No. _____

In The

Supreme Court of the United States

SONG U. CHON,

Petitioner,

v.

DONALD B. VERRILLI, JR.,
SOLICITOR GENERAL OF THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The reference in the questions below to the "harboring statute" is a reference to 8 U.S.C. § 1324(a)(1)(A)(iii). The reference in the questions below to "conspiring" is a reference to a criminal conspiracy brought against a defendant pursuant to 8 U.S.C. § 1324(a)(1)(A)(v)(I).

Section 201(a) of Title II of the Civil Rights Act of 1964 states, "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on account of race, color, religion, or national origin."

The questions presented are:

1. Is it a violation of the harboring statute for a hotel owner to authorize his employees to rent rooms to illegal aliens or alien smugglers?

2. When a hotel owner is required to comply with Title II of the Civil Rights Act of 1964, is he lawfully subject to prosecution for conspiring to violate the harboring statute if he merely authorizes his employees to rent rooms to illegal aliens or to alien smugglers?

3. Is a hotel owner who agrees with his employees to "encourage" alien smugglers to rent rooms for illegal aliens guilty of conspiring to violate the harboring statute, when the term "encourage" is not an offense element under that statute?

QUESTIONS PRESENTED – Continued

4. Does the harboring statute provide a public hotel owner with fair notice that he can be charged with conspiring to violate the harboring statute if he authorizes his employees to rent hotel rooms to persons he knows are illegal aliens or alien smugglers?

5. Has the Fifth Circuit impermissibly broadened the scope of the harboring statute by equating "facilitating the presence" of an illegal alien with the "harboring" offense element of that statute?

6. Is a hotel owner who provides food, temporary shelter, and laundry services to illegal alien guests guilty of "harboring" aliens in violation of the harboring statute because he has facilitated their stay at his hotel?

PARTIES TO THE PROCEEDINGS

The petitioner, Song U. Chon, was the defendant in the United States District Court below and the appellant in the appeal taken to the United States Court of Appeals for the Fifth Circuit.

Respondent, the United States, was the appellee in the proceedings before the United States Court of Appeals below.

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The Court of Appeals for the Fifth Circuit published the opinion in this case. Captioned *United States v. Song U. Chon*, it is published at 713 F.3d 812 (2013). The District Court did not publish an opinion in this case. It merely sentenced Chon based on the guilty verdicts returned by the jury. There are no pertinent rulings from the District Court to present for review.

JURISDICTION

The Court of Appeals for the Fifth Circuit filed its opinion and decision affirming petitioner Chon's conviction on April 10, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review by writ of certiorari the circuit court's decision denying relief to Petitioner Song U. Chon on his appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendment V, U.S. Constitution: This Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime. . . . ; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Code:

8 U.S.C. § 1324(a)(1)(A): Any person who –

> (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;
>
> (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or
>
> . . .
>
> (v)(I) engages in any conspiracy to commit any of the preceding acts,. . . .

42 U.S.C. § 2000a

> (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on account of race, color, religion, or national origin.

STATEMENT OF FACTS

The petitioner, Song U. Chon, was tried before a jury and convicted of Count I of an indictment which

accused him of conspiring from June of 2003 through May of 2009 to harbor illegal aliens, in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I). Chon was sentenced to 10 years in prison on the conspiracy to harbor illegal aliens count and to 15 years on Count II (the money laundering count).[1] On appeal, the Fifth Circuit ruled the evidence was legally sufficient to affirm Chon's conviction of conspiring to harbor aliens.

The Government's case against Chon was based on its seizure of 606 aliens found to occupy the Gateway Hotel ("the Hotel" or "Chon's Hotel") over a six-year period. Like other budget hotels in El Paso, Texas, Chon's Hotel was utilized by several alien smugglers. Located in close proximity to the Mexican border, Chon purchased the Hotel in February of 2004 from three other Korean owners, with whom he had partnered to purchase the Hotel in 1989.

The Government's case rested primarily on testimony of U.S. Immigration and Customs Enforcment ("ICE") agents, who over a six-year period, conducted raids on the Hotel. At trial, the Government proved that smugglers used the hotel to shelter aliens they illegally crossed over the border until they could arrange to transport these aliens to other locations. Although the number of illegal aliens brought to the Hotel by smugglers was never stated, Chon's general

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[1] Chon's guilt of Count II was predicated on proving as the "specified unlawful activity" the conspiracy to harbor illegal aliens offense alleged in Count I – as acknowledged by the Fifth Circuit in part B of its Opinion.

manager, Armando Arzate, estimated that 25 percent of the Hotel's total occupancy consisted of illegal aliens. Of this percentage, the trial testimony indicated that many of the illegal aliens apprehended paid their own room rental. On occasion the Hotel clerks extended credit to alien smugglers for the payment of room rent.

Chon's general manager, Armando Arzate, and desk clerks Alejandro Garcia-Rico, Jaime Amador, and Jose Herrera Robles (the Hotel maintenance man) dealt face-to-face with the general public. Chon never personally interacted with the customers of the Hotel or managed the Hotel. Chon left the task of running the Hotel to Arzate. The uncontested testimony established that Armando Arzate exercised supervisory authority over Jaime Amador, Alejandro Garcia-Rico, and all of the other employees of the Hotel. Chon implemented this arrangement because he did not speak Spanish and could not communicate with many of the Hotel's employees, who spoke Spanish. Chon spoke only Korean and limited English.

Unlike his employees, Chon did not accept "tips" from alien smugglers who directed illegal aliens to the Hotel or know of the tips they received. The only compensation he or the Hotel ever received from alien smugglers was the room rent charged. The room rent charged occupants of the Hotel ranged from $28.00 for the least expensive, single person room accommodation to $45.00 for the most expensive, multiple room accommodation. Twenty-five of the hotel's rooms were monthly rentals.

At trial, the evidence established that Chon never met or conversed with the alien smugglers who sent aliens to the Hotel and that he did not talk to prospective guests who contacted the hotel by phone. None of the Government's witnesses indicated that Chon knew any of the alien smugglers who rented rooms for illegal aliens at the Hotel. While there was evidence that alien smugglers' names or initials were sometimes recorded on the hotel's registration cards, there is no indication that Chon ever discussed with his employees who these people were, whether they were alien smugglers or other persons, such as labor contractors housing their workers or family members. ICE agents admitted that Chon was never recorded talking to a single alien smuggler on any of the 10,000 plus telephone conversations at the Hotel which they wiretapped. In contrast, the evidence admitted regarding Armando Arzate, Alejandro Garcia-Rico, and other hotel personnel reveals that they did have contact with alien smugglers.

The Government failed to produce any evidence that Chon was ever aware of his employees' communications or dealings with alien smugglers. Even though Arzate and Herrera, his employees, testified for the Government, they never indicated in their testimony that Chon participated in alien smuggling activities or that he was ever aware of their dealings with the smugglers. Until his arrest, Chon was not even aware that ICE agents had called Arzate, Alejandro Garcia-Rico, and Herrera into their office and entered into agreements with two of them to testify as Government's witnesses.

The most these witnesses would confirm is that Chon's primary concern was to make sure that the Hotel collected the room rental fees it was owed and that Chon did not prohibit them from accepting room rental fees from anyone. Throughout their testimony, the Government's witnesses (primarily Chon's own employees) revealed that Chon showed no interest in alien smuggling, that he did not want his employees to enforce the immigration laws, and that he really did not care who his employees rented to, so long as the person renting one or more rooms had some sort of identification and paid all room rental fees.

Chon was confronted by an ICE agent in 2007 about the number of illegal aliens found to occupy rooms of the Hotel. As a result Chon provided interviews to ICE in 2007. In one recorded May 2007 interview played for the jury, Chon stated that he had no right to ask for immigration documents from the persons who rented rooms at the Hotel or to prevent illegal aliens from renting rooms at the Hotel. Chon never denied knowledge that illegal aliens rented rooms at his Hotel. He openly admitted to at least one ICE agent that he knew that illegal aliens were renting rooms at his Hotel. After being interviewed by ICE in May of 2007, the Department of Homeland Security ("DHS") sent Chon a letter in 2007 notifying him of the illegal activities occurring in his Hotel and instructing him to "revoke the permission for use of your property to those engaging in unlawful activities."

Chon never denied ICE agents permission to search the Hotel when the request was made. He and

his employees gave ICE agents the right to search the Hotel without a search warrant every time a request was made. At all times Chon cooperated with ICE agents who conducted raids or investigations. Based on Chon's policies, his desk clerks provided registration lists to ICE agents when asked to do so and cooperated with these agents in whatever manner requested. This cooperation included opening doors to some of the rooms ICE agents wanted to search. After receiving the above-referenced letter in 2007 from DHS informing him of illegal aliens at his hotel, Chon directed Arzate to consult with an attorney about the problem, which led Chon to implement a procedure whereby desk clerks photocopied the identification of prospective hotel guests. Agent Andrew Gunnoe testified that Arzate was very helpful, that he provided room numbers and assisted whenever asked to do so. Gunnoe also described Jose Herrera as helpful also, even when asked to help them determine whether a particular individual was in a given room.

As a Government witness, Arzate testified that he "always helped the agents" who came to the Hotel to investigate illegal aliens. Although both he and Herrera entered into agreements with the Government to testify against Chon and did testify, neither employee indicated that Chon participated in or approved of any alien smuggling activities involving the hotel. There was also no evidence that Chon utilized trap doors, hidden hotel rooms, escape tunnels, back door exits or other devices in his Hotel to allow illegal aliens to escape when raids were in progress. In fact, the evidence adduced at trial indicated that

none of the illegal aliens found by ICE in the Hotel ever escaped.[2]

The Fifth Circuit determined that Chon, Garcia-Rico, Arzate, Herrera, and May cooperated with the alien smugglers to facilitate their use of the Gateway Hotel to harbor illegal aliens based on the following evidence:

* "The Gateway Hotel employed Armando Arzate ("Arzate") as its general manager, Garcia-Rico as a front-desk clerk, and Jose Herrera ("Herrera") as a maintenance man."

* "The Gateway Hotel also rented its restaurant area to JuoHsuan Hsu ("May") who ran May's café."

* " . . . Herrera made arrangements to allow illegal aliens to sneak into rooms at the Gateway Hotel without law enforcement noticing and to wash the dirty clothing of the illegal aliens once they made it into their rooms."

* "At the phone requests of the alien smugglers, Gateway Hotel employees

[2] Arzate, who worked at Chon's Hotel before Chon became the sole owner, indicated in his testimony that the large number of illegal aliens who stayed at the Hotel was a problem which pre-existed the date Chon became owner. His testimony is consistent with other testimony in the record, which indicated that Chon's Hotel was only one of several low-budget motels in El Paso alien smugglers targeted for housing illegal aliens.

would regularly agree to deliver food from May's Café directly to illegal aliens who were hiding inside hotel rooms."

* "The front-desk clerks also facilitated the alien smuggler's use of the Gateway Hotel by allowing alien smugglers to pay for rooms used by illegal aliens. Immigration and Customs Enforcement ("ICE") agents testified that during several raids, Garcia-Rico, who was working at the front desk, called the rooms where illegal aliens were located, presumably to warn the illegal aliens of the raid."[3]

* "Law enforcement recorded numerous telephone calls between Gateway Hotel employees and the alien smugglers, including a telephone call between Garcia-Rico and an alien smuggler during which Garcia-Rico agreed to pay $850 to transport an illegal alien who was staying at the Gateway Hotel out of El Paso."

* "Moreover, evidence established that Garcia-Rico, Arzate, and Herrera all received tips from the alien smugglers

[3] The Fifth Circuit uses the word "presumably" here. Nothing in the record establishes that any of the ICE agents ever confirmed whether hotel desk clerk Alejandro Rico-Garcia warned illegal aliens in the Hotel when ICE agents were searching the Hotel. This statement amounts to pure speculation. But even if Garcia-Rico did engage in such conduct, the record indicates that he did so without Chon's knowledge or approval.

for their cooperation in harboring illegal aliens in the Gateway Hotel."

* "After more than 100 illegal aliens were removed from the Gateway Hotel in a single raid in 2006, Arzate suggested to Chon that they change the path of the business away from renting to illegal aliens. Chon rejected this suggestion by responding that they had 'no authority to request papers.' "

* "Chon and Arzate occasionally discussed the credit situation of the alien smugglers who were long-standing clients of the Gateway Hotel."

* "Herrera, in a recorded conversation with an alien smuggler, explained that Chon 'was making a big deal about' money an alien smuggler owed for rooms illegal aliens used at the Gateway Hotel."

The Fifth Circuit ultimately provided the following reasoning for upholding Chon's conviction for conspiring to harbor aliens:

> Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could infer that Chon agreed with Arzate, among others, to encourage alien smugglers to rent rooms for illegal aliens by providing a location where illegal aliens could obtain food, shelter, and laundry services without the need to leave their rooms at the Gateway Hotel. Chon's contention that

> he simply did not prevent illegal aliens from renting a room is belied by his facilitation of their presence and his willingness to allow alien smugglers to rent rooms on behalf of groups of illegal aliens. Although there was no direct evidence of an express agreement between Chon and the alien smugglers, the concerted action among Chon, his employees, and the alien smugglers supports an inference of such an agreement. Moreover, Chon's participation in the conspiracy was supported by direct evidence, including testimony regarding his willingness to offer credit to alien smugglers and his subsequent complaints about alien smugglers who owed him money.

No evidence was adduced at trial which established that Chon had knowledge, expertise, or training in applying the immigration laws of the United States.

REASONS FOR GRANTING REVIEW

I. The Fifth Circuit's ruling that Chon was guilty of "harboring" aliens because he and his employees agreed to the lawful act of encouraging alien smugglers to rent rooms at his hotel is an important question of federal law that conflicts with the decisions of this Court

"[This] Court has repeatedly said that the essence of a conspiracy is 'an agreement to commit an unlawful act.'" *United States v. Recio*, 537 U.S. 270, 274 (2003). Proving a conspiracy also requires "at least the degree of criminal intent necessary for the substantive offense itself." *Ingram v. United States*, 360 U.S. 672, 678 (1959). The Fifth Circuit did not find Chon guilty of conspiring with alien smugglers to harbor aliens; instead, Chon was found guilty of conspiring with his Hotel employees to encourage alien smugglers to rent hotel rooms – an entirely lawful activity. Based on this Court's definition of a conspiracy, Chon did not commit a criminal offense. The alleged objective of the conspiracy was a lawful act – to encourage alien smugglers to rent hotel rooms for illegal aliens. The District Court's own instruction to the jury in Chon's case makes this point. Its jury charge instructed the jury as follows:

Hotel Clerk's Responsibility

> You are not to infer any wrong-doing solely from a hotel clerk's failure to ask a guest about immigration status. A hotel clerk may legally rent a room to an illegal alien. It is

> not unlawful to do so. The hotel clerk is not required to ask that person if he or she has legal papers to be in the United States.

The Fifth Circuit's opinion likewise acknowledges that Chon and his employees did not have the degree of criminal intent necessary to commit the substantive offense of illegal alien "harboring." Its opinion expressly states that the alleged agreement Chon entered into with his employees was to encourage alien smugglers to rent hotel rooms only – not to "harbor" aliens. Such an agreement is entirely lawful under the "harboring" statute (8 U.S.C. § 1324(a)(1)(A)(iii)), which only makes it illegal for a person who "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation." The statute clearly has no application to the conspiracy the Fifth Circuit identifies in Chon's case, i.e. the alleged conspiracy between Chon and his employees "to encourage alien smugglers to rent rooms for illegal aliens by providing a location where illegal aliens could obtain food, shelter, and laundry services without the need to leave their rooms at the Gateway Hotel." There is no provision in the "harboring" statute itself which makes "encouraging" of any sort an element of a "harboring" offense.

The next subsection of the statute (8 U.S.C. § 1324(a)(1)(A)(iv)) does make it a crime for any

person who "encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." But Chon was not charged with conspiring to commit the crime under 8 U.S.C. § 1324(a)(1)(A)(iv). He was charged instead with conspiring to "harbor" illegal aliens under Section 1324(a)(1)(A)(iii). Thus, the Fifth Circuit has crafted an alien smuggling offense which is not even recognized as a criminal offense under 8 U.S.C. § 1324(a)(1)(A). It has achieved this objective by holding that Chon illegally conspired with his hotel employees "to **encourage** alien smugglers to rent rooms for alien smugglers . . . ", even though such conduct is not a crime under federal law. The Fifth Circuit's holding that Chon conspired to "harbor" aliens even though he did nothing more than agree with his own employees to commit a lawful act thus conflicts with applicable decisions of this Court.

II. By affirming Chon's conviction for "harboring" illegal aliens based on conduct which has never before been declared unlawful, the Fifth Circuit has decided an important question of federal law that conflicts with decisions of this Court

The Government based its "harboring" of aliens prosecution on the theory that Chon knew or should have known that many of the persons who rented or occupied rooms at his Hotel ("the Gateway Hotel") were illegal aliens. No evidence was adduced at trial

that Chon had a legal duty to determine the immigration status of those persons who occupied or rented rooms at his Hotel. No reported case is cited where a defendant was convicted of harboring aliens for merely renting a hotel room to an illegal alien or collecting hotel room rent from someone who paid for the illegal alien's hotel room. By holding that Chon and others agreed "to encourage alien smugglers to rent rooms for illegal aliens by providing a location where illegal aliens could obtain food, shelter, and laundry services without the need to leave their rooms at the Gateway Hotel," the Fifth Circuit has imposed a burden on hotel owners which never before existed.

Hotels owners do not discriminate in the persons to whom rooms are rented. They routinely rent rooms to drug dealers, drug addicts, runaways, prostitutes, and criminals without questioning the reasons their guests are renting rooms. The primary objective of a hotel is to rent rooms; not to inquire into their guests' criminal background or whether their guests have legal status to remain in the country. Most hotel owners are also careful to respect their customer's privacy and few are willing to become agents for law enforcement. Chon was like most hotel owners.

It is also not uncommon for hotels to provide room service and laundry services for the customers as an amenity. Chon has been unable to find one case where a hotel which provides room service or a laundry

facility constitutes evidence that the hotel management has conspired to harbor aliens.[4]

No evidence was adduced at trial that Chon ever agreed to hinder or impede ICE agents during their raids or investigations of his Hotel. There were no secret rooms in his Hotel for hiding aliens, secret alarms, back street escapes, or tunnels to prevent illegal aliens from being detected or escaping. The trial testimony is uncontested that Armando Arzate, Jose Herrera, Chon, and the personnel of the Hotel opened hotel room doors for ICE agents, provided these agents with customer registration lists, gave ICE agents consent to conduct warrantless searches of the Hotel when asked to do so, and cooperated to the full extent they could with the ICE agents investigating illegal alien activity. Chon's cooperation explains why not one of these 606 illegal aliens apprehended by ICE agents at the Hotel over a six-year period ever escaped.

The Court of Appeals for the Third Circuit in *Lozano v. City of Hazelton*, 620 F.3d 170 (3d Cir. 2010), in dicta, has stated that renting housing or shelter to illegal aliens is not a crime. In refusing to

[4] Although the Fifth Circuit makes reference to evidence in the trial record which indicated that Chon "skimmed" $300 to $400 per day from the cash revenue generated from Hotel operations, this fact, even if true, has no relevance or bearing whatsoever on the "conspiracy to harbor illegal aliens" count of the indictment. It is certainly relevant to the tax fraud counts of the indictment of which Chon was convicted.

adopt the view that the mere act of renting to an illegal alien could be criminally prosecuted as a "harboring" offense, it observed: "It is highly unlikely that a landlord's renting of an apartment to an alien lacking lawful immigration status could ever, without more, satisfy the definition of harboring." *Id.* at 223. This Court should adopt the same analysis. Given the Third Circuit's refusal to recognize any duty on the part of a hotel owner to refrain from renting rooms to illegal aliens, this Court should likewise conclude that a hotel owner is free to rent hotel rooms to an illegal alien, regardless of whether the alien pays for the room out of his own pocket or relies on someone else to pay for the room.

The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and that the offense be defined in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Vill. of Hoffman Estates v. Flip-side, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). The Fifth Circuit ignored this doctrine in Chon's case. Without citing to legal authority, it simply characterized Chon's "harboring" activities as "facilitation of [the illegal aliens] presence" and the displaying of a "willingness to allow alien smugglers to rent rooms on behalf of groups of illegal aliens." The Fifth Circuit's use of these "code" words effectively obscures the real problem with the Government's

case, which is that renting hotel rooms to illegal aliens is not a crime.

There is also nothing inherently illegal about a hotel owner who rents a portion of his hotel to a tenant who provides room service or laundry services to the hotel's guests. Many hotels provide such amenities. Chon could not reasonably be expected to foresee that the Fifth Circuit would be the first federal appellate court to declare such activities as illegal. Chon has thus been convicted under a statute which is unconstitutional because, "as applied," it did not provide Chon with fair notice of the offense of which he was convicted. Until this decision, hotel owners and their staff were not prosecuted for any of the "facilitating" activities the Fifth Circuit has declared "illegal."

III. By imposing on hotel owners the duty to refrain from renting hotel rooms to illegal aliens, the Fifth Circuit has not only threatened the continued viability of Title II of the Civil Rights Act of 1964, but also decided an important question of federal law that conflicts with decisions of this Court

Section 201(a) of Title II of the Civil Rights Act of 1964 states, "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on account

of race, color, religion, or national origin." Section 201 of the Act, 78 Stat. 243, 42 U.S.C. § 2000a. Listed in Section 201(b) are four classes of business establishments covered under the Act, each of which "serves the public" and "is a place of public accommodation" within the meaning of Section 201(a) "if its operations affect commerce, or if discrimination or segregation by it is supported by State action." *Id*. These establishments are: "(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;. . . ." *Id*. On the basis of this civil rights statute, petitioner Chon's Hotel, which consisted of 88 rental units, fits the definition of a public accommodation.

Title II of the Civil Rights Act of 1964 protects prospective hotel guests from discrimination. However, if the owners of public hotels and their employees can be prosecuted under the "harboring" statute for renting rooms to illegal aliens or for accepting hotel room rent from persons who are alien smugglers, many will choose to discriminate against such individuals. In this situation, one can anticipate that many hotels will deny hotel rooms to prospective guests if the hotel staff perceive these prospective guests to be illegal aliens. The fear of facing a criminal prosecution under the "harboring" statute will in many cases override the fear these persons have of violating the Civil Rights Act of 1964. Other hotels

will choose to comply with this Act, only to find out later that the Government is targeting owners and hotel clerks for criminal prosecution for having violated the "harboring" statute. The Fifth Circuit's analysis has thus created an irreconcilable conflict between the alien "harboring" statute and Title II of the Civil Rights Act.

The situation will pose compliance problems for hotel owners and their employees who do not have the knowledge, training, or expertise to distinguish between prospective guests who have legal status and those who do not. Even if the situation were otherwise, hotel owners and their employees cannot, as civilians, demand that prospective guests produce passports and other immigration documents for inspection. Under the law, they have no right to demand such documents from prospective guests. Placing a hotel desk clerk and their owners in the position of having to decide within a 5 to 10 minute time check-in period whether to rent a room to a prospective guest will inevitably box them into a Catch-22 situation.

The facts of Chon's case present the following disturbing questions: "Is there a requirement that a hotel owner determine the citizenship and immigration status of its guests? Does this requirement extend to all guests, or does it apply only to those persons who appear to be Mexican? Is a hotel owner who charges $28 for a hotel room which caters to working class Mexicans required to inquire of their citizenship and immigration status, and if so, are

upscale hotels exempted from this requirement? Also, does having a restaurant and laundry service in the hotel where customers can order room service or obtain laundry services prove that the hotel and its employees and owners are guilty of "harboring" illegal aliens? Does the same analysis apply to upscale hotels? Noteworthy in the Fifth Circuit's opinion is the concern expressed that Chon refused to "change the path of the business away from renting to illegal aliens." Is this the sort of burden the law should place on private businessmen who operate a public hotel?

This Court has upheld the constitutionality of Title II of the Civil Rights Act of 1964 over the complaint that the Act subjects businesses forced to comply with the Act into involuntary servitude. *Heart Atlanta Motel v. United States*, *et al.*, 379 U.S. 241 (1964); *Hamm v. City Rock Hill*, 379 U.S. 306 (1964). The Fifth Circuit's analysis thus conflicts with decisions of this Court and the "public accommodation" law embodied within the Act. Its analysis will lead to a multitude of problems. By forcing hotel operators to deny rooms to people they suspect are illegal aliens, an explosion of civil rights lawsuits may ensue. Owners and employees of budget hotels may refuse to provide public accommodations to Hispanics and persons of color on the pretext that they are thought to be illegal aliens. It is doubtful that upscale hotels which cater primarily to affluent Anglos will be targeted, even though they provide room service or laundry services for their guests. This will create a

measurable discriminatory impact on the poor and working class.

It is inconceivable that Congress intended on the one hand to prohibit hotels from denying public accommodation to a person based on race, color, religion, or national origin and on the other it wanted to see hotel owners and employees convicted of "harboring" illegal aliens for merely renting hotel rooms. Congress could not have intended a person to be subjected to an alien "harboring" prosecution unless he or she provided substantial assistance to an alien amounting to more than simply providing a public accommodation. As the Third Circuit in *Lozano* observed, "Although the federal government does not intend for aliens here unlawfully to be harbored, it has never evidenced an intent for them to go homeless." *Id.* at 224.

The Fifth Circuit's creation of an implied duty on the part of hotel owners and their staff to refrain from renting hotel rooms to persons they know or believe may be "alien smugglers" squarely conflicts with important civil rights decisions of this Court. These decisions have interpreted the Civil Rights Act of 1964 as unconditionally requiring public hotel owners and their employees to refrain from denying service to prospective guests based on race, color, religion, or national origin. Chon's case must be distinguished from "harboring" prosecutions where the alleged "harboring" conduct did not involve a public accommodation. A defendant trucker who conceals illegal aliens in the cab of his tractor on a

long distance haul cannot be accused of violating Title II of the Civil Rights Act of 1964 because he is not required under the Act to "accommodate" illegal aliens as a trucker. Renting a public hotel room is different. A public hotel owner has no choice but to offer a room to anyone who wants to rent one. By law, he ***must*** accommodate all persons who desire to rent a room. This Court should therefore grant Chon's petition on this issue.

IV. By eliminating the requirement in an alien "harboring" case that the defendant's facilitation be "substantial," the Fifth Circuit has adopted a new "harboring" definition which conflicts with the way other courts of appeals have defined this offense element

The term "harboring" of an alien, as used in 8 U.S.C. § 1324(a)(1)(A)(iii), has not been defined by this Court. The Second and Third Circuits have defined "harboring" as conduct "tending to substantially facilitate an alien's remaining in the United States illegally and to prevent government authorities from detecting the alien's unlawful presence." *United States v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999); *United States v. Ozcelizk*, 527 F.3d 88, 100 (3d Cir. 2008). The Seventh Circuit, in *United States v. Costello*, 666 F.3d 1040 (7th Cir. 2012), has defined "harboring" as "providing . . . a known illegal alien a secure haven, a refuge, a place to stay in which the authorities are unlikely to be seeking him." The

Eighth Circuit has defined "harboring" as conduct which "substantially facilitates an alien's remaining in the country illegally." *United States v. Tipton*, 518 F.3d 591, 595 (8th Cir. 2008).

In earlier published opinions, the Fifth Circuit adopted the same "harboring" definition used in *Tipton*, supra. See, e.g., *United States v. Rubio-Gonzales*, 674 F.2d 1067, 1073 (5th Cir. 1982) (Harboring means any conduct that "substantially facilitate[s] an alien's remaining in the United States illegally."); *United States v. Cantu*, 557 F.2d 1173, 1180 (5th Cir. 1977) (treating statutory language of "conceal, harbor, or shield" inclusively under the "harboring" statute). But in Chon's case, the Fifth Circuit abandoned its "substantial facilitation" definition and adopted a much more liberal definition. It now treats "harboring" as proof that a defendant provided any sort of "facilitation" to an illegal alien to remain in the country, however slight that might be. Accordingly, there is no mention anywhere by the Fifth Circuit opinion in Chon's case that the facilitation of the alien must be "substantial," as it had required in its earlier opinions.

The "harboring" definition adopted by the Fifth Circuit in Chon's case is therefore a much more lenient definition than the "harboring" definition other United States Courts of Appeals have adopted. Now that there is no longer any requirement that a defendant "substantially" facilitate an illegal alien's efforts to remain in the United States, the Government will be permitted, at least in the Fifth Circuit,

to prosecute anyone who provides even the slightest "facilitation" to an illegal alien whose objective is to remain in the country. A hotel employee's mere act of sending up food to an illegal alien in a hotel room will suffice to prove an alien "harboring" conviction. So will the single act of renting a hotel room, especially since the Fifth Circuit has indicated in Chon's case that any illegal alien in a rented room must be "harbored" because such aliens are necessarily (at least in the Fifth Circuit's view) "hiding inside [their] hotel rooms." By this logic, anyone who rents a hotel room to an illegal alien is guilty of violating the "harboring" statute.

The Fifth Circuit fails to recognize that the aliens who rented hotel rooms in Chon's hotel were not, in any sense of the term, provided a "safe haven." The ICE raids and inspections at Chon's Hotel were the norm, not the exception. In fact, during one raid alone, more than 100 illegal aliens were removed from Chon's Hotel, with Chon's consent and full cooperation. This Court should therefore address the split of authority between the circuit courts and define what must be proven to establish a "harboring" offense. At a minimum, it should rule that the facilitation a person provides to an illegal alien must be "substantial" before that person can be found guilty of a "harboring" offense.

V. By imposing on civilian hotel owners the duty to determine if a prospective customer is an illegal alien, the Fifth Circuit has decided an important question of federal law that conflicts with decisions of this Court

In *Arizona v. United States*, 132 S. Ct. 2492 (2012), this Court struck down Section 6 of Arizona S. B. 1070 after ruling the statute was preempted by federal law. The Arizona statute provided that a state officer, "without a warrant, may arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States." *Id.*, at 2505. After noting that as a general rule it is not a crime for a removable alien to remain present in the U.S. and that allowing a state to achieve its own immigration policy could result in unnecessary harassment of aliens federal officials determined should not be removed, this Court stated: "Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer." *Id.*, at 2505-2506. It further held that because Section 6 authorized state officers to decide whether an alien should be detained, it violated the principle that the removal process is entrusted to the Federal Government. *Id.*, at 2506.

Quoting from Justice Alito's concurring opinion in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Court further noted that there are "significant complexities involved in enforcing federal immigration law, including the determination whether a person is

removable." *Id.* The Court stated that any agreements reached between states cooperating with the Attorney General of the United States in the enforcement of the immigration laws "must contain written certification that officers have received adequate training to carry out the duties of an immigration officer." *Id*.

The Fifth Circuit's determination that Chon was guilty of "harboring" illegal aliens conflicts with this Court's federal preemption analysis in *Arizona v. United States*, supra, and the concurring opinion of Justice Alito in *Padilla v. Kentucky*, supra. After the Fifth Circuit's decision in Chon's case, hotel owners will be forced to refrain from renting hotel rooms to illegal aliens or persons they believe may be "alien smugglers" in order to avoid being criminally prosecuted under the "harboring" statute, even though, like Chon, these owners have no expertise or training to determine who are illegal aliens subject to deportation or removal. This will result in a strict liability application of the law, as occurred in this case. Chon was convicted of "harboring" all 606 illegal aliens apprehended over a six-year period from his Hotel, even though the record indicates that many if not most of these illegal aliens paid their own way and did not check into the Gateway Hotel with the help of alien smugglers.[5]

[5] In Chon's case, it was of no concern to the Fifth Circuit that Chon was not present when many of these illegal alien

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The resulting anomaly defies logic: whereas state law enforcement officers, who are provided considerable training in the enforcement of state and federal laws, are preempted by federal law from enforcing federal immigration laws without specialized training, civilian hotel owners, who have no training or expertise in the immigration laws, must now enforce the immigration laws when checking in their hotel guests or else they risk criminal prosecution for "harboring" any illegal alien apprehended inside their hotel. A second problem with placing the burden on hotel owners and clerks to prove that the persons they rent hotel rooms to are not illegal aliens is that, like Chon, they have no right under the law to force such persons to produce immigration paperwork or submit to an immigration inspection. But they are still, under the Fifth Circuit's logic, held accountable. This makes no sense at all. Finally, imposing a vicarious liability burden on hotel owners is especially troubling, particularly in a case such as Chon's, where the hotel owner does not speak Spanish and must rely on his hotel manager and employees to run the hotel.[6]

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apprehensions occurred or that he did not register any of these illegal aliens as guests of the Hotel.

[6] The numerous inferences the Fifth Circuit makes to support its determination that Chon "harbored" illegal aliens is based entirely on lawful conduct. It has disregarded the district court's jury instruction that renting a room to an illegal alien is not a crime and that a hotel clerk is not required to ask a prospective guest if he or she had legal papers to be in the

(Continued on following page)

VI. By substituting a "facilitating presence" element as synonymous with the "harboring" offense element in a conspiring to "harbor" illegal aliens prosecution, the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, as to call for this Court's supervisory power

In conducting its legal sufficiency analysis, the Fifth Circuit in Chon's case did not apply the "harboring" definition it adopted long ago in earlier cases. See e.g. *United States v. Rubio-Gonzales*, 674 F.2d 1067, 1073 (5th Cir. 1982) (Harboring means any conduct that "substantially facilitate[s] an alien's remaining in the United States illegally."); *United States v. Cantu*, 557 F.2d 1173, 1180 (5th Cir. 1977) (treating statutory language of "conceal, harbor, or shield" inclusively under the "harboring" statute). Without making any reference to the "harboring" definition relied on in these earlier cases, the Fifth Circuit merely ruled Chon was guilty of conspiring to "harbor" illegal aliens because of his "facilitation of [illegal aliens'] presence" and "willingness to allow illegal alien smugglers to rent rooms on behalf of illegal aliens." While the "facilitation of aliens' presence" term may constitute part of the definition of

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country. The alleged conspiracy in Chon's case must therefore be contrasted with many conspiracies – such as drug conspiracies – where the illegality of every act committed in furtherance of the illicit drug possession or distribution offense is self-evident.

"harboring" previously adopted by the Fifth Circuit, it is not a synonym. And though a "willingness to allow illegal alien smugglers to rent rooms on behalf of illegal aliens" may be descriptive of "facilitating an illegal alien's presence," it also is not synonymous with the Fifth Circuit's previous prior law defining the element of "harboring" under the "harboring" of illegal aliens statute.

The Fifth Circuit's watered-down "facilitation of presence" analysis has greatly transformed the nature of a "harboring" offense prosecution in the Fifth Circuit. Based on the "facilitation of presence" analysis utilized in Chon's case (a published decision), the burden of proof placed on the Government to prove an illegal alien "harboring" offense is now much easier. Under the new definition, the pizza delivery man who delivers a hot pizza to an illegal alien's hotel room can be found guilty of harboring because this conduct would facilitate the alien's stay or presence at his hotel. This evidence would not prove the traditional "harboring" element because the act of delivering a pizza would not represent probative evidence which substantially facilitates the illegal alien's remaining in the country. But it will prove "harboring" under a "facilitation of alien's presence" analysis.

The law is well-settled that in undertaking a legal sufficiency review in a criminal case, appellate courts are required to determine, after viewing all the evidence in the light most favorable to the judgment, whether any rational trier of fact could have found all of the essential elements of the offense beyond a

reasonable doubt. *Jackson v. Virginia*, 433 U.S. 307, 319 (1979). The Fifth Circuit has disregarded this rule by failing to analyze the legal sufficiency of the evidence against the "harboring" offense element of the "harboring" aliens statute. It has instead replaced the "harboring" offense element of that statute with a "facilitation of presence" element, which is not even part of the statute. By failing to consider the legal sufficiency of the evidence with regard to the "harboring" element of the statute and by replacing the statutory offense element of "harboring" with a "facilitation of presence" element, the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, as to call for this Court's supervisory power.

VII. By impliedly holding that a public hotel owner who knowingly rents a hotel room to an illegal alien is guilty under the harboring statute, the Fifth Circuit has decided an important federal question of first impression that has not, but should be, settled by this Court

Petitioner Chon asserts that this is a case of first impression. He can find no reported decision where a federal court has ever found a defendant guilty of "harboring" aliens merely because he or she rented an apartment or some other accommodation to a person he or she knew (or had reason to know) was not legally in the United States. See e.g. *Lozano v. City of Hazelton*, 620 F.3d 170 (3d Cir. 2010), wherein the

Court of Appeals for the Third Circuit, after observing that some of the more lenient jurisdictions did not require proof of concealment in order to prove up a case of harboring aliens, stated: "However, even in the more lenient tests of these jurisdictions, we are unaware of any case in which someone has been convicted of 'harboring' merely because s/he rented an apartment to someone s/he knew (or had reason to know) was not legally in the United States." *Id*., at 223.

The Third Circuit did recognize that cases exist where the defendant "played a much more active role in helping an alien remain in the United States" than merely renting to an illegal alien. *Id*., at 223. It then cites to the following cases in support of this point: *United States v. Tipton*, 518 F.3d 591, 595 (8th Cir. 2008) (defendant found guilty of "harboring" aliens where the evidence showed he employed and housed six unauthorized aliens, provided them with transportation, gave them money to purchase necessities, and maintained counterfeit immigration papers for them); *United States v. Zheng*, 306 F.3d 1080, 1082 (11th Cir. 2002) (defendant's "harboring" conviction affirmed where he employed ten to twenty unauthorized alien employees who were both overworked and underpaid and arranged for them to live at this house in accommodations described as "barracks-like"); and *United States v. Sanchez*, 963 F.2d 152, 155 (8th Cir. 1992) (the defendant convicted of "harboring" based on showing that he rented an apartment to his unauthorized alien employees, provided them with

transportation to and from work, and offered to obtain immigration papers for them). *Id.*, at 223-224.

The Third Circuit's decision in *City of Hazelton* illustrates that the question of whether a landlord's mere act of renting an apartment to a person he knows is an illegal alien is guilty of a "harboring" offense is one of first impression. This question was not addressed in *City of Hazelton* because it was a civil case – not a "harboring" of aliens criminal prosecution initiated pursuant to 8 U.S.C. § 1324. There are no published cases, to Chon's knowledge, where a public hotel owner was ever charged with "harboring" for merely renting a room to an illegal alien, even if payment for that room came from an alien smuggler and not the alien itself.[7] Nor should there be a duty. It defies logic that a public hotel owner should be required to ascertain the legal status of the aliens (who may number in the dozens on a daily basis) who do nothing more than rent a room at his or her hotel, given the limited contact hotel owners have with prospective guests.

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[7] Unless the Government can show in a given case that the source of a hotel room payment affects the "harboring" analysis, it would make no difference who pays the hotel bill. If it is not a crime to rent a hotel room to an "illegal alien," the mere fact that the "illegal" alien's bill is paid by an alien smuggler would not alter the analysis. Here, no showing was made by the Government of any effect which resulted because alien smugglers paid hotel bills or were given credit for hotel rooms that were occupied by illegal aliens.

Review of this issue is warranted since this Court has never defined the meaning of "harboring" under 8 U.S.C. § 1324. If review is refused or denied, hotel owners can be expected to be randomly prosecuted for engaging in no conduct other than renting hotel rooms to illegal aliens. The decision below therefore threatens to criminalize, for the first time in American history, hotel owners who have done nothing more than provide temporary lodging to guests who stay at their hotel in exchange for a room rental fee.

CONCLUSION

The Court should grant the petition for writ of certiorari on all questions presented and reverse the decision of the Fifth Circuit's decision in this case.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11-50143

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SONG U. CHON, also known as The Korean; ALEJANDRO GARCIA-RICO; MANUEL CARDOZA; YCL CORPORATION, doing business as The Gateway Hotel,

Defendants-Appellants.

Appeals from the United States District Court for the Western District of Texas.

(Filed April 10, 2013)

Before HIGGINBOTHAM, SMITH, and ELROD, Circuit Judges.

PER CURIAM:

A jury convicted Defendants-Appellants Song U. Chon ("Chon"), Alejandro Garcia-Rico ("Garcia-Rico"), Manuel Cardoza ("Cardoza"), and YCL Corporation ("YCL") of conspiring to smuggle, transport, and harbor illegal aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I). A jury also convicted Chon of money laundering in violation of 18 U.S.C.

§ 1956(a)(1)(A)(i) and (B)(i), and three counts of willfully aiding and assisting in the filing of a false tax return in violation of 26 U.S.C. § 7206(2). Chon, Cardoza, and YCL each challenge their convictions and Chon and Garcia-Rico challenge their sentences. For the reasons that follow, we find no reversible error and, therefore, AFFIRM.

I.

The facts of this case[1] involve the use of the Gateway Hotel, which is located in close proximity to the United States-Mexico border in El Paso, Texas, as a location to harbor illegal aliens beginning in 2003 and continuing through May 2009. YCL owned the Gateway Hotel until Chon, one of the four directors of YCL, purchased it in February 2004.[2] Chon, as owner of the Gateway Hotel, worked on a daily basis in an office near the front desk. During the years in question, the Gateway Hotel employed Armondo [sic] Arzate ("Arzate") as its general manager, Garcia-Rico as a front-desk clerk, and Jose Herrera ("Herrera") as a maintenance man. The Gateway Hotel also rented its

[1] We view the facts in the light most favorable to the jury verdict as we must. *E.g., United States v. Cantu-Ramirez,* 669 F.3d 619, 622 n.1 (5th Cir. 2012).

[2] Even after Chon purchased the Gateway Hotel in February 2004, all filings relating to the business occurring at the Gateway Hotel, such as federal tax returns and hotel occupancy records, continued to be made in the name of "YCL, Inc., doing business as the Gateway Hotel."

restaurant area to Juo-Hsuan Hsu ("May") who ran May's Café.

Overwhelming, undisputed evidence was offered at trial that individuals conducting alien-smuggling operations ("alien smugglers"), including Cardoza, utilized the Gateway Hotel as a location to harbor illegal aliens who had just crossed the border before they were transported to other locations in the United States. The prosecution offered evidence that Chon, Garcia-Rico, Arzate, Herrera, and May cooperated with the alien smugglers to facilitate their use of the Gateway Hotel to harbor illegal aliens. For example, Herrera made arrangements to allow illegal aliens to sneak into rooms at the Gateway Hotel without law enforcement noticing and to wash the dirty clothing of the illegal aliens once they made it into their rooms. At the phone requests of the alien smugglers, Gateway Hotel employees would regularly agree to deliver food from May's Café directly to illegal aliens who were hiding inside hotel rooms. The front-desk clerks also facilitated the alien smuggler's use of the Gateway Hotel by allowing alien smugglers to pay for rooms used by illegal aliens. Immigration and Customs Enforcement ("ICE") agents testified that during several raids, Garcia-Rico, who was working at the front desk, called the rooms where illegal aliens were located, presumably to warn the illegal aliens of the raid. Law enforcement recorded numerous telephone calls between Gateway Hotel employees and the alien smugglers, including a telephone call between Garcia-Rico and an alien smuggler during

which Garcia-Rico agreed to pay $850 to transport an illegal alien who was staying at the Gateway Hotel out of El Paso. Moreover, evidence established that Garcia-Rico, Arzate, and Herrera all received tips from the alien smugglers for their cooperation in harboring illegal aliens in the Gateway Hotel.

ICE conducted raids of the Gateway Hotel throughout the duration of the alleged conspiracy, resulting in the discovery of hundreds of illegal aliens. Chon, who admitted that he knew illegal aliens were being housed at the Gateway Hotel, was often present when ICE conducted raids of the Gateway Hotel.[3] After more than 100 illegal aliens were removed from the Gateway Hotel in a single raid in 2006, Arzate suggested to Chon that they change the path of the business away from renting to illegal aliens. Chon rejected this suggestion by responding that they had "no authority to request papers." Chon and Arzate occasionally discussed the credit situation of the alien smugglers who were longstanding clients of the Gateway Hotel. Herrera, in a recorded conversation with an alien smuggler, explained that Chon "was making a big deal about" money an alien smuggler owed for rooms illegal aliens used at the Gateway Hotel.

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[3] Moreover, in 2007, the Department of Homeland Security sent Chon a letter notifying him of the illegal activities occurring in his hotel and instructing him to "revoke the permission for use of your property to those engaging in unlawful activities."

Chon was responsible for maintaining the books for the Gateway Hotel throughout the duration of the conspiracy. Chon created two sets of books: one that accurately portrayed the gross receipts, and another that substantially understated gross receipts. To facilitate this underreporting of gross receipts, Chon directed Arzate to set aside $300 to $400 each day from the Gateway Hotel's gross receipts. Chon also signed and prepared YCL's 2005, 2006, and 2007 corporate tax returns. In each year, the gross receipts from the Gateway Hotel were substantially understated.

In 2009, Chon, Garcia-Rico, Cardoza, YCL, Arzate, Herrera, and May, among others, were charged with conspiring to smuggle, transport, and harbor illegal aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) ("Count I"). Chon was also charged with money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and (B)(i) ("Count II"), and three counts of willfully aiding and assisting in the filing of a false tax return in violation of 26 U.S.C. § 7206(2) ("Counts III, IV, and V"). Arzate, Herrera, and May each pled guilty prior to trial. A jury found Chon, Garcia-Rico, Cardoza, and YCL guilty on all charges. The district court sentenced Chon to 120 months of imprisonment on Count I, 180 months on Count II, which was an upward departure from the Guidelines range of 108 to 135 months, and 36 months on Counts III, IV, and V, all to be served concurrently, and ordered Chon to pay restitution of $481,812.32. The district court sentenced Garcia-Rico to fifty-one months' imprisonment

on Count I. Chon, Garcia-Rico, Cardoza, and YCL each timely filed a notice of appeal.

II.

Chon, Cardoza, and YCL each contend that there was insufficient evidence to sustain their convictions.[4] Each defendant properly preserved their insufficiency-of-the-evidence claim; therefore, we review each sufficiency challenge *de novo. United States v. Grant,* 683 F.3d 639, 642 (5th Cir. 2012) (citation omitted). Our review of the sufficiency of the evidence is "highly deferential to the verdict." *United States v. Harris,* 293 F.3d 863, 869 (5th Cir. 2002). "[V]iewing the evidence in the light most favorable to the prosecution," we consider whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979) (emphasis in original). We

[4] In addition to Chon's challenges to the sufficiency of the evidence on each of his convictions, Chon also challenges several instructions that the district court gave the jury. Having considered the record and the parties' arguments regarding the challenged jury instructions, we conclude that Chon has failed to demonstrate that the district court committed reversible error. Chon also argues that the district court abused its discretion by refusing to provide a jury instruction relating to the charges for willfully preparing a tax return that is fraudulent as to any material matter. Because Chon's proffered instruction was not relevant to such a charge and, therefore, did not concern an important point in the trial, the district court did not abuse its discretion in denying the proffered instruction. *See, e.g., United States v. Jobe,* 101 F.3d 1046, 1059 (5th Cir. 1996).

"accept[ ] all credibility choices and reasonable inferences made by the trier of fact which tend to support the verdict," *United States v. Asibor,* 109 F.3d 1023, 1030 (5th Cir. 1997) (citation omitted), and resolve "any conflicts in the evidence . . . in favor of the verdict." *United States v. Duncan,* 919 F.2d 981, 990 (5th Cir. 1990) (citing *United States v. Clark,* 741 F.2d 699, 703 (5th Cir. 1984)).

A.

We first consider Chon, Cardoza, and YCL's sufficiency challenges to their conspiracy convictions. To obtain a conviction under § 1324(a)(1)(A)(v)(I), the government must establish that the defendant:

> [A]greed with one or more persons to transport or move illegal aliens within the United States in furtherance of their unlawful presence, or to conceal, harbor, or shield from detection such aliens, knowingly or in reckless disregard of the fact that such aliens had come to, entered, or remained in the United States in violation of law.

United States v. Ahmed Khan, 258 F. Appx. 714, 717 (5th Cir. 2007) (unpublished but persuasive).

In order to prove a conspiracy, the government must prove beyond a reasonable doubt that an agreement existed to violate the law and each conspirator knew of, intended to join, and voluntarily participated in the conspiracy. *United States v. Davis,* 226 F.3d 346, 354 (5th Cir. 2000). The agreement to

violate the law does not have to be "explicit or formal;" a tacit agreement is sufficient. *United States v. Freeman,* 434 F.3d 369, 376 & n.5 (5th Cir. 2005). The existence of an agreement to violate the law may be established solely by circumstantial evidence and may be inferred from "concert of action." *See, e.g., United States v. Bieganowski,* 313 F.3d 264, 277 (5th Cir. 2002). Voluntary participation in the conspiracy "may be inferred from a collocation of circumstances," and knowledge of the conspiracy "may be inferred from surrounding circumstances." *Id.* (citation and internal quotation marks omitted). While a conspirator must knowingly participate in some way in the larger objectives of the conspiracy, he does not need to know all details of the unlawful enterprise or have a major role in the unlawful enterprise. *Davis,* 226 F.3d at 354. We consider in turn each defendant's sufficiency challenge to their conspiracy conviction.

1.

Chon primarily argues that the evidence is insufficient to prove that he engaged in any conduct that manifested an intent to conceal, harbor, or shield aliens from detection or that he agreed with one or more co-conspirators to violate § 1324(a)(1)(A)(v)(I). We disagree.

Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could infer that Chon agreed with Arzate, among others, to encourage alien smugglers to rent rooms for illegal

aliens by providing a location where illegal aliens could obtain food, shelter, and laundry services without the need to leave their rooms at the Gateway Hotel. Chon's contention that he simply did not prevent illegal aliens from renting a room at the Gateway Hotel is belied by his facilitation of their presence and his willingness to allow alien smugglers to rent rooms on behalf of groups of illegal aliens. Although there was no direct evidence of an express agreement between Chon and the alien smugglers, the concerted action among Chon, his employees, and the alien smugglers supports an inference of such agreement. Moreover, Chon's participation in the conspiracy was supported by direct evidence, including testimony regarding his willingness to offer credit to alien smugglers and his subsequent complaints about alien smugglers who owed him money. There is also strong circumstantial evidence that Chon was aware of the scope and objectives of the conspiracy, such as his admitted presence at the Gateway Hotel when over 100 illegal aliens were removed in a single raid and his daily "skim" of $300 to $400 in cash receipts.

2.

Cardoza, although he concedes that he agreed with a co-conspirator to transport at least two illegal aliens, argues that there was insufficient evidence to prove that his actions were in furtherance of the two aliens' illegal presence. This argument is without merit. Cardoza, in a recorded phone conversation

with another member of the conspiracy, explicitly agreed to move illegal aliens from his home to a drop-off location and pay $900 to transport the illegal aliens from El Paso to other cities in the United States. This recorded phone conversation is direct evidence of Cardoza's voluntary and knowing agreement with another member of the conspiracy to participate in transporting illegal aliens in violation of § 1324(a)(1)(A)(v)(I). Moreover, federal agents witnessed Cardoza carry out this agreement by transporting and delivering two illegal aliens to the agreed upon location. Finally, Cardoza's contention that there is no evidence that he agreed with any other co-conspirator is irrelevant in light of the direct evidence of his agreement with one co-conspirator. Cardoza's conviction does not depend on evidence that he agreed to conspire directly with Chon or a showing that he played a large part in the conspiracy. *See Davis,* 226 F.3d at 354.

3.

YCL's only argument on appeal is that there was insufficient evidence that YCL's agents' or employees' actions in furtherance of the conspiracy were committed within their scope of employment. The record does not support YCL's argument. We have held that "a corporation is criminally liable for the unlawful acts of its agents, provided that the conduct is within the scope of the agent's authority, whether actual or apparent." *United States v. Inv. Enters., Inc.,* 10 F.3d 263, 266 (5th Cir. 1993) (citing *United States v. Bi-Co*

Pavers, Inc., 741 F.2d 730, 737 (5th Cir. 1984)). Here, overwhelming evidence showed that YCL operated the Gateway Hotel during the years in question, including tax returns filed under the name "YCL, Inc., doing business as the Gateway Hotel." Moreover, evidence established that Chon was the President and, accordingly, an agent of YCL. Chon's actions that form the basis for his conspiracy conviction, as discussed above, also serve as the basis for YCL's conviction because Chon's actions were within the scope of his authority as President of YCL.[5]

B.

We next consider the sufficiency of the evidence in support of Chon's conviction for money laundering, in violation of § 1956(a)(1)(A)(i) and (B)(i). To establish this offense, the government must prove that the defendant: "(1) conducted or attempted to conduct a financial transaction, (2) that the defendant knew [sic] involved the proceeds of unlawful activity, and (3) that the defendant knew [sic] was designed to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the unlawful activity." *Bieganowski,* 313 F.3d at 279 (citations omitted). "The

[5] YCL does not advance any argument that Chon's actions should not be attributed to YCL; rather, it takes the position that Chon was "uninformed about [the hotel employees'] activities." Given the overwhelming evidence supporting a finding that Chon was aware of and encouraged his employee's activities in the conspiracy, this argument is without merit.

substantive offense of money laundering requires that the defendant knew that the funds in question represented the proceeds of unlawful activity." *Id.* at 278 (citing *United States v. Burns,* 162 F.3d 840, 847 (5th Cir. 1998)). Chon's argument that the evidence was insufficient to prove that he committed the offense of money laundering rests on his contention that the evidence was insufficient to prove that he was aware of the "unlawful activity," namely the conspiracy to smuggle, transport, and harbor aliens. Because the evidence supports a finding that Chon knowingly participated in the conspiracy, Chon's challenge to the sufficiency of the evidence to support his money-laundering conviction also fails.

C.

Finally, Chon contends that the evidence is insufficient to prove that he willfully aided and assisted in the filing of a false tax return. He asserts that YCL was not the owner of the Gateway Hotel and, therefore, YCL had no obligation to report any gross receipts from Gateway Hotel. Chon's argument fails because § 7206(2) does not require that the defendant overstate or understate income, or have any filing requirement, for that matter. Rather, a conviction is proper under § 7206(2) if a defendant willfully aids or assists in the preparation of a return which is fraudulent or is false as to *any material matter.* 26 U.S.C. § 7206(2). Even under Chon's theory of the case that YCL did not own the Gateway Hotel and therefore had no income to report, Chon willfully

aided and assisting [sic] in the filing of a tax return that fraudulently reported that YCL was the proper entity to report the Gateway Hotel income. Accordingly, the evidence is sufficient to support the guilty verdict on each count of willfully aiding and assisting in the filling of a false tax return.

III.

Chon and Garcia-Rico also challenge the reasonableness of their sentences. We review sentences for reasonableness under an abuse-of-discretion standard. *Gall v. United States,* 552 U.S. 38, 46 (2007). In conducting this review, we "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range . . . or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range." *Id.* at 51. If the district court's sentencing decision is procedurally sound, we "then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."[6] *Id.*

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[6] Garcia-Rico did not argue that his fifty-one-month sentence was substantively unreasonable. Chon also did not clearly argue that his 180-month sentence on the money-laundering conviction was substantively unreasonable; however, several statements in his briefing indicate that the district court "did not properly consider" the 18 U.S.C. § 3553(a) factors. We have considered the entirety of the record and Chon's limited

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A.

Chon and Garcia-Rico both argue that it was procedural error for the district court to impose certain enhancements to their offense levels. We review *de novo* a district court's application and interpretation of the Guidelines. *United States v. Solis-Garcia,* 420 F.3d 511, 514 (5th Cir. 2005). The factual findings that a district court makes in support of its decision to apply an enhancement are reviewed for clear error. *United States v. Mata,* 624 F.3d 170, 174 (5th Cir. 2010). "There is no clear error if the district court's finding is plausible in light of the record as a whole." *United States v. Juarez-Duarte,* 513 F.3d 204, 208 (5th Cir. 2008) (citation omitted). Because Chon and Garcia-Rico both objected to the enhancements challenged on appeal, we review their challenges to the Guidelines enhancements for harmless error. *United States v. Olano,* 507 U.S. 725, 734 (1993). An error is harmless if it "does not affect substantial rights." Fed. R. Crim. P. 52(a). The government bears the burden of showing that an error was harmless beyond a reasonable doubt. *Olano,* 507 U.S. at 734.

1.

Garcia-Rico's only claim on appeal is that it was error for the district court to impose a three-level

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argument on this issue and find no basis for overturning the district court's discretion in selecting Chon's sentence.

enhancement to his offense level pursuant to U.S.S.G. § 3B1.1(b) for his alleged role as a manager or supervisor of the conspiracy to smuggle, transport, and harbor illegal aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I). Section 3B1.1(b) authorizes a three-level enhancement to the defendant's offense level if the "defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(b). The commentary to § 3B1.1(b) states that to qualify for an adjustment based on a role as a manager or supervisor:

> [T]he defendant must have been the . . . manager[ ] or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

U.S.S.G. § 3B1.1 cmt. n.2. Garcia-Rico contends the district court's finding that he was a manager or supervisor was clearly erroneous because he did not manage or supervise any other participants or exercise management responsibilities over the property, assets, or activities of a criminal organization. This argument fails in light of the unrebutted facts contained in Garcia-Rico's pre-sentence report ("PSR"), which the district court adopted, that plausibly

support the conclusion that Garcia-Rico was a manager or supervisor of the criminal activity in this case. *See United States v. Harris,* 702 F.3d 226, 230 (5th Cir. 2012) (explaining that a district court "may adopt the facts contained in a [PSR] without further inquiry if those facts have an adequate evidentiary basis with sufficient indicia of reliability and the defendant does not present rebuttal evidence or otherwise demonstrate that the information in the PSR is unreliable." (alteration in original) (quoting *United States v. Trujillo,* 502 F.3d 353, 357 (5th Cir. 2007))). The PSR contained information that Garcia-Rico received wired monetary payments from alien smugglers that were then used to smuggle, transport, and harbor illegal aliens. This fact, which Garcia-Rico failed to rebut or otherwise demonstrate was unreliable, directly supports a finding that Garcia-Rico exercised management responsibility over the property of the illegal harboring conspiracy. Accordingly, the district court did not err, much less clearly err, by adopting the findings and recommendations in the PSR to apply the three-level manager or supervisor enhancement.

2.

Chon raises numerous issues related to the calculation of his Guidelines range. Most of the issues – specifically, the alleged errors in calculating the adjusted offense level for Count I and Counts III, IV, and V – are harmless because they did not affect Chon's sentencing range which, pursuant to U.S.S.G.

§ 3D1.3(a), was driven by Chon's Count II money-laundering conviction because it carried the greatest adjusted offense level. *See United States v. Ramos,* 71 F.3d 1150, 1158 n.27 (5th Cir. 1995). Only two challenges relate to enhancements that the district court imposed relating to the money-laundering conviction.[7]

Chon first argues that the district court erred by imposing a two-level enhancement pursuant to U.S.S.G. § 2S1.1(b)(3) based on its finding that Chon utilized sophisticated means in committing the money-laundering offense. While Chon concedes that he maintained two sets of financial records and "skimmed" income on a daily basis, he argues that these actions do not constitute "sophisticated means" as defined in the sentencing commentary. We disagree. Maintaining two sets of books, skimming income on a daily basis, and disguising alien-smuggling proceeds as "parking income" in an attempt to make the criminally derived funds appear legitimate are sufficiently complex to support the enhancement here. *See United States v. Stewart,* 213 F. Appx. 291,

[7] Chon also argues that the district court erred by adopting the PSR's finding that the "grand total of laundered monetary instruments derived from the proceeds of the smuggling and harboring undocumented aliens is $1,394,268.49." The calculation of the value of the laundered funds is only relevant to the calculation of the Guidelines range if the base offense level is selected pursuant to § 2S1.1(a)(2) – which did not occur here. Accordingly, we conclude that any error in calculating the total value of laundered funds was harmless because the enhancement did not affect Chon's Guidelines range.

293 (5th Cir. 2007) (unpublished but persuasive) (concluding that a sophisticated means enhancement was proper because the means utilized – instructing a bookkeeper to generate separate books to support misstatements – were more complex than simply making misstatements without supporting books).

Second, Chon argues that the district court clearly erred by imposing a four-level enhancement pursuant to U.S.S.G. § 3B1.1(a) based on its finding that Chon was a leader or organizer of the money-laundering offense. Specifically, Chon argues that "[t]he absence of evidence that Chon led anyone or organized any alien smuggling activity . . . precludes a finding that he was a 'leader/organizer' of the money laundering offense of which he was convicted." The record, which includes evidence that Chon exercised decision-making authority, claimed a larger share of the fruits of the crime, and had a high degree of control and authority over others, belies Chon's assertion. *See* U.S.S.G. § 3B1.1 cmt. n.4 (providing examples of factors that distinguish "a leadership and organizational role from one of mere management or supervision"). The district court's finding that Chon was a leader or organizer of the criminal activity is plausible in light of the record as a whole.

B.

Chon also contends that the district court committed procedural error by failing to adequately explain its selection of an 180-month sentence on the

money-laundering offense, which constituted an upward departure of forty-five months. Chon did not object before the district court as to the procedural or substantive reasonableness of his sentence. Because Chon failed to raise an objection below, review is for plain error. *See United States v. Mondragon-Santiago,* 564 F.3d 357, 361 (5th Cir. 2009). To succeed on plain-error review, Chon must show a clear or obvious forfeited error that affected his substantial rights. *Id.* We have discretion to correct the error only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted).

Section 3553(c) requires that: (1) a district court at sentencing, in open court, state the reasons for its imposition of the particular sentence; and (2) if the sentence is outside the Guidelines range, a district court must state the specific reason for the departure and must state those reasons "with specificity in a statement of reasons form." 18 U.S.C. § 3553(c); *see also Mondragon-Santiago,* 564 F.3d at 362 ("While sentences within the Guidelines require little explanation, more is required if the parties present legitimate reasons to depart from the Guidelines." (quotation and internal citation omitted)). At Chon's sentencing hearing, the district court made only a single passing reference to § 3553(a) and did not provide any explanation for the sentence it selected or for its decision to depart from the advisory guideline range on Count II. The district court did, however, indicate on the statement of reasons that it was

departing "from the advisory guideline range for reasons authorized by the sentencing guidelines manual," and then selected the box indicating that the sentence above the advisory guideline range was based upon the "government motion for upward departure."

Considering the district court's single passing reference to the § 3553(a) factors and lack of any explanation for the upward departure, besides the indication on the statement of reasons that it was based on the government's motion for an upward departure, the district court committed procedural error. *See id.* at 363-64 (finding procedural error where the district court failed to adequately explain its reasons for a within-Guidelines sentence); *United States v. Tisdale,* 264 F. Appx. 403, 411-12 (5th Cir. 2008) (finding procedural error where the district court "gave no indication it had considered [the parties'] § 3553(a) arguments or any of the § 3553(a) factors" in selecting a within-Guidelines sentence). The second element of the plain-error test is also met in this case because "the law requiring courts to explain sentences is clear." *Mondragon-Santiago,* 564 F.3d at 364 (citing *United States v. Mares,* 402 F.3d 511, 521 (5th Cir. 2005)).

We conclude, however, that Chon has failed to demonstrate that the error affected his substantial rights. In *United States v. Gore,* we concluded that a district court's failure to explain its reasons for an upward departure in open court did not affect the defendants' substantial rights because the statement

of reasons referred to the PSR, which provided reasons for the departure. 298 F.3d 322, 324-26 (5th Cir. 2002). We reasoned that because the ultimate goal of § 3553(c) is to permit effective appellate review of sentencing, the district court's reference to the PSR was sufficient to allow effective review of the basis for departure. *Id.* at 325-26; *see also United States v. Fajardo,* 469 F. Appx. 393, 395 (5th Cir. 2012) (unpublished but persuasive) (same); *United States v. Silva-Torres,* 293 F. Appx. 316, 319-20 (5th Cir. 2008) (unpublished but persuasive) (same). Here, the district court, in the written statement of reasons, indicated that the upward departure was based upon the "government motion for upward departure." The government's motion for upward departure extensively discussed the rationale for recommending that the district court sentence Chon to the statutory maximum for each count of conviction. Because the district court's reference to the government's motion allows for review of the basis for the upward departure in this case, Chon is unable to demonstrate that the court's failure to explain its reasons for departing at sentencing affected his substantial rights. *See Gore,* 298 F.3d at 325-26.

IV.

For the foregoing reasons, the Defendants-Appellants' convictions and sentences are AFFIRMED.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA
v.
YCL CORPORATION d/b/a THE GATEWAY HOTEL, SONG U. CHON, ALEJANDRO GARCIA-RICO, and MANUEL CARDOZA

VERDICT

Case Number: EP-09-CR-1565-FM

(Filed Feb. 4, 2011)

WE, THE JURY, FIND:

YCL CORPORATION d/b/a THE GATEWAY HOTEL:

Guilty **AS TO COUNT ONE.**

SONG U. CHON:

Guilty **AS TO COUNT ONE.**

ALEJANDRO GARCIA-RICO:

Guilty **AS TO COUNT ONE**.

MANUEL CARDOZA:

Guilty **AS TO COUNT ONE.**

SONG U. CHON:

Guilty **AS TO COUNT TWO.**

SONG U. CHON:

Guilty **AS TO COUNT THREE.**

SONG U. CHON:

Guilty **AS TO COUNT FOUR.**

SONG U. CHON:

Guilty **AS TO COUNT FIVE.**

Feb. 4, 2011
DATE