must be  
24 based solely on the evidence presented in this courtroom in  
25 accordance with these instruction. You must completely

1 disregard any report that you may have read in the press,  
2 heard it on -- seen on television or heard on the radio.

3           Indeed, it would be unfair and the parties have no --  
4 it would be unfair for you to consider such reports, since  
5 they are not evidence and the parties have no opportunity of  
6 contradicting their accuracy or otherwise explaining them  
7 away. In short, it would be a violation of your oath as  
8 jurors to allow yourselves to be influenced in any manner by  
9 such publicity.

10           Now, there are two kinds of evidence that you may  
11 properly consider in deciding whether the defendant is guilty  
12 or not guilty. One type of evidence is called direct  
13 evidence. Direct evidence is where a witness testifies to  
14 what he or she saw, heard or observed. In other words, when a  
15 witness testifies about what is known to him or her of his or  
16 her own knowledge, by virtue of his or her own senses; what he  
17 or she sees, feels, touches or hears; that is called direct  
18 evidence. I saw John Jones walking down the street. That's  
19 an example.

20           The other type of evidence you may consider is  
21 circumstantial evidence. Circumstantial evidence is evidence  
22 which tends to prove a disputed fact by proof of other facts.  
23 And there is a simple example of circumstantial evidence which  
24 I use here often. Assume that when you came into the  
25 courthouse this morning, the sun was shining and it was a nice

1 day. Assume that the courtroom blinds are drawn, the doors  
2 are closed and you cannot see outside. And as you're sitting  
3 here, someone walked in here with an umbrella that was  
4 dripping wet. Shortly thereafter, somebody else walked in  
5 with a raincoat that was also dripping wet.

6 Now, you cannot see outside of the courtroom and you  
7 cannot see whether or not it's raining, so you have no direct  
8 evidence of that fact. But on the combination of facts which  
9 I asked you to assume, it would be reasonable, it would be  
10 logical for you to conclude that it has been raining.

11 That is all there is to circumstantial evidence. You  
12 infer on the basis of reason and experience and common sense  
13 that an established fact exists, somebody walked in with a wet  
14 umbrella, a wet raincoat, or the non-existence of some other  
15 fact.

16 Circumstantial evidence is of no less value than  
17 direct evidence because the law makes no distinction between  
18 direct and circumstantial evidence. Instead, the law simply  
19 requires that before convicting a defendant, the jury must be  
20 satisfied of the defendant's guilt beyond a reasonable doubt,  
21 from all the evidence based on direct and circumstantial  
22 evidence in the case.

23 Now, as I've stated and I want to emphasize that a  
24 lawyer's questions are not evidence. At times a lawyer, on  
25 cross-examination, may have incorporated into a question a

1 stated fact that assumes facts to be true and asked the  
2 witness if the statement was true. Now, if the witness denies  
3 the truth of the statement and if there's no evidence in the  
4 record proving that the assumed fact to be true, you may not  
5 consider the fact to be true, simply because it was contained  
6 in the lawyer's question.

7           The famous example of this is the lawyer's question  
8 of a married witness: When did you stop beating your wife?  
9 Now, you would not be permitted to consider the assumed fact  
10 that he ever beat his wife, unless the witness himself  
11 indicated that he had, or unless there is some other evidence  
12 in the record that he had beaten his wife. In short,  
13 questions are not evidence, answers are. However, answers,  
14 obviously, must be considered in conjunction with the question  
15 that's being asked.

16           Now, the evidence in this case consists of the sworn  
17 testimony of the witnesses and the exhibits that were received  
18 in evidence and any stipulations that you heard. Exhibits  
19 which have been marked for identification, but were not  
20 received, may not be considered by you as evidence. Only the  
21 exhibits received may be considered as evidence.

22           Similarly, you are to disregard any testimony that I  
23 have ordered to be stricken. As I've indicated before, only  
24 the witnesses' answers are evidence and you are not to  
25 consider a question as evidence. Similarly, statements by

1 counsel are not evidence. You should consider the evidence in  
2 light of your own common sense and experience and you may draw  
3 reasonable inferences from the evidence. Finally, as I've  
4 told you many times, anything you may have seen or heard about  
5 this case outside the courtroom is not evidence and must be  
6 totally disregarded.

7 Now, during the course of this trial, you have heard  
8 the attorneys read several stipulations. A stipulation is an  
9 agreement among the parties that certain facts are true. You  
10 should regard such agreed facts as true. During the course of  
11 the trial, you have heard an attorney read stipulations of  
12 testimony.

13 A stipulation of testimony is an agreement among the  
14 parties that if a witness were to be called and give the -- if  
15 called, a witness would have given the testimony agreed to.  
16 You must accept as true the fact that the witness would have  
17 given the testimony in court. However, it is for you to  
18 determine the effect to be given to that testimony.

19 Now, the parties have presented exhibits in the form  
20 of charts and summaries. I admitted these charts and  
21 summaries in evidence to the underlying documents that they  
22 represent in order to save time and to avoid unnecessary  
23 inconvenience. You should consider these charts and summaries  
24 as you would any other evidence in the case.

25 Now, during the trial, you may have heard the

1 attorneys use the term inference. In their arguments, they  
2 may have asked you to infer on the basis of your reason, your  
3 experience and common sense, from one or more established  
4 facts, the existence of some other fact. An inference is not  
5 a suspicion or a guess. It is a reasoned, logical decision to  
6 conclude that a disputed fact exists on the basis of another  
7 fact which you know exists. There are times when different  
8 inferences may be drawn from the facts, whether proven by  
9 direct or circumstantial evidence.

10 The government asked you to draw one set of  
11 inferences, while the defense asked you to draw another. It  
12 is for you and you alone, to decide what inferences that you  
13 will draw. However, the process of drawing inferences from  
14 facts in evidence is not a matter of guesswork or speculation.  
15 An inference is a deduction or a conclusion which you, the  
16 jury, are permitted to draw, but not required to draw from the  
17 facts which have been established, either by direct evidence  
18 or by circumstantial evidence.

19 In drawing inferences, you should exercise your  
20 common sense. You are permitted to draw from the facts which  
21 you find to be proven such reasonable inferences as would be  
22 justified in light of your experience. Here, again, let me  
23 remind you that, whether based upon direct or circumstantial  
24 evidence or upon the logical, reasonable inferences drawn from  
25 such evidence, you must be satisfied of the guilt of the

1 defendant beyond a reasonable doubt before you may convict.

2 Now, the fact that one party called most of the  
3 witnesses or may have introduced more evidence than the other  
4 does not mean that you should necessarily find in favor of the  
5 side offering more witnesses.

6 By the same token, you do not have to accept the  
7 testimony of any witness who has been contradicted or  
8 impeached if you find the witness not to be credible. You  
9 also have to decide which witnesses to believe and which  
10 witnesses not to. To do this, you must look at all the  
11 evidence, drawing upon your common sense and personal  
12 experience. After examining all the evidence, you may decide  
13 that a party calling more witnesses has not persuaded you  
14 because you do not believe the witnesses.

15 I will discuss with you the criteria for evaluating  
16 credibility. You should keep in mind that the burden of proof  
17 is always on the government and the defendant is not required  
18 to call any witnesses or offer any evidence since he is  
19 presumed to be not guilty.

20 Now, you have had an opportunity to observe all of  
21 the witnesses. It is now your job to decide how believability  
22 (sic) each witness was in his or her testimony. You are the  
23 sole judges of the credibility of each witness and the  
24 importance of his or her testimony.

25 In assessing credibility, you should carefully

1 scrutinize all the testimony of each witness, the  
2 circumstances under which each witness testified and any other  
3 matter in evidence which may help you decide the truth and the  
4 importance of each witness's testimony.

5           Your decision whether or not to believe a witness may  
6 depend upon a number of factors. For instance, was a  
7 witnesses candid? Was a witness frank and forthright or did a  
8 witness seem as if he or she was hiding something, being  
9 evasive or suspect in some way?

10           How did the witness testify on direct examination,  
11 compared to how the witness testified on cross-examination?  
12 Was the witness consistent in his and her testimony or did he  
13 or she contradict himself or herself? Did the witness appear  
14 to know what he or she was talking about and did the witness  
15 strike you as someone who is trying to report his or her  
16 knowledge accurately?

17           How much you choose to believe a witness may be  
18 influenced by the witness's bias. Does the witness have a  
19 relationship with the government or the defendant which may  
20 affect how he or she testified? Does the witness have some  
21 incentive, loyalty or motive that might cause him or her to  
22 shade the truth or does the witness have some bias, prejudice  
23 or hostility that may have caused the witness, consciously or  
24 not, to give you something other than a completely accurate  
25 account of the facts the witness is testifying about?

1           Even if the witness was impartial, you should  
2 consider whether the witness had an opportunity to observe the  
3 facts about what he or she is testifying about. You should  
4 consider the witness's ability to express himself or herself.  
5 Ask yourselves whether the witness's recollection of the facts  
6 stands up in light of all the other evidence in the case.

7           In other words, what you must try to do in deciding  
8 credibility is to size up the witness in light of his or her  
9 demeanor, the explanations given and in light of all the other  
10 evidence in the case, just as you would in any important  
11 matter that you are trying to decide if a person is being  
12 truthful, straightforward and accurate in his or her  
13 recollection. In deciding the question of credibility,  
14 remember that you should use your common sense, your good  
15 judgment and your experience.

16           Now, you have heard the testimony of an agent from  
17 the Federal Bureau of Investigation, the FBI. The fact that a  
18 witness may be employed as a law enforcement officer does not  
19 mean that her testimony is necessarily deserving of more or  
20 less consideration or greater or lesser weight than any other  
21 ordinary witness.

22           At the same token, it is quite legitimate for defense  
23 counsel to try to attack the credibility of a law enforcement  
24 witness on the grounds that her testimony may be colored by  
25 personal or professional interest in the outcome of the case.

1 It is your decision, after reviewing all of the evidence,  
2 whether to accept the testimony of a law enforcement witness  
3 and to give that testimony whatever weight, if any, you find  
4 it deserves.

5 In connection with your evaluation of credibility of  
6 witnesses, you should specifically consider evidence of  
7 resentment or anger, which some witness may have had.  
8 Evidence of witness's bias, prejudice or hostility requires  
9 you to view that witness's testimony with caution, to weigh it  
10 with care and subject it to close and searching scrutiny.

11 In evaluating the credibility of witnesses, you  
12 should take into account any evidence the witness who  
13 testified may benefit in some way from the outcome of the  
14 case. Such an interest in the outcome creates a motive to  
15 testify falsely. It may sway the witness to testify in a way  
16 that advances his or her own interests.

17 Therefore, if you find any witness whose testimony  
18 you are considering may have an interest in the outcome of the  
19 trial, then you should bear that factor in mind when  
20 evaluating the credibility of his or her testimony and accept  
21 it with great care; however, this is not to suggest that every  
22 witness who has an interest in the outcome of the case will  
23 testify falsely. It is for you to decide to what extent, if  
24 at all, the witness's interest has affected or colored his or  
25 her testimony.

1           Now, you've heard, on several occasions, evidence  
2 that a witness may have made a statement on an earlier  
3 occasion which counsel would argue is inconsistent with the  
4 witness's testimony at trial. If you found that a witness  
5 made an earlier statement that conflicts with his or her trial  
6 testimony, you may consider that fact in deciding how much of  
7 his or her trial testimony, if any, to believe.

8           In making this determination, you may consider  
9 whether the witness purposely made a false statement or  
10 whether it was an innocent mistake; whether the inconsistency  
11 concerned an important fact or whether it had to do with small  
12 details; whether the witness had an explanation for the  
13 inconsistency and whether that explanation appealed to your  
14 common sense.

15           It is exclusively your duty, based upon all the  
16 evidence and your own good judgement, to determine whether the  
17 prior statement was inconsistent and if so, how much, if any,  
18 weight to be given to the inconsistent statement in  
19 determining whether to believe all or part of the witness's  
20 testimony at trial.

21           One witness in this case, Tara Devine, was permitted  
22 to testify as an expert on Vermont family law. A witness may  
23 be permitted to testify to an opinion on those matters which  
24 he or she has special knowledge, skill, experience and  
25 training. Such testimony is presented to you under the theory

1 that someone who is experienced and knowledgeable in the field  
2 can assist you in understanding the evidence or in reaching an  
3 independent decision on the facts.

4 In weighing this opinion -- opinion testimony, you  
5 may consider the witness's qualifications, her opinions, the  
6 reasons for testifying as well as all the other considerations  
7 that ordinarily apply when you are deciding whether or not to  
8 believe a witness's testimony. You may give the opinion  
9 testimony whatever weight, if any, you find it deserves in  
10 light of all the other evidence in the case.

11 You should not, however, accept the opinion testimony  
12 merely because I allowed the witness to testify concerning her  
13 opinion. You should -- nor should you substitute it for your  
14 own reason, your judgement, your common sense. As I've said  
15 many times, the determination of the facts in the case rests  
16 solely with you, the jury.

17 Now, you may not infer a defendant is guilty of  
18 participating in criminal conduct merely from the fact that he  
19 was present at the time a crime was being committed and he had  
20 knowledge that it was being committed. Similarly, you may not  
21 infer that a defendant was guilty of participating in criminal  
22 conduct merely from the fact that he associated with other  
23 people who are guilty of wrongdoing.

24 Now, the defendant has pleaded not guilty to the  
25 charges in the indictment. To convict the defendant, the

1 burden is on the government to prove the defendant's guilt on  
2 each element on each charge beyond a reasonable doubt. This  
3 burden never shifts to the defendant for the simple reason  
4 that the law presumes the defendant to be innocent and never  
5 imposes upon a defendant in a criminal case the burden or duty  
6 of calling any witnesses or producing any evidence.

7 In other words, the defendant starts with a clean  
8 slate and is presumed innocent on each charge until such time,  
9 if ever, that you, as a jury, are satisfied that the  
10 government has proven the defendant guilty of a given charge  
11 beyond a reasonable doubt.

12 Now, the defendant did not testify in this case and  
13 under our Constitution, he has no obligation to testify or to  
14 present any other evidence, because it is the government's  
15 burden to prove the defendant guilty beyond a reasonable  
16 doubt. That burden remains with the government throughout the  
17 entire trial and never shifts to a defendant.

18 The defendant is never required to prove that he is  
19 not guilty. You may not attach any significance to the fact  
20 that the defendant did not testify. No adverse inference  
21 against him may drawn by you because he did not take the  
22 witness stand. You may not consider this against the  
23 defendant in any way in your deliberations in the jury room.

24 Now, with these instruction in mind, let's turn to  
25 the charges against the defendant, as contained in the

1 indictment. I remind you that an indictment is not itself --  
2 is not evidence. It merely describes the charges made against  
3 the defendant. It's an accusation. It may not be considered  
4 by you as evidence of guilt of the defendant.

5 In reaching your determination of whether or not the  
6 government has proven the defendant guilty beyond a reasonable  
7 doubt, you may only consider the evidence introduced or lack  
8 of evidence and only what is charged in the indictment.

9 The defendant has denied that he is guilty of the  
10 charges set forth in the indictment. The indictment contains  
11 two counts. Each count charges the defendant with a different  
12 crime. You must consider each count separately and return a  
13 separate verdict of guilty or not guilty for each. Whether  
14 you find the defendant guilty or not guilty as to one count  
15 should not affect your verdict as to the other offense  
16 charged.

17 The defendant is not charged with committing any  
18 other crime other than the offenses that are committed -- that  
19 are set forth in the indictment. I want to emphasize to you  
20 now that you are only to return a verdict as to the charges  
21 that are contained in the indictment.

22 You will hear shortly that to sustain the burden of  
23 proof of some elements of some counts, the government must  
24 prove that the defendant acted knowingly, willfully and  
25 intentionally. I want to take a moment to define those terms

1 for you. Knowledge, willfulness and intent involve the state  
2 of a person's mind. The defendant's state of -- the state of  
3 a defendant's mind is, in some form, an element of both crimes  
4 which is being charged. Accordingly, the defendant's state of  
5 mind is a fact which you are called upon to decide.

6 Medical science has not yet devised an instrument  
7 that you can record what is in one's mind in the distant past.  
8 Rarely is direct proof available to establish that -- what is  
9 one's state of mind, but a state of mind may be inferred from  
10 what a person says or does, his words, his actions and his  
11 conduct at the time of the occurrence of certain events. The  
12 state of mind in which an act is done is often more clearly  
13 and conclusively shown by the act itself or by a series of  
14 acts than by words or explanations or acts uttered long after  
15 its occurrence.

16 Accordingly, intent, willfulness and knowledge are  
17 usually established by surrounding facts and circumstances as  
18 of the time the acts in question occurred or the events took  
19 place and a reasonable inference to be drawn from them. As I  
20 mentioned, you should -- you will need to consider, for  
21 certain elements of each charge, whether the defendant acted  
22 knowingly, willfully or intentionally.

23 I'll now define each of those terms for you. A  
24 person acts knowingly if he acts intentionally and voluntarily  
25 and not because of ignorance, mistake or accident or

1 carelessness. Whether the defendant acted knowingly may be  
2 proven by fact -- by the defendant's conduct and all the facts  
3 and circumstances surrounding the case. A person acts  
4 willfully when he acts with knowledge that his conduct is  
5 unlawful and with intent to do something that the law forbids,  
6 that is to say, with a bad purpose to disobey or disregard the  
7 law. By contrast, a person's conduct was not willful if it  
8 was due to negligence, inadvertence or mistake.

9 Finally, the last state of mind that you will need to  
10 consider is intent. Before you can find the defendant acted  
11 intentionally, you must be satisfied beyond a reasonable doubt  
12 that the defendant acted deliberately and purposely. That is,  
13 the defendant's acts must be the product of the defendant's  
14 conscious objective, rather than a product of mistake or  
15 accident. In a few moments, I will elaborate on the meaning  
16 of intent as it applies in this case.

17 Now, I have just instructed you on the general  
18 meaning of intent. You have also heard the attorneys refer to  
19 motive. Intent and motive are related concepts, but they are  
20 also different in several ways that are important for you to  
21 understand. Proof of motive is not a necessary element of the  
22 crimes which the defendant is charged. Proof of motive does  
23 not establish guilt, nor does lack of proof of motive  
24 establish the defendant is not guilty. If the guilt of the  
25 defendant is shown beyond a reasonable doubt, it is immaterial

1 what the motive for the crime may be or whether any motive be  
2 shown. However, the presence or absence of motive is a  
3 circumstance that you may consider as bearing on the intent of  
4 the defendant.

5 You have heard some witnesses testify that the  
6 defendant has character traits of law-abidingness, charity and  
7 unconditional generosity. As I will describe to you  
8 momentarily, this evidence is relevant only to the defendant's  
9 motive and therefore, his intent.

10 As I also will describe to you in a few moments, the  
11 government must prove beyond a reasonable doubt the defendant  
12 acted with intent to obstruct the parental rights of Janet  
13 Jenkins which arose by court order. You may, therefore,  
14 consider proof of the defendant's character traits in deciding  
15 whether the government has proven the defendant's intent  
16 beyond a reasonable doubt. You may not, however, consider  
17 evidence about a defendant's character for any other purpose.

18 As I have just mentioned, the defendant has called  
19 witnesses who have testified to his reputation in the  
20 community, to the character traits of law-abidingness,  
21 unconditional generosity and charity. You are not to take  
22 this testimony as a witness's opinion as to whether or not the  
23 defendant is guilty or not guilty. That question is for you  
24 alone to determine. You should, however, consider this  
25 character evidence, together with all of the other facts and

1 all the other evidence in the case, in determining whether the  
2 defendant is guilty or not guilty of the charges.

3 Specifically, as I have instructed you a few moments ago, you  
4 may consider this character evidence in your determination of  
5 the defendant's intent. Such character evidence alone may  
6 indicate to you that it is improbable that the person with the  
7 reputation for law-abidingness, unconditional generosity and  
8 charity would commit the offenses charged.

9 Accordingly, if after considering the questions of  
10 the defendant's reputation for these character traits, you  
11 find a reasonable doubt that has been created, you must acquit  
12 him on those charges. On the other hand, if, after  
13 considering all the evidence, including the defendant's  
14 reputation, you are satisfied beyond a reasonable doubt that  
15 he is guilty, you should not acquit him merely because you  
16 believe he is a person of good reputation.

17 The defendant has called witnesses who may have also  
18 offered their opinion as to the defendant has a character  
19 trait of law-abidingness, unconditional generosity and  
20 charity. The instructions that I've just given to you as to  
21 the defendant's reputation apply equally here. You are not to  
22 take the testimony regarding the witness's opinion or the  
23 defendant's character as the defendant -- as the witness's  
24 opinion as to whether or not the defendant is guilty or not  
25 guilty. Once again, that question is for you to determine.

1           You should, however, consider this character  
2 evidence, together with all the other facts and all the other  
3 evidence in the case in determining whether the defendant is  
4 guilty or not guilty of the charges.

5           Specifically, as I've instructed you a few moments  
6 ago, you may consider this character evidence in your  
7 determination of the defendant's intent. Accordingly, if  
8 after considering all the evidence, including testimony about  
9 a defendant's character, law-abidingness, unconditional  
10 generosity and charity, you find that a reasonable doubt is  
11 created, you must acquit him of those charges.

12           On the other hand, if after considering all of the  
13 evidence, including that of the defendant's character of law-  
14 abidingness, generosity and charity, you are satisfied beyond  
15 a reasonable doubt he is guilty, you should not acquit him  
16 merely because you believe him to be a person of good  
17 character.

18           You may not draw any inference, favorable or  
19 unfavorable, towards the government or the defendant from the  
20 fact that certain persons were not named in the defendant's  
21 indictment, or that certain persons were named as co-  
22 conspirators but not indicted. The circumstances of these  
23 persons who were not indicted must play no part in your  
24 deliberations. Whether a person should be named as a co-  
25 conspirator or indicted as the defendant is a matter within

1 the sole discretion of the United States Attorney and the  
2 Grand Jury. Therefore, you may not consider it in any way in  
3 reaching your verdict as to the defendant on trial.

4 In reaching the verdict, you must bear in mind that  
5 the guilt is individual. Your verdict as to Mr. Zodhiates  
6 must be determined separately with respect to him, solely on  
7 the evidence or lack of evidence presented against him,  
8 without regard to the guilt or innocence of any other person.

9 Now, as I have said a few times, that the government  
10 must prove the defendant's guilt beyond a reasonable doubt and  
11 you've heard this from counsel many, many, many times. The  
12 question, actually, is, what is a reasonable doubt? The words  
13 almost define themselves. It is a doubt based upon reason and  
14 common sense. It is a doubt that a reasonable person has  
15 after carefully weighing all the evidence or lack of evidence.  
16 It is a doubt that would cause a reasonable person to hesitate  
17 to act in a matter of importance in his or her personal life.

18 Proof beyond a reasonable doubt must therefore be  
19 proof of such a convincing character that a reasonable person  
20 would not hesitate to rely and act upon it in the most  
21 important of his or her own affairs. A reasonable doubt is  
22 not a caprice or a whim. It is not speculation or suspicion.  
23 It is not an excuse to avoid the performance of an unpleasant  
24 duty and it is not sympathy.

25 In a criminal case, the burden is at all times upon

1 the government to prove guilt beyond a reasonable doubt as to  
2 each crime charged. The law does not require the government  
3 to prove guilt beyond all possible doubt. Proof beyond a  
4 reasonable doubt is sufficient to convict.

5           However, the burden never shifts to a defendant,  
6 which means that it's always the government's burden to prove  
7 each of the elements of the crimes charged beyond a reasonable  
8 doubt. If, after fair and impartial consideration of all the  
9 evidence, you have a reasonable doubt, it's your duty to find  
10 the defendant not guilty. On the other hand, if, after fair  
11 and impartial consideration of all of the evidence, you are  
12 satisfied of the defendant's guilt beyond a reasonable doubt,  
13 you should vote to convict.

14           I will now explain to you the crimes charged in the  
15 indictment. Count 1 of the indictment charges the defendant  
16 with conspiracy to violate federal law in violation of  
17 Title 18, United States Code, Section 371.

18           Specifically, Count 1 charges as follows: From in or  
19 about September 2009 to in or about April 15th, in the Western  
20 District of New York and elsewhere, Philip Zodhiates did  
21 knowingly, willfully and unlawfully combine, conspire and  
22 agree with others, known and unknown to the Grand Jury, to  
23 commit an offense against the United States, that is, to  
24 remove a child, Isabella Miller-Jenkins, from the United  
25 States and to retain that child, who has been in the United

1 States, outside of the United States with intent to obstruct  
2 the lawful exercise of parental rights, in violation of Title  
3 18, United States Code, Section 1204.

4 Count 1 of indictment states the following overt  
5 acts. In order to affect the object of the conspiracy, the  
6 following acts were committed by the defendant and others in  
7 the Western District of New York and elsewhere:

8 1. That on or about September 21st, 2009, the  
9 defendant, Philip Zodhiates, traveled from Virginia to the  
10 Buffalo, New York area;

11 2. That on or about September 21st, 2009, the  
12 defendant, Philip Zodhiates, had telephone contact from the  
13 Buffalo, New York area with Kenneth Miller;

14 3. That on or about September 21st, 2009, the  
15 defendant, Philip Zodhiates, had telephone contact from the  
16 Buffalo, New York area with an individual in Canada who agreed  
17 to help transport Lisa Miller in Canada;

18 4. That on or about September 22nd, 2009, Lisa  
19 Miller and Isabella Jenkins-Miller (sic) traveled across the  
20 Rainbow Bridge from Niagara Falls, New York to Canada;

21 5. That on or about September 22nd, 2009, the  
22 defendant, Philip Zodhiates, had telephone contact from the  
23 Buffalo, New York area with an individual in Canada who helped  
24 transport Lisa Miller in Canada;

25 6. That on or about September 22nd, 2009, the

1 defendant, Philip Zodhiates, had telephone contact from the  
2 Buffalo, New York area with Kenneth Miller.

3 All in violation of Title 18, United States Code,  
4 Section 371.

5 Now, the relevant statute on the subject is Title 18,  
6 United States Code, Section 371, which states in pertinent  
7 part as follows: If two or more persons conspire to commit  
8 any offense against the United States and one or more of those  
9 such persons does any act to affect the object of the  
10 conspiracy, each is guilty of an offense against the  
11 United States.

12 In this case, the defendant is accused in Count 1 of  
13 having been a member of a conspiracy to violate federal law.  
14 A conspiracy is a kind of criminal partnership; a combination  
15 or agreement of two or more persons to join together to  
16 accomplish some unlawful purpose.

17 The crime of conspiracy to violate federal law is an  
18 independent offense. It is separate and distinct from the  
19 actual violation of any specific federal laws which the law  
20 refers to as substantive crimes. Congress has deemed it  
21 appropriate to make conspiracy, standing alone, a separate  
22 crime, even if the conspiracy is not successful. This is  
23 because collective criminal activity poses a greater threat to  
24 the public safety and welfare than individual conduct and  
25 increases the likelihood of success of a particular criminal

1 venture. These are the elements of the crime.

2 Now, in order to satisfy the burden of proof with  
3 respect to Count 1, the government must establish each of the  
4 following four essential elements beyond a reasonable doubt.

5 First, that two or more persons entered into an  
6 unlawful agreement to remove a child from the United States  
7 and to retain that child, who had been in the United States,  
8 outside the United States with an intent to obstruct the  
9 lawful exercise of parental rights.

10 Second, that the defendant knowingly and willfully  
11 became a member of the conspiracy.

12 Third, that one of the members of the conspiracy  
13 knowingly committed at least one of the overt acts charged in  
14 the indictment.

15 And fourth, that the overt acts which you find have  
16 been committed were committed in furtherance of some object of  
17 the conspiracy.

18 Now, the first element which the government must  
19 prove beyond a reasonable doubt to establish the offense of  
20 conspiracy is that two or more persons entered into an  
21 unlawful agreement charged in the indictment, namely an  
22 agreement to remove Isabella Miller-Jenkins from the  
23 United States with the intent to obstruct the lawful exercise  
24 of parental rights of Janet Jenkins; or to retain Isabella  
25 Miller-Jenkins, who had been in the United States, outside the

1 United States with intent to obstruct the lawful exercise of  
2 parental rights of Janet Jenkins. In short, the indictment  
3 alleges in Count 1 that the conspiracy had two unlawful  
4 objectives. The first alleged objective is removing Isabella  
5 Jenkins from the United States with intent to obstruct the  
6 lawful exercise of Janet Jenkins' parental rights.

7 The parental rights at issue in the first alleged  
8 objective are Janet's rights to visit Isabella Miller-Jenkins  
9 as that right was defined by the laws and courts of Vermont.  
10 Specifically, as of September 21st, 2009, Vermont law gave  
11 Janet Jenkins the right to visit Isabella Miller-Jenkins.

12 It's important to remember that by defining the term  
13 parental rights, I am only instructing you, as a matter of  
14 law, on what parental rights Janet Jenkins had and when she  
15 had those rights. I am not instructing you on what the  
16 defendant knew or intended with regard to those rights. That  
17 is a question of fact that you must decide and which the  
18 government must prove beyond a reasonable doubt.

19 The second alleged objective of the conspiracy is  
20 retaining Isabella Miller outside of the United States with  
21 intent to obstruct the lawful exercise of Janet Jenkins'  
22 parental rights.

23 The parental rights at issue in the second alleged  
24 objective are Janet's Rights, custodial rights, to Isabella  
25 Miller-Jenkins, as those rights were defined by the laws and

1 courts of Vermont. Specifically, on November 20th, 2009, a  
2 Vermont Family Court Judge transferred custody of Isabella  
3 Miller-Jenkins to Janet Jenkins, effective January 1st, 2010.

4 I emphasize again, I am only instructing you on what  
5 the parental rights were, the rights that Janet Jenkins had  
6 and when she had those rights. What the defendant knew or  
7 intended with regard to those rights is a question of fact  
8 which you must decide and which the government must prove  
9 beyond a reasonable doubt.

10 To find the government has proven this first element  
11 of the conspiracy charged, you must be unanimous that the  
12 government has proven beyond a reasonable doubt that an  
13 agreement existed with regard to at least one of the two  
14 alleged unlawful objectives of the conspiracy.

15 In order for the government to satisfy this element,  
16 you need not find that the alleged members of the conspiracy  
17 met together and entered into any express or formal agreement.  
18 Similarly, you need not find that the alleged conspirators  
19 stated, in words or writings, what the scheme was, its object  
20 or purpose or every precise detail of the scheme or the means  
21 by which its object or purpose was to be accomplished.

22 You may, of course, find that the existence of an  
23 agreement to disobey or disregard the law has been established  
24 by direct proof. However, since a conspiracy is, by its very  
25 nature, characterized by secrecy, you may also infer its

1 existence from the circumstances of the case and the conduct  
2 of the parties involved.

3 In a very real sense, then, in the context of  
4 conspiracy cases, actions often speak louder than words. In  
5 this regard you may, in determining whether an agreement  
6 existed here, consider the actions and statements of all those  
7 you find to have participated as proof that a common design  
8 existed on the part of the persons charged to act together for  
9 the accomplishment of the unlawful purposes.

10 The second element which the government must prove  
11 beyond a reasonable doubt to establish the offense of  
12 conspiracy is that the defendant acting knowingly, willfully  
13 and voluntarily, became a participant and a member of the  
14 conspiracy. If you are satisfied that a conspiracy charged in  
15 the indictment existed, you must then ask yourselves  
16 whether -- who were the members of the conspiracy.

17 In deciding whether the defendant was, in fact, a  
18 member of the conspiracy, you should consider whether, based  
19 upon all the evidence, the defendant knowingly and willfully  
20 joined the conspiracy. Ask yourselves whether he participated  
21 with knowledge of its unlawful purpose and with the specific  
22 intent of furthering its business or one of the objectives as  
23 an associate or a worker.

24 In that regard, it's been said that in order for a  
25 defendant to be deemed a participant in a conspiracy, you must

1 have a stake in the venture or its outcome. You are  
2 instructed that while proof of financial interest in the  
3 outcome or the scheme is not essential, if you find the  
4 defendant had such an interest, that is a factor which you may  
5 properly consider in determining whether or not the defendant  
6 was a member of the conspiracy charged in the indictment.

7 As I mentioned a moment ago, before the defendant can  
8 be found to have been a conspirator, you must find that he  
9 knowingly joined in the unlawful agreement or plan. The key  
10 question, therefore, is whether the defendant joined the  
11 conspiracy with an awareness of at least some of the basic  
12 aims and purposes of the unlawful agreement or agreements you  
13 considered as part of the first element of the conspiracy  
14 count.

15 It is important for you to note that a defendant's  
16 participation in a conspiracy must be established by  
17 independent evidence of his own acts or statements as well as  
18 those of the other alleged co-conspirators and the reasonable  
19 inferences which may be drawn from them.

20 The defendant's knowledge is a matter of inference  
21 from the facts proved. In that connection, I instruct you  
22 that to become a member of the conspiracy, the defendant need  
23 not have known the identity of each and every other member,  
24 nor need he have been apprised of all their activities.  
25 Moreover, a defendant need not have been fully informed as to

1 all the details, the scope of the conspiracy, in order to  
2 justify an inference of knowledge on his part. Furthermore, a  
3 defendant need not have joined in all the conspirator's  
4 unlawful objectives.

5           The extent of a defendant's participation has no  
6 bearing on the issue of a defendant's guilt. A conspirator's  
7 liability is not measured by the extent or the duration of his  
8 participation. Indeed, each member may perform a separate and  
9 distinct act and may perform them at different times. Some  
10 conspirators play major roles, while others play minor roles  
11 in a scheme. An equal role is not what the law requires. In  
12 fact, even a single act may be sufficient to draw a defendant  
13 within the ambit of the conspiracy.

14           I want to caution you, however, that the defendant's  
15 mere presence at the scene of the alleged crime does not, by  
16 itself, make him a member of the conspiracy. Similarly, mere  
17 association with one of more members of the conspiracy does  
18 not automatically make the defendant a member. A person may  
19 know or be friendly with a criminal without being a criminal  
20 himself. Mere similarity of conduct or the fact that they  
21 have assembled together and discussed common aims and  
22 interests does not necessarily establish proof of the  
23 existence of a conspiracy.

24           I also want to caution you that mere knowledge or  
25 acquiescence, without participation in the unlawful plan, is

1 not sufficient. Moreover, the fact that the acts of the  
2 defendant, without knowledge, merely happened to further the  
3 purpose or the objectives of a conspiracy does not make the  
4 defendant a member. More is required under the law.

5 What is necessary is that the defendant must have  
6 participated with knowledge of at least some of the purposes  
7 or objectives of the conspiracy and with the intention of  
8 aiding in the accomplishments of those unlawful ends.

9 In sum, the defendant, with an understanding of the  
10 unlawful character of the conspiracy, must have intentionally  
11 engaged, advised or assisted in fore with the purpose of  
12 furthering the illegal undertaking. He thereby becomes a  
13 knowing and willing participant in the unlawful agreement,  
14 that is to say, a conspirator.

15 The third element which the government must prove  
16 beyond a reasonable doubt to establish the offense of  
17 conspiracy is that at least one of the overt acts charged in  
18 the indictment was knowingly committed by at least one of the  
19 conspirators at or about the time and place alleged.

20 The indictment charges that the following overt acts  
21 were committed in the Western District of New York and  
22 elsewhere:

23 1. That on or about September 21st, 2009, the  
24 defendant, Philip Zodhiates, traveled from Virginia to the  
25 Buffalo, New York area;

1           2. That on or about September 21st, 2009, the  
2 defendant, Philip Zodhiates, had telephone contact from the  
3 Buffalo, New York area with Kenneth Miller;

4           3. That on or about September 21st, 2009, the  
5 defendant, Philip Zodhiates, had telephone contact from the  
6 Buffalo, New York area with an individual in Canada who had  
7 agreed to help transport Lisa Miller in Canada;

8           4. That on or about September 22nd, 2009, Lisa  
9 Miller and Isabella Miller-Jenkins traveled across the Rainbow  
10 Bridge from Niagara Falls, New York to Canada;

11           5. That on or about September 22nd, 2009, the  
12 defendant, Philip Zodhiates, had telephone contact from the  
13 Buffalo, New York area with an individual in Canada who helped  
14 transport Lisa Miller in Canada;

15           6. That on or about September 22nd, 2009, the  
16 defendant, Philip Zodhiates, had telephone contact from the  
17 Buffalo, New York area with Kenneth Miller.

18           Those are the overt acts that are set forth in the  
19 conspiracy count. In order for the government to satisfy the  
20 element of a conspiracy charge, it's not required that all the  
21 overt acts alleged in the indictment be proven. Similarly,  
22 you need not find the defendant himself committed an overt  
23 act. It is sufficient for the government to show that one of  
24 the other conspirators knowingly committed an overt act in  
25 furtherance of the conspiracy and such an overt act becomes,

1 in the eyes of the law, the act of all the members of the  
2 conspiracy. You are further instructed that the overt act  
3 need not have been committed at precisely the time alleged in  
4 the indictment. It is sufficient if you are convinced beyond  
5 a reasonable doubt that it occurred at or about the time and  
6 place stated.

7 Finally, you must find that either the agreement was  
8 formed or that the overt act was committed in the Western  
9 District of New York, which includes Niagara Falls, New York.

10 Now, the fourth and final element that the government  
11 must prove beyond a reasonable doubt to prove the conspiracy  
12 charge is the overt act was committed for the purpose of  
13 carrying out the unlawful agreement. In order for the  
14 government to establish this element, it must be proved beyond  
15 a reasonable doubt that at least one overt act was knowingly  
16 and willfully done by at least one conspirator in furtherance  
17 of some object or purpose of the conspiracy.

18 As I previously instructed you, the indictment in  
19 this case alleges that the conspiracy had two objectives;  
20 first, to remove a child, Isabella Miller-Jenkins, from the  
21 United States with intent to obstruct the lawful exercise of  
22 Janet Jenkins' parental rights and second, to retain Isabella  
23 Miller-Jenkins, who had been in the United States, outside of  
24 the United States with the intent to obstruct the exercise of  
25 Janet Jenkins' parental rights.

1           In that regard, you should bear in mind that the  
2 overt act standing alone may be innocent, lawful -- may be an  
3 innocent, lawful act. Frequently, however, an apparently  
4 innocent act sheds its harmless character if it is a step in  
5 carrying out, promoting, aiding or assisting in a  
6 conspiratorial scheme. You are therefore instructed that the  
7 overt act does not have to be an act which in and of it itself  
8 is criminal or constitutes an objective of the conspiracy.

9           Now, I have admitted into evidence acts and  
10 statements of others because those acts and statements were  
11 committed by persons who the government charges were co-  
12 conspirators of the defendant. The reason for allowing this  
13 evidence to be received against the defendant has to do with  
14 the nature of the crime of conspiracy.

15           Conspiracy is often referred to as a partnership in  
16 crime. Thus, as in other types of partnerships, when people  
17 enter into a conspiracy to accomplish an unlawful end, each  
18 and every member becomes an agent of the other conspirators in  
19 carrying out the conspiracy. Accordingly, the reasonably  
20 foreseeable acts, declarations, statements and omissions of  
21 any member of the conspiracy and in furtherance of the common  
22 purpose of the conspiracy are deemed, under the law, to be the  
23 acts of all the members and all the members are responsible  
24 for such acts, declarations, statements and omissions.

25           If you find beyond a reasonable doubt that the

1 defendant was a member of the conspiracy charged in the  
2 indictment, then any acts done or statements made in  
3 furtherance of the conspiracy by persons also found by you to  
4 have been members of the conspiracy may be considered against  
5 the defendant. This is so even if such acts were done and  
6 statements were made in the defendant's absence and without  
7 his knowledge.

8           However, before you may consider the statements or  
9 acts of co-conspirators in deciding the issue of the  
10 defendant's guilt, you must first determine that the acts and  
11 statements were made during the existence and in furtherance  
12 of the unlawful scheme. If the acts were done or the  
13 statements made by someone who you do not find to have been a  
14 member of the conspiracy, or if they have not been done in  
15 furtherance of the conspiracy, they may not be considered by  
16 you evidence against the defendant.

17           Now, the second count, Count 2 -- just one moment.  
18 As I noted a few minutes ago, the defendant is charged in  
19 Count 1 with conspiracy to violate the International Parental  
20 Kidnapping Crime Act.

21           Charge (sic) 2 charges the substantive offense of  
22 removing and aiding and abetting the removal of Isabella  
23 Miller-Jenkins from the United States. In other words,  
24 Count 2 charges the actual violation of the International  
25 Parental Kidnapping Crime Act, rather than the conspiracy to

1 violate the Act.

2 Count 2 reads as follows: That on or about  
3 September 22nd, 2009, in the Western District of New York and  
4 elsewhere, the defendant, Philip Zodhiates, with intent to  
5 obstruct the lawful exercise of parental rights, did knowingly  
6 remove and aid and abet the removal of a child, Isabella  
7 Miller-Jenkins, from the United States.

8 The statute on this subject is Title 18, United  
9 States Code, Section 1204, which provides in relevant part  
10 that: Whoever removes a child from the United States with  
11 intent to obstruct the lawful exercise of parental rights  
12 shall be guilty of a crime.

13 In order to prove the defendant guilty of the  
14 International Parental Kidnapping Act by removing from the  
15 United States, the government must prove the following three  
16 elements beyond a reasonable doubt: First, that Isabella  
17 Miller-Jenkins was previously in the United States; second,  
18 that the defendant took Isabella Miller from the United States  
19 to another country and third, the defendant acted with intent  
20 to obstruct the lawful exercise of the parental rights of  
21 Janet Jenkins.

22 The first element the government must prove beyond a  
23 reasonable doubt is that the defendant (sic), Isabella  
24 Miller-Jenkins, was previously in the United States. I don't  
25 think that needs further explanation.

1           Second, what the government must prove beyond a  
2 reasonable doubt is that the defendant took Isabella Miller-  
3 Jenkins from the United States to another country. In order  
4 to prove this element, the government must establish that the  
5 defendant moved the child from the United States to another  
6 country and that the movement of the child from the  
7 United States had to occur before the child reached the age of  
8 16.

9           Third, what the government must prove beyond a  
10 reasonable doubt is that the defendant acted with intent to  
11 obstruct the lawful exercise of Janet Jenkins' parental  
12 rights. As this Court -- the term parental rights means Janet  
13 Jenkins' right to visit Isabella Miller-Jenkins, as the right  
14 was defined by the law and courts of Vermont at the time  
15 Isabella Miller-Jenkins was removed from the United States.  
16 It does not matter whether the parental rights arose by court  
17 order, legally binding agreement of the parties or by  
18 operation of law.

19           As I previously stated, by defining the term parental  
20 rights, I'm only instructing you, as a matter of law, on what  
21 the parental rights of -- that Janet Jenkins had and when she  
22 had those rights. I am not instructing you on what the  
23 defendant knew or intended with regard to those rights. That  
24 is a question of fact that you must decide and whether the  
25 government's proven beyond a reasonable doubt.

1           To find the defendant acted with intent to obstruct  
2 the lawful exercise of parental rights, you must find the  
3 defendant acted deliberately, with the purpose of interfering  
4 with Janet Jenkins' parental rights. You may consider all the  
5 evidence of the defendant's other acts in determining whether  
6 the government has proven beyond a reasonable doubt that the  
7 defendant acted with this intent.

8           Now, the indictment also alleges that the defendant  
9 aided and abetted in intentional (sic) parental kidnapping.  
10 This is still Count 2. This is an alternative way of proving  
11 this. And that's for you to decide whether the government has  
12 proven it.

13           The aiding and abetting statute, Section 2(a) of  
14 Title 18 of the United States Code, provides that: Whoever  
15 commits an offense against the United States or aids or abets  
16 or counsels, commands or induces or procures its commission is  
17 punishable as a principal.

18           Under the aiding and abetting statute, it's not  
19 necessary for the government to show that the defendant  
20 himself physically committed the crime for which he is charged  
21 with in order for the government to sustain its burden of  
22 proof on Count 2. A person who aids or abets another to  
23 commit an offense is just as guilty of that offense as if he  
24 committed it himself.

25           Accordingly, you may find the defendant guilty of

1 intentional (sic) parental kidnapping if you find beyond a  
2 reasonable doubt that the government has proven that another  
3 person actually committed the offense of international  
4 parental kidnapping and the defendant aided or abetted that  
5 person in the commission of the offense.

6 As you can see, the first requirement is that you  
7 find that another person has committed the crime of  
8 international parental kidnapping. Obviously, no one can be  
9 convicted of aiding or abetting the criminal acts of another  
10 if no crime was committed by the other person in the first  
11 place, but if you decide that an international parental  
12 kidnapping occurred with respect to Isabella Miller-Jenkins,  
13 then you must consider whether the defendant aided or abetted  
14 the commission of the crime.

15 In order to aid or abet another to commit a crime, it  
16 is necessary that the defendant knowingly associated himself,  
17 in some way, with the crime and that he participated in the  
18 crime by doing some act to help make the crime succeed. To  
19 establish the defendant knowingly associated himself with the  
20 crime of international parental kidnapping, the government  
21 must establish that the defendant intended to obstruct Janet  
22 Jenkins' lawful exercise of parental rights.

23 I have previously instructed you on how the  
24 government must prove intent to obstruct the lawful exercise  
25 of parental rights as to Count 2 and that instruction applies

1 equally in the context of aiding and abetting.

2 To establish the defendant participated in the  
3 commission of international parental kidnapping, the  
4 government must prove that he engaged in some affirmative  
5 conduct or overt act with a specific purpose of bringing about  
6 the crime. The mere presence of a defendant where the crime  
7 is being committed, or even coupled with knowledge of a  
8 defendant that a crime is being committed, or merely  
9 associating with others who were committing the crime, is not  
10 sufficient to establish aiding and abetting.

11 One who has no knowledge that a crime is being  
12 committed or is about to be committed or inadvertently does  
13 something that aids in the commission of a crime is not an  
14 aider or abettor. An aider and abettor must know that the  
15 crime is being committed and act in a way in which intended to  
16 bring about success of the criminal venture.

17 To determine whether the defendant aided or abetted  
18 the commission of the crime of the international kidnapping,  
19 ask yourselves the following questions: Did he participate in  
20 the crime charged as something that he wished to bring about?  
21 Did he knowingly associate himself with the criminal venture?  
22 Did he seek, by his actions, to make the criminal venture  
23 succeed?

24 If the government has proven beyond a reasonable  
25 doubt that the defendant did these three things, then he is an

1 aider and abettor and therefore, guilty of the offense. If,  
2 on the other hand, your answer to any one of these questions  
3 is no, then he is not an aider and abettor and you must find  
4 him not guilty.

5 Now, as you consider the two charges that I have just  
6 discussed, it is important for you to remember that you're  
7 being asked to decide whether or not the defendant has  
8 proven -- whether the government has proven the defendant  
9 guilty beyond a reasonable doubt. You are not being asked  
10 whether any other persons have been proven guilty. Your  
11 verdict must be based solely on the evidence or lack of  
12 evidence as to Mr. Zodhiates in regard with the instructions  
13 and without regard to whether the guilt of other persons has  
14 or has not been proven.

15 The question of possible punishment of a defendant is  
16 of no concern to the jury. It should not, in any sense, enter  
17 into or influence your deliberations. The duty of imposing  
18 the sentence rests solely and exclusively on the Court.

19 Your function is to weigh the evidence in the case  
20 and to determine whether or not a defendant is guilty beyond a  
21 reasonable doubt solely on the basis of such evidence. Under  
22 your oath as jurors, you cannot allow consideration of the  
23 punishment which may be imposed upon a defendant, if he is  
24 convicted, to influence you in your verdict in any way or in  
25 any sense enter into your deliberations.

1           Now, during your deliberations, you should not  
2 discuss or provide any information about the case with  
3 anyone -- during deliberations you should not discuss or  
4 provide any information about the case with anyone other than  
5 your fellow jurors. This includes, as we talked about  
6 generally, use of your phone, don't do any research, any link  
7 or et cetera. You are to find your verdict based upon the  
8 evidence presented here.

9           When you get into the jury room, ladies and gentlemen  
10 and before you deliberate -- before you begin your  
11 deliberations, you should select someone to be your  
12 foreperson. The foreperson will be responsible for signing  
13 all communications to the Court and for handing them to the  
14 marshal during your deliberations. You're about to go to the  
15 jury room and begin your deliberations.

16           I will be sending to you all the exhibits to you in  
17 the jury room for your consideration and also, those  
18 photographs of the witnesses. I have found it -- that it's  
19 very helpful for a jury, in deliberations, to see the  
20 witnesses because as you can see there, there's been probably  
21 maybe 15 to 20 witnesses and it's just easier to remember who  
22 the witnesses are. You can see the person -- the photograph  
23 of the person who testified and the name under the photograph.

24           If you want any testimony of any witnesses read back,  
25 that can be done, but please remember that it's not always

1 easy to locate what you might want, so you'll have to be as  
2 specific as possible if you want any testimony read back.

3 Your request for testimony, in fact, any  
4 communication with the Court, should be made to me in writing,  
5 signed by your foreperson, put in the envelope and given to  
6 the marshal or the security officer. I will respond to any  
7 questions or requests you have as promptly as I can, either in  
8 writing or by having you return to the courtroom so I can  
9 speak with you in person.

10 In any event, do not tell me or anyone else how the  
11 jury stands on the issue of the defendant's guilt until after  
12 a unanimous verdict is reached and you are asked to return to  
13 the court with your verdict.

14 I'll also be sending a copy of the indictment to you  
15 in the jury room. It is for you to have during your  
16 deliberations. You may use it to read the crimes the  
17 defendant has been charged with committing. You are reminded,  
18 however, that an indictment is merely an accusation. It is  
19 not to be used by you as proof of any conduct charged.

20 I'll also be sending a copy of these instructions to  
21 you on the law in order to assist you in your deliberations.  
22 You are to apply these instructions to the facts as you  
23 determine them to be. I remind you, however, that you are to  
24 read these instructions as a whole and should not single out  
25 any one instruction as alone stating the law.

1           Now, a verdict form has also been prepared for your  
2 use, for you to report. The marshal will take the form to the  
3 jury room and you will have to reach a unanimous verdict as to  
4 what -- a unanimous agreement as to what your verdict should  
5 be. You will have the foreperson fill it in, sign it, date it  
6 and state on the verdict form that upon which you have  
7 unanimously agreed upon. You should then inform the Court by  
8 a note, again sealed, that you have reached a verdict.

9           The verdict sheet says as follows: The United States  
10 v. Philip Zodhiates on the caption. Verdict of the jury.  
11 Having been instructed on the law of the case, you are now  
12 required to make a unanimous finding of guilty or not guilty  
13 for each count charged in the indictment. Your answers to the  
14 questions on this form must be unanimous. Your answers must  
15 be based on a finding beyond a reasonable doubt. A copy of  
16 the indictment has been provided to you and marked as Court  
17 Exhibit Number 9.

18           Count 1, conspiracy. How do you find the defendant,  
19 Philip Zodhiates, on Count 1; guilty or not guilty?

20           You just check off which one is applicable.

21           Count 2, this is the international parental charge,  
22 the substantive charge.

23           The first charge is the conspiracy.

24           How do you find the defendant, Philip Zodhiates, on  
25 Count 2 of the indictment; guilty, not guilty?

1           And again, just check it off.

2           Final instructions. Now that you've completed the  
3 verdict sheet, please place in the envelope provided and seal  
4 the envelope. Inform the Court by a written note that you  
5 have reached a verdict.

6           That's all you say. Do not disclose the verdict to  
7 the Court or anyone else until you are asked to do so by the  
8 Judge -- that's me -- in open court.

9           Then, I certify this verdict to be true and accurate  
10 and signed by the foreperson and dated. Then, you put it in  
11 an envelope and seal the envelope.

12           Now, as I've stated, the government, to prevail, must  
13 prove the essential elements, as I've previously defined them,  
14 beyond a reasonable doubt. If the government does so, your  
15 verdict should be guilty. If it fails, your verdict should be  
16 not guilty. To report a verdict, it must be unanimous.

17           And as I've previously instructed you, your verdict  
18 must be unanimous in every sense. In order to convict the  
19 defendant on Count 1, conspiracy, all 12 of you must agree on  
20 a specific object or objects of -- the defendant agreed to try  
21 to accomplish. All of you must agree that the defendant  
22 agreed to try to remove Isabella Miller-Jenkins from the  
23 United States with intent to obstruct existing visitation  
24 rights of Janet Jenkins; or all of you must agree the  
25 defendant agreed to try to retain Isabella Miller-Jenkins

1 outside of the United States after departure with intent to  
2 obstruct the existing parental rights of Janet Jenkins.

3 And the same rule applies to Count 2, all of it. It  
4 must be a unanimous verdict as to Count 2, whether he's guilty  
5 of the charges set forth, as I've explained to you.

6 Your function, ladies and gentlemen, is to weigh the  
7 evidence and determine whether or not the defendant is guilty,  
8 solely upon the basis of the evidence and the law as I have  
9 indicated to you.

10 Each juror is entitled to his or her opinion. Each  
11 should, however, exchange views with his or her fellow jurors.  
12 That is the very purpose of jury deliberation; to discuss and  
13 consider the evidence, to listen to the arguments of fellow  
14 jurors, to present your individual views, to consult with one  
15 another until you have reached agreement solely and wholly on  
16 the evidence, if you can do so without violence to your  
17 individual judgement.

18 Each of you must decide the case for yourself after  
19 consideration with your fellow jurors of the evidence in the  
20 case, but you should not hesitate to change an opinion which,  
21 after discussion with your fellow jurors, appears erroneous.  
22 However, if after carefully considering all the evidence and  
23 the arguments of your fellow jurors, you entertain a view that  
24 differs from the others, you are not to yield your convictions  
25 simply because you are outnumbered. Your final vote must

1 reflect your conviction as to how these issues should be  
2 decided.

3 All right. Ladies and gentlemen, if you could just  
4 step in the jury deliberation room for just one moment, I'll  
5 bring you back shortly.

6 (The jury left the courtroom at 11:37 a.m.)

7 THE COURT: All right. Counsel?

8 MR. VAN DE GRAAF: Your Honor, I thought -- I thought  
9 you read everything accurately from what I had.

10 THE COURT: Pardon me?

11 MR. VAN DE GRAAF: I thought you read accurately from  
12 what I had.

13 THE COURT: All right. My law clerk has indicated to  
14 me that in Count 1 of the indictment, you misstated the end  
15 date. It's April 2015. Yours read April 15th.

16 MR. VAN DE GRAAF: Oh, I missed that. Yes.

17 THE COURT: I'll make that. They'll have a copy of  
18 the indictment, the date of the indictment. All the  
19 objections that were previously made are preserved for the  
20 record. There's no need to restate them.

21 MR. HEMLEY: I just want to say, Your Honor, we just  
22 want to point out other things.

23 MR. BOYD: Thank you. We understand we need not  
24 repeat previous objections for preservation purposes. With  
25 that in mind, I wanted to object, just specifically on page

1 80, to the references to rights being defined by the laws and  
2 courts of Vermont, for the reasons previously stated without  
3 repeating them.

4 On page 96, I believe the phrase beyond a reasonable  
5 doubt was -- should have been included after -- I'm sorry. On  
6 page 96, which was the number 19-9, Count 1, acts and  
7 declarations of co-conspirators.

8 In the fourth paragraph, in the sentence beginning,  
9 "If you find beyond a reasonable doubt that the defendant was  
10 a member of the conspiracy charged in the indictment that any  
11 acts done or statements made in furtherance of the conspiracy  
12 by persons also found by you..." should have then included the  
13 phrase, "...beyond a reasonable doubt to have been members of  
14 the conspiracy may be considered against the defendant."

15 On page 103, which is instruction 42-20, we would  
16 again object to the reference to the laws and courts of  
17 Vermont without the instruction that we had requested for the  
18 reasons previously stated.

19 And those -- and then the final concern I wanted to  
20 raise was on page 111, instruction 2-18. The first sentence,  
21 as initially read, I believe the Court stated, "it is  
22 important to remember that defendant has proven" -- before  
23 restating the instruction using the word government when  
24 initially reading the instruction. With that, we had no  
25 further objections. Thank you.

1 THE COURT: Mr. Van De Graaf?

2 MR. VAN DE GRAAF: I mean, I think that with respect  
3 to the last point, I don't remember if you read it correctly,  
4 but certainly, the government agrees with the way that it was  
5 drafted, so if there was a misstatement and the Court wants to  
6 clarify them, I'm not sure it's necessary. I think it's  
7 obvious, from the totality of what you read and they'll have  
8 the written materials in front of them, so I'm not sure you  
9 have to clarify it now, but if the Court feels that it's  
10 appropriate, certainly the government has no objection.

11 THE COURT: Well, I think I've instructed the jury  
12 clearly and read the indictment, with the one exception I left  
13 out the timeframe of the conspiracy. I just had an open-ended  
14 date, April 15th. I will correct that when the jury gets  
15 back.

16 As far as the reasonable doubt, I don't how many  
17 times I said it. Last time I counted how many times I said it  
18 in a case, I think it was like, 100 and something times. I  
19 think I'm pretty close to that in this case. I think it's  
20 quite clear to the jury. It was argued many, many times by  
21 counsel and it was set forth many, many times on the elements  
22 of what the government must prove beyond a reasonable doubt  
23 and I think it is thorough and complete and I think no further  
24 explanation is needed. Bring the jury back, please.

25 (The jury entered the courtroom at 11:44 a.m.)

1 THE COURT: Ladies and gentlemen, just one  
2 clarification. When I read the timeframe on Count 1, the  
3 conspiracy count, in the charge, I indicated that it was --  
4 the conspiracy began on or about from September 2009 and I  
5 indicated to the -- I think I said April -- April 15th. I  
6 didn't give the year.

7 In the indictment, it charges that from on or about  
8 September 2009 to on or about the date of the returning of the  
9 superseding indictment. The date of the superseding  
10 indictment is April 2015. That date is on the back of the --  
11 it's on the -- well, it's actually April 24th, so that's the  
12 date. Okay. It's set forth in the indictment.

13 With that, would you please have the -- administer  
14 the oath to the marshal?  
15 (Whereupon Court Security Office Lobaugh was sworn at 11:46  
16 a.m.)

17 THE COURT: All right. Well, at this point in time,  
18 our alternates 1, 2, 3, 4, 5 and 6, we're going to excuse you.  
19 All the regular jurors, there was no reason to excuse any.  
20 And it happens in trials, many times, where regular jurors are  
21 excused for very important reasons, death in the family or  
22 something has come up where the person can no longer serve and  
23 that's why we have alternates. We wouldn't want to start the  
24 trial over again. In this case, that did not happen, so  
25 you're excused.

1 I want to thank you very much on behalf of all the  
2 parties, the Court, for your time, your patience. I hope you  
3 found it meaningful to serve on a jury. I hope you don't feel  
4 like you wasted your time. I think this is -- you just had  
5 the opportunity to view a trial in the United States District  
6 Court and I hope that you learned from that experience. Thank  
7 you very much. The six of you will be excused, okay? Thank  
8 you.

9 (Alternate jurors were discharged at 11:48 a.m.)

10 THE COURT: Now, ladies and gentlemen, in a moment,  
11 we'll send you to the jury deliberation room. Ms. Daniels has  
12 indicated to me that she's -- I don't know if she's got an  
13 apple for you, I guess, yogurt. She's a kind of a health  
14 person. I think she may have some tofu, or I don't know,  
15 stuff I don't eat to hold you over a while. And then, we'll  
16 deal with any lunch that you may wish to have, what timeframe,  
17 okay?

18 So, that will just hold you over for a minute because  
19 we've been going for almost an hour, well, an hour and 45  
20 minutes or so without a break, really. So, that will just  
21 hold you over for a while, so you can name your foreperson and  
22 you can enjoy your yogurt or tofu or whatever else. She likes  
23 that stuff. So, must figure if she likes it, you're going to  
24 like it, too. Good luck. Okay.

25 As soon as she comes back, we'll send you to the jury

1 deliberation room. All set?

2 THE CLERK: Yes.

3 THE COURT: All right. Ladies and gentlemen, you may  
4 begin your deliberations.

5 (The jury began deliberations at 11:49 a.m.)

6 THE COURT: On the jury instructions, they'll be in a  
7 book. You can take a look at them, if you wish. The headings  
8 are removed. I do have a table of contents. And I have  
9 eliminated half of page 111, 112 and 113. They deal with cell  
10 phones. It gets very confusing. I'm sure you read it, but I  
11 don't think it serves any purpose, at least at this point in  
12 the trial. And that is, if you were asked or participate in  
13 any way about jury service in this case, you should respond.

14 This is a language that's been taken from the  
15 Judicial Conference of the United States. There was a lot  
16 of -- many problems throughout the United States, where jurors  
17 were having access to conducting private investigations,  
18 learning information through the use of all these gadgets that  
19 we have today. I don't think in this case it's necessary, so  
20 that will be eliminated from the charge. That's where I  
21 stopped. You may have noticed that I stopped for a few  
22 minutes.

23 It gets kind of confusing. There has to be a simpler  
24 way of saying all that than the way they recommend it. And  
25 I'll work on that in the future, but I don't think it's

1 necessary in this case. So, when you look at the charge, if  
2 you wish to look at it, it will be handed to the jury and  
3 please note that starting at page 111, halfway down, that will  
4 be eliminated. Okay. You're all available? Do you have your  
5 cell phones that you have the number --

6 MR. HEMLEY: Not yet, I don't believe. Who should we  
7 give them to?

8 THE COURT: The cell phones?

9 THE CLERK: The number.

10 THE COURT: The number.

11 MR. HEMLEY: Yes, I understand that.

12 THE COURT: You can't bring them up here and there's  
13 a reason why I don't allow that, because I've had them going  
14 off during trials and it's been very disruptive, but they're  
15 available to you downstairs. Denise, do we allow them to take  
16 them to the --

17 MR. HEMLEY: We have been given permission to bring  
18 them up to the attorney's room, Your Honor.

19 THE COURT: So, you can bring them -- there's a  
20 lawyer's lounge here, you know.

21 MR. HEMLEY: Yes, I understand that.

22 THE COURT: So, you can bring them in there.

23 MR. HEMLEY: Yes.

24 MR. GRABLE: We've been using that for lunch, Judge.

25 THE COURT: You can use them 'til your life's

1 content. Yeah, go to lunch. The jury's going to get a lunch  
2 at about 12:15. It's not going to be yogurt or tofu.

3 MR. GRABLE: How do we -- how would you like us to  
4 provide the jury with the exhibits? Who should we give them  
5 to?

6 THE COURT: Ms. Daniels will do that. You can go  
7 over with her to make sure that the exhibits that will be sent  
8 to the jury room meet your acceptance or approval, okay? All  
9 right. Thank you, gentlemen.

10 MR. VAN DE GRAAF: Thank you, Your Honor.

11 THE COURT: Leave your phone -- you can walk around.  
12 I -- you can go have lunch. I don't think anything's going to  
13 happen in the next hour or two hours. They're going to be  
14 eating lunch until at least 1 o'clock. So, all I would like  
15 is if we call you, that you're available within at least 10 or  
16 15 minutes.

17 MR. GRABLE: Yes. Thank you, Your Honor.

18 THE COURT: All notes that they have, I get them.  
19 You will see all the notes. Copies will be made for you. We  
20 will discuss any issues in court with the jury. If they need  
21 further instructions or we have to answer a note, you will  
22 participate thoroughly in that process. There will be no  
23 contact by me or any court member with the jury from this  
24 point forward, other than to take a note and to have lunch.

25 MR. GRABLE: Thank you.

1 MR. VAN DE GRAAF: Thank you, Your Honor.

2 THE COURT: Thank you, gentlemen.

3 (A recess was taken at 11:53 a.m.)

4 (The jury entered the room at 2:20 p.m.)

5 THE CLERK: All rise. You may be seated.

6 THE COURT: I have received a note from the jury.

7 Mr. Cruz, I believe you are the foreperson, sir?

8 THE FOREPERSON: Yes.

9 THE COURT: And it says that, we have reached a  
10 verdict. You have reached a unanimous verdict?

11 THE FOREPERSON: Yes.

12 THE COURT: Okay. Ms. Daniels, will you please take  
13 the verdict form Mr. Cruz? The verdict will now be published.  
14 Ms. Daniels, would you please return the verdict form to the  
15 foreperson?

16 THE CLERK: In the case of the United States of  
17 America v. Philip Zodhiates, criminal case number 14-CR-175A.  
18 Count 1, conspiracy. How do you find as to the defendant,  
19 Philip Zodhiates, on Count 1 of the indictment?

20 THE FOREPERSON: We find the defendant guilty.

21 THE CLERK: Count 2, international parental  
22 kidnapping. How do you find as to the defendant, Philip  
23 Zodhiates, on Count 2 of the indictment?

24 THE FOREPERSON: We find the defendant guilty.

25 THE COURT: The courtroom deputy will now poll the

1 jury. Ladies and gentlemen, each of you will be asked whether  
2 the verdict announced by the foreperson is your individual  
3 verdict. The answer is yes or no.

4 THE CLERK: Juror Number 1, if your verdict agrees  
5 with the verdict reported by the foreperson, answer yes. If  
6 your verdict does not agree with the verdict reported by the  
7 foreperson, answer no. Does your verdict agree in all  
8 respects?

9 JUROR NUMBER 1: Yes.

10 THE CLERK: Juror Number 2, if your verdict agrees  
11 with the verdict reported by the foreperson, answer yes. If  
12 your verdict does not agree with the verdict reported by the  
13 foreperson, answer no. Does your verdict agree in all  
14 respects?

15 JUROR NUMBER 2: Yes.

16 THE CLERK: Juror Number 3, if your verdict agrees  
17 with the verdict reported by the foreperson, answer yes. If  
18 your verdict does not agree with the verdict reported by the  
19 foreperson, answer no. Does your verdict agree in all  
20 respects?

21 JUROR NUMBER 3: Yes.

22 THE CLERK: Juror Number 4, if your verdict agrees  
23 with the verdict reported by the foreperson, answer yes. If  
24 your verdict does not agree with the verdict reported by the  
25 foreperson, answer no. Does your verdict agree in all

1 respects?

2 JUROR NUMBER 4: Yes.

3 THE CLERK: Juror Number 5, if your verdict agrees  
4 with the verdict reported by the foreperson, answer yes. If  
5 your verdict does not agree with the verdict reported by the  
6 foreperson, answer no. Does your verdict agree in all  
7 respects?

8 JUROR NUMBER 5: Yes.

9 THE CLERK: Juror Number 6, if your verdict agrees  
10 with the verdict reported by the foreperson, answer yes. If  
11 your verdict does not agree with the verdict reported by the  
12 foreperson, answer no. Does your verdict agree in all  
13 respects?

14 JUROR NUMBER 6: Yes.

15 THE CLERK: Juror Number 7, if your verdict agrees  
16 with the verdict reported by the foreperson, answer yes. If  
17 your verdict does not agree with the verdict reported by the  
18 foreperson, answer no. Does your verdict agree in all  
19 respects?

20 JUROR NUMBER 7: Yes.

21 THE CLERK: Juror Number 8, if your verdict agrees  
22 with the verdict reported by the foreperson, answer yes. If  
23 your verdict does not agree with the verdict reported by the  
24 foreperson, answer no. Does your verdict agree in all  
25 respects?

1 JUROR NUMBER 8: Yes.

2 THE CLERK: Juror Number 9, if your verdict agrees  
3 with the verdict reported by the foreperson, answer yes. If  
4 your verdict does not agree with the verdict reported by the  
5 foreperson, answer no. Does your verdict agree in all  
6 respects?

7 JUROR NUMBER 9: Yes.

8 THE CLERK: Juror Number 10, if your verdict agrees  
9 with the verdict reported by the foreperson, answer yes. If  
10 your verdict does not agree with the verdict reported by the  
11 foreperson, answer no. Does your verdict agree in all  
12 respects?

13 JUROR NUMBER 10: Yes.

14 THE CLERK: Juror Number 11, if your verdict agrees  
15 with the verdict reported by the foreperson, answer yes. If  
16 your verdict does not agree with the verdict reported by the  
17 foreperson, answer no. Does your verdict agree in all  
18 respects?

19 JUROR NUMBER 11: Yes.

20 THE CLERK: Juror Number 12, if your verdict agrees  
21 with the verdict reported by the foreperson, answer yes. If  
22 your verdict does not agree with the verdict reported by the  
23 foreperson, answer no. Does your verdict agree in all  
24 respects?

25 JUROR NUMBER 12: Yes.

1 THE COURT: All right. The courtroom deputy will  
2 file and record the verdict.

3 Ladies and gentlemen, your duties have been  
4 completed. I want to thank you very you much on behalf of the  
5 parties for your attention, for your conscientious efforts in  
6 this case.

7 As you know, I'm sure you appreciate jury service is  
8 not an easy job. It's a very difficult job to sit, listen to  
9 a trial, listen to the evidence, follow the law and render a  
10 verdict that is fair and just based upon the evidence and the  
11 law. You have worked very hard in this case, no question  
12 about it. You were always very attentive and most  
13 appreciative about it.

14 We have a great system, ladies and gentlemen. All 12  
15 of you never knew each other. We come into a court of law,  
16 you sit here, you listen to the proof, you listen to the  
17 evidence, you follow the law and to the best of your ability,  
18 you render a verdict and that's what our system is all about.

19 But for your participation in this process, we would  
20 not have a system that we have in the United States, which I  
21 think is a wonderful system, a great system, but it requires  
22 the participation of all citizens. I can't imagine any other  
23 fairer way to do it than the way we do it in the United  
24 States.

25 And you actually took a hard role. You were part of

1 the system. You did your job and you rendered a verdict. I  
2 want to thank you very much for all your work and your  
3 attention and efforts in this case.

4 You are now hereby discharged. We will -- you will  
5 not have jury service again in the federal courts for two  
6 years and so, we will not see each other again for a couple of  
7 years. We may see each other again. I hope you thought this  
8 experience was a very important experience in your life and  
9 that I want to wish you well. Ms. Daniels? You may follow  
10 Ms. Daniels.

11 (The jury was discharged at 2:30 p.m.)

12 THE COURT: Counsel, the jury has rendered a verdict  
13 in this case. Mr. Zodhiates will be afforded an opportunity  
14 to meet with the probation officer to provide information  
15 before sentencing. We will schedule sentencing in one moment,  
16 as soon as Ms. Daniels comes back.

17 You will have an opportunity to file any motions that  
18 you wish to file under Rule 33, but we will set a date for  
19 sentencing. At the time of sentencing, counsel, as well as  
20 Mr. Zodhiates, will have an opportunity to address the Court  
21 and say anything you wish to say in mitigation of the  
22 sentence.

23 So, as soon as Ms. Daniels comes back, we will set a  
24 date for sentencing. Sentencing will be scheduled for  
25 January 30th at 9 o'clock -- I'm sorry -- at 1 o'clock, yes.

1 I'm sorry, at 1 o'clock.

2 As I said, Mr. Zodiates will have an opportunity to  
3 address the Court at the time of sentencing and also be  
4 available to provide information for the report.

5 Obviously, Mr. Grable and Mr. Hemley, you should be  
6 present during the interview. As I said, you'll be able to  
7 file any objections to the report and we'll give you a  
8 schedule of a time for filing any objections to the report.  
9 This is different than the Rule 33 that you may be making.  
10 That's up to counsel whether you choose to make a Rule 33  
11 motion, but this will be the schedule for filing all papers as  
12 far as the pre-sentence report is concerned.

13 THE CLERK: Counsel, you will be given a sheet with  
14 all the dates that I am about to recite. The initial pre-  
15 sentence report will be due December 16th. The statement of  
16 the parties with respect to sentencing factors and objections,  
17 if any, and motions, if any, will be due January 9th.  
18 Responses to any objections, or responses to any motions will  
19 be due January 17th.

20 A sentencing memorandum and/or character letters in  
21 support of the defendant will be due January 17th. Any motion  
22 to adjourn the sentencing date will be due no later than  
23 January 20th. The final pre-sentence report will be due  
24 January 23rd and the government's response to any legal  
25 arguments in defendant's sentencing memorandum will be due

1 January 23rd.

2 MR. HEMLEY: I'm sorry. I missed the last date,  
3 Ms. Daniels.

4 THE CLERK: January 23rd. I'm going to give you a  
5 sheet with all these dates on it.

6 MR. HEMLEY: Thank you.

7 THE COURT: The jury note will be marked Court  
8 Exhibit 11. Is that the right number? And the verdict will  
9 be marked Court Exhibit 12.

10 THE CLERK: The verdict is filed as a verdict.

11 THE COURT: It is a verdict. Okay. All right. As  
12 far as bail?

13 MR. VAN DE GRAAF: Your Honor, Mr. Zodhiates has been  
14 compliant with bail, pending trial. The government doesn't  
15 feel that detention is necessary. If the Court felt  
16 additional security or additional conditions was appropriate,  
17 we leave it to the Court's discretion whether there should be  
18 some sort of bail or security in light of the conviction.

19 THE COURT: Well, he owns property in Nicaragua, I  
20 learned from the trial.

21 MR. HEMLEY: Yes, Your Honor.

22 THE COURT: He has surrendered his passport, I  
23 understand.

24 MR. HEMLEY: He has long since surrendered his  
25 passport, Your Honor. He is a long-standing citizen of

1 Waynesboro, Virginia, where he operates a business. It is an  
2 ongoing business. He has a family, he is surrounded by  
3 friends. He's a member of a congregation in the Waynesboro  
4 area. He has made every single court appearance that has been  
5 required of him. And we don't see that, in this case, given  
6 that his passport has been surrendered and his intention to  
7 certainly appear whenever this Court or any Court requires,  
8 that anything additional is --

9 THE COURT: Any limitations on his bail, as far as  
10 geographical limitations of any sort?

11 MR. VAN DE GRAAF: I don't think there were, Your  
12 Honor. I mean, certainly, the Court could increase the  
13 contact with the probation officer as one thing. In addition,  
14 obviously, the Court's learned that Mr. Zodhiates has some  
15 financial capability, if the Court thought it was appropriate  
16 to have some bail -- some amount of bail that might be  
17 appropriate as well.

18 MR. HEMLEY: Your Honor, with all respect, it really  
19 is unnecessary to tie up any finances. He's going to have  
20 ongoing expenses certainly in connection with this case and  
21 with other matters. He has to operate his business. He's got  
22 11 employees who depend on the continued vitality of his  
23 business. I don't think it's necessary. As I said, he has  
24 made every appearance and there's no indication that he'll do  
25 anything but continue to so.

1 THE COURT: All right. I'll continue bail as  
2 previously set.

3 MR. HEMLEY: Thank you.

4 THE COURT: Those same conditions are in effect.

5 MR. HEMLEY: I have one other question and that is,  
6 being not entirely familiar with the requirements of this  
7 district, Mr. Zodhiates is, of course, going to be a resident  
8 in Waynesboro, Virginia for the rest of the time prior to  
9 sentence. May he be in touch with pre-sentence services in  
10 the Charlottesville, Virginia area rather than --

11 THE COURT: No. It will be done here. I find that  
12 when I get pre-sentence reports -- I'm sorry. As far as the  
13 pre-sentence reports is concerned?

14 MR. HEMLEY: Yes, sir.

15 THE COURT: No. That will be done here. I find that  
16 the pre-sentence reports that I get from other districts are  
17 very different in the preparation and content and substance  
18 than what we require in this district. You can do it today if  
19 you'd like.

20 MR. HEMLEY: Yes.

21 THE COURT: You want to do it today?

22 MR. HEMLEY: Yes.

23 THE COURT: Well, we can do that. We do have a  
24 probation officer here. She is available and you can have  
25 that interview today.

1 MR. HEMLEY: That would be great. Thank you.

2 THE COURT: That would be fine. I find that the  
3 reports I get from other districts are not the same style, you  
4 might say, but I think sometimes, they're not as complete as I  
5 wish. So, you can -- Ms. Pandolfe, you're here. She's the  
6 lady in the first row back there. She'll be available for the  
7 preparation of the pre-sentence report.

8 MR. HEMLEY: Thank you, Your Honor.

9 THE COURT: Okay. Anything further?

10 MR. DiGIACOMO: No, Your Honor. Thank you.

11 MR. VAN DE GRAAF: No, Your Honor.

12 MR. GRABLE: Thank you.

13 THE COURT: Thank you, counsel. Court will be in  
14 recess.

15 THE CLERK: All rise.

16 (Proceedings ended.)

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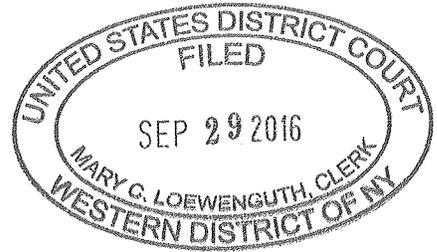
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I certify that the foregoing is a  
correct transcription of the proceedings  
recorded by me in this matter.

s/ Megan E. Pelka, RPR  
Court Reporter,



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

**JURY VERDICT**  
14-CR-175-A

PHILIP ZODHIATES,

Defendant.

**VERDICT OF THE JURY**

Having been instructed on the law applicable to this case, you are now required to make a unanimous finding of guilty or not guilty for each count charged in the Indictment. Your answers to the questions on this form must be unanimous. Your answers must also be based on findings made beyond a reasonable doubt. A copy of the Indictment has been provided to you and marked as Court Exhibit No. 9.

**COUNT 1**

**(Conspiracy)**

How do you find as to the Defendant, Philip Zodhiates, on Count 1 of the Indictment?

Guilty X Not Guilty \_\_\_\_\_

**EXHIBIT**  
**21**

**COUNT 2**

**(International Parental Kidnapping)**

How do you find as to the Defendant, Philip Zodhiates, on Count 2 of the Indictment?

Guilty X Not Guilty \_\_\_\_\_

**FINAL INSTRUCTIONS**

Now that you have completed the verdict sheet, place it in the envelope provided and seal the envelope. Inform the Court by a written note that you have reached a verdict. Do not disclose the verdict to the Court or anyone else until you are asked to do so by the Judge in open Court.

**I CERTIFY THIS VERDICT TO BE TRUE AND ACCURATE.**

\_\_\_\_\_  
Signature of Jury Foreperson

DATED: 9/29/16

UNITED STATES DISTRICT COURT

Western District Of New York

UNITED STATES OF AMERICA

v.

Philip Zodhates

JUDGMENT IN A CRIMINAL CASE

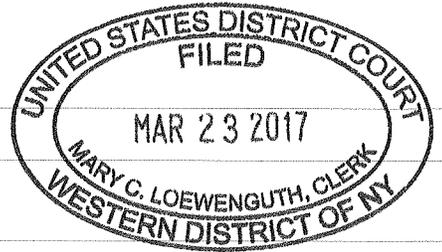
Case Number: 1:14CR00175-002

USM Number: 18649-084

James W. Grable, Jr. and Robert B. Hemley
Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to counts
pleaded nolo contendere to count(s) which was accepted by the court.
was found guilty on counts 1 and 2 of the Superseding Indictment after a plea of not guilty.



The defendant is adjudicated guilty of these offenses:

Table with 4 columns: Title & Section, Nature of Offense, Offense Ended, Count. Rows include 18 U.S.C. §371 (Conspiracy to Obstruct Parental Rights) and 18 U.S.C. §1204 and §2 (International Parental Kidnapping).

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

- The defendant has been found not guilty on count(s)
Count(s) is are dismissed on the motion of the United States.

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

March 22, 2017
Date of Imposition of Judgment

Richard J. Arcara
Signature of Judge

Honorable Richard J. Arcara, Senior U.S. District Judge
Name and Title of Judge

March 23, 2017
Date

EXHIBIT 22

DEFENDANT: Philip Zodhiates  
CASE NUMBER: 1:14CR00175-002

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:  
36 months on Count 1 and 36 months on Count 2 to be served concurrently to each other

*The cost of incarceration fee is waived.*  
*Sentence Stayed pending appeal*

The court makes the following recommendations to the Bureau of Prisons:  
- If the sentence is affirmed on appeal, designate to FCI Petersburg, Virginia.

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

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

at \_\_\_\_\_  a.m.  p.m. on \_\_\_\_\_

as notified by the United States Marshal.

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

before 2 p.m. on \_\_\_\_\_

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

at \_\_\_\_\_, with a certified copy of this judgment.

UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Philip Zodhiates  
CASE NUMBER: 1:14CR00175-002

### SUPERVISED RELEASE

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

One (1) year on Count 1 and one (1) year on Count 2 to be served concurrently to each other

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

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

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

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

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

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

### STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Philip Zodhiates  
CASE NUMBER: 1:14CR00175-002

### SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit to a search of his person, property, vehicle, place of residence or any other property under his control, based upon reasonable suspicion, and permit confiscation of any evidence or contraband discovered.

DEFENDANT: Philip Zodhiates  
 CASE NUMBER: 1:14CR00175-002

**CRIMINAL MONETARY PENALTIES**

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

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	\$ 200	\$ 0	\$ 0

- The determination of restitution is deferred until \_\_\_\_\_. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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<b>TOTALS</b>	\$ _____	\$ _____
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- Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
  - the interest requirement is waived for the  fine  restitution.
  - the interest requirement for the  fine  restitution is modified as follows:

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

DEFENDANT: Philip Zodhiates  
 CASE NUMBER: 1:14CR00175-002

**SCHEDULE OF PAYMENTS**

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

- A  Lump sum payment of \$ \_\_\_\_\_ due immediately, balance due
  - not later than \_\_\_\_\_, or
  - in accordance  C,  D,  E, or  F below; or
- B  Payment to begin immediately (may be combined with  C,  D, or  F below); or
- C  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after the date of this judgment; or
- D  Payment in equal \_\_\_\_\_ (e.g., weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E  Payment during the term of supervised release will commence within \_\_\_\_\_ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant’s ability to pay at that time; or
- F  Special instructions regarding the payment of criminal monetary penalties:  
 The defendant shall pay a special assessment of \$100 on each count for a total of \$200, which shall be due immediately. If incarcerated, payment shall begin under the Bureau of Prisons Inmate Financial Responsibility Program. Payments shall be made to the Clerk, U.S. District Court (WD/NY), 2 Niagara Square, Buffalo, New York 14202.

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

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

Joint and Several

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

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant’s interest in the following property to the United States:

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

*United States v. Philip Zodhiates*

In the  
United States Court of Appeals  
For the Second Circuit

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August Term, 2017

No. 17-839-cr

UNITED STATES OF AMERICA  
*Appellee,*

*v.*

PHILIP ZODHIATES,  
*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Western District of New York.  
No. 1:14-cr-00175-2 (RJA), Richard J. Arcara, *District Judge.*

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Argued: April 9, 2018

Decided: August 21, 2018

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Before: PARKER, RAGGI, *Circuit Judges*, AND FURMAN, *District Judge*.\*

Defendant-Appellant Philip Zodhiates appeals from a judgment of conviction for conspiring with parent Lisa Miller to remove her child from the United States to Nicaragua in order to

\* Judge Jesse M. Furman, of the United States District Court for the Southern District of New York, sitting by designation.

1 obstruct the lawful exercise of parental rights by Miller’s civil union  
2 partner, Janet Jenkins, in violation of the International Parental  
3 Kidnapping Crime Act. *See* 18 U.S.C. §§ 371, 1204, and 2.  
4 AFFIRMED.

5  
6  
7  
8 \_\_\_\_\_  
9 PAUL J. VAN DE GRAAF, Special Assistant United  
10 States Attorney (Michael DiGiacomo, Assistant  
11 United States Attorney, *on the brief*), for James P.  
12 Kennedy, United States Attorney for the Western  
13 District of New York, Buffalo, New York, *for*  
*Appellee United States of America.*

14 ROBERT B. HEMLEY (David A. Boyd, Esq., Gravel &  
15 Shea PC, Burlington, Vermont; James W. Grable,  
16 Jr., Connors, LLP, Buffalo, New York, *on the brief*),  
17 Gravel & Shea PC, Burlington, Vermont, *for*  
18 *Defendant-Appellant Philip Zodhiates.*

19  
20 WILLIAM J. OLSON, William J. Olson PC, Vienna,  
21 Virginia, *for Amici Curiae in Support of Appellant:*  
22 *Downsize DC Foundation, DownsizeDC.org, Gun*  
23 *Owners of America, Inc., and Gun Owners*  
24 *Foundation.*

1 BARRINGTON D. PARKER, *Circuit Judge*:

2  
3 Defendant-Appellant Philip Zodhiates appeals from a judgment of  
4 conviction in the United States District Court for the Western District of New  
5 York (*Arcara, J.*). He was convicted of conspiring with and aiding and abetting  
6 parent Lisa Miller to remove her seven-year-old child from the United States to  
7 Nicaragua in order to obstruct the lawful exercise of parental rights by Miller's  
8 civil union partner, Janet Jenkins, in violation of the International Parental  
9 Kidnapping Crime Act ("IPKCA"). *See* 18 U.S.C. §§ 371, 1204, and 2.

10 Zodhiates contends that the District Court erred in declining to suppress  
11 inculpatory location information garnered from his cell phone records. The  
12 records should have been suppressed, he argues, because, in violation of the  
13 Fourth Amendment, the government had obtained them through a subpoena  
14 issued pursuant to the Stored Communications Act ("SCA"), *see id.* § 2703(c)(2),  
15 rather than a court-approved warrant. He also contends that portions of the  
16 District Court's charge to the jury and statements by the prosecutor in his  
17 summation had the effect of denying him a fair trial. We conclude that these  
18 contentions are without merit and, accordingly, we affirm the judgment.

1 **BACKGROUND**

2 The facts construed in the light most favorable to the government are as  
3 follows. Lisa Miller and Janet Jenkins entered into a civil union in Vermont in  
4 2000. In 2002, Miller gave birth to a daughter, "IMJ." About a year later, Miller  
5 and Jenkins separated, and Miller took IMJ to Virginia while Jenkins remained in  
6 Vermont. In 2003, Miller petitioned a Vermont family court to dissolve the civil  
7 union and the court awarded custody to Miller and visitation rights to Jenkins.  
8 After Miller repeatedly refused to respect Jenkins' visitation rights, Jenkins  
9 sought to enforce them in Virginia and, ultimately, the Virginia Court of Appeals  
10 held that Vermont, not Virginia, had jurisdiction over the dispute and ordered its  
11 courts to "grant full faith and credit to the custody and visitation orders of the  
12 Vermont court." *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 332 (Va. Ct. App.  
13 2006).

14 In 2007, the Vermont court warned Miller that "[c]ontinued interference  
15 with the relationship between IMJ and [Jenkins] could lead to a change of  
16 circumstances and outweigh the disruption that would occur if a change of  
17 custody were ordered." A. 189. Miller refused to comply with the order and,  
18 following several contempt citations of Miller, Jenkins returned to court in

1 Vermont. In November 2009, the Vermont family court awarded sole custody of  
2 IMJ to Jenkins and visitation rights to Miller.

3 In September 2009, while the Vermont litigation was pending, Philip  
4 Zodhiates, a businessman with strong ties to the Mennonite community, along  
5 with Kenneth Miller, a Mennonite pastor living in Virginia, and Timothy Miller,  
6 a Mennonite pastor living in Nicaragua, helped Miller to kidnap IMJ and flee to  
7 Nicaragua.<sup>1</sup> As confirmed by Zodhiates' cell phone and email records, which  
8 were introduced at trial, Zodhiates drove Miller and IMJ from Virginia to  
9 Buffalo, and then Miller and IMJ crossed into Ontario. From Ontario, Miller and  
10 IMJ traveled to Nicaragua where Miller remains a fugitive and IMJ resides. Email  
11 records also show that, following the kidnapping, Zodhiates helped Miller and  
12 her daughter settle in Nicaragua. Zodhiates coordinated with others to remove a  
13 number of personal items from Miller's Virginia apartment, and, in November  
14 2009, Zodhiates arranged for an acquaintance who was traveling to Nicaragua to  
15 bring various personal possessions to Miller. At the time of the kidnapping,  
16 Virginia law made same-sex marriages entered into outside of Virginia void

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<sup>1</sup>  
Lisa Miller, Timothy Miller, and Kenneth Miller are not related to each other.

1 there in all respects and such marriages could not be used to establish familial or  
2 step-parent rights in Virginia. *See* Va. Const. Art. I, § 15-A.<sup>2</sup>

3 The Government’s investigation commenced in 2010 in Vermont, soon  
4 after it became apparent that Miller had disappeared. During the course of the  
5 investigation, the Government issued subpoenas, which are subjects of this  
6 appeal, to nTelos Wireless, a Virginia cell phone company. The subpoenas sought  
7 billing records spanning 28 months and other information<sup>3</sup> pertaining to two cell  
8 phones that had frequent contact with Kenneth Miller in September 2009. These

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2

This provision was held unconstitutional by *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014).

3

Specifically:

- “All subscriber information,” such as “account number,” “subscriber name,” and “other identifying information”;
- “Means and source of payments”;
- “Length of service”;
- “Detail records of phone calls made and received (including local and incoming call records if a cellular account) and name of long distance carrier if not [nTelos]”;
- “Numeric (non-content) detail records of text messages (including SMS), multimedia messages (including MMS), and other data transmissions made and received (including any IP address assigned for each session or connection).” A. 34.

1 phones were listed in the customer name “Response Unlimited, Inc.,” a direct  
2 mail marketing company owned by Zodhiates. The subpoenas did not request  
3 the contents of phone calls or text messages, nor did they specifically request  
4 information concerning the locations from which phone calls were made or  
5 received.

6 In response to the subpoenas, nTelos produced billing records that showed  
7 detailed call information, including the date and time of phone calls made from  
8 various cell phones, together with the “service location” from which each call  
9 was made or received. Information presented in the “service location” field  
10 showed the general vicinity of the cell phone when the call was made or  
11 received, such as a county name, but did not contain details about precisely  
12 where in the general area the phone was located. These records, which were later  
13 featured prominently at Zodhiates’ trial, linked Zodhiates to Miller in Virginia  
14 and Buffalo, and established telephone contact among the conspirators.

15 The matter was subsequently transferred to the Western District of New  
16 York, where Zodhiates, Miller, and Timothy Miller were indicted for violating  
17 the IPKCA.<sup>4</sup>

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<sup>4</sup>

Miller remains a fugitive. Timothy Miller pleaded guilty after being

1 Before trial, Zodhiates moved to suppress the cell phone evidence, arguing  
2 that because he had a reasonable expectation of privacy in his movements from  
3 one place to another, the Government violated the Fourth Amendment when it  
4 obtained the billing records with a subpoena instead of a warrant. The District  
5 Court, relying on *United States v. Miller*, 425 U.S. 435 (1976) and *Smith v. Maryland*,  
6 442 U.S. 735 (1979), denied Zodhiates' motion. The District Court found it "too  
7 much" to conclude that a cell phone subscriber operates under the belief that his  
8 location is kept secret from telecommunication carriers and other third parties  
9 and that because "there is no reasonable expectation of privacy in the cell phone  
10 location information at issue in this case" a warrant was not required. A. 52.  
11 (internal quotation marks omitted). At trial, the Government introduced  
12 evidence including phone records reflecting contact between Zodhiates and  
13 Miller in the months before the kidnapping; phone records reflecting contact  
14 between Zodhiates and Miller's father; Zodhiates' cell phone bill showing that he  
15 traveled from Virginia to Buffalo on the day of the kidnapping; and phone  
16 records reflecting contact between the co-conspirators.

17 Near the end of the trial, the District Court shared with the parties its

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deported from Nicaragua to the United States.

1 proposed jury charge—to which no objection was lodged—which read, in part,  
2 as follows:

3 In this case, the term “parental rights” means Janet Jenkins’ right to  
4 visit IMJ, as that right was defined by the law and courts of Vermont  
5 at the time IMJ was removed from the United States. . . . To find  
6 that Zodhiates acted with the intent to obstruct the lawful exercise of  
7 parental rights, you must find that he acted deliberately with the  
8 purpose of interfering with Janet Jenkins’ parental rights. You may  
9 consider all of the evidence of Zodhiates’ other acts in determining  
10 whether the government has proven beyond a reasonable doubt  
11 that Zodhiates acted with this intent.

12  
13 *United States v. Zodhiates*, No. 14-CR-175-RJA, 2016 U.S. Dist. LEXIS 125002, at \*9-  
14 10 (Sept. 14, 2016).

15 Relying on the intended charge, the prosecutor stated in his rebuttal  
16 summation that “[i]t doesn’t matter what [Zodhiates] understands about Virginia  
17 litigation,” A. 267, and that the Virginia litigation “should have no bearing on the  
18 intent issues,” *id.* at 262. That evening, following closing arguments, the defense  
19 concluded that this remark by the prosecutor had been improper and requested  
20 that the District Court include in its charge a “curative instruction regarding the  
21 relevance of Virginia law,” reading in part that:

22 Parental rights for purposes of this case are defined by reference to  
23 the law of the state where the child, [IMJ], lived before leaving the  
24 United States. Prior to this case, there were a series of court

1 proceedings in Vermont and Virginia about the parental rights of  
2 Lisa Miller and Janet Jenkins. One legal issue in the proceedings was  
3 whether Vermont or Virginia law governed the parental rights of  
4 Lisa Miller and Janet Jenkins. In its summation, the Government  
5 suggested that Virginia law is irrelevant to this case. That is  
6 incorrect.

7  
8 If, as Lisa Miller requested, Virginia had found that Janet Jenkins  
9 had no parental rights, it would have been impossible for Lisa Miller  
10 to obstruct parental rights for purposes of the international parental  
11 kidnapping statute because Janet Jenkins would have had no  
12 parental rights that could be obstructed. I will instruct you shortly  
13 that as a matter of law, Vermont law was found to control. I will also  
14 instruct you about what parental rights Janet Jenkins had and when.

15  
16 By instructing you as to the law, I am not instructing you on what  
17 the defendant knew or intended with regard to parental rights. That  
18 is a question of fact which you must decide, and which the  
19 government must prove beyond a reasonable doubt. In doing so,  
20 you may consider evidence about the litigation in both Vermont and  
21 Virginia for the purpose of considering whether the prosecution has  
22 proven beyond a reasonable doubt that Mr. Zodiates knew Janet  
23 Jenkins had parental rights, understood those rights, and intended  
24 to obstruct those rights.

25  
26 *Id.* at 74.

27 The District Court denied the request. It concluded that “[n]othing in the  
28 Court’s current charge precludes the jury from considering both the Virginia and  
29 the Vermont litigation when it decides whether the defendant knew about and  
30 intended to obstruct Vermont rights.” *Id.* at 289. It also concluded that “the

1 Court’s intended charge gives the jury a properly balanced instruction on what  
2 evidence it may consider with regard to the issue of intent” and that “[t]he Court  
3 also believes that expressly instructing the jury that it may consider a Virginia  
4 litigation . . . runs the risk of unnecessarily confusing the jury.” *Id.* at 288-89. At  
5 the conclusion of the trial, the District Court instructed the jury consistent with  
6 the proposed instruction it had shared with the parties earlier. Zodhiates  
7 subsequently raised this challenge to the District Court’s instruction in a motion  
8 under Fed. R. Civ. P. 33 for a new trial, which the Court denied.

9 The jury found Zodhiates guilty on both counts of the indictment and the  
10 District Court sentenced him principally to 36 months of incarceration. This  
11 appeal followed. Zodhiates’ main contentions are that the District Court erred in  
12 refusing to suppress the cell phone records and denying his requested curative  
13 charge. We disagree and therefore we affirm.

## 14 DISCUSSION

### 15 I. Fourth Amendment Challenge

16 Zodhiates contends that the government violated the Fourth Amendment  
17 when it secured his cell phone records by subpoena under the SCA because it  
18 was required to proceed by a warrant supported by probable cause and,

1 consequently, the records were inadmissible. When considering an appeal  
2 stemming from a motion to suppress evidence, we review legal conclusions *de*  
3 *novo* and findings of fact for clear error. *United States v. Ganius*, 824 F.3d 199, 208  
4 (2d Cir. 2016) (*en banc*).

5 During the pendency of this appeal, the Supreme Court decided *Carpenter*  
6 *v. United States*, 138 S. Ct. 2206 (2018), in which it held that “an individual  
7 maintains a legitimate expectation of privacy in the record of his physical  
8 movements as captured through [cell service location information]” and,  
9 therefore, under the requirements of the Fourth Amendment, enforcement  
10 officers must generally obtain a warrant before obtaining such information. *Id.* at  
11 2217. However, Zodhiates is not entitled to have the records suppressed because,  
12 under the “good faith” exception, when the Government “act[s] with an  
13 objectively reasonable good-faith belief that their conduct is lawful,” the  
14 exclusionary rule does not apply. *Davis v. United States*, 564 U.S. 229, 238 (2011)  
15 (internal quotation marks omitted). This exception covers searches conducted in  
16 objectively reasonable reliance on appellate precedent existing at the time of the  
17 search. *See United States v. Aguiar*, 737 F.3d 251, 259 (2d Cir. 2013).

1           In 2011, appellate precedent—the third party doctrine—permitted the  
2 government to obtain the phone bill records by subpoena as opposed to by  
3 warrant. Under this doctrine, the Fourth Amendment “does not prohibit the  
4 obtaining of information revealed to a third party and conveyed by [the third  
5 party] to Government authorities.” *Miller*, 425 U.S. at 443. In *Miller*, the Supreme  
6 Court held that the government was entitled to obtain a defendant’s bank  
7 records with a subpoena, rather than a warrant, because the bank records were  
8 “business records of the banks” and the defendant had “no legitimate  
9 expectation of privacy” in the contents of his checks because those documents  
10 “contain[ed] only information voluntarily conveyed to the banks and exposed to  
11 their employees in the ordinary course of business.” *Id.* at 440-42 (internal  
12 quotation marks omitted). Similarly, in *Smith*, the Supreme Court held that a  
13 defendant did not have a reasonable expectation of privacy in the telephone  
14 numbers that he dialed because “[t]elephone users . . . typically know that they  
15 must convey numerical information to the phone company; that the phone  
16 company has facilities for recording this information; and that the phone  
17 company does in fact record this information for a variety of legitimate business  
18 purposes.” 442 U.S. at 743.

1           These cases stand for the proposition that, in 2011, prior to *Carpenter*, a  
2 warrant was not required for the cell records. We acknowledged as much in  
3 *United States v. Ulbricht*, 858 F.3d 71 (2d Cir. 2017), when we considered ourselves  
4 bound by the third party doctrine in *Smith* “unless it is overruled by the Supreme  
5 Court,” *id.* at 97.<sup>5</sup>

6           To escape this result, Zodhiates directs us to *United States v. Jones*, 565 U.S.  
7 400, 404 (2012), which held that when the government engages in prolonged  
8 location tracking, it conducts a search under the Fourth Amendment requiring a  
9 warrant. However, *Jones* is of no help to him. It was decided in 2012, after the  
10 Government’s 2011 subpoena and consequently is not relevant to our good faith  
11 analysis. For these reasons, we conclude that the District Court properly denied  
12 Zodhiates’ motion to suppress the cell location evidence.

13

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5

Further, all five courts of appeal to have considered, before *Carpenter*, whether the warrant requirement in the Fourth Amendment applied to historical cell site information concluded, in light of *Smith* and *Miller*, that it did not. *United States v. Thompson*, 866 F.3d 1149 (10th Cir. 2017); *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016) (*en banc*); *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), *rev’d*, 138 S. Ct. 2206 (2018); *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015) (*en banc*); *In re Application of the United States for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013).

## II. Jury Charge

1  
2 Next, Zodiates contends that the District Court erred in failing to instruct  
3 the jury, as he requested, that in considering whether he intended to obstruct  
4 parental rights under the IPKCA, those rights were defined by Virginia, rather  
5 than Vermont, law, because Virginia was the state where IMJ lived before leaving  
6 the United States. The principles applicable to this contention are familiar ones.  
7 “A defendant is entitled to have his theory of the case fairly submitted to the  
8 jury, as long as it has some foundation in the evidence,” *United States v. Vaughn*,  
9 430 F.3d 518, 522 (2d Cir. 2005), but he is not entitled to have the exact language  
10 he proposes read to the jury, *see United States v. Dyman*, 739 F.2d 762, 771 (2d Cir.  
11 1984).

12 We review a district court’s rejection of a requested jury charge for abuse  
13 of discretion. *See United States v. Hurtado*, 47 F.3d 577, 585 (2d Cir. 1995). “In order  
14 to succeed on his challenges to the jury instructions, appellant has the burden of  
15 showing that his requested charge accurately represented the law in every  
16 respect and that, viewing as a whole the charge actually given, he was  
17 prejudiced.” *United States v. Ouimette*, 798 F.2d 47, 49 (2d Cir. 1986). The trial

1 court has substantial discretion to fashion jury instructions, so long as they are  
2 fair to both sides. *See United States v. Russo*, 74 F.3d 1383, 1393 (2d Cir. 1996).

3       Zodhiates’ challenge fails because, as the District Court correctly noted,  
4 “[i]t is clear in this case that, as a matter of state family law, Vermont family law .  
5 . . defined parental rights, regardless of where [the child] resided.” A. 291.  
6 Moreover, Zodhiates cannot show that he was prejudiced by the instruction  
7 ultimately given by the District Court.

8       The IPKCA defines “parental rights” as “the right to physical custody of  
9 the child . . . whether arising by operation of law, court order, or legally binding  
10 agreement of the parties.” 18 U.S.C. § 1204(b)(2)(B). Here, a Vermont court order  
11 afforded Jenkins parental rights. *See Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951,  
12 956 (Vt. 2006). Moreover, at the time IMJ was taken from Virginia, an order from  
13 a court of that state had also recognized that the Vermont courts had jurisdiction  
14 over the custody dispute and required Virginia courts to give full faith and credit  
15 to the Vermont orders. *See Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337-38  
16 (Va. Ct. App. 2006); *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, 827 (Va. 2008)  
17 (recognizing Vermont’s jurisdiction in reliance on law-of-the-case doctrine).  
18 Because Virginia itself recognized that the Vermont court order was controlling,

1 the District Court was correct when it instructed the jury that Vermont law  
2 defined parental rights. We agree with the District Court that to instruct  
3 otherwise would have been misleading and confusing.

4         Zodhiates attempts to sidestep the Vermont order by contending that,  
5 contrary to the District Court’s conclusion, this Court in *United States v. Amer*, 110  
6 F.3d 873, 878 (2d Cir. 1997), defined parental rights under the IPKCA by  
7 reference to Article 3 of the Hague Convention, which specifies “the law of the  
8 State in which the child was habitually resident immediately before the removal  
9 or retention,” Hague Convention on the Civil Aspects of Int’l Child Abduction,  
10 art. 3, Oct. 25, 1980, P.I.A.S. No. 11,670. *Amer*, Zodhiates contends, means that  
11 only Virginia law defined Jenkins’ parental rights.

12         In *Amer*, the defendant was a citizen of both Egypt and the United States.  
13 As *Amer*’s marriage began deteriorating, he brought his three children from New  
14 York to Egypt, and he was convicted of violating the IPKCA. *Amer*, 110 F.3d at  
15 876. In that case, in the absence of a court order or legally binding agreement, we  
16 looked to Article 3 of the Hague Convention (and, by extension, to the law of  
17 New York as the children’s habitual residence prior to removal) to define  
18 parental rights. Nothing in *Amer* can reasonably be read to hold that parental

1 rights under the IPKCA are always defined by the state of the child’s habitual  
2 residence.

3 In any event, Zodhiates cannot demonstrate prejudice. As the District  
4 Court noted, its charge did not prevent the parties from arguing, or the jury from  
5 deciding, what impact, if any, the Virginia or Vermont custody litigation may  
6 have had on Zodhiates’ intent.<sup>6</sup> Indeed, the defense took considerable advantage  
7 of this latitude by making repeated references in his arguments to the Virginia  
8 litigation and to events in Virginia. *See, e.g.*, A. 123 (Def. Ex. 25, an email sent to  
9 Zodhiates about the Virginia litigation); *see also id.* at 221-26 (transcript of defense  
10 counsel discussing the Virginia litigation on cross-examination). Accordingly, we  
11 see no error.

### 12 III. Prosecution Summation

13 Finally, Zodhiates contends that the District Court erred in denying his  
14 request for a curative instruction in response to the prosecutor’s rebuttal  
15 summation. During that summation, the prosecutor told the jury that “[i]t

---

6

“Nothing in the Court’s current charge precludes the jury from considering both the Virginia and Vermont litigation when it decides whether the defendant knew about and intended to obstruct Vermont rights.” A. 289.

1 doesn't matter what [Zodhiates] understands about Virginia litigation," *id.* at 267,  
2 and that the Virginia litigation "should have no bearing on the intent issues," *id.*  
3 at 262. Following closing arguments, Zodhiates objected to the remarks and  
4 requested the following curative instruction: "In its summation, the Government  
5 suggested that Virginia law is irrelevant to this case. That is incorrect." A. 74.

6 The District Court correctly denied the request because the prosecutor's  
7 statements, in context, were unobjectionable. The District Court recognized them  
8 for what they were: factual interpretations of the evidence and not statements of  
9 legal principles. As the District Court observed in denying Zodhiates' motion for  
10 a new trial: "[T]he AUSA's comment simply told the jury that, in the  
11 Government's view, Zodhiates's interpretation of the evidence was wrong—not  
12 that Zodhiates's understanding of the Virginia litigation was legally irrelevant."  
13 *United States v. Zodhiates*, 235 F. Supp. 3d 439, 457 (W.D.N.Y. 2017). The  
14 prosecutor was entitled to present to the jury the Government's interpretation of  
15 the evidence. He was entitled to argue that the Virginia litigation deserved no  
16 weight in the jury's consideration of Zodhiates' intent, just as the defense was  
17 entitled to, and in fact did, argue that it deserved great weight. *See United States v.*

1 *Salameh*, 152 F.3d 88, 138 (2d Cir. 1998) (*per curiam*) (affording prosecutor “broad  
2 latitude” as to reasonable inferences he may argue to jury).

3 In any event, the District Court adequately addressed *Zodhiates*’ concerns  
4 when it instructed the jury to determine “what the defendant knew or intended  
5 with regard to” Jenkins’ parental rights under Vermont law. *Zodhiates*, 235 F.  
6 Supp. 3d at 457 n.10 (internal quotation marks omitted). As the District Court  
7 correctly observed, nothing in the charge or the summation precluded the jury  
8 from considering both the Virginia and Vermont litigation when it decided  
9 whether *Zodhiates* knew about and intended to obstruct Jenkins’ rights. For  
10 these reasons, we see no error in the prosecutor’s remarks or in the District  
11 Court’s response to them.

## 12 CONCLUSION

13 For the foregoing reasons, the judgment of the District Court is  
14 AFFIRMED.

**United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

**ROBERT A. KATZMANN**  
CHIEF JUDGE

Date: August 21, 2018

Docket #: 17-839cr

Short Title: United States of America v. Miller (Zodhiates)

**CATHERINE O'HAGAN WOLFE**  
CLERK OF COURT

DC Docket #: 1:14-cr-175-2

DC Court: WDNY (BUFFALO)

DC Judge: Arcara

DC Judge: McCarthy

**BILL OF COSTS INSTRUCTIONS**

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- \* be filed within 14 days after the entry of judgment;
- \* be verified;
- \* be served on all adversaries;
- \* not include charges for postage, delivery, service, overtime and the filers edits;
- \* identify the number of copies which comprise the printer's unit;
- \* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- \* state only the number of necessary copies inserted in enclosed form;
- \* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- \* be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

**ROBERT A. KATZMANN**  
CHIEF JUDGE

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DC Docket #: 1:14-cr-175-2  
DC Court: WDNY (BUFFALO)  
DC Judge: Arcara  
DC Judge: McCarthy

**VERIFIED ITEMIZED BILL OF COSTS**

Counsel for

\_\_\_\_\_

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

\_\_\_\_\_

and in favor of

\_\_\_\_\_

for insertion in the mandate.

Docketing Fee \_\_\_\_\_

Costs of printing appendix (necessary copies \_\_\_\_\_) \_\_\_\_\_

Costs of printing brief (necessary copies \_\_\_\_\_) \_\_\_\_\_

Costs of printing reply brief (necessary copies \_\_\_\_\_) \_\_\_\_\_

**(VERIFICATION HERE)**

\_\_\_\_\_  
Signature

# MANDATE

UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21<sup>st</sup> day of August, two thousand and eighteen.

Before: Barrington D. Parker,  
Reena Raggi,  
*Circuit Judges,*  
Jesse M. Furman,  
*District Judge.\**

United States of America,

Appellee,

v.

Philip Zodhiates,

Defendant - Appellant.

**JUDGMENT**

Docket No. 17-839

The appeal in the above captioned case from a judgment of the United States District Court for the Western District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED.

For the Court:  
Catherine O'Hagan Wolfe,  
Clerk of Court


\*Judge Jesse M. Furman, of the United States District Court for the Southern District of New York, sitting by designation.

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


**EXHIBIT**  
**24**

**MANDATE ISSUED ON 10/26/2018**

*United States v. Philip Zodhiates*

In the  
United States Court of Appeals  
For the Second Circuit

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August Term, 2017

No. 17-839-cr

UNITED STATES OF AMERICA  
*Appellee,*

*v.*

PHILIP ZODHIATES,  
*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Western District of New York.  
No. 1:14-cr-00175-2 (RJA), Richard J. Arcara, *District Judge.*

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Argued: April 9, 2018

Decided: August 21, 2018

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Before: PARKER, RAGGI, *Circuit Judges*, AND FURMAN, *District Judge*.\*

Defendant-Appellant Philip Zodhiates appeals from a judgment of conviction for conspiring with parent Lisa Miller to remove her child from the United States to Nicaragua in order to

\* Judge Jesse M. Furman, of the United States District Court for the Southern District of New York, sitting by designation.

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1 obstruct the lawful exercise of parental rights by Miller’s civil union  
2 partner, Janet Jenkins, in violation of the International Parental  
3 Kidnapping Crime Act. *See* 18 U.S.C. §§ 371, 1204, and 2.  
4 AFFIRMED.  
5  
6  
7

8 \_\_\_\_\_  
9 PAUL J. VAN DE GRAAF, Special Assistant United  
10 States Attorney (Michael DiGiacomo, Assistant  
11 United States Attorney, *on the brief*), for James P.  
12 Kennedy, United States Attorney for the Western  
13 District of New York, Buffalo, New York, *for*  
*Appellee United States of America.*

14 ROBERT B. HEMLEY (David A. Boyd, Esq., Gravel &  
15 Shea PC, Burlington, Vermont; James W. Grable,  
16 Jr., Connors, LLP, Buffalo, New York, *on the brief*),  
17 Gravel & Shea PC, Burlington, Vermont, *for*  
18 *Defendant-Appellant Philip Zodhiates.*  
19

20 WILLIAM J. OLSON, William J. Olson PC, Vienna,  
21 Virginia, *for Amici Curiae in Support of Appellant:*  
22 *Downsize DC Foundation, DownsizeDC.org, Gun*  
23 *Owners of America, Inc., and Gun Owners*  
24 *Foundation.*  
25 \_\_\_\_\_

1 BARRINGTON D. PARKER, *Circuit Judge*:

2  
3 Defendant-Appellant Philip Zodhiates appeals from a judgment of  
4 conviction in the United States District Court for the Western District of New  
5 York (*Arcara, J.*). He was convicted of conspiring with and aiding and abetting  
6 parent Lisa Miller to remove her seven-year-old child from the United States to  
7 Nicaragua in order to obstruct the lawful exercise of parental rights by Miller's  
8 civil union partner, Janet Jenkins, in violation of the International Parental  
9 Kidnapping Crime Act ("IPKCA"). *See* 18 U.S.C. §§ 371, 1204, and 2.

10 Zodhiates contends that the District Court erred in declining to suppress  
11 inculpatory location information garnered from his cell phone records. The  
12 records should have been suppressed, he argues, because, in violation of the  
13 Fourth Amendment, the government had obtained them through a subpoena  
14 issued pursuant to the Stored Communications Act ("SCA"), *see id.* § 2703(c)(2),  
15 rather than a court-approved warrant. He also contends that portions of the  
16 District Court's charge to the jury and statements by the prosecutor in his  
17 summation had the effect of denying him a fair trial. We conclude that these  
18 contentions are without merit and, accordingly, we affirm the judgment.

1 **BACKGROUND**

2 The facts construed in the light most favorable to the government are as  
3 follows. Lisa Miller and Janet Jenkins entered into a civil union in Vermont in  
4 2000. In 2002, Miller gave birth to a daughter, "IMJ." About a year later, Miller  
5 and Jenkins separated, and Miller took IMJ to Virginia while Jenkins remained in  
6 Vermont. In 2003, Miller petitioned a Vermont family court to dissolve the civil  
7 union and the court awarded custody to Miller and visitation rights to Jenkins.  
8 After Miller repeatedly refused to respect Jenkins' visitation rights, Jenkins  
9 sought to enforce them in Virginia and, ultimately, the Virginia Court of Appeals  
10 held that Vermont, not Virginia, had jurisdiction over the dispute and ordered its  
11 courts to "grant full faith and credit to the custody and visitation orders of the  
12 Vermont court." *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 332 (Va. Ct. App.  
13 2006).

14 In 2007, the Vermont court warned Miller that "[c]ontinued interference  
15 with the relationship between IMJ and [Jenkins] could lead to a change of  
16 circumstances and outweigh the disruption that would occur if a change of  
17 custody were ordered." A. 189. Miller refused to comply with the order and,  
18 following several contempt citations of Miller, Jenkins returned to court in

1 Vermont. In November 2009, the Vermont family court awarded sole custody of  
2 IMJ to Jenkins and visitation rights to Miller.

3 In September 2009, while the Vermont litigation was pending, Philip  
4 Zodhiates, a businessman with strong ties to the Mennonite community, along  
5 with Kenneth Miller, a Mennonite pastor living in Virginia, and Timothy Miller,  
6 a Mennonite pastor living in Nicaragua, helped Miller to kidnap IMJ and flee to  
7 Nicaragua.<sup>1</sup> As confirmed by Zodhiates' cell phone and email records, which  
8 were introduced at trial, Zodhiates drove Miller and IMJ from Virginia to  
9 Buffalo, and then Miller and IMJ crossed into Ontario. From Ontario, Miller and  
10 IMJ traveled to Nicaragua where Miller remains a fugitive and IMJ resides. Email  
11 records also show that, following the kidnapping, Zodhiates helped Miller and  
12 her daughter settle in Nicaragua. Zodhiates coordinated with others to remove a  
13 number of personal items from Miller's Virginia apartment, and, in November  
14 2009, Zodhiates arranged for an acquaintance who was traveling to Nicaragua to  
15 bring various personal possessions to Miller. At the time of the kidnapping,  
16 Virginia law made same-sex marriages entered into outside of Virginia void

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1

Lisa Miller, Timothy Miller, and Kenneth Miller are not related to each other.

1 there in all respects and such marriages could not be used to establish familial or  
2 step-parent rights in Virginia. *See* Va. Const. Art. I, § 15-A.<sup>2</sup>

3 The Government's investigation commenced in 2010 in Vermont, soon  
4 after it became apparent that Miller had disappeared. During the course of the  
5 investigation, the Government issued subpoenas, which are subjects of this  
6 appeal, to nTelos Wireless, a Virginia cell phone company. The subpoenas sought  
7 billing records spanning 28 months and other information<sup>3</sup> pertaining to two cell  
8 phones that had frequent contact with Kenneth Miller in September 2009. These

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2

This provision was held unconstitutional by *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014).

3

Specifically:

- "All subscriber information," such as "account number," "subscriber name," and "other identifying information";
- "Means and source of payments";
- "Length of service";
- "Detail records of phone calls made and received (including local and incoming call records if a cellular account) and name of long distance carrier if not [nTelos]";
- "Numeric (non-content) detail records of text messages (including SMS), multimedia messages (including MMS), and other data transmissions made and received (including any IP address assigned for each session or connection)." A. 34.

1 phones were listed in the customer name “Response Unlimited, Inc.,” a direct  
2 mail marketing company owned by Zodhiates. The subpoenas did not request  
3 the contents of phone calls or text messages, nor did they specifically request  
4 information concerning the locations from which phone calls were made or  
5 received.

6 In response to the subpoenas, nTelos produced billing records that showed  
7 detailed call information, including the date and time of phone calls made from  
8 various cell phones, together with the “service location” from which each call  
9 was made or received. Information presented in the “service location” field  
10 showed the general vicinity of the cell phone when the call was made or  
11 received, such as a county name, but did not contain details about precisely  
12 where in the general area the phone was located. These records, which were later  
13 featured prominently at Zodhiates’ trial, linked Zodhiates to Miller in Virginia  
14 and Buffalo, and established telephone contact among the conspirators.

15 The matter was subsequently transferred to the Western District of New  
16 York, where Zodhiates, Miller, and Timothy Miller were indicted for violating  
17 the IPKCA.<sup>4</sup>

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<sup>4</sup>

Miller remains a fugitive. Timothy Miller pleaded guilty after being

1 Before trial, Zodhiates moved to suppress the cell phone evidence, arguing  
2 that because he had a reasonable expectation of privacy in his movements from  
3 one place to another, the Government violated the Fourth Amendment when it  
4 obtained the billing records with a subpoena instead of a warrant. The District  
5 Court, relying on *United States v. Miller*, 425 U.S. 435 (1976) and *Smith v. Maryland*,  
6 442 U.S. 735 (1979), denied Zodhiates' motion. The District Court found it "too  
7 much" to conclude that a cell phone subscriber operates under the belief that his  
8 location is kept secret from telecommunication carriers and other third parties  
9 and that because "there is no reasonable expectation of privacy in the cell phone  
10 location information at issue in this case" a warrant was not required. A. 52.  
11 (internal quotation marks omitted). At trial, the Government introduced  
12 evidence including phone records reflecting contact between Zodhiates and  
13 Miller in the months before the kidnapping; phone records reflecting contact  
14 between Zodhiates and Miller's father; Zodhiates' cell phone bill showing that he  
15 traveled from Virginia to Buffalo on the day of the kidnapping; and phone  
16 records reflecting contact between the co-conspirators.

17 Near the end of the trial, the District Court shared with the parties its

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deported from Nicaragua to the United States.

1 proposed jury charge—to which no objection was lodged—which read, in part,  
2 as follows:

3 In this case, the term “parental rights” means Janet Jenkins’ right to  
4 visit IMJ, as that right was defined by the law and courts of Vermont  
5 at the time IMJ was removed from the United States. . . . To find  
6 that Zodiates acted with the intent to obstruct the lawful exercise of  
7 parental rights, you must find that he acted deliberately with the  
8 purpose of interfering with Janet Jenkins’ parental rights. You may  
9 consider all of the evidence of Zodiates’ other acts in determining  
10 whether the government has proven beyond a reasonable doubt  
11 that Zodiates acted with this intent.

12  
13 *United States v. Zodiates*, No. 14-CR-175-RJA, 2016 U.S. Dist. LEXIS 125002, at \*9-  
14 10 (Sept. 14, 2016).

15 Relying on the intended charge, the prosecutor stated in his rebuttal  
16 summation that “[i]t doesn’t matter what [Zodiates] understands about Virginia  
17 litigation,” A. 267, and that the Virginia litigation “should have no bearing on the  
18 intent issues,” *id.* at 262. That evening, following closing arguments, the defense  
19 concluded that this remark by the prosecutor had been improper and requested  
20 that the District Court include in its charge a “curative instruction regarding the  
21 relevance of Virginia law,” reading in part that:

22 Parental rights for purposes of this case are defined by reference to  
23 the law of the state where the child, [IMJ], lived before leaving the  
24 United States. Prior to this case, there were a series of court

1 proceedings in Vermont and Virginia about the parental rights of  
2 Lisa Miller and Janet Jenkins. One legal issue in the proceedings was  
3 whether Vermont or Virginia law governed the parental rights of  
4 Lisa Miller and Janet Jenkins. In its summation, the Government  
5 suggested that Virginia law is irrelevant to this case. That is  
6 incorrect.

7  
8 If, as Lisa Miller requested, Virginia had found that Janet Jenkins  
9 had no parental rights, it would have been impossible for Lisa Miller  
10 to obstruct parental rights for purposes of the international parental  
11 kidnapping statute because Janet Jenkins would have had no  
12 parental rights that could be obstructed. I will instruct you shortly  
13 that as a matter of law, Vermont law was found to control. I will also  
14 instruct you about what parental rights Janet Jenkins had and when.

15  
16 By instructing you as to the law, I am not instructing you on what  
17 the defendant knew or intended with regard to parental rights. That  
18 is a question of fact which you must decide, and which the  
19 government must prove beyond a reasonable doubt. In doing so,  
20 you may consider evidence about the litigation in both Vermont and  
21 Virginia for the purpose of considering whether the prosecution has  
22 proven beyond a reasonable doubt that Mr. Zodiates knew Janet  
23 Jenkins had parental rights, understood those rights, and intended  
24 to obstruct those rights.

25  
26 *Id.* at 74.

27 The District Court denied the request. It concluded that “[n]othing in the  
28 Court’s current charge precludes the jury from considering both the Virginia and  
29 the Vermont litigation when it decides whether the defendant knew about and  
30 intended to obstruct Vermont rights.” *Id.* at 289. It also concluded that “the

1 Court's intended charge gives the jury a properly balanced instruction on what  
2 evidence it may consider with regard to the issue of intent" and that "[t]he Court  
3 also believes that expressly instructing the jury that it may consider a Virginia  
4 litigation . . . runs the risk of unnecessarily confusing the jury." *Id.* at 288-89. At  
5 the conclusion of the trial, the District Court instructed the jury consistent with  
6 the proposed instruction it had shared with the parties earlier. Zodhiates  
7 subsequently raised this challenge to the District Court's instruction in a motion  
8 under Fed. R. Civ. P. 33 for a new trial, which the Court denied.

9 The jury found Zodhiates guilty on both counts of the indictment and the  
10 District Court sentenced him principally to 36 months of incarceration. This  
11 appeal followed. Zodhiates' main contentions are that the District Court erred in  
12 refusing to suppress the cell phone records and denying his requested curative  
13 charge. We disagree and therefore we affirm.

## 14 DISCUSSION

### 15 I. Fourth Amendment Challenge

16 Zodhiates contends that the government violated the Fourth Amendment  
17 when it secured his cell phone records by subpoena under the SCA because it  
18 was required to proceed by a warrant supported by probable cause and,

1 consequently, the records were inadmissible. When considering an appeal  
2 stemming from a motion to suppress evidence, we review legal conclusions *de*  
3 *novo* and findings of fact for clear error. *United States v. Ganius*, 824 F.3d 199, 208  
4 (2d Cir. 2016) (*en banc*).

5 During the pendency of this appeal, the Supreme Court decided *Carpenter*  
6 *v. United States*, 138 S. Ct. 2206 (2018), in which it held that “an individual  
7 maintains a legitimate expectation of privacy in the record of his physical  
8 movements as captured through [cell service location information]” and,  
9 therefore, under the requirements of the Fourth Amendment, enforcement  
10 officers must generally obtain a warrant before obtaining such information. *Id.* at  
11 2217. However, *Zodhiates* is not entitled to have the records suppressed because,  
12 under the “good faith” exception, when the Government “act[s] with an  
13 objectively reasonable good-faith belief that their conduct is lawful,” the  
14 exclusionary rule does not apply. *Davis v. United States*, 564 U.S. 229, 238 (2011)  
15 (internal quotation marks omitted). This exception covers searches conducted in  
16 objectively reasonable reliance on appellate precedent existing at the time of the  
17 search. *See United States v. Aguiar*, 737 F.3d 251, 259 (2d Cir. 2013).

1           In 2011, appellate precedent—the third party doctrine—permitted the  
2 government to obtain the phone bill records by subpoena as opposed to by  
3 warrant. Under this doctrine, the Fourth Amendment “does not prohibit the  
4 obtaining of information revealed to a third party and conveyed by [the third  
5 party] to Government authorities.” *Miller*, 425 U.S. at 443. In *Miller*, the Supreme  
6 Court held that the government was entitled to obtain a defendant’s bank  
7 records with a subpoena, rather than a warrant, because the bank records were  
8 “business records of the banks” and the defendant had “no legitimate  
9 expectation of privacy” in the contents of his checks because those documents  
10 “contain[ed] only information voluntarily conveyed to the banks and exposed to  
11 their employees in the ordinary course of business.” *Id.* at 440-42 (internal  
12 quotation marks omitted). Similarly, in *Smith*, the Supreme Court held that a  
13 defendant did not have a reasonable expectation of privacy in the telephone  
14 numbers that he dialed because “[t]elephone users . . . typically know that they  
15 must convey numerical information to the phone company; that the phone  
16 company has facilities for recording this information; and that the phone  
17 company does in fact record this information for a variety of legitimate business  
18 purposes.” 442 U.S. at 743.

1           These cases stand for the proposition that, in 2011, prior to *Carpenter*, a  
2 warrant was not required for the cell records. We acknowledged as much in  
3 *United States v. Ulbricht*, 858 F.3d 71 (2d Cir. 2017), when we considered ourselves  
4 bound by the third party doctrine in *Smith* “unless it is overruled by the Supreme  
5 Court,” *id.* at 97.<sup>5</sup>

6           To escape this result, Zodhiates directs us to *United States v. Jones*, 565 U.S.  
7 400, 404 (2012), which held that when the government engages in prolonged  
8 location tracking, it conducts a search under the Fourth Amendment requiring a  
9 warrant. However, *Jones* is of no help to him. It was decided in 2012, after the  
10 Government’s 2011 subpoena and consequently is not relevant to our good faith  
11 analysis. For these reasons, we conclude that the District Court properly denied  
12 Zodhiates’ motion to suppress the cell location evidence.

13

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5

Further, all five courts of appeal to have considered, before *Carpenter*, whether the warrant requirement in the Fourth Amendment applied to historical cell site information concluded, in light of *Smith* and *Miller*, that it did not. *United States v. Thompson*, 866 F.3d 1149 (10th Cir. 2017); *United States v. Graham*, 824 F.3d 421 (4th Cir. 2016) (*en banc*); *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), *rev’d*, 138 S. Ct. 2206 (2018); *United States v. Davis*, 785 F.3d 498 (11th Cir. 2015) (*en banc*); *In re Application of the United States for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013).

## II. Jury Charge

1  
2 Next, Zodiates contends that the District Court erred in failing to instruct  
3 the jury, as he requested, that in considering whether he intended to obstruct  
4 parental rights under the IPKCA, those rights were defined by Virginia, rather  
5 than Vermont, law, because Virginia was the state where IMJ lived before leaving  
6 the United States. The principles applicable to this contention are familiar ones.  
7 “A defendant is entitled to have his theory of the case fairly submitted to the  
8 jury, as long as it has some foundation in the evidence,” *United States v. Vaughn*,  
9 430 F.3d 518, 522 (2d Cir. 2005), but he is not entitled to have the exact language  
10 he proposes read to the jury, *see United States v. Dyman*, 739 F.2d 762, 771 (2d Cir.  
11 1984).

12 We review a district court’s rejection of a requested jury charge for abuse  
13 of discretion. *See United States v. Hurtado*, 47 F.3d 577, 585 (2d Cir. 1995). “In order  
14 to succeed on his challenges to the jury instructions, appellant has the burden of  
15 showing that his requested charge accurately represented the law in every  
16 respect and that, viewing as a whole the charge actually given, he was  
17 prejudiced.” *United States v. Ouimette*, 798 F.2d 47, 49 (2d Cir. 1986). The trial

1 court has substantial discretion to fashion jury instructions, so long as they are  
2 fair to both sides. *See United States v. Russo*, 74 F.3d 1383, 1393 (2d Cir. 1996).

3       Zodhiates’ challenge fails because, as the District Court correctly noted,  
4 “[i]t is clear in this case that, as a matter of state family law, Vermont family law .  
5 . . defined parental rights, regardless of where [the child] resided.” A. 291.  
6 Moreover, Zodhiates cannot show that he was prejudiced by the instruction  
7 ultimately given by the District Court.

8       The IPKCA defines “parental rights” as “the right to physical custody of  
9 the child . . . whether arising by operation of law, court order, or legally binding  
10 agreement of the parties.” 18 U.S.C. § 1204(b)(2)(B). Here, a Vermont court order  
11 afforded Jenkins parental rights. *See Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951,  
12 956 (Vt. 2006). Moreover, at the time IMJ was taken from Virginia, an order from  
13 a court of that state had also recognized that the Vermont courts had jurisdiction  
14 over the custody dispute and required Virginia courts to give full faith and credit  
15 to the Vermont orders. *See Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 337-38  
16 (Va. Ct. App. 2006); *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, 827 (Va. 2008)  
17 (recognizing Vermont’s jurisdiction in reliance on law-of-the-case doctrine).  
18 Because Virginia itself recognized that the Vermont court order was controlling,

1 the District Court was correct when it instructed the jury that Vermont law  
2 defined parental rights. We agree with the District Court that to instruct  
3 otherwise would have been misleading and confusing.

4         Zodhiates attempts to sidestep the Vermont order by contending that,  
5 contrary to the District Court's conclusion, this Court in *United States v. Amer*, 110  
6 F.3d 873, 878 (2d Cir. 1997), defined parental rights under the IPKCA by  
7 reference to Article 3 of the Hague Convention, which specifies "the law of the  
8 State in which the child was habitually resident immediately before the removal  
9 or retention," Hague Convention on the Civil Aspects of Int'l Child Abduction,  
10 art. 3, Oct. 25, 1980, P.I.A.S. No. 11,670. *Amer*, Zodhiates contends, means that  
11 only Virginia law defined Jenkins' parental rights.

12         In *Amer*, the defendant was a citizen of both Egypt and the United States.  
13 As *Amer's* marriage began deteriorating, he brought his three children from New  
14 York to Egypt, and he was convicted of violating the IPKCA. *Amer*, 110 F.3d at  
15 876. In that case, in the absence of a court order or legally binding agreement, we  
16 looked to Article 3 of the Hague Convention (and, by extension, to the law of  
17 New York as the children's habitual residence prior to removal) to define  
18 parental rights. Nothing in *Amer* can reasonably be read to hold that parental

1 rights under the IPKCA are always defined by the state of the child’s habitual  
2 residence.

3 In any event, Zodhiates cannot demonstrate prejudice. As the District  
4 Court noted, its charge did not prevent the parties from arguing, or the jury from  
5 deciding, what impact, if any, the Virginia or Vermont custody litigation may  
6 have had on Zodhiates’ intent.<sup>6</sup> Indeed, the defense took considerable advantage  
7 of this latitude by making repeated references in his arguments to the Virginia  
8 litigation and to events in Virginia. *See, e.g.*, A. 123 (Def. Ex. 25, an email sent to  
9 Zodhiates about the Virginia litigation); *see also id.* at 221-26 (transcript of defense  
10 counsel discussing the Virginia litigation on cross-examination). Accordingly, we  
11 see no error.

### 12 III. Prosecution Summation

13 Finally, Zodhiates contends that the District Court erred in denying his  
14 request for a curative instruction in response to the prosecutor’s rebuttal  
15 summation. During that summation, the prosecutor told the jury that “[i]t

---

6

“Nothing in the Court’s current charge precludes the jury from considering both the Virginia and Vermont litigation when it decides whether the defendant knew about and intended to obstruct Vermont rights.” A. 289.

1 doesn't matter what [Zodhiates] understands about Virginia litigation," *id.* at 267,  
2 and that the Virginia litigation "should have no bearing on the intent issues," *id.*  
3 at 262. Following closing arguments, Zodhiates objected to the remarks and  
4 requested the following curative instruction: "In its summation, the Government  
5 suggested that Virginia law is irrelevant to this case. That is incorrect." A. 74.

6 The District Court correctly denied the request because the prosecutor's  
7 statements, in context, were unobjectionable. The District Court recognized them  
8 for what they were: factual interpretations of the evidence and not statements of  
9 legal principles. As the District Court observed in denying Zodhiates' motion for  
10 a new trial: "[T]he AUSA's comment simply told the jury that, in the  
11 Government's view, Zodhiates's interpretation of the evidence was wrong—not  
12 that Zodhiates's understanding of the Virginia litigation was legally irrelevant."  
13 *United States v. Zodhiates*, 235 F. Supp. 3d 439, 457 (W.D.N.Y. 2017). The  
14 prosecutor was entitled to present to the jury the Government's interpretation of  
15 the evidence. He was entitled to argue that the Virginia litigation deserved no  
16 weight in the jury's consideration of Zodhiates' intent, just as the defense was  
17 entitled to, and in fact did, argue that it deserved great weight. *See United States v.*

1 *Salameh*, 152 F.3d 88, 138 (2d Cir. 1998) (*per curiam*) (affording prosecutor “broad  
2 latitude” as to reasonable inferences he may argue to jury).

3 In any event, the District Court adequately addressed *Zodhiates*’ concerns  
4 when it instructed the jury to determine “what the defendant knew or intended  
5 with regard to” Jenkins’ parental rights under Vermont law. *Zodhiates*, 235 F.  
6 Supp. 3d at 457 n.10 (internal quotation marks omitted). As the District Court  
7 correctly observed, nothing in the charge or the summation precluded the jury  
8 from considering both the Virginia and Vermont litigation when it decided  
9 whether *Zodhiates* knew about and intended to obstruct Jenkins’ rights. For  
10 these reasons, we see no error in the prosecutor’s remarks or in the District  
11 Court’s response to them.

12 **CONCLUSION**

13 For the foregoing reasons, the judgment of the District Court is  
14 **AFFIRMED.**

(ORDER LIST: 586 U.S.)

MONDAY, FEBRUARY 25, 2019

CERTIORARI -- SUMMARY DISPOSITIONS

17-5018 KLIKNO, STEVEN V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit in light of *Stokeling v. United States*, 586 U. S. \_\_\_\_ (2019).

17-8401 FRANKLIN, JIMMY L. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit in light of the position asserted by the Solicitor General in his brief for the United States filed on July 6, 2018.

17-8740 VAN SACH, JOSEPH V. UNITED STATES

17-9399 SHIELDS, ERNEST D. V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Seventh Circuit in light of *Stokeling v. United States*, 586 U. S. \_\_\_\_ (2019).

18-5213 BAKER, DAWN V. BERRYHILL, NANCY A.

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of that court's opinion in *Washington v. Commissioner of Social Security*, 906 F.3d 1353 (CA11 2018).

18-6177 LIPSCOMB, TONY V. UNITED STATES

18-6369 BROWNING, LASHON V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Seventh Circuit in light of *Stokeling v. United States*, 586 U. S. \_\_\_\_ (2019).

#### ORDERS IN PENDING CASES

18M103 HOM, JOHN C. V. UNITED STATES

The motion to direct the Clerk to file a petition for a writ of certiorari out of time under Rule 14.5 is denied.

18M104 GRIGSBY, PHILIP A. V. BALTAZAR, WARDEN

The motion for leave to proceed as a veteran is denied. Justice Gorsuch took no part in the consideration or decision of this motion.

17-1606 SMITH, RICKY L. V. BERRYHILL, NANCY A.

The motion for divided argument filed by the Solicitor General is granted, and the time is divided as follows: 15 minutes for petitioner, 15 minutes for the Solicitor General, and 30 minutes for Court-appointed *amicus curiae* in support of the judgment below.

18-315 COCHISE CONSULTANCY, ET AL. V. UNITED STATES, EX REL. HUNT

The motion of the Solicitor General for leave to participate

in oral argument as *amicus curiae* and for divided argument is granted.

**CERTIORARI GRANTED**

18-328 ROTKISKE, KEVIN C. V. KLEMM, PAUL, ET AL.

The petition for a writ of certiorari is granted.

**CERTIORARI DENIED**

17-5239 RAZZ, RODNEY L. V. UNITED STATES  
17-5543 DAVIS, JAMES L. V. UNITED STATES  
17-5745 PHELPS, JOHN T. V. UNITED STATES  
17-5772 CONDE, KENNETH R. V. UNITED STATES  
17-6026 WILLIAMS, ANTHONY B. V. UNITED STATES  
17-6054 EVERETTE, LATELLIS V. UNITED STATES  
17-6140 JONES, XAVIER V. UNITED STATES  
17-6276 MIDDLETON, JULIAN M. V. UNITED STATES  
17-6357 REEVES, EDWARD T. V. UNITED STATES  
17-6374 RIVERA, ARMANDO V. UNITED STATES  
17-6540 SHOTWELL, DESMOND V. UNITED STATES  
17-6664 MAYS, MICHAEL A. V. UNITED STATES  
17-6829 HARDY, BOBBY J. V. UNITED STATES  
17-6887 WRIGHT, BENJIE E. V. UNITED STATES  
17-6991 BAXTER, RUBIN D. V. UNITED STATES  
17-7140 PACE, KELVIN V. UNITED STATES  
17-7391 REPRESS, DARRYL V. UNITED STATES  
17-7563 COTTMAN, LESLEY W. V. UNITED STATES  
17-7716 GARCIA, DANIEL K. V. UNITED STATES  
17-7747 BEVERLY, NATHANIEL V. UNITED STATES  
17-7762 JACKSON, STEVEN V. UNITED STATES  
17-7952 WRIGHT, JAMES C. V. UNITED STATES

17-8272 BANNISTER, JEROME V. UNITED STATES  
17-8289 WRIGHT, IRAMM V. UNITED STATES  
17-8431 CASAMAYOR, DANIEL V. UNITED STATES  
17-8544 ROBINETT, SHANNON D. V. UNITED STATES  
17-8663 HALL, ANTHONY S. V. UNITED STATES  
17-8676 KING, ERNEST V. UNITED STATES  
17-8678 JACKSON, ANTHONY G. V. UNITED STATES  
17-8745 WILLIAMS, TREVOR V. UNITED STATES  
17-8766 DeSHAZIOR, EDWIN V. UNITED STATES  
17-8860 DAVIS, ISSAC V. UNITED STATES  
17-8951 LEWIS, CEFALO V. UNITED STATES  
17-9097 LEWIS, JAUMON R. V. UNITED STATES  
17-9128 JOYNER, KEENAN V. UNITED STATES  
17-9151 GODBEE, BURNETT V. UNITED STATES  
17-9353 WALKER, WILLIE V. UNITED STATES  
17-9378 DIEMER, DARYL V. UNITED STATES  
17-9589 HARRIS, KENNETH L. V. UNITED STATES  
18-192 J. B. R. V. UNITED STATES  
18-323 EVANS, SUZAN V. UNITED STATES, ET AL.  
18-340 IN-N-OUT BURGER V. NLRB  
18-566 MENENDEZ, HERIBERTO V. GARBER, MARSHALL  
18-578 PENDER, WILLIAM L., ET AL. V. BANK OF AMERICA, ET AL.  
18-642 ZUKERMAN, MORRIS E. V. UNITED STATES  
18-651 MONTGOMERY, JASON C. V. UNITED STATES  
18-674 MURPHY, JEDIDIAH I. V. DAVIS, DIR., TX DCJ  
18-680 HUSS, WARDEN V. ROBINSON, LOREN  
18-742 WASHINGTON, BRANDON V. ALABAMA  
18-773 SULLIVAN, DANIEL V. FREDERICK, MD, ET AL.

18-779 POWER INTEGRATIONS, INC. V. FAIRCHILD SEMICONDUCTOR INT'L  
18-783 BARONE, JOHN M. V. WELLS FARGO BANK, N.A.  
18-784 BUGG, ELDON V. HONEY, MARC, ET AL.  
18-785 ALSTON, ESHED V. ADMIN. OFFICE OF CTS., ET AL.  
18-786 BLAIR, GLENN V. McCLINTON, ANGELA, ET AL.  
18-792 SATTERLEE, RONALD L. V. MILLER-DEGASE, ALICIA  
18-800 SHAO, LINDA V. McMANIS FAULKNER, LLP  
18-802 DeHOOG, JAMES, ET AL. V. ANHEUSER-BUSCH InBEV, ET AL.  
18-812 TEAMSTERS LOCAL 210 V. SILVERMAN, LEON, ET AL.  
18-816 DAVIS, GAVIN B. V. UNITED STATES  
18-822 COHEN, STEVEN G. V. GRIEVANCE ADMINISTRATOR  
18-829 DAVIS, JOHN H. V. ANDERSON, JUDGE, ET AL.  
18-836 LUNA, PHIL M. V. FLORIDA  
18-844 CHAVEZ-JUAREZ, CESAR O. V. BARR, ATT'Y GEN.  
18-849 HTC CORPORATION V. 3G LICENSING, S.A., ET AL.  
18-871 JARMUTH, RONALD V. INT'L CLUB HOMEOWNERS ASSN.  
18-875 HILL, ALBERT G., ET AL. V. PBL MULTI-STRATEGY FUND, L.P.  
18-892 KIRSCH, MARK N. V. UNITED STATES  
18-904 KING LAW GROUP, PLLC, ET AL. V. M2 TECHNOLOGY, INC.  
18-914 BOVE, GERALD E. V. UNITED STATES  
18-919 DAVIES, ROBERT R. V. UNITED STATES  
18-924 BULLOCK, MICHAEL A. V. NORTH CAROLINA  
18-945 TSL, INC. V. SNEAD, RANKIN, ET AL.  
18-960 NATIONWIDE BIWEEKLY ADM., INC. V. BMO HARRIS BANK, N.A.  
18-961 SWARTZ, MITCHELL B. V. PATENT AND TRADEMARK  
18-991 HUEBNER, LEVI V. MIDLAND CREDIT MANAGEMENT  
18-993 YOUNG ADULT INSTITUTE, INC. V. LEVY, JOEL M., ET AL.  
18-1002 DAVIS, CYNTHIA, ET AL. V. VALSAMIS, INC.

18-5092 ANDERSON, TYRONE V. UNITED STATES  
18-5232 PETTIS, CHARLES L. V. UNITED STATES  
18-5288 SERRANO, ROBERT V. UNITED STATES  
18-5384 RIVERA-RUPERTO, WENDELL V. UNITED STATES  
18-5612 SMITH, DETRICK C. V. UNITED STATES  
18-5838 SWOPES, HOSEA V. UNITED STATES  
18-5940 PEREZ, MOISES V. UNITED STATES  
18-6025 BORRERO, RENE V. UNITED STATES  
18-6092 ABLES, ROBERT D. V. UNITED STATES  
18-6257 McCRANIE, EDWARD D. V. UNITED STATES  
18-6410 McKINZY, MICHAEL V. GASTON, CARLETHA  
18-6411 REED, ENNIS V. CALIFORNIA  
18-6715 EDSTROM, CORTNEY J. V. MINNESOTA  
18-6727 STOJETZ, JOHN C. V. SHOOP, WARDEN  
18-6752 McGUIRE, DAVID V. OHIO  
18-6772 GRANT, DONOVAN V. UNITED STATES  
18-6781 FARR, JOAN E. V. CIR  
18-6813 GHOSH, RASH B. V. BERKELEY, CA  
18-6818 RANGEL, RUBEN V. CALIFORNIA  
18-7026 COATS, BRYAN V. UNITED STATES  
18-7099 RATUSHNY, RICHARD A. V. KAUFFMAN, SUPT., ET AL.  
18-7118 LYNCH, RICHARD E. V. FLORIDA  
18-7136 HANNA, MARK V. LeBLANC, SEC., LA DOC, ET AL.  
18-7137 MADRIGAL, JAMIE R. V. OHIO  
18-7146 SAGE, JONATHAN S. V. WASHINGTON  
18-7149 DANIELAK, MARY V. BREWER, WARDEN  
18-7151 MULHERN, CURTIS J. V. PENNSYLVANIA  
18-7155 PROVENCIO, ALFREDO V. LIZARRAGA, WARDEN

18-7157 MAYFIELD, CODY W. V. MARTIN, WARDEN  
18-7159 LAMAR, ANDREW M. V. O'DELL, JOHN  
18-7160 ARANOFF, GERALD V. ARANOFF, SUSAN  
18-7164 KNUTH, NATHAN D. V. ARP, JUDGE, ET AL.  
18-7165 JONES, DRAKILE L. V. MICHIGAN  
18-7168 WILLIAMS, MICHAEL D. V. SOTO, WARDEN  
18-7170 YANCEY, JONATHAN V. ALABAMA  
18-7171 YOUNG, ZURI S. V. VOONG, M., ET AL.  
18-7172 KEEN, TOMAS M. V. WASHINGTON  
18-7173 LOFGREN, KAREN V. HARDIN, TODD  
18-7174 EVERSON, SHAWNDELL V. NEW YORK  
18-7175 LIPSEY, CHRISTOPHER V. COURT OF APPEAL OF CA  
18-7179 TAYLOR, TREVILLE J. V. NEBRASKA  
18-7182 GATES, ROY D. V. TEXAS  
18-7202 SOTO, FIDEL R. V. CALIFORNIA  
18-7234 EDWARDS, ROBYN G., ET AL. V. GENE SALTER PROPERTIES, ET AL.  
18-7237 SAUNDERS, DIONE C. V. BERRYHILL, NANCY A.  
18-7244 MORALES, VIDAL L. V. UNITED STATES  
18-7250 JONES, DIANE S. V. SAMSON RESOURCES CORP., ET AL.  
18-7276 VEGA, JUAN FRANCISCO, ET AL. V. KAPUSTA, REBECCA  
18-7298 MOORE, NICOLE M. V. FLORIDA  
18-7311 WILKINS, KEENAN G. V. GONZALEZ, PAUL, ET AL.  
18-7337 MARTIN, GARY D. V. TERRY, ACTING WARDEN  
18-7354 JOHNSON, DERRICK L. V. BRADLEY, WARDEN  
18-7368 HOWARD, REDMOND V. McCREADY, DARYL, ET AL.  
18-7385 LE, CHENG V. UNITED STATES  
18-7394 BROWN, TORREY V. TANNER, WARDEN  
18-7395 WILFRED H. V. WEST VIRGINIA

18-7397 BREEDEN, JACKIE V. KELLEY, DIR., AR DOC  
18-7404 LAAKE, JOHN V. TURNING STONE RESORT CASINO  
18-7410 KOTT, WALTER A. V. VANNOY, WARDEN  
18-7412 KENNEDY, KEITH V. LA DOC  
18-7427 DAUD, ABDIRAHMAN Y. V. UNITED STATES  
18-7430 FARAH, MOHAMED A. V. UNITED STATES  
18-7436 AASE, JEFFREY N. V. SCHNELL, COMM'R, MN DOC  
18-7440 WHITMAN, CHRISTOPHER V. UNITED STATES  
18-7443 THORNTON, WALLACE V. UNITED STATES  
18-7445 GEORGE, LENNIS A. V. KENT, WARDEN  
18-7447 LEMON, CHRISTOPHER E. V. UNITED STATES  
18-7452 GARCIA-CARILLO, HERMINIO V. UNITED STATES  
18-7454 ST. VALLIER, TYSHAUN V. UNITED STATES  
18-7456 SEBERT, JONATHAN V. UNITED STATES  
18-7462 JOHNSON, WILLIAM A. V. UNITED STATES  
18-7468 JONES, ROBERT C. V. PALMER, WARDEN, ET AL.  
18-7473 ALBRIGHT, WILLIAM D. V. KANSAS  
18-7498 HALL, EDDIE V. TERRIS, WARDEN  
18-7522 KENNEDY, FREDDIE B. V. UNITED STATES  
18-7523 JAMES, CHARLES V. KRUEGER, WARDEN  
18-7537 SALDIERNA, FELIX R. V. NORTH CAROLINA  
18-7550 REYES-RUIZ, MARBIN R. V. UNITED STATES  
18-7556 HORTON, MICHAEL J. V. DUCART, WARDEN  
18-7562 ISAIAH, DONALD J. V. JONES, SEC., FL DOC  
18-7565 FULLER, MICHAEL V. EPPINGER, WARDEN  
18-7578 HOWARD, JEFFREY T. V. UNITED STATES  
18-7579 PRICE, DAVID L. V. UNITED STATES  
18-7585 GAY, LEMUEL V. UNITED STATES

18-7587 HUDSON, BIVEN V. UNITED STATES  
18-7588 ODOM, FRANK V. UNITED STATES  
18-7593 SANCHEZ, RICHARD M. V. UNITED STATES  
18-7598 MORRIS, CAROL J. V. UNITED STATES  
18-7600 HOLT, JOHNATHAN V. UNITED STATES  
18-7602 DEMERSON, PERCY E. V. UNITED STATES  
18-7605 DIAZ, DANIEL V. UNITED STATES  
18-7607 WHITE, BRUCE V. UNITED STATES  
18-7609 ALSTON, MERLIN V. UNITED STATES  
18-7615 BACON, MICHAEL A. V. UNITED STATES  
18-7619 MORRIS, MICHAEL S. V. UNITED STATES  
18-7623 GOOLSBY, JAMES V. UNITED STATES  
18-7638 WILLIAMS, JOHN T. V. UNITED STATES  
18-7644 BENITEZ, CARLOS V. KEY, SUPT., AIRWAY HEIGHTS  
18-7654 FAUSNAUGHT, STEVEN V. UNITED STATES  
18-7662 LEWIS, NOLAN V. UNITED STATES  
18-7664 GREER, JOHN F. V. UNITED STATES  
18-7666 VASQUEZ, ROWY D. V. UNITED STATES  
18-7667 TAYLOR, MARION V. VANNOY, WARDEN  
18-7713 GRIMSLEY, DARNELL V. MCGINLEY, SUPT., ET AL.

The petitions for writs of certiorari are denied.

17-6271 JAMES, ROBERT L. V. UNITED STATES  
17-6577 ORR, RICHARD A. V. UNITED STATES  
17-8739 DORVILUS, MAURICE V. UNITED STATES  
17-9469 GARCIA, PHILLIP A. V. UNITED STATES

The petitions for writs of certiorari are denied. Justice Kagan took no part in the consideration or decision of these petitions.

18-551 PHILIP MORRIS USA INC. V. JORDAN, ELAINE

18-552 PHILIP MORRIS USA INC. V. BROWN, MARY

18-621 R.J. REYNOLDS TOBACCO, ET AL. V. PARDUE, MARY F.

18-649 R.J. REYNOLDS TOBACCO, ET AL. V. SEARCY, CHERYL

18-653 PHILIP MORRIS USA INC. V. MCKEEVER, VICKIE

18-654 PHILIP MORRIS USA INC., ET AL. V. RICHARD BOATRIGHT, ET UX.

The petitions for writs of certiorari are denied. Justice Kavanaugh took no part in the consideration or decision of these petitions.

18-798 BLAUCH, JOANNA J. V. COLORADO

The motion of petitioner to defer consideration of the petition for a writ of certiorari is denied. The petition for a writ of certiorari is denied.

18-897 R.J. REYNOLDS TOBACCO CO. V. NALLY, MARLENE

18-898 R.J. REYNOLDS TOBACCO CO. V. JOHNSTON, BARBARA J.

The petitions for writs of certiorari are denied. Justice Kavanaugh took no part in the consideration or decision of these petitions.

18-900 ZODHIATES, PHILIP V. UNITED STATES

The motion of Foundation for Moral Law for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

18-7448 FOXX, CHARLES V. UNITED STATES

18-7453 STERLING, COREY K. V. UNITED STATES

The petitions for writs of certiorari are denied. Justice Sotomayor, with whom Justice Ginsburg joins, dissenting from the denials of certiorari: I dissent for the reasons set out in

*Brown v. United States*, 586 U. S. \_\_\_\_ (2018) (Sotomayor, J., dissenting).

18-7495 BOYD, WILLIE E. V. QUINTANA, WARDEN

The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

18-7608 WHITNEY, JAMES E. V. CHANCELLOR, BLAKE H.

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

18-7614 JACOBY, MICHAEL V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Gorsuch took no part in the consideration or decision of this petition.

18-7656 GARCIA, ARMANDO V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

**HABEAS CORPUS DENIED**

18-7681 IN RE ERASMO AGUINAGA

The petition for a writ of habeas corpus is denied.

**REHEARINGS DENIED**

17-8786 DEVEAUX, DIN V. CALDWELL, WARDEN

17-8963 HERBERT, RICHARD V. CVS PHARMACY, ET AL.

17-9058 CARTER, KENNETH E. V. BERRYHILL, NANCY A.

17-9108 HURD, DALE R. V. LIZARRAGA, WARDEN

17-9144 HONISH, MARK F. V. UNITED STATES

17-9322 HAFFER, GRETCHEN A. V. NEW HAMPSHIRE

17-9563 INGRAM, CURTIS C. V. DIAZ, SEC., CA DOC  
18-223 IN RE CHRISTOPHER DAWSON  
18-375 ALEXANDER, DANIEL H. V. BAYVIEW LOAN SERVICING, LLC  
18-458 PELLEGRINI, LILLIAN V. FRESNO COUNTY, CA, ET AL.  
18-598 CHIEN, ANDREW V. CLARK, ANDREW K., ET AL.  
18-683 STARK, BRADLEY C. V. UNITED STATES  
18-5128 IN RE GIGI FAIRCHILD-LITTLEFIELD  
18-5886 MITCHELL, DWIGHT V. TAYLOR, WILSON, ET AL.  
18-6160 CARMODY, KEVIN R. V. BD. OF TRUSTEES, ET AL.  
18-6230 SHOATE, HARVEY L. V. LEWIS, WARDEN  
18-6294 WALCOTT, STEVEN A. V. TERREBONNE PARISH JAIL, ET AL.  
18-6298 FRATTA, ROBERT A. V. DAVIS, DIR., TX DCJ  
18-6326 COXE, TERRY A. V. WHITE, SUPT., WA  
18-6354 JOSSIE, CHERYL L. V. CVS PHARMACY  
18-6383 KULICK, ROBERT J. V. REIN, STEVEN  
18-6507 BROWN, ALICE V. DEL NORTE COUNTY, CA, ET AL.  
18-6647 SHARMA, KIRAN V. UNITED STATES  
18-6654 IN RE GARY R. DEBOLT

The petitions for rehearing are denied.

Cite as: 586 U. S. \_\_\_\_ (2019)

1

Per Curiam

**SUPREME COURT OF THE UNITED  
STATES**

**JIM YOVINO, FRESNO COUNTY SUPERINTENDENT  
OF SCHOOLS v. AILEEN RIZO**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18–272. Decided February 25, 2019

PER CURIAM.

The petition in this case presents the following question: May a federal court count the vote of a judge who dies before the decision is issued?

A judge on the United States Court of Appeals for the Ninth Circuit, the Honorable Stephen Reinhardt, died on March 29, 2018, but the Ninth Circuit counted his vote in cases decided after that date.\* In the present case, Judge Reinhardt was listed as the author of an en banc decision issued on April 9, 2018, 11 days after he passed away. By counting Judge Reinhardt’s vote, the court deemed Judge Reinhardt’s opinion to be a majority opinion, which means that it constitutes a precedent that all future Ninth Circuit panels must follow. See *United States v. Caperna*, 251 F.3d 827, 831, n. 2 (2001). Without Judge Reinhardt’s vote, the opinion attributed to him would have been approved by only 5 of the 10 members of the en banc panel who were still living when the decision was filed.

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\*In *Altera Corp. v. Commissioner*, 2018 WL 3542989 (CA9, July 24, 2018), decided four months after Judge Reinhardt died, his vote was initially counted as one of the two judges in the majority. A footnote in the opinion stated: “Judge Reinhardt fully participated in this case and formally concurred in the majority opinion prior to his death.” *Id.*, at \*1, n. \*\*. Later, however, the court vacated the opinion and issued an order reconstituting the panel. *Altera Corp. v. Commissioner*, 898 F.3d 1266 (CA9 2018). No similar action was taken in this case.

Per Curiam

Although the other five living judges concurred in the judgment, they did so for different reasons. The upshot is that Judge Reinhardt's vote made a difference. Was that lawful?

I

Aileen Rizo, an employee of the Fresno County Office of Education, brought suit against the superintendent of schools, claiming, among other things, that the county was violating the Equal Pay Act of 1963, 77 Stat. 56–57, 29 U. S. C. §206(d). The District Court denied the county's motion for summary judgment, and the Ninth Circuit granted the county's petition for interlocutory review. A three-judge panel of the Ninth Circuit vacated the decision of the District Court based on a prior Ninth Circuit decision, *Kouba v. Allstate Ins. Co.*, 691 F. 2d 873 (1982), that the panel "believed it was compelled to follow." 887 F. 3d 453, 459 (2018) (en banc). The court then granted en banc review "to clarify the law, including the vitality and effect of *Kouba*." *Ibid.* Like other courts of appeals, the Ninth Circuit takes the position that a panel decision like that in *Kouba* can be overruled only by a decision of the en banc court or this Court, see *Naruto v. Slater*, 888 F. 3d 418, 421 (2018), and therefore a clear purpose of the en banc decision issued on April 9 was to announce a new binding Ninth Circuit interpretation of the Equal Pay Act issue previously addressed by *Kouba*. The opinion authored by Judge Reinhardt and issued 11 days after his death purports to do that, but its status as a majority opinion of the en banc court depends on counting Judge Reinhardt's vote.

The opinions issued by the en banc Ninth Circuit state that they were "Filed April 9, 2018," and they were entered on the court's docket on that date. A footnote at the beginning of the en banc opinion states:

"Prior to his death, Judge Reinhardt fully participated in this case and authored this opinion. The majority

Cite as: 586 U. S. \_\_\_\_ (2019)

3

Per Curiam

opinion and all concurrences were final, and voting was completed by the en banc court prior to his death.” 887 F. 3d, at 455, n. \*.

## II

The Ninth Circuit did not expressly explain why it concluded that it could count Judge Reinhardt’s opinion as “[t]he majority opinion” even though it was not endorsed by a majority of the living judges at the time of issuance, but the justification suggested by the footnote noted above is that the votes and opinions in the en banc case were inalterably fixed at least 12 days prior to the date on which the decision was “filed,” entered on the docket, and released to the public. This justification is inconsistent with well-established judicial practice, federal statutory law, and judicial precedent.

As for judicial practice, we are not aware of any rule or decision of the Ninth Circuit that renders judges’ votes and opinions immutable at some point in time prior to their public release. And it is generally understood that a judge may change his or her position up to the very moment when a decision is released.

We endorsed this rule in *United States v. American-Foreign S. S. Corp.*, 363 U. S. 685 (1960), which interpreted an earlier version of 28 U. S. C. §46(c), the statutory provision authorizing the courts of appeals to hear cases en banc. The current version of this provision permits a circuit to adopt a rule allowing a senior circuit judge to sit on an en banc case under certain circumstances, but at the time of our decision in *American-Foreign S. S. Corp.*, this was not allowed. Instead, only active judges could sit en banc. See 28 U. S. C. §46(c) (1958 ed.).

In *American-Foreign S. S. Corp.*, Judge Harold Medina was one of the five active judges on the Second Circuit when the court granted a petition for rehearing en banc. After briefing was complete but before an opinion issued,

Per Curiam

Judge Medina took senior status. When the en banc court issued its decision, the majority opinion was joined by Judge Medina and two active Circuit Judges; the two other active Circuit Judges dissented. We vacated the judgment and remanded the case, holding that “[a]n ‘active’ judge is a judge who has not retired ‘from regular active service,’” and “[a] case or controversy is ‘determined’ when it is decided.” 363 U. S., at 688. Because Judge Medina was not in regular active service when the opinion issued, he was “without power to participate” in the en banc decision. *Id.*, at 687, 691; cf., *id.*, at 691–692 (Harlan, J., dissenting).

Our holding in *American-Foreign S. S. Corp.* applies with equal if not greater force here. When the Ninth Circuit issued its opinion in this case, Judge Reinhardt was neither an active judge nor a senior judge. For that reason, by statute he was without power to participate in the en banc court’s decision at the time it was rendered.

In addition to §46(c), §46(d) also shows that what the Ninth Circuit did here was unlawful. That provision states:

“A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.”

Under §46(c), a court of appeals case may be decided by a panel of three judges, and therefore on such a panel two judges constitute a quorum and are able to decide an appeal—provided, of course, that they agree. Invoking this rule, innumerable court of appeals decisions hold that when one of the judges on a three-judge panel dies, retires, or resigns after an appeal is argued or is submitted for decision without argument, the other two judges on the panel may issue a decision if they agree. See, e.g., *United States v. Allied Stevedoring Corp.*, 241 F. 2d 925, 927 (CA2 1957); *Murray v. National Broadcasting Co.*, 35 F. 3d 45,

Cite as: 586 U. S. \_\_\_\_ (2019)

5

Per Curiam

47 (CA2 1994); *Singh v. Ashcroft*, 121 Fed. Appx. 471, 472, n. (CA3 2005); *ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F. 3d 307, 309, n. (CA5 1999); *Clark v. Metropolitan Life Ins. Co.*, 67 F. 3d 299, n. \*\* (CA6 1995); *Kulumani v. Blue Cross Blue Shield Assn.*, 224 F. 3d 681, 683, n. \*\* (CA7 2000). See also *Nguyen v. United States*, 539 U. S. 69, 82 (2003) (“[S]ettled law permits a quorum to proceed to judgment when one member of the panel dies or is disqualified.”). With the exception of one recent decision issued by the Ninth Circuit after Judge Reinhardt’s death but subsequently withdrawn, see *supra*, at 1 n., we are aware of no cases in which a court of appeals panel has purported to issue a binding decision that was joined at the time of release by less than a quorum of the judges who were alive at that time.

\* \* \*

Because Judge Reinhardt was no longer a judge at the time when the en banc decision in this case was filed, the Ninth Circuit erred in counting him as a member of the majority. That practice effectively allowed a deceased judge to exercise the judicial power of the United States after his death. But federal judges are appointed for life, not for eternity.

We therefore grant the petition for certiorari, vacate the judgment of the United States Court of Appeals for the Ninth Circuit, and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE SOTOMAYOR concurs in the judgment.

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT**

JANET JENKINS, et al.,

Plaintiffs,

v.

No. 2:12-cv-184-WKS

KENNETH L. MILLER, et al.,

Defendants.

**DECLARATION OF DIEGO A. SOTO  
IN SUPPORT OF PLAINTIFF JANET JENKINS'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT ONE  
AGAINST DEFENDANTS PHILIP ZODHIATES, KENNETH MILLER, AND  
TIMOTHY MILLER**

I, Diego A. Soto, declare under penalty of perjury that the following is true and correct:

1. I am a Staff Attorney at the Southern Poverty Law Center and represent Plaintiffs Janet Jenkins and Isabella Miller-Jenkins in this case.

2. Exhibit 1 is a true and correct copy of Government Exhibit 5 in *United States v. Kenneth L. Miller*, No. 2:11-cr-161 (D. Vt.), the Rutland, Vermont Family Court's June 17, 2004 Temporary Order Re: Parental Rights & Responsibilities ordering that Jenkins had the right to visitation with Isabella.

3. Exhibit 2 is a true and correct copy of Government Exhibit 13 in *United States v. Zodhiates*, No. 1:14-cr-175 (W.D.N.Y.), the Rutland, Vermont Family Court's June 17, 2004 Temporary Order Re: Parental Rights & Responsibilities ordering that Jenkins had the right to visitation with Isabella.

4. Exhibit 3 is a true and correct copy of Government Exhibit 12 in *United States v. Kenneth L. Miller*, No. 2:11-cr-161 (D. Vt.), the Rutland, Vermont Family Court's September

11, 2009 Interim Order Regarding Parent–Child Contact ordering unsupervised parent–child contact between Jenkins and Isabella from September 25, 2009, to September 27, 2009.

5. Exhibit 4 is a true and correct copy of Government Exhibit 20 in *United States v. Zodhiates*, No. 1:14-cr-175 (W.D.N.Y.), the Rutland, Vermont Family Court’s September 11, 2009 Interim Order Regarding Parent–Child Contact ordering unsupervised parent–child contact between Jenkins and Isabella from September 25, 2009, to September 27, 2009.

6. Exhibit 5 is a true and correct copy of Government Exhibit 14 in *United States v. Kenneth L. Miller*, No. 2:11-cr-161 (D. Vt.), the Rutland, Vermont Family Court’s November 20, 2009 Findings of Fact, Conclusions of Law, and Order granting Jenkins “sole physical and legal custody” of Isabella and ordering that Isabella be transferred to her on January 1, 2010.

7. Exhibit 6 is a true and correct copy of Government Exhibit 21 in *United States v. Zodhiates*, No. 1:14-cr-175 (W.D.N.Y.) , the Rutland, Vermont Family Court’s November 20, 2009 Findings of Fact, Conclusions of Law, and Order granting Jenkins “sole physical and legal custody” of Isabella and ordering that Isabella be transferred to her on January 1, 2010.

8. Exhibit 7 is a true and correct copy of the December 15, 2011 indictment in *United States v. Kenneth L. Miller*, No. 2:11-cr-161 (D. Vt.).

9. Exhibit 8 is a true and correct copy of the jury charge in *United States v. Kenneth L. Miller*, No. 2:11-cr-161 (D. Vt.).

10. Exhibit 9 is a true and correct copy of the verdict form in *United States v. Kenneth L. Miller*, No. 2:11-cr-161 (D. Vt.).

11. Exhibit 10 is a true and correct copy of the judgment in *United States v. Kenneth L. Miller*, No. 2:11-cr-161 (D. Vt.).

12. Exhibit 11 is a true and correct copy of the opinion of the United States Court of Appeals for the Second Circuit in *United States v. Kenneth L. Miller*, No. 13-822 (2d Cir.).

13. Exhibit 12 is a true and correct copy of the mandate of the United States Court of Appeals for the Second Circuit filed in *United States v. Kenneth L. Miller*, No. 2:11-cr-161 (D. Vt.).

14. Exhibit 13 is a true and correct copy of the docket report in *United States v. Kenneth L. Miller*, No. 13-822 (2d Cir.) on September 14, 2018.

15. Exhibit 14 is a true and correct copy of the April 24, 2015 superseding indictment in *United States v. Timothy Miller*, No. 1:14-cr-175 (W.D.N.Y.).

16. Exhibit 15 is a true and correct copy of the superseding indictment given to the jury in *United States v. Zodhiates*, No. 1:14-cr-175 (W.D.N.Y.).

17. Exhibit 16 is a true and correct copy of the plea agreement in *United States v. Timothy Miller*, No. 1:14-cr-175 (W.D.N.Y.).

18. Exhibit 17 is a true and correct copy of the November 30, 2016 plea colloquy in *United States v. Timothy Miller*, No. 1:14-cr-175 (W.D.N.Y.).

19. Exhibit 18 is a true and correct copy of the judgment in *United States v. Timothy Miller*, No. 1:14-cr-175 (W.D.N.Y.).

20. Exhibit 19 is a true and correct copy of the docket report in *United States v. Timothy Miller*, No. 1:14-cr-175 (W.D.N.Y.).

21. Exhibit 20 is a true and correct copy of the transcript of jury trial proceedings on September 29, 2016, in *United States v. Zodhiates*, No. 1:14-cr-175 (W.D.N.Y.).

22. Exhibit 21 is a true and correct copy of the jury verdict in *United States v. Zodhiates*, No. 1:14-cr-175 (W.D.N.Y.).

23. Exhibit 22 is a true and correct copy of the judgment in *United States v. Zodhiates*, No. 1:14-cr-175 (W.D.N.Y.).
24. Exhibit 23 is a true and correct copy of the opinion of the United States Court of Appeals for the Second Circuit in *United States v. Zodhiates*, No. 17-839-cr (2d Cir.).
25. Exhibit 24 is a true and correct copy of the mandate of the United States Court of Appeals for the Second Circuit in *United States v. Zodhiates*, No. 17-839-cr (2d Cir.).
26. Exhibit 25 is a true and correct copy of the order list of the Supreme Court of the United States on February 25, 2019.

Executed on December 13, 2019

/s/ Diego A. Soto

Diego A. Soto

*Counsel for Plaintiffs*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT**

JANET JENKINS, et al.,

Plaintiffs,

v.

KENNETH L. MILLER, et al.,

Defendants.

No. 2:12-cv-184-WKS

**MEMORANDUM IN SUPPORT OF PLAINTIFF JANET JENKINS'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT ONE  
AGAINST DEFENDANTS PHILIP ZODHIATES, KENNETH MILLER, AND  
TIMOTHY MILLER**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE..... 1

    I. Kenneth Miller Was Convicted in 2012 of Aiding and Abetting International Parental Kidnapping..... 2

    II. Timothy Miller Pleaded Guilty in 2017 to Conspiracy to Commit International Parental Kidnapping..... 4

    III. Zodhiates Was Convicted in 2017 of International Parental Kidnapping, Aiding and Abetting International Parental Kidnapping, and Conspiracy to Commit International Parental Kidnapping ..... 6

    IV. Jenkins Claims Zodhiates, Kenneth Miller, and Timothy Miller Intentionally Interfered with Her Parental Rights ..... 8

SUMMARY OF ARGUMENT ..... 9

ARGUMENT ..... 11

    I. Zodhiates’s and Timothy Miller’s Convictions Establish Beyond a Reasonable Doubt All the Elements of Conspiracy to Intentionally Interfere with Jenkins’s Parental Rights ..... 14

        A. Element 1: Zodhiates and Timothy Miller Each Agreed with Another to Effect the Vermont Tort of Intentional Interference with Parental Rights ..... 14

            1. Element 1(a): Zodhiates and Timothy Miller each agreed to abduct or otherwise compel or induce Isabella, a minor, to leave Jenkins, her parent..... 15

            2. Element 1(b): Jenkins was legally entitled to Isabella’s custody ..... 16

            3. Element 1(c): Zodhiates and Timothy Miller each entered into the agreement with knowledge that Jenkins did not consent..... 18

        B. Element 2: The Vermont Tort of Intentional Interference with Parental Rights Was Done..... 19

            1. Element 2(a): A person abducted or otherwise compelled or induced Isabella, a minor, to leave Jenkins, a parent ..... 19

            2. Element 2(b): Jenkins was legally entitled to Isabella’s custody ..... 20

            3. Element 2(c): The person acted with knowledge that Jenkins did not consent ..... 20

C. Element 3: The Vermont Tort of Intentional Interference with Parental Rights Was Done in Furtherance of the Agreement.....	21
D. Element 4: The Vermont Tort of Intentional Interference with Parental Rights Damaged Jenkins .....	22
II. Kenneth Miller’s Conviction Establishes Beyond a Reasonable Doubt the First Two Elements of Aiding and Abetting the Intentional Interference with Jenkins’s Parental Rights .....	23
A. Element 1: Another Person Committed the Vermont Tort of Intentional Interference with Parental Rights.....	24
B. Element 2: Kenneth Miller Knew that the Intentional Interference with Parental Rights Constituted a Breach of Duty .....	25
CONCLUSION.....	26

**TABLE OF AUTHORITIES**

**Cases**

*Akerley v. N. Country Stone, Inc.*,  
620 F. Supp. 2d 591 (D. Vt. 2009)..... 14

*Concord Gen. Mut. Ins. Co. v. Gritman*,  
146 A.3d 882 (Vt. 2016)..... 23

*Gelb v. Royal Globe Ins. Co.*,  
798 F.2d 38 (2d Cir. 1986)..... 11, 12, 19

*Houston Cas. Co. v. Rup*,  
No. 1:16-cv-294, 2017 WL 3327579 (D. Vt. Aug. 3, 2017) (Murtha, J.) ..... 12

*In re Quigley Co., Inc.*,  
676 F.3d 45 (2d Cir. 2012)..... 23

*Irving Nat’l Bank v. Law*,  
10 F.2d 721 (2d Cir. 1926)..... 19

*Jenkins v. Miller*,  
983 F. Supp. 2d 423 (D. Vt. 2013)..... 15, 19, 23, 24

*Jenkins v. Miller*,  
No. 2:12-cv-184, 2017 WL 4402431 (D. Vt. Sept. 29, 2017) ..... 14

*McCarthy v. United States*,  
394 U.S. 459 (1969)..... 12

*New York v. Julius Nasso Concrete Corp.*,  
202 F.3d 82 (2d Cir. 2000)..... 12

*Parklane Hosiery Co. v. Shore*,  
439 U.S. 322 (1979)..... 12

*Samirah v. Sabhnani*,  
772 F. Supp. 2d 437 (E.D.N.Y. 2011) ..... 12, 13

*SEC v. Monarch Funding Corp.*,  
192 F.3d 295 (2d Cir. 1999)..... 12

*Singer v. Fulton Cty. Sheriff*,  
63 F.3d 110 (2d Cir. 1995)..... 13

*State v. O’Dell*,  
924 A.2d 87 (Vt. 2007)..... 17

*State v. Petruccelli*,  
743 A.2d 1062 (Vt. 1999)..... 17

*State v. Wootten*,  
756 A.2d 1222 (Vt. 2000)..... 16, 17

*United States v. Hasan*,  
586 F.3d 161 (2d Cir. 2009)..... 18

<i>United States v. Kenneth L. Miller</i> , 808 F.3d 607 (2d Cir. 2015).....	4
<i>United States v. Podell</i> , 572 F.2d 31 (2d Cir. 1978).....	12
<i>United States v. Saliba</i> , No. 8-CR-792, 2010 WL 1189350 (E.D.N.Y. Mar. 26, 2010).....	18
<i>United States v. Zodhiates</i> , 901 F.3d 137 (2d Cir. 2018).....	8
<i>Zodhiates v. United States</i> , 139 S. Ct. 1273 (2019).....	8
<b>Statutes</b>	
18 U.S.C. § 1204.....	2, 5
18 U.S.C. § 1589(a) .....	12
18 U.S.C. § 2.....	2, 5
18 U.S.C. § 371.....	4
Vt. Stat. Ann. tit. 13, § 2451 .....	17
Vt. Stat. Ann. tit. 15, § 664(1) .....	1
Vt. Stat. Ann. tit. 15, § 664(2) .....	1
Vt. Stat. Ann. tit. 15, § 665(e).....	17
<b>Other Authorities</b>	
Restatement (Second) of Torts § 700.....	15, 19, 22, 23, 24
Restatement (Second) of Torts § 876(b).....	23
<b>Rules</b>	
Fed. R. Civ. P. 56(a) .....	11, 23, 26
<b>Treatises</b>	
Charles Alan Wright & Arthur R. Miller, 18 Federal Practice and Procedure § 4416 (1981).....	12

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, Plaintiff Janet Jenkins, through undersigned counsel, moves for partial summary judgment on Count 1 of the Revised Second Amended Complaint, ECF 223, against Defendants Philip Zodhiates, Kenneth Miller, and Timothy Miller for the reasons set forth in this memorandum in support.

### **STATEMENT OF THE CASE**

This case arises from the international kidnapping of then-seven-year-old Isabella Miller-Jenkins in September 2009 by her mother Lisa Miller to keep her away from her other mother, Janet Jenkins. Isabella remains missing to this day.

The Rutland, Vermont Family Court ordered that Jenkins had the right to visitation with Isabella on numerous occasions starting in June 2004. *See, e.g., Kenneth L. Miller Gov't Ex. 5, Ex. 1; Zodhiates Gov't Ex. 13, Ex. 2.* For example, on September 11, 2009, the court ordered unsupervised parent-child contact between Jenkins and Isabella from September 25, 2009, to September 27, 2009. *See Kenneth L. Miller Gov't Ex. 12, Ex. 3; Zodhiates Gov't Ex. 20, Ex. 4; see also* Vt. Stat. Ann. tit. 15, § 664(2) (defining "Parent child contact"). On November 20, 2009, based in part on the numerous violations of prior court orders by Lisa Miller, the court granted Jenkins "sole physical and legal custody" of Isabella and ordered that Isabella be transferred to Jenkins on January 1, 2010. *See Kenneth L. Miller Gov't Ex. 14, Ex. 5; Zodhiates Gov't Ex. 21, Ex. 6; see also* Vt. Stat. Ann. tit. 15, § 664(1) (defining "Legal responsibility" and "Physical responsibility"). Criminal cases against Defendants Philip Zodhiates, Kenneth Miller, and Timothy Miller uncovered that the trio were among those who helped Lisa Miller kidnap Isabella.

In summary, Zodhiates proposed "some personal options" to Lisa Miller when it seemed she had no legal options to prevent Jenkins's visitation with Isabella. Zodhiates recruited Kenneth Miller, who in turn recruited Timothy Miller in Nicaragua. Timothy Miller purchased

airline tickets for Lisa Miller and Isabella to travel to Nicaragua from Canada. Zodhiates drove Lisa Miller and Isabella from Virginia to the United States–Canada border, where they entered Canada. Kenneth Miller recruited a fellow Mennonite pastor to drive Lisa Miller and Isabella to the airport in Toronto where they flew to Nicaragua. On his way back to Virginia, Zodhiates updated Lisa Miller’s attorneys at Defendant Liberty Counsel on Lisa Miller’s and Isabella’s departure. Timothy Miller helped Lisa Miller and Isabella adjust to life in Nicaragua. Zodhiates, Kenneth Miller, and Timothy Miller relayed messages from Lisa Miller in Nicaragua back to her co-conspirators in the United States, including Defendant Victoria Hyden and Lisa Miller’s attorney Defendant Rena Lindevaldsen. In those messages, Lisa Miller asked that certain belongings in her Virginia home be retrieved and transported to her in Nicaragua. Zodhiates, Kenneth Miller, Timothy Miller, and others coordinated that transportation of Lisa Miller’s belongings to Nicaragua and the removal of what remained in her Virginia home. After Jenkins was granted sole physical and legal custody of Isabella, they transferred \$500 from Virginia to Lisa Miller in Nicaragua.

**I. Kenneth Miller Was Convicted in 2012 of Aiding and Abetting International Parental Kidnapping**

On December 15, 2011, a grand jury impaneled in this Court returned a one-count indictment charging Kenneth Miller with aiding and abetting Lisa Miller in the removal of Isabella Miller-Jenkins from the United States with the intent to obstruct the lawful exercise of parental rights, in violation of 18 U.S.C. §§ 2, 1204. *See Kenneth L. Miller* Indictment, Ex. 7.<sup>1</sup>

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<sup>1</sup> 18 U.S.C. § 1204, the crime of international parental kidnapping, provides: “Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.”

18 U.S.C. § 2 provides: “(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b)

After a four-day jury trial, the Court charged the jury on the elements of the crime as follows:

In order to prove Kenneth Miller guilty of aiding and abetting international parental kidnapping, the government must prove beyond a reasonable doubt:

First, that the child was in the United States;

Second, that Lisa Miller took the child from the United States to another country;

Third, that Lisa Miller acted with the intent to obstruct the lawful exercise of parental rights of Janet Jenkins; and

Fourth, that Kenneth Miller aided and abetted Lisa Miller in committing this crime.

*Kenneth L. Miller* Jury Charge at 13–14, Ex. 8; *see also id.* at 14–20 (elaborating on elements).

The Court instructed the jury that Jenkins had the right to visit Isabella. *Id.* at 15 (“[T]he Rutland Vermont family court’s orders regarding custody and visitation defined the parental rights of Lisa Miller and Janet Jenkins. . . . To find that Lisa Miller acted with the intent to obstruct the lawful exercise of parental rights, you must find that she acted deliberately with the purpose of interfering with the parental rights of Janet Jenkins, specifically her visitation rights.”).

The Court explained criminal aiding and abetting as follows:

In order to aid or abet another to commit a crime, it is necessary that a defendant knowingly associate himself in some way with the crime, and that he participate in the crime by doing some act to help make the crime succeed. . . .

To establish that Kenneth Miller knowingly associated himself with the crime of international parental kidnapping, the government must establish that he intended to obstruct the lawful exercise of parental rights. . . . The government must prove beyond

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Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.”

a reasonable doubt that Kenneth Miller had knowledge of the facts that constitute the offense, i.e., that Janet Jenkins had parental rights—specifically visitation rights—and that Lisa Miller intended to obstruct the lawful exercise of those rights by removing the child from the country. . . .

To establish that Kenneth Miller participated in the commission of the crime of international parental kidnapping, the government must prove that he engaged in some affirmative conduct or overt act for the specific purpose of bringing about the crime.

*Id.* at 16–17.

The jury found Kenneth Miller guilty on August 14, 2012. *Kenneth L. Miller Verdict Form*, Ex. 9. The Court imposed its judgment on March 4, 2013. *Kenneth L. Miller Judgment*, Ex. 10. The United States Court of Appeals for the Second Circuit affirmed the conviction on December 16, 2015, *see United States v. Kenneth L. Miller*, 808 F.3d 607 (2d Cir. 2015); *see also Kenneth L. Miller 2d Cir. Op.*, Ex. 11, and issued the mandate on February 1, 2016, *see Kenneth L. Miller 2d Cir. Mandate*, Ex. 12. Kenneth Miller did not petition the Supreme Court of the United States for a writ of certiorari. *See Kenneth L. Miller 2d Cir. Docket Report* at 5, Ex. 13.

## **II. Timothy Miller Pleaded Guilty in 2017 to Conspiracy to Commit International Parental Kidnapping**

On April 24, 2015, a grand jury impaneled in the United States District Court for the Western District of New York returned a two-count superseding indictment against Lisa Miller, Philip Zodhiates, and Timothy Miller. *See Timothy Miller Superseding Indictment*, Ex. 14; *Zodhiates Indictment*, Ex. 15. The first count (“the conspiracy count”) charged each with conspiring to remove Isabella from the United States and to retain her outside the United States with intent to obstruct Jenkins’s parental rights, in violation of 18 U.S.C. § 371.<sup>2</sup> The second

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<sup>2</sup> 18 U.S.C. § 371, the crime of conspiracy, provides in relevant part: “If two or more persons conspire either to commit any offense against the United States, or to defraud the United States,

count (“the international parental kidnapping count”) charged each with removing, and aiding and abetting the removal of, Isabella from the United States with intent to obstruct Jenkins’s parental rights, in violation of 18 U.S.C. §§ 2, 1204.

On November 30, 2016, Timothy Miller pleaded guilty to the conspiracy count. *Timothy Miller Plea Agreement*, Ex. 16. The plea agreement set forth the following elements of the crime:

- a. That Isabella Miller Jenkins [sic] was previously in the United States;
- b. that the defendant agreed with others including Lisa Miller and Ken Miller to assist the taking of Isabella Miller Jenkins [sic] from the United States and retaining the child outside the United States; and
- c. the defendant acted with the intent to obstruct the lawful exercise of parental rights of Janet Jenkins.

*Id.* at 2; *see also Timothy Miller Plea Colloquy* at \*10, Ex. 17.<sup>3</sup> Timothy Miller also agreed to the following facts:

- a. That Isabella Miller Jenkins [sic] is the daughter of Lisa Miller and Janet Jenkins. Prior to September 22, 2009, Isabelle Miller Jenkins [sic] lived in the United States and Janet Jenkins had the parental right to visit Isabella Miller.
- b. That on or about September 21, 2009, the defendant was a Mennonite minister in Managua, Nicaragua when he was contacted by Kenneth Miller. Kenneth Miller told the defendant that Lisa Miller was looking to leave the United States with her daughter Isabella Miller Jenkins [sic] as she could lose custody of Isabella to Janet Jenkins.
- c. Based on this information, the defendant agreed to assist in arranging Lisa’s and Isabella’s departure from the United States. The defendant did also purchase one-way airline tickets on

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or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.”

<sup>3</sup> Pincite pages preceded by an asterisk refer to the page numbers generated by the Court’s CM/ECF system.

September 21, 2009, for Lisa and Isabella to travel from Canada to Managua, Nicaragua on September 22, 2009.

d. Lisa and Isabella departed Canada on or about September 22, 2009, and arrived in Managua, Nicaragua. The defendant learned in November 2009 that Janet Jenkins was award [sic] custody of Isabella Miller Jenkins [sic]. The defendant continued to assist Lisa Miller with assistance up to and including May 2010 when he accepted and provided Lisa Miller with money.

*Timothy Miller* Plea Agreement at 3, Ex. 16; *see also Timothy Miller* Plea Colloquy at \*11–12, Ex. 17.

The court imposed its judgment on March 23, 2017. *See Timothy Miller* Judgment at 2, Ex. 18. Timothy Miller did not appeal his judgment of conviction. *See Timothy Miller* Docket Report at 7, Ex. 19.

### **III. Zodhiates Was Convicted in 2017 of International Parental Kidnapping, Aiding and Abetting International Parental Kidnapping, and Conspiracy to Commit International Parental Kidnapping**

After a seven-day jury trial, the court charged the jury in Zodhiates's case. On the conspiracy count of the superseding indictment, the court charged the jury as follows:

Now, in order to satisfy the burden of proof with respect to Count 1, the government must establish each of the following four essential elements beyond a reasonable doubt.

First, that two or more persons entered into an unlawful agreement to remove a child from the United States and to retain that child, who had been in the United States, outside the United States with an intent to obstruct the lawful exercise of parental rights.

Second, that the defendant knowingly and willfully became a member of the conspiracy.

Third, that one of the members of the conspiracy knowingly committed at least one of the overt acts charged in the indictment.

And fourth, that the overt acts which you find have been committed were committed in furtherance of some object of the conspiracy.

*Zodhiates* Jury Charge at \*51, Ex. 20; *see also id.* at \*48–61 (elaborating on elements).

The Court instructed the jury that, “as of September 21st, 2009, Vermont law gave Janet Jenkins the right to visit Isabella Miller-Jenkins,” *id.* at \*52, and that, “on November 20th, 2009, a Vermont Family Court Judge transferred custody of Isabella Miller-Jenkins to Janet Jenkins, effective January 1st, 2010,” *id.* at \*53.

On the international parental kidnapping count of the superseding indictment, the court charged the jury as follows:

In order to prove the defendant guilty of the International Parental Kidnapping Act by removing from the United States, the government must prove the following three elements beyond a reasonable doubt: First, that Isabella Miller-Jenkins was previously in the United States; second, that the defendant took Isabella Miller from the United States to another country and third, the defendant acted with intent to obstruct the lawful exercise of the parental rights of Janet Jenkins.

*Id.* at \*62; *see also id.* at \*61–64 (elaborating on elements). The court further charged the jury on the government’s alternative theory of aiding and abetting as follows:

Now, the indictment also alleges that the defendant aided and abetted in intentional (sic) parental kidnapping. This is still Count 2. This is an alternative way of proving this. And that's for you to decide whether the government has proven it.

...

[Y]ou may find the defendant guilty of intentional (sic) parental kidnapping if you find beyond a reasonable doubt that the government has proven that another person actually committed the offense of international parental kidnapping and the defendant aided or abetted that person in the commission of the offense.

...

In order to aid or abet another to commit a crime, it is necessary that the defendant knowingly associated himself, in some way, with the crime and that he participated in the crime by doing some act to help make the crime succeed. To establish the defendant knowingly associated himself with the crime of international parental kidnapping, the government must establish that the

defendant intended to obstruct Janet Jenkins' lawful exercise of parental rights.

...

To establish the defendant participated in the commission of international parental kidnapping, the government must prove that he engaged in some affirmative conduct or overt act with a specific purpose of bringing about the crime.

*Id.* at \*64–66; *see also id.* at \*65–67 (elaborating on elements).

The court again instructed the jury that “the term parental rights means Janet Jenkins’ right to visit Isabella Miller-Jenkins, as the right was defined by the law and courts of Vermont at the time Isabella Miller-Jenkins was removed from the United States.” *Id.* at \*63, \*65–66.

The jury convicted Zodhiates on both counts of the superseding indictment on September 29, 2016. *See Zodhiates Jury Verdict*, Ex. 21. The court imposed its judgment on March 22, 2017. *Zodhiates Judgment* at 1–2, Ex. 22. The Second Circuit affirmed the conviction on August 21, 2018, *see United States v. Zodhiates*, 901 F.3d 137 (2d Cir. 2018); *see also Zodhiates* 2d Cir. Op., Ex. 23, and issued the mandate on October 26, 2018, *see Zodhiates* 2d Cir. Mandate, Ex. 24. The Supreme Court denied Zodhiates’s petition for a writ of certiorari on February 25, 2019. *See Zodhiates v. United States*, 139 S. Ct. 1273 (2019); *see also* Feb. 25, 2019 Sup. Ct. Order List at 10, Ex. 25.

#### **IV. Jenkins Claims Zodhiates, Kenneth Miller, and Timothy Miller Intentionally Interfered with Her Parental Rights**

On May 4, 2017, Jenkins filed a Revised Second Amended Complaint, claiming in Count 1 that Zodhiates, Kenneth Miller, and Timothy Miller, among other things, conspired with, and aided and abetted, Lisa Miller in intentionally interfering with Jenkins’s parental rights. *See Compl.* ¶ 65, ECF 223; *see also Op. & Order* at 16–38, ECF 277 (Sept. 29, 2017) (denying motion to dismiss Count 1); *Op. & Order* at 39–42, ECF 115 (Oct. 24, 2013) (denying motion to

dismiss Count 1); Op. & Order, ECF 396 (Oct. 29, 2019) (denying Timothy Miller's motion to dismiss).

### SUMMARY OF ARGUMENT

Jenkins alleges in Count 1 that Zodiates, Kenneth Miller, and Timothy Miller are liable to her for the Vermont tort of intentional interference with her parental rights under two theories of liability: civil conspiracy and civil aiding and abetting. The criminal convictions of Zodiates, Kenneth Miller, and Timothy Miller for their involvement in kidnapping Isabella to interfere with Jenkins's parental rights preclude them from relitigating all—or, in Kenneth Miller's case, all but one—of the elements of that tort claim. Jenkins is entitled to summary judgment on Count 1 against Zodiates and Timothy Miller based on the civil-conspiracy theory. She is entitled to summary judgment on the first two elements of Count 1 against Kenneth Miller based on the civil aiding-and-abetting theory.

**I.** The Vermont tort of intentional interference with parental rights requires that (1) a person abduct or otherwise compel or induce a minor child to leave a parent (2) who is legally entitled to her custody, (3) with knowledge that the parent does not consent. Under Jenkins's civil-conspiracy theory, she must prove by a preponderance of the evidence that Zodiates and Timothy Miller (1) each agreed with another to effect the Vermont tort of intentional interference with parental rights; (2) the tort was done; (3) the tort was done in furtherance of the agreement; and (4) the tort damaged Jenkins. Zodiates's jury made findings, and Timothy Miller made admissions, sufficient to establish each of the elements beyond a reasonable doubt.

**A.** *First*, Zodiates's jury found, and Timothy Miller admitted, that he and another agreed to remove Isabella from the United States with an intent to obstruct Jenkins's visitation rights. This is sufficient to show that each agreed to compel or induce Isabella to leave Jenkins, who was legally entitled to Isabella's custody, with knowledge that Jenkins did not consent.

**B.** *Second*, Zodhiates's jury found that Zodhiates or another removed Isabella from the United States with an intent to obstruct Jenkins's visitation rights. Timothy Miller admitted that Lisa Miller removed Isabella from the United States to avoid losing custody of Isabella to Jenkins, who had the parental right to visit Isabella. This is sufficient to show that someone compelled or induced Isabella to leave Jenkins, who was legally entitled to Isabella's custody, with knowledge that Jenkins did not consent.

**C.** *Third*, Zodhiates's jury found that, when removing Isabella from the United States, Zodhiates (or the other person) acted with intent to obstruct Jenkins's parental rights. Timothy Miller admitted that Lisa Miller—who was looking to leave the United States with Isabella because she could lose custody of Isabella to Jenkins, who had the parental right to visit Isabella—departed Canada and arrived in Nicaragua with Isabella. This is sufficient to show that the Vermont tort of intentional interference with parental rights was done in furtherance of the agreement to effect that tort.

**D.** *Fourth*, Zodhiates's jury found, and Timothy Miller admitted, that Isabella was taken from the United States to another country even though Jenkins had parental rights. This is sufficient to show that the Vermont tort of intentional interference with parental rights damaged Jenkins.

Therefore, there can be no genuine dispute as to any material fact regarding Zodhiates's and Timothy Miller's liability on Count 1, and Jenkins is entitled to judgment as a matter of law on Count 1 against them.

**II.** Under Jenkins's civil aiding-and-abetting theory, she must prove by a preponderance of the evidence that (1) another person committed the Vermont tort of intentional interference with parental rights; (2) Kenneth Miller knew that the intentional interference with parental

rights constituted a breach of duty; and (3) Kenneth Miller gave substantial assistance or encouragement to the person who committed the Vermont tort of intentional interference with parental rights.

Kenneth Miller's conviction for aiding and abetting international parental kidnapping establishes the first two elements beyond a reasonable doubt. His jury found beyond a reasonable doubt that Lisa Miller took Isabella from the United States to another country to obstruct Jenkins's parental rights and without Jenkins's consent. The jury also found beyond a reasonable doubt that he intended to obstruct Jenkins's parental rights.

Therefore, there can be no genuine dispute of material fact regarding the first two elements of Count 1 against Kenneth Miller, and Jenkins is entitled to judgment as a matter of law against him on those elements.

### **ARGUMENT**

Summary judgment should be granted on Jenkins's Vermont tort claim against Zodiates, Kenneth Miller, and Timothy Miller for intentional interference with her parental rights because their prior convictions preclude them from relitigating issues presented by that claim. Rule 56(a) of the Federal Rules of Civil Procedure requires the Court to grant summary judgment on "each claim or defense—or the part of each claim or defense—on which summary judgment is sought . . . if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Collateral estoppel can satisfy both requirements. "[F]ederal law governs the collateral estoppel effect of a federal criminal conviction in a subsequent diversity action." *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 43 (2d Cir. 1986). "Under the doctrine of offensive collateral estoppel (more recently called offensive issue preclusion), a plaintiff may foreclose a defendant from relitigating an issue the defendant has previously litigated but lost against another plaintiff."

*SEC v. Monarch Funding Corp.*, 192 F.3d 295, 303 (2d Cir. 1999) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979)). “A criminal conviction constitutes estoppel in a subsequent civil proceeding as to the matters determined by the judgment in the criminal case.” *Houston Cas. Co. v. Rup*, No. 1:16-cv-294, 2017 WL 3327579, at \*2 (D. Vt. Aug. 3, 2017) (Murtha, J.).

A criminal conviction by guilty plea can constitute estoppel in a subsequent civil proceeding. *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978); *see also Gelb*, 798 F.2d at 43 (“[A] party other than the Government may assert collateral estoppel based on a criminal conviction.”). A guilty plea “is an admission of all the elements of a formal criminal charge.” *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

“For the bar to apply: (1) the issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and actually decided, (3) there must have been a full and fair opportunity for litigation in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits.” *Gelb*, 798 F.2d at 44 (citing Charles Alan Wright & Arthur R. Miller, 18 Federal Practice and Procedure § 4416 (1981)). To evaluate these factors, the court looks to the jury instructions, verdict, and findings of the jury in the prior criminal proceeding. *See, e.g., New York v. Julius Nasso Concrete Corp.*, 202 F.3d 82, 86–87 (2d Cir. 2000).

The court’s analysis in *Samirah v. Sabhnani*, 772 F. Supp. 2d 437, 441 (E.D.N.Y. 2011), illustrates how this Court should assess this motion. In that case, a married couple forced two individuals to work as domestic servants in their home for little pay under very poor conditions and physically abused them. A jury convicted the couple of, among other things, forced labor in violation of 18 U.S.C. § 1589(a). 772 F. Supp. 2d at 441. The victims then sued the couple for

damages on various claims and moved for summary judgment on ten of those claims, including the state-law claim of false imprisonment, on the basis of the couple's convictions. *Id.*

The court granted summary judgment on the plaintiffs' claim for false imprisonment because, comparing the elements of the crime with the tort, "all of the elements of false imprisonment were necessarily found by the jury in convicting the defendants of forced labor." *Id.* at 451. New York's tort of false imprisonment requires that "(1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged." *Id.* (citing *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995)). Meanwhile, the couple's forced labor convictions required the jury to find beyond a reasonable doubt that they "(1) 'knowingly' (2) 'obtained the labor or services' of the plaintiffs (3) through 'threats of serious harm or physical restraint' and 'a scheme, plan or pattern intended to cause the plaintiffs to believe that non-compliance would result in serious harm.'" *Id.* (internal citations omitted).

The court reasoned that all three jury findings satisfied the first element of the tort: "By knowingly obtaining the plaintiffs' labor through use of threats of serious harm or physical restraint, the defendants necessarily confined the plaintiffs to the space in which they were forced to work." *Id.* The third finding satisfied the second and third elements of the tort: "[T]he only reasonable conclusion from the record and the jury's determination that the plaintiffs believed that non-compliance with the defendants' directions would result in serious harm, is that the plaintiffs were aware of the confinement and did not consent to it." *Id.* As for the fourth element of the tort, the court reasoned that it was met because there was "no evidence or suggestion that the plaintiffs' confinement was privileged." *Id.*

That same method of analysis applies here.

**I. Zodhiates's and Timothy Miller's Convictions Establish Beyond a Reasonable Doubt All the Elements of Conspiracy to Intentionally Interfere with Jenkins's Parental Rights**

Jenkins is entitled to summary judgment against Zodhiates and Timothy Miller on Count 1. Zodhiates and Timothy Miller are collaterally estopped from challenging their liability under Vermont law for conspiring to intentionally interfere with Jenkins's parental rights because their convictions establish all elements of the tort beyond a reasonable doubt.

Under Vermont law, civil conspiracy requires that the plaintiff was damaged by something illegal done in furtherance of an agreement between two or more persons to effect an illegal purpose. *See Jenkins v. Miller*, No. 2:12-cv-184, 2017 WL 4402431, at \*10 (D. Vt. Sept. 29, 2017) (ECF 277) (citing *Akerley v. N. Country Stone, Inc.*, 620 F. Supp. 2d 591, 600 (D. Vt. 2009)). Under Count 1, the illegal purpose and illegal act is the Vermont tort of intentional interference with parental rights. Therefore, under Jenkins's civil conspiracy theory of Zodhiates's and Timothy Miller's liability under Count 1, she must prove by a preponderance of the evidence that:

Element 1: Zodhiates and Timothy Miller each agreed with another to effect the Vermont tort of intentional interference with parental rights.

Element 2: The Vermont tort of intentional interference with parental rights was done.

Element 3: The Vermont tort of intentional interference with parental rights was done in furtherance of the agreement.

Element 4: The Vermont tort of intentional interference with parental rights damaged Jenkins.

**A. Element 1: Zodhiates and Timothy Miller Each Agreed with Another to Effect the Vermont Tort of Intentional Interference with Parental Rights**

The first element of Jenkins's civil conspiracy theory of Zodhiates's and Timothy Miller's liability under Count 1 requires that she prove by a preponderance of the evidence that

Zodhiates and Timothy Miller each agreed with another to effect the Vermont tort of intentional interference with parental rights. That tort requires that (a) a person abduct or otherwise compel or induce a minor child to leave a parent (b) who is legally entitled to her custody, (c) with knowledge that the parent does not consent. *Jenkins v. Miller*, 983 F. Supp. 2d 423, 451–52 (D. Vt. 2013); accord Restatement (Second) of Torts § 700 (“One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent.”). Therefore, Jenkins must prove by a preponderance of the evidence that:

Element 1(a): Zodhiates and Timothy Miller each agreed to abduct or otherwise compel or induce Isabella, a minor, to leave Jenkins, her parent.

Element 1(b): Jenkins was legally entitled to Isabella’s custody.

Element 1(c): Zodhiates and Timothy Miller each entered into the agreement with knowledge that Jenkins did not consent.

**1. Element 1(a): Zodhiates and Timothy Miller each agreed to abduct or otherwise compel or induce Isabella, a minor, to leave Jenkins, her parent**

The first element of Jenkins’s civil conspiracy theory of Zodhiates’s and Timothy Miller’s liability under Count 1 requires that she prove by a preponderance of the evidence that Zodhiates and Timothy Miller each agreed with another to abduct or otherwise compel or induce a minor child to leave a parent. The jury found that Zodhiates and another agreed to remove Isabella from the United States. *See Zodhiates Jury Charge at \*51, Ex. 20*. Timothy Miller admitted that he and another agreed to remove Isabella from the United States. *See Timothy Miller Plea Agreement at 2–3, Ex. 16*. This finding and admission satisfy the tort’s requirement that Zodhiates and Timothy Miller each agreed with another to abduct or otherwise compel or induce Isabella to leave Jenkins. By agreeing to remove Isabella from the United States,

Zodhiates and Timothy Miller necessarily agreed to separate Isabella from Jenkins, whether involuntarily by abduction or compulsion or voluntarily by inducement. *See Zodhiates Jury Charge* at \*63, Ex. 20 (requiring only that Zodhiates “took” or “moved” Isabella from the United States to another country).

**2. Element 1(b): Jenkins was legally entitled to Isabella’s custody**

The first element of Jenkins’s civil conspiracy theory of Zodhiates’s and Timothy Miller’s liability under Count 1 also requires that she prove by a preponderance of the evidence that she was legally entitled to Isabella’s custody. Jenkins alleges she was legally entitled to Isabella’s custody because she had visitation rights, *see, e.g., Kenneth L. Miller Gov’t Ex. 5, Ex. 1; Zodhiates Gov’t Ex. 13, Ex. 2; Kenneth L. Miller Gov’t Ex. 12, Ex. 3; Zodhiates Gov’t Ex. 20, Ex. 4*, and then sole physical and legal custody, *see Kenneth L. Miller Gov’t Ex. 14, Ex. 5; Zodhiates Gov’t Ex. 21, Ex. 6*.

The jury found that Zodhiates and another entered into the agreement with an intent to obstruct Jenkins’s visitation rights. *See Zodhiates Jury Charge* at \*51, Ex. 20. Timothy Miller admitted that he and another entered into the agreement with an intent to obstruct Jenkins’s visitation rights. *See Timothy Miller Plea Agreement* at 2–3, Ex. 16. This finding and admission satisfy the tort’s requirement that Jenkins was legally entitled to Isabella’s custody.

Zodhiates and Timothy Miller are collaterally estopped from relitigating whether Jenkins actually had visitation rights because the precise issue was necessarily decided in their criminal cases. Neither could have been convicted (either by jury verdict or guilty plea) if Jenkins did not have parental rights.

Jenkins’s visitation rights satisfy this element’s requirement that she was legally entitled to Isabella’s custody because visitation is a form of temporary custody. *Cf. State v. Wootten*, 756 A.2d 1222, 1225 n.4 (Vt. 2000) (declining “to rely on an interpretation of” Vt. Stat. Ann. tit. 13,

§ 2451, which criminalizes knowingly taking, enticing, or keeping a child from the child’s lawful custodian without a legal right to do so, and Vt. Stat. Ann. tit. 15, § 665(e), “which clarifies that ‘the parent with physical responsibility shall be considered the custodial parent,’” “that permits the existence of only one custodian at any moment”); *State v. O’Dell*, 924 A.2d 87, 90 (Vt. 2007) (“The purpose of the custodial interference statute is to protect *any* custodian from deprivation of his or her rights, even if such deprivation results from the actions of a person who has a right to physical custody” and “to protect children, who are victims in these cases and suffer detrimental effects from wrongful taking or withholding.”); *State v. Petruccelli*, 743 A.2d 1062, 1068 (Vt. 1999) (“Modern custodial interference statutes were intended to respond to the increasing occurrence of parental abduction of children as a means to settle a custody dispute or to permanently alter custody.”).

In *Wootten*, for example, a father was awarded temporary physical custody of his two sons and their mother was awarded unsupervised visitation with them on two separate dates. 756 A.2d at 1223. The father removed the children from Vermont before the mother’s second visitation day and was charged with custodial interference. *Id.* The Vermont Supreme Court rejected the father’s argument “that he cannot be prosecuted for custodial interference because he was the children’s lawful custodian at the moment of the taking.” *Id.* at 1228 (citing *Petruccelli*, 743 A.2d at 1069). Like the mother in *Wootten*, Jenkins’s visitation rights entitled her to custody of Isabella on certain dates, including from September 25, 2009, to September 27, 2009. *See Zodhiates Gov’t Ex. 20, Ex. 4.* And like the father in *Wootten*, Lisa Miller cannot avoid liability for kidnapping Isabella simply because she had physical custody of Isabella on other dates.

**3. Element 1(c): Zodhiates and Timothy Miller each entered into the agreement with knowledge that Jenkins did not consent**

The first element of Jenkins’s civil conspiracy theory of Zodhiates’s and Timothy Miller’s liability under Count 1 further requires that she prove by a preponderance of the evidence that Zodhiates and Timothy Miller each entered into the agreement with knowledge that Jenkins did not consent. The jury found that Zodhiates and another entered into the agreement with an intent to obstruct Jenkins’s visitation rights. *See Zodhiates Jury Charge at \*51, Ex. 20.* Timothy Miller admitted that he and another entered into that agreement with an intent to obstruct Jenkins’s visitation rights. *See Timothy Miller Plea Agreement at 2–3, Ex. 16.* This finding and admission also satisfy the tort’s requirement that Zodhiates and Timothy Miller had knowledge that Jenkins did not consent. Zodhiates and Timothy Miller could not have intended to obstruct Jenkins’s visitation rights if they believed she consented to Isabella’s leaving her. *Cf. United States v. Hasan*, 586 F.3d 161, 165–66 (2d Cir. 2009) (holding government introduced sufficient evidence for jury to find child’s mother did not give consent to defendant’s parents’ taking child to foreign country); *United States v. Saliba*, No. 8-CR-792, 2010 WL 1189350, at \*1–2 (E.D.N.Y. Mar. 26, 2010) (allowing government to introduce evidence that defendant abused his then-wife to rebut defendant’s anticipated defense that he did not intend to obstruct her lawful exercise of parental rights because she consented to his taking their child to a foreign country or led him to believe she would join them there).

\* \* \*

Therefore, Zodhiates and Timothy Miller are collaterally estopped from relitigating this issue, there can be no genuine dispute as to any material fact regarding the first element of Count 1, and Jenkins is entitled to judgment as a matter of law on the first element of Count 1 against Zodhiates and Timothy Miller.

**B. Element 2: The Vermont Tort of Intentional Interference with Parental Rights Was Done**

The second element of Jenkins’s civil conspiracy theory of Zodiates’s and Timothy Miller’s liability under Count 1 requires that she prove by a preponderance of the evidence that the Vermont tort of intentional interference with parental rights was done. Again, that tort requires that (a) a person abduct or otherwise compel or induce a minor child to leave a parent (b) who is legally entitled to her custody, (c) with knowledge that the parent does not consent. *Jenkins*, 983 F. Supp. 2d at 451–52; accord Restatement (Second) of Torts § 700. So, Jenkins must prove by a preponderance of the evidence that:

Element 2(a): A person abducted or otherwise compelled or induced Isabella, a minor, to leave Jenkins, a parent.

Element 2(b): Jenkins was legally entitled to Isabella’s custody.

Element 2(c): The person acted with knowledge that Jenkins did not consent.

**1. Element 2(a): A person abducted or otherwise compelled or induced Isabella, a minor, to leave Jenkins, a parent**

The second element of Jenkins’s civil conspiracy theory of Zodiates’s and Timothy Miller’s liability under Count 1 requires that she prove by a preponderance of the evidence that a person abducted or otherwise compelled or induced Isabella, a minor, to leave Jenkins, a parent.

The jury found that Zodiates or another removed Isabella from the United States.<sup>4</sup> See *Zodiates* Jury Charge at \*62, 64–65, Ex. 20. Timothy Miller admitted that, prior to September 22, 2009, Isabella lived in the United States, that Jenkins had the parental right to visit Isabella, that Lisa Miller was looking to leave the United States with Isabella because she could lose

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<sup>4</sup> The jury found Zodiates guilty on the second count of the superseding indictment for international parental kidnapping and aiding and abetting international parental kidnapping. “[E]ach is a good estoppel.” *Gelb*, 798 F.2d at 45 (quoting *Irving Nat’l Bank v. Law*, 10 F.2d 721, 724 (2d Cir. 1926)).

custody of Isabella to Jenkins, that he purchased one-way airline tickets for Lisa Miller and Isabella to travel from Canada to Nicaragua, that Lisa Miller and Isabella departed Canada on or about September 22, 2009, and that he continued to assist Lisa Miller after Jenkins was awarded custody of Isabella in November 2009. *See Timothy Miller Plea Agreement* at 3, Ex. 16.

This finding and these admissions prove beyond a reasonable doubt that someone—Zodhiates, Lisa Miller, or another person—abducted or otherwise compelled or induced Isabella to leave Jenkins in the United States.

**2. Element 2(b): Jenkins was legally entitled to Isabella’s custody**

The second element of Jenkins’s civil conspiracy theory of Zodhiates’s and Timothy Miller’s liability under Count 1 also requires that she prove by a preponderance of the evidence that she was legally entitled to Isabella’s custody. Zodhiates’s conviction and Timothy Miller’s guilty plea prove this element beyond a reasonable doubt for the reasons set forth in *supra* Part I.A.2. Moreover, the jury found that the other person who kidnapped Isabella committed the offense of international parental kidnaping, which necessarily decides this issue. *See Zodhiates Jury Charge* at \*64–65, Ex. 20.

**3. Element 2(c): The person acted with knowledge that Jenkins did not consent**

The second element of Jenkins’s civil conspiracy theory of Zodhiates’s and Timothy Miller’s liability under Count 1 further requires that she prove by a preponderance of the evidence that the person who abducted or otherwise compelled or induced Isabella to leave Jenkins acted with knowledge that Jenkins did not consent. Zodhiates’s conviction and Timothy Miller’s guilty plea prove this element beyond a reasonable doubt for the reasons set forth in *supra* Part I.A.3.

\* \* \*

Therefore, Zodhiates and Timothy Miller are collaterally estopped from relitigating this issue, there can be no genuine dispute as to any material fact regarding the second element of Count 1, and Jenkins is entitled to judgment as a matter of law on the second element of Count 1 against Zodhiates and Timothy Miller.

**C. Element 3: The Vermont Tort of Intentional Interference with Parental Rights Was Done in Furtherance of the Agreement**

The third element of Jenkins's civil conspiracy theory of Zodhiates's and Timothy Miller's liability under Count 1 requires that she prove by a preponderance of the evidence that the Vermont tort of intentional interference with parental rights (the illegal act) was done in furtherance of the agreement to effect the Vermont tort of intentional interference with parental rights (the illegal purpose).

The jury found beyond a reasonable doubt that, when removing Isabella from the United States, Zodhiates (or the other person) acted with intent to obstruct Jenkins's parental rights. *See Zodhiates Jury Charge at \*62, Ex. 20.* Timothy Miller admitted that Lisa Miller was looking to leave the United States with Isabella because she could lose custody of Isabella to Jenkins, who had the parental right to visit Isabella, and that Lisa Miller and Isabella departed Canada and arrived in Nicaragua. *See Timothy Miller Plea Agreement at 3, Ex. 16.*

This finding and these admissions prove beyond a reasonable doubt that whoever kidnapped Isabella—Zodhiates, Lisa Miller, or another person—did so in furtherance of the agreement to interfere with Jenkins's parental rights.

Therefore, Zodhiates and Timothy Miller are collaterally estopped from relitigating this issue, there can be no genuine dispute as to any material fact regarding the third element of Count 1, and Jenkins is entitled to judgment as a matter of law on the third element of Count 1 against Zodhiates and Timothy Miller.

**D. Element 4: The Vermont Tort of Intentional Interference with Parental Rights Damaged Jenkins**

The fourth and final element of Jenkins's civil conspiracy theory of Zodhiates's and Timothy Miller's liability under Count 1 requires that she prove by a preponderance of the evidence that the illegal act damaged Jenkins.

The jury found beyond a reasonable doubt that Isabella was taken from the United States to another country even though Jenkins had parental rights. *See Zodhiates Jury Charge at \*62–65, Ex. 20.* Timothy Miller admitted that: (a) before September 22, 2009, Jenkins had the parental right to visit Isabella; (b) Lisa Miller and Isabella departed Canada on or about September 22, 2009, and arrived in Managua, Nicaragua; (c) in November 2009, he learned that Jenkins was awarded custody of Isabella; and (d) after learning that Jenkins was awarded custody of Isabella, he continued to assist Lisa Miller up to and including May 2010, when he accepted and provided her money. Isabella's removal and retention from the United States while Jenkins had parental rights constitutes damage to Jenkins. *See Restatement (Second) of Torts § 700 cmt. d* (“The deprivation to the parent of the society of the child is itself an injury that the law redresses.”).

Therefore, Zodhiates and Timothy Miller are collaterally estopped from relitigating this issue, there can be no genuine dispute as to any material fact regarding the fourth element of Count 1, and Jenkins is entitled to judgment as a matter of law on the fourth element of Count 1 against Zodhiates and Timothy Miller.

\* \* \*

For these reasons, Zodhiates and Timothy Miller are collaterally estopped from relitigating all issues presented by Count 1, there can be no genuine dispute as to any material fact regarding Count 1, and Jenkins is entitled to judgment as a matter of law on Count 1 against

Zodhiates and Timothy Miller. If the Court determines that Zodhiates or Timothy Miller is collaterally estopped on some but not all elements of Count 1, summary judgment should be granted on those elements that Zodhiates and Timothy Miller are precluded from relitigating. *See* Fed. R. Civ. P. 56(a) (“A party may move for summary judgment, identifying each claim or defense—or *the part of each claim* or defense—on which summary judgment is sought.” (emphasis added)).

**II. Kenneth Miller’s Conviction Establishes Beyond a Reasonable Doubt the First Two Elements of Aiding and Abetting the Intentional Interference with Jenkins’s Parental Rights**

Kenneth Miller is collaterally estopped from challenging the first two elements of aiding and abetting the intentional interference with Jenkins’s parental rights because his conviction for aiding and abetting international parental kidnapping establishes those elements of the tort beyond a reasonable doubt.

Under Vermont law, “a person is subject to liability for harm to a third person from the tortious conduct of another if the person . . . knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself or herself.” *Concord Gen. Mut. Ins. Co. v. Gritman*, 146 A.3d 882, 887 (Vt. 2016) (quoting Restatement (Second) of Torts § 876(b)).<sup>5</sup> The Vermont tort of intentional interference with parental rights itself requires that a person abduct or otherwise compel or induce a minor child to leave a parent who is legally entitled to her custody, with knowledge that the parent does not consent. *Jenkins*, 983 F. Supp. 2d at 451–52; *accord* Restatement (Second) of Torts § 700.

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<sup>5</sup> The Second Circuit, like other courts, has recognized that the Restatement (Second) of Torts § 876(b) sets forth the elements for a civil claim based on aiding and abetting. *See, e.g., In re Quigley Co., Inc.*, 676 F.3d 45, 60 (2d Cir. 2012).

Under Jenkins's civil aiding-and-abetting theory of Kenneth Miller's liability under Count 1, she must prove by a preponderance of the evidence that:

Element 1: Another person committed the Vermont tort of intentional interference with parental rights, which requires that:

Element 1(a): The person abducted or otherwise compelled or induced Isabella to leave Jenkins.

Element 1(b): Jenkins was legally entitled to Isabella's custody.

Element 1(c): The other person knew that Jenkins did not consent.

Element 2: Kenneth Miller knew that the intentional interference with parental rights constituted a breach of duty.

Element 3: Kenneth Miller gave substantial assistance or encouragement to the person who committed the Vermont tort of intentional interference with parental rights.

**A. Element 1: Another Person Committed the Vermont Tort of Intentional Interference with Parental Rights**

The first element of Jenkins's civil aiding-and-abetting theory of Kenneth Miller's liability under Count 1 requires that she prove by a preponderance of the evidence that another person committed the Vermont tort of intentional interference with parental rights. Kenneth Miller's criminal conviction for aiding and abetting international parental kidnapping proves this element beyond a reasonable doubt.

Again, the Vermont tort of intentional interference with parental rights requires that Jenkins prove by a preponderance of the evidence that: (a) the person abducted or otherwise compelled or induced Isabella to leave Jenkins; (b) Jenkins was legally entitled to Isabella's custody; and (c) the person knew that Jenkins did not consent. *Jenkins*, 983 F. Supp. 2d at 451–52; *accord* Restatement (Second) of Torts § 700. By finding Kenneth Miller guilty of aiding and abetting international parental kidnapping, the jury necessarily found beyond a reasonable doubt

that: (1) Lisa Miller took Isabella from the United States to another country, and (2) Lisa Miller acted with the intent to obstruct the lawful exercise of parental rights of Jenkins. *See Kenneth L. Miller Jury Charge* at 14–15, Ex. 8. As the court instructed Kenneth Miller’s jury, Jenkins had visitation rights before Isabella was supposed to be transferred to Jenkins’s custody on January 1, 2010. *See id.* at 15; *see also Kenneth L. Miller Gov’t Ex. 5, Ex. 1; Kenneth L. Miller Gov’t Ex. 14, Ex. 5.* Together, these findings establish that Lisa Miller abducted or otherwise compelled or induced Isabella to leave Jenkins and that she knew Jenkins, who at the time had visitation rights, did not consent.

Therefore, Kenneth Miller is collaterally estopped from relitigating this issue, there can be no genuine dispute as to any material fact regarding the first element of Count 1, and Jenkins is entitled to judgment as a matter of law on the first element of Count 1 against Kenneth Miller.

**B. Element 2: Kenneth Miller Knew that the Intentional Interference with Parental Rights Constituted a Breach of Duty**

The second element of Jenkins’s civil aiding-and-abetting theory of Kenneth Miller’s liability under Count 1 requires that she prove by a preponderance of the evidence that Kenneth Miller knew that the intentional interference with parental rights constituted a breach of duty. Kenneth Miller’s criminal conviction for aiding and abetting international parental kidnapping also proves this element beyond a reasonable doubt.

By finding Kenneth Miller guilty of aiding and abetting international parental kidnapping, the jury necessarily found beyond a reasonable doubt that Kenneth Miller knowingly associated himself with the crime of international parental kidnapping because he intended to obstruct Jenkins’ lawful exercise of parental rights; he knew Jenkins had parental rights and that Lisa Miller intended to obstruct the lawful exercise of those rights by removing Isabella from the United States. *See Kenneth L. Miller Jury Charge* at 16–17, Ex. 8.

Therefore, Kenneth Miller is collaterally estopped from relitigating this issue, there can be no genuine dispute as to any material fact regarding the second element of Count 1, and Jenkins is entitled to judgment as a matter of law on the second element of Count 1 against Kenneth Miller.

\* \* \*

For these reasons, Kenneth Miller is collaterally estopped from relitigating all issues presented by the first two elements of Count 1, there can be no genuine dispute as to any material fact regarding those elements of Count 1, and Jenkins is entitled to judgment as a matter of law on those elements of Count 1 against Kenneth Miller. *See* Fed. R. Civ. P. 56(a).

### CONCLUSION

Plaintiff Janet Jenkins's motion for partial summary judgment on Count 1 against Defendants Philip Zodiates, Kenneth Miller, and Timothy Miller should be granted.

December 13, 2019

Respectfully submitted.

/s/ Frank H. Langrock

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF VERMONT**

JANET JENKINS, et al.,

Plaintiffs,

v.

No. 2:12-cv-184-WKS

KENNETH L. MILLER, et al.,

Defendants.

**STATEMENT OF UNDISPUTED FACTS  
IN SUPPORT OF PLAINTIFF JANET JENKINS'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT ONE  
AGAINST DEFENDANTS PHILIP ZODHIATES, KENNETH MILLER, AND  
TIMOTHY MILLER**

Pursuant to Rule 56(c)(1) of the Federal Rules of Civil Procedure and Rule 56(a) of the Local Rules of the United States District Court for the District of Vermont, Plaintiff Janet Jenkins, through undersigned counsel, submits this statement of material facts that cannot be disputed in support of her motion for partial summary judgment on Count One against Defendants Philip Zodhiates, Kenneth Miller, and Timothy Miller:

**UNDISPUTED FACTS MATERIAL TO COUNT ONE AGAINST KENNETH MILLER**

1. On December 15, 2011, a grand jury impaneled in this Court returned a one-count indictment charging Kenneth Miller with aiding and abetting Lisa Miller in the removal of Isabella Miller-Jenkins from the United States with the intent to obstruct the lawful exercise of parental rights, in violation of 18 U.S.C. §§ 2, 1204. *See Kenneth L. Miller* Indictment, Ex. 7.

2. Exhibit 8 is a true and correct copy of the entirety of the Court's jury charge and is incorporated herein.

3. The Rutland, Vermont Family Court ordered that Jenkins had the right to visitation with Isabella on numerous occasions starting in June 2004. *See, e.g., Kenneth L. Miller Gov't Ex. 5, Ex. 1; Zodhiates Gov't Ex. 13, Ex. 2.*

4. For example, on September 11, 2009, the court ordered unsupervised parent–child contact between Jenkins and Isabella from September 25, 2009, to September 27, 2009. *See Kenneth L. Miller Gov't Ex. 12, Ex. 3; Zodhiates Gov't Ex. 20, Ex. 4.*

5. On November 20, 2009, the court granted Jenkins “sole physical and legal custody” of Isabella and ordered that Isabella be transferred to her on January 1, 2010. *See Kenneth L. Miller Gov't Ex. 14, Ex. 5; Zodhiates Gov't Ex. 21, Ex. 6.*

6. The jury found Kenneth Miller guilty on August 14, 2012. *Kenneth L. Miller Verdict Form, Ex. 9.*

7. The Court imposed its judgment on March 4, 2013. *Kenneth L. Miller Judgment, Ex. 10.*

8. The United States Court of Appeals for the Second Circuit affirmed the conviction on December 16, 2015. *See United States v. Kenneth L. Miller*, 808 F.3d 607 (2d Cir. 2015); *see also Kenneth L. Miller 2d Cir. Op.*, Ex. 11.

9. The United States Court of Appeals for the Second Circuit issued the mandate on February 1, 2016. *See Kenneth L. Miller 2d Cir. Mandate, Ex. 12.*

10. Kenneth Miller did not petition the Supreme Court of the United States for a writ of certiorari. *See Kenneth L. Miller 2d Cir. Docket Report at 5, Ex. 13.*

#### **UNDISPUTED FACTS MATERIAL TO COUNT ONE AGAINST TIMOTHY MILLER**

11. On April 24, 2015, a grand jury impaneled in the United States District Court for the Western District of New York returned a two-count superseding indictment against Lisa

Miller, Philip Zodhiates, and Timothy Miller. *See Timothy Miller* Superseding Indictment, Ex. 14.

12. The first count (“the conspiracy count”) charged each with conspiring to remove Isabella from the United States and to retain her outside the United States with intent to obstruct Jenkins’s parental rights, in violation of 18 U.S.C. § 371. *See id.* at 1.

13. The second count (“the international parental kidnapping count”) charged each with removing, and aiding and abetting the removal of, Isabella from the United States with intent to obstruct Jenkins’s parental rights, in violation of 18 U.S.C. §§ 2, 1204. *See id.* at 3.

14. On November 30, 2016, Timothy Miller pleaded guilty to the conspiracy count. *Timothy Miller* Plea Agreement, Ex. 16.

15. Exhibit 16 is a true and correct copy of the entirety of Timothy Miller’s plea agreement and is incorporated herein.

16. The Rutland, Vermont Family Court ordered that Jenkins had the right to visitation with Isabella on numerous occasions starting in June 2004. *See, e.g., Kenneth L. Miller* Gov’t Ex. 5, Ex. 1; *Zodhiates* Gov’t Ex. 13, Ex. 2.

17. For example, on September 11, 2009, the court ordered unsupervised parent–child contact between Jenkins and Isabella from September 25, 2009, to September 27, 2009. *See Kenneth L. Miller* Gov’t Ex. 12, Ex. 3; *Zodhiates* Gov’t Ex. 20, Ex. 4.

18. The court imposed its judgment on March 23, 2017. *See Timothy Miller* Judgment at 2, Ex. 18.

19. Timothy Miller did not appeal his judgment of conviction. *See Timothy Miller* Docket Report at 7, Ex. 19.

**UNDISPUTED FACTS MATERIAL TO COUNT ONE AGAINST PHILIP ZODHIATES**

20. On April 24, 2015, a grand jury impaneled in the United States District Court for the Western District of New York returned a two-count superseding indictment against Lisa Miller, Philip Zodhiates, and Timothy Miller. *See Zodhiates* Indictment, Ex. 15.

21. The first count (“the conspiracy count”) charged each with conspiring to remove Isabella from the United States and to retain her outside the United States with intent to obstruct Jenkins’s parental rights, in violation of 18 U.S.C. § 371. *See id.* at 1.

22. The second count (“the international parental kidnapping count”) charged each with removing, and aiding and abetting the removal of, Isabella from the United States with intent to obstruct Jenkins’s parental rights, in violation of 18 U.S.C. §§ 2, 1204. *See id.* at 3.

23. Exhibit 20 is a true and correct copy of the entirety of the court’s jury charge and is incorporated herein.

24. The Rutland, Vermont Family Court ordered that Jenkins had the right to visitation with Isabella on numerous occasions starting in June 2004. *See, e.g., Kenneth L. Miller* Gov’t Ex. 5, Ex. 1; *Zodhiates* Gov’t Ex. 13, Ex. 2.

25. For example, on September 11, 2009, the court ordered unsupervised parent–child contact between Jenkins and Isabella from September 25, 2009, to September 27, 2009. *See Kenneth L. Miller* Gov’t Ex. 12, Ex. 3; *Zodhiates* Gov’t Ex. 20, Ex. 4.

26. The jury convicted Zodhiates on both counts of the superseding indictment on September 29, 2016. *See Zodhiates* Jury Verdict, Ex. 21.

27. The court imposed its judgment on March 22, 2017. *Zodhiates* Judgment at 1–2, Ex. 22.

28. The Second Circuit affirmed the conviction on August 21, 2018. *See United States v. Zodhiates*, 901 F.3d 137 (2d Cir. 2018); *see also Zodhiates* 2d Cir. Op., Ex. 23.

29. The Second Circuit issued the mandate on October 26, 2018. *See Zodhiates* 2d Cir. Mandate, Ex. 24.

30. The Supreme Court denied *Zodhiates*'s petition for a writ of certiorari on February 25, 2019. *See Zodhiates v. United States*, 139 S. Ct. 1273 (2019); *see also* Feb. 25, 2019 Sup. Ct. Order List at 10, Ex. 25.

December 13, 2019

Respectfully submitted.

/s/ Frank H. Langrock

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