

No. 05-680

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**In the Supreme Court of the United States**

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RANDALL RE AND ANTHONY CALABRESE,  
PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the evidence in this case was sufficient to support the jury's finding that petitioners' conspiracy to commit extortion affected interstate commerce as required under the Hobbs Act, 18 U.S.C. 1951.

2. Whether, after a limited remand in which the district court was asked to determine whether it would have imposed the same criminal sentence if it had understood the Sentencing Guidelines to be advisory, the district court properly refused to consider petitioner's post-sentencing conduct.

3. Whether the district court committed structural error by relying at sentencing on facts not found by the jury or admitted by petitioner.

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 18-21) is reported at 419 F.3d 582. An earlier opinion of the court of appeals (Pet. App. 1-17) is reported at 401 F.3d 828.

**JURISDICTION**

The judgment of the court of appeals was entered on August 12, 2005. On November 9, 2005, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including November 23, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Following a jury trial, petitioners were convicted of conspiring to commit extortion, in violation of 18 U.S.C. 1951(a), and conspiring to travel to commit extortion, in violation of 18 U.S.C. 1952. The district court sentenced each petitioner to 87 months of imprisonment, to be followed by three years of supervised release, and a fine of \$12,500. Pet. App. 6. The court of appeals affirmed the convictions but ordered a limited remand for the district court to determine whether it would have imposed different sentences if it had understood the Sentencing Guidelines to be advisory. *Id.* at 1-17. On remand, the district court held that it would have imposed the same sentences under advisory Guidelines. See *id.* at 19. The court of appeals affirmed petitioners' sentences. *Id.* at 18-21.

1. Petitioner Re and his wife jointly owned a warehouse in Englewood, Florida. Gregory Leach, the victim of petitioners' extortionate scheme, owned a warehouse on adjacent property. Over the years, Re and Leach had numerous disputes concerning their warehouses. Pet. App. 1-2.

In 1997, petitioner Re listed his warehouse for sale. A potential buyer, Jimmy Daughtry, came forward but made an offer substantially below the asking price. Re made a counter offer, but Daughtry never responded. Pet. App. 2; Gov't C.A. Br. 5.

Daughtry ultimately decided not to buy petitioner Re's warehouse, opting instead to lease warehouse space from Leach. On April 17, 1997, a real estate agent informed Re that Leach had told Daughtry that a sewer line for Re's warehouse had been installed across Leach's property without appropriate permits or inspec-

tions. The real estate agent also told Re that this disclosure had prevented the sale of petitioner's warehouse to Daughtry. Pet. App. 2; Gov't C.A. Br. 5.

On May 3, 1997, Leach was contacted by another "potential lessee," who identified himself as Sammy Bender. Leach met "Bender" at the warehouse. In response to Bender's questions, Leach confirmed that he owned the warehouse and knew Daughtry. A second person then struck Leach from behind with a baseball bat, and Bender began punching Leach in the face and throat. Leach fell to the floor, and one of the assailants took from him a gun that Leach had brought to the meeting. The assailants continued to beat Leach as he lay on the ground. As they did so, they instructed Leach to tell Daughtry to move out. They also repeatedly asked Leach if he was "getting the message," and Leach indicated that he was. Pet. App. 2-3.

Between April 22 and April 30, 1997, petitioners Re and Calabrese, both of whom live near Chicago, Illinois, made 13 calls to each other. On May 2, 1997, Calabrese flew to Florida, where he rented a car. Two days later, Calabrese gave his friend Dennis Kowalski a gun that was later determined to have been taken from Leach. Leach subsequently identified Calabrese in a photographic array as the assailant "Bender." Pet. App. 4-5; Gov't C.A. Br. 9-11.

2. In May 2002, a federal grand jury in the Northern District of Illinois returned a two-count indictment against petitioners. Count One charged them with violating the Hobbs Act, 18 U.S.C. 1951(a), which establishes criminal penalties for any person who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do."

Petitioners were charged with “conspir[ing] to commit extortion, which extortion would and did affect commerce.” Indictment 1. Count Two of the indictment charged petitioners with conspiring to travel in interstate commerce to commit extortion, in violation of 18 U.S.C. 1952. Pet. App. 6.

To prove the interstate-commerce element of the charged Hobbs Act offense, the government established through the testimony of Leach that (1) Leach used out-of-state paint, gasoline, and tools (including an Echo brand weed-eater) in doing maintenance on the warehouse; (2) Leach used the rental payments from Daughtry to pay maintenance expenses; and (3) Leach’s loss of rents reduced the funds available to pay those expenses. Pet. App. 12; Gov’t C.A. Br. 15-16. A jury found petitioners guilty of both of the charged offenses. Pet. App. 6.

In sentencing petitioners, the district court treated the Sentencing Guidelines as mandatory. Petitioners’ Guidelines sentences included three enhancements based on facts found by the court by a preponderance of the evidence. Pet. App. 15.

3. Petitioners appealed their convictions and sentences. On January 12, 2005, while petitioners’ appeals were pending before the Seventh Circuit, this Court issued its decision in *United States v. Booker*, 543 U.S. 220. The Court held that the federal sentencing scheme enacted by Congress, under which the sentencing court rather than the jury finds facts that establish a mandatory Guidelines range, is inconsistent with this Court’s decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). *Booker*, 543 U.S. at 230-245. The Court further held that the constitutional infirmity was most appropriately



eliminated by severing the statutory provisions that mandate sentences within the applicable Guidelines range, leaving a sentencing scheme in which the Guidelines range is advisory and federal sentences are reviewable for unreasonableness. *Id.* at 246-268.

4. After this Court issued its decision in *Booker*, the court of appeals affirmed petitioners' convictions but ordered a limited remand to allow the district court to determine whether it would have imposed the same sentences if it had understood the Guidelines to be advisory. Pet. App. 1-17.

a. Petitioners argued that the evidence was insufficient to sustain their Hobbs Act convictions because the government had not established that the conspiracy to commit extortion affected interstate commerce. The court of appeals rejected that contention, holding that the government had shown the required effect on interstate commerce under a "depletion of assets theory." Pet. App. 11-14. The court explained that the government had established the following connections between petitioners' extortionate conduct and interstate commerce: (1) Leach's loss of rent payments diminished the funds available to pay warehouse expenses; (2) in maintaining the warehouse, Leach used paint, tools, and gasoline (for certain equipment) from outside the State of Florida; (3) Leach used an Echo brand weed-eater to cut weeds and grass around the warehouse; and (4) Echo is located in Zurich, Illinois, and London, Ontario. *Id.* at 12. Although the court of appeals expressed concern that the government had not developed that evidence in greater detail, *id.* at 13, the court concluded that a reasonable jury could infer "that the out-of-state weed-eater, gas, paint, and tools were purchased on a customary basis by Leach exclusively for warehouse-related

maintenance.” *Id.* at 14. The court found that evidence sufficient to establish the required effect on interstate commerce. *Id.* at 12, 14.

b. In challenging their sentences, petitioners argued, *inter alia*, that the federal Sentencing Guidelines violated the Sixth Amendment. Because the claim had not been raised in the district court, the court of appeals reviewed it for plain error. See Pet. App. 15. Following the procedures that it had adopted in *United States v. Paladino*, 401 F.3d 471 (7th Cir.), cert. denied, 126 S. Ct. 106 (2005), the court of appeals ordered a limited remand to allow the district court to determine whether it would have imposed the same sentence if it had understood the Guidelines to be advisory. Pet. App. 16-17.

5. On remand, petitioners argued that they had made extraordinary rehabilitative progress since being sentenced, and that the district court should take that fact into consideration in determining appropriate sentences under the advisory Guidelines regime. See Pet. App. 19. The district court stated that it was not sure what term of imprisonment it would impose if it took into consideration petitioners’ conduct since the time of their original sentencing. *Ibid.* The district court construed the court of appeals’ remand order, however, as precluding consideration of post-sentencing events and conduct. See *id.* at 19-20. The district court found that, in light of the seriousness of the violent crimes that petitioners had committed, it would have imposed the same sentences even if it had understood the Guidelines to be advisory. *Id.* at 19.

6. The court of appeals affirmed, holding that petitioners had failed to establish reversible plain error. Pet. App. 18-21. The court rejected petitioners’ argument that the district court should have considered their

post-sentencing conduct. The court explained that “[t]he purpose of the limited remand is to decide whether the court committed plain error when it originally sentenced the defendants.” *Id.* at 20. In light of the district court’s determination that it would have imposed the same sentences if it had understood the Guidelines to be advisory, the court of appeals held that petitioners had not been prejudiced by the district court’s earlier treatment of the Guidelines as mandatory, and that petitioners therefore could not establish plain error. *Ibid.* Because the purpose of a *Paladino* remand is to determine whether plain error occurred at the original sentencing, the court of appeals concluded, “[p]ost-sentencing events or conduct simply are not relevant to th[e] inquiry.” *Id.* at 21.

#### ARGUMENT

Petitioners contend that (1) the evidence was insufficient to prove the effect on interstate commerce required under the Hobbs Act (Pet. 4-6), (2) their post-sentencing conduct should have been considered on the limited *Paladino* remand (Pet. 6-8), and (3) the district court committed structural error in enhancing their sentences based upon facts not found by the jury or admitted by petitioners (Pet. 8-12). Those claims lack merit and do not warrant this Court’s review.

1. a. The Hobbs Act makes it a federal crime to commit an act of extortion (or attempt or conspire to do so) that “in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce.” 18 U.S.C. 1951(a). That broad jurisdictional language demonstrates “a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or

physical violence.” *Stirone v. United States*, 361 U.S. 212, 215 (1960); see *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 408 (2003).

Both before and after this Court’s decision in *United States v. Lopez*, 514 U.S. 549 (1995), the Hobbs Act has been uniformly construed to prohibit the illegal interference in any manner whatever with interstate commerce, even when the effect of such interference or attempted interference is slight. As the Second Circuit has explained:

Our cases have long recognized that the jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce. \* \* \*

\* \* \* We now expressly hold that *Lopez* did not raise the jurisdictional hurdle for bringing a Hobbs Act prosecution. \* \* \* [O]ur sister Circuits that have addressed this question have all so held.

*United States v. Farrish*, 122 F.3d 146, 148 (2d Cir. 1997) (brackets and internal quotation marks omitted), cert. denied, 522 U.S. 1118 (1998).

In keeping with that analysis, courts of appeals have consistently upheld Hobbs Act convictions where acts of extortion or robbery have depleted the assets of commercial enterprises that regularly purchase goods that have moved in interstate commerce. See, e.g., *United States v. Haywood*, 363 F.3d 200, 209-211 (3d Cir. 2004) (robbery of a bar); *United States v. Capozzi*, 347 F.3d 327, 336-337 (1st Cir. 2003) (extortion of car dealership), cert. denied, 540 U.S. 1168 (2004); *United States v. Curtis*, 344 F.3d 1057, 1070-1071 (10th Cir. 2003) (robberies of stores and restaurants), cert. denied, 540 U.S. 1157 (2004); *United States v. Gray*, 260 F.3d 1267,

1272-1277 (11th Cir. 2001) (robbery of restaurant), cert. denied, 536 U.S. 963 (2002); *United States v. Arena*, 180 F.3d 380, 389-391 (2d Cir. 1999) (robbery of medical facilities), cert. denied, 531 U.S. 811 (2000); *United States v. Vong*, 171 F.3d 648, 654 (8th Cir. 1999) (robbery of jewelry stores); *United States v. Hebert*, 131 F.3d 514, 520, 523-524 (5th Cir. 1997) (robberies of bank, restaurant, and liquor stores), cert. denied, 523 U.S. 1101 (1998).

b. Petitioners do not contest the general validity of the “depletion of assets” theory (see Pet. App. 12) on which the court of appeals relied in sustaining their convictions. Rather, they argue that the evidence here was insufficient to establish that the requisite depletion of assets occurred. For at least three reasons, that claim does not warrant further review.

i. The court of appeals held that the jury could reasonably have found that “the out-of-state weed-eater, gas, paint, and tools were purchased on a customary basis by Leach exclusively for warehouse-related maintenance.” Pet. App. 14. Combined with evidence that the loss of Daughtry’s rental payments would deplete the assets available for those purchases, the court found that evidence sufficient to establish the required effect on interstate commerce. *Id.* at 12-14. Contrary to petitioners’ suggestion (Pet. 5), the court of appeals did not hold that a single purchase at some unidentified time within a 20-year period is sufficient under the depletion-of-assets theory to establish the interstate-commerce element. Rather, the court emphasized that the depletion-of-assets theory requires that “the *victim-enterprise* must *customarily purchase* goods in interstate commerce.” Pet. App. 13.

Indeed, the court of appeals specifically observed that evidence of a single out-of-state purchase “would not amount to the *customary purchase* of interstate goods, as required.” Pet. App. 13. The court further cautioned that, “if Leach simply used gasoline, paint, and tools he had purchased for his personal consumption, then no *victim-enterprise* (i.e., warehouse) funds would have been used to purchase those interstate goods, as required.” *Ibid.* Under either of those scenarios, the court of appeals concluded, the jury “would have been precluded from finding that the interstate commerce requirement of the Hobbs Act was met.” *Ibid.* There is consequently no basis for petitioners’ contention that the court of appeals in this case endorsed an unusually broad conception of the depletion-of-assets theory.

ii. Petitioners contend (Pet. 6) that the court of appeals erred in crediting “the victim’s conclusory and imprecise testimony” that he used out-of-state gas, paint, and tools to maintain the warehouse. Nothing in this Court’s decisions suggests, however, that any heightened proof requirement applies when the government seeks to demonstrate, for purposes of establishing the jurisdictional element of a federal statute, that particular interstate transactions have in fact occurred. To the extent that petitioners argue that the proof here was insufficient under ordinary evidentiary standards, that claim raises a fact-bound question that does not warrant this Court’s review. In any event, as the court of appeals correctly held, Leach’s uncontested testimony was sufficient to allow a reasonable jury to find that supplies

used to maintain the warehouse traveled in interstate commerce. See Pet. App. 13 & n.4.<sup>1</sup>

iii. Even if the question presented otherwise warranted this Court's review, this case would be an unsuitable vehicle for resolving it. As the government's brief in the court of appeals explained (at 13-15), petitioners failed to raise this claim in the district court, and it is therefore reviewable only for plain error.<sup>2</sup> Petitioners cannot establish that the evidence of effects on interstate commerce was so deficient that the district court plainly erred in submitting the case to the jury.

2. Petitioners contend (Pet. 6-8) that the court of appeals erred, and created a conflict with the Third Circuit, in holding that a district court should not consider post-sentencing conduct when determining, in a limited remand, whether it would have imposed a lower sentence under advisory Guidelines. The decision below was correct, does not conflict with any decision of the Third Circuit, and does not warrant further review.

a. In *Paladino*, the Seventh Circuit identified the standards and procedure to be used within the circuit in resolving plain-error claims under *Booker*. See *Paladino*, 401 F.3d at 481-485. With regard to the "substantial-rights" prong of plain-error review, the court explained that the record usually will not reveal whether *Booker* error materially affected a defendant's sentence. See *id.* at 482. Rather, the court held, "[t]he only practical way (and it happens also to be the shortest, the easiest, the quickest, and the surest way) to de-

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<sup>1</sup> Petitioner Calabrese's interstate travel to commit the assault on Leach constitutes a further link between petitioners' offenses and interstate commerce. See Pet. App. 14.

<sup>2</sup> The court of appeals did not address the government's argument that the claim was subject to plain error review. See Pet. App. 11-12.

termine whether the kind of plain error argued in these cases has actually occurred is to ask the district judge.” *Id.* at 483. To that end, the Seventh Circuit in such cases will retain jurisdiction and will order a limited remand so that the district court can determine whether it “would have imposed a different sentence had [it] known the guidelines were merely advisory.” *Id.* at 484. If the district court determines that it would have imposed the same sentence under advisory Guidelines, there has been no prejudice and the court of appeals will affirm the sentence, unless it is “unreasonable.” Alternatively, if the district court determines that it would have imposed a different sentence under advisory Guidelines, then the court of appeals will find that there has been reversible plain error, vacate the sentence, and remand for resentencing. *Ibid.*

b. In light of the purpose of the limited-remand procedure adopted in *Paladino* and applied in this case, the court of appeals correctly held that petitioners’ post-sentencing conduct should not be considered. As the court explained, the purpose of the limited remand is to determine whether the district court would have imposed a different sentence if it had understood the Guidelines to be advisory. Pet. App. 20-21. Because that inquiry looks to what the district court would have done at the time of the original sentencing, “[p]ost-sentencing events or conduct simply are not relevant.” *Id.* at 21.

c. Contrary to petitioners’ contention (Pet. 8), the decision below does not conflict with any decision of the Third Circuit. Petitioners cite no case, and we are aware of none, in which the Third Circuit has held that district courts may (or may not) consider post-sentencing conduct in resentencing defendants on remand in



*Booker* plain-error cases. In *United States v. Miller*, 417 F.3d 358, 363 (3d Cir. 2005), the court noted that on such a remand, “the District Court is free to use its ordinary discretion in handling the various procedural issues (such as the admission of additional evidence) that may arise.” The “additional evidence” at issue in *Miller*, however, did not concern post-sentencing developments; rather, the quoted passage refers to the district court’s refusal to consider additional evidence about the scope of one defendant’s involvement in the conspiracy. *Id.* at 360.<sup>3</sup>

d. In any event, petitioners’ claim involves a transitional issue that will likely have little continuing importance. This Court has repeatedly denied review of questions concerning the proper standards for evaluating

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<sup>3</sup> The post-*Booker* remand procedures devised by the Third and Seventh Circuits differ in scope and purpose. Under the Seventh Circuit’s limited-remand procedure, the district court is asked to decide whether it would have imposed a different sentence if it had understood the Guidelines to be advisory. Based on the district court’s response to that inquiry, the court of appeals determines whether reversible plain error has occurred. Only if the court of appeals finds after the limited remand that the defendant was prejudiced by the district court’s prior treatment of the Guidelines as mandatory, or that the sentence imposed is unreasonable, does the Seventh Circuit vacate the original sentence and remand for resentencing. See *Paladino*, 401 F.3d at 483-484. The Third Circuit, by contrast, does not order limited remands, but instead presumes prejudice and automatically remands for resentencing. See, e.g., *United States v. Davis*, 407 F.3d 162, 164-166 (3d Cir. 2005) (en banc); *United States v. Miller*, 417 F.3d 358, 362-363 (3d Cir. 2005). Even if the Third Circuit were to hold in the future that the district court in a resentencing procedure should consider all information available at the time of the resentencing (including information concerning events that postdated imposition of the original sentence), it would not logically follow that a district court within the Seventh Circuit should adopt the same approach in a *Paladino* limited remand.

*Booker* plain-error claims. See, e.g., *Mares v. United States*, 126 S. Ct. 43 (2005); *Rodriguez v. United States*, 125 S. Ct. 2935 (2005). There is no reason for a different result in this case, which presents the much narrower and less significant question of what body of evidence should be considered in a *Paladino* limited remand.

3. Petitioners contend (Pet. 8-12) that the petition should be held pending this Court's decision in *Washington v. Recuenco*, cert. granted, 126 S. Ct. 478 (2005) (No. 05-83). Although petitioners' argument is not entirely clear, they frame the question presented (Pet. i) as "[w]hether enhancing a sentence on the basis of a judge-found fact in violation of the Sixth Amendment is structural error and thus not subject to harmless-error review." Petitioners' claim is without merit, and there is no reason to hold the petition pending the disposition of *Recuenco*.

a. Petitioners did not argue in the court of appeals that a Sixth Amendment violation under *Booker* is structural error. This Court generally does not consider questions that were neither pressed nor passed upon below. See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). There is no reason for the Court to depart from that practice in this case.

b. Petitioners' claim appears to be premised on the contention (Pet. 8-10) that the remedial opinion in *Booker*, see 543 U.S. at 245-268, is inconsistent with the decision in *Blakely* because *Booker* permits courts to impose sentences under advisory Guidelines that exceed the maximum sentences that could have been imposed under mandatory Guidelines based solely on facts found by the jury or admitted by the defendant. Petitioners

contend (Pet. 10-12) that the Court's decision in *Recuenco* may bear on that question.

Petitioners' claim lacks merit. The remedial decision in *Booker* is not inconsistent with the decision in *Blakely*. As the Court made clear in *Booker*, it was the mandatory nature of the Guidelines that created the Sixth Amendment violation. See *Booker*, 543 U.S. at 233 (“[E]veryone agrees that the constitutional issues presented \* \* \* would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges.”). The remedial opinion addressed the distinct question whether the statutory provisions that make the Guidelines mandatory could properly be severed, thereby eliminating the Sixth Amendment violation. A majority of the Court concluded that they could, see, e.g., *id.* at 244-246, and petitioners identify no reason for this Court to reconsider that determination. And because the question presented in *Recuenco*—*i.e.*, whether a Sixth Amendment violation under Washington's mandatory system is structural error—has no bearing on whether the Court's severance analysis in *Booker* was correct, there is no reason for this Court to hold the petition pending the disposition of *Recuenco*.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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