Nos. 05-1302 & 05-1303 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,
v.

HAIDER BOKHARI and
QASIM BOKHARI
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
(Honorable Rudolph T. Randa) (No. 04-CR-56)

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

R. HEWITT PATE
Assistant Attorney General

MAKAN DELRAHIM
SCOTT D. HAMMOND
Deputy Assistant Attorneys General

MARVIN N. PRICE, JR.
CARLA M. STERN
JASON C. TURNER
Attorneys
Antitrust Division
U.S. Department of Justice
209 S. LaSalle Street
Chicago, IL 60604

JOHN J. POWERS, III
JAMES J. FREDRICKS
Attorneys
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 307-1403

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STATEMENT CONCERNING ORAL ARGUMENT

The government believes oral argument would aid the Court's decisional process by further clarifying the factual and legal issues.

JURISDICTIONAL STATEMENT

The jurisdictional summary in the appellant's brief incorrectly cites 28 U.S.C. § 3231 (*see* Br. 1-2) for the district court's jurisdiction instead of 18 U.S.C. § 3231.[1] Final judgments in that court were entered on January 28, 2005. R107; R108. On April 5, 2005, the district court amended Qasim Bokhari's judgment. R123. Appellants timely filed notices of appeal on February 7, 2005. R110; R111. This Court's jurisdiction rests on 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court, after considering the factors in 18 U.S.C. § 3553(a) and treating the U.S. Sentencing Guidelines as non-mandatory, imposed reasonable sentences.

2. Whether the district court complied with the Due Process Clause by imposing a sentence based on factually accurate information and in accordance with the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738 (2005).

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[1] Br. refers to appellants' consolidated brief. R, followed by a number, refers to the record with that district court docket entry number, and where followed by a second number, the page(s) of that record; HB and QB refer to Haider Bokhari and Qasim Bokhari; and HB Tr. or QB Tr. and HB PSR or QB PSR to the respective sentencing transcripts (R118 or R120) and presentence investigative reports.

STATEMENT OF THE CASE

On March 16, 2004, the grand jury returned a nine-count indictment against three brothers: the two appellants, Qasim and Haider Bokhari, and their older brother Raza Bokhari.[2] R1. On September 23, 2004, the grand jury returned a superseding indictment charging the three brothers with conspiracy to commit mail fraud in violation of 18 U.S.C. § 371 (Count 1), mail fraud in violation of 18 U.S.C. § 1341 (Counts 2-4), and conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) (Count 5). R72 (sealed version); R75:1-19 ("Indictment") (redacted version). In separate counts, it also charged Qasim (Count 6), Haider (Count 7), and Raza (Count 8) Bokhari with money laundering in violation of 18 U.S.C. § 1956(a) R75:20-22.

On October 22, 2004, pursuant to a plea agreement (R84), Qasim Bokhari entered a guilty plea to Counts 1-6 of the superseding indictment, all the charges against him. R107:1. That same day, Haider Bokhari, without a plea agreement, entered a guilty plea to

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[2] This indictment also charged the defendants' mother, Shahida Bokhari, and Haider Bokhari's wife, Kelly Bokhari. The charges against them were later dismissed on the government's motion. R61; R62; R63; R64.

Counts 1-5 & 7, all the charges against him. R108:1. The pleas were accepted. R107:1; R108:1.

On January 28, 2005, the district court held separate sentencing hearings for Qasim and Haider Bokhari. It sentenced each to 72 months imprisonment for the money laundering offenses (Counts 5-7) and the statutory maximum of 60 months for the mail fraud offenses (Counts 1-4), to be served concurrently and followed by a three year term of supervised release. QB Tr. 35-36; R107:3-4; HB Tr. 31-33; R108:3-4. The court also ordered $1,288,742.76 in restitution and forfeiture of various property, but imposed no fine because of the large amount of restitution. QB Tr. 35-36; HB Tr. 32-33.

Qasim and Haider Bokhari appealed their sentences. R110; R111. They are currently incarcerated. Raza Bokhari remains a fugitive.

STATEMENT OF THE FACTS

I. The E-Rate Program

Between 2000 and 2002, the three Bokhari brothers devised and carried out a scheme to defraud the federal E-Rate Program. That government program provides funding for economically disadvantaged schools to purchase and install computer systems and networks for

internet access and internal communication. Indictment ¶ 1, R75:1; QB PSR ¶ 18; HB PSR ¶ 8. The program encourages schools to upgrade their technology infrastructure by paying between 20%-90% of the cost depending on how needy a school is. Indictment ¶¶ 2-3, R75:1-2; QB PSR ¶ 19; HB PSR ¶ 9. The E-Rate Program requires participating schools to pay the remaining 80%-10% of the cost in order to encourage them to negotiate favorable prices and avoid making unnecessary purchases. Indictment ¶ 3, R75:2; QB PSR ¶ 19; HB PSR ¶ 9.

Another cost-containment measure is the requirement that schools must seek competitive bids for the desired goods and services. Indictment ¶ 4, R75:2-3; QB PSR ¶ 20; HB PSR ¶ 10. The schools must list what they are seeking funding for on a Form 470 and submit it to the Universal Services Administrative Company ("USAC"), a not-for-profit company that administers the program for the government. Indictment ¶¶ 1, 4, R75:1-3; QB PSR ¶ 20; HB PSR ¶ 10. To preserve an open and competitive bidding process, service providers are not allowed to complete the Form 470 for the schools. Indictment ¶ 4, R75:2; QB PSR ¶ 20; HB PSR ¶ 10. USAC posts the information from the Form 470 on its website so that service providers can access it and

formulate bids. QB PSR ¶ 20; HB PSR ¶ 10. Twenty-eight days after the posting, schools can select a provider and sign a contract for goods and services. Indictment ¶¶ 4-5, R75:3-4; QB PSR ¶ 20; HB PSR ¶ 10.

After a contract is signed, the school seeks funding from the E-Rate Program by completing a "Services Ordered and Certification Form," known as a Form 471. Indictment ¶ 5, R75:3; QB PSR ¶ 21; HB PSR ¶ 11. Before funds are dispensed, the E-Rate Program requires two more forms. The school must file a form confirming that it is receiving, is scheduled to receive, or has received the goods and services from the selected provider. Indictment ¶ 6, R75:3. And after USAC has received that confirmation and the service provider has actually performed the work and billed the school for its share, the provider can bill the E-Rate Program by submitting an invoice called a Form 474. *Id.* ¶ 7, R75:3; QB PSR ¶ 22; HB PSR ¶ 12.

II. Defrauding the Program

The Bokhari brothers first became involved with the E-Rate Program during its 2000 funding year. Indictment ¶ 11, R75:4; QB PSR ¶ 39; HB PSR ¶ 29. That year, their company, Technologies 2000 LLC, did shoddy and incomplete program-related work at grossly

inflated prices for several schools. QB PSR ¶ 39; HB PSR ¶ 29.

For funding year 2001, defendants created another company, Universal Consulting LLC, as part of a fraudulent scheme to obtain money from the E-Rate Program without performing any work. Indictment ¶ 8, R75:4; QB PSR ¶ 40; HB PSR ¶ 30. Qasim Bokhari registered it as a limited liability corporation in Virginia using the address of Raza Bokhari's in-laws. QB PSR ¶ 30; HB PSR ¶ 20. It conducted no business apart from the scheme to defraud the E-Rate Program and the effort to launder the proceeds. QB PSR ¶ 31; HB PSR ¶ 21.

The defendants induced school officials to select Universal Consulting as their schools' provider under the E-Rate Program by promising the officials that their schools would not have to pay the portion of the cost the program requires their schools to pay and by offering free computers. Indictment ¶ 13, R75:5; QB PSR ¶ 40; HB PSR ¶ 30. To prevent competitive bidding, the Bokharis often filled out the Form 470 for the schools and asked school officials to refer inquiries from potential bidders to them. QB PSR ¶ 20; HB PSR ¶ 10. And to inflate the size of some of the contracts, the Bokharis took over the

school's role in completing and submitting the school's forms and concealed the dollar amounts from school officials. Indictment ¶ 14, R75:5-6; QB PSR ¶ 41; HB PSR ¶ 31. They concentrated their recruiting efforts upon the poorest schools, those where the E-Rate program covered 90% of the costs, to maximize the amount of money they could fraudulently obtain. QB PSR ¶ 19; QB Tr. 30; HB PSR ¶ 9. Ultimately, they convinced twenty-one schools in the Milwaukee and Chicago areas to select Universal Consulting as their service provider under the E-Rate Program and requested over $16 million in funding from the E-Rate Program. Indictment ¶ 15, R75:6; QB PSR ¶¶ 41, 54; HB PSR ¶¶ 31, 44.

Although Raza Bokhari, who moved to Pakistan once the fraudulent scheme was underway, was the oldest brother and Qasim Bokhari was Universal Consulting's president, Haider Bokhari took the active lead in that scheme. QB PSR ¶¶ 23, 30; HB PSR ¶¶ 13, 20. He was the primary contact with the schools and issued most of the initial wrongful inducements. QB PSR ¶ 24; HB PSR ¶ 14. For example, he told Noah's Ark Preparatory School that it would not have to pay its 10% share if it selected Universal Consulting. QB PSR ¶ 24; HB PSR

¶ 14. He also promised to give that school 20 to 30 free computers. QB PSR ¶ 24; HB PSR ¶ 14. Likewise, Haider promised St. Anthony's Elementary School that it would not have to pay its 10% share, and when a school official expressed concern about its responsibility to pay that share, he offered to send a bill for that share with the understanding that the school would not have to pay it. QB PSR ¶ 24; HB PSR ¶ 14.

Haider Bokhari prepared the E-Rate Program paperwork and contracts for the schools, but only showed them the portions that needed a school official's signature. Indictment ¶ 19(b), R75:8; QB PSR ¶ 25; HB PSR ¶ 15. Thus, he hid from these officials the high costs of the goods and services their schools were requesting from the E-Rate Program. QB PSR ¶ 25; HB PSR ¶ 15. For example, the principal at Nuestra America believed he was requesting only $30,000 to $60,000 worth of E-Rate funding, but Haider Bokhari submitted a Form 471 actually seeking $788,973 in funding. QB PSR ¶ 25; HB PSR ¶ 15. This pattern of illegal inducements and criminal conduct was repeated at all of the twenty-one schools. QB PSR ¶ 25, 53; HB PSR ¶¶ 15, 43.

Haider Bokhari served as the contact on the invoices—the Form

474s—submitted to USAC, which claimed all work had been performed, when in fact virtually none had. QB PSR ¶ 26; HB PSR ¶ 16. After Haider submitted a Form 474 falsely claiming all the work had been completed at Noah's Ark, he asked the school's principal to lie if contacted by USAC and say the work had been completed. Indictment ¶ 19(f), R75:9; QB PSR ¶ 27; HB PSR ¶ 17. For another school, Parklawn Christian School, Haider Bokhari submitted a document to USAC containing the principal's forged signature. QB PSR ¶ 27; HB PSR ¶ 17.

Qasim Bokhari's primary responsibility in the fraudulent scheme was filing the various forms with USAC, including the fraudulent invoices. QB PSR ¶ 32; HB PSR ¶ 22. For example, at the direction of Haider Bokhari, he fabricated invoices to show falsely that the schools had been billed for their portion of the costs when USAC requested proof from certain schools that Universal Consulting had performed the work. QB PSR ¶ 32; HB PSR ¶ 22.

The Bokharis entered into large contracts with the twenty-one schools and requested on Form 471s funding related to these contracts totaling $16,366,608. Indictment ¶ 15, R75:6; QB PSR ¶ 53-54; HB

PSR ¶ 43-44. They submitted fraudulent invoices, Form 474s, billing the program a total of $1,288,742 for work at three schools, but virtually none of this work had been done. Indictment ¶¶ 16-17, R75:6-7; QB PSR ¶¶ 22, 42, 53-54; HB PSR ¶¶ 12, 32, 43-44. Between November 2001 and April 2002, the Bokharis received checks from USAC totaling $1,288,742. Indictment ¶ 19(i)-(k), R75:9-10; QB PSR ¶¶ 42, 53-54; HB PSR ¶¶ 32, 43-44.

III. Laundering The Proceeds

The Bokharis deposited the $1,288,742 and transferred it to other accounts controlled by them for the purpose of concealing and disguising the nature, location, source, ownership, and control of those criminal proceeds. Indictment ¶ 33, R75:17; QB PSR ¶ 45; HB PSR ¶ 35. For the sole purpose of laundering these proceeds, the Bokhari brothers established multiple financial accounts in their own names and in the names of their mother and Haider's wife, who were unaware of the fraudulent scheme. Indictment ¶ 35, R75:17-18; QB PSR ¶ 47; HB PSR ¶ 37. The money was transferred back and forth through numerous accounts, some of which were closed immediately after the funds passed through them. QB PSR ¶ 47; HB PSR ¶ 37. The

structure of the transactions, as designed by the Bokhari brothers, passed the largest transactions through the women's accounts because they were not involved in the fraud. QB PSR ¶ 47; HB PSR 37. For example, some funds went initially to Qasim's account then to Haider's wife's account; from there, it went through Haider's hands to their mother's account, and then finally to Raza Bokhari in Pakistan. QB PSR ¶ 47; HB PSR ¶ 37.

Qasim Bokhari took the lead on the money laundering effort. He deposited the USAC checks into an account opened in his and Universal Consulting's name. QB PSR ¶¶ 33, 46; HB PSR ¶¶ 23, 36. He was responsible for all the wire transfers made as part of the money laundering effort. QB PSR ¶ 51; HB PSR ¶ 41. He took his mother to open a new bank account in her name, filled out the paperwork, and told her where to sign. QB PSR ¶ 51; HB PSR ¶ 41. This account was primarily used to funnel money to Raza Bokhari in Pakistan using a name that was not associated with the fraud. QB PSR ¶ 51; HB PSR ¶ 41. Qasim Bokhari initiated all the wire transfers to Pakistan either from his accounts or his mother's. QB PSR ¶ 51; HB PSR ¶ 41. Through multiple accounts, $620,000 was funneled and wired to

Pakistan, mostly to Raza Bokhari. QB PSR ¶ 47; HB PSR ¶37. Most of the rest was used to finance personal purchases such as the home the Bokharis lived in and several vehicles. QB PSR ¶ 47; HB PSR ¶ 37. And Qasim was responsible for filing Universal Consulting's federal tax returns, but did not report the money received from the E-Rate Program on any of the company's or his own returns. QB PSR ¶ 35; HB PSR ¶ 25.

IV. Sentencing

The defendants' presentence investigative reports made the following recommendations:

Sentencing Guideline	Haider	Qasim
Fraud Base Offense Level, Counts 1-4 (§ 2B1.1(a))	6	6
Intended loss, $16,363,608.95, over $ 7 million but under $20 million (§ 2B1.1(b)(1)(K))	+20	+20
Fraud involved sophisticated means (§ 2B1.1(b)(9))	+2	
HB was manager or supervisor of extensive fraud (§ 3B1.1(b))	+3	
Fraud Adjusted Offense Level	31	26
Money Laundering Base Offense Level, Counts 5-7, taken from underlying offense (§ 2S1.1(a)(1))	28[3]	26
Conviction under 18 U.S.C. § 1956 (§ 2S1.1(b)(2)(B))	+2	+2
Laundering involved sophisticated means (§ 2S1.1(b)(3))	+2	+2
QB was organizer, leader, manager or supervisor of laundering activity (§ 3B1.1(c))		+2
Money Laundering Adjusted Offense Level	32	32
Acceptance of responsibility (§ 3E1.1(a))	-2	-2
Timely notice of guilty plea (§ 3E1.1(b))	-1	-1
Total Offense Level	29	29

HB Revised PSR ¶¶ 57-74; QB PSR ¶¶ 61-77. The defendants had no

[3] This does not include Haider Bokhari's three-level increase for his aggravating role in the fraudulent scheme. *See* HB Revised PSR ¶ 64; U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 2S1.1, cmt. n. 2(C) (2004). Haider's role plays no part in the calculation of his guideline range under this approach.

criminal record. QB PSR ¶ 81; HB Revised PSR ¶ 77. Thus, the recommended guidelines range for both was 87-108 months. QB PSR ¶109; HB PSR ¶ 111.

Qasim Bokhari made three objections to his PSR: 1) the loss was $1.2 million not $16 million because he "did not intend on being awarded all of the contracts" and "it would have been impossible for the defendants to do all of the work on the bids"; 2) the money laundering was not sophisticated; and 3) he was a minor participant, not a organizer, leader, manager, or supervisor, and thus is entitled to a two level reduction under U.S.S.G. § 3B1.2. R92:1-2, 4-6. Haider Bokhari made similar objections: 1) the correct loss figure is the actual loss of $1.2 million, not the "supposed 'intended loss' figure of $16,363,608.95"; 2) the money laundering was "unsophisticated, inept, and unavailing"; and 3) he was not a manager or supervisor of the mail fraud scheme. R95:1-3; R98:1-2. Neither contested the accuracy of the specific facts underlying the offenses and described in the PSRs.

Shortly after the Supreme Court's decision in *United States v. Booker*, 125 S.Ct. 738, 765 (2005), and before this Court provided guidance on that decision, the district court explained how it would

proceed in sentencing the Bokharis under *Booker*'s remedial sentencing scheme. The court stated that the sentencing guidelines would be treated as "strongly advisory." QB Tr. 2; HB Tr. 3-4. Accordingly, the court did not believe that it had to definitively resolve defendants' objections to the presentence report. QB Tr. 3; HB Tr. 4-5. Rather, the court stated that after hearing the government's recommendation, including its responses to the defendants' objections, and the defendants' arguments on those objections, "its ruling will incorporate all of that into its ruling, given the standard that it has to apply relative to the gravity of the offense, the character of the Defendant, the need to protect the community." QB Tr. 3-4; HB Tr. 4-5. No one objected to this procedure.

The court also stated that it would consider the statutory factors—"the gravity of the offense, the character of the Defendant, [and] the need to protect the community" and the need for "deterrence, punishment, retribution, [and] rehabilitation." QB Tr. 29; HB Tr. 24-25; *see* 18 U.S.C. § 3553(a). But it made clear that "punishment, because of the gravity of the offense, is . . . the thing that drives this offense." HB Tr. 30; QB Tr. 30, 35. The offense was "significantly

severe and grave" because of the large amount of money involved and the defendants' intentions. QB Tr. 32; HB Tr. 25-26. "[T]his was an effort to get some money out of the E-Rate program. And it is an effort that can't, in the Court's opinion, be chalked up to naivete, or starting out with good intentions." QB Tr. 30; HB Tr. 26-27. "[G]iven the structure of [defendants'] operation," the court found, "there wasn't any intention here, really, to get with the program, the E-Rate program, and provide schools with the things that this program was designed to do." QB Tr. 31; HB Tr. 25-26. Rather, the defendants viewed "the E-Rate program as an opportunity to make some money. And when the money came, it was in large amounts." QB Tr. 31; HB Tr. 25-26.

The court recognized a special need here "to afford adequate deterrence to criminal conduct," 18 U.S.C. § 3553(a)(2)(B), because the program relies upon "the honesty of the participants, and the capacity of the system to trust the people in the system." HB Tr. 30. Thus, a significant sentence was necessary "to make sure that people who don't have the propensity to do this out of conscience are deterred because of the possible negative consequences that would flow from the violation of these standards." *Id.* The court also recognized "the need to provide

restitution to any victims of the offense," 18 U.S.C. § 3553(a)(7), and therefore ordered restitution but waived the fine. HB Tr. 32-33; QB Tr. 35-36, 39.

The district court did rely on the Guidelines to support its conclusion that defendants had been convicted of a serious offense. Specifically, in assessing the gravity of the offense, the court considered both the intended loss and the actual loss because "the gravity of the offense . . . ties in . . . with . . . the amount of loss." HB Tr. 25. Relying on cases interpreting U.S.S.G. § 2B1.1(b)(1), the court found "that under that section of the Guidelines the intended loss is important. It isn't, as was mentioned this morning, and suggested today, that there wasn't any real chance of getting the monies that were submitted relative to these 21 contracts." HB Tr. 25. The court found that "[i]t is what was intended" and that "the money would have been taken, if it had been forthcoming." *Id.* Nevertheless, the court explained that even if it used the actual loss of $1.2 million, as opposed to the intended loss of $16 million, "it's a significant, significant amount." QB Tr. 32; HB Tr. 32. The district court imposed the 72 month sentence "because it is the gravity of the offense that drives this, and because the Court

doesn't see that 1.2 Million Dollars is insignificant." QB Tr. 35.

Consistent with its view that the Guidelines are "strongly advisory," the court did not conclusively resolve all of the defendants' objections to the presentence reports, though it did discuss some of them. For example, it remarked that these were "[n]ot the most sophisticated means that the Court has seen," and that the argument for that enhancement is weak, but it did not conclude that the means were insufficiently sophisticated for an enhancement. HB Tr. 27-28. Similarly, because of the family dynamics, the court observed that it had a "hard time saying" whether the aggravating role enhancements apply, but it did not actually say that they did not. HB Tr. 31; QB Tr. 34. The district court did not find an actual range, but did observe that, if its concerns about the sophisticated means and aggravating role enhancements were taken into account, the guidelines offense level "would come down in the area of a level 27" or "around a 27" or in the "26 range." HB Tr. 31; QB Tr. 35.

In deciding on a sentence, the court also recognized the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. §

3553(a)(6). The court compared the defendants to a previous defendant before the court, "a pillar of the community," who ran a program that received government funds and who had been sentenced earlier in the week. QB Tr. 31. That defendant had built a program into a national operation that empowered certain segments of the community and did a lot of good with the program. *Id.* There was an intention to do good, despite causing a loss of about $400,000. *Id.* at 31-32; HB Tr. 25-26. In comparison, the Bokharis' offense is much graver because of the much larger loss and their bad intentions, and thus a greater sentence is justified. QB Tr. 31-32; HB Tr. 25-26. Between the Bokharis, however, the district court did not see "a real distinction," HB Tr. 31, and so imposed the same sentence: 72 months for money laundering (Counts 5-7) and 60 months for mail fraud (Counts 1-4). That sentence—as the court repeatedly explained, HB Tr. 30; QB Tr. 30, 35—was driven by the gravity of the offense.

SUMMARY OF ARGUMENT

Defendants bilked the federal E-Rate Program out of over $1 million by deceiving poor schools into believing that they could obtain technology for free. Instead, defendants laundered the money they

obtained into their own pockets and left the schools with nothing. The district court's belief that defendants' crimes warranted a sentence of 72 months for each defendant is fully supported by the evidence.

The district court correctly viewed the guidelines as advisory, imposed reasonable sentences, and adequately explained that they were based primarily on the gravity of the offense and secondarily by the need for general deterrence. To be sure, at the time the district court imposed the sentences at issue in this appeal, it did not have the benefit of subsequent decisions by this Court and other appellate courts explaining how district courts should sentence defendants in light of *Booker*. In hindsight, the court should have been more definitive in ruling on defendants' objections to the PSRs and been more precise about the applicable sentencing guidelines ranges. But based on what the court said, the defendants were not prejudiced because they would have received the same or higher sentences had the district court ruled on their objections and computed the guidelines ranges. Since there is no reason to believe that the court would impose lower sentences if the case were remanded, this Court should affirm the sentences imposed.

The due process right to be sentenced on the basis of accurate

information was not violated because the information before the court about the offenses and the defendants' backgrounds was accurate. Nor was the due process right to fair warning violated by the retroactive application of the post-*Booker* sentencing scheme. The U.S. Code fairly warned the defendants that their conduct was prohibited and subject to a specific maximum punishment.

STANDARD OF REVIEW

This Court reviews sentences imposed subsequent to *Booker* for "unreasonable[ness]." *United States v. Booker*, 125 S.Ct. 738, 765 (2005) (quoting 18 U.S.C. § 3742(e)(3) (1994 ed.)). The factors set forth in 18 U.S.C. § 3553(a) "guide appellate courts . . . in determining whether a sentence is unreasonable." *Id.* at 766. The district court's factual findings are reviewed for clear error. *See Maine v. Taylor*, 477 U.S. 131, 145 (1986).

Issues the defendants failed to raise in the district court are reviewed for plain error. *United States v. Paladino*, 401 F.3d 471, 481 (7th Cir. 2005). Plain error requires that the defendants establish that the district court clearly erred, that this error affected the defendant's substantial rights and seriously affected the "fairness, integrity, or

public reputation" of judicial proceedings, that is, it caused a "miscarriage of justice." *Id.* "It is a miscarriage of justice to give a person an illegal sentence that increases his punishment," but the defendant suffers no prejudice—that is, no increase in punishment—if the court "would have imposed the same sentence" and that sentence is reasonable. *Id.* at 483.

ARGUMENT

I. The Sentences Are Reasonable and any Error for Failure to Rule on Guidelines Issues and Ranges Caused Defendants No Prejudice

Obeying the command of *Booker* and 18 U.S.C. § 3553(a), the district court considered the statutory factors,[4] including the guidelines,

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[4] 18 U.S.C. § 3553(a) enumerates seven factors that the court "shall consider":

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed--
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range . . . as set forth

which it treated as advisory, but not mandatory.[5] HB Tr. 3; QB Tr. 2-3. The district court considered the gravity of the offense—a measure of both the nature and seriousness of the offense and the need for punishment, § 3553(a)(1), (2)(A)—and concluded that the offense was "significantly severe and grave" because of the large amount of money involved and the defendants' intentions. QB Tr. 32; HB Tr. 25-26. This factor was "key"; it was what drove the court's sentencing decisions. HB Tr. 30; QB Tr. 30, 35.

The court addressed several other statutory factors as well: 1) the need for deterrence (§ 3553(a)(2)(B)) because the E-Rate Program

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> in the guidelines . . . .
> (5) any pertinent policy statement . . . issued by the Sentencing Commission . . . .
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> (7) the need to provide restitution to any victims of the offense.

[5] While Qasim Bokhari agreed in his plea agreement "to have his sentence determined under the United States Sentencing Guidelines . . . and waive[d] all constitutional challenges to the validity of the U.S.S.G.," Plea Agreement ¶ 13, R84:12, the government did not seek to enforce this provision in the district court and does not seek to do so now. The defendants maintain, and the government agrees, that Justice Breyer's "Remedy Opinion" in *Booker*, provides the appropriate framework for sentencing. Br. 21-22; *but cf. id.* at 42-50 (arguing that this scheme cannot be applied retroactively to the Bokharis).

depends on the honesty of its participants, HB Tr. 30; 2) the defendants' history and character (§ 3553(a)(1)), which were "very, very positive" and were weighed by the court against the gravity of the offense, HB Tr. 28-29; QB Tr. 32-34; and 3) the need to provide restitution (§ 3553(a)(7)), QB Tr. 35-36, 39; HB Tr. 32-33. In an effort to avoid "unwarranted sentence disparities" between defendants with similar records and offenses, § 3553(a)(6), the district court also compared the Bokharis to one another and to another defendant who had taken money from another government program and had been sentenced earlier in the week. QB Tr. 31; HB Tr. 25-26, 31.[6] Thus, in most respects, the district court did what courts are supposed to do at post-*Booker* sentencings, and the 72 month sentences it imposed are reasonable given the court's detailed explanation.

Defendants correctly observe that the district court did not make specific findings on all of the defendants' objections to the presentence report and did not precisely calculate the applicable sentencing

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[6] The court considered some statutory factors irrelevant. For example, "retribution really isn't a factor here, because that factor is generally related to individual victims." HB Tr. 29; *see also* QB Tr. 34-35; HB Tr. 28-29 (rehabilitation not relevant).

guidelines ranges. Br. 30. In fact, the district court should have calculated the applicable guideline range and definitively resolved defendants' objections to the PSR. *United States v. George*, 403 F.3d 470, 472-73 (7th Cir. 2005). Nonetheless, their claim (Br. 30) that the district did not adequately explain its decision and that the sentences are unreasonable is incorrect. As we have already observed, the district court clearly stated that the gravity of the offense was the key factor in its decision to impose 72 month sentences on each defendant. QB Tr. 30, 32, 35; HB Tr. 25-26, 30. Moreover, the court did resolve the key guidelines issue—the amount of loss to be used in calculating defendants' offense levels—and the remaining issues that it did not definitively resolve would not have changed the sentence imposed by the court. Accordingly, the court's failure to be more precise in its analysis of the guidelines issues in this case was at best harmless error.

A. The Intended Loss Was Over $7 Million

The PSRs properly attributed a $16 million loss to both defendants (QB PSR ¶ 62; HB Revised PSR ¶ 58) because the "loss is the greater of actual loss or intended loss" and intended loss means the "pecuniary harm that was intended to result from the offense" which "includes

intended pecuniary harm that would have been impossible or unlikely to occur." U.S.S.G. § 2B1.1, cmt. n. 3(A). In this case, there is no dispute that defendants signed contracts with twenty-one schools and requested funding from the E-Rate program totaling $16,366,609 for those contracts. As the district court found, they sought this amount, had no intention of doing the work, and would have taken the full amount. *See supra* p. 16. Thus, the intended loss was "[m]ore than $7,000,000," U.S.S.G. § 2B1.1(b)(1)(K), but not "[m]ore than $20,000,000," U.S.S.G. § 2B1.1(b)(1)(L), and the 20 offense level increase should apply. The court would have imposed the same sentence because, as the court noted, even if it had relied solely on the $1.2 million actually received by the defendants rather than the $16 million they requested, the offense had the same gravity and warranted a 72 month sentences. QB Tr. 32, 35; *cf.* HB Tr. 32.

The defendants' three arguments why the intended loss was not $16 million are wrong.[7] First, they contend that the defendants—or at

[7] For the first time, defendants make the argument on appeal that if the intended loss was $16 million, then the court should have departed downward. Br. 38. This argument is clearly waived. In any event, even assuming this Court can review a district court's decision not to grant a downward departure (*see United States v. Franz*, 886 F.2d 973, 979 (7th Cir. 1989); *United States v. Wright*, 37 F.3d 358,

least Qasim Bokhari—initially intended to perform the work. Br. 36-37. The district court rejected the factual basis for this contention, effectively making a credibility determination: "The idea is hard to accept by the Court that somehow this was started with good intentions. And if not with good intentions, without an expectation of getting any money at all." QB Tr. 30. Rather, it was "an effort to get some money out of the E-Rate program" that "can't, in the Court's opinion, be chalked up to naivete, or starting out with good intentions." *Id.*; HB Tr. 26-27.

Defendants also contend that there was no intent to obtain the full $16 million without providing goods and services because "they would

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360-61 (7th Cir.1994)), the difference between the amount of the actual loss and the intended loss would not justify a departure. The discrepancy between the actual loss and intended loss is not so unusual or atypical in this case to "take it out of the 'heartland' of cases anticipated in the Guidelines." *United States v. Crucean*, 241 F.3d 895, 898 (7th Cir. 2001). The guidelines anticipated discrepancies between actual and intended losses and advised courts to use the greater amount. U.S.S.G. 2B1.1, cmt. n. 3(A). The guidelines' use of graduated ranges also means that the difference in dollar amounts ($1.2 million v. $16 million) does not result in a many-fold difference in offense level increases: the $1.2 million loss results in a 16 level increase, while the increase for a $16 million loss would only be a 20 level increase. *See* § 2B1.1(b)(1)(I)-(K). As the district court recognized, both figures are substantial and show the gravity of this offense, the main basis for the sentences imposed by the court. *See* QB Tr. 32; HB Tr. 25-26.

have had to take several additional steps to obtain that money, but there was no showing of an intent to take those steps." Br. 37. Again, the district court rejected this contention. The district court found that the scheme was not a "naive venture" or "lark" but an operation that was thought out over a significant period of time. HB Tr. 27. The "structure of this operation," shows that the "there wasn't any intention here, really, to get with the program, the E-Rate program, and provide schools with the things that this program was designed to do." QB Tr. 31; HB Tr. 25-26. Rather, it was designed to make money from the program without "provid[ing] schools with the things that this program was designed to do." QB Tr. 31; HB Tr. 25-26. It is incredible that the defendants repeated their fraudulent scheme at all twenty-one schools and successfully billed the program for three schools, but did not intend to take the final steps to obtain the funds at the remaining eighteen. As the court asked rhetorically: "Then why do it?" QB Tr. 30. It is "[a]kin to walking into the bank with a gun and saying, well, I am going to do this for the purposes of holding up the bank. And you're surprised when the teller turns over some money." *Id.*

Lastly, defendants rely on *United States v. Schneider*, 930 F.2d

555 (7th Cir. 1991) and *United States v. Sung* (*Snug* in their brief), 51 F.3d 92 (7th Cir. 1995), to show that they did not intend a $16 million loss. Br. 36-37. *Schneider*, however, demonstrates that the amount of the funding requests, based on the contracts, is the correct amount of loss in this case. In *Schneider*, this Court explained that "'loss' within the meaning of the Guidelines includes intended, probable, or otherwise expected loss, a qualification of vital importance in a case such as this where the fraud is discovered or otherwise interrupted before the victim has been fleeced."[8] *Id.* at 558. In determining that loss, the Court distinguished between two types of fraud. "One is where the offender . . . does not intend to perform his undertaking, the contract, or whatever; he means to pocket the entire contract price without rendering any service in return." 930 F.2d at 558. Accordingly, "the contract price is a reasonable estimate of what we are calling the expected loss." *Id.* The other is where the offender obtains the contract by fraud, but intends to perform the contract and make a profit of the contract price minus his costs. *Id.* The defendants in *Schneider* committed the fraud with the intention of performing the contract, and

[8] Of course, the Bokharis did successfully fleece the program of $1.2 million before the scheme was interrupted.

so the loss there was not simply the contract price. *Id.* The fraud committed by the Bokharis, however, is of the first type because they did not intend to perform the contracts they signed with the schools. Thus, under *Schneider*, the intended loss here is the amount of funding the Bokharis requested from USAC for the contracts they had entered with the schools. And the 20 level enhancement for an intended loss over $7 million should apply.

In *Sung*, a criminal trademark infringement case, the defendant's sentence depended on the retail value of the infringing items because if the value exceeded $2000, the offense level was increased "'by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit),'" which was deleted in 2001 by consolidation with § 2B1.1.[9] *Sung*, 51 F.3d at 94 (quoting U.S.S.G. § 2B5.3). This Court did not "reduce[] the amount of loss . . . after finding that the defendant did not have any reasonable expectation of being able to sell the number of counterfeit bottles for which he had ordered cartons," as defendants contend. Br. 36. Rather, the Court concluded that the fraud and deceit guideline "does not answer the question whether the infringing boxes

[9] *See* Federal Sentencing Guidelines Manual, Vol. 2, Appendix C, Amendment 617 (2004).

should be treated as if they represented the retail value of the completed product or only the value of the boxes themselves" and remanded for consideration under the guideline related to attempt cases. 51 F.3d at 95-96. In this case, the Bokharis entered contracts involving specific dollar amounts and submitted them to USAC for funding. That they intended to obtain the amount of funding requested is obvious.

B. Defendants Were Not Prejudiced By The District Court's Failure To Resolve their Other Objections To The PSR

The Bokharis did not object to the district court's procedure, its failure to rule on all of their objections, or its failure to precisely determine the appropriate guidelines ranges. Thus, to the extent that the Bokharis can show that the procedure and failure to rule are clear errors, they must also establish that these errors affected their substantial rights and caused a miscarriage of justice. *See Paladino*, 401 F.3d at 481. This they cannot do because the district court "would have imposed the same sentence," *id.* at 483, if it had ruled on the enhancements and found a specific guidelines range. The district court's sentencing decision was primarily driven by the gravity of the offense and secondarily by the need for deterrence. Thus, a ruling on the

sophisticated means and aggravating roles enhancements would not benefit the defendants. To the degree the district court had concerns about these enhancements, it already factored that in by not sentencing within the 87-108 month range set for offense level 29.

Even if the enhancements for sophisticated means of money laundering and the aggravating role enhancements did not apply to Haider Bokhari, his offense level would still be 27, which yields a range of 70-87 months. Specifically, adding 20 levels for the intended loss between $7 million and $20 million and 2 levels for sophisticated means in the fraud to the base fraud offense level of 6 yields an adjusted fraud offense level of 28. This level becomes the base offense level for the money laundering. When 2 levels for a § 1956 offense are added and 3 levels for acceptance of responsibility and timely notice of a guilty plea are subtracted, Haider's adjusted money laundering offense level is 27. Similarly, for Qasim Bokhari, if either the sophisticated money laundering or the aggravating role enhancement did not apply, his offense level would still be 27.

C. The PSR Rightly Found Sophisticated Means of Money Laundering and an Aggravating Role by Qasim Bokhari in that Laundering

The record fully supported the PSRs' recommendation that defendants should receive enhancements for sophisticated means in the money laundering offense conduct (and in the fraud offense conduct), and an aggravating role for Qasim Bokhari. Accordingly, had the district court conclusively resolved all of the defendants' objections to the PSR in light of the evidence in the record, the resulting offense levels would have been 29, yielding guideline ranges of 87-108 months.[10] Thus, "it is inconceivable that" the consideration of that range "would have led to a lower sentence" than the 72 months defendants received. *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005). "Any error therefore was harmless." *Id.* (citing Fed.R.Crim.P. 52(a)). Indeed, as this Court noted in *George*: "It is hard to conceive of below-range sentences that would be unreasonably high." *Id.*

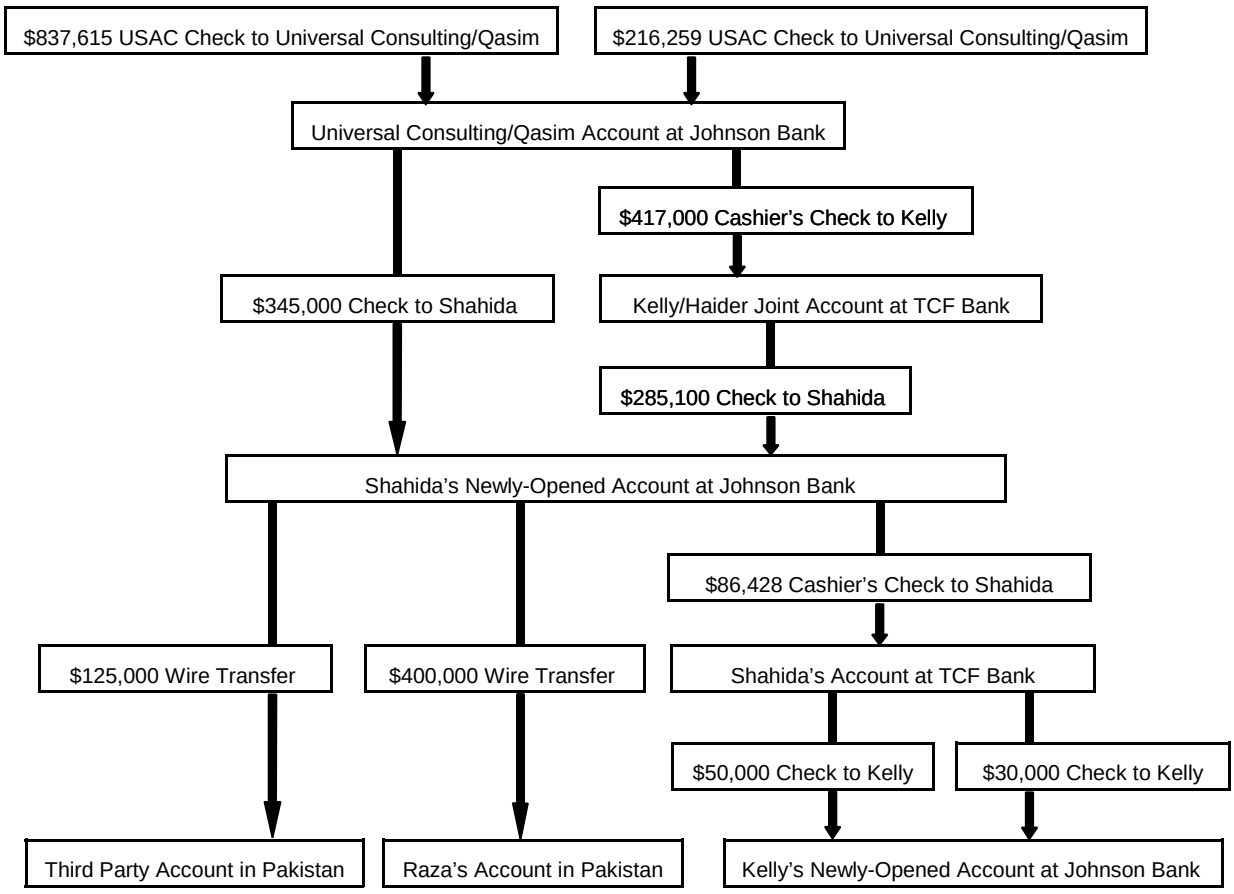
[10] If there is a remand for further proceedings, the government would urge the district court to apply these enhancements, find an offense level of 29, and sentence the defendants within the 87-108 month range. Thus, on remand, the district court might impose an even greater sentence after actually calculating the guidelines range. *See United States v. Goldberg*, No. 03-3955, slip op. at 6-7 (7th Cir. May 5, 2005).

1. The Sophisticated Means to Launder the Illegal Proceeds

The PSRs correctly concluded that the sophisticated money laundering enhancement under U.S.S.G. § 2S1.1(b)(3) (HB Revised PSR ¶ 66; QB PSR ¶ 69) was applicable. Under this guideline, sophisticated money laundering means "complex or intricate offense conduct pertaining to the execution or concealment of the 18 U.S.C. § 1956 offense." U.S.S.G. § 2S1.1(b)(3) cmt. n. 5(A). It "typically involves the use of" 1) "fictitious entities" or "shell corporations"; 2) "two or more levels (*i.e.*, layering) of transactions, transportation, transfers, or transmissions, involving criminally derived funds that were intended to appear legitimate"; or 3) "offshore financial accounts." *Id.* cmt. n. 5(a)(i)-(iv). Although use of any one of these would justify the enhancement, the Bokharis used all three. They used Universal Consulting as a shell corporation to further the money laundering. Universal Consulting was registered out of state at the address of Raza Bokhari's in-laws and only opened a bank account when, after existing nearly a year, the fraudulent invoices were submitted to USAC. QB PSR ¶¶ 30-31; HB PSR ¶¶ 20-21. As Qasim Bokhari admitted, "[t]he only activity conducted by [Universal Consulting] was the application for, receipt, and subsequent laundering

of the fraudulently obtained funds from the E-Rate Program." Plea Agreement ¶ 5(a), R84:2; *see also* QB PSR ¶ 31; HB PSR ¶ 21.

The money laundering also involved multiple layers of transactions. Defendants transferred the proceeds from their E-Rate scheme through numerous bank accounts. Some of these accounts were opened for the sole purpose of laundering this money, including some opened in the names of relatives uninvolved in the fraud—their mother, Shahida Bokhari, and Haider's wife, Kelly Bokhari. QB PSR ¶ 47. And accounts were closed immediately after the funds passed through them. *Id.* Defendants structured the transactions to pass the largest amounts through the women's accounts because they were not involved in the fraud. *Id.* One series of transactions illustrates the multiplicity of layers:



Plea Agreement ¶ 5(m)-(n), (bb); R84:4-5, 8-9. Shahida Bokhari's account at Johnson Bank was closed after the remaining funds were transferred out. *Id.* ¶ 5(bb); R84:9.

Furthermore, the money laundering involved offshore accounts. Specifically, the money was transferred to accounts which belonged to Raza Bokhari and a third party and which were located in Pakistan where it is difficult or impossible for the U.S. government to recover or

further trace the proceeds. QB PSR ¶ 51; HB PSR ¶ 41.[11]

2. Qasim Bokhari's Aggravating Role in the Money Laundering Operation

The two-level enhancement for Qasim Bokhari's role in the offense pursuant to U.S.S.G. § 3B1.1(c) and recommended by his PSR (QB PSR ¶ 71) is also fully supported by the evidence.[12] This enhancement applies "[i]f the defendant was an organizer, leader, manager, or supervisor in *any criminal activity.*" U.S.S.G. § 3B1.1(c) (emphasis added). Thus, this "inclusive[]" provision applies even to "relatively small criminal

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[11] Haider Bokhari's PSR also recommended an enhancement to the fraud offense level pursuant to U.S.S.G. § 2B1.1(b)(9) because that offense involved sophisticated means. HB Revised PSR ¶ 59. Haider Bokhari did not object to this increase in the district court. Likewise, on appeal he does not argue that it should not apply: his argument on sophisticated means is limited to attacking the enhancement related to the money laundering offense, which is based on a different guideline, U.S.S.G. § 2S1.1(b)(3). *See, e.g.,* Br. 19, 34. Accordingly, he has waived his objection to the fraud enhancement. Under the plea agreement with Qasim Bokhari, the government did not recommend this enhancement for Qasim, but it did not agree that there was no factual basis for it or that the government would not recommend it for Haider Bokhari. *See* Plea Agreement ¶¶ 18, 22-25, R84:13-17.

[12] While we believe Haider Bokhari had an aggravating role in the fraud offense warranting a three level increase in the fraud offense level pursuant to U.S.S.G. § 3B1.1(b), that increase would not affect his total offense level. *See* HB Revised PSR ¶ 64; *see also* U.S.S.G. § 2S1.1 cmt. n. 2(C); *supra* note 3. Accordingly, the government does not address this issue with respect to Haider.

enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation." U.S.S.G. § 3B1.1 cmt. background. While the district court believed the oldest brother, Raza Bokhari, was the "kingpin," HB Tr. 31, "[t]here can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." U.S.S.G. § 3B1.1 cmt. n. 4. Even if Qasim did not manage another participant, he "nevertheless exercised management responsibility over the property [and] assets" of their money laundering operation and coordinated that operation. U.S.S.G. § 3B1.1 cmt. n. 2; *see also United States v. Carrera*, 259 F.3d 818, 827 (7th Cir. 2001) ("[S]ection 3B1.1(c) does not require an explicit finding that the defendant exercised control, so long as the criminal activity involves more than one participant and the defendant played a coordinating or organizing role.") (internal quotation marks and citation omitted).

Specifically, Qasim Bokhari deposited the USAC checks into an account opened in his and Universal Consulting's name and was responsible for all the wire transfers made as part of the money laundering effort. QB PSR ¶¶ 33, 46, 51. And Qasim brought his mother to the bank to open in her name the critical account that was

primarily used to funnel the proceeds to Raza Bokhari in Pakistan. Qasim filled out the paperwork for her and told her where to sign. *Id.* ¶ 51. He initiated all the wire transfers to Pakistan—a total of $620,000—either from his accounts or his mother's. *Id.* In addition, as president of Universal Consulting, he was responsible for filing its tax returns, but he did not report the substantial amounts of money received from the E-Rate Program on any of the company's or his own returns. *Id.* ¶ 35. He also personally benefitted: the illegal and laundered proceeds paid off the house Qasim lived in, purchased or leased the cars he drove, including a Porsche, and covered his law school tuition. *Id.* ¶ 36. Thus, based on "the nature of [his] participation in the" money laundering and "the degree of [his] participation in planning [and] organizing" that offense, U.S.S.G. § 3B1.1 cmt. n. 4, Qasim had an aggravating role in that offense, and a two-level increase under U.S.S.G. § 3B1.1(c) is warranted.

In sum, had the district court actually ruled on the challenged sentencing enhancements, it would have found them applicable and considered a guideline range of 87-108 months for offense level 29. If anything, a finding of that range and its consideration would only have

caused the district court to impose a sentence higher than the 72 months imposed. Accordingly, any error is harmless and not plain error affecting substantial rights or causing a miscarriage of justice.

II. The District Court Provided Due Process by Relying on Factually Accurate Information and Treating the Guidelines as Advisory

The Bokharis make two arguments that their sentences violate the Due Process Clause, but did not make either argument in the district court. Accordingly, they must show plain error. *See Paladino*, 401 F.3d at 481. In any event, defendants have not shown a due process violation.

A. The Information Before the District Court Was Factually Accurate

First, the Bokharis contend that their due process right to be sentenced only upon accurate information was violated because "the trial court erroneously believed that their Guidelines ranges were Level 26 (Qasim) and Level 27 (Haider)." Br. 40. The district court, however, did not definitively conclude that these offense levels applied. Rather, the court only made conditional observations: "If it took into account" its doubts about the applicability of the sophisticated money laundering and the role in the offense enhancements in this case, it "would still have [Qasim Bokhari] somewhere in the 26 range in that type of analysis." QB Tr. 35. Likewise, for Haider Bokhari, "this would come down in the

area of a level 27."[13] HB Tr. 31. Thus, the court suggested how it would adjust the offense levels if it concluded that the defendants' objections had merit. However, as it stated at the outset, it did not make "an independent analysis--or individual analysis" of the objections to the enhancements "to make sure that the certain range exists before the Court sentences." QB Tr. 3; HB Tr. 4-5. As explained above, *see supra* pp. 23-31, 33-39, the correct offense level is 29, yielding a range of 87-108. And even if the court had denied the sophisticated laundering enhancement or Qasim Bokhari's role in the offense, the correct offense level would have been 27.

Moreover, the Bokharis' argument proves too much. It converts every error in calculating a guidelines range into a due process violation. Basing a sentence on inaccurate information about the defendant's criminal history implicates the Due Process Clause,[14] but a challenge to

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[13] Even if the district court had denied the sophisticated money laundering and aggravating role for enhancements for Haider Bokhari, his offense level would still be 27. *See supra* p. 32.

[14] The cases cited by defendants demonstrate this point: *United States v. Tucker*, 404 U.S. 443, 447-48 (1972) involved a sentence based on constitutionally invalid convictions; *Townsend v. Burke*, 334 US 736, 741 (1948) involved a sentence based on convictions where the convictions did not actually exist and the uncounseled defendant had no opportunity to object; *United States ex rel. Welch v. Lane*, 738 F.2d

the sentencing guideline determination, where as here, there is no dispute about the accuracy of the underlying information, does not raise a constitutional issue. *Cf. Scott v. United States*, 997 F.2d 340, 341-42 (7th Cir. 1993) (ordinary misapplication of the guidelines does not support relief under 28 U.S.C. § 2255, which permits a court to grant relief if the sentence was imposed in violation of the Constitution). To show a violation of the "due process right to be sentenced on the basis of accurate information," a defendant must show: 1) "that information before the sentencing court was inaccurate" and "that the sentencing court relied on the misinformation in passing sentence." *Welch*, 738 F.2d at 864. The Bokharis have not identified any inaccurate information in the PSR or otherwise before the court. *Cf. Lechner v. Frank*, 341 F.3d 635, 638-39 (7th Cir. 2003) (one prior conviction and three arrests inaccurately reported by PSR as four prior convictions). At most, they have raised an issue about the guidelines determination, which they

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863, 864 (7th Cir. 1984), involved a sentence based on the court's mistaken belief that defendant's prior robbery conviction was for armed robbery; and *United States v. Harris*, 558 F.2d 366, 374-75 (7th Cir. 1977), involved a sentence based on dubious hearsay statements of criminal misconduct far more serious than the conviction.

argue extensively on non-constitutional grounds in their brief, and to which we have already responded in this brief. *See* Br. 21-39.

B. The Treatment of the Guidelines as Advisory Satisfies Due Process

The defendants argue that the *Booker* decision effectively functions as an *ex post facto* law that violates their due process rights because it subjects them to greater punishment than would have been possible under the mandatory guideline scheme in effect at the time of their offense. Br. 42-43. The premise of this argument—that the guideline offense level was 21 or 25, which sets a mandatory cap of 46 months or 71 months under the pre-*Booker* guidelines (Br. 42-43)—is flawed. As explained above, *see supra* pp. 25-31, 33-39, the correct offense level was 29 with a range of 87-108 months. Even if the sophisticated money laundering enhancement or Qasim's aggravating role enhancement did not apply, the offense level would be 27, and their 72 month sentences would be within the applicable range of 70-87 months.

Furthermore, the legal basis for the argument is also flawed. In *Booker*, the Supreme Court held that both its Sixth Amendment holding and its remedial interpretation of the Sentencing Act should be applied by sentencing courts and by appellate courts to cases then pending on

direct review. 125 S.Ct. at 769. In fact, the Court recognized that one respondent, Fanfan, had received a sentence that complied with the Sixth Amendment because he had received a sentence lower than that authorized by the guidelines. Nevertheless, the Court still remanded to allow the government to "seek resentencing under the system set forth in today's opinions." *Id.* And as the defendants point out, sentencing courts have been applying the sentencing system set forth in *Booker* since that case was decided. *See* Br. 23-28.

The Due Process Clause does not command a different result. In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the Supreme Court reversed, on due process grounds, a state court's retroactive application of its construction of a criminal trespass statute to prosecute "sit-in" protestors who would not leave the restaurant that refused to serve them. Reviewing decisions in which the Court had held criminal statutes "void for vagueness" under the Due Process Clause, the *Bouie* Court emphasized the "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime." *Id.* at 350-51; *see also Rogers v. Tennessee*, 532 U.S. 451, 457 (2001). Deprivation of the right to fair warning, the Court continued, can result both from vague

statutory language and from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face. *Bouie*, 378 U.S. at 352. Thus, the Court concluded that if a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," the construction must not be given retroactive effect. *Id.* at 354 (citations omitted).

More recently in *Rogers*, the Supreme Court emphasized that its holding in *Bouie* did not extend the *Ex Post Facto* Clause to the courts through the rubric of due process.[15] *Rogers*, 532 U.S. at 458-60. As the

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[15] The defendants are not helped by citing Justice Scalia's *Rogers* dissent criticizing the Court for holding that there are greater limits on retroactive legislating under the *Ex Post Facto* Clause than on retroactive applications of judicial constructions of a statute under the Due Process Clause. *See* Br. 47-48. If anything, this dissent only further clarifies that the Supreme Court did not apply the *Ex Post Facto* Clause to statutory construction or incorporate that clause's prohibitions into the Due Process Clause. Thus, the Bokharis' citation of *Miller v. Florida*, 482 U.S. 423 (1987), *United States v. Seacott*, 15 F.3d 1380 (7th Cir. 1994), and *United States v. Eske*, 189 F.3d 536 (7th Cir. 1999), *overruled on other grounds*, *Johnson v. United States*, 529 U.S. 694 (2000), and *Calder v. Bull*, 3 Dall. 386 (1798) (Br. 44-46) is unhelpful because these cases considered whether the *Ex Post Facto* Clause barred an expansion of punishment. And *United States v. Lewis*, 41 F.3d 1209 (7th Cir. 1994), to which the defendants attribute a quotation about the *Ex Post Facto* Clause on page 44 of their brief, does not contain that quotation or relate to that clause or the Due Process Clause. The quotation can be found in *United States v. Harris*, 41 F.3d

Supreme Court explained in *Rogers*, it "has long been settled by the constitutional text and our own decisions[] that the *Ex Post Facto* Clause does not apply to judicial decisionmaking." *Id.* at 462. Nor would such application be desirable, because "[s]trict application of *ex post facto* principles . . would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system." *Id.* at 461. Accordingly, the *Rogers* Court concluded that "a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Id.* at 462 (citation omitted).

The Bokharis contend "[t]he result [in *Booker*] was 'unexpected and indefensible'" under the law at the time of their offenses. Br. 49. But the key factor identified in *Bouie* and *Rogers* is the principle of fair warning. At the time the Bokharis defrauded the E-Rate Program and laundered the proceeds, the U.S. Code provided fair warning of these

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1121 (7th Cir. 1994), which rejected an *ex post facto* argument because the defendant "failed to show that he suffered any detriment as a result of the district court's application of the Guidelines which were in effect at the time of sentencing." *Id.* at 1123.

crimes and their maximum punishment. *Cf. United States v. Seacott*, 15 F.3d 1380, 1392 (7th Cir. 1994) (Easterbrook, J., concurring) ("Changing the guidelines after the commission of a crime does not deprive the criminal of notice of the elements of the offense or the statutory limits of punishment."). Prior to *Blakely*, the law of this circuit—and every other circuit—was that although Congress had enacted mandatory guidelines, the U.S. Code established the maximum penalty for every crime.[16] *See Simpson v. United States*, 376 F.3d 679, 681 (7th Cir. 2004). With respect to defendants' crimes, the applicable statutory maximums are:

- 18 U.S.C. § 371: 5 years for conspiracy to commit mail fraud (Count 1);
- 18 U.S.C. § 1341: 5 years for mail fraud (Counts 2-4)[17];
- 18 U.S.C. § 1956(h): 20 years for conspiracy to commit money laundering (Count 5); and
- 18 U.S.C. § 1956(a): 20 years for money laundering (Count 6 (Qasim) & Count 7 (Haider)).

Thus, the defendants had fair warning that they each were subject to

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[16] *Blakely v. Washington*, 124 S.Ct. 2531, was decided in June 2004, long after the defendants committed the offenses here.

[17] On July 30, 2002, after the defendants committed their offenses, Congress raised the maximum sentence for mail fraud to 20 years as part of the Sarbanes-Oxley Act, 116 Stat. 745, 805, sec. 903(a)).

total of 60 years imprisonment for the offenses they committed.[18]

Finally, the only circuit that has addressed this *ex post facto* argument has rejected it. In *United States v. Duncan*, 400 F.3d 1297, 1306 (11th Cir. 2005), the defendant argued that applying *Booker* to pending cases violated the Due Process Clause. The Eleventh Circuit followed the principles announced by the Supreme Court in *Rogers* to determine whether application of the *Booker* opinion would violate the due process principles of fair warning. *Id.* at 1306-07. The court noted that at the time defendant Duncan committed his crime of possessing at least 5 kilograms of cocaine, the U.S. Code informed him that he was subject to a sentence of life imprisonment for that offense. *Id.* at 1307. The sentencing guidelines at the time also informed him that the judge would engage in fact-finding to determine his sentence, and could impose a sentence up to life imprisonment. *Id.* The *Duncan* Court concluded that the defendant had had ample warning at the time he committed his crime that life imprisonment was a potential consequence of his actions, and that as a result, his due process rights could not be said to have been

[18] In his plea agreement, Qasim recognized that these statutory limits provided the maximum penalty. Plea Agreement, ¶¶ 6-7, R84:10.

violated. *Id.*

In reaching this decision, the Eleventh Circuit relied on *Dobbert v. Florida*, 432 U.S. 282 (1977). *See Duncan*, 400 F.3d at 1307-08. After defendant Dobbert committed a capital offense, the Florida death penalty statutes were found unconstitutional. *See* 432 U.S. at 284-88. However, Florida promptly enacted a new death penalty procedure, under which Dobbert was tried, convicted and sentenced to death. *Id.* Dobbert argued, based on the *Ex Post Facto* Clause, that there was no death penalty in effect in Florida at the time of his criminal conduct, because the Florida statute then in effect was declared invalid after he committed his crime. *Id.* at 297. The Supreme Court rejected this argument:

> [T]his sophistic argument mocks the substance of the *Ex Post Facto* Clause. Whether or not the old statute would, in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability to which the State ascribed to the act of murder.

Id. The Bokharis' argument is similarly wrong because the U.S. Code provided fair warning that their conduct was illegal and could subject them to a 60 year term of imprisonment. *See also United States v. Gray*,

362 F. Supp. 2d 714, 728 (S.D. W.Va. 2005) (rejecting *ex post facto* argument because the defendants "had fair warning of the potential consequences of their conduct by virtue of the statutory maximums set by the United States Code").

CONCLUSION

This Court should affirm the defendants' sentences.

Respectfully submitted.

R. HEWITT PATE
Assistant Attorney General

MAKAN DELRAHIM
SCOTT D. HAMMOND
Deputy Assistant Attorneys General

MARVIN N. PRICE, JR.
CARLA M. STERN
JASON C. TURNER
Attorneys
Antitrust Division
U.S. Department of Justice
209 S. LaSalle Street,
Chicago, IL 60604

JOHN J. POWERS, III
JAMES J. FREDRICKS
Attorneys
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 307-1403

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_____

James J. Fredricks
Attorney
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, N.W.
Room 3224
Washington, DC 20530
(202) 307-1403

CERTIFICATE OF SERVICE

I, James J. Fredricks, hereby certify that I caused two copies and one electronic copy in PDF format of the accompanying RESPONSE BRIEF FOR APPELLEE UNITED STATES OF AMERICA to be sent via Federal Express on the 23rd of May, 2005 to the following:

Craig W. Albee
Counsel for Haider Bokhari
Glynn, Fitzgerald & Albee, S.C.
526 E. Wisconsin Avenue
Milwaukee, Wisconsin 53202

Michael J. Steinle
Counsel for Qasim Bokhari
Law Offices of Michael J. Steinle
2600 N. Mayfair Road #700
Milwaukee, Wisconsin 53226

_____
James J. Fredricks

In the

United States Court of Appeals

For the Seventh Circuit

No. 03-3955

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEFFREY L. GOLDBERG,

Defendant-Appellant.

Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division.
No. 03 CR 332—**Milton I. Shadur**, *Judge*.

ARGUED APRIL 4, 2005—DECIDED MAY 5, 2005

Before POSNER, ROVNER, and WILLIAMS, *Circuit Judges*.

POSNER, *Circuit Judge*. The defendant pleaded guilty to mail fraud and was sentenced to 52 months in prison, the middle of the applicable guideline range after the judge imposed a two-level "vulnerable victim" enhancement. U.S.S.G. § 3A1.1(b). The appeal challenges the enhancement and also seeks, in the alternative, a *Booker*-motivated limited remand under *United States v. Paladino*, 401 F.3d 471, 483-84 (7th Cir. 2005). It is an alternative because the defendant would prefer that we order him resentenced rather than merely ask the judge whether he would give the defendant

the same sentence under the post-*Booker* regime, in which the sentencing guidelines are advisory, rather than, as before, mandatory. We shall see later that it is a risky preference.

A certified financial planner, acccountant, and lawyer, Goldberg defrauded some 130 people of a total of some $8 million. The judge received more than 20 letters from victims of Goldberg's scheme, and at the sentencing hearing read into the record four of them, including one from Goldberg's own aunt, a woman in her eighties. Goldberg had fleeced her and her husband of more than $100,000—in her words, a "majority of my husband's and my entire lifetime assets, other than Social Security." A letter from another woman, not elderly, stated: "I was truly at a vulnerable point in my life when I met Jeff Goldberg . . . . At the time of the divorce I felt I needed someone that I could trust to help me negotiate and understand the financial aspect of the divorce settlement as I had no knowledge at all of financial matters." The judge thought the four letters showed that some of Goldberg's victims had indeed been vulnerable victims.

Goldberg complains that there is no evidence that he *targeted* vulnerable persons. The government responds that if a victim is vulnerable, it is irrelevant that he or she was not a target. Concerning this issue there is tension in our cases, compare *United States v. Parolin*, 239 F.3d 922, 927 n. 2 (7th Cir. 2001); *United States v. Paneras*, 222 F.3d 406, 413 (7th Cir. 2000), and *United States v. Snyder*, 189 F.3d 640, 649 (7th Cir. 1999), with *United States v. Sims*, 329 F.3d 937, 944 (7th Cir. 2003); *United States v. Rumsavich*, 313 F.3d 407, 411 (7th Cir. 2002); *United States v. Grimes*, 173 F.3d 634, 637-38 (7th Cir. 1999), and *United States v. Almaguer*, 146 F.3d 474, 478 (7th Cir. 1998), as well as in cases from other circuits. See, e.g., *United States v. Frank*, 247 F.3d 1257, 1259-60 (11th

Cir. 2001); *United States v. Brawner*, 173 F.3d 966, 973 (6th Cir. 1999); *United States v. Burgos*, 137 F.3d 841, 843-44 (5th Cir. 1998). The cases that dispense with the requirement note that an explicit "targeting" requirement in an application note to the applicable guideline (U.S.S.G. §3A1.1(b)(1)) was removed by the Sentencing Commission in 1995.

The tension can be dissolved by noting the difference between a nonindividualized fraudulent solicitation communicated indiscriminately by mail or television or other media to a large audience of potential victims, and a personalized solicitation in which the defendant deals face to face with his victims. In the first type of case, the presence of vulnerable victims is accidental and unavoidable and the defendant makes no effort to exploit anyone's vulnerability. "[The current] application note says that the enhancement 'would not apply in a case in which the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile.' U.S.S.G. § 3A1.1, cmt. n. 2. The missing element in that case is that the defendant had no reason to know such a victim existed." *United States v. Zats*, 298 F.3d 182, 189 (3d Cir. 2002). In the second type of case the defendant could easily avoid dealing with vulnerable victims and, having decided not to forbear, should not be allowed to escape responsibility for having taken advantage of people unable to protect themselves. Knowledge that some of the people he was dealing with were especially vulnerable to financial fraud did not cause Goldberg to lay off them. See *United States v. Monostra*, 125 F.3d 183, 190 (3d Cir. 1997). He knew he was exploiting the vulnerable, along with others who were not vulnerable. He intended the inevitable consequences of his acts.

Very oddly, the government, in response to questions from the bench, told us that Goldberg had not been given adequate notice that such an enhancement was in the offing.

If true, he would be entitled to a new sentencing hearing. E.g., *United States v. Pandiello*, 184 F.3d 682, 686 (7th Cir. 1999); *United States v. Carey*, 382 F.3d 387, 392 (3d Cir. 2004); *United States v. Thorn*, 317 F.3d 107, 131 n. 17 (2d Cir. 2003). It is not true. Although neither the prosecutor nor the presentence investigation report had recommended such an enhancement, the judge warned the parties before the sentencing hearing that he might consider it because of the letters he had received from victims of the fraud. At argument Goldberg's lawyer told us he hadn't seen many of the letters until the sentencing hearing, but he did not contend and could not truthfully have contended that he had had no opportunity to inspect and if possible refute the damaging letters well in advance. No more process than this was required. See *United States v. Pandiello*, *supra*, 184 F.3d at 686-87.

For on August 18, 2003, months before sentencing, the district judge had told the parties that he had received "some letters from victims and three supplemental reports (dated July 11, July 30, and August 8, 2003) from the probation officer that summarize other victim impact statements." The judge "advise[d] the defendant and counsel for both parties that at the time of sentencing this court will consider one or both of the following bases for possibly imposing a custodial sentence in excess of the range of 37 to 46 months that applies to the total offense level of 21 and a criminal history category of 1 (the estimate reflected in the PSI): (1) a possible two-level increase in the total offense level, occasioned by the possible application of the vulnerable victim adjustment under [U.S.S.G.] § 3A1.1; (2) a possible upward departure under Guideline § 5K2.0 (or perhaps Guideline § 5K2.3 as well) by reason of what may be found to be the exceptionally severe impact of defendant's conduct on numerous victims." The judge added that "all of

those materials have also been provided to defense counsel and the United States Attorney's Office" and that the parties could file written responses.

On October 22, Goldberg filed a motion for a downward departure in which he argued against a vulnerable-victim enhancement. Further supplements identifying victims of Goldberg's fraud were submitted by the probation office before the sentencing hearing on October 30—at which Goldberg acknowledged having received them.

Although there was no infirmity in the judge's procedure, Goldberg is entitled to a limited *Paladino* remand because the judge based the enhancement on his own findings. It is worth pointing out, however, that Goldberg may be better off with that relief than with his preferred relief, which is an order resentencing him. Any resentencing would be conducted under the new, post-*Booker* regime, in which the guidelines are merely advisory, and so he'd be exposed to the risk of a higher sentence. Suppose we agreed with him that the judge hadn't given adequate notice of intent to impose a vulnerable-victim enhancement. Suppose further that if the case were remanded for resentencing, the judge, after giving Goldberg due notice, again imposed the vulnerable-victim enhancement. The judge might then decide that 52 months was too light a punishment for Goldberg's crime. Although the sentence was at the midpoint of the guideline range, the range is now merely advisory. Judge Shadur made clear that he was disturbed by the magnitude of Goldberg's fraud and moved by the letters from which we quoted. He might want to give Goldberg a longer sentence, and if the departure were a reasonable one we would have to affirm.

We were surprised to learn that Goldberg's lawyer and—we understand from him, and from the argument of another criminal defense lawyer in an appeal argued before us the

same day—other members of the defense bar as well believe that a sentence meted out in the pre-*Booker* era of mandatory guidelines is the ceiling in the event of a resentencing unless there are changed factual circumstances, such as additional criminal conduct by the defendant. If there are no such changed circumstances, Goldberg's lawyer told us, the inference would arise that any heavier sentence imposed on remand was vindictively motivated and therefore improper. That is a misunderstanding, and it is a misunderstanding dangerous to criminal defendants. When there is no relevant legal or factual change between sentence and resentence, the motive for an increase in punishment is indeed suspect. *Alabama v. Smith*, 490 U.S. 794, 798-99 (1989); *United States v. Peyton*, 353 F.3d 1080, 1085-86 (9th Cir. 2003); *United States v. Rodgers*, 278 F.3d 599, 603 (6th Cir. 2002). But *Booker* brought about a fundamental change in the sentencing regime. The guidelines, mandatory when Goldberg was sentenced, are now advisory. Were he to be resentenced, it would be under a different standard, one that would entitle the judge to raise or lower the sentence, provided the new sentence was justifiable under the standard of reasonableness. *United States v. Tedder*, No. 03-3345, 2005 WL 767061, at *8 (7th Cir. Apr. 6, 2005); *United States v. Forrest*, 402 F.3d 678, 684 (6th Cir. 2005). No inference of vindictiveness would arise from the exercise of the judge's new authority.

The risk that the judge might increase the sentence is not significant in a *Paladino* remand. Such a remand asks the judge whether he would have given the defendant a shorter sentence had he realized the guidelines are merely advisory. If so, this would show that his treating the guidelines as mandatory had been a plain error, and so we would vacate for resentencing. Since our basis for doing this would be the judge's having told us that he wanted to shorten the defendant's sentence, it would be an unusual case, to say the

least, in which the judge would impose a heavier rather than a lighter sentence; presumably it would be a case in which damaging new information had come to light since the *Paladino* remand.

Tedder in contrast was a case in which we ordered the defendant resentenced because the judge had misapplied the guidelines, in which event he can impose a higher sentence because the guidelines are merely advisory. And this demonstrates that a defendant who appeals a pre-*Booker* sentence on the basis that the guidelines were misapplied (as in Goldberg's challenge to the vulnerable-victim enhancement) is playing with fire, because if he wins and is resentenced the judge will have more sentencing latitude, up as well as down, than he did when the guidelines were deemed mandatory.

But the challenge failed in this case, and Goldberg is therefore entitled only to a *Paladino* remand, which we hereby order.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit