Nos. 02-2158, 02-2159, 02-2165, 02-2166 & 02-2288

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UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

VINCENT A. CIANCI, JR.,
FRANK E. CORRENTE, and
RICHARD E. AUTIELLO
Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

SUPPLEMENTAL BOOKER BRIEF FOR THE APPELLEE, UNITED STATES OF AMERICA

ROBERT CLARK CORRENTE
United States Attorney

DONALD C. LOCKHART
Bar No. 62470
RICHARD W. ROSE
TERRENCE P. DONNELLY
Assistant United States Attorneys
Fleet Center
50 Kennedy Plaza, 8th Floor
Providence, Rhode Island 02903
Tele: (401) 709-5000

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I. STATEMENT OF THE ISSUE

Whether defendants can satisfy the plain-error standard in connection with their Booker claims.

II. STATEMENT OF THE CASE

The government incorporates by reference the procedural history sections of its principal responsive brief (Brief at 4-50) and its supplemental brief dated September 17, 2004 (Brief at 1-4).

III. SUMMARY OF ARGUMENT

1. Although it is now plain that the district court erred when it treated the sentencing guidelines as binding, this conclusion has no implications for the forfeiture issues on appeal. Booker simply does not apply to forfeiture matters.

2. Based on the transcripts of the sentencing hearings, none of the defendants can establish a reasonable probability that they would have received lower sentences under advisory guidelines. Indeed, in Cianci's case, the district court suggested that the applicable guideline sentencing range did not adequately reflect the magnitude of his abuse of the public's trust. Thus, defendants fail the third prong of the plain-error test.

3. Defendants also fail the fourth prong for the reasons set forth in the government's earlier supplemental brief and because sentences imposed within a correctly determined guideline sentencing range should be deemed presumptively reasonable.

IV. ARGUMENT

A. THE FIRST AND SECOND PRONGS OF THE PLAIN-ERROR TEST

The government concedes that in light of United States v. Booker, 125 S. Ct. 738 (2005), it is now plain that the district court erred when it treated the sentencing guidelines as binding. It is equally plain, however, that this conclusion has no implications for the forfeiture issues on appeal.

As the government explained in its earlier supplemental brief (Brief at 12-13), forfeiture is not governed by the sentencing guidelines. It is exclusively a statutory matter. USSG § 5E1.4 ("Forfeiture is to be imposed upon a convicted defendant as provided by statute"). Moreover, there is no legislative limit on the amount that can be forfeited. Forfeiture does not entail any mandatory step increases or incremental levels of punishment akin to statutory maximums or guideline enhancements. Thus, nothing in Booker calls into question the reasoning of the decisions cited earlier (Brief at 12-13), which have uniformly rejected Apprendi- and Blakely-based forfeiture challenges. A recent, post-Blakely district court opinion is on point. United States v. Upton, 352 F. Supp.2d 92, 98-99 (D. Mass. 2005).[1]

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[1] The government also adheres to its position (Brief at 6-7) that Cianci affirmatively waived any Sixth Amendment challenge to the forfeiture ruling when he chose the judge over the jury as factfinder pursuant Rule 32.2(b)(4).

B. THE THIRD PRONG OF THE PLAIN-ERROR TEST

It is a defendant's burden under the third prong to establish "a reasonable probability that the district court, freed of mandatory guidelines, would have given him a lower sentence." United States v. Antonakopoulos, No. 03-1384, 2005 WL 407365, at *12 (1st Cir. Feb. 22, 2005). The third prong "is not met by the mere assertion that the court might have given the defendant a more favorable sentence." Id. at *9. Rather, a "reasonable probability" claim must be based on "specific facts" in the record. Id. None of the defendants can meet this burden.

Cianci. The district court viewed Cianci's role and abuse-of-trust enhancements as logical corollaries of the jury's verdict. It expressed no reservations at all in imposing either enhancement. (74:38-40.) Moreover, though recognizing that it had the power to depart downward based on public service and charitable deeds, it declined to do so in light of the facts of Cianci's case. (74:74-76.) It even suggested that an upward departure might have been warranted given the "egregious" nature of Cianci's abuse of trust and the fact that the two-level enhancement did "not come close to accurately reflecting the magnitude" of that abuse. (74:86-87.) On the heels of this observation, the court stated: "there is no question in my mind, I am not going to sentence you at the bottom end of the guideline range." (74:88) (emphasis added). The only question was whether Cianci should receive a sentence in the middle

or at the top of the range. (74:88.) The court chose 64 months, the middle of the range. (74:88.)

Given this record, Cianci cannot satisfy his burden of showing a reasonable probability that he would have received a lower sentence under advisory guidelines. If anything, the record strongly suggests that he would have received the same sentence or perhaps even a higher sentence. The district court did not express any dissatisfaction with the guidelines. Moreover, the record does not disclose any significant "mitigating circumstances that existed at the time of the original sentence but which were not available for consideration under the mandatory Guidelines regime." Antonakopoulos, 2005 WL 407365, at *10.

Corrente. The district court expressed the same level of confidence in concluding that Corrente was "at least a manager or supervisor" (75:30) and that it was "very clear" that he had abused a position of public trust (75:33). There was no motion for a downward departure. The court sentenced Corrente to 63 months, the low end of the 63-78 month range, based on his age and ill health and the conviction that he should not receive a longer sentence than Cianci. (75:46-47.) The court, however, did not state or imply that it would have imposed an even lower sentence if it had not been bound by the guidelines. Thus, Corrente is unable to satisfy his burden under the third prong. See United States v. Rodriguez, No. 04-12676, 2005 WL 272952, at *9-10 (11th Cir. Feb.

4, 2005) (defendant fails third prong where "[t]he record provides no reason to believe any result is more likely than the other"); United States v. Mares, No. 03-21035, slip op. at 19-21 (5th Cir. Mar. 4, 2005) (same).

Autiello. With respect to the sole disputed enhancement in Autiello's case, the district court concluded that it was "crystal clear" that the Tow List and Maggiacomo Job offenses involved payments "for the purposes of influencing an elected official or an official holding a high level decision-making position." (76:22.) The enhancement based on this finding was therefore "perfectly warranted." (76:23.) There were no facts which warranted a downward departure. (76:28-29.) After remarking that there were no factors that pulled strongly in either direction, the court sentenced Autiello to 46 months, in the middle of the 41-51 month range. (76:34-35.) The court did not state or imply that it would have imposed a lower sentence if it had not been bound by the guidelines. Thus, Autiello cannot satisfy his burden under the third prong.

C. THE FOURTH PRONG OF THE PLAIN-ERROR TEST

1. Introduction

Success on the third prong does not automatically entitle a defendant to a remand. "[B]ecause relief on plain-error review is in the discretion of the reviewing court, a defendant has the further burden to persuade the court that the error 'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" United States v. Vonn, 535 U.S. 55, 63 (2002) (quoting United States v. Olano, 507 U.S. 725, 736 (1993)). This Court's authority to notice plain error should be exercised "sparingly," Jones v. United States, 527 U.S. 373, 389 (1999), and only "in those circumstances in which a miscarriage of justice would otherwise result." Olano, 507 U.S. at 736 (internal quotation marks omitted); accord United States v. Medina-Martinez, 396 F.3d 1, 9-10 (1st Cir. 2005).

If this Court were to conclude that the fourth prong is satisfied merely because a defendant has shown that he probably would have received a lower sentence under an advisory guideline system, then the fourth prong would be rendered a nullity. It would serve no separate purpose. The Supreme Court has warned against conflating the third and fourth prongs. Olano, 507 U.S. at 737 ("a plain error affecting substantial rights does not without more, satisfy [the fourth prong], for otherwise the discretion afforded by Rule 52(b) would be illusory"). In short, a missed

opportunity to convince a judge to impose a lower sentence does not, in itself, create a miscarriage of justice. There must be something more.

For three reasons discussed below, defendants cannot satisfy their fourth prong burden. If this Court were to adopt one or more of these reasons, it would give content to the fourth prong.

2. Overwhelming/Uncontroverted Evidence

In its earlier supplemental brief (Brief at 14-15), the government explained why Cianci's and Corrente's enhancements were essentially foreordained in light of the verdicts and the evidence. Although Autiello has not raised any sentencing issues to date (either in his principal brief or in a supplemental brief), it was likewise "perfectly clear" (76:22) that the sole contested enhancement applied to him. With respect to the Tow List offense, the "absolutely indisputable" and "uncontradicted" evidence was that "the money was demanded and eventually went to Mr. Corrente." (76:22.) Thus, as the government argued earlier (Brief at 15), defendants fail the fourth prong of the plain-error test as interpreted by United States v. Cotton, 535 U.S. 625 (2002) and Johnson v. United States, 520 U.S. 461 (1997).

This Court has applied the logic of Cotton and Johnson to unpreserved Blakely claims. See United States v. Stokes, 388 F.3d 21, 29 (1st Cir. 2004); United States v. DelRosario, 388 F.3d 1, 14-15 (1st Cir. 2004); United States v. Savarese, 385 F.3d 15, 22-

23 (1st Cir. 2004). A Sixth Circuit panel has applied the Cotton rationale post-Booker, albeit in a decision that now appears to be a dead letter within that circuit. See United States v. Bruce, 396 F.3d 697, 717-20 (6th Cir. 2005); but see United States v. McDaniel, No. 03-1940, 2005 WL 366899, at *7 n.7 (6th Cir. Feb. 17, 2005).

This Court has left open "the exact relationship" between the third and fourth prongs of the plain-error test in the case of forfeited Booker claims. Antonakopoulos, 2005 WL 407365, at *8. It has also suggested that Booker errors are different in character from Apprendi or Blakely errors, at least in the context of third prong analysis. Id. at *6-8 & n.9. It does not follow, however, that Cotton and Johnson and the First Circuit decisions based on them are suddenly irrelevant to fourth prong analysis in light of Booker. The government submits that when an enhancement is supported by overwhelming or undisputed evidence or is virtually compelled by the jury's verdict or the defendant's admissions, this remains a valid basis on which to conclude that no miscarriage of justice has occurred. This is true even though the enhancement was imposed under guidelines that were perceived to be binding at the time of sentencing. At the very least, it is a relevant, if not dispositive, factor in the fourth prong analysis.

3. Presumptively Reasonable Sentences

Booker requires judges to consult the applicable guideline sentencing range ("GSR") in making sentencing decisions. Booker, 125 S. Ct. at 767. By implication, Booker suggests that sentences imposed within a correctly determined GSR will be deemed presumptively reasonable (if not immune from attack on appeal). After all, such GSRs are the product of a carefully crafted system and they take into account a variety of aggravating and mitigating factors, including factors listed in 18 U.S.C. § 3553(a). See United States v. Wilson, 350 F. Supp.2d 910, 912-13, 925 (D. Utah 2005) (sentencing court should give "heavy" or "considerable" weight to the applicable guideline sentencing range, and it should follow the guidelines "in all but the most exceptional cases"). It follows that a defendant who has been sentenced within or below the applicable GSR cannot establish a miscarriage of justice for purposes of plain-error review. At the very least, this is a relevant factor in assessing whether a defendant has met his burden under the fourth prong.

4. The Teague Analogy

In any event, there can be no claim of a miscarriage of justice for an independent reason discussed in detail at pages 15-18 of the government's earlier supplemental brief: judge-found sentencing facts are sufficiently reliable so that the public can have faith in the outcome of sentencing proceedings that were

conducted pursuant to the then-mandatory sentencing guidelines. Booker explains why mandatory guideline enhancements triggered by judge-found facts are incompatible with the Sixth Amendment. But there is nothing in Booker which indicates that the Supreme Court views such enhancements to be fundamentally unfair. Nor is there anything in the opinion which suggests that the Court believes that the mandatory guideline system -- in place for nearly two decades -- resulted in a miscarriage of justice.

If anything, the Supreme Court has signaled the opposite view. For Teague retroactivity purposes, the Court has already held that the Apprendi-based holding of Ring v. Arizona, 536 U.S. 584 (2002), is not a "watershed" rule of criminal procedure because judge-found sentencing facts are sufficiently reliable even when they spell the difference between life and death. Schriro v. Summerlin, 124 S. Ct. 2519, 2524-26 (2004) (reasoning that it is "implausible that judicial factfinding so 'seriously diminishe[s]' accuracy as to produce an 'impermissibly large risk' of injustice")(emphasis and brackets in original); see also Sepulveda v. United States, 330 F.3d 55, 61 (1st Cir. 2003) (holding Apprendi is not retroactively applicable under Teague and reasoning that "'a decision . . . by a judge (on the preponderance standard) rather than a jury (on the reasonable-doubt standard) is not the sort of error that necessarily undermines the fairness . . . of judicial proceedings.'")

As Judge Easterbrook has reasoned post-Blakely, "[a]lthough the plain-error standard differs formally from the [Teague] standard for retroactive application, whether an error gravely undermines the reliability of the outcome is common to the two inquiries." United States v. Messino, 382 F.3d 704, 715 (7th Cir. 2004) (Easterbrook, J., dissenting in part on different grounds). Thus, the Teague analogy cannot be defeated merely by pointing out that the Teague and plain-error doctrines serve different purposes or that they are phrased in somewhat different terms. Nor can it be defeated merely by observing that finality concerns are stronger in cases that are on collateral review.

The logic of Judge Easterbrook's position is inescapable: "It would be weird to hold that a sentencing process used since 1987 with the Supreme Court's approbation . . . plus the support of all federal circuits even after Apprendi, now must be deemed so unreliable that it undermines the fairness, integrity, and public reputation of judicial proceedings." Messino, 382 F.3d at 715. Barring an adequate explanation of why Judge Easterbrook is wrong, defendants cannot satisfy the fourth prong.

V. CONCLUSION

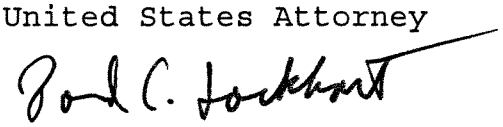
For the above reasons, this Court should reject defendants' Booker claims.

Respectfully submitted,

UNITED STATES OF AMERICA,

By its Attorneys,

ROBERT CLARK CORRENTE
United States Attorney



DONALD C. LOCKHART
Bar No. 62470
RICHARD W. ROSE
TERRENCE P. DONNELLY
Assistant United States Attorneys

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2005, I served two copies of this brief by first-class mail, postage prepaid, to each of the following:

John A. MacFadyen, Esq.
The Owen Building
101 Dyer Street, 3rd Floor
Providence, RI 02903

Anthony M. Traini, Esq.
56 Pine Street, Suite 200
Providence, RI 02903

Richard C. Bicki, Esq.
56 Pine Street, Suite 200
Providence, RI 02903