

No. 03-2632

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

BRIAN BAILEY,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES
AS APPELLEE REGARDING *BOOKER*

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TABLE OF CONTENTS

	PAGE
ARGUMENT	
BAILEY’S SENTENCE SHOULD BE UPHeld UNDER THE PLAIN ERROR STANDARD	1
<i>A. Bailey Has Forfeited The Booker Issue</i>	<i>2</i>
<i>B. Bailey Has Not Demonstrated A “Reasonable Probability” That The District Court Would Impose A More Lenient Sentence Under A Non-Mandatory Guidelines Scheme</i>	<i>3</i>
CONCLUSION	6
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES:	PAGE
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	2-3
<i>Blakely v. Washington</i> , 124 S. Ct. 2531 (2004)	2
<i>United States v. Antonakopoulos</i> , 399 F.3d 68 (1st Cir. 2005)	1, 3-5
<i>United States v. Gonzalez-Mercado</i> , No. 03-2173, 2005 WL 740506 (1st Cir. April 1, 2005)	5
<i>United States v. Booker</i> , 125 S. Ct. 738 (2005)	1
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	4
<i>United States v. Rodriguez</i> , 311 F.3d 435 (1st Cir. 2002), cert. denied, 538 U.S. 937 (2003)	3
<i>United States v. Serrano-Beauvaix</i> , 400 F.3d 50 (1st Cir. 2005)	2-4

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The United States files this brief pursuant to the Court's order of March 18, 2005, which invited the parties' views on whether Appellant Brian Bailey is entitled to resentencing under *United States v. Booker*, 125 S. Ct. 738 (2005), and *United States v. Antonakopoulos*, 399 F.3d 68 (1st Cir. 2005). Contrary to the arguments in his supplemental brief, Bailey is not eligible for resentencing.

ARGUMENT

**BAILEY'S SENTENCE SHOULD BE UPHeld
UNDER THE PLAIN ERROR STANDARD**

Bailey did not preserve the *Booker* issue for appeal, and he has not met his burden of showing that he is entitled to relief under the plain error analysis set

forth in *Antonakopoulos*. For these reasons, the Court should reject his *Booker* challenge.

A. *Bailey Has Forfeited The Booker Issue*

A *Booker* claim will be preserved for appellate review only if the defendant argued in the district court (1) that the Federal Sentencing Guidelines were unconstitutional or (2) that the application of the Guidelines to his or her sentence was error under *Blakely v. Washington*, 124 S. Ct. 2531 (2004), or *Apprendi v. New Jersey*, 530 U.S. 466 (2000). See *United States v. Serrano-Beauvaix*, 400 F.3d 50, 55 (1st Cir. 2005) (citing *Antonakopoulos*, 399 F.3d at 76). Failure to make at least one of these arguments in the district court results in forfeiture of the *Booker* claim, meaning that this Court will review the issue only under a plain error standard. *Ibid*.

In the district court, Bailey did not argue either that the Guidelines were unconstitutional or that the judge's application of the Guidelines violated *Apprendi*. (*Blakely* was not decided until after his sentencing.) Instead, he argued that the evidence was insufficient to establish that Nikolas Dais, the pretrial detainee he assaulted, was a vulnerable victim for purposes of Section 3A1.1(b)(1) of the Sentencing Guidelines. See App. 1016-1022, 1025-1027.

Bailey asserts (Supp. Br. 5), however, that he raised “an *Apprendi*-like error” in the district court. The objection he raised below – that the evidence was insufficient to support a finding of vulnerability – is not “*Apprendi*-like.” In *Apprendi*, the Supreme Court held that “[o]ther than the fact of a prior conviction,

any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” 530 U.S. at 490. Thus, an objection is “*Apprendi*-like” only if the defendant argues that the sentencing judge is prohibited from basing the Guidelines calculation on facts that have not been found by a jury beyond a reasonable doubt. Bailey does not assert, and we have found nothing in the record to indicate, that he made such an argument below.

Alternatively, Bailey contends (Supp. Br. 6-9) that the standard adopted in *Antonakopoulos* for assessing whether a *Booker* claim was forfeited is too restrictive and impractical. This panel, however, is bound by *Antonakopoulos* under the “law of the circuit doctrine.” *United States v. Rodriguez*, 311 F.3d 435, 438-439 (1st Cir. 2002), cert. denied, 538 U.S. 937 (2003); see also *Serrano-Beauvaix*, 400 F.3d at 56 (Lipez, J., joined by Torruella, J., concurring) (*Antonakopoulos* “is binding on subsequent panels” of this Circuit). Consequently, Bailey’s *Booker* claim must be deemed forfeited under *Antonakopoulos*.

B. Bailey Has Not Demonstrated A “Reasonable Probability” That The District Court Would Impose A More Lenient Sentence Under A Non-Mandatory Guidelines Scheme

In order to qualify for a remand under the plain error standard, there must be (1) an error (2) that is plain, (3) affects substantial rights and (4) seriously impairs the fairness, integrity, or public reputation of judicial proceedings.

Antonakopoulos, 399 F.3d at 77. The first two prongs of the plain error test are

met “whenever defendant’s Guidelines sentence was imposed under a mandatory Guidelines system.” *Ibid.* “But to meet the third prong of the test, the defendant must persuade [the Court] that there is a ‘reasonable probability that the district court would impose a different sentence more favorable to the defendant’” under an advisory Guidelines scheme. *Serrano-Beauvaix*, 400 F.3d at 55 (quoting *Antonakopoulos*, 399 F.3d at 75). “[I]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice” under a plain-error analysis. *Antonakopoulos*, 399 F.3d at 77 (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)).

Bailey contends (Supp. Br. 10), however, that he does not bear the burden of showing a “reasonable probability” of a more favorable outcome and, instead, is entitled to a presumption that the district judge “would have analyzed the case differently” if “not constrained by the mandatory nature of the Guidelines.” He bases this argument on his assertion (Supp. Br. 10) that *Antonakopoulos* “cannot be applied to a case in which there was no plea and a variety of sentencing issues were considered by the district court.” Bailey is mistaken. *Antonakopoulos* involved a jury trial, not a guilty plea. 399 F.3d at 71-72. Moreover, the district court in *Antonakopoulos* did, in fact, consider a variety of sentencing issues, imposing at least three sentencing enhancements based on judge-made factfinding. See *id.* at 73-74, 82-83.

Antonakopoulos thus governs Bailey’s case and places upon him the burden of proving a “reasonable probability” that resentencing under an advisory

Guidelines system would result in a more lenient sentence. He has not met this burden. This Court has emphasized that the “reasonable probability” test “is not met by the mere assertion that the court might have given the defendant a more favorable sentence.” *Id.* at 80. Rather, the defendant must base his or her showing on “specific facts.” *Ibid.* His supplemental brief does not point to any such facts, and indeed, does not even attempt to make the “reasonable probability” showing. See *United States v. Gonzalez-Mercado*, No. 03-2173, 2005 WL 740506 (1st Cir. April 1, 2005). Having failed to bear his burden of proof, Bailey is not entitled to resentencing under *Booker*.

CONCLUSION

The Court should affirm Bailey's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2005, two copies of the foregoing
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REGARDING *BOOKER* were served by Federal Express, overnight delivery, on:

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I further certify that, on the same date, a disk containing a copy of the brief was served on Mr. Slavitt by overnight delivery.

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