No. 06-432

In the Supreme Court of the United States

JORGE HERNANDEZ-CASTILLO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's prior felony conviction under California law for sexual intercourse with a minor three years younger was a felony conviction for a "crime of violence" for purposes of Section 2L1.2(b)(1)(A)(ii) of the Sentencing Guidelines, which provides for a 16-level enhancement for defendants convicted of illegally reentering the United States following deportation after having been convicted of a crime of violence.

2. Whether the court of appeals erred in not reviewing petitioner's sentence for reasonableness when his attorney did not challenge the reasonableness of the sentence on appeal.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 449 F.3d 1127.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2006. A petition for rehearing was denied on August 2, 2006 (Pet. App. 39). The petition for a writ of certiorari was filed on September 22, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of New Mexico, petitioner was convicted of illegally reentering the United States after deportation following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a)(1), (2) and (b)(2).

He was sentenced to 57 months of imprisonment. Pet. App. 11-18. The court of appeals affirmed. *Id.* at 1-10.

1. On July 18, 2004, petitioner, a Mexican national, was stopped at a border patrol checkpoint north of Las Cruces, New Mexico, and admitted that he had entered the United States illegally the previous day. Pet. App. 2-3; PSR ¶ 4. An immigration check revealed that petitioner had been deported from the United States on July 3, 1998, following a June 23, 1998, conviction for sexual intercourse with a minor more than three years younger, in violation of Cal. Penal Code § 261.5(c) (West 1999). Pet. App. 2; PSR ¶ 5. Petitioner had been 18 years old at that time and had been involved in a consensual sexual relationship with a 14-year-old female, who became pregnant. Pet. App. 2.

2. Petitioner pleaded guilty to illegally reentering the United States after deportation following a conviction for an aggravated felony, in violation of 8 U.S.C. 1326(a)(1), (2) and (b)(2). In calculating petitioner's offense level, the Probation Office began with a base offense level of eight, added 16 levels because petitioner had been previously deported after a conviction for a felony that is a crime of violence, and subtracted three levels for acceptance of responsibility. That calculation resulted in a total offense level of 21, which, when combined with a criminal history category of IV, yielded a Sentencing Guidelines range of 57 to 71 months of imprisonment. PSR ¶¶ 7-23; Pet. App. 3; see Sentencing Guidelines §§ 2L1.2(a) and (b)(1)(A)(ii), 3E1.1, 4A1.1(b), (d) and (e).

Petitioner objected to the "crime of violence" enhancement, arguing that his conviction for sexual intercourse with a minor more than three years younger should be treated as a misdemeanor because his rela-

tionship with the minor was consensual. Pet. App. 22; PSR Addendum. The district court held that the enhancement applied because the offense of "sex with a minor three years younger, which is a felony, which * * * is more commonly known as statutory rape," is listed as a "crime of violence" in the commentary to Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)). Pet. App. 25-27.

On May 25, 2005, the district court, having "tak[en] into account the sentencing factors of 18 U.S.C. 3553(a) * * * including the nature and circumstances of the offense and the history and characteristics of the defendant, also the seriousness of the offense, the requirement to promote respect for the law and to provide just punishment for the offense—that is, of illegally reentering the United States—and to afford adequate deterrence to this type of criminal conduct," concluded that the "guideline imprisonment range of 57 to 71 months is a reasonable sentence." Pet. App. 27-28. The district court imposed a sentence of 57 months of imprisonment. *Id.* at 28.

3. On appeal, petitioner argued that the district court erred in holding that his statutory rape conviction qualified categorically as a felony and "crime of violence" under the Sentencing Guidelines, because the statute under which he was prosecuted for the offense "permit[ted] the classification of the offense to be a misdemeanor or a felony" and he was sentenced under that statute "to merely 157 days in the Los Angeles County jail," which "was clearly a misdemeanor sentence." Pet. C.A. Br. 9-12. He further argued that any facts about the prior conviction, apart from the fact of conviction itself, should be tried to a jury. *Id.* at 6-9. Although he cited *United States* v. *Booker*, 543 U.S. 220 (2005), for

other purposes, see Pet. C.A. Br. 6, 7, 9, 13, petitioner did not raise a challenge to the reasonableness of his sentence.

On June 6, 2006, the court of appeals affirmed, concluding that "the district court did not err * * * by classifying [petitioner]'s prior California conviction as both a felony and a crime of violence." Pet. App. 8. The court of appeals explained that, while it was true that petitioner was convicted for a crime that was "punishable either as a felony or a misdemeanor," it was clear under California law that petitioner's offense was properly classified as a felony. *Id.* at 5-7. The court of appeals further determined that, because the conviction was one for "statutory rape" under California law, and because statutory rape is included in the commentary to Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) as an offense that is "always classified as [a] 'crime[] of violence,'" petitioner's "conviction was for a crime of violence irrespective of whether his relationship with [the victim] was consensual." Pet. App. 7-8 (quoting *United States* v. *Munguia-Sanchez*, 365 F.3d 877, 881 (10th Cir.), cert. denied, 543 U.S. 896 (2004)).

Because petitioner's counsel did not contest "the reasonableness of the resulting sentence," the court affirmed the sentence. Pet. App. 8. The court "fe[lt] compelled to comment, however," that this may be "the obvious case where an exercise of *Booker* discretion could mitigate a sentence that does not fit the particular facts of the case." *Id.* at 8-9. "The sentence results from a sixteen-level enhancement on account of a consensual sexual relationship [petitioner] had with a younger girl many years ago, with parental consent, when both were teenagers." *Id.* at 8. The court explained that, "[u]nder the Sentencing Guidelines, this prior act, a statutory

rape, is classified as a violent felony, leading to a 16-point enhancement, which translates into about four additional years in federal prison," when, "[i]n reality, [petitioner] committed no violence and he was punished at the level of a misdemeanor." *Ibid.* "[B]ut unfortunately for [petitioner], his lawyer has not challenged the reasonableness of the sentence." *Id.* at 9.

ARGUMENT

Petitioner contends (Pet. 16-18) that the court of appeals erred in finding that his conviction for statutory rape was a "crime of violence" and (Pet. 10-16) in failing to consider his sentence for reasonableness pursuant to *United States* v. *Booker*, 543 U.S. 220 (2005). The former holding is correct and does not conflict with the decision of any other court of appeals, and the latter issue was not raised by petitioner in the court of appeals. Thus, there is no warrant for further review by this Court.

1. Petitioner contends (Pet. 16-18) that the court of appeals erred in holding that his conviction for statutory rape was a "crime of violence" that triggered the 16-level enhancement of Sentencing Guidelines § 2L1.2(b)(1)(A)(ii). That claim lacks merit and does not warrant further review.

a. Petitioner first contends (Pet. 16-17) that statutory rape should not be classified as a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii)[1] because statutory rape does not always involve the use of force. Petitioner's claim is contradicted by the ex-

[1] Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) provides: "If the defendant previously was deported, or unlawfully remained in the United States, after * * * a conviction for a felony that is * * * a crime of violence * * * increase by 16 levels."

press language of the Sentencing Guidelines which includes "statutory rape" as a "crime of violence." *Id.* § 2L1.2, comment. n.1(B)(iii).[2] The Sentencing Commission's commentary is binding unless it is "plainly erroneous" or "inconsistent" with the Guidelines it interprets. *Stinson* v. *United States*, 508 U.S. 36, 43-47 (1993). The commentary here is therefore binding on the classification of statutory rape as a crime of violence.

A question involving the interpretation of the Sentencing Guidelines normally does not warrant this Court's review, in light of the Sentencing Commission's "statutory duty 'periodically [to] review and revise' the Guidelines." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (quoting 28 U.S.C. 994(*o*)). That general rule carries added force here, because the Sentencing Commission has demonstrated its attention to the specific question posed by the petition. Before petitioner's case, the Sentencing Commission adopted a clarifying amendment that "makes clear that the enumerated offenses [in Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)), which includes 'statutory rape,'] are always classified as 'crimes of violence,' regardless of whether the prior offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines App. C amend.

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[2] Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) states:

> "Crime of violence" means any of the following: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, *statutory rape*, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

Ibid. (emphasis added).

658. Before the amendment, there was some "confusion over whether the specified offenses listed in th[e prior] definition, particularly sexual abuse of a minor and residential burglary, also had to include as an element of the offense 'the use, attempted use, or threatened use of physical force against the person of another.'" *Ibid.* The amendment removed the ambiguity, and at the time of petitioner's illegal reentry and at the time of sentencing it was established that a prior conviction for one of the enumerated offenses, including "statutory rape," warrants the 16-level enhancement, regardless of whether the elements of that crime included the use, attempted use, or threatened use of physical force. See, *e.g. United States* v. *Alvarado-Hernandez*, 465 F.3d 188, 189 (5th Cir. 2006); *United States* v. *Ortiz-Delgado*, 451 F.3d 752, 756-757 (11th Cir. 2006); *United States* v. *Granbois*, 376 F.3d 993, 996 (9th Cir.), cert. denied, 543 U.S. 1014 (2004).

Contrary to petitioner's contention (Pet. 17), there is no "significant Circuit split" regarding the classification of "statutory rape" as a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii). As petitioner notes, in *United States* v. *Houston*, 364 F.3d 243 (2004), the Fifth Circuit found that statutory rape was not a "crime of violence" under the firearms provision of the Sentencing Guidelines, which adopts the definition of "crime of violence" under the career offender provision of the Guidelines. See *id.* at 246 (discussing Sentencing Guidelines § 2K2.1, comment. (n.5) (2001); *id.* § 4B1.2, comment. (n.1)). The Fifth Circuit has since limited the holding in *Houston* to the Guidelines provisions at issue there, which "did not include statutory rape as an enumerated offense." *Alvarado-Hernandez*, 465 F.3d at 190 n.1. The Fifth Circuit recognizes that, by contrast, "the

provision at issue in this case, § 2L1.2, specifically enumerates statutory rape as a crime of violence." *Ibid.* There is, therefore, no disagreement among the courts of appeals that warrants further review by this Court.

b. Petitioner further contends (Pet. 17-18) that his conviction for statutory rape should not be treated as a felony for purposes of Section 2L1.2(b)(1)(A)(ii) of the Sentencing Guidelines. He asserts that this Court should "revisit the 'categorical' application of the California 'wobbler' rule" and treat his prior felony conviction as though it were a misdemeanor conviction. That argument lacks merit and does not warrant further review.

The "wobbler" rule applies to certain California statutes, such as the one under which petitioner was prosecuted, that allow the court to classify the offense as either a felony or a misdemeanor. Petitioner does not dispute that a plurality of this Court has found that the fact that a felony conviction could have been a misdemeanor conviction under a "wobbler" statute "is of no moment" in determining whether that prior conviction was, in fact, a felony conviction. *Ewing* v. *California*, 538 U.S. 11, 28 (2003) (plurality opinion); Pet. 17-18 (citing *Ewing*). Nor does petitioner dispute that the court of appeals correctly determined that, under California law, his conviction is classified as a felony. Pet. 17-18; Pet. App. 7.

Nonetheless, petitioner argues that his prior felony conviction should be treated as though it had been a misdemeanor conviction under the facts of this case because his sentence for that felony allowed him to "resolve [his] teenage indiscretions through probationary counseling and made him into a responsible father." Pet. 18. While it is true that the purpose of the "wobbler" scheme is to

allow sentencing judges "to downgrade certain felonies" and "impose a misdemeanor sentence in those cases in which the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in state prison as a felon," *Ewing*, 538 U.S. at 29 (plurality opinion) (quoting *In re Anderson*, 447 F.2d 117, 152 (Cal. 1968) (Tobriner, J., concurring and dissenting)), the fact that petitioner's prior sentence had that effect "is of no moment" in this case where petitioner's conviction is characterized as a felony under state law, *id.* at 28.

2. Petitioner also contends (Pet. 10-16) that the court of appeals erred when it did not consider his sentence for reasonableness pursuant to *Booker*. Petitioner's argument is mistaken.

Although petitioner argues that there should not be a "presumption of reasonableness" (Pet. 11) for Sentencing Guidelines sentences, the court of appeals did not apply a presumption of reasonableness to petitioner's sentence. Instead, the court of appeals held that it could not consider the reasonableness of petitioner's sentence because petitioner failed to raise the issue. Pet. App. 4, 8, 9. A court of appeals is under no obligation to consider a claim that is not timely raised. See *Tulengkey* v. *Gonzales*, 425 F.3d 1277, 1279 n.1 (10th Cir. 2005) ("Issues not raised on appeal are deemed to be waived") (quoting *Krastev* v. *INS*, 292 F.3d 1268, 1280 (10th Cir. 2002)). Claims are timely raised if they are contained in the appellant's opening brief in the court of appeals. Fed. R. App. P. 28(a)(5). The Tenth Circuit also requires that the opening brief include a citation to "the precise reference in the record where the issue was raised and ruled on" in the district court. 10th Cir. R. 28.2(C)(2).

The longstanding principle that the court of appeals may decline to decide an issue that has not been raised by the appellant applies to *Booker* claims. *Booker* itself indicated that it "expect[ed] reviewing courts to apply ordinary prudential doctrines" in determining whether relief is warranted, 543 U.S. at 268. One such "prudential doctrine" is the abandonment of a claim by failing to raise it in a timely manner. See, *e.g.*, *Pasquantino* v. *United States*, 544 U.S. 349, 372 n.14 (2005) (declining to consider sentence in light of *Blakely* v. *Washington*, 542 U.S. 296 (2004), pursuant to its prudential rule that petitioners need to raise the claim before the court of appeals and in their petition for a writ of certiorari). The court of appeals was therefore entitled to exercise discretion not to rule on a *Booker* claim that petitioner did not present. As the Eleventh Circuit has explained, "[i]t 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 [courts of appeals] should be powerless to apply [a] prudential rule to foreclose [a] defendant['s] * * * untimely *Blakely*, now *Booker*, claim." *United States* v. *Levy*, 416 F.3d 1273, 1277, cert. denied, 126 S. Ct. 643 (2005); accord *United States* v. *Smith*, 416 F.3d 1350, 1354 (11th Cir.), cert. denied, 126 S. Ct. 784 (2005).

3. On November 3, 2006, this Court granted writs of certiorari in *Claiborne* v. *United States*, No. 06-5618, and *Rita* v. *United States*, No. 06-5754, to address various aspects of the application of reasonableness review under *Booker* in the imposition and appellate review of federal sentences. The petition in this case need not be held pending the disposition of *Claiborne* and *Rita*, however, because petitioner raised no challenge to the rea-

sonableness of his sentence under *Booker* in the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2006