No. 05-196

In the Supreme Court of the United States

JOHN F. TRIPLETT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion by holding that petitioner had abandoned a claim of error under *United States* v. *Booker*, 125 S. Ct. 738 (2005), by raising it for the first time in his petition for a writ of certiorari.

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction and sentence (Pet. App. 22a-26a) is unpublished, but the judgment is noted at 99 Fed. Appx. 882 (Table). The opinion of the court of appeals reinstating its prior judgment on remand from this Court (Pet. App. 1a-3a) is not published in the *Federal Reporter*, but is available at 128 Fed. Appx. 105.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2005. The petition for a writ of certiorari was filed on August 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 371, by failing to disclose to his employer that he had an ownership interest in nuclear-plant valves that he had purchased on his employer's behalf and that he had received substantial kickbacks on the transactions. Pursuant to the Sentencing Guidelines, the district court imposed a sentence of 51 months of imprisonment and a $10,000 fine. Pet. App. 27a-28a, 33a.

2. On appeal, petitioner alleged that the indictment in his case had been constructively amended and that the district court had erred in various ways in its application of the Guidelines. See Pet. App. 22a-26a. Petitioner raised no constitutional challenge to judicial factfinding at sentencing (nor had he done so in the district court). On February 25, 2004, the court of appeals affirmed petitioner's conviction and sentence in an unpublished per curiam decision. *Ibid*. Petitioner filed a petition for rehearing, which the court of appeals denied on April 26, 2004. See *id*. at 20a-21a.

3. On June 24, 2004, this Court decided *Blakely* v. *Washington*, 542 U.S. 296 (2004), holding that judicial factfinding that increased a state guidelines sentence violated the Sixth Amendment. On July 22, 2004, petitioner filed a petition for a writ of certiorari in which he argued for the first time that his sentence violated his Sixth Amendment rights because the district court imposed sentencing enhancements based on facts not found by the jury. See Pet. 23-29, *Triplett* v. *United States,* 125 S. Ct. 994 (No. 04-137).

4. On January 12, 2005, this Court decided *United States* v. *Booker*, 125 S. Ct. 738 (2005), holding that the Sixth Amendment, as construed in *Blakely*, applies to the federal Sentencing Guidelines. *Id.* at 746-748. In answering the remedial question in *Booker*, the Court applied severability analysis and held that the Guidelines are advisory rather than mandatory and that federal sentences are reviewable for unreasonableness. *Id.* at 757-769.

On January 24, 2005, the Court granted petitioner's petition for writ of certiorari, vacated the judgment, and remanded the case to the court of appeals for further consideration in light of *Booker*. Pet. App. 19a.

5. On remand, the court of appeals reinstated its original judgment. Relying on circuit precedent, the court stated that it will not ordinarily consider issues not raised in an appellant's initial brief on appeal. Pet. App. 2a-3a (citing *United States* v. *Dockery*, 401 F.3d 1261 (2005) (per curiam), petition for cert. pending, No. 05-5714 (filed Aug. 5, 2005); *United States* v. *Ardley*, 242 F.3d 989 (11th Cir.), cert. denied, 533 U.S. 962 (2001) and 535 U.S. 979 (2002)). The court of appeals stated that it saw nothing

> in the Supreme Court's remand order, which is cast in the usual language, requiring that we treat the case as though the * * * issue had been timely raised in this Court. . . . In the absence of any requirement to the contrary in either [*Booker*] or in the order remanding this case to us, we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned.

Ibid. (quoting *Ardley*, 242 F.3d at 990). Accord, *e.g.*, *United States* v. *Levy*, 416 F.3d 1273, 1279-1280 (11th Cir. 2005) (per curiam) (reinstating the original judgment after this Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *Booker*); *United States* v. *Mosley*, 140 Fed. Appx. 41 (11th Cir. 2005) (per curiam) (same), petition for cert. pending, No. 05-6086 (filed Aug. 24, 2005). The court emphasized that petitioner had raised the claim for the first time in his petition for a writ of certiorari. Pet. App. 2a.

ARGUMENT

1. Petitioner contends (Pet. 8-18) that the Eleventh Circuit's practice of treating as abandoned *Booker* and *Blakely* claims that are not raised in a party's initial brief contravenes the retroactivity principle of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), and conflicts with the law of other circuits that "at minimum, * * * consider an appellant's *Booker* claim pursuant to this Court's 'plain error' test." Pet. 12. Petitioner also contends (Pet. 19-23) that the court of appeals' decision undermines this Court's mandate directing that his case be reconsidered in light of *Booker*. Those arguments lack merit. For the reasons set forth at greater length in the government's briefs in opposition in other cases challenging the Eleventh Circuit's application of its procedural default rule, see, *e.g.*, Br. in Opp. at 5-17, *Tugman* v. *United States*, petition for cert. pending, No. 04-1387, the court's application of that rule is consonant with retroactivity principles and there is no conflict among the circuits that warrants this Court's review.[1]

[1] We have provided petitioner with the government's brief in opposition in *Tugman*.

a. The Court concluded in *Griffith* v. *Kentucky*, *supra*, that retroactive application of new rules on direct appeal is necessary both because of "the nature of judicial review" and in order to "treat[] similarly situated defendants the same." 479 U.S. at 323. That rationale is in no way inconsistent with application of procedural default rules to bar consideration of claims that have not been adequately preserved. Defendants who have not preserved a claim of error are not "similarly situated" (*ibid.*) to those who have. Cf. *Shea* v. *Louisiana*, 470 U.S. 51, 59-60 (1985) (holding that it is not inequitable to draw a distinction between a defendant who raises a claim on collateral attack and one who raises it on direct review because "[t]he one litigant already has taken his case through the primary system," while "[t]he other has not").

b. Contrary to petitioner's contention, Pet. 19-23, the court of appeals' decision does not contravene this Court's order remanding the case "for further consideration in light of [*Booker*]." Pet. App. 19a. This Court expressly said in *Booker* that not "every appeal will lead to a new sentencing hearing." 125 S. Ct. at 769. The Court "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." *Ibid.* *Booker* indicated that "plain-error" is only one of a number of "prudential doctrines" that may preclude relief. *Ibid.* Abandonment is another. Indeed, this Court in *Pasquantino* v. *United States*, 125 S. Ct. 1766, 1781 n.14 (2005), applied its own prudential doctrines to decline to vacate a sentence for further consideration in light of *Blakely* when the request was made for the first time in the petitioners' merits brief and "[p]etitioners did not raise this claim

before the Court of Appeals or in their petition for certiorari." "It seems relatively obvious that if the Supreme Court may apply its prudential rules to foreclose a defendant's untimely *Blakely*, now *Booker*, claim, there is no reason why [the Eleventh Circuit] should be powerless to apply its prudential rule to foreclose [a] defendant's * * * untimely *Blakely*, now *Booker*, claim." *United States* v. *Levy*, 416 F.3d 1273, 1277 (11th Cir. 2005) (per curiam); accord *United States* v. *Smith*, 416 F.3d 1350, 1354 (11th Cir. 2005) (per curiam).

c. Petitioner contends (Pet. 19-22) that the decision below conflicts with *Stutson* v. *United States*, 516 U.S. 193 (1996) (per curiam). That argument lacks merit. *Stutson* involved whether a criminal defendant was eligible for relief from the untimely filing of a notice of appeal because the delay in filing was the result of "excusable neglect" within the meaning of Rule 4(b) of the Federal Rules of Appellate Procedure. The government had argued in the court of appeals that the "liberal understanding of [the] 'excusable neglect'" language of Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure embodied in this Court's decision in *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), was limited to the bankruptcy context and did not apply to criminal cases like the one at issue in *Stutson*. See *Stutson*, 516 U.S. at 194. The court of appeals affirmed without opinion. In this Court, the government abandoned its earlier position and argued that the reasoning of *Pioneer* applied equally to criminal cases under the Federal Rules of Appellate Procedure. See *id.* at 194-195. Based in part on the government's concession, this Court granted the petition, vacated the judgment, and remanded to the court of appeals for further consideration in light of *Pio-*

neer. Nothing in that decision, which simply "invit[ed] [the court of appeals] to clarify its ambiguous ruling," *Id*. at 196, suggests that courts may not apply procedural bar rules to claims based on intervening decisions of this Court.

d. This Court has denied review in a number of cases in which the Eleventh Circuit declined to entertain a claim under the intervening decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), solely because it was not raised in the petitioner's opening brief, see, *e.g.*, *Ardley* v. *United States*, 535 U.S. 979 (2002) (No. 01-8714); *Nealy* v. *United States*, 534 U.S. 1023 (2001) (No. 01-5152); *Padilla-Reyes* v. *United States*, 534 U.S. 913 (2001) (No. 01-5284), and the Court has denied review in several cases that specifically challenged application of the procedural bar rule in that context. See, *e.g.*, *Phillips* v. *United States*, 536 U.S. 961 (2002) (No. 01-5718) (denying review when petitioner challenged application of rule to bar consideration of *Apprendi* claim); *Garcia* v. *United States*, 534 U.S. 823 (2001) (No. 00-1866) (denying review when Eleventh Circuit declined, on remand from this Court for reconsideration in light of *Apprendi*, to consider claim because it was not raised in initial brief); see also *Thompson* v. *United States*, 535 U.S. 1114 (2002) (No. 01-8603) (denying petition that challenged application of rule to bar consideration of ex post facto claim). There is no reason for a different result in this case.

Review should also be denied because the application of the Eleventh Circuit's procedural default rule to *Blakely* and *Booker* claims is a transitional issue of limited continuing importance. This issue arises most frequently in cases currently on appeal in which the sentence was imposed before this Court's decision in

Blakely, when sentencing courts treated the Guidelines as mandatory and defendants did not routinely raise Sixth Amendment challenges to judicial factfinding under the Guidelines. As this case itself demonstrates, this Court's decision in *Blakely* put many defendants and courts on notice of the potential for error. After *Blakely*, most defendants who wish to raise Sixth Amendment challenges to sentencing on appeal do so in a timely manner in their opening briefs. This issue should arise rarely or never in appeals briefed after *Booker* because defense counsel are now well aware that the Guidelines are not binding under that decision. This issue thus affects a limited number of cases and can be expected to be of steadily decreasing significance by the time this Court would be able to hear argument on and decide this issue.

This Court recently denied review in *Rodriguez* v. *United States*, 125 S. Ct. 2935 (2005) (No. 04-1148), which involved the application of the plain-error rule, Fed. R. Crim. P. 52(b), to *Booker* error, although that issue implicated a clear conflict in the circuits. U.S. Br. at 7, *Rodriguez*, *supra* (No. 04-1148). The Court's denial of certiorari in *Rodriguez* is consistent with the fact that it, like this case, presented a "transitional issue * * * [of] limited continuing importance once the cases in which sentences were imposed before *Booker* have become final." *Ibid*. The same conclusion is warranted here.

2. Petitioner is correct (Pet. 23-25) that there is a conflict in the circuits on the proper application of the plain-error test to claims of *Booker* error. That conflict is further analyzed in the government's brief in *Rodriguez*. See U.S. Br. at 11-18, *Rodriguez*, *supra* (No. 04-1148). The petition for a writ of certiorari in *Rodriguez*

presented the same plain-error issue petitioner raises and alleged the same circuit conflict. Pet. at 7-12, *Rodriguez*, *supra* (No. 04-1148). The government suggested in *Rodriguez* that this Court grant certiorari in order to resolve the conflict in the circuits, U.S. Br. at 7, *Rodriguez*, *supra* (No. 04-1148), but the Court denied review. 125 S. Ct. 2935. There are no circumstances that would warrant a different result in this case.

In any event, the *Rodriguez* issue is not implicated here. The petitioner in *Rodriguez* properly presented his plain-error claim under *Booker* by raising it in his opening brief. See *United States* v. *Rodriguez*, 398 F.3d 1291, 1297 (11th Cir.), cert. denied, 125 S. Ct. 2935 (2005). Because the court of appeals deemed petitioner to have abandoned his *Booker* claim by raising it only after briefing in his case was complete, that court did not have occasion to apply plain-error principles to the claimed error. This Court "do[es] not ordinarily address for the first time * * * an issue which the Court of Appeals has not addressed." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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