Nos. 07-1112, 07-1113, 07-1281

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee/Cross-Appellant

v.

ELNORA M. CALIMLIM; JEFFERSON N. CALIMLIM,

Appellants/Cross-Appellees

ON APPEAL FROM THE DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

REPLY BRIEF FOR THE UNITED STATES AS CROSS-APPELLANT

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ARGUMENT

THE DISTRICT COURT ERRED IN CALCULATING THE DEFENDANTS' SENTENCES

As explained in detail in the United States' opening brief, the district court erred as a matter of law in calculating the defendants' advisory guidelines range under the United States Sentencing Guidelines by rejecting upward adjustments for (1) the defendants' commission of another felony in the course of the crime of forced labor, (2) the vulnerability of the defendants' victim, and (3) the defendants' use of their minor children in the course of their crimes. In their brief as cross-appellees, the defendants fail to justify the district court's refusal to apply these three upward adjustments. In light of the guidelines range the district court *should have* consulted, the ultimate sentence the court imposed was unreasonably low.

1. As explained in the United States' opening brief (at 38-43), Section 2H4.1 of the Guidelines governs forced labor convictions under 18 U.S.C. 1589. U.S.S.G. § 2H4.1 & Commentary. Subsection 2H4.1(b)(4) dictates that a district court should increase a defendant's offense level by 2 where "any other felony offense was committed during the commission of, or in connection with, the peonage or involuntary servitude offense." The defendants apparently concede on appeal (Def. Rep. 15-16)[1] that Section 2H4.1 governs their offense level calculation. The defendants also concede (Def. Rep. 15) that "[t]he jury did convict the Calimlims of additional felonies." Nevertheless, the defendants continue to insist (Def. Rep. 15) that the district court correctly refused to apply the adjustment in Subsection (b)(4) because "[t]he underlying guideline took into account the other felonies of which the Calimlims stood convicted."

As the district court found – and the defendants do not dispute – the harboring felonies of which the defendants were convicted are governed *not* by U.S.S.G. § 2H4.1, but by U.S.S.G. § 2L1.1. Section 2H4.1 defines "any other felony offense" in the broadest terms to include "any conduct that constitutes a felony offense under federal, state, or local law (other than an offense that is itself covered by this subpart)." U.S.S.G. § 2H4.1, Commentary 2. The defendants'

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[1] References to "U.S. Br. __" refer to pages in the United States' Brief As Appellee/Cross-Appellant; references to "Def. Rep. __" refer to pages in the defendants' "Reply Brief and Response to Cross-Appeal"; references to "U.S. App. __" refer to pages in the United States' appendix; references to "Tr. __" are to pages in the sequentially numbered trial transcript.

harboring convictions undoubtedly fall within the plain language of the Guideline and cannot be excluded by the Commentary's admonition that "an offense that is itself covered by" Section 2H4.1 may not serve as the basis for this adjustment.

The defendants suggest (Def. Rep. 16) that applying the other felony adjustment could constitute double counting because "it is difficult on the facts of this case to imag[in]e how one could hold Martinez in involuntary servitude without also harboring her." In order to determine whether applying the other felony adjustment would constitute impermissible double counting, the question before this Court is not whether, *on the facts of this case*, the defendants could have committed the base offense without committing the additional felonies. Rather, the question is whether any defendant could have committed the offense of forced labor without committing the harboring offenses. Indeed, this Court has held that the "bar on double counting comes into play only if the offense itself *necessarily* includes the same conduct as the enhancement." *United States* v. *Senn*, 129 F.3d 886, 897 (7th Cir. 1997). The type of case-specific reasoning urged by the defendants would read most enhancements out of the Guidelines altogether.

It is clear that the offense of forced labor need not include the felony offenses of harboring an illegal alien and conspiring to harbor an illegal alien. Any person may be a victim of forced labor, whether that person is a citizen of the United States, a lawful permanent resident, a legal alien visitor, or an illegal alien. Thus, in committing the harboring offenses, the defendants committed separate and additional felonies meriting an enhanced sentence under the Guidelines.

2. The district court erred as a matter of law in determining that the 2-level "vulnerable victim" adjustment provided in U.S.S.G. § 3A1.1(b)(1), where a "defendant knew or should have known that a victim of the offense was a vulnerable victim," did not apply in this case. The Guideline's application notes define "vulnerable victim" as "a person (A) who is a victim of the offense of conviction * * * ; and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." U.S.S.G. § 3A1.1 Application Note 2.

In their brief as cross-appellees (at 16-20), the Calimlims defend the district court's refusal to apply the vulnerable victim adjustment primarily by reiterating the argument they made below that the vulnerability of a victim must be judged with reference to other people who have been the victims of the particular crime at issue rather than with reference to society generally. In support of that argument, the defendants rely, as they did below, on the Ninth Circuit's decision in *United States* v. *Castaneda*, 239 F.3d 978 (9th Cir. 2001), and the First Circuit's decision in *United States* v. *Sabatino*, 943 F.2d 94 (1st Cir. 1991). As explained in the United States' opening brief (at 47-53), the interpretation of Section 3A1.1 set forth in those decisions is incorrect, has been rejected by a number of courts of appeals,[2] and is inconsistent with this Court's view that the "'vulnerable victim'

[2] See *United States* v. *Veerapol*, 312 F.3d 1128, 1133 (9th Cir. 2002), cert. denied, 538 U.S. 981 (2003); *United States* v. *Zats*, 298 F.3d 182 (3d Cir. 2002); *United States* v. *McCall*, 174 F.3d 47, 51 (2d Cir. 1998).

sentencing enhancement is intended to reflect the fact that some potential crime victims have a lower than average ability to protect themselves from the criminal." *United States* v. *Grimes*, 173 F.3d 634, 637 (7th Cir. 1999). Indeed, in *United States* v. *Veerapol*, 312 F.3d 1128, 1133 (9th Cir. 2002), cert. denied, 538 U.S. 981 (2003), the Ninth Circuit held that its prior endorsement of the more-vulnerable-than-most interpretation of Section 3A1.1 in *Castaneda* did not apply in an involuntary servitude case. On the contrary, the court held that it was perfectly appropriate to apply the vulnerable victim enhancement to an involuntary servitude scheme that "typically targets people like the victims" in that case. *Ibid.*

In an attempt to bolster their erroneous view of the law, the defendants struggle to distinguish the Ninth Circuit's decision in *Veerapol* by emphasizing that "threats of physical and legal harm to the employee as well as physical abuse occurred" in that case. Def. Rep. 18. But whether or not these defendants used physical abuse against Martinez is irrelevant to a determination of whether she is vulnerable within the meaning of Section 3A1.1. The Guidelines instruct that the adjustment must apply where a victim is "unusually vulnerable due to age, physical or mental condition, or * * * is otherwise particularly susceptible to the criminal conduct." U.S.S.G. § 3A1.1 Commentary 2. Aside from assessing whether the defendants knew or should have known of the victim's vulnerability, the proper inquiry here focuses solely on characteristics of Martinez, not on the behavior of the defendants. As explained in the United States' opening brief (at 53-54), Irma Martinez was a vulnerable victim within the meaning of Section 3A1.1 because she

was young, spoke virtually no English, knew no one in the United States, knew essentially nothing of the customs and laws of the United States, and came from a family that was desperately poor and relied on any extra income she could earn for them. Because the Calimlims knew that Martinez was vulnerable in all of those respects, the district court erred in refusing to apply the vulnerable victim adjustment in U.S.S.G. § 3A1.1.

3. As explained in the United States' opening brief (at 55-58), the district court refused to apply the "use of a minor" adjustment in this case based on an incorrect interpretation of U.S.S.G. § 3B1.4 that has been rejected by this Court. The district court concluded that the adjustment could not apply because it found that the children did not "know[] full[] well what was going on [a]nd the reasons for it." U.S. App. 17. But this Court has unambiguously held that a minor need not know that he or she is being used by a defendant in the commission or cover-up of a crime in order for the defendant to be subject to the Section 3B1.4 adjustment. See *United States* v. *Ramsey*, 237 F.3d 853, 861 (7th Cir.), cert. denied, 534 U.S. 831 (2001); see also *United States* v. *Shearer*, 479 F.3d 478, 483 (7th Cir. 2007); *United States* v. *Gaskin*, 364 F.3d 438, 464 (2d Cir. 2004), cert. denied, 544 U.S. 990 (2005). This approach is consistent with the intent of the enhancement to protect minors from being used in criminal activities. See *United States* v. *Brazinskas*, 458 F.3d 666, 668 (7th Cir. 2006).

The defendants do not even attempt to defend the district court's rationale, instead arguing that the evidence does not support a finding that the defendants

used their children to commit the crimes of which they were convicted. Initially, that factual determination is for the district court to make on remand, based upon a correct interpretation of the law. More importantly, the defendants are simply incorrect. As explained in the United States's opening brief (at 57-58), there was ample evidence presented at trial that the defendants did in fact use their children, when they were minors, to aid in the commission of forced labor and particularly to prevent the detection of that crime.

Indeed, in their brief as cross-appellees (at 21), the defendants admit that the Calimlim children joined in the scheme to keep Martinez hidden from the public. Although the defendants insist that the children did so because they believed they were protecting Martinez from detection – an assertion the United States does not concede – the Calimlim children's subjective belief about why they joined in that scheme is irrelevant to the determination of whether their parents used them in the commission of the forced labor offense, or in preventing the detection of that crime. The defendants' admission that the children were an integral part of the Calimlims' scheme to keep Martinez hidden from the world outside their house is tantamount to an admission that they used their children to prevent the detection of their crimes.

4. The defendants devote the bulk of their briefing as cross-appellees to arguing that the sentence imposed by the district court was reasonable. For the reasons given in this brief and in the United States' opening brief, the district court erred as a matter of law in calculating the defendants' advisory guidelines range.

This Court should therefore vacate the defendants' sentences and remand the case for resentencing pursuant to a correct interpretation of the relevant provisions of the Guidelines. See *United States* v. *Jointer*, 457 F.3d 682, 686-687 (7th Cir. 2006), petition for cert. pending, No. 06-7600 (filed Oct. 27, 2006).

When compared to the guidelines range the district court should have used as a reference point, the sentence imposed on these defendants is unreasonably low. Correctly calculated, the defendants' advisory guidelines range would have been 31, which carries a sentence range of 108-135 months. The 48-month sentence imposed by the district court constitutes a downward adjustment of 60 months – or 56% – from the low end of that range and 87 months – or 64% – from the high end of that range. Such a deviation is unreasonable. Moreover, the justifications offered by the district court do not support a downward departure. The district court based its downward departure on its conclusion that the Calimlims had led "blameless lives, except for this incident," and on the medical needs of the defendants. U.S. App. 27. As explained in the United States' opening brief (at 58-61), neither consideration is a proper basis for a downward departure in this case. Indeed, in their brief as cross-appellees (at 23-28), the defendants do not even attempt to support the district court's justifications, instead focusing entirely on the legal contours of the "reasonableness" standard of review.

CONCLUSION

This Court should vacate the defendants' sentences remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 28.1(e)(2)(B)(i) and 32. The brief was prepared using Wordperfect 12.0 and contains 2,085 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, which has been sent to the Court by overnight mail on a compact disc, has been scanned with the most recent version of Trend Micro Office Scan (version 7.0) and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2007, two copies of the foregoing BRIEF FOR THE UNITED STATES AS CROSS-APPELLANT were served by overnight delivery to the following counsel of record:

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