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

BRIEF AND APPENDIX FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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JURISDICTIONAL STATEMENT

The appellants/cross-appellees' jurisdictional statement is complete and correct.

STATEMENT OF ISSUES

1. Is 18 U.S.C. 1589's prohibition on knowingly coercing another person's labor through threats of serious harm, through a scheme, plan, or pattern intended to cause the person to believe serious harm would result, or through abuse or threatened abuse of the legal process, unconstitutionally vague?

2. Did the district court's jury instructions accurately state the legal standard for conviction under 18 U.S.C. 1589?

3. Did the evidence demonstrate that the defendants had a pecuniary motive for harboring an illegal alien?

4. Did the district court err in refusing to increase the defendants' offense level based on their commission of other felonies in the course of committing the offense of forced labor?

5. Did the district court err in refusing to increase the defendants' offense level based on the vulnerability of their victim?

6. Did the district court err in refusing to increase the defendants' offense level based on their use of their minor children in the commission of their crimes?

7. Did the district court err in reducing the defendants' offense level pursuant to 18 U.S.C. 3553 because it concluded that, aside from keeping a young woman in a condition of forced labor for 19 years, the defendants led "blameless lives"?

STATEMENT OF THE CASE

On December 6, 2005, a federal grand jury returned a third superceding indictment charging defendants Elnora and Jefferson Calimlim with violating federal law by keeping a young woman in their home in a condition of forced labor for 19 years. Def. App. 32-40.[1] The indictment charged the Calimlims with (1)

[1] References to "Def. App. __" refer to pages in the defendants' appendix; references to "U.S. App. __" refer to pages in the United States' appendix; references to "R. __" refer to the docket number of items filed as part of the district court record; references to "Tr. __" refer to pages in the sequentially numbered trial transcript; and references to "Sent. Tr." refer to pages in the transcript of the sentencing hearing.

conspiring to obtain forced labor in violation of 18 U.S.C. 371 and 1589, Def. App. 32-35; (2) obtaining forced labor in violation of 18 U.S.C. 2, 1589, and 1594, Def. App. 36; (3) harboring an alien for private financial gain in violation of 8 U.S.C. 1324(a)(1)(A)(iii) and 1324(a)(1)(B)(i), Def. App. 37; and (4) conspiring to harbor and conceal an alien for the purpose of private financial gain in violation of 8 U.S.C. 1324(a)(1)(A)(v)(I) and 1324(a)(1)(B)(i), Def. App. 38. On May 26, 2006, following an eight-day trial, a jury convicted the defendants on all four counts. R. 189-190. After holding a sentencing hearing on November 16, 2006, the district court sentenced both defendants to 48 months' imprisonment as to each of the counts, with terms to run concurrently. R. 218, 221-222; see also Def. App. 1-22 (amended judgments).

The defendants timely appealed their convictions on January 10, 2007, R. 234-237, and the United States timely cross-appealed the Calimlims' sentences on February 2, 2007, R. 246-247.

STATEMENT OF FACTS

From the evidence presented at trial, the jury could reasonably have found that the following events occurred. The defendants, Drs. Elnora and Jefferson Calimlim, are citizens of the Philippines. Since 1973, they have resided in the United States and have "permanent resident" status. Tr. 718, 721-722. In 1985, the defendants arranged for 19 year-old Irma Martinez to travel from the Philippines to the United States, accompanied by Elnora Calimlim's father, Dr. Jovito Mendoza. Tr. 75, 158, 331-333, 724-725. Martinez had worked as a maid

for the Mendozas in the Philippines from age 16 and was recruited by Dr. Mendoza to travel to the United States to work as a maid and nanny for Elnora Calimlim and her husband in exchange for a salary of $100 per month. Tr. 324-326, 341. Elnora Calimlim came from a wealthy family in the Philippines. Growing up, she and each of her siblings had a personal domestic servant assigned to see to their needs. Tr. 716-718, 762.

Martinez testified that the "only" reason she chose to come to the United States was to help her family financially. Tr. 423. Martinez's family was very poor. Tr. 723. At the time she left the Philippines, she had five siblings. Tr. 147-148. Her parents' home consisted of only one room, had neither electricity nor plumbing, and frequently flooded during storms. Tr. 149-153, 326-328. Because Martinez's parents could not afford to purchase her plane fare or pay for a passport, the Mendozas paid those costs. Tr. 331-334. When Martinez arrived in the United States, however, Elnora Calimlim informed Martinez that she was responsible for reimbursing them for the cost of her flight. Tr. 334.

Martinez did not have possession of her passport when she traveled to the United States. Tr. 335, 760-761. For the entirety of her stay with the Calimlims, the defendants held her passport. Tr. 335. Martinez was admitted to the United States on a tourist visa, which expired on June 21, 1987 – approximately two years after her date of entry into the United States.[2] Tr. 75-76. Beginning the day after

[2] Senior Special Agent Jeffrey Stillings, who is employed by the United States Department of Homeland Security, testified that the type of visa that

Martinez was admitted into the United States on this visa, the Calimlims told her that she was in the country illegally, and that she would be arrested, jailed, and deported if anyone discovered her presence. Tr. 315, 450-451, 501. Within three or four months of arriving in the United States, Martinez wrote a letter to her mother stating that she believed she was in the country illegally because Elnora Calimlim told her that her papers were illegal. Tr. 471-472, 500. Elnora Calimlim admitted at trial that Martinez was in the United States legally for at least the first six months of her time with the Calimlims. Tr. 759. The Calimlims did not tell Martinez that she had been admitted to the United States on a tourist visa valid for two years or that she had to exit and reenter the country every six months during those two years. Tr. 501-502. Elnora Calimlim told Martinez that she could not leave the house or walk around the neighborhood. Tr. 315. Thereafter, the Calimlims repeatedly warned Martinez that she would be subject to arrest, imprisonment, and deportation if discovered. Tr. 352-353, 450, 746.

Martinez testified that Elnora Calimlim's father told her before she came to the United States that she would be able to return to the Philippines to visit her family after three years. Tr. 414-415. But when Martinez expressed her desire to visit her family, the Calimlims told her that she would no longer be able to assist her family financially. Tr. 505. After one such discussion, Elnora Calimlim offered to increase Martinez's salary to $400 per month if she stayed and worked

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Martinez had stamped in her passport was good for two years, but required her to depart and reenter the country at least every six months. Tr. 97-98, 112.

for the family for ten years. Tr. 505. Martinez testified that this discussion about not being able to help her family financially changed her mind about going home. Tr. 422, 505. As the Calimlims knew, Martinez's family was desperately poor. Tr. 723. They depended on the money Martinez sent to them to build a house, Tr. 153, 424, 740; to buy land to farm so that they could make a living, Tr. 169, 740; to educate their other children, Tr. 176-177, 548; and to pay for medical expenses, Tr. 182, 426, 740. Martinez knew that her family depended on the money she sent to them from the United States, and she felt the need to continue supporting them. Tr. 425-427, 476, 502, 520, 544. Martinez testified that, while she wanted to continue to work in the United States to support her family, she wanted to work for a different employer – one who would allow her to have her freedom. Tr. 425, 520. However, she believed the Calimlims' statements that if anyone discovered her, she would be deported and never permitted to return to the United States. Tr. 478.

When Martinez first arrived, the Calimlim family lived in a house on Tanala Drive in Brookfield, Wisconsin. Tr. 338. During the time that Martinez lived in that house, she shared a room with the Calimlims' youngest child Christina. Tr. 338, 559. When she arrived in the United States, Martinez did not speak any English. Tr. 339. She remained unable to communicate in English for five or six years. Tr. 340. Martinez learned English by watching "Sesame Street" in order to communicate with the Calimlim children. Tr. 338. The Calimlims put Martinez to work the day after she arrived at the defendants' home. Tr. 340. Her typical day began at 6 a.m. and ended near 10 p.m. after she cleaned up the Calimlims' dinner

dishes. Tr. 344, 408, 410, 577, 730. She worked weekend days in addition to week days. Tr. 371, 577, 729-730. When Martinez occasionally slept past 6 a.m., the Calimlims raised their voices at her, told her that she should be "concerned" next time it happened, and threatened to throw ice water on her face if it happened again. Tr. 369. Martinez's duties initially included caring for the Calimlim children, vacuuming, dusting, doing the laundry, cleaning, cooking, washing and waxing the cars, and changing the oil in the cars. Tr. 344-345, 353-355, 563. When Martinez accompanied the Calimlim family on vacations to Florida and Michigan, she continued to clean, cook, and take care of the children. Tr. 359, 574, 608-609.

Beginning a few years after her arrival in the United States, Martinez was also required to clean and fix up the Calimlims' investment properties, including by caulking and grouting bathtubs, cleaning the stoves and cabinets, varnishing the cabinets, and painting the bathrooms. Tr. 365. She also periodically cleaned Jefferson Calimlim's medical offices. Tr. 367-368.

After approximately ten years, the family moved to a new house on Still Point Trail, where Martinez had her own room in the basement of the house. Tr. 347, 432. In the new house, Martinez's duties increased because the new house contained more rooms and the family had acquired more cars. Tr. 356, 371. The Calimlims required Martinez to power wash the tennis court and to wash the outside of the windows in the back of the house, out of sight of the road. Tr. 374.

The Calimlims controlled every aspect of Martinez's life. Martinez was not allowed to leave the house alone or to open the front door. Tr. 346-350. Even when Christina Calimlim was very young, Martinez was not allowed to meet Christina when her car pool dropped her off, but had to wait inside the house and open the garage door for Christina so that no one would see her. Tr. 346, 559. In the ten years that Martinez live in the Calimlims' house on Tanala Drive, she cannot remember walking out the front door even once. Tr. 347, see also Tr. 567. The only time she ever answered the front door at the house on Still Point Trail was while wearing a mask on Halloween.[3] Tr. 376-378. Elnora Calimlim told Martinez that she was not permitted to play outside with Christina because Martinez was not in the country legally and could go to prison if someone saw her. Tr. 350-352. Martinez testified that she wanted to go out and meet friends, but was afraid because the Calimlims told her that she would be imprisoned if people saw her and discovered that she was in the country illegally. Tr. 418-420, 450.

When the Calimlims had visitors to the house or hosted social events at the Still Point Trail house, they made Martinez stay in her room and did not permit her to leave her room, even to use the bathroom. Tr. 379, 382-383, 569. On some occasions, the parties lasted from early afternoon until after midnight and Martinez had to stay in her room for so long that she awoke with stomach and back pain

[3] Although Martinez testified that she occasionally walked out of the front door at the Still Point Trail house in order to assist with things like picking up leaves, Tr. 376, other evidence demonstrated that the front door of that house was not visible from the road, Tr. 66, 291, 295.

from lack of access to a bathroom. Tr. 382. During these parties, she was not permitted to listen to music or watch television while hiding in her room. Tr. 382. She was not permitted to keep her personal things in the bathroom located in the basement because a visitor who saw such items might discover her existence. Tr. 380. The Calimlims told Martinez to lock herself in her room so that none of the guests would discover her and reminded her again that she could be sent to prison if anyone did. Tr. 382-385.

When the family lived on Tanala Drive, Martinez was not permitted to answer the home phone unless it rang at least ten times to ensure that the person on the other end of the line was a member of the family. Tr. 387, 742. At the Still Point Trail house, Martinez was permitted to answer only the "third" phone line, which was primarily used by the computer modem. Tr. 388, 569, 742. Christina Calimlim testified about a family rule that forbade any member of the household from discussing Martinez's existence with anyone outside of the family. Tr. 565. Several long-time friends and immediate neighbors of the Calimlims – including the godmothers of two of the Calimlim children – testified that they had no idea that Martinez existed, although she lived with the Calimlims for 19 years. Tr. 187, 190-191, 220-221, 241-242, 253, 261, 263, 290, 294. Christina Calimlim testified that she never mentioned Martinez to any of her friends or teachers. Tr. 564-565.

Martinez was not permitted to seek medical care during her 19 years with the Calimlims. Tr. 319-323, 441, 459. She asked to see a dentist to treat a broken tooth and a gynecologist to treat debilitating menstrual cramps. Tr. 319-321. The

Calimlims told Martinez that she could not see a doctor because she did not have insurance or a Social Security card, and because it would be too expensive. Tr. 321-322. Elnora Calimlim later told Martinez that she would not be able to have children. Tr. 323.

The Calimlims also controlled all of Martinez's communications with the outside world. Martinez was permitted to speak on the phone to her family in the Philippines only four or five times in the 19 years she spent with the Calimlims. Tr. 158, 404, 460, 767. While on the phone, she was surrounded by the Calimlims. Tr. 404. She was never allowed to travel to the Philippines to visit her family. Tr. 158. She was permitted to send occasional letters to her mother, but was not allowed to put her return address on the envelope, and her parents were not allowed to send letters directly to her. Tr. 404-406, 571-572. Martinez testified that she did not tell her mother everything that was happening to her in the United States because she did not want to scare her mother. Tr. 430. In one letter to her parents, however, Martinez wrote both that she did not send letters more often because Elnora Calimlim "gets angry" and that she felt like she was "in a prison" because the Calimlims hid her any time they went out and saw another Filipino. Tr. 516.

Irma Martinez is a practicing Catholic and was permitted to go to church occasionally while living with the Calimlims. Tr. 392-394. Sometimes she went to church with the Calimlims, but was not permitted to sit with the family. Tr. 392-393, 568, 790. Other times, Elnora Calimlim picked which church Martinez

would attend. Tr. 394. On those occasions, either Elnora Calimlim or one of her children drove Martinez to church and picked her up.[4] Tr. 395. When the Calimlims drove Martinez to church, they made her move down in her seat in the car so that the neighbors would not see her. Tr. 396. Martinez was taken to three or four different churches because Elnora stated that she did not want Martinez to go to one church for too long because someone might think she lived in the area. Tr. 395. Martinez met a young man at one of the churches, and spoke to him a few times. Tr. 397. After Elnora Calimlim observed Martinez talking to the man, Martinez was not taken back to that church for at least two years. Tr. 397-398.

The Calimlims also controlled Martinez's finances. When Martinez arrived in the United States, Elnora Calimlim told her that she would be paid $100 per month. Tr. 341. In the 19 years she lived with the Calimlims, however, Martinez did not receive a single paycheck. Tr. 341. Although Elnora Calimlim initially deposited Martinez's earnings into a savings account, she closed the account one day after Martinez's visa expired. Tr. 343, 788. When Martinez's parents wrote to her to request money from time to time, Martinez would authorize Elnora Calimlim to send money to the Martinezes through Elnora Calimlim's parents in the Philippines. Tr. 160-161. Martinez did not know how much she was being paid, but believes it was up to $400 per month after working for ten years. Tr. 409, 505,

[4] On not more than five occasions, Martinez walked to church alone when the Calimlims were out of town. Tr. 510. But Martinez was cautioned to walk along a path that is set back from the road and runs behind the Calimlims' house. Tr. 296-298, 510.

507; see also Tr. 739. On the few occasions when Martinez was taken to a store to purchase personal items, she was not given cash to make the purchases, but was told to fill up her cart and then wait in the car while Elnora Calimlim completed the transaction. Tr. 401-402, 457. The Calimlims deducted the money spent on such personal items from Martinez's wages. Tr. 402, 777.

Evidence presented at trial established that the Calimlims sent approximately 654,412 pesos to Martinez's family over the 19 years that she worked for them. Tr. 537, Exh. 47. Based on evidence of annual conversion rates between Filipino pesos and U.S. dollars, that amounted to less than $19,000 total, or approximately $1,000 per year, Exhs. 38, 47, although the Calimlims may have sent some small additional amount that was not accounted for in the evidence presented at trial, Tr. 542. Martinez testified that Elnora Calimlim once told her that there was a 50% tax on money sent to the Philippines. Tr. 509.

Although it has been possible since the time of Martinez's arrival in the United States to bring a foreign citizen into this country to work legally, Tr. 124-128, the Calimlims never attempted to obtain the necessary permit for Martinez to work legally as their maid and/or nanny, Tr. 784. Jefferson Calimlim stipulated at trial that, from at least 1976 to the present, he has known of the legal requirements for allowing a domestic worker to enter the United States and to remain here, including in the event that the worker's visa expired. Tr. 305-306; R. 175. The Calimlims never told Martinez that there was a program through which they could have brought her into the country to work legally. Tr. 502. Had they brought

Martinez into the country to work legally, they would have been required to sign an employment contract, pay Martinez a prevailing wage rate, and limit her duties to those appropriate for her job classification. Tr. 125-131. They also would have had to guarantee that Martinez was free to leave the house when not working, would have had to provide her with her own living space, and would not have been able to charge her rent. Tr. 126. Martinez testified that she wanted to be able to work legally in the United States so that she could continue to help her family financially, but wanted to work for someone other than the Calimlims and have her "freedom." Tr. 425, 520. Jefferson Calimlim and his eldest son started a business to recruit nurses from the Philippines to come work legally in the United States. Tr. 747-748. When federal agents searched the Calimlim's home, they found blank forms used to apply to bring a foreign worker into the United States. Tr. 93.

Martinez was finally removed from the Calimlims' home on September 29, 2004, when federal agents executed a search warrant after receiving an anonymous tip – later determined to be from the ex-wife of one of the Calimlims' sons – that the Calimlims had an illegal alien living in their home. Tr. 61-63, 67-68, 612, 614. Agents found Martinez hiding in the closet of her bedroom in the basement, trembling. Tr. 67-68, 308-310.

SUMMARY OF ARGUMENT

1. The defendants' challenges to their convictions for violating the forced labor statute and for conspiring to do so are without merit. The forced labor statute prohibits knowingly coercing another person's labor through threats of serious

harm, through a scheme, plan, or pattern intended to cause the person to believe serious harm would result, or through abuse or threatened abuse of the legal process. The evidence presented at trial clearly demonstrated that the Calimlims knowingly coerced Irma Martinez to provide her labor for 19 years by intentionally making her believe that, if she left their employ, she would face arrest, imprisonment, and deportation, as well as the resulting loss of vital financial support for her impoverished family.

The defendants' claim that the terms "serious harm" and "abuse of law or the legal process," as used in 18 U.S.C. 1589, are unconstitutionally overbroad and vague is without merit. The statute does not prohibit any activity protected by the First Amendment; rather, it prohibits intentionally coercing another person to provide her labor. There is, moreover, no question that the terms of the statute, as understood by an ordinary citizen, prohibit the Calimlims' actions. Thus, the statute is neither vague nor overbroad.

2. Nor is there any merit to the defendants' claim that the district court's jury instructions about the meaning of those terms incorrectly stated the law. Contrary to the defendants' claims, the district court did not instruct the jury that it could convict the defendants of forced labor for merely warning Martinez of the potential legal consequences of her illegal immigration status. Rather, the district court correctly stated the law by instructing the jury that it could convict the defendants of forced labor if it found that they intentionally made Martinez believe that she had no choice but to provide her labor to them in order to avoid serious harm

and/or the abuse of legal process. The district court also correctly stated that "serious harm" includes both physical and nonphysical harm, and the defendants did not object to that instruction.

3. The defendants are similarly incorrect that the government failed to present sufficient evidence that they harbored an illegal alien for financial gain. The defendants admit that they harbored an illegal alien, and the evidence presented to the jury demonstrated that they did so in order to obtain a valuable commodity, *i.e.*, Martinez's labor, seven days a week for 19 years. Elnora Calimlim admitted at trial that she knew she would have had to pay more if they had hired a domestic worker who was in the country legally.

4. In addition to affirming the defendants' convictions, this Court should vacate their sentences and remand for resentencing because the district court did not calculate the advisory guideline range correctly and imposed an unreasonably low sentence. First, the district court incorrectly refused to enhance the defendants' sentences because they committed other felonies in the course of committing the offense of forced labor. Although the court applied Guideline Section 2H4.1 both to determine the defendant's base offense level and to increase that level because they held Martinez in a condition of forced labor for more than one year, the court erroneously refused to apply another subsection of the same guideline to account for the defendants' commission of other felonies in the course of committing forced labor.

5. Second, the district court erred in refusing to apply the vulnerable victim enhancement in this case. The court erroneously concluded that applying that adjustment would constitute double counting even though the victim's vulnerability was not an element of the offense and was not otherwise accounted for in the guidelines calculation. The court also applied an incorrect understanding of who constitutes a vulnerable victim, relying on a Ninth Circuit case that conflicts with this Court's understanding of the purpose of the vulnerable victim adjustment. Moreover, there is ample evidence that Irma Martinez was, in fact, a vulnerable victim.

6. Third, the district court erred in refusing to increase the defendants' advisory offense level because they used their minor children in the commission of their crimes. The court reasoned that the adjustment should not apply because the children did not realize that they were being used. But this Court has unambiguously held that the enhancement for the use of minors focuses not on whether the minors knew they were being used, but on whether they were in fact used. There is ample evidence in this case to support the conclusion that the defendants used their minor children in the commission of their crimes.

7. Finally, the district court unreasonably reduced the defendants' offense level because the court found that they led "blameless lives," not counting "this incident." The defendants kept a young woman in a condition of forced labor for 19 years, working her every day of the week, not permitting her freedom of movement, preventing her from socializing outside the house, and keeping her in a

state of fear that she would be imprisoned. Regardless of how they conducted the rest of their lives, it was unreasonable for the court to describe them as "blameless."

ARGUMENT

I

THIS COURT SHOULD UPHOLD THE DEFENDANTS' CONVICTIONS[5]

A. This Court Should Uphold The Defendants' Convictions For Violating The Forced Labor Statute

The defendants challenge their convictions for conspiring to violate and for violating the forced labor statute, 18 U.S.C. 1589. Section 1589 makes it illegal for a person to "knowingly provide[] or obtain[] the labor or services of a person" through any of three possible 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 (3) by means of the abuse or threatened abuse of law or the legal process."

Defendants Jefferson and Elnora Calimlim obtained the labor of Irma Martinez for 19 years by making her believe that she would be arrested, imprisoned, and deported if she left them because of her status as an illegal

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[5] The defendants did not challenge the restitution order entered against them, and have waived their right to do so. *Marie O.* v. *Edgar*, 131 F.3d 610, 614 n.7 (7th Cir. 1997).

immigrant, and that her family would therefore suffer serious economic harm. They did this in spite of the fact that the Calimlims themselves were the cause of Martinez's illegal status. In challenging their convictions, the defendants tie all of their claims together with what they deem "a consistent theme" that portrays them as merely tough bargainers in the labor market. They claim that they "ha[d] and exercis[ed] economic power" that Irma Martinez did not have, and that they used their power to "persuade" her to remain at work "only by relying upon accurate recitation of legal consequences that mean advantage to the employer and disadvantage to the employee." Def. 19. But this description of the 19 years that Martinez provided her labor to the Calimlims seven days per week is belied by the record.

For nearly 20 years, the defendants created and implemented a deceitful plan to coerce Martinez into providing her labor to them under whatever conditions they imposed. Although the defendants could have brought Martinez into the country to work for them legally, they made no effort to do so. Rather, immediately upon Martinez's arrival in the United States – while she was present on a still valid tourist visa – the Calimlims told her that she was in the country illegally and that she would be imprisoned if anyone discovered her. The Calimlims intentionally took advantage of Martinez's ignorance of immigration law and cultivated her isolation in order to make her reasonably believe that she had no choice but to provide her labor to them.

It is true that Martinez wanted to work – indeed, wanted to work in the United States – so that she could earn money to help her deeply impoverished family. But, as Martinez testified, she wanted her freedom, she wanted a life, and she wanted to work for an employer other than Elnora and Jefferson Calimlim. Tr. 425, 520. She did not seek out her freedom or another job, however, because, as the jury found, the defendants made Martinez reasonably believe that she had no choice but to continue to provide her labor to the Calimlims. This was exactly as the Calimlims intended; they knowingly created her perilous immigration situation because they knew that, if Martinez believed she would be subject to harm such as imprisonment if she left their employ, she would have no choice but to work for them at least 15 hours per day, seven days per week if that is what they demanded. Martinez was not an employee with little economic power in the marketplace who had to settle for a less-than-ideal job. On the contrary, she lived in a condition of forced labor for 19 years.

1. There Is No Merit To The Defendants' Contention That The Forced Labor Statute Is Unconstitutionally Overbroad And Vague

The defendants argue that the forced labor statute, 18 U.S.C. 1589, is unconstitutionally overbroad and vague. This Court reviews such claims de novo. *Gresham* v. *Peterson*, 225 F.3d 899, 902-903 (7th Cir. 2000).

a. The Forced Labor Statute Is Not Unconstitutionally Overbroad

The overbreadth doctrine applies only to statutes that trench on First Amendment rights. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Thus,

in order to prevail on their overbreadth theory, the defendants must demonstrate that Section 1589 prohibits "a substantial amount" of speech protected by the First Amendment. *City of Chicago* v. *Morales*, 527 U.S. 41, 52 (1999). The defendants fall far short of the mark, failing to demonstrate that Section 1589 criminalizes any constitutionally protected speech.

The defendants argue that Section 1589's prohibition on obtaining another person's labor by means of a "threat[] of serious harm" "covers a great deal of otherwise protected speech." Def. Br. 27. The defendants are plainly mistaken. In support of their argument, the defendants offer a panoply of examples of purported threats of serious harm they claim are protected by the First Amendment. Section 1589 does not, however, criminalize the mere verbal expression of a threat of harm. Rather, by its plain terms, Section 1589 criminalizes intentionally obtaining another person's labor by making that person reasonably believe that she has no choice but to provide her labor or suffer some form of serious harm. Section 1589 does not prohibit any speech *qua* speech, and the intentionally coercive extraction of another person's labor that is prohibited by Section 1589 is not entitled to First Amendment protection. Moreover, words used to threaten or intimidate are not constitutionally protected speech. See *Virginia* v. *Black*, 538 U.S. 343, 359 (2003). "Numerous cases hold that governments may proscribe threats, extortion, blackmail and the like, despite the fact that they criminalize utterances because of their expressive content." *Gresham*, 225 F.3d at 909 (internal quotation marks omitted).

The defendants attempt to manufacture an overbreadth problem by offering a number of hypothetical actions by employers they claim are criminalized by Section 1589. However, the hypothetical situations they proffer would not run afoul of Section 1589, and cannot, therefore, support an overbreadth claim.[6] For example, the defendants attempt to paint their systemic efforts to make Martinez believe that she would be arrested and imprisoned, and that her family would thereafter be left without a necessary source of financial support, if she left their employ or was discovered as on a par with a "small employer's truthful statement to employees that they must start paying a portion of their health insurance premiums or face loss of health insurance benefits." Def. Br. 28. The Calimlims' treatment of Martinez bears no relation to an employer's informing his employees of an impending reduction in benefits. Such a warning from an employer cannot be viewed as designed to coerce an employee into continuing to work for that particular employer, and would not leave a reasonable employee with the belief that she had no choice but to continue to provide her labor to that particular employer when a job with another employer was available.

Because Section 1589 neither prohibits speech nor has a "sufficiently substantial impact on conduct protected by the First Amendment," *City of Chicago*, 527 U.S. at 52-53, it is not overbroad.

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[6] Any argument that a reasonable employer in one of the hypothetical situations might believe his actions to be prohibited by Section 1589 is a vagueness challenge, not an overbreadth challenge.

b. The Forced Labor Statute Is Not Unconstitutionally Vague[7]

The defendants also assert that Section 1589 runs afoul of the Fifth Amendment because it us unconstitutionally vague. As this Court has held:

> Unconstitutionally vague statutes pose two primary difficulties: (1) they fail to provide due notice so that "ordinary people can understand what conduct is prohibited," and (2) they "encourage arbitrary and discriminatory enforcement."

United States v. *Cherry*, 938 F.2d 748, 753 (7th Cir. 1991) (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)); see also *United States* v. *Turcotte*, 405 F.3d 515, 531 (7th Cir. 2005), cert. denied, 126 S. Ct. 1022 (2006). Where, as here, a statute does not threaten any First Amendment rights, a vagueness challenge must be "examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." *Maynard* v. *Cartwright*, 486 U.S. 356, 361 (1988).

Because Section 1589, as applied to the Calimlims, gave them ample notice that the conduct they engaged in was prohibited, the statute is not void for vagueness. Section 1589 punishes only those who knowingly obtain another person's labor through prohibited means. This Court has repeatedly held in other cases raising vagueness challenges to criminal statutes that, "especially with regard to the adequacy of notice to the complainant that his conduct is proscribed," the requirement in a criminal statute that the government prove intent or knowledge does "much to destroy any force in the argument that application of the [statute]

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[7] Much of what the defendants style as a vagueness challenge merely repeats the challenges they assert to the district court's jury instructions. See Def. Br. 24-26. The United States responds to those claims in Section I.A.2, *infra*.

would be so unfair that it must be held invalid." *United States* v. *Jackson*, 935 F.2d 832, 839 (7th Cir. 1991); *Cherry*, 938 F.2d at 754. This Court has also noted that a statute's inclusion of a scienter requirement also "diminish[es] the likelihood of unfair enforcement." *United States* v. *Collins*, 272 F.3d 984, 989 (7th Cir. 2001). Where, as here, a statute contains a scienter requirement, a defendant "bears an especially heavy burden in raising his vagueness challenge." *Ibid.* The Calimlims have not overcome their burden.

In their brief, the defendants claim that the terms "serious harm" and "threatened abuse of law or the legal process" are unconstitutionally vague. Def. Br. 26-27. The defendants are incorrect. The terms in question, given their everyday meaning, are readily understood by a person of ordinary intelligence, as is required by the Fifth Amendment. Nor is Section 1589 susceptible to arbitrary enforcement by "policemen, prosecutors, and juries" seeking "to pursue their personal predilections." *Collins*, 272 F.3d at 989 (quoting *Smith* v. *Goguen*, 415 U.S. 566, 575 (1974)). There is "no lack of clarity" in the terms "serious harm" or "threatened abuse of law or legal process" that would "give law enforcement officials discretion to pull within the statute activities not within Congress' intent." *Collins*, 272 F.3d at 989; see *United States* v. *Garcia*, No. 02-CR-110S-01, 2003 WL 22956917, at *5-6 (W.D.N.Y. Dec. 2, 2003) (unpublished decision). Indeed, the only court so far to consider a vagueness challenge to Section 1589's prohibition on forced labor found that the very phrases challenged by the

defendants are made up of "common words" and have a "plain and unambiguous meaning." *Garcia*, 2003 WL 22956917, at *3.

The term "serious harm" is not a term of art and its meaning is unambiguous. Moreover, as the *Garcia* court explained, the phrase "by means of abuse or threatened abuse of law or legal process" plainly encompasses using the prospect of deportation as a means of coercing another person to provide labor. *Id.* at *4-5. The most recent edition of Black's Law Dictionary defines "abuse of process" and "abuse of legal process" as "[t]he improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope." *Black's Law Dictionary* 11 (8th ed. 2004). Similarly, the Second Restatement of Torts defines "abuse of process" as the use of "a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed." Rest.2d Torts § 682. The legal process encompassing the arrest, imprisonment, and deportation of noncitizens is certainly not intended or designed to be used by individuals as a means of coercing others to provide their labor. The defendants, therefore, had fair warning that using the prospect of arrest, imprisonment, and deportation as a means of coercing Martinez to provide her labor was illegal.

Thus, the plain language of the statute makes clear that innocent warnings of potential legal consequences alone – or, as the defendants suggest, in combination with low pay – do not constitute forced labor in violation of 18 U.S.C. 1589. Rather, the statute prohibits intentionally making another person reasonably

believe that she will suffer abuse of the legal process or other serious harm *in order to obtain* her labor. No reasonable person of ordinary intelligence would understand the statute to prohibit mere "honest, accurate advice of legal consequences." Def. Br. 26.

In any case, because the Calimlims' vagueness challenge must be treated as an as-applied challenge, there is no need to consider whether truly innocent warnings of potential legal consequences could be swept within the ambit of Section 1589. The evidence before the jury clearly established that the Calimlims caused Martinez to reasonably believe that she had no choice but to provide her labor to them or suffer serious harm. The Calimlims intentionally brought Martinez into the country illegally and then used her illegal status (beginning before she was even illegal) to coerce her into providing her labor to them by repeatedly telling her that she was subject to arrest, imprisonment and deportation if detected, and must therefore stay hidden within the Calimlims' home, working as their domestic servant. As the jury found, the Calimlims' warnings to Martinez were, far from being innocent, intended to coerce Martinez into providing at least 15 hours of labor per day, seven days per week, for 19 years, in exchange for approximately $1,000 per year. The defendants do not challenge the sufficiency of the evidence supporting the jury's findings of intent or of the fact that Martinez's labor was coerced.

Moreover, the Calimlims' reliance on the Supreme Court's decision in *United States* v. *Kozminski*, 487 U.S. 931 (1988), is unavailing. The Court in

Kozminski considered the scope of 18 U.S.C. 1584, which prohibits knowingly holding another person in a condition of "involuntary servitude." The Court determined that, as a matter of statutory interpretation, Section 1584 prohibits only servitude that is compelled through the "use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." 487 U.S. at 952. As the defendants admit, however, *Kozminski* did not consider a vagueness challenge to Section 1584. Def. Br. 22. More importantly – and also admitted by the defendants – Congress enacted the statute at issue in the instant case, 18 U.S.C. 1589, in response to the *Kozminski* Court's limited interpretation of the involuntary servitude statute. Def. Br. 24; see also Victims of Trafficking and Violence Protection Act, Pub. L. No. 106-386, § 102(b)(13) (codified at 22 U.S.C. 7101(b)(13)); H.R. Rep. No. 939, 106th Cong., 2d Sess. 100-101 (2000). In enacting Section 1589 as part of the Victims of Trafficking and Violence Protection Act (VTVPA), Congress countered the Court's narrow construction of the term "involuntary servitude" by criminalizing a wider range of coercive conduct used to compel labor, including non-physical coercion. See 22 U.S.C. 7101(b)(13); see also H.R. Rep. No. 939, *supra*, at 100-101. Thus, the Supreme Court's narrow interpretation of Section 1584 cannot apply to Section 1589, which Congress enacted expressly to undo what the Court did in *Kozminski*.

2. There Is No Merit To The Defendants' Challenge To The Forced Labor Jury Instructions

The defendants also claim that the district court erred in instructing the jury on the meaning of the statutory terms "serious harm" and "abuse or threatened abuse of law or legal process" in a number of respects. Def. Br. 33-41. In reviewing jury instructions, this Court must read the instructions as a whole. See, *e.g.*, *Lalvani* v. *Cook County*, 396 F.3d 911, 914 (7th Cir. 2005). While "jury instructions need not be perfect," they must "fairly and accurately inform the jury about the law." *Hernandez* v. *HCH Miller Park Joint Venture*, 418 F.3d 732, 738 (7th Cir. 2005).

The district court instructed the jury that, in order to find the defendants guilty of violating Section 1589, it must find that they knowingly obtained the labor of Irma Martinez through one of three means:

> "A", through threats of serious harm to, or physical restraint against, a person; or "B", through a 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, "C" through abuse or threatened abuse of law or legal process.

Tr. 1026. The defendants do not dispute – nor could they – that this is a correct statement of the law.[8] See 18 U.S.C. 1589. Rather, the defendants challenge several of the court's definitional and explanatory instructions regarding the terms

[8] The defendants conceded below that the jury could convict the defendants of forced labor if it found that they used any of the three prohibited means, and that the jury was not required to specify which means it found the defendants to have used. R. 184; Tr. 887.

"serious harm," Tr. 1028-1029, and "abuse or threatened abuse of law or the legal process," Tr. 1029, 1031. This court accords "great deference to the district court's choice of language in jury instructions, upholding instructions that are accurate statements of the law and which are supported by the record." *United States* v. *Bailey*, 227 F.3d 792, 799 (7th Cir. 2000) (internal quotation marks & citation omitted).

Although the district court gave separate instructions on the terms "serious harm" and "abuse or threatened abuse of law or the legal process," the defendants conflate their challenges to those instructions. See, *e.g.*, Def. Br. 33. The defendants seem to present two primary arguments: (1) that the district court's instructions allowed the jury to convict the defendants of violating Section 1589 if it found that they merely warned Martinez that she could be subject to arrest and deportation because of her illegal status, Def. Br. 33-37; and (2) that the district court's instructions allowed the jury to convict the defendants of violating Section 1589 without finding that they used or threatened to use physical violence or coercion, Def. Br. 33-35, 37-40. The defendants cannot prevail on their first claim because the district court gave no such instruction; the defendants cannot prevail on the second claim because the district court's instruction was an accurate statement of the law.

1. The thrust of the defendants' challenge to the district court's instruction on "abuse or threatened abuse of law or the legal process" is that the jury was permitted to convict the defendants if it found that the defendants merely warned

Martinez "that deportation could occur if others discovered" her. Def. Br. 34. The defendants are incorrect. The court correctly instructed the jury that:

> The term abuse or threatened abuse of law or the legal process means use or threatened use of a law or legal process, whether civil or criminal, against another person primarily to accomplish a purpose for which the law or process was not designed. The usual case of abuse or threatened abuse of law or legal process involves some form of extortion, like the threat of criminal punishment, where the law or legal process is used or threatened to put pressure upon another person to compel her to take or refrain from taking some action.

Tr. 1029. The court also made clear that the jury could convict the defendants of the offense of forced labor only if it found that they had used one of the three prohibited means "to cause Irma Martinez reasonably to believe that she had no choice but to remain working for the Defendants." Tr. 1029-1030. Indeed, at the urging of the defendants, the court specifically instructed the jury that "[w]arnings of legitimate but adverse consequences or credible threats of deportation, standing alone, are not sufficient to violate the forced labor [s]tatute." Tr. 1031.

Taken as a whole, as they must be, *United State* v. *Perez*, 43 F.3d 1131, 1137 (7th Cir. 1994), the district court's jury instructions were an accurate statement of the law. The instructions made clear to the jury that it could convict the defendants of the offense of forced labor only if it found that they had used abuse or threats of abuse of law or legal process (or one of the other two prohibited means) *in order to coerce* Martinez into providing her labor. That is exactly the

conduct that Congress prohibited in 18 U.S.C. 1589.[9] No reasonable reading of the instructions leaves room for a jury to convict a defendant of forced labor based only on innocent warnings of potential legal consequences, as the defendants suggest.

2. The defendants' primary complaint about the district court's instructions regarding the meaning of the phrase "serious harm" seems to be that the court allowed the jury to convict the defendants of violating the forced labor statute if it found that they coerced Martinez to provide her labor through threats of nonphysical harm. See Def. Br. 34, 37, 39-40. The district court instructed the jury that:

> The term "serious harm" includes both physical and non-physical types of harm. A threat of serious harm, therefore, need not involve any threat of physical violence. It 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 as the worker to provide, or to continue providing, labor or services.

Tr. 1028-1029. The defendants' challenge to this instruction must fail because the instruction is an accurate statement of the law and is supported by the record.

The defendants did not request that the district court instruct the jury that it could only consider threats of physical violence or coercion. In fact, the

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[9] Furthermore, the government presented ample evidence that the Calimlims' intentionally made Martinez reasonably believe that she would be subject to arrest, imprisonment, and deportation if discovered in order to coerce her into providing her labor to them in spite of her desire to work for another employer. That is more than sufficient to support the court's instructions and the jury's guilty verdicts.

defendants' proposed jury instruction made no reference to physical violence or coercion. R. 160, Instruction 29. Nor did the defendants object to the government's proposed instruction on the meaning of the term "serious harm," which the district court ultimately adopted verbatim. Tr. 834. Failure to object to a jury instruction "precludes appellate review" unless the district court's giving the instruction constitutes "plain error" – that is, an error that "affects substantial rights." Fed. R. Crim. P. 30(d), 52(b); see also *United States* v. *Reed*, 227 F.3d 763, 771 (7th Cir. 2000). The defendants do not even attempt to argue that the district court's instruction on the definition of "serious harm" rises to the level of plain error, and have therefore waived their right to do so. Moreover, because the district court's instruction was not error of any kind, let alone plain error, this Court should reject the defendants' argument.

The district court's instruction was an accurate statement of the law and was supported by the evidence presented at trial. As discussed *supra* at 25-26, Congress enacted Section 1589 in response to the Supreme Court's decision in *Kozminski*, which narrowly interpreted 18 U.S.C. 1584, the involuntary servitude statute. Section 1584 prohibits holding another person in or selling another person into "any condition of involuntary servitude," but does not define the term "involuntary servitude." The Supreme Court construed the term narrowly, requiring that a victim's labor be compelled through the "use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or legal process." 487 U.S. at 952. As the First Circuit found in *United States* v. *Bradley*,

Congress enacted Section 1589 as part of the VTVPA in order to correct what it viewed as the Supreme Court's "mistakenly narrow[ing] the definition of involuntary servitude by limiting it to physical coercion." 390 F.3d 145, 156 (1st Cir. 2004), vacated on other grounds, 545 U.S. 1101 (2005). Section 1589 accomplished this by specifying the prohibited means of procuring another person's labor, including by making a person believe that she or a third party would suffer "serious harm" if she did not provide her labor.

The plain and ordinary meaning of the phrase "serious harm" encompasses far more than physical harm or coercion. Congress codified this ordinary understanding of the term in the "Purposes" section of the VTVPA, which states that one purpose of the new statute was "to reach cases in which persons are held in a condition of servitude through nonviolent coercion." Pub. L. 106-386, § 102(b)(13), 114 Stat. at 1467. Moreover, then conference report accompanying the VTVPA explains that:

> Section 1589 is intended to address the increasingly subtle methods of traffickers who place their victims in modern-day slavery, such as where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence.

H.R. Conf. Rep. No. 939, 106th Cong., 2d Sess. 101 (2000). The report states unambiguously that "[t]he term 'serious harm' as used in this Act refers to a broad array of harms, including both physical and nonphysical," and specifically lists bankruptcy to a victim's family as one type of serious harm contemplated by the

Act. *Ibid.* Thus, there is no question that the district court's instruction to the jury on the meaning of "serious harm" is an accurate statement of the law.

As the defendants note, Def. Br. 34, the district court also instructed the jury that it could consider Martinez's "background, physical and mental condition, experience, education, socioeconomic status, and any inequalities between her and the Defendants with respect to these considerations, including their relative stations in life, among other things." Tr. 1030. This, too, was an accurate statement of the law, reflecting the conference report's instruction that "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 at 101.[10]

B. There Is No Merit To The Defendants' Challenge To Their Convictions For Harboring An Illegal Alien For Private Financial Gain

The defendants' final claim is that the government did not present sufficient evidence to prove that the Calimlims harbored an illegal alien for private financial gain. Def. Br. 41-48. The defendants admit that they harbored an illegal alien for at least 17 years, but claim that the United States did not prove that they had a

[10] The district court's instructions were also supported by the evidence presented to the jury. The government presented ample evidence that the defendants held Martinez in a condition of forced labor by making her believe that she and her family would suffer serious harm if she left.

"pecuniary motive" for doing so. Def. Br. 45; see also *United States* v. *Fujii*, 301 F.3d 535, 539-540 (7th Cir. 2002). In reviewing this claim, this Court must "review the evidence and draw all reasonable inferences therefrom in the light most favorable to the government." *Id.* at 539. The defendants cannot prevail on their sufficiency claim unless they demonstrate that no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Ibid.*

There is ample evidence to demonstrate that the defendants had a pecuniary motive for harboring Martinez. By keeping Martinez in their home, isolated from the world and afraid to leave, the Calimlims obtained 19 years' worth of her labor – for at least 15 hours a day, seven days a week – in exchange for approximately $1,000 per year. Evidence presented at trial demonstrated that, if the Calimlims had brought Martinez into the country to work for them legally: (1) they would have had to pay her the prevailing wage rate for her type of work; (2) they would have had to sign a labor contract with her guaranteeing her freedom to leave the house when not working; and (3) if she obtained a visa to do domestic work they would not have been permitted to require her to perform duties such as changing the oil in their cars and cleaning their rental properties. Tr. 124-131.

The evidence also demonstrated that government agents who searched the Calimlims' house around the time that Martinez was rescued found blank immigration forms employers use to seek permission to bring in foreign employees. Tr. 93. Elnora Calimlim herself testified that she knew she would have had to pay more money had they hired an American housekeeper to perform

the tasks that Martinez performed for them. Tr. 741. That is more than sufficient to demonstrate that the Calimlims acted with a pecuniary motive and that they in fact obtained private financial gain. Indeed, the district court ordered the Calimlims to pay more than $900,000 to Martinez in restitution to make up for the wages they should have been paying her during the 19 years she toiled for them. R. 263. Because the defendants cannot demonstrate that no rational trier of fact would conclude that they harbored an illegal alien for private financial gain, this Court must affirm their convictions.

II

THE DISTRICT COURT ERRED IN CALCULATING THE DEFENDANTS' SENTENCES

This Court has held that, in choosing an appropriate sentence for a convicted criminal defendant, a district court must first consult a properly calculated advisory range pursuant to the United States Sentencing Guidelines and then, by reference to the factors specified in 18 U.S.C. 3553(a), select a sentence either inside or outside the range. *United States* v. *Walker*, 447 F.3d 999, 1007 (7th Cir.), cert. denied, 127 S. Ct. 314 (2006). Because the district court in this case did not consult a properly calculated advisory guidelines range, this Court should vacate the sentence and remand the case for resentencing of both defendants. This Court reviews de novo a district court's calculation of a defendant's advisory guideline range. *United States* v. *Chamness*, 435 F.3d 724, 726 (7th Cir. 2006).

The district court erred as a matter of law in calculating the defendants' offense level under the Guidelines by rejecting upward adjustments for (1) the defendants' commission of another felony in the course of their crime, (2) the vulnerability of the victim, and (3) the defendants' use of their minor children in the course of their crime. In addition, the district court's downward departure from the Guideline range and the resulting sentence were unreasonable.

The presentence report (PSR) submitted to the district court recommended that the defendants' adjusted offense level be 27. The PSR (1) set the base offense level for counts one and two at 22, as required by U.S.S.G. § 2H4.1(a)(1); (2) increased the offense level by 3 pursuant to U.S.S.G. § 2H4.1(b)(3)(A) because the victim was held in a condition of involuntary servitude for more than one year, and (3) further increased the offense level by 2 levels because defendants knew or should have known that the victim was unusually vulnerable or particularly susceptible to the criminal conduct, pursuant to U.S.S.G. § 3A1.1(b)(1). Both the United States and the defendants objected to the calculation in the PSR. The United States urged the district court to apply three additional upward adjustments: (1) a 2-level upward adjustment because the defendants committed a felony in connection with the commission of the crime of forced labor, pursuant to U.S.S.G. § 2H4.1(b)(4)(A); (2) a 2-level upward adjustment pursuant to U.S.S.G. § 3B1.4 for using their minor children in the commission of their crimes; and (3) a 2-level upward adjustment either because (a) they were both organizers, leaders, managers, and supervisors in a criminal activity pursuant to U.S.S.G. § 3B1.1(c), or (b) they

abused their position of trust as physicians pursuant to U.S.S.G. § 3B1.3. The government also argued that defendants were not entitled to any kind of downward adjustment under the factors listed in 18 U.S.C. 3553. The total offense level advocated by the United States was 33. The defendants, in turn objected to both of the upward adjustments in the PSR, as well as the three additional adjustments sought by the United States. They further argued that they were entitled to a downward adjustment under the factors enumerated in 18 U.S.C. 3553.

After holding a sentencing hearing, the district court settled on an adjusted offense level of 23. Over the government's objection, the district court (1) declined to apply the vulnerable victim adjustment; (2) refused to apply the three additional upward adjustments requested by the government; and (3) applied a 2-level downward adjustment based on the factors listed in 18 U.S.C. 3553. Over the defendants' objection, the district court applied the 3-level upward adjustment for holding the victim in involuntary servitude for more than a year. The resulting offense level carries a sentencing range of 46-57 months for defendants such as the Calimlims, who fall within criminal history category 1. The district court sentenced the defendants to 48 months' imprisonment on each count, to run concurrently.

A. The District Court Erred In Refusing To Add Two Levels To The Defendants' Offense Level Because They Committed Another Felony In The Course Of Committing The Offense Of Forced Labor

The district court erred as a matter of law in refusing to apply a 2-level upward adjustment to the defendants' advisory offense level for committing the additional felonies of harboring an alien for private financial gain and conspiring to conceal an alien for private financial gain in the course of committing the offense of forced labor. Section 2H4.1 of the guidelines is titled "Peonage, Involuntary Servitude, and Slave Trade," and governs convictions under 18 U.S.C. 241, 1581-1590, and 1592. U.S.S.G. § 2H4.1 & Commentary. Because the defendants were convicted of counts one and two, charging conspiracy and violation of 18 U.S.C. 1589, the district court correctly used Section 2H4.1 to determine the defendants' base offense level of 22. U.S.S.G. § 2H4.1(a)(1). The district court also increased the defendants' offense level by 3 under Section 2H4.1(b)(3)(A), which dictates such an adjustment where the "victim was held in a condition of peonage or involuntary servitude for more than one year." But the court refused to apply the 2-level adjustment dictated by Section 2H4.1(b)(4) where "any other felony offense was committed during the commission of, or in connection with, the peonage or involuntary servitude offense."

1. Guideline Section 2H4.1 Requires A Two-Level Upward Adjustment For The Defendants' Commission Of Other Felonies In The Course Of Committing The Offense Of Forced Labor

Initially, the district court's explanation for denying this adjustment is difficult to understand. The court stated:

> The Court views this as not consistent with commentary 2, to Section 2H4.1. I think the matter is accounted for in the guideline calculations, and in that sense would be excessive and may border on double counting. But, in essence, the Court agrees that it doesn't comport with the standards outlined in commentary 2 and is incorporated into the offense. And so the Court is going to deny that request by the Government.

U.S. App.15. Commentary 2 to Section states, in its entirety:

> Under subsection (b)(4), 'any other felony offense' means any conduct that constitutes a felony offense under federal, state, or local law (other than an offense that is itself covered by this subpart). When there is more than one such other offense, the most serious such offense (or group of closely related offenses in the case of offenses that would be grouped together under §3D1.2(d)) is to be used. See Application Note 3 of §1B1.5 (Interpretation of References to other Offense Guidelines).

Given the broad definition of "any other felony offense" in the commentary, it is difficult to imagine how the defendants' felony conviction for harboring an alien and conspiring to harbor an alien in connection with their forced labor convictions would not, in the district court's words, "comport with the standards outlined in commentary 2." The commentary instructs that the adjustment should not be applied to cover any offense that is itself covered by subpart 2H4; but the defendants' convictions for harboring an alien and conspiring to harbor an alien in violation of 8 U.S.C. 1324 are governed by U.S.S.G. § 2L1.1. Thus, nothing in the

plain language of Section 2H4.1 or Commentary 2 justifies excluding the defendants' harboring convictions from the scope of the 2-level adjustment.

Nor could applying the 2-level adjustment in Section 2H4.1(b)(4) constitute "double counting" as the district court suggests. The 2-level upward adjustment for the commission of another felony (2H4.1(b)(4)) is a "specific offense characteristic" instruction in the guideline governing the offense level for forced labor convictions (2H4.1(a)). The plain language of the guidelines expressly directs application of the 2-level adjustment in Section 2H4.1(b)(4) where a defendant has committed any other felony "during the commission of, or in connection with" a forced labor offense. The guidelines must be read as a whole, and applying the "other felony" adjustment to the base level in Section 2H4.1(a) "does not 'increase' a defendant's offense level[; i]t merely sentences him under the offense guideline [that] reflects the full scope of his conduct." *United States* v. *Beith*, 407 F.3d 881, 889 (7th Cir. 2005); see also *United States* v. *Hochschild*, 442 F.3d 974, 979 (6th Cir. 2006).

In any event, as this Court has held, 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). Commentary 2 incorporates this idea by prohibiting application of the "other felony" adjustment where the other felony is already covered by guideline Section 2H4. But the felony offenses of harboring an illegal alien and conspiring to harbor an illegal alien are not "incorporated into the offense" of forced labor. Anyone can

be a victim of forced labor; there is no requirement that the victim be an illegal alien. The harboring convictions are, therefore, separate and additional crimes meriting an enhanced sentence under the guidelines. Moreover, the defendants' additional criminal conduct did not serve as the basis for any other adjustment applied by the district court or sought by the United States. See *United States* v. *Haines*, 32 F.3d 290, 293 (7th Cir. 1994).

2. Guideline Section 2H4.1 Governs Sentencing For The Offense Of Forced Labor

Alternatively, the district court may have intended to adopt the defendants' argument against application of the other felony adjustment. The district court began its explanation for refusing to apply Section 2H4.1(b) by stating: "The Court is going to agree with the defense position on this." U.S. App. 15. The defendants argued that the special offense characteristics adjustments in Section 2H4.1(b) should not apply to the defendants because those sections refer to the underlying offense as "peonage or involuntary servitude" rather than as "forced labor." See U.S.S.G. § 2H4.1(b)(3) ("If any victim was held in a condition of peonage or involuntary servitude for (A) more than one year, increase by 3 levels"); *id.* at § 2H4.1(b)(4) ("If any other felony offense was committed during the commission of, or in connection with, the peonage or involuntary servitude offense, increase" by 2 levels).

The caption of Section 2H4.1 reads "Peonage, Involuntary Servitude, and Slave Trade." Nevertheless, the guideline makes clear that it applies to the offense

of forced labor prohibited by 18 U.S.C. 1589. Indeed, the defendants did not object to the application of Section 2H4.1 to determine their base offense level. Moreover, the district court overruled the defendants' objection to applying the 2-level adjustment for holding Martinez in forced labor for more than a year – a decision the defendants do not challenge on appeal – but agreed that the adjustment for committing another felony should not apply. The district court gave no explanation for these disparate results. That the district court applied the adjustment in Section 2H4.1(b)(3) for holding Martinez for more than a year undercuts its reliance on the defendants' arguments against applying the adjustment in Section 2H4.1(b)(4). Both subsections describe specific offense characteristics and both use the phrase "peonage and involuntary servitude." The district court was correct to apply the adjustment in subsection (b)(3) and erred as a matter of law in refusing to apply the adjustment in subsection (b)(4).

In any case, the defendants' argument is misplaced and has been rejected by the only court of appeals to consider it. As discussed *supra,* the First Circuit noted in *United States* v. *Bradley,* 390 F.3d 145, 150 (1st Cir. 2004), that Congress enacted 18 U.S.C. 1589 criminalizing forced labor as part of the larger VTVPA in order to counter the Supreme Court's decision in *Kozminski,* 487 U.S. at 949-950, narrowly interpreting the definition of involuntary servitude. The bill considered in the Senate would have redefined and enlarged the offense of involuntary servitude. *Bradley,* 390 F.3d at 156. The House bill, which was ultimately adopted by Congress, opted to create a new forced labor offense in Section 1589.

Ibid. But, as the First Circuit found, the adoption of new nomenclature did not alter the fact that Congress viewed forced labor as a species of involuntary servitude. *Ibid.* Congress used the same terms to define forced labor in Section 1589 and to define involuntary servitude in the VTVPA. Moreover, the VTVPA states as one of its purposes that "[i]nvoluntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion." *Bradley*, 390 F.3d at 156-157.

Congress intended that the offense of forced labor be treated as a type of involuntary servitude, and the Sentencing Commission effectuated that intent when it amended Section 2H4.1 to include the offense of forced labor within the category of "peonage, involuntary servitude, and slave trade." Indeed, Chapter 77 of Title 18 of the United States Code, within which Section 1589 is found, is captioned "Peonage, Slavery, and Trafficking in Persons." If it was appropriate for Congress to include the offense of forced labor in this category in the Code, it must be appropriate for the Commission to include forced labor within the same category in the guidelines. The fact that the Commission "fail[ed] to update the language in the caption and enhancements by adding the words 'forced labor'" does not overcome the clearly-expressed will of Congress and the Commission. *Bradley*, 390 F.3d at 157.

B. The District Court Erred In Refusing To Add Two Levels To The Defendants' Offense Level Because Their Victim Was Vulnerable

The district court erred as a matter of law in determining that the 2-level "vulnerable victim" adjustment in U.S.S.G. § 3A1.1 did not apply in this case. Section 3A1.1 instructs a sentencing court to increase a defendant's offense level by two levels "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim." U.S.S.G. § 3A1.1(b)(1). The application notes define "vulnerable victim" to mean "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. The adjustment for a victim's vulnerability applies where the defendant knew or should have known of the vulnerability. *Ibid*.

Although the district court's justification for refusing to apply the adjustment is somewhat unclear, see U.S. App. 11-12, the court seems to have adopted the defendants' suggestion below that Section 3A1.1 may apply here only if Martinez is more vulnerable than most of the people who are victims of forced labor, or is vulnerable in a way that most people who are victims of forced labor are not. The court reached this conclusion by relying on (1) an erroneous view of what constitutes double counting and (2) the Ninth Circuit's decision in *United States* v. *Castaneda*, 239 F.3d 978 (9th Cir. 2001), a case that interprets Section 3A1.1 incorrectly and has not even been followed by the Ninth Circuit itself.

1. Applying The Vulnerable Victim Adjustment In This Case Would Not Constitute Double Counting

The district court seemed to suggest that applying the vulnerable victim adjustment here would constitute double counting because the victim's vulnerability is already accounted for in the underlying offense. See U.S. App. 11-12. The court noted that the jury was instructed that it could consider any particular vulnerabilities of Martinez in determining whether the defendants coerced her into providing her labor. The court then concluded that it could not apply the Section 3A1.1 adjustment unless the victim is "[m]ore vulnerable than those similarly situated." U.S. App. 12. The court's interpretation is wrong as a matter of law.

The guidelines instruct sentencing courts not to impose the vulnerable victim adjustment "if the factor that makes the person a vulnerable victim is incorporated into the offense guideline." U.S.S.G. § 3A1.1 Application Note 2. Martinez's vulnerabilities are not incorporated into the offense guideline for forced labor. The guideline offers the following example of what it means to incorporate a victim's vulnerability into the offense guideline: "For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age." *Ibid.* The guideline governing the offense of forced labor – U.S.S.G. § 2H4.1 – does not provide for any enhancements due to victim vulnerabilities. Indeed, all of the enhancements in Section 2H4.1 are focused on a defendant's conduct rather

than any characteristic of the victim. Thus, the guideline enhances a defendant's offense level where the defendant (1) inflicted permanent, life-threatening, or serious bodily injury on the victim, § 2H4.1(b)(1), (2) used or brandished a dangerous weapon, § 2H4.1(b)(2), (3) held the victim for more than 30 days, § 2H4.1(b)(3), and (4) committed any other felony offense in the commission of the offense of forced labor, § 2H4.1(b)(4). None of these enhancements incorporates a victim's vulnerability. Indeed, the only court to consider this very argument rejected it in an involuntary servitude case, holding that Section 2H4.1, which applies in an identical manner to offenses of involuntary servitude and forced labor, does not "provide an adjustment for victim characteristics such as [the victim's] immigrant status and the linguistic, educational, and cultural barriers that contributed to her remaining in involuntary servitude." *United States* v. *Veerapol*, 312 F.3d 1128, 1132-1133 (9th Cir. 2002).

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." *Senn*, 129 F.3d at 897. A victim's vulnerability is not an element of the offense of forced labor. Nor do all victims of forced labor offenses necessarily exhibit any particular vulnerabilities, or any vulnerabilities at all. The offense of forced labor may be committed through several means of coercion, including by threatening serious physical harm to the victim. It is not hard to imagine a situation in which such threats would make a robust person with no particular vulnerabilities feel compelled to provide his or her labor.

2. The District Court Employed An Incorrect Understanding Of What Constitutes A Vulnerable Victim

The district court and the defendants also relied on the reasoning of the Ninth Circuit in *United States* v. *Castaneda*, 239 F.3d 978 (9th Cir. 2001), which held that the vulnerable victim enhancement could not apply in that case because the victim of the defendant's Mann Act offense did not suffer from any vulnerabilities that were not common among people who were victimized by Mann Act violations. See U.S. App. 12. In settling on the requirement that the victims must be vulnerable in a way that "distinguish[es] them from the typical victims of a Mann Act violator," 239 F.3d at 982, the Ninth Circuit adopted the reasoning of a prior First Circuit case that also involved a violation of the Mann Act, *United States* v. *Sabatino*, 943 F.2d 94 (1st Cir. 1991). In *Sabatino*, the First Circuit explained that a victim's vulnerability must be unusual "given the kind of victim that is typically involved in a Mann Act violation." 943 F.2d at 103. This requirement that a sentencing court focus on whether a victim is more vulnerable than most of the people who are in fact victimized by the crime in question misinterprets the vulnerable victim guideline and is contrary to the weight of courts of appeals authority governing application of Section 3A1.1(b).

This Court has explained that the "purpose of the vulnerable victim enhancement * * * is to punish more severely those who target the helpless." *United States* v. *Newsom*, 402 F.3d 780, 785 (7th Cir. 2005), cert. denied, 546 U.S.

1224 (2006). This Court has also elaborated on the enhancement's "twofold purpose":

> One, the practical, is to recognize the lower cost to the criminal of committing a crime against such a victim than against a victim of ordinary robustness. A vulnerable or susceptible victim is (1) less likely to defend himself, (2) less likely perhaps to be aware that he is a victim of crime, (3) less likely to complain. * * * The guideline's other purpose, the moralistic, is to express society's outrage at criminals who unsportingly prey on the weak, the defenseless.

United States v. *Lallemand*, 989 F.2d 936, 940 (7th Cir. 1993). Consistent with these goals of Section 3A1.1, this Court has assessed a victim's vulnerability in comparison to society generally rather than in comparison to other people who have been victims of the offense at issue: "The 'vulnerable victim' 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. Because criminals incur reduced risks and costs in victimizing such people, a higher than average punishment is necessary to deter the crimes against them." *United States* v. *Grimes*, 173 F.3d 634, 637 (7th Cir. 1999).

At least two other courts of appeals have expressly rejected the *Sabatino*/*Castaneda* interpretation of Section 3A1.1. The Second Circuit, in *United States* v. *McCall*, 174 F.3d 47, 51 (2d Cir. 1998), stated that "a more vulnerable-than-most test varies considerably from a particularly vulnerable test." The court explained that a more-vulnerable-than-most test that required application of the enhancement when a particular victim is more vulnerable than at least 50%

of the people who are victims of the offense in question would be both overinclusive and underinclusive:

> Some crimes – armored car robberies – are unlikely to involve a particularly vulnerable victim, although some armored car companies may be more vulnerable than others. Other crimes – fraudulent cancer cures – may be directed at a class of victims who are virtually all particularly vulnerable.

Ibid. Rather, the Second Circuit held that "[t]he correct test calls for an examination of the individual victims' ability to avoid the crime rather than their vulnerability relative to other potential victims of the same crime." *Ibid.* Such an interpretation, the court held, is consistent with the view that the enhancement should "be applied where an extra measure of deterrence and punishment is necessary because the defendant knew of a victim's substantial inability to avoid the crime." *Ibid.*

Relying on the Second Circuit's decision, the Third Circuit adopted the same standard in *United States* v. *Zats*, 298 F.3d 182 (3d Cir. 2002). The court held that the question whether to apply the vulnerable victim enhancement is a question of "whether an individual debtor's circumstances made [the defendant's] improper debt collection methods particularly likely to succeed against him or her, not merely whether the debtor is more vulnerable than most debtors." *Id.* at 188. The Third Circuit explained that its interpretation of Section 3A1.1 is consistent with the purpose of the enhancement:

> Our objective is to provide extra deterrence for defendants who are especially likely to succeed in their criminal activities because of the vulnerability of their prey. An extra dose of punishment removes the

> criminal's incentive to facilitate his crime by selecting victims against whom he actually will enjoy a high probability of success.

Ibid. The purpose of the enhancement articulated by both the Second and Third Circuits is essentially identical to the purpose understood and articulated by this Court. Thus, the Second and Third Circuits' rejection of the more-vulnerable-than-most standard is entirely consistent with this Circuit's body of law interpreting Section 3A1.1.[11] See *Lallemand*, 989 F.2d at 940 ("It should go without saying that the characteristics which make a victim unusually susceptible to a particular offense need not be ones wholly idiosyncratic to him; they can be shared with others.").

Moreover, even the Ninth Circuit has not applied the more-vulnerable-than-most standard outside of the Mann Act context. In *Veerapol*, 312 F.3d at 1133, a case involving application of the vulnerable victim enhancement in an involuntary servitude case, the Ninth Circuit held that the *Sabatino/Castaneda* standard did not apply. The court relied on a distinction made in *Castaneda* between cases in which the particular "scheme" targets victims with substantially the same vulnerabilities and cases in which the "offense" does. The *Castaneda* court referred to the particular defendant's conduct as the "scheme" and to the statutory crime as the "offense," explaining that Section 3A1.1 does not "require that the victims be more vulnerable than the typical victims of the particular *scheme* or type of *scheme* that

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[11] This Court has declined to express its views on the more-vulnerable-than-most standard articulated in *Sabatino* and *Castaneda*. *United States* v. *Julian*, 427 F.3d 471, 490 n.9 (7th Cir. 2005), cert. denied, 546 U.S. 1220 (2006).

is utilized," but does require that they be more vulnerable than the "usual victims of the offense." 239 F.3d at 980-981 & n.4. Thus, if an offense allows for a variety of "schemes," the vulnerable victim adjustment may apply to all of the victims of a particular scheme or type of scheme. The *Veerapol* court stated that its "limitation on the § 3A1.1 enhancement in Mann Act cases does not apply in cases where the specific manner in which the defendant committed the offense is a 'scheme * * * [that] typically targets people like the victims [in that case]." *Veerapol*, 312 F.3d at 1133 (alterations in original) (quoting *United States* v. *Mendoza*, 262 F.3d 957, 962 (9th Cir. 2001)). This repudiation of the more-vulnerable-than-most standard is consistent with the Second Circuit's recognition in *McCall* that almost all of the victims of certain offenses share particular vulnerabilities that are not accounted for in the offense guideline. See also *United States* v. *O'Brien*, 50 F.3d 751, 757 (9th Cir. 1995).

Though the United States is not aware of any other court of appeals that has expressly adopted or rejected the *Sabatino/Castaneda* more-vulnerable-than-most standard, most other circuits interpret Section 3A1.1 in a manner that is consistent both with the standard articulated by the Second and Third Circuits and with this Court's view of the purposes of Section 3A1.1. A number of circuits rely on the formulation that a vulnerable victim must be one who is in greater need of societal protection, reasoning that the victimization of such a person renders the defendant's conduct "more criminally depraved." See, *e.g.*, *United States* v. *Angeles-Mendoza*, 407 F.3d 742, 747-748 & n.6 (5th Cir. 2005); *United States* v.

Checora, 175 F.3d 782, 794 (10th Cir. 1999); *United States* v. *Castellanos*, 81 F.3d 108, 111 (9th Cir. 1996); *United States* v. *Stover*, 93 F.3d 1379, 1386-1387 (8th Cir. 1996).[12]

Furthermore, it is unclear how a sentencing court would administer such a standard. The First Circuit in *Sabatino* and the Ninth Circuit in *Castaneda* looked to published literature about the characteristics of victims of Mann Act offenses, which mostly involve prostitution. See 18 U.S.C. 2421, *et seq*. But courts cannot rely on the fact that such a body of social science research will be available to describe the characteristics of a "typical" victim of each criminal offense in the United States Code. Absent such literature, a sentencing judge will be hard-pressed to determine what vulnerabilities a typical victim of a particular offense would possess without relying on his or her own imagination. Such a result would

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[12] Some courts, such as the Fourth and Fifth Circuits, have stated that "[t]he vulnerability that triggers § 3A1.1 must be an 'unusual' vulnerability which is present in only some victims of that type of crime." *United States* v. *Moree*, 897 F.2d 1329, 1335 (5th Cir. 1990); see also *United States* v. *Singh*, 54 F.3d 1182, 1191 (4th Cir. 1995) (relying on *Moree*). When such statements are read in context, however, it is clear that those courts are merely implementing the Guidelines' admonition against double counting. Thus, the Fifth Circuit explained that a victim's vulnerability may not be present in all potential victims of an offense because "[a] condition that occurs as a necessary prerequisite to the commission of a crime cannot constitute an enhancing factor under § 3A1.1." *Moree*, 897 F.3d at 1335. In other words, where a particular vulnerability is an element of an offense – *e.g.*, a victim's illegal status in a case charging harboring an illegal alien – that characteristic cannot be the basis of a vulnerable victim enhancement. Indeed, the Fifth Circuit recently held, in an unpublished decision, that it is not double counting to impose a vulnerable victim enhancement based on a victim's illegal status in a forced labor case. *United States* v. *Chang*, No. 06-11229, 2007 WL 2253508, *3-4 (5th Cir. Aug. 7, 2007).

undermine the purpose of the Sentencing Guidelines – to achieve "uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders." U.S.S.G. § 1A1.1 (Introduction & General Application Rules, Part A, ¶ 3).

Even if a court were to rely on published cases to determine the relevant "typical" vulnerabilities, such an assessment would likely be misleading. Not every defendant who receives a vulnerable victim enhancement appeals the sentence and unless a particular case results in an appeal concerning application of Section 3A1.1, it is unlikely that a court will find a published account of the victim's vulnerabilities. Moreover, sentences that result in an appeal concerning the vulnerability of the victim will most likely be cases in which it is a close call whether the victim is in fact vulnerable – thereby providing a skewed vision of the typical vulnerabilities for the offense in question. Moreover, in this case, there are almost no reported forced labor cases because the offense of forced labor per se is relatively new.

3. Irma Martinez Is A Vulnerable Victim

Finally, there is no question that, under the correct interpretation of Section 3A1.1, Irma Martinez clearly qualifies as a vulnerable victim because she was vulnerable and the Calimlims were aware of and took advantage of her vulnerabilities. When Martinez was brought to the United States, she was only 19 years old, spoke virtually no English, and did not know anyone in the United States. Martinez was entrusted to the Calimlims by her parents after Martinez had

worked for Elnora Calimlim's parents in the Philippines. The Calimlims were aware that Martinez knew almost nothing about the laws and customs of the United States. Moreover, the Calimlims knew that Martinez's family in the Philippines was poor and relied on any extra income Martinez could earn for them.

All of these factors taken together qualify Martinez as a vulnerable victim. Martinez's young age alone might be enough under Section 3A1.1 to qualify her as a vulnerable victim. But her age in combination with her naivete, isolation, inability to speak English, and immigration status is certainly sufficient to meet the vulnerability standard of Section 3A1.1. This Court held in one case that "a 20-year-old is hardly an experienced adult well able to resist the lies and threats of a much older person." *United States* v. *Newman*, 965 F.2d 206, 211 (7th Cir. 1992). In another case, the court found victims to be vulnerable within the meaning of Section 3A1.1 because they were unsophisticated. *United States* v. *Parolin*, 239 F.3d 922, 927 (7th Cir. 2001). In the instant case, it is clear that the Calimlims chose Martinez as the object of their forced labor scheme because they knew that she was less able to resist their demands and the conditions they imposed on her than an average person would have been. That is enough to qualify Martinez as a vulnerable victim.

C. The District Court Erred In Refusing To Add Two Levels To The Defendants' Offense Level Because They Used Their Minor Children In The Commission Of Their Crimes

The district court also erred as a matter of law in interpreting Section 3B1.4 of the guidelines, which instructs a sentencing court to increase a defendant's offense level by 2 levels if the defendant "used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense." The application notes to Section 3B1.4 explain that "'[u]sed or attempted to use' includes directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting." This Court has held that, in applying this adjustment, the word "use" must be interpreted broadly. *United States* v. *Ramsey*, 237 F.3d 853, 859 (7th Cir. 2001). Thus, this Court has held that a defendant "uses" a minor to commit a crime or to avoid detection of the offense when he takes some affirmative action to involve a minor in the commission of the crime – or, presumably, its cover-up. See, *e.g.*, *United States* v. *Acosta*, 474 F.3d 999, 1002 (7th Cir. 2007); *United States* v. *Hodges*, 315 F.3d 794, 802 (7th Cir. 2003).

The United States urged the district court to apply this adjustment because the Calimlims used their children when they were minors to commit the crime of forced labor and in particular to avoid detection and apprehension for their offense. Trial testimony established that the children were integral to the Calimlims' efforts to keep Martinez isolated from the outside world. The defendants objected to the adjustment because they claimed that they did not take "affirmative action to

involve a minor" in the offense of forced labor. The district court agreed with the defendants, stating that he was "not convinced that this was such an affirmative using of the children in the sense that the children were cooperators, participants, knowing fully well what was going on [a]nd the reason for it." U.S. App. 17.

In concluding that the "use of a minor" adjustment did not apply in this case, the district court used an interpretation of U.S.S.G. § 3B1.4 that is incorrect and has been rejected by this Court. 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. This Court held in *Ramsey* that the "enhancement in section 3B1.4 focuses on whether the defendant used a minor in the commission of a crime, not whether the minor knew that he was being used to commit a crime." 237 F.3d at 861; see also *United States* v. *Shearer*, 479 F.3d 478, 483 (7th Cir. 2007). The Second Circuit has adopted the same reasoning, stating:

> [T]he appropriate focus of a court's inquiry is on the actions and intent of the defendant. Whether the minor himself engaged in any criminal actions, whether the minor intended to assist in the adult's criminal activity, or whether the minor even knew that the adult was involved in criminal activity are factors irrelevant to application of the § 3B1.4 enhancement.

United States v. *Gaskin*, 364 F.3d 438, 464 (2d Cir. 2004). 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). Because the district court applied the wrong legal standard for determining

whether defendants used minors within the meaning of U.S.S.G. § 3B1.4, the district court erred in calculating the appropriate offense level for these defendants.

There is, moreover, ample evidence that the defendants did in fact use their children, when they were minors, to aid in the commission of forced labor and particularly in preventing the detection of that crime. When Martinez came to the United States in 1985, the Calimlims' children were approximately four, eight, and eleven years old. Tr. 338-339. Martinez testified that the Calimlim children were participants in enforcing rules intended to keep Martinez out of sight – by, for instance, instructing Martinez not to answer the door and to go to her room when visitors came over. Tr. 378-379. The Calimlims' daughter Christina testified that she and her brothers adhered to house rules about how to contact Martinez on the telephone. Tr. 569. Christina also testified that, when she or one of her brothers brought a friend to the house, they first called Martinez using one of these methods to let her know a guest would be in the house so that she could stay out of sight. Tr. 569-570. She further testified that she never mentioned Martinez to her friends or to any of her teachers, and reluctantly admitted that there was a family rule prohibiting discussion of Martinez with anyone outside of the family. Tr. 564-565.

In addition, Jefferson M. Calimlim, the eldest Calimlim child, was convicted of harboring an illegal alien from 1985 to 2004 in connection with Martinez's 19-year stay with the Calimlim family. R. 191. During part of that time, Jefferson M. Calimlim was a minor. His harboring and concealment of Martinez was an integral part of his parents' conspiracy to secure forced labor from Martinez. Thus, the

younger Jefferson Calimlim's conviction for actions in furtherance of his parents' conspiracy establishes that the Calimlims used their eldest son in the commission of their crime.

D. The District Court's 48-Month Sentence Was Unreasonably Short

In addition to refusing to apply the three enhancements discussed above, the district court lowered the defendants' offense level by two levels after considering the factors enumerated in 18 U.S.C. 3553. Because the district court in this case did not consult a properly calculated advisory guidelines range, this Court should reverse the sentence and remand the case for resentencing of both defendants. In addition, any sentence outside of the advisory guideline range must be assessed by this Court for reasonableness. Under current Seventh Circuit law, "[t]he farther the sentence varies from the Guideline advisory range, the more compelling the district court's reasoning must be." *Walker*, 447 F.3d at 1007.[13] The district court considered the seriousness of the offense, the need to promote respect for the law, the need to afford adequate deterrence to criminal conduct, the history and characteristics of the defendants, and the medical needs of the defendants. The court rejected the defendants' argument that domestic worker situations such as the one created by the Calimlims is part of the "culture" of the Philippines and of Filipino domestic workers abroad, but agreed that a message had been sent to the Filipino community that this type of domestic worker relationship is not acceptable

[13] The validity of this standard is under review by the Supreme Court in *Gall* v. *United States* (06-7949).

in the United States. The court went on to conclude that the Calimlims had led "blameless lives, except for this incident." U.S. App. 27. Based on this conclusion, and on the medical needs of the defendants, the court concluded that a just punishment in this case is something less than the guideline range associated with an offense level of 25. Thus, the court reduced the offense level to 23, which is associated with a guideline range of 46-57 months, and imposed a sentence at the low end of that range, 48 months.

A sentence of 48 months is unreasonably low, particularly in light of the fact that the district court should have applied the three upward adjustments discussed above. Had the court properly calculated the defendants' offense level, it would have ended up with an offense level of 31, which carries a sentence range of 108-135 months. A sentence of 48 months 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.[14]

None of the factors enumerated in 18 U.S.C. 3553 justifies such a departure in this case. The district court's assertion that, "except for this incident," defendants led "blameless lives" does not ring true. The Calimlims took in a 19 year-old woman who knew nothing of the laws or customs of this country, and kept her in a condition of forced labor for 19 years by making her believe that she

[14] Using the advisory range calculated by the district court – *i.e.*, the range calculated without the three upward adjustments in question – the district court's sentence departed 9 months, or 16%, from the low end of the calculated range and 18 months, or 32%, from the high end.

and her family would suffer dire consequences if anyone discovered her existence. Their crime was not a one-time action, but a deliberate scheme that spanned two decades. Indeed, the assignment of criminal history category 1 to the Calimlims takes sufficient account of their otherwise law-abiding nature. Moreover, the Calimlims clearly understood that their behavior was illegal as they took careful measures to ensure that nobody outside of their family knew that Martinez lived in the Calimlims' house. The district court purported to accept that this crime is a serious offense; but that recognition cannot be squared with its assessment of the Calimlims' as "otherwise blameless."

In considering the medical needs of defendants, the district court noted that the Calimlims are not young; that Elnora Calimlim suffers from diabetes, hyperthyroid, and hypertension; and that Jefferson Calimlim suffers from hypertension, kidney stones, arthritis, gout, high cholesterol, and acid reflux. U.S. App. 28-29. But the district court did not conclude that any of the Calimlims' list of ailments is serious, and did not explain why such ailments warranted a shorter sentence. Sentences outside of the advisory guidelines range require a more thorough explanation. *Walker*, 447 F.3d at 1007. Moreover, in seeking release on bond pending appeal from this court, the defendants did not claim to be receiving inadequate medical care while incarcerated.

The defendants argued to the district court that, when the Sentencing Commission "sat down and determined a guideline base offense level" for the offense of forced labor, they really did not have this type of offense in mind. Sent.

Tr. 30. The defendants argued that the U.S.S.G. § 2H4.1 is really intended to govern situations in which a victim was "threatened with death, or beaten up," or situations in which "young girls [are] brought into this country to sell their bodies in prostitution." Sent. Tr. 30. Because this case did not involve such circumstances, the defendants argued that this case should fall outside the base offense level of Section 2H4.1 But the defendants' argument is misplaced. Section 2H4.1 *enhances* a defendant's base offense level where a victim sustained permanent, life-threatening, or serious bodily injury, 2H4.1(b)(1), and where a dangerous weapon was used or brandished, 2H4.1(b)(2). And the sex trafficking offense described by the defendants would not even be governed by Section 2H4.1, but would be subject to a higher base offense level under U.S.S.G. § 2G1.3. Thus, the defendants are simply incorrect that their offense falls outside the class of cases the Commission had in mind in crafting Section 2H4.1.

CONCLUSION

This Court should affirm the defendants' convictions, should vacate the defendants' sentences, and should 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 no more than 16,500 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.

/s/ Sarah E. Harrington
SARAH E. HARRINGTON
Attorney

APPENDIX:

District Court’s Oral Rulings on Contested Sentencing Issues

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JEFFERSON N. CALIMLIM, and
ELNORA M. CALIMLIM,

Defendants.

Case No. 04-CR-248

Milwaukee, Wisconsin

November 16, 2006

TRANSCRIPT OF SENTENCING

BEFORE THE **HONORABLE RUDOLPH T. RANDA,**
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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of the factual statements in the report that you wish to make? Or your attorney?

MS. CALIMLIM: No, sir.

THE COURT: Mr. Calimlim, have you had the opportunity to review and discuss the presentence report with your attorney, Mr. Brown?

MR. CALIMLIM: Yes, sir.

THE COURT: Are there any additional objections to any of the factual statements in the report?

MR. CALIMLIM: No, sir.

THE COURT: The Court will put the same question to the Government. Does the Government have any objections to any of the factual statements in the report, aside from what has already been submitted?

MS. JOHNSON: Not on behalf of the Government.

THE COURT: Well, let's take up the objections first, then. And we can first proceed by asking is the -- or does either party wish to make any additional arguments relative to the objections? I know that the Government indicated it was going to respond here now relative to the objections made by the defense. Is that still the posture of the Government? And let's do it this way. Let's start out with, for instance, the defense objection to Paragraph 49, vulnerable victim enhancement or assessment. First, does the defense wish to make additional arguments relative to that objection?

MR. BROWN: Judge, I think we have stated everything -- at least on behalf of my client, I think everything's been stated in writing. I may want opportunity to respond to the Government if they raise something that I am not anticipating, but I think we pretty much stated our positions.

MR. FITZGERALD: I agree.

THE COURT: All right. Does the Government wish to make additional arguments to that?

MS. FRENCH: Yes. Very briefly, Your Honor. The standard for determining whether the vulnerable victim enhancement applies is determining whether or not the particular victim, Irma Martinez in this case, was unusually vulnerable. The defense cites the Castaneda case, which I believe is out of the Ninth Circuit. Correct. It is. And the Government would refer the Court to United States v. Veerapol, which is directly on point and out of the Ninth Circuit. It's a 1584 case. Specifically addresses whether or not the notion or consent of vulnerable victim is encompassed within the specific offense of involuntary servitude, and therefore whether or not the vulnerable victim enhancement should apply. And the Court concluded in that case -- and the cite to that case, Your Honor, and I have copies for the Court if the Court wishes to have a copy -- is 312 F.3d 1128. Specifically concludes that the vulnerable victim enhancement should apply to the 1584 prosecution, because in this instance the victim was unusually

vulnerable due to age, physical/mental condition, and they describe specifically, with respect to this victim, what her vulnerabilities were.

So we would -- the Government would first take the position that Veerapol is the controlling case law on point, and certainly even within the Castaneda case that the Defendants cite, the Court points out that in that particular case there was no individualized assessment of the victim as to whether the victim, or victims, plural, were unusually vulnerable. And this is a Mann Act case. It's a different Statute as well. And they even noted that there was another case, similar case under 2423 in which the Court in United States v. Johnson found that the victim was, in fact, unusually vulnerable, and they set forth the reasons why. So it's a particularized finding applied -- particularized finding as to the victim in the individual case.

With respect to why the vulnerable victim enhancement is appropriately applied in this case, Miss Martinez was particularly vulnerable. She worked for the Defendants' family in the Philippines under very different conditions, and testified her expectation was that she would be working under similar conditions in the United States.

I think most importantly -- and which I will not go into detail, because the Court has heard the testimony -- is the extreme isolation for this extended period of time that Miss Martinez was subjected to. Even the Defendants' friends didn't

know she was in the house. And I would only point out that those hundred letters, none of those people, with the exception of a couple family members, even knew she existed. So they have absolutely no idea how that woman, the victim in this case, was treated.

The control of the communication, both phone and the mail; the control of the finances; the confiscation of her Passport; and the cultural ignorance. The fact that her experience for the first 18, 19 years of her life was in the Philippines, and she had absolutely no understanding of how things operated in the United States. And then the use of her immigration status as a means to compel her labor are all the individualized factors why the vulnerable victim enhancement applies in this case.

THE COURT: I'd like to see that case. Does the defense have any response to this case? Or the argument? I know the defense has cited the Castaneda case and -- involving the Mann Act, but any comment on this?

MR. BROWN: Yes, Judge. A couple things. First of all, I don't agree that the case is directly on point. I think it's distinguishable in a number of areas. One of which, which is important, I am going to defer to Mr. Fitzgerald. Let him argue that.

But, you know, the case -- the Veerapol case is an involuntary servitude case. We have a forced labor case.

That's the distinction that I think is going to come up again and again this morning in sentencing. And I think it's an important distinction that's oftentimes been blurred in this case. I think there is a very different circumstance, but I want to let Mr. Fitzgerald address that.

On the facts there is a significant difference, Judge. The first question is, can you at all apply a vulnerable victim special characteristic to this case, in a forced labor case? And that's just a question of law. But on the facts themselves, Judge, in that case -- and I can see why it was an involuntary servitude case. Apparently the victims were not allowed to use the telephone. They were not allowed to use the mail. They had a second grade -- or somebody had a second grade education. There were physical force threats. There were bruises that were placed on people's bodies. There were threats to kill if they tried to go back to Thailand, I believe it was.

So there are huge differences in terms of the factual circumstances in that case. Factual circumstances even under -- if the view that the Government's theory of the case is correct here, there were huge differences in the circumstances. The jury verdict in this case, in a forced labor case, where the psychological coercion is the issue -- you know, the Government itself has indicated shortly after the case was tried that this is a case of first impression. That there's never been a conviction in this country for a case involving that kind of

theory.

And so I think -- by virtue of that -- I think that's an admission. I think it's accurate. And I think it distinguishes this case. So on the facts I believe there is basis not to hold that Irma Martinez was a vulnerable victim. And in terms of the differences between involuntary servitude and forced labor, I defer to Mr. Fitzgerald.

MR. FITZGERALD: Well, thank you. And that distinction is going to be important this morning, Your Honor. But I think, frankly, on some of the other legal issues on the objections before the Court, and this one -- the important point with respect to this Veerapol case has already been made. It's an involuntary servitude case. You know, which is different, because that Statute required or still requires, still viable -- after Kosminski I'm not certain -- physical violence or threats of physical violence. Much more so than the forced labor situation does under 1589.

But the other kind of legal concept in this objection that the Courts have talked about, that the Government doesn't speak as much about, is the concept that in making this analysis or calculation the victim has to be more vulnerable than others similarly situated in the offense. Whether it's a Mann Act violation, or involuntary servitude violation, or forced labor violation. And that really is a factor in the question, of course. And Mr. Brown has touched on a number those. But one

of the reasons why we wrote the memorandum was to kind of get some of our thoughts in writing before the Court. It wasn't so much to make Mr. Morgan have to respond at the eleventh hour. But what we tried to highlight from the trial record were a number of facts that speak to a number of issues in this sentencing today, including this enhancement.

And so we have a young woman who came here as an adult with the consent and permission of her parents. And by her own admission, Judge, by her own words on that witness stand, viewed herself as being off on an adventure. And it really is so obvious it doesn't even bear saying or repeating today that this was an adventure that her family agreed to. This was an adventure that had the purpose of making Irma's life and their life better. This apparently is something, as we know now, that the Martinez family has done on a regular basis with their other children. Sending them as domestic helpers around the world to places far more dangerous than Brookfield, Wisconsin. Kuwait. The middle east. I think at one time one of the siblings wanted to go to Korea.

And so these don't seem to us to be vulnerable people in the context of this offense. And I think that's the prism that the Court has to look through. This -- or window through which the Court has to look at some of these legal issues today.

And then, finally, we submitted a number of things, both in the letters and in these newspaper articles from the

Philippines, that talk about how the practice in the Philippines of sending people to work around the country, around the world, as domestic helpers has gone on for generations. Goes back 40 years. And the woman who runs the foreign agency in the Philippines is quoted in one of those articles as being very proud of the fact that Filipino domestic helpers are the best in the world. And we will talk a little bit later this morning about what they get paid for that. But this doesn't appear to us, at least factually, to be a situation where in the context of this violation that is before the Court, Irma Martinez was a vulnerable person. So we'd ask the Court not to apply the enhancement.

THE COURT: Anything else?

MS. FRENCH: Yes, Your Honor. I want to address a couple points that were just made by Mr. Fitzgerald. One is that the Veerapol case really is not on point because it's a 1584 case. We direct the Court's attention to United States v. Bradley, 390 F.3d 145, Page 156, where there is on point discussion about how the enhancements and 2H4.1 of the guidelines, although it's titled peonage and involuntary servitude, also applies under the forced labor Statute. Which, of course, is clear, because if you look under that section of the sentencing guidelines, you will see under statutory provisions that it clearly includes 1589. And the Court in Bradley specifically addresses this very issue, which is even

though the title says peonage, involuntary servitude, and slave trade, and even though -- which we will come to I guess in a moment, but I will raise it now, since it seems pertinent -- one of the enhancements the Government has requested is the other felony offense in which probation has determined, because of the -- what they view as a limiting language to peonage or involuntary servitude offenses -- should not apply. The Court addresses that very issue, and says that this clearly is the base offense level for forced labor, which Congress clearly has anticipated is a subspecies, and says it's a subspecies of involuntary servitude, and that they intended for the case law to apply from 1584 to 1589. I have a somewhat marked up copy of Bradley and that page, Your Honor, if you wish to see it. But it addresses that very issue.

Second, just to make this crystal clear, because -- Kosminski did not find that Title 18, 1584, was unconstitutional. That is not the holding of the case. And that is how the case is described in some of the Defendants' briefs or motions. The Kosminski case held that psychological coercion alone was overly broad under the Statute to compel somebody's services. And that's not very artfully stated. Under Kosminski the Court held that threats, force, or legal coercion, or the actual use of, that compelled somebody's service, were a violation of the Statute. And so as a factual matter this case could have been brought under 1584 or 1589.

Because 1584, which has been in effect since 1948, and which, because of the length and the history, there is a substantial amount of case law that's developed -- would be the basis to charge, in a factual case such as this, that the threat of legal coercion or legal coercion alone compelled the services.

So the facts in this case could easily have been a violation of 1584. And as the Court is well aware by now, Congress clearly meant to expand the Kosminski holding when it passed 1589, and made clear that the body of case law under 1584 applied to 1589, because it was a subspecies of 1584, the involuntary servitude Statute.

THE COURT: Anything else on this issue?

MR. BROWN: No, sir.

MR. FITZGERALD: No.

THE COURT: The Court has some difficulty with this application, because obviously the Court sat through the trial, sat through the instruction conference. The elements of the offense were such that, you know, they had to -- in determining whether or not Irma Martinez was influenced, had to determine the -- her special vulnerabilities. Told the jury that not all people are the same. You can consider the person's background, physical and mental condition, experience, socioeconomic status, difference in status, inequalities between the Defendants and Irma Martinez, to the point where was Irma Martinez vulnerable in such a way that she would be influenced either by force or

the other three -- the three factors that were brought to bear as to whether or not this was a forced situation.

And I respect the Ninth Circuit's opinion here, but it seems to me that when we look at this application of a vulnerable victim section, it calls for an unusually vulnerable victim. And that's where the defense argument makes some sense. More vulnerable than those similarly situated. We told the jury to say that, you know, people who are in these situations are sometimes vulnerable. Are they -- and you make that determination. But we're not talking -- having made that determination, do we then take the next step and add on points because this one -- this person was unusually vulnerable? And the Court can't say that in this situation, so I'm going to grant the defense motion and alter the offense level based upon that decision.

The next one is Paragraph 48. Any additional arguments relative to the defense objection to the enhancement for being held for more than one year in involuntary servitude? I believe that was to Paragraph 48?

MR. FITZGERALD: On behalf of the defense, Your Honor?

THE COURT: Yes.

MR. FITZGERALD: No.

MR. BROWN: No, sir.

THE COURT: The Government response?

MS. JOHNSON: Your Honor, it's the Government's

position that it's appropriate that the Defendants receive an enhancement due to the length of time that Irma Martinez was held -- she was held in servitude in their house. I don't think that any individual would willingly give up their youth. And considering the fact that Irma Martinez was held from 19 to -- by the time we took her out she was approximately 39 years old. She had been told that she had lost her child bearing -- her child bearing capabilities and a number other things. So it would only be appropriate, considering the length of time, that there be an enhancement. Because it's virtually 20 years of her life that was lost. I may have misspoken. Said involuntary servitude. I meant forced labor.

THE COURT: I'm sorry?

MS. JOHNSON: I may have said involuntary servitude, but I misspoke. I meant forced labor. And again, the arguments that were made previously that -- as demonstrated by the Bradley case -- that the Kosminski line of cases apply to involuntary servitude. So this enhancement -- under this enhancement would be appropriately applied to involuntary servitude -- to an involuntary servitude case and a forced labor case.

THE COURT: Any additional response from the defense relative to that argument?

MR. BROWN: Not on behalf of Dr. Calimlim.

MR. FITZGERALD: No.

THE COURT: All right. The Court is going to deny

this motion relative to this objection to Paragraph 48. The Court agrees with the Probation Officer's reasoning and the Government's position relative to this enhancement or assessment, and is going to deny that motion.

That takes care of I think the objections of the defense that were formally raised. There is a motion for downward departure, but given the structure of sentencing now post-Booker, we, as the Court has just indicated, do the calculation, and then we will take into account the factors under 3553 which direct the Court to impose a sentence of not more than necessary to achieve the objectives of that section.

But before we get to that stage, we now have to deal with the objections raised by the Government. Does the Government wish to make any additional arguments relative to their objections? Or at least their requests, I should say, for enhancements?

The first one is 2H4.1(b), which is an enhancement for the commission of another felony in connection with the offense. The Government wish to make additional arguments thereon?

MS. FRENCH: Judge, just simply to repeat that United States v. Bradley addresses this specific issue in response to the defense objection. That although this says in connection with a peonage or involuntary servitude offense, the statutory provisions make clear that it covers 1589, and United States v. Bradley on Page 156 specifically addressed this issue and says

all of these specific offense characteristics do apply to a forced labor violation under 1589.

THE COURT: Any response from the Government -- I mean from the defense, excuse me.

MR. BROWN: On behalf of Dr. Calimlim I will rely on what we have submitted, Judge.

MR. FITZGERALD: So will I.

THE COURT: The Court is going to agree with the defense position on this. The Court views this as not consistent with commentary 2, to Section 2H4.1. I think the matter is accounted for in the guideline calculations, and in that sense would be excessive and may border on double counting. But, in essence, the Court agrees that it doesn't comport with the standards outlined in commentary 2 and is incorporated into the offense. And so the Court is going to deny that request by the Government.

3B1.4, which is the use of a minor, another enhancement asked for by the Government. Any additional argument relative to that?

MS. FRENCH: No, Your Honor. But I would like to, for the record, preserve the Government's objection to the denial by the Court of the vulnerable victim enhancement, and the other felony enhancement.

THE COURT: Of course. All those -- all the rulings of the Court, if they're adverse, are deemed to be objected to

and preserved. Any comment from -- or argument from the defense relative to the 3B1.4 enhancement?

MR. BROWN: Not other than what's been submitted, Judge.

MR. FITZGERALD: No.

MS. FRENCH: Your Honor, excuse me, but I actually do have one comment.

THE COURT: All right.

MS. FRENCH: There is a particularly compelling part of Miss Martinez's testimony concerning this very issue. When she first came to the United States, there was a time -- there were actually two times, but there was a second time that she wanted to go outside with Tina, who was approximately 5 years old at the time. And both of these Defendants were present, and speaking in different languages. Jefferson Senior Calimlim was having a conversation with his daughter, and Elnora Calimlim was explaining to Miss Martinez, according to Miss Martinez's trial testimony, that Jefferson Senior was explaining to Tina how it was not possible for her to go outside and play with Irma Martinez because Irma Martinez was illegal and could, therefore, be arrested and be put in prison or sent to jail. Something of that nature. I have the exact page, if it's important to the Court.

It's absolutely clear from the collective trial testimony that while the children were underage they were part

and complicit of this hiding and secreting away of Irma Martinez. In fact, even Christina Calimlim, who testified at trial, and the brother, Jack, sought full immunity from the Government before they would even testify before the Grand Jury, because the position was that they were actually implicated, certainly at least in the harboring. So for all of those reasons the Government agrees this is an appropriate upward adjustment enhancement.

THE COURT: Anything else?

MS. FRENCH: No.

THE COURT: Well, the Court is not going to give the enhancement. I am not convinced that this was such an affirmative using of the children in the sense that the children were cooperators, participants, knowing fully well what was going on. And the reason for it. The victim was brought into the family when the children were minority -- in minority status. And, of course, when one adopts or assumes adult status, one is responsible for one's own actions. But it's too closely related to part of the family dynamic and process.

And also, there isn't any indication that this wasn't being done for Irma's own protection. And obviously the argument by the defense, and the theory of the defense, kind of squares with -- or coincides with this position. But because there is that position, and because the Court isn't convinced, that it hasn't been overcome, that there is this -- what the

Court deems to be an affirmative use of the children and participation, it's going to deny that enhancement.

The next one is 3B1.1(c), which is role in the offense as supervising. And that is another request by the Government to enhance the guideline range because of the Defendants' role in the offense. Any additional arguments relative to that?

MS. FRENCH: No, Your Honor.

MR. BROWN: No, Your Honor.

MR. FITZGERALD: No.

THE COURT: The Court is going to deny that enhancement. The Court is going to do so -- I'm accepting the defense arguments, essentially, relative to the fact that this request doesn't meet the criteria outlined in application note 4, and that's done in the context that parents are, of course, always leaders and organizers of their children. And I just don't think that -- given that context -- that this enhancement is appropriate, because the criteria in application note 4, as the Court has just stated, are not met.

The next request by the Government is application -- or is the application of use of special skills enhancement requested under 3B1.3. Any additional arguments as to that?

MS. FRENCH: No, Your Honor.

MR. BROWN: No, sir.

MR. FITZGERALD: No.

THE COURT: The Court is going to deny that motion. I

important with anybody. And no one have right to make decision for other people's life. To make decision for them. To make my choice without telling me. To make my plan without consulting me. And that's not right. That's not right at all.

I'm not mad. Also, I'm very scared. I am scared. I don't want to hear about prison. I don't want to hear about sentencing. I don't like that word at all. I am sorry. This whole thing, I didn't do this. I know that. I didn't do any of this. The truth came out. It's not come from me. It come from the very beginning, from the family who took me here to the United States. I didn't do any of this. I didn't wish any of this. I didn't wish to wake up in the sweet nightmare. I think that's all I have to say.

THE COURT: All right. You may step down, ma'am.

MS. MARTINEZ: Thank you for listening.

THE COURT: Now the Court is going to proceed to sentencing. And as I started to say, and as I started to say at the beginning, the Court has made a calculation under the sentencing guidelines, which it's required to do. The sentencing guidelines represent a body of sentencing knowledge and wisdom that is not completely disregarded. But post-Booker the Court also has to take into account whether or not those sentencing guidelines are correct. And that is whether or not, given the history and circumstances of the Defendants, and the gravity and characteristics of -- circumstances of the offense,

taking into account, as the Court indicated, not to impose a sentence more than necessary to achieve the objectives of that Section. Which is, as the Court has indicated, a -- are designed to take into account the seriousness of the offense; promote respect for the law; impose a just punishment; focus in, if necessary, on deterrence; protect the public from further criminal behavior; and at the same time take into account the educational, medical, and vocational needs of the Defendants.

And the Court is going to, first of all, examine the seriousness of the offense. A lot has been said relative to the context in which this offense occurred, and that context is the culture out of which Miss Martinez came, and the Calimlims came from, and how in the Philippines this type of service is not unusual. It is something that has been going on, as Mr. Fitzgerald indicated, for decades. And the Court from its own experience knows that it's been going on for decades. I even know that while in the service, and some of the brief associations I had with Navy personnel, a lot of the stewards in the Navy are Filipinos. And I know our ranks of nurses are a lot of Filipinos. And the stories that the Court heard about Miss Martinez's own family -- brother wanting to go to Ireland, other places. And that this is a way, according to all reports, that people rise up out of poverty.

And there is evidence in this case, too, that the money that Irma Martinez sent home benefitted her family. Or

the money that was sent home for Miss Martinez benefitted her family. And the figure is that the Philippines get 9 Billion Dollars a year from Filipinos abroad who send money back. And as indicated by the Department of -- I suppose you'd call it labor, but whatever the Department is in the Philippines, they're very proud of the fact that the Filipinos have dominated this area and have developed an expertise, and that Filipino maids are -- especially for the elderly -- prized employees who have a certain, as I have indicated, expertise.

And the letters that Court has received indicate the same thing. That I have read. The letters which talk about how this has all been a part of not only the Defendants' culture, but their own. And it goes back to the Mendoza family. Elnora's brother wrote a letter saying that, you know, this is something that they experienced in the Philippines, and had loyal maids in the Philippines, in exchange for the service -- for their service of making life easier for them, that they would enjoy life themselves. Interesting phrase in that letter is that they in turn would enjoy life in the city. Coming to the city.

And the whole tenor of these letters is it's a common practice because of a lack of job opportunities, and the severe socioeconomic conditions in the Philippines to hire live-ins who work for room and board and for a set sum of money.

Doctors Paulino and Miriam Cruz (phonetic) wrote the

cultural differences must be appreciated. Defendants were helping the less fortunate. Defendant's brother stated my brother and his wife made Irma's dream a reality. And that is an excerpt which squares with the Government's argument, that this wasn't a dream. And as Miss Martinez has just indicated, it was a nightmare.

But there is a certain vision of this type of culture that is superior and supercilious that -- Dr. Seisen (phonetic) indicates that the maids in the Mendoza household were paid the standard prevailing pay. As indicated by the Government, it was not just the case here.

The Court was particularly displeased by a letter from Jose Latory (phonetic) of the Latory Company when he said that the victim bit the hand that fed her. She received a God given opportunity, and that the relationship was more beneficial for the victim than it was for the Defendants.

Mr. Fitzgerald quoted Mr. Ortiguera, and I read that letter, too, and one of the letters was that the victim was better off than most, because she had modern appliances to use, a comfortable home, abundant food, and the ability to communicate with her family.

Well, there was limited communication with the family. And I know there's arguments that were made that she had her own line after awhile, and that she wrote letters back, call me when you can, and that type of thing. But it wasn't that open, and

it wasn't that free.

And these letters suggest, as the Court has just pointed out, the culture that has been argued here, that this is something that is done. But even if we look at -- and just want to assess this offense in terms of the culture of the Philippines -- it wasn't consistent with that culture. Because the Defendant (sic) wasn't allowed to move about in the city. Enjoy the life of the city. As was indicated by Dr. Mendoza, Elnora's brother. He said that that's the way it was in the Mendoza household in the Philippines. It was a trade-off. And there wasn't that much of a trade-off.

And then we compare that with the culture of America, and it's quite a bit different. We've got a Statue of Liberty in New York harbor. And it says something to the effect of give me your tired, your oppressed, your wretched refuse of your teeming shore, yearning to breathe free. I stand at the Golden Gate with that torch. It's a great vision of America that anybody coming here has got, first and foremost, what this country was founded upon, and that is liberty. Freedom to be what you want to be, do what you want to do, as long as you operate within the confines of the law. And it's why people want to come to this country. It's why Irma herself felt -- said she struck gold when she was invited to America.

That's why people are coming into this country. We have an immigration problem from Mexico. The second largest

production of wealth in Mexico is the money that Mexicans send back from the United States to Mexico. First is the nationalized oil and gas industry. This country generates wealth. It generates opportunity. It generates all of that. But first and foremost it stands for the idea that everybody should be free. No one should be allowed to control anyone else's life. Outside the law.

And the way this should have been done, when we discuss the seriousness of the offenses, is that Defendants should have got out the I-140, should have contacted the Department of Labor, should have legalized Irma Martinez. If that was done, as we all know from the certification from the Department of Labor, there would have been a clear statement of the wages that she was being paid, including overtime wages, which she just mentioned she just found out about. Wow, 8 hours a day, and I get paid extra for overtime. There has to be a statement according to that certification that the alien is free to leave at any time. Free to move about, which that means. And that she is put up in a private part of the home. Or he is, depending on the circumstances. At no cost.

But that Department of Labor Certification indicates exactly what I indicated is the fundamental core value of America, and that's liberty. That's freedom. And that is it guarantees even an alien that there will be a certain protection under the law, and a certain guarantee that they will have the

freedom consistent with human dignity.

When I do naturalization proceedings, I always tell people when they become American citizens they have a new dignity, because they're not subjects anymore. And they aren't. Americans are independent, free people. And that's why we're a great nation. It's because people are able to operate and function in this environment.

And when we discuss the seriousness of the offense, all of this operates directly against that. It has been characterized by the Government as a danger to American society. And it is a danger to American society if we adopt other cultures, attitudes, and behaviors that are foreign to this grand idea of liberty. This whole idea that the individual is unique. Each individual is unique. Each individual has certain inalienable rights. And this is what this is all about. The right to life, liberty, and the pursuit of happiness. It's the American dream. It's the American promise. And this offense operates against that.

And so a person in the Defendants' position -- people in the Defendants' position can't argue that culture overrides that. Particularly when, as the search warrant disclosed, there are some I-140's in the house. With references to the Department of Labor certification, which the Court has just discussed, which indicates all of these things are guaranteed to people who are aliens and are going to be working in someone's

household. It's a way to legitimize people. And that's the way it should have been done. And it wasn't.

We have the 13th Amendment, as argued by the Government. And a lot of times the argument would say well, you know, these people are fed, they're well taken care of. Got a place to stay. It's better than Africa. Just like America is better than the Philippines. I don't want to say, by making that statement, to denigrate the Philippines. Filipinos are wonderful people. Fought bravely during World War II. Filipino Scouts. Just ask Douglas McArthur about the Filipinos. They're a Democracy and they have their problems, just like any other Democracy. And they're good people. They don't threaten the peace of the world.

But one has to question whether or not this type of servitude would be tolerated or should be tolerated there. And it isn't tolerated in the United States. And that's why we had these laws. That's why the jury found the Defendants guilty. So it's a very serious offense that isn't overcome by the cultural aspects of this case.

The other aspect that the Court has to consider is to promote respect for the law. The Court has already mentioned our huge problem with illegal aliens. There is a great danger that respect for the law is being tossed right out the window by a lot of Americans. One can't, as I have indicated earlier, criticize the people that are trying to get into the United

States. If I was in their shoes, I would try to do the same thing, probably. But you have to have the law first. You have to promote a respect for the law. And in this case, it's an I-140 and the Department of Labor Certifications that should have been followed here.

The defense is correct. When I consider the deterrent aspect, I -- these Defendants don't have to be deterred. Because -- or the public protected from them. But the Government makes a good argument that in combination with respect for the law, and deterrence of other people, and view as a rising problem -- although I'm not considering that as a big part of this disposition. One certainly still has to consider the deterrent aspect.

The Court also has to take into account, as I have started out these statements, not only the nature and circumstances of the offense, which I have just discussed, but also the history and characteristics of the Defendants. And what does come through from that history and the Defendants' characteristics are -- and one would be hard put to argue with Mr. Brown's comments that this -- these were blameless lives, except for this incident. This offense.

It's argued by the Government that not one local church has written any letter of support. But the Court has, as indicated, received letters from Father Ozalino Tuazon (phonetic) -- maybe I'm mispronouncing it -- from Sonrocay

(phonetic) Parish. These Defendants helped out those parishes with support. The Bishop of Volangas (phonetic). Socrates Volangas. Said they've helped many families in the Philippines. Dr. -- or Father Carlo Marchello (phonetic) has indicated similar things. The Filipino-American community, as I have indicated. 100 people who signed those letters indicate that they've been stalwarts of that -- stalwarts of that organization.

There is no dispute that Dr. Jefferson Calimlim and Elnora, too, volunteered their time when she was practicing, and -- but Dr. Jefferson Calimlim more so. At St. Ben's letters from patients indicate that the attention that they were given was careful, professional, concerned attention. Medical treatment. Mr. Nenig -- I don't -- think it was Nenig indicated that his life was changed because of Dr. Jefferson Calimlim. The Calimlims are prosocial in their orientation in all aspects except for this case. And except for this offense. And so this also has to be given some consideration in the Court's disposition.

In addition, the Court has to take into account, as it indicated, the educational, medical needs of the Defendants. The Defendants are not spring chickens, as the phrase goes. They're not young. The presentence report points out Elnora suffers from diabetes and hyperthyroid and hypertension. Jefferson suffers from hypertension also, and kidney stones, and

arthritis, gout, high cholesterol, acid reflux. Some of the things that the Court remembers from the presentence report. So those are -- those are things that the Court has to also take into consideration.

And having covered all of this, having covered the seriousness of the offense, the need to promote respect for the law, the deterrent aspect, protect the public from further crimes, and those needs of the Defendants that the Court has just discussed, what is a just punishment in this case? And the just punishment is something a little less than the guidelines, but not as low as the defense indicates.

The Court is going to sentence the Defendants to 48 months on each of these counts. Going to run it concurrent. This takes into account what the Court has also said -- takes into account the arguments of the defense. And the Court agrees that certainly a message has been sent already, but a message has to be sent further. Or farther. Or in addition. The Court takes this -- or understands the ancillary punishment of deportation, and the fact of separation of these Defendants from their family. But these are normal consequences of any disposition. Or sentence, I should say.

I don't think there was any credit for time served on this, was there?

MS. JOHNSON: No.

MR. BROWN: No.

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2007, two copies of the foregoing BRIEF AND APPENDIX FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT were served by overnight delivery to the following counsel of record:

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