Nos. 04-1146 & 04-1147

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

TIMOTHY H. BRADLEY & KATHLEEN MARY O'DELL,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

SUPPLEMENTAL BRIEF OF THE UNITED STATES AS APPELLEE REGARDING THE APPLICATION OF *UNITED STATES* V. *BOOKER*

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

RULES: **PAGE**

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INTRODUCTION

This brief responds to this Court's order of July 13, 2005 inviting briefing on the application of *United States* v. *Booker* to this case.

The defendants were convicted after a jury trial of violating 18 U.S.C. 371 (conspiracy to violate the laws of the United States), 18 U.S.C. 1589 (forced labor), 18 U.S.C. 1590 (trafficking into forced labor); 18 U.S.C. 1592 (document servitude); and violating 18 U.S.C. 1343 (wire fraud). *United States* v. *Bradley*, 390 F.3d 145, 149-150 (1st Cir. 2004), vacated, 125 S. Ct. 2543 (2005). The district court sentenced Bradley and O'Dell to 70 months' imprisonment and restitution of $13,052. Bradley was also fined $12,500. *Id*. at 150. Both

defendants appealed their sentences and convictions, and this Court affirmed. *Id.* at 157. The defendants petitioned the Supreme Court for certiorari, arguing that their sentences were plainly erroneous under the Court's then-recent decision in *United States* v. *Booker*, 125 S. Ct. 738 (2005). On June 6, 2005, the Supreme Court vacated this Court's judgment and remanded for further consideration in light of *Booker*. *Bradley* v. *United States*, 125 S. Ct. 2543 (2005).

ARGUMENT

THE DEFENDANTS HAVE NOT MET THEIR BURDEN TO SHOW A REASONABLE PROBABILITY THAT THE DISTRICT COURT WOULD HAVE SENTENCED THEM MORE LENIENTLY UNDER ADVISORY GUIDELINES

A. The Plain Error Standard In the Context Of Forfeited Booker *Claims*

The defendants acknowledge that their arguments under *United States* v. *Booker* were not preserved below and so are reviewed only for plain error. In *United States* v. *Olano*, 507 U.S. 725, 732 (1993), the Supreme Court held that where, as here, a defendant forfeited his argument below, he must show that (1) there was error, (2) it was "plain," and (3) it affected his substantial rights. Even where those three factors are satisfied, a reviewing court should correct a forfeited error only if (4) it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Ibid*. (quoting *United States* v. *Young*, 407 U.S. 1, 15 (1985)). Because the district court sentenced the defendants under the then-mandatory Guidelines, the first two factors of the *Olano* test are satisfied. *United States* v. *Antonakopoulos*, 399 F.3d 68, 77 (1st Cir. 2005). To satisfy the third and

fourth factors, "the defendant must point to circumstances creating a reasonable probability that the district court would impose a different sentence more favorable to the defendant under the new 'advisory Guidelines' *Booker* regime." *Id.* at 75. This Court is not "overly demanding as to proof of probability where, either in the existing record or by plausible proffer, there is reasonable indication that the district judge might well have reached a different result under advisory guidelines." *United States* v. *Heldeman*, 402 F.3d 220, 224 (1st Cir. 2005). But a "theoretical possibility" of a lower sentence — which would, of course, exist in every case — "is insufficient to meet [a defendant's] burden" to show plain error. *United States* v. *Mercado*, 412 F.3d 243, 253 (1st Cir. 2005); see also *United States* v. *Guzman*, No. 04-1888, 2005 WL 1970603, at *4 (1st Cir. Aug. 17, 2005) ("[T]he inherent uncertainty about how the sentencing court would have exercised its newfound discretion when weighing the section 3553(a) factors under an advisory guidelines system is not enough to enable a defendant to carry his burden.").

B. None Of The Defendants' Proffered Grounds Satisfies Their Burden To Show A Reasonable Probability Of A Lower Sentence

The defendants make the same three arguments in support of their request for a remand for resentencing: (1) the district court should be permitted to consider the defendants' characteristics, which, they argue, it was not permitted to consider under the mandatory Guidelines; (2) the district court's comments at trial and at sentencing, as well as its choice of the lowest possible sentence under the appropriate Guideline range, indicate that, under advisory Guidelines, the court

might lower the defendants sentences based on its authority to consider the "nature and circumstances of the offense," the "seriousness of the offense," and the "just punishment" for the offense under 18 U.S.C. 3553(a); and (3) there is other information which would bear on the court's discretion. O'Dell makes an additional argument that because her circumstances are different from Bradley's, the court might give her a lesser sentence. None of these arguments satisfies this Court's plain-error standard for remand under *Booker*.[1]

1. The Defendants' History And Community Service Were Known To The District Court And Do Not Show A Reasonable Probability Of A Lower Sentence

The defendants argue that under Section 3553(a)(1), their "history and characteristics" are such that they would likely receive lower sentences. The defendants point (Bradley Br. 8-9, O'Dell Br. 7-9) to information contained in the presentence reports regarding the past difficulties in their lives. They also rely on expressions of support from the community for prior community service, including numerous letters that were submitted to the district court, see Supp. App. at 1-25. Obviously, the district court was fully aware of the information contained in the

[1] The defendants also assert (Bradley Br. 1 n.1, O'Dell Br. 1 n.1) that their counsel met with a probation officer who indicated "there may be additional facts" that were not developed below "which may have justified a sentence below the now advisory guideline range." It is unclear if the defendants are arguing for a remand based on the possibility of mitigating factors other than those to which they point in their briefs. If they are making such an argument, it must be rejected. The defendants' burden to obtain remand is to point to specific factors in the record or proffer them. See *United States* v. *Estevez*, No. 03-1496, 2005 WL 1967945, at *1 (1st Cir. Aug. 17, 2005).

presentence reports and the letters submitted to it. Moreover, at sentencing, many members of the defendants' families were present, and counsel read to the court on their behalf an emotional plea for lenient sentencing. Tr., Bradley 1/16/04 Sent. H'rg, at 39. In response, the district court merely stated "Thank you," and noted for the record that it had also read the impact statements of the four victims. *Ibid*.

Defendants argue (Bradley Br. 7, O'Dell Br. 7) that the district court's ability to take such factors into account prior to *Booker* was "extraordinarily limited" because these factors were "discouraged" grounds for departure under the Guidelines, but that under the advisory Guidelines, these factors may be considered. As this Court has recognized, however, even "discouraged" bases for downward departures could be considered under the mandatory Guidelines. See *United States* v. *Cacho-Bonilla*, 404 F.3d 84, 95 & n.5 (1st Cir. 2005). Further even when such factors would not have been sufficient to justify a departure from the Guidelines, they still could have been taken into consideration when determining where within the appropriate range to sentence a defendant. *Ibid*.

This Court has concluded that when a defendant proffers characteristics to support a remand under *Booker* that were known to the district court at the time of sentencing and the court "chose not to speak to them at sentencing[ ] [t]he inference is that the court was unimpressed." *United States* v. *Martins*, 413 F.3d 139, 154 (1st Cir. 2005); see also *United States* v. *McLean*, 409 F.3d 492, 505 (1st Cir. 2005) ("[The defendant] actually made the mitigating arguments that he now posits before the district court. He does not elaborate how he could make them

more convincingly on remand."). Defendants have not demonstrated that the district court would have given these characteristics greater weight under advisory Guidelines. Cf. *United States* v. *De Los Santos*, No. 03-2436, 2005 WL 2035234, at *3 (1st Cir. Aug. 24, 2005) (rejecting defendant's argument that combination of difficult childhood, alcoholism, and being a deportable alien showed reasonable probability of lower sentence under advisory Guidelines).

2. The Defendants' Collateral Attacks On Their Convictions Mischaracterize The Record And Are Irrelevant To Sentencing

As the defendants recognize (Bradley Br. 4 n.4, O'Dell Br. 4 n.5), merely being sentenced at the low end of the Guideline range does not, of itself, show there is any likelihood that the district court would have given them a lower sentence under an advisory regime. *Guzman*, 2005 WL 1970603, at *5. Rather, "[a] defendant who is sentenced at the bottom of the guideline range must show some additional basis for a finding that the district court would have been inclined to disregard the guideline range and sentence below it." *Ibid.* Here, the district court gave no indication that it would have imposed a shorter sentence if it had been able. In *United States* v. *Figuereo*, 404 F.3d 537, 542 (1st Cir. 2005), this Court rejected defendant's *Booker* argument where, although the district court had sentenced him to the bottom of the Guideline range, the court made no comment on the defendant's proffered mitigation arguments. Similarly, in *Guzman*, this Court rejected the defendant's plain error argument where, although he had been sentenced at the bottom of the Guideline range, the district court's comments at

sentencing were ambiguous. *Guzman*, 2005 WL 1970603, at *5. Moreover, in *Cacho-Bonilla*, 404 F.3d at 95, this Court rejected the defendants' argument that their charitable work would likely result in a lower sentence on remand where, as in this case, the district court had sentenced them to the bottom of the Guideline range, but had made no comment indicating it would have given a shorter sentence if it had been able. This Court reasoned that the defendants' charitable work had already been considered by the district court when it sentenced them to the bottom of the range. *Ibid.*

In an effort to show that the district court would have been inclined to give them lower sentences, defendants point to statements by the judge during trial and at sentencing. Both those statements show no such inclination on the part of the district judge. Defendants' characterization of the record is neither factually correct nor legally sufficient.

Defendants attempt to create the appearance that the district court had some doubt about the veracity of the government's witnesses or the quality of the evidence. But defendants mischaracterize the statements. Defendants argue (Bradley Br. at 4, O'Dell Br. at 5) that the court doubted victim Andrew Flynn's "veracity." That is incorrect. The court admonished the government to instruct Flynn during a recess to stop being "obstructive" because "he is dragging this out because he will not answer the questions that he is asked." Tr., Day 4 A.M., at 106. The court directed the government to tell Flynn "that he is to answer these questions directly," noting that "eight or ten questions" were being asked "when

two or three would suffice." *Id*. at 106-107. Nothing in that exchange suggests that the court found Flynn untruthful.

The defendants also argue (Bradley Br. 5, O'Dell Br. 5-6) that the district court indicated that it was inclined to grant a motion for judgment of acquittal. That is not correct. In arguing for O'Dell's motion for acquittal, her counsel stated "I understand the court is instinctly [*sic*] disinclined to grant a judgment of acquittal at this stage, preferring to go to the jury." Tr., Day 7 A.M., at 98. In response, the district court stated "[a]s you know, under Rule 29, the standard is not what the court's inclination is." This response to counsel's argument does not establish that the court doubted the strength of the government's case.

The defendants also point (Bradley Br. 5-6, O'Dell Br. 6) to the district court's statements at sentencing in denying Bradley's motion for a downward departure. Bradley argued that his offense conduct was outside the heartland of offenses under 18 U.S.C. 1589. Tr., Bradley 1/16/04 Sent. Hr'g, at 27-31. The district court rejected the defendants' arguments, stating "[i]n reviewing this matter the court has been struck by how the findings of Congress [regarding human trafficking] * * * fit the facts of this case as determined by the jury." *Id*. at 35. The defendants argue that the district court's reference to the facts "as determined by the jury" indicates the court disagreed with those findings. Nothing in the court's statement supports that conclusion. The more reasonable inference is that the district court merely recognized that the jury, rather than the court, had been the finder of fact.

Under 18 U.S.C. 3553(a)(1), the sentencing court is to consider "the nature and circumstances of the offense" and under Section 3553(a)(2), the court should consider "the need for the sentence imposed" "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." The defendants apparently argue (Bradley Br. 6 & 9-10) (without authority or analysis) that this statutory language would permit the district court to take into account any doubts it might have had about the strength of the government's case.

The factors in Section 3553(a) simply do not permit a court to raise or lower a sentence based on the court's view of the strength of government's case. Where, as here, the defendants exercised their Sixth Amendment right to trial by jury, guilt or innocence is determined by the jury, not the district court. If the court believes the government did not put on sufficient evidence to prove the offense, it may preclude or overrule a jury verdict. See Fed. R. Crim. P. 29. Under certain circumstances, the court may order a new trial. See Fed. R. Crim. P. 33. But where the jury's verdict stands, court's sentence must be consistent with the offense found by the jury. The "nature and circumstances of the offense" under Section 3553(a)(1) and the "seriousness of the offense" under Section 3553(a)(2) necessarily mean the offense as found by the jury. While a court may consider nature and seriousness of the offense, it may not base its sentence on a disagreement with the jury's verdict. Furthermore, there is no reason to think the district court here has not already considered these factors in determining where,

within the Guideline range, to sentence defendants.

This case is in sharp contrast to those in which this Court has remanded under *Booker* because the district court expressly stated that it would have given a shorter sentence if it had not been bound by the Guidelines. See, *e.g.*, *United States* v. *Lewis*, 406 F.3d 11, 21-22 (1st Cir. 2005) (district court sentenced at low end of mandatory range, but expressed concern it could not sentence lower); *United States* v. *Morin*, 403 F.3d 41, 42 (1st Cir. 2005) (court sentenced at low end of range and stated it would have departed downward if it could have); *Heldeman*, 402 F.3d at 224 (district court stated that mitigating arguments were legitimate but could not justify a departure under the then-mandatory Guidelines); *United States* v. *MacKinnon*, 401 F.3d 8, 10 (1st Cir. 2005) (district court stated sentence under mandatory Guidelines was "obscene" and "unwarranted by the conduct").

3. The "Other Factors" Proffered By The Defendants Are Irrelevant To Sentencing

The defendants also rely (Bradley Br. 10, O'Dell Br. 10) on a proffered signed statement, dated August 6, 2003, from Martin Saddler, a Jamaican the defendants brought to the United States in 2001 along with victims Flynn and Hutchinson, Supp. App. 26-27.[2] No charges were brought against the defendants based on their treatment of Saddler, and he did not testify at trial. Saddler's statement indicates "[t]here was never any force used *on me* by [the defendants] for

[2] Although the statement purports to be an affidavit, it is not notarized, nor does it state where it was signed. It is also not a declaration under 28 U.S.C. 1746.

any reason. There were no threats for me to work or stay and I never heard [Hutchinson or Flynn] threatened to be killed or injured by [the defendants]." Supp. App. at 26 (emphasis added).[3]

The defendants also argue (Bradley Br. 10, O'Dell Br. 10) that Owen Flynn, who is the father of one of the victims and who testified at trial, had a drug conviction "that was not disclosed during trial."[4]

Defendants put on no evidence at trial relating to these matters, nor were they raised at any time with the district court. We are hard pressed to understand why they are being raised at this time since they do not bear on the question before this court, that is, whether to remand to the district court for resentencing. Defendants point to no factor under Section 3553(a) to which they believe these

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[3] The government proffers that if Saddler had testified, Jeremy Faulkner, who was on the government's witness list but who was not called at trial (R. 19, 31), would have testified that he worked for Bradley for two days after Flynn and Hutchinson escaped. Faulkner would have testified that he worked with Saddler and that Saddler told him about their poor living conditions and treatment by the defendants, including telling him that one of the other Jamaicans had been attacked by Bradley's dogs — confirming the testimony of Hutchinson and Flynn. Faulkner would have also testified that Saddler had asked Faulkner to drive him to New York so he would not have to return to work for Bradley. Saddler told Faulkner that the defendants had taken his passport to prevent him from leaving. Saddler's statement acknowledges that he asked someone to drive him to New York. Supp. App. 27.

[4] The government proffers to this Court that prior to trial, counsel for O'Dell informed trial counsel that defendants had information suggesting that Owen Flynn had a prior drug conviction. In response, the government conducted a criminal background check on Mr. Flynn, and it failed to reveal any prior convictions. After receiving the defendants' supplemental appendix, the government has learned that Mr. Flynn does have prior convictions.

matters relate.

Bradley also argues (Bradley Br. at 9) that a pending forfeiture action against him will result in the loss of his house, business, and savings, and the district court would find this relevant to determining his "just punishment." That civil *in rem* forfeiture action under 18 U.S.C. 981 remains pending, with a trial scheduled for December 2005. *United States* v. *Litchfield, NH, 21 Pinecrest Rd., et al*., 1:04-cv-00016-JD (D. N.H.). Undersigned counsel was informed that the government and Bradley are in the process of negotiation in an effort to settle the case. Thus, the amount to be forfeited, if any, remains undetermined.[5] More importantly, civil *in rem* forfeiture is not "punishment" of a person. *United States* v. *Ursery*, 518 U.S. 267, 278 (1996) (a separate civil *in rem* action is irrelevant for purposes of the Double Jeopardy Clause); *United States* v. *Leon-Delfis*, 203 F.3d 103, 115 (1st Cir. 2000) (same). While a claimant may challenge an *in rem* civil forfeiture under the Excessive Fines Clause, see, *e.g.*, *United States* v. *One Parcel of Real Property*, 395 F.3d 1, 5 (1st Cir. 2004), Bradley may pursue those claims in the civil action; they are not relevant to his "just punishment" for the offenses of conviction in this case.

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[5] Interestingly, Bradley argues (Bradley Br. 9) that "there is no evidence Bradley relied upon criminal conduct when operating his business over the years." That statement is contradicted by his convictions for wire fraud and forced labor in this case, and necessarily will be a critical issue in the forfeiture action.

4. O'Dell's Argument That Her Offense Conduct Was Meaningfully Different From Bradley's Was Rejected By The District Court

O'Dell argues (O'Dell Br. 9) that her conduct was less culpable than Bradley's and might result in a lower sentence on remand. At sentencing, O'Dell argued for three-level adjustment for a minor or minimal role under the U.S.S.G. 3B1.2. Tr., O'Dell 1/16/04 Sent. Hr'g, at 8-12. The government responded by citing evidence that O'Dell had been significantly involved in the offense, including evidence that she took the victim's passports, communicated threats, and monitored their movements. *Id*. at 12-13. The court then denied the requested minor role adjustment without comment. *Id*. at 13. Again, because the district court already rejected the mitigating argument now made here, O'Dell has failed to meet her burden of showing a reasonable probability that she would receive a shorter sentence on remand. *Figuereo*, 404 F.3d at 542; *Cacho-Bonilla*, 404 F.3d at 95.

CONCLUSION

This Court should affirm the defendants' sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 6, I served two copies of the foregoing SUPPLEMENTAL BRIEF OF THE UNITED STATES AS APPELLEE REGARDING THE APPLICATION OF *UNITED STATES* V. *BOOKER* and a diskette containing an electronic copy of the document by first class mail on:

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