NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

DAMION ST. PATRICK BASTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A federal statute confers "extra-territorial jurisdiction" on federal courts for offenses involving commercial sex trafficking. Based on this statute, the government asked a district court to order the defendant, a Jamaican citizen, to pay restitution to the Australian woman he coerced into prostitution, for money she earned through prostitution in Australia. The district court denied this request, ruling that the government was "overreaching," because this restitution was not authorized by the Constitution. Invoking the Constitution's Foreign Commerce Clause, the government appealed this ruling to the Court of Appeals for the Eleventh Circuit, which reversed. The Eleventh Circuit recognized that this Court has given "little guidance" on the scope of the Foreign Commerce Clause. It reasoned that this Clause confers a "broad" power, of "at least" the same scope as the Interstate Commerce Clause. The Eleventh Circuit concluded that the Foreign Commerce Clause therefore gives Congress the power to regulate the conduct at issue here, because Congress had a "rational basis" to conclude that sex trafficking "is part of an economic class of activities that have a substantial effect on commerce . . . between the United States and other countries."

The Eleventh Circuit's reasoning accords with like decisions by the Third, Fourth and Ninth Circuits, but conflicts with dicta from the Sixth Circuit. It is far afield. There is room for serious doubt whether the Foreign Commerce Clause delegates any police power. If it does, it would delegate less police power than its interstate commerce counterpart. It certainly does not authorize ordering a foreign defendant to pay restitution to a foreign victim for conduct that occurred exclusively overseas.

Baston respectfully requests that this Court grant certiorari to provide guidance on this important question.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Damion St. Patrick Baston respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case No. 14-14444 in that court on March 24, 2016, United States v. Damion St. Patrick Baston, 818 F.3d 651 (11th Cir. 2016), which affirmed the judgment and commitment, but vacated and remanded the order of restitution of the United States District Court for the Southern District of Florida. Baston filed a Petition for Panel and En Banc Rehearing on April 14, 2016. This petition was denied by the Eleventh Circuit on May 20, 2016.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, United States v. Baston, 818 F.3d 651 (11th Cir. March 24, 2016), which affirmed the judgment and commitment, and, on a government cross-appeal, vacated and remanded the order of restitution of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-2).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on September 5, 2013. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. I, § 8, cl. 3

> The Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

United States Constitution, Art. I, § 8, cl. 10

> The Congress shall have the power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.

United States Constitution, Art. 2, § 2, cl. 2

> The President . .. shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.

United States Constitution, Art. I, § 8, cl. 18

> The Congress shall have the power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

18 U.S.C. § 1591. Sex trafficking of children or by force, fraud, or coercion

> (a) Whoever knowingly – (1) in or affecting foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person . . . knowing, or in reckless disregard of the fact, that means of force, fraud, coercion, described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act . . . shall be punished as provided in subsection (b).

18 U.S.C. § 1593. Mandatory Restitution

> . . . the court shall order restitution for any offense under this chapter.

18 U.S.C. § 1596. Additional jurisdiction in certain trafficking offenses

(a) In general. – In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section . . . 1591 if –

> **(1)** an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)); or
>
> **(2)** an alleged offender is present in the United States, irrespective of the nationality of the offender.

(b) Limitation on Prosecutions of Offenses Prosecuted in Other Countries. – No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

STATEMENT OF THE CASE

Baston, a Jamaican national, was convicted on a total of 21 counts, including sex trafficking, money laundering, aggravated identity theft, and unlawful re-entry as an alien into the United States. Count 1, which charged commercial sex trafficking in violation of 18 U.S.C. § 1591, alleged that Baston coerced an Australian woman, K.L. to engage in prostitution in Australia, and, later, in the United States. United States v. Baston, 818 F.3d 651, 657-58 (11th Cir. 2016).

After the jury convicted Baston, the government, based on Baston's § 1591 sex trafficking convictions, and pursuant to 18 U.S.C. § 1593, asked the district court to order a total of $904,770 in restitution on behalf of Baston's prostitute-victims. Section 1593 requires violators of § 1591 to pay mandatory restitution to their prostitute-victims, for the "value to the defendant of the victim's services or labor." 18 U.S.C. § 1593. For prostitution that occurred in Australia, the government relied on 18 U.S.C. § 1596, which provides "extra-territorial" jurisdiction for offenses in violation of 18 U.S.C. § 1591.

In response to the request for restitution for the victim named in Count 1, K.L, Baston did not object to a restitution award of $78,000 for money K.L. earned while prostituting for him in the United States. DE176. However, Baston objected to the government's request for $400,000 that K.L. earned while prostituting for Baston in Australia. DE176. Baston argued inter alia that if 18 U.S.C. § 1596 established extra-territorial jurisdiction to order restitution for K.L.'s prostitution earnings in Australia, this exceeded Congress's authority under the Foreign Commerce Clause. Baston, 818 F.3d at 660; DE176. The district court agreed with Baston, finding that ordering restitution for the $400,000 of prostitution overseas was not authorized by the Constitution, and that the government was "overreaching." DE176:11. Though granting restitution on behalf of other sex

trafficking victims, and for K.L.'s prostitution in the United States, the district court declined to award the $400,000 in restitution sought by the government for K.L.'s prostitution earnings in Australia. DE176:11

Baston appealed his convictions and sentence, and the government cross-appealed the district court's denial of the $400,000 restitution award. Baston, 818 F.3d at 666. After briefing and oral argument, the Eleventh Circuit ruled in favor of the government, affirming Baston's convictions and sentence, and reversing the district court denial of the $400,000 in restitution sought for Australian prostitution proceeds. Id. at 666-670.

In so ruling, the Eleventh Circuit recognized that neither the victim, K.L., nor Baston, the defendant, were U.S. citizens, A-3-4, and that restitution was being sought for sex trafficking that "occurred exclusively overseas." A-30. The Eleventh Circuit nonetheless held that ordering restitution for Australian prostitution proceeds was "a constitutional exercise of Congress's authority under the Foreign Commerce Clause." A-26-30 (citation omitted). Baston filed this timely writ for a petition of certiorari, seeking this Court's review of the Eleventh Circuit's ruling on restitution.

REASONS FOR GRANTING THE WRIT

1. It is unconstitutional to order Baston to pay restitution as part of his sentence, based on the "extra-territorial jurisdiction" conferred by 18 U.S.C. § 1596, because the Foreign Commerce Clause does not empower Congress to authorize restitution to a foreign victim, from a foreign defendant, for conduct that "occurred exclusively overseas."

A jury convicted Baston, a Jamaican defendant, of all 21 counts charged in the indictment, including counts of commercial sex trafficking in violation of 18 U.S.C. § 1591. At sentencing, the government asked the district court to order Baston, as part of his sentence, to pay restitution to an Australian sex trafficking prostitute-victim, for money Baston, while in Australia, coerced her to earn as a prostitute in Australia. United States v. Baston, 818 F.3d 651, 668 (11th Cir. 2016). The conduct at issue "occurred exclusively overseas." Id. Thus, the government's restitution request was akin to "foreign-cubed litigation." RJR Nabisco, Inc. v. European Community, __S.Ct. __, 2016 WL 3369423, at * 26 (U.S. June 20, 2016) (Breyer, J., concurring and dissenting in part) ("foreign-cubed" cases are cases "where the plaintiffs are foreign, the defendants are foreign, and all the relevant conduct occurred abroad.") (quoting Morrison v. National Australia Bank Ltd., 561 U.S. 247, 283 n. 11 (2010) (Stevens, J., concurring in the judgment)).

It is presumed, even by those who seek extraterritorial application of U.S. law, that, absent express congressional intent, a U.S. statute "does not extend" to a foreign-cubed case. Id. (citing oral argument in the case). However, in the present case, Congress enacted a separate statute, that expressly confers "extra-territorial jurisdiction" over forced labor offenses. including sex-trafficking by force in violation of 18 U.S.C. § 1591. 18 U.S.C. § 1596. This statute has two subsections.

Subsection (a)(1) provides that U.S. courts shall have extraterritorial jurisdiction if the defendant is "a U.S. citizen or an alien lawfully admitted." 18 U.S.C. § 1596(a)(1). Baston, the defendant in this case, was neither a U.S. citizen, nor an alien lawfully admitted – in fact, in this case Baston was convicted of having, as an alien, illegally re-entered into the United States. DE172:1.

Subsection (a)(2) confers extraterritorial jurisdiction if an alleged offender "is present in the United States, irrespective of [his] nationality." 18 U.S.C. § 1596(a)(2). Baston was arrested in the United States. Baston, 818 F.3d at 658. Thus, he was present in the United States, and, under the terms of § 1596(a)(2), Baston was subject to the extraterritorial application of § 1591 to his case.

To be clear, the issue here is not whether the "presumption against extraterritoriality" applies – the issue in this Court's very recent decision in RJR Nabisco, 2016 WL 3369423 at * 7-18. By enacting § 1596, Congress clearly expressed its intent to confer extraterritorial jurisdiction when a defendant "is present in the United States." 18 U.S.C. § 1596(a)(2). The issue here, therefore, is whether the application of this statute to order Baston to pay restitution as part of his criminal sentence is beyond Congress' power, and therefore unconstitutional.

The unlawful sex trafficking with which Baston was charged involved prostitution both in the United States and in Australia. At trial, Baston did not object to the extraterritorial application of § 1591 to his conduct. Baston's defense with regard to sex trafficking in Australia was to point out that prostitution "is legal there," and to claim that he did not coerce anyone to engage in prostitution in Australia. Baston, 818 F.3d at 659. After the jury convicted him on all 21 counts, at restitution sentencing proceedings, the government sought a total of $904,700 in restitution on behalf of five victims, including $400,000 in restitution on behalf of K.L., for moneys she earned as an Australian prostitute, in Australia. Baston objected to this extraterritorial application of U.S.

law. Baston argued that restitution to K.L., for moneys she earned in Australia, was beyond the jury's verdict, because, properly read, the verdict only reached conduct in the United States, not Australia. Baston further argued that if restitution for prostitution in Australia was authorized by the jury's verdict, it was nonetheless invalid because it would be beyond Congress's power to authorize under the Constitution.

The district court sustained Baston's objection, and denied the government's request for $400,000 in restitution for moneys K.L. earned in Australia. DE176:11. But the government cross-appealed this ruling, arguing that the $400,000 in restitution for Australian prostitution was within the jury's verdict. The government also argued that the restitution was constitutional. In support, the government did not cite to any treaty, or international law. Instead, the government relied exclusively on the power granted to Congress by the Foreign Commerce Clause of the Constitution, Art. I, § 8, cl. 3. Agreeing with the government's cross-appeal, the Eleventh Circuit reversed the district court's denial of restitution, holding that restitution was within the jury's verdict, and was authorized by the Foreign Commerce Clause. Baston, 818 F.3d at 666. The Eleventh Circuit held that the Foreign Commerce Clause authorized restitution even when, as here, the restitution was to be paid by a Jamaican sex trafficking offender, to an Australian prostitute, for conduct that "occurred exclusively overseas." Id. at 666-69.

A. It is doubtful whether the Framers intended to grant Congress any authority to enact extraterritorial criminal laws when they authorized Congress "[t]o regulate Commerce with Foreign Nations."

No provision of the Constitution expressly empowers Congress to create criminal offenses under United States law for conduct that, as here, "occurred exclusively overseas." The most

immediately relevant provision of the Constitution would be the Offences Clause. Cf. Taylor v. United States, __ U.S. __, 136 S.Ct. 2074, 2082-83 (2016) (Thomas, J., dissenting) (noting that the Offences Clause contains an express limited grant of "federal criminal authority").

The "Offences Clause" of the Constitution gives Congress a power:

> To define and punish Piracies and Felonies committed on the High Seas, and Offences against the Law of Nations.

U.S. Const. Art. I, § 8, Cl. 10.

The Framers' debates regarding the adoption of the Offences Clause indicate that this Clause, by delegating to Congress a power to "define and punish" crimes, did not authorize Congress to create new crimes, but merely authorized Congress to codify crimes that had previously been recognized, internationally, as criminal offenses. United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1248-49 (11th Cir. 2012) (the power to "define and punish" is a power of "codification"). The Offences Clause "did not enable Congress to create offenses that were not recognized by the law of nations." Id. at 1250 (emphasis added).

Moreover, the Offences Clause specifically defines three kinds of offenses for which Congress is granted a power to "define and punish": piracies, felonies committed on the high seas, and offences against the law of nations. United States v. Smith, 18 U.S. (5 Wheat.) 153, 158-59 (1820). The first grant, piracy, refers specifically to robbery on the high seas, outside U.S. territory. United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820). The second, the Felonies Clause, is likewise directed at conduct "on the High Seas." The third grant relates to "offences against the law of nations." It addresses international offenses, like genocide, committed outside the United States – but the nature of the offenses it encompasses "is limited by customary international law."

Bellaizac-Hurtado, 700 F.3d at 1248-49. The Eleventh Circuit, giving force to the Clause's limitation to "offences against the law of nations" in Bellaizac-Hurtado, held that Congress lacked power under the Offences Clause to criminalize drug trafficking inside Panama, because "[d]rug trafficking was not a violation of customary international law at the time of the Founding, and drug trafficking is not a violation of customary international law today." Id. at 1253-54 (vacating convictions). Bellaizac-Hurtado is thus an example of how the Offences Clause limits Congress's power to authorize criminal prosecution for conduct that takes place overseas.

The Treaty Clause of the Constitution authorizes the President "by and with the Advice and Consent of the Senate, to make Treaties." U.S. Const. Art. II, § 2, cl. 2. The Necessary and Proper Clause empowers Congress "to make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States." U.S. Const. Art. I, § 8, cl. 18. Conceivably, the Treaty Clause, coupled with the Necessary and Proper Clause, gives Congress a "police power" to criminalize activity that occurs outside the United States, if the United States ratifies a treaty with a foreign Nation, and enacts implementing domestic legislation. But, to date, it remains unresolved whether this is so.

In Bond v. United States, the parties disagreed about whether Congress, by enacting a criminal statute under the Treaty Clause and the Necessary and Proper Clause, can "effectively afford the Government a police power." 134 S.Ct. 2077, 2087 (2014). This Court did not resolve the "debate" on this question, deciding the case instead on narrower, statutory construction grounds – after noting the well-settled understanding that the federal government, in contrast to the States, "has no [police power] authority." Id. In sum, the Constitution does not indicate, at least not expressly, whether the Treaty Clause, as implemented by the Necessary and Proper Clause, might authorize any

police power at all. See Bond, 134 S.Ct. at 2087. The Treaty Clause suggests that, if the United States government, in its own courts, has a power to punish the conduct of non-U.S. citizens that occurred exclusively overseas, this international application of U.S. law requires a treaty between the United States and the relevant foreign government(s). Bond, 134 S.Ct. at 2087.

In light of these meaningful constitutional limitations on Congress' police power overseas, it is doubtful whether the Framers intended to grant Congress any authority to enact extraterritorial criminal laws when they wrote into the Constitution a wholly separate clause, the Foreign Commerce Clause, authorizing Congress "[t]o regulate Commerce with Foreign Nations." Art. I, § 8, cl. 3. The express text of the Foreign Commerce Clause certainly does not refer to a police power. The Foreign Commerce Clause does not mention "Piracies" or "Felonies" or "Offences." It addresses regulation of "Commerce with Foreign Nations." Cf. Taylor, 136 S.Ct. at 2083 (Thomas, J., dissenting) (pointing out that the phase "Commerce . . . among the several States" in the Constitution's Interstate Commerce Clause does not expressly encompass "robbery") (quoting Art. I, § 8, cl. 3). The meaningful limitations in the Offences Clause and the other constitutional provisions discussed above suggest that the Foreign Commerce Clause does not authorize Congress to enact any extraterritorial criminal laws. Or, at the least, that any police power it might implicitly delegate must be exceedingly narrow.

Yet, for the present case, the Eleventh Circuit found that the Foreign Commerce Clause of the Constitution, Art. I, § 8, cl. 3, empowered Congress "to enact extraterritorial criminal laws." 818 F.3d at 667. This holding is erroneous.

B. Baston mistakenly equated the Foreign Commerce power with the Interstate Commerce power.

Baston's analysis began by noting: "What little guidance we have from the Supreme Court establishes that the Foreign Commerce Clause provides Congress a broad power." Id. at 667-68. Baston noted: "The Supreme Court has described the Foreign Commerce Clause, like the Indian Commerce Clause, as granting Congress a power that is 'plenary,' Bd. of Trustees of Univ. of Ill. v. United States, 289 U.S. 48, 56 (1933), and 'broad.' United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194 (1876)." Id. at 668. Further, "like the Indian Commerce Clause, the Foreign Commerce Clause does not pose the federalism concerns that limit the scope of the Interstate Commerce Clause." Id. (citing Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449 n. 13 (1979)). "Indeed, the Supreme Court has suggested that the 'power to regulate commerce . . . when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce." Id. (quoting Atl. Cleaners & Dyers v. United States, 286 U.S. 427, 434 (1932)). "The Supreme Court has cited James Madison, for example, who described the Foreign Commerce Clause as a 'great and essential power' that the Interstate Commerce Clause merely 'supplement[s],' The Federalist No. 42, at 283 (Jacob E. Cooke ed., 1961)." (citing Japan Line, 441 U.S. at 448 n. 12). Baston added:

> We need not demarcate the outer bounds of the Foreign Commerce Clause in this opinion. We can evaluate the constitutionality of section 1596(a)(2) by assuming, for the sake of argument, that the Foreign Commerce Clause has the same scope as the Interstate Commerce Clause. In other words, Congress's power under the Foreign Commerce Clause includes at least the power to regulate the "channels" of commerce between the United States and other countries, the "instrumentalities" of commerce between the United States and other countries, and activities that have a "substantial effect" on commerce between the United States and other countries.

Id. at 668 (citing Gonzales v. Raich, 545 U.S. 1, 16-17 (2005).

Baston acknowledged, in passing, without more, the Sixth Circuit's contrary dicta in United States v. Al-Maliki, 787 F.3d 784, 793 (6th Cir. 2015). Id. at 668. In Al-Maliki, the Sixth Circuit recognized that "an unbounded reading of the Foreign Commerce Clause allows the federal government to intrude on the sovereignty of other nations." 787 F.3d at 793. The Sixth Circuit stated that it was "skeptical" of the government's reliance on the argument that "Congress has greater commerce power over conduct occurring in foreign countries than conduct occurring in the States." Id. However, because this issue was presented for the first time on appeal, the Sixth Circuit was not in a position to reverse the defendant's conviction on "plain error" review. Id.

In support of its reasoning, Baston cited United States v. Bollinger, 798 F.3d 201, 215 (4th Cir. 2015), cert. denied, __S.Ct. __, 2016 WL 9245288 (U.S. May 23, 2016), and United States v. Pendleton, 658 F.3d 299, 308 (3d Cir. 2011), cert. denied, 132 S.Ct. 2771 (2012). Baston, 818 F.3d at 668. In Bollinger and Pendleton the Fourth and Third Circuits, respectively, held that the application of a United States criminal law to conduct overseas was valid under the Foreign Commerce Clause, and cited to the Ninth Circuit's like result in United States v. Clark, 435 F.3d 1100, 1114 (9th Cir. 2006), cert. denied, 127 S.Ct. 2029 (2007). Bollinger, 798 F.3d at 215; Pendleton, 658 F.3d at 306-08.

Baston then reasoned:

> Section 1596(a)(1) is constitutional at the least as a regulation of activities that have a "substantial effect" on foreign commerce. Section 1596(a)(2) gives extraterritorial effect to section 1591, the statute that defines the crime of sex trafficking by force, fraud, or coercion. And Congress had a "rational basis" to conclude that such conduct – even when it occurs exclusively overseas – is "part of an

> economic 'class of activities' that have a substantial effect on . . . commerce" between the United States and other countries.

Id. at 668 (quoting Raich, 545 U.S. at 17, 19). Baston noted that, when it enacted § 1591 as part of the Trafficking Victims Protection Act of 2000, "Congress found that trafficking of persons has an aggregate economic impact on interstate and foreign commerce, and we cannot say that this finding is irrational." Id. at 669 (citing 22 U.S.C. § 7101(b)(1) - (12) and United States v. Evans, 476 F.3d 1176, 1179 (11th Cir. 2007)). Baston concluded: "Accordingly, section 1596(a)(2) is a constitutional exercise of Congress's authority under the Foreign Commerce Clause." Id.[1]

The reasoning in Baston (and in the Pendleton, Bollinger and Clark decisions from the Third, Fourth, and Ninth Circuit, respectively) is flawed.

Baston concluded that the Foreign Commerce Clause delegates a "broad" power to Congress to enact extraterritorial criminal laws. 818 F.3d at 667-68. Indeed, a "broader" power than that delegated by the Interstate Commerce Clause. Id. at 668. To reach this conclusion, Baston first relied on cases decided by this Court which recognize that Congress has "broad" power under the

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[1] Baston faulted the defendant for "wrong[ly]" claiming on appeal that Congress can enact extraterritorial crimes "only under the Offences Clause." 818 F.3d at 666 (emphasis added). But this was not Baston's argument. He argued:

> Having written into the Offences Clause "three distinct grants of power" for Congress to apply criminal law extraterritorially, and again authorized extraterritoriality under the Treaty Clause as implemented by the Necessary and Proper Clause, it seems improbable that the Framers of the Constitution intended to grant yet another authority for extraterritorial application of criminal law when it authorized Congress, in a wholly separate clause, Art. I, § 8, cl. 3, "[t]o regulate Commerce with Foreign Nations."

Resp. & Reply Br. 39-40. Baston did not address this argument.

Foreign Commerce Clause. Having concluded that the Foreign Commerce Clause is "broad," Baston reasoned that the Foreign Commerce Clause has "at least" the same scope as the Interstate Commerce Clause. 818 F.3d at 668. Baston noted that Congress's power under the Interstate Commerce Clause "reaches 'purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.'" Id. at 664-65 (quoting Raich, 545 U.S. at 16-17). Baston reasoned that the Foreign Commerce Clause must, like the Interstate Commerce Clause, "at least" reach conduct that Congress has a "rational basis" to conclude "is 'part of an economic 'class of activities' that have a substantial effect on . . . commerce' between the United States and other countries." Id. at 668 (quoting Raich, 545 U.S. at 17, 19). But this comparison of the Foreign and Interstate Commerce police powers is flawed.

First, the cases in which this Court has noted a "broad" Foreign Commerce Clause power involve Congress's regulation of matters like "taxation of foreign commerce" – matters that require a "uniform national rule" and that are therefore regulated by Congress alone, not by individual States. Japan Line, Ltd., 441 U.S. at 449 & n. 13. This power to oust States from regulating foreign commerce is a dormant power in relation to the States. It does not imply a power to extend American criminal law into other countries. The two contexts are "starkly" different. See Jessica E. Notebaert, The Search for a Constitutional Justification for the Noncommercial Prong of 18 U.S.C. § 2423(c), 103 J. Crim. L. & Criminology 949, 968 (2013).

Baston relied on Congress's "plenary" power over Indian Affairs. 818 F.3d at 667. But this Indian Affairs power has its own history, that is distinct from the power to regulate commerce with foreign Nations.

Baston looked for guidance on the meaning of the Foreign Commerce Clause in this Court's jurisprudence interpreting the Interstate Commerce Clause. But the present inquiry implicates Congress' power to authorize a sentence of restitution in U.S. courts for criminal conduct that occurred exclusively overseas. The inquiry is whether there is a police power to punish conduct that occurred outside the United States. This is neither a power over "commerce," nor activity that is "interstate." The Interstate Commerce Clause is not directly relevant.

Further, with regard to police power, the Foreign Commerce Clause is not "broader" than the Interstate Commerce Clause, but, arguably, confers less power than the Interstate Commerce Clause.

In Raich, this Court addressed whether the Interstate Commerce Clause empowered Congress to criminalize the growing of marihuana at home, for personal consumption, even though this activity occurred intrastate and was "purely local." 545 U.S. at 16. Naturally, one could be skeptical whether the personal cultivation of marihuana, at home, for personal use, was "economic activity in the first place." 545 U.S. at 43 (O'Connor, J., dissenting). To overcome this objection and demonstrate the "economic" nature of the activity being regulated, Raich noted that Congress' prohibition on intrastate activity was part of a "comprehensive regime," the Controlled Substances Act (CSA), that regulated a controlled substance, marihuana, by "excluding [it] entirely from the market." Id. at 12, 22, 26. Raich emphasized that "[i]t has long been settled that Congress' power to regulate commerce includes the power to prohibit commerce in a particular commodity." 545 U.S. at 19, n. 29 (emphasis added). Raich analogized the regulation of marihuana to other items for which Congress has eliminated the market, such as the prohibition on commerce in bald and golden eagles, biological weapons, nuclear materials, plastic explosives, and contraband cigarettes. Id. at 26, n. 36. In sum, Congress could prohibit a "purely local" activity like cultivating marihuana at

home for personal consumption, because its occurrence "tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety." Raich, 545 U.S. at 16, 19 (emphasis added).

Raich's analysis of the interstate commerce power is thus premised on Congress' power to decide that any commerce in a particular commodity is not in the Nation's interest, and to therefore criminalize this entire market, even when its comprehensive regime reaches activity that occurs "purely local[ly]." See Taylor, 136 S.Ct. at 2080 ("Congress possesses the authority to regulate (and to criminalize) . . . activities [that] occur entirely within the boundaries of a single State.") (emphasis added).

But with regard to activity that occurs, as here, "exclusively overseas," Congress does not have this power to prohibit. It does not have the power to reach across the seas into foreign sovereign nations and eliminate activities there "in their entirety." As the district court noted at Baston's restitution hearing, Congress does not have the power to authorize criminal prosecution of a marihuana dealer in a country, like Holland, where commerce in this particular commodity can be lawful. DE176:9. Prostitution is legal in some countries, including, as it happens, within Australia – as Baston pointed out in his defense at his trial. Baston, 818 F.3d at 659. In sum, the "substantial effects" test applied in Raich does not extend to activities overseas.

Moreover, each sovereign country is responsible for the enforcement its criminal laws. See United States v. Bowman, 260 U.S. 94, 97-98 (1922) ("Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds, which affect the peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise [its criminal

jurisdiction]."). Consequently, "norms of international sovereignty require a greater restriction of Congress' authority to criminalize conduct occurring in a foreign locale than norms of federalism require when criminalizing conduct occurring in the United States." Notebaert, The Search for a Constitutional Justification for the Noncommercial Prong of 18 U.S.C. § 2423(c), 103 J. Crim. L. & Criminology at 968. As a result, Congress' police power under the Foreign Commerce Clause is not as broad as its police power under the Interstate Commerce Clause.

Baston made the sweeping statement that "nothing in the Foreign Commerce Clause limits Congress' authority to enact extraterritorial criminal laws," and, in support, cited Hartford Fire Ins. v. California, 509 U.S. 764, 813-14 (1993) (Scalia, J., dissenting) and Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 606 (5th ed 2011). 818 F.3d at 667. But Justice Scalia's reference to a "broad power" under the Foreign Commerce Clause in a dissenting opinion in a civil antitrust case, and a jurist's observation in a civil litigation treatise that the Foreign Commerce Clause gives Congress power to regulate conduct overseas, did not address the police power conferred by the Foreign Commerce Clause.

Worse, it is simply incorrect to say that "nothing" limits Congress's authority to enact extraterritorial criminal laws. International law principles, for one, affect Congress' law-making power abroad. Cf. Anthony J. Colangelo, The Foreign Commerce Clause, 96 Va. L. Rev. 949, 1026 (2010) ("if the claimed effect on foreign commerce would be sufficient to authorize U.S. regulation inside a foreign nation under jurisdictional principles of international law, it automatically should be sufficient under the Foreign Commerce Clause.")

Thus, it is well-settled that Congress' imposition of American legal rules on foreign countries can be limited by the international law principle of "comity." F. Hoffman-La Roche Ltd. v.

Empagran S.A., 542 U.S. 155, 169, 124 S.Ct. 2359, 2369 (2004). This principle reflects "the respect sovereign nations afford each other by limiting the reach of their laws." Hartford Fire Ins., 509 U.S. at 817 (Scalia, J., dissenting). The principle of "comity" is particularly forceful when a party is invoking a peculiarly American legal remedy. See id. (declining to interpret U.S. antitrust law to apply to injuries overseas because of foreign nations' disagreement about whether the American treble-damage award is the appropriate remedy for such violations). Here, therefore, comity concerns apply forcefully, because the remedy of granting criminal restitution to a prostitute for the value of her services appears to be unique to the United States. Cf. Frances Simmons, Making Possibilities Realities: Compensation for Trafficked People, 34 Sydney L. Rev. 511, 519 & n. 45 (2012) (only citing the United States' Trafficking and Violence Protection Act of 2000 (the law at issue here) in support of the statement that "[i]n some countries, laws have been introduced to make specific provision for mandatory restitution by convicted [sex trafficking] offenders.").

In addition, under the "nationality" principle of international law, the applicability of U.S. law abroad can depend on whether a person is a U.S. citizen. See, e.g., Rivard v. United States, 375 F.2d 882, 885-86 n. 6 (5th Cir. 1967). Under the "protective" principle, applicability of U.S. can turn on whether conduct caused injury within the U.S. Restatement (Second) of Foreign Relations Law § 33(1). These principles also may limit the applicability of U.S. law overseas.

In sum, again, it is doubtful whether the Foreign Commerce Clause gives Congress any authority to enact extraterritorial criminal laws. If it gives any such authority, it would be narrow. Baston's blanket assertion that "nothing in the Foreign Commerce Clause limits Congress' authority to enact extraterritorial criminal laws" signals how far afield jurists can stray when given "little guidance" by this Court. 818 F.3d at 667-68.

Baston recognizes that the Foreign Commerce Clause might authorize criminal law-making over acts that significantly interfere with the "instrumentalities" or "channels" of foreign commerce. To take an example, international airports overseas can be viewed as a vital channel of international commerce. Consequently, the Foreign Commerce Clause may empower the United States to prosecute violent acts at international airports, wherever these airports may be, regardless of the nationalities of the offenders, and the victims. See RJR Nabisco, Tr. of Oral Arg. 7 (Justice Breyer notes that 18 U.S.C. § 37(b) creates jurisdiction to prosecute violence against a person who commits acts of violence at an international airport, if the offender is found in the United States). Baston's case does not present this issue. It presents a narrow issue: does the Foreign Commerce Clause authorize, as here, an order to a Jamaican national to pay restitution to an Australian prostitute for money she earned in Australia. By resolving this issue, this Court will provide needed guidance.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,
MICHAEL CARUSO
Federal Public Defender

By: _____

Timothy Cone
Assistant Federal Public Defender
Counsel for Petitioner

Fort Pierce, FL
July 29, 2016

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-14444-EE

UNITED STATES OF AMERICA,

Plaintiff - Appellee -
Cross Appellant,

versus

DAMION ST. PATRICK BASTON,
a.k.a. R.A.B.,
a.k.a. Drac,
a.k.a. "D",
a.k.a. Daddy,

Defendant - Appellant -
Cross Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR and FAY, Circuit Judges, and ROBRENO,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

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* Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 14-14444, 15-10923

D.C. Docket No. 1:13-cr-20914-CMA-1

UNITED STATES OF AMERICA,

Plaintiff–Appellee–Cross Appellant,

versus

DAMION ST. PATRICK BASTON,
a.k.a. R.A.B.,
a.k.a. Drac,
a.k.a. "D",
a.k.a. Daddy,

Defendant–Appellant–Cross Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(March 24, 2016)

Before WILLIAM PRYOR and FAY, Circuit Judges, and ROBRENO,* District Judge.

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* Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

WILLIAM PRYOR, Circuit Judge:

This appeal and cross-appeal require us to review the convictions and sentence of Damion Baston, an international sex trafficker nicknamed "Drac" (short for Dracula) who sometimes dressed up as a vampire, complete with yellow contact lenses and gold-plated fangs. Baston forced numerous women to prostitute for him by beating them, humiliating them, and threatening to kill them, and he pimped them around the world, from Florida to Australia to the United Arab Emirates. Baston challenges the sufficiency of the evidence for one conviction, a supplemental jury instruction, and the award of restitution to his victims. Those challenges fail, but the cross-appeal by the government about a refusal to award one victim increased restitution has merit.

The government argues that the district court erred when it refused to award restitution to a victim of Baston's sex trafficking in Australia. The district court ruled that an award of restitution for Baston's extraterritorial conduct would exceed the power of Congress under Article I of the Constitution, U.S. Const. Art. I, and the Due Process Clause of the Fifth Amendment, *id.* Amend. V. To decide those issues, we must examine the scope of the Foreign Commerce Clause, *id.* Art. I, § 8, cl. 3, a question of first impression in this Circuit, and the constitutionality of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 223, 18 U.S.C. § 1596(a)(2), a question of first

impression in any circuit. We conclude that Congress has the constitutional authority to punish sex trafficking by force, fraud, or coercion that occurs overseas. We affirm Baston's convictions and sentence, but we vacate his order of restitution and remand with an instruction for the district court to increase his restitution obligation.

I. BACKGROUND

Baston immigrated to the United States from Jamaica in 1989. After he was convicted of an aggravated felony, Baston was ordered removed in 1998. But Baston illegally reentered the country by purchasing the identity of a citizen of the United States. Under this assumed identity, Baston opened bank accounts, started businesses, and rented apartments in Florida. He also obtained a Florida driver's license and a United States passport. Baston traveled the world under the assumed identity, visiting Australia, New Zealand, Indonesia, the United Arab Emirates, Russia, China, and Brazil, among other places. Baston funded his lavish lifestyle by forcing numerous women to prostitute for him.

Baston learned how to be a pimp from *Pimpology*, a book written by Pimpin' Ken. Consistent with the fifth law of *Pimpology*, Baston "prey[ed] on the weak" by recruiting women who were sexually abused as children. *See* Pimpin' Ken, *Pimpology: The 48 Laws of the Game* 21 (2008). Baston also forced his

victims to refer to him as "Daddy," *see id.*, and took all of the money they earned, *see id.* at 20.

But Baston was not always faithful to the laws of *Pimpology*. Unlike Pimpin' Ken who rejected the use of violence, *see id.* at 2–3, Baston punched, slapped, choked, and threatened to kill his victims whenever they got "out of line." And his victims took those threats seriously. In addition to his Transylvanian tendencies, Baston maintained a muscular physique aided by having his victims inject him with steroids on a regular basis. He also claimed to be a member of the Bloods gang.

K.L., an Australian, met Baston at a nightclub in Gold Coast, Australia, when she was 24 years old. She dreamed of opening her own restaurant, and Baston offered to help her. But K.L. soon discovered that Baston's real business was pimping women. Baston sent K.L. to have sex with clients throughout Australia at prices he determined. When Baston was not in Australia, he had K.L. wire her earnings to his bank accounts in Miami. K.L. also prostituted for Baston in the United Arab Emirates, Florida, and Texas.

K.L. testified that Baston beat her "often" and that he threatened to hurt her and her family if she ever stopped working for him. Baston would backhand K.L. whenever she committed any perceived slight, like failing to cook him breakfast or telling a bouncer how much money she made. One night, Baston suspected that

K.L. was cheating on him. He woke her up, punched her hard in the pelvis, threw her to the ground, and strangled her. He heated up kitchen knives over an open flame and threatened to slit her throat. On another occasion, Baston took K.L. to the bathroom, held her against the wall by her throat, and bit her cheek until she bled. K.L. eventually escaped Baston's control after her family contacted the American embassy, which refused to let her return to Baston in the United States.

T.M. was 21 years old when she met Baston. She was attending Georgia Southern University and needed money for college. She sent pictures of herself to one of Baston's associates, who convinced her to come to Miami to work as an escort. After she arrived in Miami, T.M. met Baston at a nightclub. He convinced her to work at various strip clubs in Miami, where she would meet clients and have sex with them at prices set by Baston. T.M. also prostituted for Baston in Texas and Australia.

Baston often reminded T.M. that, if she ever left him, "it wouldn't be good" for her or her family. One night, Baston thought that T.M. was flirting too much with a client. He drove her to a secluded park and backhanded her so hard that she fell to the ground. He reminded T.M. that he could bury her in the park and no one would ever find her. On another occasion, Baston thought T.M. was being "disrespectful," so he wrapped a belt around her neck and made her beg for forgiveness while she crawled around on her hands and knees like a dog. T.M.

mustered the courage to flee from Baston when he temporarily left the country to visit Jamaica.

J.R. met Baston in 2013. She was 21 years old at the time, living with her mother in Georgia and working at a Little Caesars restaurant. But J.R. dreamed of being a model. Baston saw her modeling pictures on Instagram and began communicating with her over the Internet and phone. Baston promised to help her modeling career and convinced her to take a bus from Georgia to Miami. When she arrived, Baston forced her to prostitute for him at various strip clubs. J.R. also prostituted for him in Georgia, Louisiana, Texas, Tennessee, and New York. Baston and J.R. typically stayed in hotels, most often a Marriott in Miami, and Baston advertised her services on Backpage.com. Whenever J.R. was supposed to be working for Baston, she had to call him "[e]very hour on the hour" and text him regularly.

If J.R. disobeyed his orders, Baston would punch her in the face. One night, Baston drove J.R. to a secluded parking lot and told her not to "fuck with him" or he would "chop . . . [her] body up and have [her] thrown in the Everglades." On another occasion, J.R. and Baston got into an argument and, although J.R. was pregnant at the time, Baston punched her in the side and threatened to stab her with a broken broom. Baston later forced J.R. to have an abortion because he "didn't want to have a baby by a punk bitch."

Baston was arrested at his mother's house in New York. A grand jury indicted him on 21 counts, including sex trafficking of K.L. by force, fraud, or coercion, 18 U.S.C. § 1591(a)(1), "in the Southern District of Florida, Australia, the United Arab Emirates, and elsewhere"; sex trafficking of T.M., *id.*, "in the Southern District of Florida[] and elsewhere"; sex trafficking of J.R., *id.*, "in the Southern District of Florida[] and elsewhere"; and several counts of money laundering, *id.* § 1956, based on the sex-trafficking proceeds that Baston wired from Australia to Miami. Baston proceeded to trial on all 21 counts.

The government called several of Baston's victims as witnesses, including K.L., T.M., and J.R. The women testified about how they met Baston, how their relationships progressed, and how Baston used violence and coercion to force them into prostitution. They also testified about how often they prostituted for Baston and how much they charged their clients.

After the government presented its case-in-chief, Baston filed a motion for a judgment of acquittal. He challenged the sufficiency of the evidence "on the indictment as a whole" by raising specific arguments against each count. With respect to the charge of sex trafficking J.R., Baston argued that he never coerced J.R. into prostitution: she was already a prostitute when he met her, and their relationship was nothing but amicable. The district court denied Baston's motion.

Baston called three witnesses: his sister, his mother, and himself. Baston's defense to the counts of sex trafficking was that he did not coerce any of the victims into prostitution; they did it freely and voluntarily. Baston argued that K.L. and T.M., for example, prostituted in Australia because it is legal there and they could make a lot of money doing it. With respect to the counts of money laundering, Baston argued in closing that "money made in Australia from a legal brothel is legal" so "sending the money by . . . wire transfer is not money laundering because there is nothing illegal about that money."

After the close of all evidence, Baston renewed his motion for a judgment of acquittal "for the reasons that were previously indicated." The district court again denied it. Before the district court instructed the jury, Baston stated that he had "[n]o problems" with the instructions and was "in agreement" with them.

On the second day of deliberations, the jury submitted the following note to the district court:

> If prostitution is legal in [A]ustralia, and money was made there by those means, would it be illegal to transfer funds abroad? Specifical[l]y the United States? Which laws are we to consider?

The district court answered the jury's question with the following supplemental instruction:

> With respect to Counts 13–21 [the counts of money laundering], . . . the unlawful activity in question is the recruiting, enticing, harboring, transportation, providing, obtaining, or maintaining a person, knowing, or in reckless disregard of the fact that means of force,

> threats of force, fraud, coercion, or any combination of such means would be used to cause that person to engage in a commercial sex act, in violation of U.S. federal law, that is, 18 U.S.C. sections 1591 and 1596. Under U.S. law, such conduct is illegal, even if it took place outside the United States, if the defendant was present in the United States at the time he was charged. As always, you should consider all of my instructions as a whole.

Baston objected to this instruction because it "involved a legal interpretation of the Statutes not includ[ed in] the Jury Instructions" and "introduced new theories to the case without the Defense being given the opportunity to argue [them]." The district court rejected these arguments.

The jury convicted Baston of all 21 counts. The district court sentenced him to 27 years of imprisonment and a lifetime of supervised release. It ordered a separate hearing on restitution.

The district court ordered Baston to pay $99,270 in restitution: $78,000 to K.L., $11,200 to T.M., and $10,070 to J.R. The district court calculated these amounts based on worksheets provided by the government, which multiplied the hours that the victims prostituted for Baston by the amounts that they charged and then subtracted their estimated living expenses. The victims' earnings were calculated based on their testimony from trial; the district court did not require the victims to testify a second time at the restitution hearing.

The $78,000 award to K.L. included the money she earned while prostituting for Baston in the United States, but excluded the $400,000 she earned while

prostituting for Baston in Australia. Baston objected that a restitution award based on conduct that occurred wholly overseas would exceed the authority of Congress under the Foreign Commerce Clause and the Due Process Clause. The district court sustained the objection by stating that "the government is overreaching and seeking amounts in restitution that aren't supported by . . . the constitution."

II. STANDARDS OF REVIEW

Several standards of review govern this appeal and cross-appeal. We review the sufficiency of the evidence *de novo*. *United States v. Hernandez*, 433 F.3d 1328, 1332 (11th Cir. 2005). We review a supplemental jury instruction for abuse of discretion, but we review *de novo* whether the instruction misstated the law or misled the jury. *United States v. James*, 642 F.3d 1333, 1337 (11th Cir. 2011). We review the factual findings underlying a restitution order for clear error, *United States v. Washington*, 434 F.3d 1265, 1267 (11th Cir. 2006), and we review the procedures used at the restitution hearing for abuse of discretion, *United States v. James*, 459 F.2d 443, 445 (5th Cir. 1972). We review the legality of a restitution order *de novo*. *United States v. Rodriguez*, 751 F.3d 1244, 1260 (11th Cir. 2014).

III. DISCUSSION

We divide our discussion into two main parts. We address Baston's appeal first. We then address the cross-appeal by the government.

A. Baston's Appeal

Baston raises three arguments on appeal. First, Baston argues that the district court abused its discretion when it issued the supplemental jury instruction. Second, Baston contends that the district court should have granted his motion for a judgment of acquittal because the government provided insufficient evidence that his trafficking of J.R. was "in or affecting interstate . . . commerce," 18 U.S.C. § 1591(a)(1). Third, he contends that the district court used unreliable testimony to calculate his restitution obligations. We address each argument in turn.

1. The District Court Did Not Abuse Its Discretion by Issuing the Supplemental Jury Instruction.

Baston argues that the supplemental jury instruction was an abuse of discretion for three reasons: it did not answer the jury's question, it misled the jury, and it misstated the law. But Baston has a problem: he made none of these arguments in the district court.

Because Baston is challenging the supplemental jury instruction for the first time on appeal, we review his arguments for plain error. Fed. R. Crim. P. 52(b). The government argues that we should not review Baston's arguments at all because he affirmatively agreed to the initial jury instructions in the district court. Under the doctrine of invited error, "[w]here a party expressly accepts a jury instruction, 'such action . . . serve[s] to waive [his] right to challenge the accepted instruction on appeal.'" *United States v. House*, 684 F.3d 1173, 1196 (11th Cir.

2012) (third and fourth alterations in original) (quoting *United States v. Silvestri*, 409 F.3d 1311, 1337 (11th Cir. 2005)). But "the issue here is the supplemental instruction given in response to the [jury's] question—not the initial instruction[s]." *United States v. Isnadin*, 742 F.3d 1278, 1297 (11th Cir. 2014). Although Baston agreed to the initial jury instructions, he did not agree to the supplemental jury instruction. Baston instead failed to object to the supplemental jury instruction on the specific grounds he raises on appeal. But "failing to object does not trigger the doctrine of invited error." *United States v. Dortch*, 696 F.3d 1104, 1112 (11th Cir. 2012). When a defendant objects to a jury instruction in the district court, but on different grounds than the ones he raises on appeal, we review the instruction for plain error. *See* Fed. R. Crim. P. 30(d).

We now turn to Baston's three challenges to the supplemental jury instruction. None identifies an abuse of discretion by the district court. "[T]he court's supplemental instruction[] w[as] sufficiently clear and responsive to the jury's inquiry to fall squarely within the trial court's range of discretion in this area." *United States v. Fuiman*, 546 F.2d 1155, 1160 (5th Cir. 1977). Because the district court did not err, it did not plainly err either. *United States v. Franklin*, 694 F.3d 1, 9 (11th Cir. 2012).

a. The Supplemental Jury Instruction Answered the Jury's Question.

Baston contends that the supplemental jury instruction did not answer the jury's question. "When a jury makes explicit its difficulties," the district court "should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612–13 (1946). The district court instructed the jury that it could convict Baston of money laundering whether or not prostitution is legal in Australia. This answer was non-responsive, according to Baston, because the jury asked whether the legality of prostitution affected the charges of sex trafficking. At trial, Baston argued that he did not coerce K.L. or T.M. into prostitution; instead, they prostituted because it was legal in Australia and they could make money doing it. Baston contends that the jury wanted more information about this defense.

The problem with Baston's argument is that the jury did not ask about sex trafficking. The jury asked about money laundering: its note asked whether it would be "illegal to *transfer funds*" to the United States "[i]f prostitution is legal in [A]ustralia[] and *money* was made there by those means." (Emphases added.) And the note asked a legal question about choice of law—"Which laws are we to consider?"—not a factual question about the victims' motives for prostituting in Australia. Tellingly, the jury's question mirrored the choice-of-law argument that Baston made in his closing argument.

The district court answered this question, and its answer must have been satisfactory because the jury asked no further questions about money laundering or sex trafficking after receiving the supplemental instruction. "[T]hat there was no further inquiry after the judge's response to the note [] indicates that the judge's response cleared the jury's difficulty with concrete accuracy." *United States v. Parr*, 716 F.2d 796, 809 (11th Cir. 1983) (second alteration in original) (quoting *United States v. Andrew*, 666 F.2d 915, 922 (5th Cir. 1982)). The district court did not abuse its discretion by answering the question that the jury actually asked instead of the question that Baston now argues it asked.

b. The Supplemental Jury Instruction Did Not Mislead the Jury.

Baston argues that the supplemental jury instruction misled the jury by suggesting it no longer needed to find that Baston's conduct was "in or affecting" commerce, 18 U.S.C. § 1591(a)(1), an essential element of sex trafficking. The supplemental instruction essentially erased this element, according to Baston, by not repeating it and by stating that he could be convicted so long as he "was present in the United States at the time he was charged." We disagree.

The jury was not misled by the supplemental jury instruction because the supplemental instruction said nothing about the elements of sex trafficking. As explained above, the jury's note asked only about money laundering, and the supplemental instruction addressed only that offense. Indeed, the instruction began

with a prefatory clause—"With respect to Counts 13–21"—that specifically referred to the counts of money laundering. The jury would not have understood the supplemental instruction as saying anything about the elements of sex trafficking.

Nor did the supplemental jury instruction need to repeat the elements of sex trafficking. Although sex trafficking was the "specified unlawful activity" for the counts of money laundering, *id.* § 1956, "[a] conviction for money laundering does not require proof that the defendant committed the specific predicate offense," *United States v. De La Mata*, 266 F.3d 1275, 1292 (11th Cir. 2001). A jury instruction on money laundering can omit the elements of the specified unlawful activity. *See United States v. Martinelli*, 454 F.3d 1300, 1311–12 (11th Cir. 2006). The district court did not confuse the jury by leaving out that unnecessary information. If any confusion somehow remained, the district court eliminated it by reminding the jury to "consider all of my instructions as a whole." *See Parr*, 716 F.2d at 809. The jury could refer to the initial jury instructions, which correctly stated the elements of sex trafficking and the requirement that Baston's conduct be "in or affecting" commerce. Because "the district court's additional instruction was responsive to the jury's specific concern while prudently refocusing the jury on the instructions . . . as a whole," *United States v. Davis*, 490 F.3d 541, 548 (6th Cir. 2007), the district court did not abuse its discretion.

c. The Supplemental Jury Instruction Did Not Misstate the Law.

Baston contends that the supplemental jury instruction misstated the law because it failed to explain that he could not be convicted of sex trafficking unless he *knew* his conduct was in or affecting commerce. We rejected this argument in *United States v. Evans*, 476 F.3d 1176 (11th Cir. 2007), where we held that sex trafficking by force, fraud, or coercion does not "requir[e] knowledge by a defendant that his actions are in or affecting interstate commerce," *id.* at 1180 n.2; *accord United States v. Phea*, 755 F.3d 255, 265 (5th Cir. 2014); *United States v. Sawyer*, 733 F.3d 228, 230 (7th Cir. 2013). Baston contends that *Evans* was wrongly decided, but "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). And *Evans* has not been overruled or abrogated. Accordingly, the district court did not abuse its discretion because it was "under no obligation to give a requested instruction that misstates the law." *United States v. L'Hoste*, 609 F.2d 796, 805 (5th Cir. 1980).

Even if *Evans* was wrongly decided (which we doubt), Baston would still lose. As explained above, the jury's note asked about money laundering, not sex trafficking. If the supplemental jury instruction had discussed the knowledge element of sex trafficking, it would have been nonresponsive and confusing. When

a jury requests a supplemental instruction, the district court should answer "within the specific limits of the question presented." *United States v. Martin*, 274 F.3d 1208, 1210 (8th Cir. 2001) (quoting *United States v. Behler*, 14 F.3d 1264, 1270 (8th Cir. 1994)). The district court did not abuse its discretion by failing to discuss something that was irrelevant to the jury's question. If Baston disagreed about the elements of sex trafficking, he should have objected to the initial jury instruction that addressed that element, not the supplemental jury instruction.

2. The District Court Did Not Err When It Denied Baston's Motion for a Judgment of Acquittal.

Baston contends that his conviction of sex trafficking J.R. was supported by insufficient evidence. A defendant is guilty of sex trafficking by force, fraud, or coercion if he "knowingly *in or affecting interstate or foreign commerce* . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person . . . knowing . . . that means of force, threats of force, fraud, [or] coercion . . . will be used to cause the person to engage in a commercial sex act." 18 U.S.C. § 1591(a)(1) (emphasis added). Baston contends that his trafficking of J.R. was not "in or affecting" interstate commerce. The question for our review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found [this element] beyond a reasonable doubt." *Musacchio v. United States*, 136 S. Ct. 709, 715 (2016) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

The parties dispute our standard of review. The government argues that, because Baston did not contest the commerce element in the district court, we should review his challenge to the sufficiency of the evidence only for a "manifest miscarriage of justice." Baston contends that we should review his argument *de novo* because he raised a "general" challenge to the sufficiency of the evidence in the district court. Neither party is correct: we review Baston's argument for plain error. Fed. R. Crim. P. 52(b).

Our review is not limited to correcting a "manifest miscarriage of justice," contrary to the government's argument. That standard does not apply unless the defendant makes *no* challenge to the sufficiency of the evidence after the close of all evidence. *See United States v. House*, 684 F.3d 1173, 1196 (11th Cir. 2012); *United States v. Tapia*, 761 F.2d 1488, 1491 (11th Cir. 1985). Baston challenged the sufficiency of the evidence in his renewed motion for a judgment of acquittal.

But our review is not *de novo* either, contrary to Baston's argument. He failed to raise the specific challenge to the sufficiency of the evidence that he now raises on appeal. Other circuits have held that a defendant preserves all challenges to the sufficiency of the evidence if he raises a "general" challenge in the district court. *See United States v. Cooper*, 654 F.3d 1104, 1117 (10th Cir. 2011); *United States v. Spinner*, 152 F.3d 950, 955 (D.C. Cir. 1998); *United States v. Hoy*, 137 F.3d 726, 729 (2d Cir. 1998). *But see United States v. Clarke*, 564 F.3d 949, 953–

54 (8th Cir. 2009). We need not decide whether those decisions are consistent with the law in this Circuit because, even if they are, Baston did not raise a "general" challenge to the sufficiency of the evidence. Although his motion for a judgment of acquittal challenged the sufficiency of the evidence "on the indictment as a whole," Baston challenged the "whole" indictment by raising *specific* arguments against each count. With respect to the count of sex trafficking J.R., Baston argued that he did not force her into prostitution; he did not argue that his conduct was not "in or affecting" commerce. When a defendant raises specific challenges to the sufficiency of the evidence in the district court, but not the specific challenge he tries to raise on appeal, we review his argument for plain error. *See United States v. Joseph*, 709 F.3d 1082, 1103 (11th Cir. 2013); *United States v. Straub*, 508 F.3d 1003, 1011 (11th Cir. 2007); *United States v. Hunerlach*, 197 F.3d 1059, 1068 (11th Cir. 1999).

Turning to the merits, we conclude that a rational juror could have found, beyond a reasonable doubt, that Baston's trafficking of J.R. was "in or affecting" interstate commerce. Because there was no error, there was no plain error either. *Franklin*, 694 F.3d at 9. The district court correctly denied Baston's motion for a judgment of acquittal.

Baston's conduct was in commerce. The phrase "in commerce" refers to the "channels" and the "instrumentalities" of interstate commerce. *United States v.*

Ballinger, 395 F.3d 1218, 1233 (11th Cir. 2005) (en banc). Baston used both when he trafficked J.R. He communicated with her by phone, text message, and Instagram; he convinced her to cross state lines on a bus; he advertised her services on Backpage.com; and he stayed with her in various hotels. Any one of these is sufficient to prove that Baston's conduct was "in commerce." *See United States v. Daniels*, 685 F.3d 1237, 1246 (11th Cir. 2012) (cell phone, interstate bus travel); *Evans*, 476 F.3d at 1179 (hotels that serve interstate travelers); *United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004) (Internet), *vacated on other grounds*, 544 U.S. 902 (2005), *op. reinstated*, 412 F.3d 1251 (11th Cir. 2005).

Baston argues that none of his interstate conduct involved force, fraud, or coercion—the actus reus of the statute—and that his actual trafficking of J.R. occurred exclusively in Florida, but we disagree. Baston also trafficked J.R. in Louisiana, Texas, Tennessee, and New York. And even if we were to assume that Baston trafficked J.R. exclusively in Florida, we have held that a defendant whose "illegal acts ultimately occur intrastate" still acts "in commerce" if he "uses the channels or instrumentalities of interstate commerce to facilitate their commission." *Ballinger*, 395 F.3d at 1226. Baston's use of phones, the Internet, hotels, and buses facilitated his trafficking of J.R., so his conduct was "in commerce."

Alternatively, Baston's conduct affected commerce. The phrase "affecting commerce" is a term of art that "ordinarily signal[s] the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). That power reaches "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). As we explained in *Evans*, sex trafficking by force, fraud, or coercion—even when it occurs "solely in Florida"—"ha[s] the capacity when considered in the aggregate . . . to frustrate Congress's broader regulation of interstate and foreign economic activity." 476 F.3d at 1179. Baston argues that *Evans* involved the sex trafficking of children, not women, but the reasoning in *Evans* cannot be limited to children. The statute prohibiting sex trafficking by force, fraud, or coercion is a valid exercise of Congress's full commerce power, so the government can satisfy the commerce element in that statute by proving that the defendant's conduct had "a minimal effect on interstate commerce." *United States v. Rodriguez*, 218 F.3d 1243, 1244 (11th Cir. 2000); *accord United States v. Walls*, 784 F.3d 543, 548 (9th Cir. 2015). That standard is easily satisfied here. Because Baston's conduct was in commerce, it necessarily affected commerce as well. *See United States v. Viscome*, 144 F.3d 1365, 1369 (11th Cir. 1998).

3. The District Court Did Not Clearly Err or Abuse Its Discretion in Calculating Baston's Restitution Obligations.

Baston's final argument on appeal is that the district court used unreliable evidence to calculate his restitution obligations to K.L., J.R., and T.M. The district court calculated the obligations based on the victims' testimony at trial: it multiplied how often the victims said they worked by how much they said they charged and then subtracted their estimated living expenses. Baston does not challenge the math; instead, he complains that the victims' testimony was unreliable because it was not subjected to rigorous cross-examination. Baston maintains that he had no occasion to cross-examine the victims about their earnings at trial because their earnings were not relevant to his guilt or innocence. Baston contends that the district court should have forced the victims to testify a second time at the restitution hearing so he could cross-examine them. This argument is meritless.

The district court did not clearly err or abuse its discretion by relying on the victims' trial testimony. In calculating a victim's losses, district courts can rely on any evidence "bearing 'sufficient indicia of reliability to support its probable accuracy.'" *United States v. Singletary*, 649 F.3d 1212, 1217 n.21 (11th Cir. 2011) (quoting *United States v. Bernardine*, 73 F.3d 1078, 1080–81 (11th Cir. 1996)). That evidence includes the "proof at trial." *United States v. Hairston*, 888 F.2d 1349, 1353 n.7 (11th Cir. 1989). Contrary to Baston's argument, evidence can be

sufficiently reliable for purposes of restitution even if it was not subjected to rigorous cross-examination. *See, e.g.*, *id.* at 1353 (relying on hearsay evidence); *In re Sealed Case*, 702 F.3d 59, 67 (D.C. Cir. 2012) (relying on grand jury testimony). And district courts are not required to hear live testimony at every restitution hearing. *See United States v. Sabhnani*, 599 F.3d 215, 258–59 (2d Cir. 2010). District courts have broad discretion in choosing the procedures to employ at a restitution hearing, "so long as the defendant is given an adequate opportunity to present his position as to matters in dispute." *United States v. Maurer*, 226 F.3d 150, 151 (2d Cir. 2000). Baston had the opportunity to challenge the victims' testimony at trial and again at the restitution hearing, and he still has not offered any specific reason why their testimony was inaccurate or untrustworthy. The district court committed no error.

B. The Cross-Appeal

In its cross-appeal, the government argues that the district court erred by refusing to award an additional $400,000 in restitution to K.L. based on her prostitution in Australia. A person convicted of sex trafficking by force, fraud, or coercion must pay "the full amount of the victim's losses." 18 U.S.C. § 1593(b)(1). The full amount includes "the gross income or value to the defendant of the victim's services or labor," *id.* § 1593(b)(3), including any money that the victim earned while prostituting for the defendant. The government contends that the

defendant must repay that money even if the prostitution occurred overseas because, under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, federal courts have "extra-territorial jurisdiction" over sex trafficking by a noncitizen who "is present in the United States." *Id.* § 1596(a)(2).

Baston argues that he does not owe restitution to K.L. for her prostitution in Australia because the jury did not convict him of that conduct, but that argument is baffling. The indictment charged Baston with trafficking K.L. "in . . . Australia," and the jury convicted him of that offense. Plenty of evidence supported its verdict, especially K.L.'s lengthy testimony about how she prostituted for Baston in Australia.

Baston also argues that the restitution statute cannot reach his extraterritorial conduct without exceeding Congress's authority under Article I of the Constitution or violating the Due Process Clause of the Fifth Amendment. Although Baston frames his arguments as challenges to the constitutionality of the restitution statute, his arguments instead challenge the constitutionality of section 1596(a)(2), which confers extraterritorial jurisdiction over sex trafficking by force, fraud, or coercion. If section 1596(a)(2) is constitutional, then the restitution statute is constitutional. *Cf. United States v. Belfast*, 611 F.3d 783, 815 (11th Cir. 2010). We first address

Baston's argument under Article I and then address his argument under the Due Process Clause.

1. Section 1596(a)(2) Is a Valid Exercise of Congress's Authority Under Article I of the Constitution.

"The powers of the legislature are defined, and limited," *Marbury v. Madison*, 5 U.S. 137, 176 (1803), and "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution," *United States v. Morrison*, 529 U.S. 598, 607 (2000). The government defends section 1596(a)(2) under the Foreign Commerce Clause, U.S. Const. Art. I, § 8, cl. 3.

Baston argues that Congress cannot enact extraterritorial laws under the Foreign Commerce Clause; it can do so only under the Offences Clause, *id.* cl. 10 (granting Congress the power "[t]o define and punish . . . Offences against the Law of Nations"). Baston also argues that section 1596(a)(2) exceeds the scope of the Foreign Commerce Clause. He is wrong on both accounts.

Congress's power to enact extraterritorial laws is not limited to the Offences Clause. Baston misreads our decision in *United States v. Bellaizac-Hurtado*, 700 F.3d 1245 (11th Cir. 2012), where we held that the Maritime Drug Law Enforcement Act, as applied to extraterritorial drug trafficking, exceeded Congress's authority under the Offences Clause. *Id.* at 1247. We did not hold that the Offences Clause is the *only* power that can support an extraterritorial criminal law; our decision was limited to the Offences Clause because the government

failed to offer "any alternative ground upon which the Act could be sustained as constitutional." *Id.* at 1258. If the government had invoked the Foreign Commerce Clause in *Bellaizac-Hurtado*, we might have reached a different result.

Contrary to Baston's argument, this Court has upheld extraterritorial criminal laws under provisions of Article I other than the Offences Clause. *See, e.g.*, *Belfast*, 611 F.3d at 813 (Interstate Commerce Clause). And nothing in the Foreign Commerce Clause limits Congress's authority to enact extraterritorial criminal laws. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813–14 (1993) (Scalia, J., dissenting) ("Congress has broad power under [the Foreign Commerce Clause], and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected."); Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 606 (5th ed. 2011) ("A fairly natural component of [the Foreign Commerce Clause] is the power to regulate conduct that occurs outside of U.S. territory."). In fact, *nothing* in Article I limits Congress's power to enact extraterritorial laws. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1980). For purposes of Article I, we ask the same question of an extraterritorial law that we ask of any law—that is, whether it falls within one of Congress's enumerated powers.

Article I gives Congress the power "[t]o regulate Commerce *with foreign Nations*, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3 (emphasis added). Neither this Court nor the Supreme Court has thoroughly explored the scope of the Foreign Commerce Clause. But many decisions have interpreted its neighbors: the Interstate Commerce Clause and the Indian Commerce Clause. For example, the Supreme Court has cautioned that the Interstate Commerce Clause "must be read carefully to avoid creating a general federal authority akin to the police power." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2578 (2012). The Interstate Commerce Clause permits Congress to enact "three general categories of regulation": Congress can "regulate the channels of interstate commerce"; "regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce"; and "regulate activities that substantially affect interstate commerce," including "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 16–17. In contrast, the Supreme Court has described the Indian Commerce Clause as a "broad power," *Ramah Navajo Sch. Bd., Inc. v. Bureau of Rev. of N.M.*, 458 U.S. 832, 837 (1982), that grants Congress "plenary" authority over Indian affairs, *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). "The extensive case law that has developed under the Interstate Commerce Clause," according to the Supreme Court, "is not readily

imported to cases involving the Indian Commerce Clause" because the Indian Commerce Clause does not implicate "the unique role of the States in our constitutional system." *Id.* One way to approach the Foreign Commerce Clause is to ask whether it is more like the Interstate Commerce Clause, the Indian Commerce Clause, or something in between.

What little guidance we have from the Supreme Court establishes that the Foreign Commerce Clause provides Congress a broad power. The Supreme Court has described the Foreign Commerce Clause, like the Indian Commerce Clause, as granting Congress a power that is "plenary," *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56 (1933), and "broad," *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876). Also like the Indian Commerce Clause, the Foreign Commerce Clause does not pose the federalism concerns that limit the scope of the Interstate Commerce Clause. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 n.13 (1979). *But see United States v. al-Maliki*, 787 F.3d 784, 793 (6th Cir. 2015) ("[A]n unbounded reading of the Foreign Commerce Clause allows the federal government to intrude on the sovereignty of other nations—just as a broad reading of the Interstate Commerce Clause allows it to intrude on the sovereignty of the States."). Indeed, the Supreme Court has suggested that "the power to regulate commerce . . . when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce."

Atl. Cleaners & Dyers v. United States, 286 U.S. 427, 434 (1932); *accord Brolan v. United States*, 236 U.S. 216, 218–19 (1915). "Although the Constitution grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases," the Supreme Court has explained, "there is evidence that the Founders intended the scope of the foreign commerce power to be the greater." *Japan Line*, 441 U.S. at 448 (citation omitted). The Supreme Court has cited James Madison, for example, *id.* at 448 n.12, who described the Foreign Commerce Clause as a "great and essential power" that the Interstate Commerce Clause merely "supplement[s]," The Federalist No. 42, at 283 (Jacob E. Cooke ed., 1961).

We need not demarcate the outer bounds of the Foreign Commerce Clause in this opinion. We can evaluate the constitutionality of section 1596(a)(2) by assuming, for the sake of argument, that the Foreign Commerce Clause has the same scope as the Interstate Commerce Clause. In other words, Congress's power under the Foreign Commerce Clause includes at least the power to regulate the "channels" of commerce between the United States and other countries, the "instrumentalities" of commerce between the United States and other countries, and activities that have a "substantial effect" on commerce between the United States and other countries. *Cf. Raich*, 545 U.S. at 16–17; *accord United States v.*

Bollinger, 798 F.3d 201, 215 (4th Cir. 2015); *United States v. Pendleton*, 658 F.3d 299, 308 (3d Cir. 2011).

Section 1596(a)(2) is constitutional at the least as a regulation of activities that have a "substantial effect" on foreign commerce. Section 1596(a)(2) gives extraterritorial effect to section 1591, the statute that defines the crime of sex trafficking by force, fraud, or coercion. And Congress had a "rational basis" to conclude that such conduct—even when it occurs exclusively overseas—is "part of an economic 'class of activities' that have a substantial effect on . . . commerce" between the United States and other countries. *Cf. Raich*, 545 U.S. at 17, 19. We explained in *Evans* the comprehensive nature of this regulatory scheme:

> Section 1591 was enacted as part of the Trafficking Victims Protection Act of 2000 . . . . [T]he TVPA is part of a comprehensive regulatory scheme. The TVPA criminalizes and attempts to prevent slavery, involuntary servitude, and human trafficking for commercial gain. Congress recognized that human trafficking, particularly of women and children in the sex industry, "is a modern form of slavery, and it is the largest manifestation of slavery today." 22 U.S.C. § 7101(b)(1); *see also id.* at § 7101(b)(2), (4), (9), (11). Congress found that trafficking of persons has an aggregate economic impact on interstate and foreign commerce, *id.* § 7101(b)(12), and we cannot say that this finding is irrational.

476 F.3d at 1179 (footnote omitted). Accordingly, section 1596(a)(2) is a constitutional exercise of Congress's authority under the Foreign Commerce Clause.

2. Section 1596(a)(2) Does Not Violate the Due Process Clause.

Baston argues that section 1596(a)(2) violates the Due Process Clause of the Fifth Amendment because he is a noncitizen and his sex trafficking of K.L. occurred exclusively in Australia. The Due Process Clause prohibits the exercise of extraterritorial jurisdiction over a defendant when it would be "arbitrary or fundamentally unfair." *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1378 (11th Cir. 2011) (quoting *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999)). The government responds that, under basic principles of due process and international law, it is fair to hold Baston accountable for trafficking K.L. in Australia. We agree with the government.

To determine whether an exercise of extraterritorial jurisdiction satisfies due process, we have sometimes consulted international law, *see, e.g.*, *id.*; *United States v. Banjoko*, 590 F.3d 1278, 1281 (11th Cir. 2009), but due process requires only that an exercise of extraterritorial jurisdiction not be arbitrary or fundamentally unfair, a question of *domestic* law, *see United States v. Davis*, 905 F.2d 245, 248–49 & n.2 (9th Cir. 1990). Compliance with international law satisfies due process because it puts a defendant "on notice" that he could be subjected to the jurisdiction of the United States. *United States v. Marino-Garcia*, 679 F.2d 1373, 1384 n.19 (11th Cir. 1982); *see also United States v. Tinoco*, 304 F.3d 1088, 1110 n.21 (11th Cir. 2002) (explaining that compliance with

international law is "sufficient" to satisfy due process). But compliance with international law is not *necessary* to satisfy due process. *See Hartford Fire*, 509 U.S. at 815 (explaining that Congress "clearly has constitutional authority" to confer extraterritorial jurisdiction in violation of international law if it so chooses); Born & Rutledge, *supra*, at 604 ("If Congress enacts legislation in violation of [the limits of international law on legislative jurisdiction], it is well settled that U.S. courts must disregard international law and apply the domestic statute.").

It is neither arbitrary nor fundamentally unfair to exercise extraterritorial jurisdiction over Baston. The Due Process Clause requires "at least some minimal contact between a State and the regulated subject." *Am. Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 221 F.3d 1211, 1216 (11th Cir. 2000) (quoting *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 314 n.2 (1970) (Harlan, J., dissenting)). Baston's contacts with the United States, to borrow the word the government used at oral argument, are "legion." Baston portrayed himself as a citizen of the United States. He resided in Florida, where he rented property, started businesses, and opened bank accounts. *Cf. Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317–18 (1981). He was present at his mother's home in New York when arrested. *Cf. Burnham v. Superior Court of Cal.*, 495 U.S. 604, 610–15 (1990) (plurality opinion). Baston used a Florida driver's license and a United States passport to facilitate his criminal activities. *Cf. Burger King Corp. v. Rudzewicz*,

471 U.S. 462, 475–76 (1985). He trafficked K.L. in both the United States and Australia, and when he trafficked her in Australia, he wired the proceeds back to Miami. *Cf. Watson v. Emp'rs Liab. Assur. Corp.*, 348 U.S. 66, 72 (1954). In short, Baston used this country as a home base and took advantage of its laws; he cannot now complain about being subjected to those laws.

Alternatively, exercising extraterritorial jurisdiction over Baston is consistent with international law. The government invokes several principles of international law, but we will discuss only one. Under the "protective principle" of international law, a country can enact extraterritorial criminal laws to punish conduct that "threatens its security as a state or the operation of its governmental functions" and "is generally recognized as a crime under the law of states that have reasonably developed legal systems." Restatement (Second) of Foreign Relations Law § 33(1); *accord United States v. Gonzalez*, 776 F.2d 931, 938–39 (11th Cir. 1985). The citizenship of the defendant is irrelevant. *See United States v. Benitez*, 741 F.2d 1312, 1316 (11th Cir. 1984). And it does not matter whether the conduct had "an actual or intended effect inside the United States"; "[t]he conduct may be forbidden if it has a *potentially* adverse effect." *Gonzalez*, 776 F.2d at 939 (emphasis added). The requirements of the protective principle are satisfied here.

Countries with developed legal systems recognize sex trafficking by force, fraud, or coercion as a crime. As Congress has explained, "The international

community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking, through declarations, treaties, and United Nations resolutions and reports." 22 U.S.C. § 7101(b)(23). For example, more than 150 countries, including Australia, have ratified the Palermo Protocol on human trafficking, which requires its participants to establish sex trafficking by force, fraud, or coercion as a criminal offense. *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Arts. 5, 3(a), Nov. 15, 2000, 2237 U.N.T.S. 319, 344–45.

Sex trafficking by force, fraud, or coercion also implicates the national security of the United States. The political branches, who are the experts in these matters, *see Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010), have identified sex trafficking as a threat to national security. According to Congress, "Trafficking in persons . . . is the fastest growing source of profits for organized criminal enterprises worldwide." 22 U.S.C. § 7101(b)(8). Those criminal enterprises, in turn, destabilize other countries and fund terrorist groups. *See id.*; White House, National Security Presidential Directive/NSPD-22 (Dec. 16, 2002), http://www.combat-trafficking.army.mil/documents/policy/NSPD-22.pdf; National Security Council, *Transnational Organized Crime: A Growing Threat to National and International Security*, https://www.whitehouse.gov/administration/eop/nsc/

transnational-crime/threat (all Internet materials as visited Mar. 22, 2016, and available in Clerk of Court's case file). Sex trafficking also risks the spread of communicable diseases, *see* 22 U.S.C. § 7101(b)(11); Arthur Rizer & Sheri R. Glaser, *Breach: The National Security Implications of Human Trafficking*, 17 Widener L. Rev. 69, 89–91 (2011), and supports underground networks that can be used to smuggle drugs, weapons, and terrorists into the United States, *see* Rizer & Glaser, *supra*, at 83–85; Sandra Keefer, *Human Trafficking and the Impact on National Security for the United States*, U.S. Army War College 3–4 (2006). These threats are more than sufficient to invoke the protective principle. *See United States v. Saac*, 632 F.3d 1203, 1211 (11th Cir. 2011).

Congress has the power to require international sex traffickers to pay restitution to their victims even when the sex trafficking occurs exclusively in another country. Baston must pay restitution to K.L. for her prostitution in Australia. The district court erred when it reduced her restitution award.

IV. CONCLUSION

We **AFFIRM** Baston's judgment of convictions and sentence and **VACATE** the order of restitution and **REMAND** with an instruction to increase the award of restitution for K.L.'s prostitution in Australia.

United States District Court

Southern District of Florida

MIAMI DIVISION

UNITED STATES OF AMERICA

v.

DAMION ST. PATRICK BASTON

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number - 1:13-20914-CR-ALTONAGA-1

USM Number: 69724-054

Counsel For Defendant: David P. Rowe, Esq.
Counsel For The United States: Olivia S. Choe, Esq. and Roy Altman, Esq.
Court Reporter: Stephanie McCarn

Date of Original Judgment: September 29, 2014; Amended on February 20, 2015
Reason for Amendment: Modification of Restitution Order (18 U.S.C. § 3664)
Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))

The defendant was found guilty of Counts 1 through 21 of the Superseding Indictment.
The defendant is adjudicated guilty of the following offenses:

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 1591(a)(1) and (b)(1)	Sex Trafficking by Force, Fraud, and Coercion	May 15, 2012	1
18 U.S.C. § 1591(a)(1) and (b)(1)	Sex Trafficking by Force, Fraud, and Coercion	August, 2012	2
18 U.S.C. § 1591(a)(1) and (b)(1)	Sex Trafficking by Force, Fraud, and Coercion	December 17, 2013	3
8 U.S.C. § 1328	Importation of Alien for Prostitution	February 22, 2012	4
18 U.S.C. § 2421	Transportation of an Individual for Prostitution	February 22, 2012	5
18 U.S.C. § 2421	Transportation of an Individual for Prostitution	April 16, 2012	6
18 U.S.C. § 2421	Transportation of an Individual for Prostitution	April 16, 2012	7
18 U.S.C. § 2421	Transportation of an Individual for Prostitution	April 29, 2012	8
18 U.S.C. § 2421	Transportation of an Individual for Prostitution	April 29, 2012	9
18 U.S.C. § 1542	Use of Passport Issued by Means of False Statement	February 22, 2012	10
18 U.S.C. § 1028A(a)(1)	Aggravated Identity Theft	February 22, 2012	11
8 U.S.C. § 1326(a) and (b)(2)	Reentry of Removed Alien	February 22, 2012	12
18 U.S.C. § 1956	Laundering of Monetary Instruments	February 22, 2012	13

18 U.S.C. § 1956	Laundering of Monetary Instruments	February 22, 2012	14
18 U.S.C. § 1956	Laundering of Monetary Instruments	February 27, 2012	15
18 U.S.C. § 1956	Laundering of Monetary Instruments	March 21, 2012	16
18 U.S.C. § 1956	Laundering of Monetary Instruments	March 22, 2012	17
18 U.S.C. § 1956	Laundering of Monetary Instruments	March 23, 2012	18
18 U.S.C. § 1956	Laundering of Monetary Instruments	March 26, 2012	19
18 U.S.C. § 1956	Laundering of Monetary Instruments	March 27, 2012	20
18 U.S.C. § 1956	Laundering of Monetary Instruments	March 28, 2012	21

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

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 any material changes in economic circumstances.

Date of Imposition of Sentence:
September 29, 2014

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

June 23, 2016

DEFENDANT: DAMION ST. PATRICK BASTON
CASE NUMBER: 1:13-20914-CR-ALTONAGA-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **324 months**. This term consists of 300 months as to Counts 1, 2, and 3; 120 months as to Counts 4 through 10; 240 months as to Counts 12 through 21, to be served concurrently with each other; and 24 months as to Count 11, to be served consecutively to Counts 1 through 10 and Counts 12 through 21.

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

The Court recommends that the Defendant is designated to a facility located in New York State.

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 U.S. Marshal

DEFENDANT: DAMION ST. PATRICK BASTON
CASE NUMBER: 1:13-20914-CR-ALTONAGA-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **LIFE**. This term consists of life as to Counts 1 through 3 and Counts 5 through 9; 3 years as to Counts 4, 10, 12, and 13 through 21; and 1 year as to Count 11, with all such terms to run concurrently.

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 defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a 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 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 and shall submit a truthful and complete written report within the first fifteen days of each month;
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 (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the 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 by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) 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.

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SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

Sex Offender Registration - If not removed, 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.

Computer Modem Restriction - The defendant shall not possess or use a computer that contains an internal, external or wireless modem without the prior approval of the Court.

Computer Possession Restriction - The defendant shall not possess or use any computer; except that the defendant may, with the prior approval of the Court, use a computer in connection with authorized employment.

Data Encryption Restriction - The defendant shall not possess or use any data encryption technique or program.

Employer Computer Restriction Disclosure - The defendant shall permit third party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon the defendant.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Permissible Computer Examination - The defendant shall submit to the U.S. Probation Officer conducting periodic unannounced examinations of the defendant's computer(s) equipment which may include retrieval and copying of all data from the computer(s) and any internal or external peripherals to ensure compliance with this condition and/or removal of such equipment for the purpose of conducting a more thorough inspection; and to have installed on the defendant's computer(s), at the defendant's expense, any hardware or software systems to monitor the defendant's computer use.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Restricted from Possession of Sexual Materials - The defendant shall not buy, sell, exchange, possess, trade, or produce visual depictions of minors or adults engaged in sexually explicit conduct. The defendant shall not correspond or communicate in person, by mail, telephone, or computer, with individuals or companies offering to buy, sell, trade, exchange, or produce visual depictions of minors or adults engaged in sexually explicit conduct.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

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Sex Offender Treatment - The defendant shall participate in a sex offender treatment program to include psychological testing and polygraph examination. Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	Total Fine	Total Restitution
$2,100.00	**0**	**$499,270.00**

Restitution with Imprisonment -

It is further ordered that the defendant shall pay restitution in the amount of **$499,270.00**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 15% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

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.

Name of Payee	Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
TO BE PROVIDED BY THE UNITED STATES PROBATION OFFICE	**$499,270.00**	**$499,270.00**	

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

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

A. Lump sum payment of **$2,100.00** due immediately.

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.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

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.