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

BRIEF OF THE UNITED STATES
AS APPELLEE

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JURISDICTION

The Appellants' jurisdictional statement is complete and correct.

ISSUES PRESENTED

1. Whether the district court's jury instruction regarding 18 U.S.C. 1589 was plainly erroneous because it misstated the law or was confusing.

2. Whether the district court abused its discretion under Federal Rules of Evidence 401, 403, and 404(b) by admitting testimony regarding the defendants' prior mistreatment of other workers.

3. Whether the district court misapplied the specific offense characteristic provisions of U.S.S.G. 2H4.1, governing Section 1589 offenses.

STATEMENT OF THE CASE

The defendants operated a tree removal company. In 1999-2000, they recruited two workers from Jamaica, inducing them through false representations regarding their salary and living conditions. In 2000-2001, the defendants recruited three more Jamaican workers, again inducing them through false promises regarding pay and living conditions. The defendants compelled the men's labor by confiscating their passports and return tickets, threatening violence against them and others, and limiting their freedom to travel.

On April 9, 2003, a federal grand jury in the District of New Hampshire returned a multiple-count indictment charging Bradley and O'Dell with one count of violating 18 U.S.C. 371 (conspiracy to violate the laws of the United States); two counts of violating 18 U.S.C. 1589 (forced labor); two counts of violating 18 U.S.C. 1594(a) (attempted forced labor); two counts of violating 18 U.S.C. 1590 (trafficking into forced labor); two counts of violating 18 U.S.C. 1592 (document servitude); and eleven counts of violating 18 U.S.C. 1343 (wire fraud). Additionally, the indictment charged O'Dell with one count of violating 18 U.S.C. 1001 (false statement). JA at 1-14.[1]

After an eight-day jury trial, the defendants were convicted under Sections 371, 1343, 1589, 1590, and 1592. Because the jury found the defendants guilty of

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[1] "JA" denotes the Joint Appendix; "R." denotes the record entries on the district court docket; "Add." denotes the Addendum to Appellants' Brief; and "Tr." denotes the trial transcript.

forced labor under Section 1589, it did not consider the counts charging attempted forced labor. The jury acquitted O'Dell of the false statements charge. The district court sentenced Bradley and O'Dell to 70 months' imprisonment and restitution of $13,052. Bradley was fined $12,500.

STATEMENT OF THE FACTS

Defendant Bradley owned and operated Bradley Tree Service, a tree removal company. Bradley lived with Defendant O'Dell in Litchfield, New Hampshire, a small town near Hudson and Nashua. O'Dell performed various work for Bradley Tree Service, and she also had her own businesses, including doing upholstery. In 2000 and 2001, Bradley and O'Dell brought Jamaican workers to New Hampshire to work for Bradley Tree Service. The men lived on Bradley and O'Dell's property.

In 2001, Bradley and O'Dell induced Andrew Flynn and David Hutchinson to come to the United States through false promises of high wages and good conditions. After the men arrived, the defendants forced the men to work for them in poor conditions and at lower wages by confiscating their passports, threatening and intimidating them, and restricting their freedom of travel. They employed these means because the year before, the defendants had brought two other Jamaicans — Garth Clarke and Livingston Wilson — to New Hampshire through false promises of high wages and good conditions. Because of the poor conditions, Clarke stayed only one week before escaping back to Jamaica. After he left, the Defendants forced Wilson to stay by confiscating his passport, threatening and intimidating him, and restricting his freedom of travel.

1. 1999 - 2000: Livingston Wilson and Garth Clarke

In the Fall of 1999, Bradley and O'Dell traveled to Jamaica, and while there recruited Garth Clarke and Livingston Wilson to work for Bradley Tree Service. Wilson was 32 years old and poorly educated. He was able to read only a little. Tr., 8/21/03 A.M. at 30-31. Garth Clarke was a 50 year-old who worked as a tourist guide and also farmed and did deep sea fishing. Tr., 8/20/03 A.M. at 84 & 87-88. Bradley and O'Dell told the men that they would be paid between $15 and $20 per hour. Tr., 8/21/03 A.M. at 39-40; Tr., 8/20/03 A.M. at 90-91. The job was to last 6 months. Tr., 8/20/03 A.M. at 91. The defendants told both men that they had a large and a small house; they would live in the large house and the workers would stay in the small house. Tr., 8/21/03 A.M. at 41; Tr., 8/20/03 A.M. at 91. Clarke agreed to go to New Hampshire because $15 to $20 per hour sounded good to him. Tr., 8/20/03 A.M. at 93-95. At the time, Clarke's daughter was attending university in New Jersey. Tr., 8/20/03 A.M. at 85. Similarly, Wilson agreed to come to the U.S. because he was from a poor family and saw it as a good chance to make some money and send his children to school. Tr., 8/21/03 A.M. at 40-41.[2]

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[2] There was substantial record evidence that the defendants used "wire" transmissions, such as telephone calls, faxes, and Western Union money transfers, in their scheme to defraud Wilson and Clarke. These transmissions support the defendants' convictions for wire fraud under 18 U.S.C. 1343. See Tr., 8/21/03 A.M. at 42-43 & 45-46; Tr., 8/20/03 A.M. 96, 98 & 101-102; Tr., 8/26/03 P.M. 104 & 115-117. The defendants do not challenge these convictions. There was similar evidence, also unchallenged on appeal, to support the wire fraud convictions involving Andrew Flynn and David Hutchinson. See Tr., 8/22/03 P.M. at 23-25 &

(continued...)

In February and March 2000, Bradley submitted applications to the New Hampshire Department of Labor to begin the process of obtaining the necessary H2B visas for Clarke and Wilson. The applications described the job as "ground man" and stated the wage was $8 per hour. Tr., 8/26/03 A.M. at 21-23. The official at the New Hampshire Department of Labor was required to verify that the wage to be paid was within the prevailing wage in the area. Because he believed the job involved landscaping duties — mowing, pruning, and so forth — he concluded that the $8 wage was slightly above the prevailing wage for that job. Tr., 8/26/03 A.M. at 25-27.

O'Dell paid for Clarke's and Wilson's airfare to the United States. Tr., 8/20/03 A.M. at 103-104. While driving them from the airport, O'Dell, using strong profanity, let the men know how disagreeable Bradley could be at times, but she told them not to pay him any mind. See Tr., 8/20/03 A.M. at 106-107; Tr., 8/21/03 A.M. at 49. Clarke told O'Dell that if he had known that Bradley was that sort of person, he never would have agreed to come to work for him. Tr., 8/20/03 A.M. at 107; see also Tr., 8/21/03 A.M. at 49.

The work for Bradley Tree Service involved removing tree limbs and chipping them. Clarke drove a large truck towing the chipper and Bradley drove the truck with a "bucket" on it. Tr., 8/20/03 P.M. at 6. Bradley would go up into the trees in the "bucket" and cut the limbs. Wilson and Clarke, working on the ground, would

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[2](...continued)
28; Tr., 8/26/03 P.M. at 106 & 117-118; Tr., 8/21/03 A.M. at 148-152.

drag the limbs to the chipper and feed them in. They also raked up. Tr., 8/20/03 A.M. at 110-112; Tr., 8/20/03 P.M. at 5-8.

The men soon found that Bradley was intimidating. On Wednesday of their first week, it rained all day and Clarke and Wilson had no rain coats, although Bradley had one. Tr., 8/20/03 A.M. at 121; Tr., 8/20/03 P.M. at 5; Tr., 8/21/03 A.M. at 54. A man from the neighborhood gave Wilson and Clarke raincoats, but Bradley took the raincoats away from them. Tr., 8/20/03 A.M. at 121-124; see also Tr., 8/21/03 A.M. at 56. The next day, Clarke slipped and hurt his side and back, which became swollen and painful, but he did not ask for Bradley's help because he was afraid of Bradley and felt threatened by him. Tr., 8/20/03 A.M. at 127-128.

That first week, the men also learned that they would not be paid or accommodated as the defendants had promised. Bradley told them that they would be paid only $7 per hour. After work on Friday of that first week, the men learned that rather than staying in a house, as they were promised, they were to stay in a small camping trailer in Bradley and O'Dell's backyard. Tr., 8/20/03 P.M. at 9 & 13-15.

The trailer had two settees with cushions for the men to sleep on; that first night it had no electricity, water, or heat. The men were very cold, and O'Dell brought them two blankets that had been used by their two dogs. Tr., 8/20/03 P.M. at 16-19, Tr., 8/21/03 A.M. at 107-108; Exh. 20 (photograph of dogs). Clarke refused to use a dog's blanket and was too cold to sleep. Tr., 8/20/03 P.M. at 18-20. That night Clarke decided that he would not stay with the defendants; the conditions

were simply too terrible. Clarke was afraid of Bradley because he did not know what to expect from him; he was always mad about something and always cursing them. Tr., 8/20/03 P.M. at 23-26.

Clarke told O'Dell that he needed to travel to New Jersey to give his daughter some important papers, although he planned to go to the Bronx because he had friends there. Clarke asked O'Dell to pay him for his week's work. At first she refused, but afterwards agreed to pay him $100. Clarke learned for the first time that Bradley and O'Dell intended to deduct the cost of the airfare from his pay. Tr., 8/20/03 P.M. at 26-31. O'Dell took Clarke to the bus station and she purchased, from Clarke's wages, a round-trip ticket to New Jersey and told Clarke that she would pick him up Monday evening. After O'Dell left the bus station, Clarke changed his ticket and went to the Bronx. Clarke had his passport with him. Tr., 8/20/03 P.M. at 31-34.

When O'Dell went to pick Clarke up on Monday, he had not returned. Tr., 8/21/03 A.M. at 75. She called Clarke's wife in Jamaica and obtained the telephone number where he was staying in the Bronx. See Tr., 8/21/03 A.M. at 76. She called him there and threatened him. She was very angry and stated that if he did not come back, she would come to the Bronx and kick his ass. Tr., 8/20/03 P.M. at 40. She threatened to call the FBI and Immigration Service. Tr., 8/20/03 P.M. at 39-40. Wilson could hear O'Dell threaten Clarke. Tr., 8/21/03 A.M. at 77-78. Bradley stated loudly enough for Wilson to hear that he felt like getting his gun and going to New York to look for Clarke, then got into his vehicle and drove away. Tr., 8/21/03

A.M. at 78-79.[3]

After Clarke left, Bradley and O'Dell took Wilson's passport and return ticket. They did not tell Wilson why they did this, but he knew that it was so he would not flee as Clarke had done. When Wilson went to the bank to cash his pay check, he would be given the passport to use as identification. Tr., 8/21/03 A.M. at 81-82. After Clarke left, things became worse for Wilson. Bradley would sometimes get angry with him and push him down and would leave him in the parking lot, telling him that O'Dell would come to pick him up. Tr., 8/21/03 A.M. at 80. When Wilson seriously cut his finger while changing the chipper blades, he felt unable to ask Bradley that he be allowed to go to a doctor. Tr., 8/21/03 A.M. at 110-112 & 131-132.

2. 2000 - 2001: David Hutchinson and Andrew Flynn

Shortly after Wilson went back to Jamaica in October 2000, so did Bradley and O'Dell. They went to the opposite side of the island from where they had recruited Wilson and Clarke. Tr., 8/21/03 A.M. at 100 & 140-141. Bradley told the manager of the hotel where they were staying that they were recruiting workers. Bradley and O'Dell told him that they had hired some Jamaican workers the previous year, but "one [had] run away." Tr., 8/21/03 A.M. at 144-145. They were now interested in hiring workers from the other side of Jamaica, but did not explain why. Tr., 8/21/03 A.M. at 141-145. The defendants eventually hired David Hutchinson, Andrew Flynn,

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[3] Clarke returned to Jamaica that Thursday, June 1, 2000. Tr., 8/20/03 P.M. at 42; Tr., 8/21/03 A.M. at 27.

and Martin Sadler.

Hutchinson was a 35-year-old taxi driver with six children, the oldest of whom planned to attend college. He was unable to read much. Tr., 8/22/03 P.M. at 6, 10-12 & 89. Bradley told Hutchinson he would earn $11 per hour or more, and that the job would last six months. Tr., 8/22/03 P.M. at 17-20. Andrew Flynn was a 22-year-old taxi driver and was also a poor reader. Tr., 8/21/03 P.M. at 5-6 & 10-11. O'Dell told him the work was hard and that the pay would be between $11 and $15 per hour. See Tr., 8/21/03 P.M. at 13-16 & 123.[4] Bradley told Flynn that they would provide housing for the workers. Tr., 8/21/03 P.M. at 19-20.

After returning to the United States, in November 2000, Bradley hired an American worker named Wilfred Dukette, who had considerable experience. Tr., 8/26/03 P.M. at 10-11. He was initially paid between $11 and $12 per hour, and was given a $1 raise shortly thereafter. Tr., 8/26/03 P.M. at 12-13.[5] Bradley told Dukette that three Jamaican workers would be coming to work for Bradley Tree Service and that he had previously hired Jamaican workers, but one had taken off. Bradley told Dukette that they would keep the Jamaicans' passports and return tickets so that they could not take flight. Bradley also told Dukette that he would be paying the

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[4] At trial, Flynn initially testified that he was told he would be making "between 15 and 12" dollars per hour. Tr., 8/21/03 P.M. at 16. On cross-examination, he stated that he remembered being told he would make between $11 and $15 per hour. Tr., 8/21/03 P.M. at 123. As discussed above, Hutchinson remembered being told he would make $11 per hour or more.

[5] The American workers who worked for Bradley Tree Service in 2001 were all paid between $12 and $14 per hour. See Exh. 38.

Jamaicans $8 per hour and told Dukette not to tell them how much he was making. Tr., 8/26/03 P.M. at 14-16.

In preparation for the Jamaican workers' arrival, Dukette and another employee built an extension on Bradley's shed. The shed was 8 feet by 8 feet, and they built an additional 8' by 8' section out of plywood. Dukette later saw bunk beds in the shed, which he believed Bradley had built. The beds had a two-inch foam pad, which Dukette believed was from O'Dell's upholstering business. Tr., 8/26/03 P.M. at 16-19.

Bradley again applied to the New Hampshire Department of Labor to begin the process for getting the workers H2B visas. The job was described as "ground man/driver" because Bradley wanted them to drive the trucks and the wage was $8 per hour. Tr., 8/26/03 A.M. at 30-32. This wage was well below the prevailing wage for drivers, which was between $11.42 and $12.63 per hour. The Department of Labor sent a letter to Bradley explaining that an employee who drove would have to be paid more. Tr., 8/26/03 A.M. at 30-33. O'Dell returned the application, which was amended by crossing off the designation "driver," and the application was approved. Tr., 8/26/03 A.M. at 33 & 35.

O'Dell telephoned Flynn and told him to meet with Hutchinson, who she said would be "heading things." Flynn had his aunt help him fill out the job application and visa application that O'Dell sent him. Tr., 8/21/03 P.M. at 20-22 & 119. The third man who was to come to the United States was named Martin Sadler.

Bradley and O'Dell paid for the men's airfare to the United States. On April

17, 2001, Flynn, Hutchinson, and Sadler flew to Boston. Tr., 8/21/03 P.M. at 29- 30; Tr., 8/26/03 P.M. at 112. O'Dell met them at the airport, and she asked them to give her their passports, saying that Bradley had told her to take them. When Sadler and Hutchinson argued with her, she insisted. Tr., 8/21/03 P.M. at 29-31. When questioned about taking the passports, O'Dell explained to them that Bradley had previously brought two other workers, but one had run away. O'Dell told the men that Bradley would hire somebody in Jamaica to destroy that man. Tr., 8/22/03 P.M. at 34-35. Flynn understood this threat to be to kill him or destroy his property. Tr., 8/21/03 P.M. at 50. Hutchinson understood this threat to be that Bradley was going to hire someone to kill the man. Tr., 8/22/03 P.M. at 35. Both men took this threat seriously and were frightened by it. Flynn knew that in Jamaica someone could pay to have a person killed. Tr., 8/21/03 P.M. at 50-51. Hutchinson also understood that it took little to have someone killed in Jamaica, and in fact he had himself seen three or four murders. Tr., 8/22/03 P.M. at 36.

After arriving, the men learned that they would not be paid or accommodated as they had been promised. They were to stay in the shed. The shed had three beds: two were wooden bunks with a foam pad, but the third was just a foam pad on the floor. It had no running water or bathroom and was heated by a space heater plugged into the wall. Tr., 8/21/03 P.M. at 33-36. Bradley eventually took the space heater away and O'Dell gave the men electric blankets. Tr., 8/25/03 A.M. at 21. The shed had no insulation, there were open-studded walls, and the electrical outlets were not boxed in. Tr., 8/25/03 P.M. at 59.

At first the men used the bathroom in the house and showered there, but later they were not allowed to use the shower in the house. Tr., 8/21/03 P.M. at 54-55. To use the shower in the trailer, the men had to fill up a water tank, which had to be filled after each man took a shower. Tr., 8/21/03 P.M. at 142.

When Hutchinson complained that Flynn snored too loudly, O'Dell permitted Flynn and Sadler to move into the trailer. Tr., 8/21/03 P.M. at 53 & 56- 57. Tr., 8/21/03 P.M. at 61. O'Dell told the men that if anyone questioned them about living in the backyard, they were to say that they were just visiting. She had the men put up a fence in front of the trailer because she did not want anyone to see them. Tr., 8/21/03 P.M. at 57-58 & 61.

Bradley and O'Dell told them that they were to be paid only $8 per hour. Tr., 8/21/03 P.M. at 43; Tr., 8/22/03 P.M. at 54.[6] There was an argument over the money, and Bradley said that if they did not want that pay they could work to pay him back their airfare. Neither Flynn nor Hutchinson had money to pay for the airfare, which they were told was $1000. Tr., 8/22/03 P.M. at 55-56; Tr., 8/21/03 P.M. at 44 & 154. They also learned that they would each have to pay $50 per week in rent. Tr., 8/21/03 P.M. at 43 & 45.

The men found the work at Bradley Tree Service hard and stressful. The men would be in the truck parking yard by 7 a.m., but they would not be paid for

[6] In July, Bradley reduced Hutchinson's wages to $7 per hour. Tr., 8/25/03 A.M. at 69. Bradley and O'Dell created a document memorializing this, but never told Hutchinson. Tr., 8/25/03 A.M. at 69-70; Tr., 8/26/03 P.M. at 108; Exh. 54.

their time until they arrived at the job site. Tr., 8/21/03 P.M. at 66-67; Tr., 8/22/03 P.M. at 61. Hutchinson drove the chipper truck and Sadler drove the bucket truck. The men's job was basically the same as it had been for Clarke and Wilson: drag the limbs to the chipper and chip them, and rake up. Tr., 8/22/03 P.M. at 60.

Wilfred Dukette worked for Bradley Tree Service until June 2001, and he worked with the Jamaicans. Tr., 8/26/03 P.M. at 11 & 20-21. Martin Sadler began working directly with Bradley, while Flynn and Hutchinson worked with Dukette. Tr., 8/26/03 P.M. at 20-21. Dukette quit working for Bradley because he would not pay Dukette more and because Dukette questioned whether Bradley was paying him for all the hours he worked. Tr., 8/26/03 P.M. at 28.

Shortly before Dukette quit, Bradley hired another American, Aaron Martin, who had just finished his first year of college. Although Martin had almost no experience, Bradley agreed to pay him $12 per hour. Bradley told him that the Jamaican workers were paid only $8 per hour and asked him not to tell them how much he was paid. Tr., 8/26/03 P.M. at 47-52. Bradley later told Martin that he had previously brought up Jamaican workers but one had run away, so he was holding on to Flynn's, Hutchinson's, and Sadler's passports and return tickets. Tr., 8/26/03 P.M. at 55-56. Martin worked with the Jamaicans and did the same job. He quit after about six weeks. He found Bradley intimidating. Tr., 8/26/03 P.M. at 52-53 & 55-57.

Flynn stated that Bradley "definitely didn't treat us like human beings." Tr., 8/21/03 P.M. at 73. Bradley gave the men no respect when speaking to them and

cursed them, and he yelled at them all the time. Tr., 8/21/03 P.M. at 74; Tr., 8/25/03 A.M. at 73. Hutchinson was frightened by Bradley yelling right in his face. Tr., 8/22/03 P.M. at 66. Once Bradley asked Flynn to get something from the truck, and when he could not find it, Bradley pushed him out of the way and got it himself. Flynn was afraid of Bradley because O'Dell had told him he would pay someone to destroy a person. Tr., 8/21/03 P.M. at 75. Like Flynn, Hutchinson was afraid of Bradley because he did not know what he would do, and Hutchinson was unwilling to raise any of his concerns with Bradley. Tr., 8/22/03 P.M. at 64- 66.

Flynn was injured twice at work. A log that Bradley had cut hit Flynn on the head, knocking him to the ground. Later, Flynn asked O'Dell to take him to the hospital, but she refused. Flynn's head was swollen for two weeks, and it was painful. Another time, Flynn's finger was injured when a log he was loading on a truck landed on it. Again, he asked to go to the hospital, but the defendants refused. Tr., 8/21/03 P.M. at 75-78. One day when the Jamaicans were at the truck yard and Bradley had left, Hutchinson got so sick that Flynn and Sadler asked for help from the man next door, and he took Hutchinson to the hospital. He had a kidney stone and severe constipation, and he was given a prescription. Tr., 8/22/03 P.M. at 68-69. When O'Dell learned that Hutchinson had gone to the emergency room, she was angry, and told him that the emergency room costs a lot of money. Tr., 8/22/03 P.M. at 69-70.

Bradley treated Sadler better than he treated Flynn or Hutchinson, and gave

him more respect. Tr., 8/21/03 P.M. at 84 & 143-144. Both Flynn and Hutchinson came to distrust Sadler; he would tell Bradley and O'Dell things that Hutchinson and Flynn had told him. Tr., 8/22/03 P.M. at 72-74; Tr., 8/21/03 P.M. at 84-85.

The defendants also significantly restricted the men's freedom of movement. Most significantly, they held the men's passports and return tickets. O'Dell would give them their passports at the bank for identification, when she would take them to cash their checks. But she took the passports back after they had cashed their checks. Tr., 8/22/03 P.M. at 82-85.

O'Dell told the men that they had to tell her before they left and when they returned. Tr., 8/21/03 P.M. at 64; Tr., 8/22/03 P.M. at 77-78. The men used Bradley and O'Dell's bicycles to get around, and they would ride to Hudson to shop. Hudson was about an hour away by bicycle and eight minutes away by car. Tr., 8/21/03 P.M. at 63-65; Tr., 8/25/03 A.M. at 152. The men were not always allowed to use the bicycles and once Bradley took away Hutchinson's bicycle because he complained that they were leaving every evening. Tr., 8/21/03 P.M. at 65-66; Tr., 8/22/03 P.M. at 75. Also, O'Dell sometimes would take them shopping and sometimes they would take a cab. Tr., 8/21/03 P.M. at 66.

In Hudson, Hutchinson and Flynn met a Jamaican woman named Jackie and they would go to church with her. Tr., 8/21/03 P.M. at 72-73. Bradley did not like them going to the church and would question them about where they went. Tr., 8/21/03 P.M. at 73.

Flynn's father, Owen Flynn, lived in Hartford, Connecticut. His father had left Jamaica when Flynn was a baby, and Flynn had not seen him in eight years. Tr., 8/21/03 P.M. at 52; 8/26/03 A.M. at 76. When Flynn asked permission to visit his father, Bradley refused. Tr., 8/21/03 P.M. at 81. Owen Flynn called to talk with O'Dell about this, and she told him that a prior Jamaican worker had run away, so she and Bradley did not allow their workers to go anywhere. Owen Flynn arranged with O'Dell to come to Litchfield to visit his son. Tr., 8/26/03 A.M. at 78-79. While Flynn's father was there, Hutchinson was still sick after visiting the emergency room because he had not yet gotten his prescription filled. Owen Flynn took the men into town and Hutchinson got his prescription filled. Tr., 8/26/03 A.M. at 87-88; Tr., 8/25/03 A.M. at 81.

The men told him that O'Dell had taken their passports. He advised the men not to travel too far without their passports, telling them that if the police picked them up, they would be in trouble. Flynn and Hutchinson asked Owen Flynn to talk with O'Dell about letting them return to Jamaica if Owen Flynn purchased their airline tickets. Tr., 8/26/03 A.M. at 90-91.

The next day, Owen Flynn called O'Dell and complained of the men's poor living conditions, and O'Dell angrily cursed him. When Owen Flynn offered to purchase tickets for the men to return to Jamaica, O'Dell told him that they had brought the men up from Jamaica and they had to work to pay off the airfare; they could not return until the work was finished. O'Dell told Owen Flynn to mind his

own business and that if he did not like it, he could come to New Hampshire and fight her, and told him that in New Hampshire one did not need a gun license. Tr., 8/26/03 A.M. at 91-92.

When Owen Flynn later discussed the situation with his son, he told his son that he did not think it was a police matter. Owen Flynn did, however, try to contact national media figures about the men's situation, but got no response. Tr., 8/26/03 A.M. at 92-93.

While playing soccer with the workers on a nearby farm, Hutchinson and Flynn met Heather Portillo, who was Bradley and O'Dell's neighbor. Tr., 8/21/03 P.M. at 88; Tr., 8/25/03 A.M. at 151. They discussed with Portillo how Bradley and O'Dell treated them. Tr., 8/21/03 P.M. at 88-89; Tr., 8/25/03 P.M. at 3-4. Portillo called the New Hampshire Department of Labor to report what she had heard. Tr., 8/25/03 P.M. at 4.

On September 20, 2001, at about 8:00 p.m., in response to an anonymous tip, two Litchfield Police Officers came to investigate the treatment of the Jamaicans. Tr., 8/25/03 P.M. at 16-17 & 63. Lieutenant Gaudette, who did the detective work for the department, asked Officers Joseph O'Brion and Paul Paquette to investigate and report the next day. Tr., 8/25/03 P.M. at 17. O'Brion interviewed the Jamaicans and Paquette spoke with O'Dell and Bradley. Tr., 8/25/03 P.M. at 21-22 & 64-66. All three men told O'Brion that O'Dell had taken their visas when they had arrived. Tr., 8/25/03 P.M. at 22, 24-25 & 28. At the time, O'Brion was unaware of the

federal laws regarding document servitude or forced labor. Tr., 8/25/03 P.M. at 18. Flynn and Hutchinson complained about their treatment and about their lack of medical care. Tr., 8/25/03 P.M. at 22 & 24- 25. O'Brion looked at Flynn's injured finger and thought that it looked deformed. Tr., 8/25/03 P.M. at 24-25; see also Exh. 2 (photograph of finger). Officer O'Brion did not ask about the men's housing conditions or whether they were being forced to work. Tr., 8/25/03 P.M. at 23, 27-29.

O'Dell told Officer Paquette that she and Bradley recruited the men in Jamaica and paid for their airfare, and told him that the Jamaicans had valid passports and visas, which she could show him. When asked if the men would be allowed to go home if they wanted, O'Dell stated that they would have to pay their own airfare if they returned early. Tr., 8/25/03 P.M. at 64-67.

The officers left after conducting the interviews, and Flynn and Hutchinson went back to the trailer. O'Dell came out and told Flynn and Hutchinson that Bradley wanted to speak to them in the house. Flynn agreed to go, but Hutchinson refused. O'Dell told Hutchinson that he did not want Bradley to come out and get him. Flynn and Hutchinson went into the house, and Sadler was already there. Bradley and O'Dell told them to sit down, and when Hutchinson refused, Bradley grabbed him by his neck and shoved him into a chair. Tr., 8/21/03 P.M. at 92-93; Tr., 8/22/03 P.M. at 96-99. The men told Bradley that they did not know who had called the police. O'Dell asked Flynn for Jackie's telephone number and he told her he did

not have it. O'Dell insisted that he did, and said that Jackie had called the police. She took Flynn to the trailer and demanded over and over that he give her the number. Tr., 8/21/03 P.M. at 94-95; Tr., 8/22/03 P.M. at 99-100. When Flynn stated that he did not have it, O'Dell told him that if he wanted the things that he had bought to take home, he had to give her the telephone number. When she turned to reach for something, Flynn ran out because he was scared. He heard something smash behind him — he thought it was his television — and he ran toward Heather Portillo's house. Tr., 8/21/03 P.M. at 95-97. When Portillo came to the door, Flynn told her what had happened, and she told him to get into her car. Tr., 8/21/03 P.M. at 99-100.

After Flynn and O'Dell went to the trailer, Bradley kept demanding to know who had called the police, and Hutchinson continued to deny that he had. Bradley told Hutchinson to shut up and they argued. Tr., 8/22/03 P.M. at 100-102. Bradley grabbed Hutchinson by the neck and began strangling him. Tr., 8/22/03 P.M. at 102. O'Dell then came into the house and said that Flynn had run away. She hit Hutchinson with her fist. Tr., 8/22/03 P.M. at 104. He shoved O'Dell and Bradley away and ran out. Bradley pushed him down when he got to the patio, and when Hutchinson was able to get outside, Bradley tripped him then began kicking him while he was on the ground. Bradley told his dog, Kita, to get Hutchinson, and Kita bit Hutchinson on the foot and side. Tr., 8/22/03 P.M. at 104-105.

Hutchinson ran to the shed and grabbed a bag containing the money that he had saved. Tr., 8/22/03 P.M. at 106 & 121-122; Tr., 8/25/03 A.M. at 113-114. With

Kita chasing after him, Hutchinson ran to Portillo's house. Tr., 8/22/03 P.M. at 106-107. He saw that Flynn was there and got in the car with him. Tr., 8/22/03 P.M. at 107.

Portillo took them to the police station. Tr., 8/21/03 P.M. at 101-102; Tr., 8/22/03 P.M. at 107-108. Officers O'Brion and Paquette took the men's photographs and statements. Tr., 8/25/03 P.M. at 30-31 & 76-83; Exh. 1 & 3 (photographs showing Hutchinson's injuries). Flynn called his father in Hartford and told him what had happened. Tr., 8/25/03 P.M. at 84; Tr., 8/26/03 A.M. at 94. After receiving the call from his son, Owen Flynn called O'Dell. She told Owen Flynn that he should tell his son that they would do to him what they did to the other guys in Jamaica. Tr., 8/26/03 A.M. at 95-96.

Bradley and O'Dell also came to the station, and Officer Paquette took their statements. Tr., 8/25/03 P.M. at 32 & 84. O'Dell told Paquette that the men's passports were in a safety deposit at the bank and that she could retrieve them the next day. Bradley told Officer Paquette that if the men had their passports they could leave at any time and he would never see them again. Tr., 8/25/03 P.M. at 86.

Because of concerns for their safety, Officer O'Brion decided that Hutchinson and Flynn could not return to Bradley and O'Dell's house. O'Brion and Paquette took them to the house to collect the men's belongings, but most of Flynn's and Hutchinson's belongings were missing. Tr., 8/25/03 P.M. at 31-32; Tr., 8/22/03 P.M. at 116; Tr., 8/21/03 P.M. at 104. When Officer O'Brion learned that

Hutchinson was living in the shed, he looked inside it. He got a camera and photographed the conditions he saw, which he thought were "deplorable." Tr., 8/25/03 P.M. at 33-38; Exh. 4A through 8B (photographs). The officers took the men to a shelter. Tr., 8/25/03 P.M. at 40.

SUMMARY OF THE ARGUMENT

1. The defendants' challenges on appeal to the district court's jury instructions regarding 18 U.S.C. 1589 were not raised prior to the jury retiring to deliberate and, therefore, are reviewed only for plain error. The instructions were not plainly erroneous. Viewed in their entirety, the instructions correctly stated the law and were not misleading or confusing.

2. The district court did not abuse its discretion in admitting evidence regarding the mistreatment of Wilson and Clarke. The evidence was admissible under Federal Rule of Evidence 401 because it was relevant to proving the defendants committed wire fraud and under Federal Rule of Evidence 404(b) as to the other counts because it was relevant to show the defendants' plan, motive, and pattern of action. Moreover, the district court did not abuse its discretion in concluding that the probative value of the evidence was not significantly outweighed by any unfair prejudice.

3. The defendants' arguments regarding U.S.S.G. 2H4.1 are without merit. The enhancements under 2H4.1(b)(3) and (b)(4) apply to the defendants' convictions for forced labor under 18 U.S.C. 1589, even though the language of those

enhancements do not specifically include the words "forced labor." The terms "peonage or involuntary servitude" in those enhancements clearly include violations of Section 1589.

ARGUMENT

I

THE DISTRICT COURT'S JURY INSTRUCTIONS REGARDING SECTION 1589 WERE NOT PLAIN ERROR, NOR DID THEY MISLEAD THE JURY OR MISSTATE THE LAW

A. Standard of Review

Preserved challenges to a jury instruction are reviewed for an abuse of discretion, unless they involve the interpretation of a statutory element of the offense, in which case they are reviewed *de novo*. *United States* v. *Figueroa-Encarnacion*, 343 F.3d 23, 29 (1st Cir. 2003), cert. denied, 124 S.Ct. 1130 (2004). The Court "review[s] the challenged jury instructions against the backdrop of the entire charge, focusing [its] inquiry on whether the instructions adequately explained the law or whether they tended to confuse or mislead the jury on the controlling issues." *United States* v. *Alzanki*, 54 F.3d 994, 1001 (1st Cir. 1995) (citations and internal quotation marks omitted), cert. denied, 516 U.S. 1111 (1996).

Where the defendant does not raise a "relevant objection to the jury instruction," the alleged error is reviewed only for plain error. *United States* v. *Colon Osorio*, 360 F.3d 48, 52 (1st Cir. 2004). To avoid plain error review, the defendant "must inform the court of the specific objection and the grounds for the objection

before the jury retires to deliberate." Fed. R. Crim. P. 30(d). The plain error standard requires that the error be both plain and affect the defendant's substantial rights. Fed. R. Crim. P. 52(b). To affect a defendant's substantial rights, the error "must have affected the outcome of the district court proceedings." *United States* v. *Olano*, 507 U.S. 725, 734 (1993). The defendant bears the burden of proof to show this prejudice. *Ibid.*

B. The Defendants' Arguments Regarding The Forced Labor Jury Instruction Were Not Raised Below And Are Without Merit.

Section 1589 was enacted in October 2000 as part of the comprehensive Trafficking Victims Protection Act of 2000 (TVPA), Pub. L.106-386, 114 Stat . 1464. In enacting the TVPA, Congress sought to remedy the inadequacies of existing law to combat the growing international problem of trafficking in human beings. See 22 U.S.C. 7101(a) & (b) (Congressional purposes and findings). In particular, Congress was aware of the limiting effects of the Supreme Court's interpretation of 18 U.S.C. 1584. See 22 U.S.C. 7101(b)(13) & (b)(14) (discussing *United States* v. *Kozminski*, 487 U.S. 931 (1988) (narrowly interpreting Section 1584), the effect of that decision, and the inadequacies of then-current law).

Section 1584 prohibits holding another person "to involuntary servitude." In *Kozminski*, 487 U.S. at 952, the Supreme Court interpreted the term "involuntary servitude" in Section 1584 to be limited to service compelled "by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." The Court was concerned that broad, "amorphous definitions" of

involuntary servitude would not provide fair notice to potential defendants or prevent arbitrary and selective enforcement. *Id*. at 951-952. The Court noted, however, that its limiting interpretation of Section 1584 was only applicable "[a]bsent change by Congress." *Id*. at 952.

In 1999 and 2000, Congress held hearings on the problems of human trafficking and efforts to contain it.[7] After reviewing the more than a decade's experience with prosecutions after *Kozminski,* Congress recognized that prohibiting only service compelled "through use or threatened use of physical or legal coercion * * * exclude[d] other conduct that can have the same purpose and effect." 22 U.S.C. 7101(b)(13). It enacted Section 1589 and related provisions to set out with greater specificity the "type of coercive activities" that are to be punished as crimes.

Section 1589 prohibits "knowingly provid[ing] or obtain[ing] the labor or services of a person" through any of three prohibited means:

> (1) by threats of serious harm to, or physical restraint against, that person or another person;
>
> (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or

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[7] See *Trafficking Of Women and Children In The International Sex Trade: Hearing Before The Subcomm. On International Operations and Human Rights Of The House Comm. On International Relations*, 106th Cong. (Sept. 14, 1999); *International Trafficking In Women and Children: Hearings Before The Subcomm. On Near Eastern And South Asian Affairs Of The Senate Comm. On Foreign Relations*, 106th Cong. (Feb. 22 & Apr. 4, 2000); *Battered Immigrant Women Protection Act of 1999: Hearing Before The Subcomm. On Immigration And Claims Of The House Comm. On The Judiciary*, 106th Cong. (July 20, 2000).

(3) by means of the abuse or threatened abuse of law or the legal process[.]

In this case, the defendants were charged with violating Section 1589 through the first and second means, that is, by threats of serious harm or physical restraint or by a scheme intended to cause the belief such harm or physical restraint would occur. See JA at 5-6 (Indictment, Counts 2 & 3). Thus, the government was required to prove the following three elements:

(1) The defendants "obtained" the labor or services of the victims.

(2) They did so through one or more of the prohibited means — (a) threats of serious harm or physical restraint; or (b) a scheme, plan, or pattern intended to cause the victim to believe that if he did not perform the services he would suffer serious harm or physical restraint.

And (3) the defendants acted knowingly. See Add. at 80 (district court instruction on elements).

The defendants now challenge the jury instructions in four respects. They argue that the district court erred in its instructions on (1) serious harm, (2) the victims' special vulnerabilities, and (3) opportunity to flee, and in failing to instruct the jury on (4) the legitimate means used to induce the victims to provide their services. These objections, however, were not timely raised in the district court. Although the defendants argue that "[t]rial counsel properly objected to the Court's forced labor instruction," see Appellants' Br. at 19 n.12, this is incorrect. At trial, counsel asserted that their proffered instructions should be given rather than the

Court's instruction. Tr., 8/28/03 P.M. at 138; R. 28 (proposed jury instructions). While the proffered jury instructions did raise specific objections to the instructions actually given, the defendants are *not* pursuing those objections on appeal; thus, these objections are abandoned. Rather, the defendants assert new objections that were not specifically made below; as a result, these objections are reviewed only for plain error. See *Colon Osorio*, 360 F.3d at 52.

Much of the defendants' arguments are based on the premise that jury instructions in a Section 1589 prosecution must be identical or nearly identical to those in a Section 1584 prosecution. While many of the same legal principles would apply to both sections, there are significant differences between them. This is particularly true, as discussed above, in the differences between the types of coercion that would be sufficient to support a conviction under them. The instructions that the district court gave in this case accurately stated the law regarding Section 1589 and they were not confusing or misleading. The defendants' arguments to the contrary, which were not preserved below, do not demonstrate any error, let alone plain error.

1. The District Court's Instruction Regarding Serious Harm Was Not Erroneous

As stated above, Section 1589 is violated when a defendant obtains a victim's labor through threats of "serious harm" or through a scheme that causes a victim to believe that serious harm will result. On appeal, the defendants argue that the district court's instruction regarding serious harm was erroneous. The defendants' specific objections on appeal were not raised below, so they are reviewed only for plain error.

Appellants contend that the serious harm instruction was too broad. They argue that the term "any consequences" in the instruction permitted the jury to convict "based upon the inference that Hutchinson and Flynn continued working simply to avoid the consequence of not getting paid or not saving enough money or having to pay for their own return airfare to Jamaica." Appellants' Br. at 21. This is plainly incorrect.

The district court instructed the jury regarding "serious harm" as follows:

> The term "serious harm" includes both physical and non-physical types of harm. Therefore, a threat of serious harm includes any threats — includes threats of any consequences, whether physical or non-physical, that are sufficient under all the surrounding circumstances to compel or coerce a reasonable person in the same situation to provide or to continue providing labor or services.

Add. at 81. It is clear from this text that the term "any consequences" is significantly restricted by the phrase "sufficient under all the surrounding circumstances to compel or coerce a reasonable person in the same situation" to provide his services. Looking at the "entire charge," as the Court must, *Alzinki*, 54 F.3d at 1001, the instructions permitted conviction *only* where the jury concluded that the harm threatened was sufficiently serious that a reasonable person would have been compelled to serve the employer and that Flynn's or Hutchinson's wills had been overcome. This is entirely consistent with section 1589.

Moreover, this instruction mirrors Congress's own understanding of the term. The Conference Report, in explaining the provisions agreed upon by the conferees and ultimately enacted, states:

> The term "serious harm" as used in this Act refers to a broad array of harms, including both physical and nonphysical, and section 1589's terms and provisions are intended to be construed with respect to the individual circumstances of victims that are relevant in determining whether a particular type or certain degree of harm or coercion is sufficient to maintain or obtain a victim's labor or services, including the age and background of the victims.

H.R. Conf. Rep. No. 939, 106th Cong., 2d Sess. 101.

This Court need not engage in a hypothetical discussion of the outer limits of the serious harms that might be sufficient under Section 1589. The defendants did not raise this objection in the district court, and the threats that the defendants made to Flynn and Hutchinson were extremely serious. Flynn and Hutchinson were made to believe that Bradley was going to pay someone to have a former worker "destroyed" for running away and returning to Jamaica. The record is replete with evidence that both Flynn and Hutchinson were fearful of what Bradley might do to them. Viewed in the context of the entire charge, the serious harm instruction was not erroneous. In light of the record evidence, it did not affect the defendants' substantial rights.[8]

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[8] Defendants offered the following definition of "serious harm" in the district court:

> A threat of serious harm means just that: a threat to harm someone in a serious and significant way. It is a threat that involves a substantial risk to death, extreme physical pain, protracted and obvious disfigurement, or the protracted loss or impairment of the function of a bodily member, organ or mental faculty[.]

R. 28 at 3-4. This definition is clearly incorrect. The term "serious harm" in Section 1589 is plainly broader than "physical injury." Indeed, this definition would have

(continued...)

2. *The District Court's Instructions Regarding The Victims' Special Vulnerabilities Were Not Erroneous*

The Defendants argue that the district court's instruction regarding the jury's consideration of Flynn's and Hutchinson's "special vulnerabilities" was improperly "subjective." See Appellants' Br. at 22. Again, the defendants failed to timely raise this specific objection in the district court and the court's instructions are to be reviewed only for plain error. There was no error here, plain or otherwise, and the Defendants misapprehend the law.

The district court's instruction clearly informed the jury for both Flynn and Hutchinson that each believed that he had no choice but to work and that such belief was reasonable: "If you find that any one or more of the prohibited means mentioned earlier were used, you must then determine whether such use was sufficient to cause Mr. Hutchinson or Mr. Flynn *reasonably to believe* that he had no choice but to work or to remain working for Bradley Tree Service." Add. at 82 (emphasis added). The instruction stated, among other things, that the jury could "consider and weigh whether or not Mr. Hutchinson and Mr. Flynn were vulnerable in some way so that the actions of the defendant, even if not sufficient to compel another person to work, were enough to compel Mr. Hutchinson and Mr. Flynn to work." Add. at 83. The

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[8](...continued)
been too narrow *even if* offered to define "physical injury" for purposes of Section 1584. Cf. *Alzanki*, 54 F.3d at 1004 (evidence of physical violence included "throwing [the victim] bodily against the wall"). Necessarily then it must too restrictive to define "serious harm" under Section 1589, and the district court did not err in rejecting it.

Defendants argue that this instruction "roots the jury on a subjective level based solely from the perspective of Hutchinson and Flynn." Appellants' Br. at 24. That is not so. As quoted above, the court's instruction in fact contained an objective element.

Moreover, the defendants' suggestion that there is anything improper with requiring the jury to make a determination of the victims' subjective state of mind is simply incorrect. Section 1589, like Section 1584, necessarily includes both a subjective and an objective element. That is, the jury must conclude both that the victims were compelled to work and that their beliefs were reasonable. The necessity of finding that the victims *themselves* were compelled to work is clear from the text of Section 1589 itself. Regardless of what a reasonable person in the circumstances would have been compelled to do, if the victim was not himself actually coerced by the prohibited means, then the defendant cannot be said to have "obtain[ed]" his services "through" those means. See 18 U.S.C. 1589.

Therefore, to prove a defendant guilty under Section 1589, the government must prove a causal connection between the defendant's coercion and the victim's reasonable belief that he was compelled to provide the services. It is in this context that the victims' vulnerabilities are relevant. In *Kozminski*, the Court held that under Section 1584, "the vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve." 487 U.S. at 952.

In *Alzanki*, this Court rejected a similar argument in the Section 1584 context.

The defendant argued that the jury instruction regarding the victim's special vulnerabilities permitted the jury to conclude that unreasonable fears would have been sufficient to establish involuntary servitude. 54 F.3d at 1001-1002. The Court concluded that "[i]t was entirely proper to instruct the jury to consider [the victim's] background and experience in assessing whether her fears were reasonable." *Id.* at 1002. The instruction here, as in *Alzanki*, permitted the jury to assess the evidence of the victim's special vulnerabilities as part of its determination of whether "[the victim's] belief — that she had no other choice — was reasonable." *Ibid*. (emphasis omitted). For example, the jury was entitled to consider Flynn's and Hutchinson's knowledge of the ease with which a murderer could be hired in Jamaica to assess whether their belief that Bradley could pay someone to "destroy" the worker who had escaped was reasonable.

The district court's instruction was, therefore, not erroneous.

3. The District Court's Instruction Regarding The Opportunity To Flee Was Not Erroneous

The defendants similarly argue that the district court's instruction regarding the opportunity to flee was erroneous because it was overly subjective. Appellants' Br. at 26. This objection was not specifically made below and therefore is only reviewed for plain error.

The district court instructed the jury that:

> The government also need not prove physical restraint; such as, the use of chains, barbed wire, or locked doors, in order to establish the offense of forced labor. The fact that Mr. Hutchinson or Mr. Flynn may have had an opportunity to flee is not determinative of the question of forced

> labor if either or both of the defendants placed Mr. Hutchinson or Mr. Flynn in such fear or circumstances that he did not reasonably believe he could leave.

Add. at 83-84. Clearly this instruction does include an objective requirement because the jury was required to find that Flynn and Hutchinson "*reasonably* believe[d]" that they could not leave.

The defendants contend that the district court should have proffered the Eleventh Circuit Model instruction for section 1584. However, contrary to defendants' contentions, that instruction and the one given by the district court are substantially similar.

The defendants' quotation of the Eleventh Circuit's instruction is incomplete and does not give the full context of the quoted language. That instruction states:

> However, it is necessary to prove that the Defendant knowingly and willfully used or threatened to use coercion, causing the victim to reasonably believe that there was no way to avoid continued service. In deciding whether a particular person reasonably believed that there was no way to avoid continued service, you should consider the method or form of the coercion threatened or used in relation to the person's particular station in life, the person's physical and mental condition, age, education, training, experience and intelligence; and also any reasonable means the person may have had to escape. Servitude cannot be "involuntary" under the law unless the coercion threatened or used was sufficient in kind or degree to completely overcome the will of an ordinary person having the same general station in life as that of the alleged victim, causing a belief that there was no reasonable means of escape and no choice except to remain in the Defendant's service.

11th Cir. Model Instr. § 59 (18 U.S.C. 1581 & 1584). This instruction, therefore, like the one given by the district court, recognizes the objective and subjective elements the government is required to prove. First, the instruction requires the jury to find

that "the victim," "a particular person," or "the alleged victim" believed that he had no way to avoid the service or that there was no means of escape, which is necessarily a subjective finding. Second, the instruction requires that the victim's subjective beliefs be "reasonable," which is necessarily an objective finding. Further, although the model instruction refers to "the victim" whereas the district court's instruction specified the particular persons who might have had the reasonable belief, this is a distinction without a difference.

Moreover, the defendants are simply wrong when they argue that opportunity to flee "*is* determinative." Appellants' Br. at 26. In fact, "[t]he government need not prove physical restraint." *Alzanki*, 54 F.3d at 1000 (Section 1584); see also *United States* v. *Bibbs*, 564 F.2d 1165, 1168 (5th Cir. 1977) (involuntary servitude under Section 1584 shown "if the defendant has placed [the victim] in such fear of physical harm that the victim is afraid to leave, regardless of the victim's opportunities for escape"), cert. denied, 435 U.S. 1007 (1978); *United States* v. *Warren*, 772 F.2d 827, 834 (11th Cir. 1985) (in Section 1584 prosecution "opportunity to escape is of no moment, if the defendant has placed him in such fear of physical harm that he is afraid to leave") (citing *Bibbs*), cert. denied, 475 U.S. 1022 (1986); *United States* v. *Booker*, 655 F.2d 562, 567 (4th Cir. 1981) (in prosecution under 18 U.S.C. 1583 for holding another as a slave, "[t]he availability of escape * * * does not preclude a finding that persons are held as slaves").

The district court thus did not plainly err by instructing the jury that although Flynn and Hutchinson had opportunities to flee, their labor could still have been

coerced if the defendants had created such circumstances that they *reasonably* believed they could not leave without risking serious harm.

4. The District Court's Instruction Regarding Consideration Of All The Relevant Facts And Circumstances Was Not Erroneous

The defendants also argue that the district court should have given an instruction substantially similar to one given in *Kozminski* regarding the facts and circumstances that the jury had to take into consideration when determining whether the victims had been compelled to work. Appellants' Br. at 30-31. The instruction that the defendants proffer on appeal directs the jury, in three paragraphs, that it must find that the coercion was a necessary cause of the victims' serving the defendants and that it must evaluate all of the factors affecting the decision to serve, including any "legitimate means" used to induce that service. See Appellants' Br. at 30-31.[9] This instruction was not proffered in the district court, and so the defendants' objection is reviewed only for plain error.

Again, the district court gave a substantially similar instruction to the jury, although it was shorter. The court instructed the jury that it had to "consider all of the facts and circumstances as you find them to have been at the relevant time in question" and that the jury had to determine if the defendants' actions overcame Flynn's or Hutchinson's will and forced them to work. Add. at 84-85. Again,

[9] It should be noted that although the instruction was included in the appendix to the Court's opinion, the Court in *Kozminski* did not discuss this specific instruction. It cannot therefore be viewed as one "approved" by the Supreme Court.

even if the instruction from the appendix in *Kozminski* might somehow have been "better" than the substantially similarly one given by the district court — a proposition that the government strongly rejects and which the defendants have not shown — the defendants have wholly failed to demonstrate how the differences in the instructions could have altered the outcome in the district court. They have thus failed to show that the instruction amounted to plain error.[10]

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING TESTIMONY REGARDING THE DEFENDANTS' MISTREATMENT OF CLARKE AND WILSON

A. Introduction And Standard Of Review

The government moved in limine for the admission of testimony regarding the Defendants' mistreatment of Clarke and Wilson. (R. 20.) The district court ruled that the evidence was relevant and therefore admissible under Fed. R. Evid. 401 as to the wire fraud charges involving Clarke and Wilson, which were Counts 10 to

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[10] Similarly, the defendants assert that the district court's instruction regarding the payment of wages was inferior to the one given in *Kozminski*. Appellants' Br. at 28-29. This argument was not raised below. Because the defendants can only argue that the correctness of the instruction given is "open to doubt," necessarily they have conceded that it was not plainly erroneous. Moreover, they cannot show that the instruction they proffer on appeal would have altered the outcome in the district court. There is no meaningful difference between the district court's instruction here, that payment of wages "is not determinative" of the issue of forced labor, see Add. at 83, and the key sentence in the instruction the defendants now proffer. See Appellants Br. at 28 (quoting *Kozminski*, 487 U.S. at 973 (appendix) ("the fact that the alleged victims were paid or were given other benefits does not necessarily mean that they were not held in involuntary servitude")).

14. The court further ruled that the evidence was admissible under Federal Rule of Evidence 404(b) to show the defendants' motive, plan, or pattern for the forced labor and related charges involving Hutchinson and Flynn, which were Counts 1 to 9, as well as for the wire fraud counts involving Hutchinson and Flynn, which were Counts 15-20, and was not excludable under Federal Rule of Evidence 403 because its probative value was not substantially outweighed by any unfair prejudice.

"[A] trial court enjoys considerable discretion in connection with the admission or exclusion of evidence, and * * * its rulings in that regard are reviewed only for abuse of that discretion." *Udemba* v. *Nicoli*, 237 F.3d 8, 14 (1st Cir. 2001).

B. The District Court Did Not Abuse Its Discretion In Ruling The Testimony Relevant To The Clarke And Wilson Wire Fraud Counts

The defendants argue that the treatment of Clarke and Wilson was not relevant to the wire fraud counts relating to them because the fraudulent scheme charged was to obtain their services through false promises of being paid $15-$20 per hour. They argue that the only facts relevant to this charge are the promise to pay the higher amount and the paying of the lesser amount. Appellants Br. at 35. The Defendants view relevance under the Federal Rules far too narrowly. Rule 401 provides that "'[r]elevant evidence' means evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence," (emphasis added). Thus, "[t]he threshold for relevance is very low under Rule 401." *United States* v. *Ford*, 22 F.3d 374, 381 (1st Cir.) (internal quotation marks omitted), cert. denied, 513 U.S. 900

(1994).

The indictment charged the defendants with fraudulently obtaining Clarke's and Wilson's labor services. In addition to promising the men high wages, the defendants also promised them that they would live in a house, but instead required them to live in a camping trailer. The defendants did this to increase their profits and it is thus inextricably tied up in the scheme to defraud the men. Also the promise of good housing was part of the inducement to get the men to come to New Hampshire and was thus a part of the defendants' fraudulent scheme.

Moreover, the evidence of the mistreatment and intimidation of the men, especially the threat made to Wilson after Clarke escaped, demonstrated the defendants' scheme to dominate them and prevent them from leaving or protesting their substantially lower wages. This was also demonstrated by the evidence of the control they exercised over Wilson after Clarke escaped, including restricting his travel, denying him medical attention, and confiscating his passport. The defendants' argument ignores this crucial element of the defendants' scheme: unless the defendants were able to dominate and control the men, they would not have been able to obtain their services. This was clearly shown when, because of their more lax initial control, Clarke was able to escape.

In short, this evidence was clearly relevant to the wire fraud charges and the district court did not abuse its discretion in admitting it.

C. The District Court Did Not Abuse Its Discretion Under Rules 404(b) and 403

In addition to ruling that the testimony regarding the defendants' treatment of Clarke and Wilson was admissible as to the wire fraud counts involving them, the district court also ruled that the testimony was admissible as to all other counts for limited purposes under Rule 404(b). That Rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, [or] knowledge[.]

Fed. R. Evid. 404(b). The district court ruled and instructed the jury that the testimony was admissible for the limited purposes of showing the defendants' motive, plan, or pattern of action. See Tr., 8/21/03 A.M. at 3-4; Tr., 8/21/03 A.M. at 135-136; Tr., 8/22/03 A.M. at 3-4; Tr., 8/28/03 A.M. at 98.

The admissibility of other acts evidence is assessed under a two-prong analysis: First, the evidence must be "specially probative of an issue in the case * * * without including bad character or propensity as a necessary link in the inferential chain." *United States* v. *Van Horn*, 277 F.3d 48, 56-57 (1st Cir. 2002) (internal quotation marks omitted). This Court assesses the probative value of the evidence "in light of the remoteness in time * * * and the degree of similarity to the crime charged." *Id*. at 57. Second, the evidence must be able to satisfy the balancing test under Rule 403, that is, its probative value must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *Ibid*.

Both prongs were clearly satisfied here. First, the defendants' treatment of

Clarke and Wilson was strikingly similar to and close in time to their treatment of Hutchinson and Flynn. The defendants recruited both pairs of men with similar promises of high wages, then forced them to live in the same poor conditions, and similarly denied them medical treatment. After Clarke escaped, the defendants threatened him in Wilson's presence, confiscated Wilson's passport and return ticket, and restricted his freedom of movement, including denying him the right to visit his very close friend Barry Perkins unaccompanied, see Tr., 8/21/03 A.M. at 94-98. Likewise the defendants confiscated Flynn's and Hutchinson's passports, threatened to "destroy" the prior worker who had escaped, and restricted their freedom of movement, including not permitting Flynn to visit his father. And the defendants themselves linked their subsequent conduct with Flynn and Hutchinson to their prior experience with Clarke: they told Flynn and Hutchinson, as they told several others, that they were taking their passports because a prior worker had run away. Indeed, Bradley told Officer Paquette that if he permitted the men to have their passports they could leave whenever they wanted. This evidence was thus "specially relevant" to show the defendants' motive and plan fraudulently to obtain Flynn's and Hutchinson's labor and to force them to work. The evidence is relevant to the defendants' conduct itself rather than any bad character or propensity shown by the conduct. That is, the defendants' plans and motive regarding their conduct toward Flynn and Hutchinson was informed by their experience with Clarke and Wilson. See *United States* v. *Frankhauser*, 80 F.3d 641, 648-649 (1st Cir. 1996) (government's proffered theory of relevance does not include propensity or bad

character as part of the inferential chain).

The defendants argue that the testimony's probative value was substantially outweighed by its potential for unfair prejudice and thus should not have been admitted under the second prong of the Rule 404(b) analysis, which is the application of the Rule 403 balancing test. The district court disagreed, and its decision is owed special deference from this Court. As this Court has said, "[o]nly rarely – and in extraordinarily compelling circumstances – will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect." *Freeman* v. *Package Mach. Co.*, 865 F.2d 1331, 1340 (1st Cir. 1988); see also *United States* v. *Currier*, 821 F.2d 52, 55 (1st Cir. 1987) ("we will interpose our judgment only if a complaining party can demonstrate that the district court's ruling did not fall within the ambit of reasonable debate").

On appeal, the defendants argue that the government "intentionally introduced racially and emotionally charged impermissible evidence" to show that the defendants' abuse was directed against "black immigrant workers, treating them as slaves." Appellants' Br. at 45-46. This claim is utterly meritless. First, and most importantly, this argument completely ignores the fact that it was the *defendants' themselves* who chose to recruit these particular victims. Furthermore, the jury heard evidence that Bradley also mistreated Dukette and Martin, the two American workers. Moreover, as noted above, the evidence of the defendants' abuse of Clarke and Wilson was consistent with the evidence of their abuse of Flynn and

Hutchinson, who were also black immigrant workers. The defendants' unsupported argument simply does not demonstrate any unfair prejudice. Cf. *United States* v. *Fazal-Ur-Raheman-Fazal*, 355 F.3d 40, 51 (1st Cir. 2004) (rejecting unsupported allegation that 404(b) evidence was intended to stir up anti-Muslim prejudice after terrorist attacks of September 11, 2001).

Moreover, any possible unfair prejudice in this case was mitigated by the district court's limiting instruction, which carefully explained the appropriate use of the evidence. See *Van Horn*, 277 F.3d at 58-59. Indeed, although the defendants criticize the court's limiting instruction on appeal, they did not object to it below when it was given to the jury *four times*.[11] And, like *Van Horn*, "nothing in the record remotely suggests a 'basis to suppose that the jurors disregarded the trial judge's [limiting instruction] and departed on a frolic of their own.'" *Ibid*.

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[11] The defendants correctly state that the district court misspoke when it gave the instruction the first two times, by referring to Counts 1 to 13 instead of Counts 1 to 9. But this confusion was cleared up by the district court's third instruction in which the court referred not to the specific numbers of the counts but to the victims to whom the counts applied. Tr., 8/22/03 A.M. at 3-4. And the district court informed the jury that it would be providing the instructions to them in writing and that they would have a copy of the indictment, so that any confusion regarding which counts were which would be cleared up. Tr., 8/22/03 A.M. at 4-5. The final limiting instruction provided to the jury in fact did correctly identify the numbers of the counts. Tr., 8/28/03 A.M. at 98.

III

THE DISTRICT COURT CORRECTLY APPLIED THE SENTENCING GUIDELINES

In reviewing the district court's application of the Sentencing Guidelines, this Court reviews the district court's legal conclusions *de novo* and its factual findings for clear error. *United States* v. *Cruz-Mercado*, 360 F.3d 30, 35 (1st Cir. 2004).

Sentencing Guideline 2H4.1 applies to the defendants' trafficking convictions. The district court applied a one-level enhancement under 2H4.1(b)(3)(C) because Flynn and Hutchinson were in a condition of involuntary servitude for more than 30 but less than 180 days. It also applied a two-level enhancement under 2H4.1(b)(4)(A) because the defendants committed the felony offense of wire fraud during the commission of the involuntary servitude offense.

Subsection 2H4.1(b)(3) provides in relevant part: "If any victim was held in a condition of peonage or involuntary servitude for * * * more than 30 days but less than 180 days, increase by 1 level." Subsection (b)(4) provides in relevant part: "If any other felony offense was committed during the commission of, or in connection with, the peonage or involuntary servitude offense, increase to * * * 2 plus the offense level as determined above[.]" The defendants argue that the enhancements under 2H4.1(b)(3) and (b)(4) do not apply to their convictions under Section 1589 because those enhancements, by their terms, apply to "peonage or involuntary servitude" offenses, which, they say, are covered by 18 U.S.C. 1581 and 1584 only. The defendants are incorrect for at least two reasons. First, the Commission amended

the guideline after the enactment of the TVPA to cover the new trafficking offenses. And second, the Commission's use of the terms "involuntary servitude" and "peonage" — as well as Congress's use of those terms — makes clear that they include the new offenses.

A. The Sentencing Commission Amended The Guideline After The Enactment Of The TVPA To Cover The New Trafficking Offenses

Prior to the enactment of the TVPA in October 2000, Guideline 2H4.1 ("Peonage, Involuntary Servitude, and Slave Trade") applied to offenses under 18 U.S.C. 1581-1588. See U.S.S.G. App. A. Those sections apply to peonage (Section 1581); having a vessel for the slave trade (Section 1582); enticement or kidnaping into slavery (Section 1583); holding or selling into involuntary servitude (Section 1584); seizure, transportation, and sale of slaves (Section 1585); serving on a vessel in the slave trade (Section 1586); possessing slaves on a vessel (Section 1587); and transporting slaves from the United States (Section 1588).

When Congress enacted the TVPA, it directed the Sentencing Commission to amend the guidelines "if appropriate," 22 U.S.C. 7109(b)(1) (as amended), and to "consider conforming the sentencing guidelines applicable to offenses involving trafficking in persons to the guidelines applicable to peonage, involuntary servitude, and slave trade offenses," 22 U.S.C. 7109(b)(2)(B) (as amended). In response, the Commission amended Guideline 2H4.1 to apply to offenses under Section 1589 (forced labor), Section 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), and Section 1592 (document misconduct in furtherance of

trafficking, peonage, slavery, involuntary servitude, or forced labor). See U.S.S.G. App. C, Amd. 612. Thus, there is no question that the Commission intended the Guideline to apply to violations of Section 1589, as it expressly identified 1589 as one of the statutes to which the Guideline applies. According to the Commission, it was amending the Guideline as the new statutes "prohibit the types of behaviors that have been traditionally sentenced under § 2H4.1." *Ibid.* The Commission noted that "[i]n promulgating this amendment, the Commission is cognizant of the extraordinarily serious nature of offenses that involve trafficking in human lives." *Ibid.*[12]

B. The Commission's Use Of The Terms "Involuntary Servitude" And "Peonage" — As Well As Congress's Use Of Those Terms — Makes Clear That They Include The New Offenses

The defendants argue that because, when it amended 2H4.1, the Commission did not alter the language of Subsections 2H4.1(b)(3) and (b)(4) to specifically apply to "*forced labor*" as well as "peonage" and "involuntary servitude," the Commission must have intended that these enhancements not apply to the newly enacted statutes. But the defendants read too much into the Commission's use of the phrases "peonage" and "involuntary servitude."

Contrary to the defendants' arguments, neither Congress nor the Commission

[12] At the same time, the Commission also created a new, lower offense level for Section 1592 offenses, and explained that this is "an offense which limits participation in peonage cases to the destruction or wrongful confiscation of a passport or other immigration document" and has a lower statutory maximum penalty. U.S.S.G., App. C., Amd. 627.

viewed the new trafficking offenses as being different in kind from the prior peonage, involuntary servitude, and slavery offenses. They have used these terms broadly, recognizing the significant overlap among them.

Congress made clear that it viewed the new offenses as applying to different conduct that had the *same purpose and effect* as that covered by the prior statutes. See 22 U.S.C. 7101(b)(1) (referring to trafficking as "modern form of slavery" and as "the largest manifestation of slavery today"); 22 U.S.C. 7101(b)(12) (referring to "involuntary servitude, peonage, and other forms of forced labor"). And in the TVPA, Congress defined "involuntary servitude" to include conduct prohibited by Section 1589. See 22 U.S.C. 7102(5).[13]

In addition, the Commission itself did not use these terms in an exclusionary sense. As noted above, Amendment 627 refers to Section 1592 as relating only to "peonage cases," whereas Section 1592 itself applies to offenses under Sections 1581 (peonage), 1583 (slavery), 1584 (involuntary servitude), 1589 (forced labor), 1590 (trafficking), 1591 (sex trafficking), and 1594(a) (attempts). See 18 U.S.C. 1592(a). Also as noted above, the Commission concluded that the new offenses "prohibit the types of behaviors that have been traditionally sentenced under § 2H4.1." U.S.S.G. App. C, Amd. 612.

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[13] Section 7102(5) defines "involuntary servitude" to be "a condition of servitude induced by means of – (A) any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or (B) the abuse or threatened abuse of the legal process." Cf. 18 U.S.C. 1589.

The defendants' argument apparently assumes that the terms "involuntary servitude" and "peonage" prior to the amendments only referred to offenses under Section 1581 and 1584. However, this is incorrect. Even before passage of the TVPA, the enhancements were not limited to Sections 1581 and 1584. They applied as well to the various slavery offenses, such as Section 1583, which involve conduct as heinous and brutal as that under Sections 1581 and 1584. See, *e.g.*, *United States* v. *Booker*, 655 F.2d 562 (4th Cir. 1981) (prosecution under 18 U.S.C. 1583 where persons were kidnaped, transported to another state, and forced to work through threats and use of violence and withholding of food).

Moreover, if the defendants were correct, the enhancements would apply to one who holds someone in peonage in violation of Section 1581, but not someone who kidnaps and holds someone in slavery, in violation of Section 1583. Similarly, the Commission encourages an upward departure if the offense involves "the holding of more than ten victims in a condition of peonage or involuntary servitude." U.S.S.G. 2H4.1, commentary 3. Under the Defendants interpretation, this encouraged upward departure would apply to victims held in peonage but not slavery. Such absurd interpretations, which are not compelled by the text, should not be adopted. See *Summit Inv. & Dev. Corp.* v. *Leroux*, 69 F.3d 608, 610 (1st Cir. 1995) ("The 'plain meaning' of statutory language controls its construction. But the meaning, or 'plainness,' of discrete statutory language is to be gleaned from the statute *as a whole*.") (emphasis in original) (citations omitted).

This Court should affirm the application of these enhancements in this case.[14]

CONCLUSION

This Court should affirm the defendants' convictions and sentences.

Respectfully submitted,

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[14] The defendants also argue, as they argued below, that applying 2H4.1(b)(4)(A) "double counted" their wire fraud conduct. Appellants' Br. at 53-54. As the district court carefully explained, see Sent. Tr., 1/16/04, at 25-26, because of the way the defendants' offenses were grouped — by victim rather than by crime — the defendants' conduct underlying the wire fraud counts was applied to their sentence only once: in the 2H4.1(b)(4)(A) enhancement. Thus, the defendants' reliance on *United States* v. *Sedoma*, 332 F.3d 20 (1st Cir. 2003), is entirely misplaced. In that case, the district court erred by using the same conduct to justify multiple enhancements, which amounted to double counting. Here, the defendants seek to have their wire fraud conduct counted against them zero times. Their argument is wholly without merit.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing BRIEF OF THE UNITED STATES AS APPELLEE complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B). The Brief was prepared in WordPerfect 9, using 14 point type, and contains 12,746 words.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing BRIEF OF THE UNITED STATES AS APPELLEE, along with a disk formatted in WordPerfect 9, by Federal Express Next Business Day delivery on:

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