No. 06-1311

# In the Supreme Court of the United States

JOSEPH JAMES STRATTON, 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

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## QUESTIONS PRESENTED

1. Whether the district court treated the federal Sentencing Guidelines as effectively mandatory when it resentenced petitioner.

2. Whether the district court violated petitioner's due process rights by finding facts that increased his advisory Guidelines range using the preponderance-of-the-evidence standard.

3. Whether a district court has the authority to impose a sentence below the advisory Guidelines range in order to counteract the Guidelines' more severe treatment of crack cocaine as compared to powder cocaine offenses.

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**BRIEF FOR THE UNITED STATES**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) on appeal from petitioner's resentencing is not published in the Federal Reporter but is available at 205 Fed. Appx. 791. The opinion of the court of appeals on appeal from petitioner's initial sentencing is reported at 422 F.3d 1285.

## JURISDICTION

The judgment of the court of appeals was entered on November 14, 2006. A petition for rehearing was denied on January 3, 2007 (Pet. App. 22-23). The petition for a writ of certiorari was filed on March 28, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiring to possess cocaine and cocaine base (crack) with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1), 841(b)(1), and 846. He was initially sentenced to 292 months of imprisonment, to be followed by four years of supervised release. The court of appeals affirmed his conviction but vacated his sentence and remanded his case for resentencing under *United States* v. *Booker*, 543 U.S. 220 (2005). Petitioner was resentenced to 235 months of imprisonment, to be followed by four years of supervised release. The court of appeals affirmed his sentence. Pet. App. 1-5; Gov't C.A. Br. 2.

1. An investigation by a Drug Enforcement Administration Task Force revealed that petitioner and Elizabeth Thompson were dealing powder and crack cocaine in Naples, Florida. Between 1996 and 2003, petitioner supplied Thompson and other mid-level cocaine dealers with more than ten kilograms of high-quality powder cocaine, most of which was processed into crack and resold. In March 2003, petitioner and Thompson were arrested. Pet. App. 2; Gov't C.A. Br. 2-3; *United States* v. *Thompson*, 422 F.3d 1285, 1289-1291 (11th Cir. 2005).

2. On July 23, 2003, a grand jury sitting in the Middle District of Florida returned a second superseding indictment that charged petitioner and Thompson with conspiring to distribute 500 grams or more of cocaine and 5 grams or more of crack cocaine and to possess those drugs in those quantities with the intent to distribute them, in violation of 21 U.S.C. 841(a)(1), 841(b)(1), and 846. The indictment also charged Thompson with two counts of distributing crack and possessing it with

the intent to distribute it. A petit jury subsequently found petitioner and Thompson guilty on all counts. Second Superseding Indictment 1-2; *Thompson*, 422 F.3d at 1289.

3. Petitioner was sentenced before this Court's decision in *Booker*. The district court found that petitioner was responsible for at least 1.5 kilograms of crack, 4/26/04 Tr. 69-70, which resulted in a base offense level of 38, see Sentencing Guidelines § 2D1.1(c)(1) (Guidelines) (drug quantity table).[1] The court imposed a two-level enhancement for obstruction of justice based on its finding that petitioner had committed perjury at trial. See 4/26/04 Tr. 65-68; Guidelines § 3C1.1. Accordingly, petitioner's total offense level was 40, which, together with his criminal history category of I, yielded a Sentencing Guidelines range of 292 to 365 months of imprisonment. See 4/26/04 Tr. 70. Before imposing sentence, the court expressed concern about the length of the sentence that petitioner faced but concluded that the sentence was required by the Guidelines, which were mandatory at that time. See *id.* at 74. The court sentenced petitioner to 292 months of imprisonment, to be followed by four years of supervised release. *Id.* at 74-75.

4. Petitioner appealed his conviction and sentence. While that appeal was pending, this Court decided *Booker*, which held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial fact-finding under mandatory federal Sentencing Guidelines. See 543 U.S. at 244.

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[1] The court's finding that petitioner was responsible for at least 1.5 kilograms of crack was based on a dealer's trial testimony that he purchased approximately seven kilograms of cocaine from petitioner, which he converted into approximately three and a half kilograms of crack. 4/26/04 Tr. 45-46.

As a remedy for that constitutional infirmity, the Court severed two provisions of the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.* *Booker*, 543 U.S. at 258-265. The first was 18 U.S.C. 3553(b)(1) (Supp. IV 2004), which had required courts to impose a Guidelines sentence. "So modified, the [SRA] makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." 543 U.S. at 245-246 (citations omitted). The Court also severed the appellate review standards in 18 U.S.C. 3742(e) (2000 & Supp. IV 2004), which had served to reinforce the mandatory character of the Guidelines. The Court replaced that provision with a general standard of review for "unreasonable[ness]," under which courts of appeals determine "whether the sentence 'is unreasonable' with regard to [18 U.S.C.] § 3553(a)." 543 U.S. at 261. In light of *Booker*, the court of appeals vacated petitioner's sentence and remanded for resentencing. *Thompson*, 422 F.3d at 1300-1302.

5. On November 28, 2005, the district court conducted a resentencing hearing. Petitioner argued that he faced a revised Guidelines range of 63 to 78 months of imprisonment because, in his view, *Booker* established that he could be held responsible only for the minimum quantity of drugs reflected by the jury's verdict—500 grams of cocaine and 5 grams of crack. 11/28/05 Tr. 6-7. The district court rejected that argument, stating "[t]hat's not what Booker held. Booker * * * held that the remedy for the mandatory guidelines was to make the guidelines range not mandatory." *Id.* at 7. The court stated that petitioner's Guidelines "range [wa]s still 292 to 365 months, the difference being the Court is not compelled by law, anymore, to impose a sentence

within that range." *Ibid.*; see *id.* at 9-10 ("[W]e're here on a Booker decision for the Court to recognize its authority to go below the 292 months, but not below 60 months, of course, since that's a mandatory minimum.").

Petitioner also contended that he was eligible for a reduction of his offense level under the safety valve provision, see Guidelines §§ 2D1.1(b)(9), 5C1.2. 11/28/05 Tr. 13. The court asked defense counsel how, in light of petitioner's continued denial of guilt, petitioner satisfied the fifth criterion for safety valve treatment, which requires that "not later than the time of the sentencing hearing, the defendant [must have] truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan," Guidelines § 5C1.2(a)(5). Counsel responded that he had "attempted to reach" the government in connection with that disclosure, and he proffered that petitioner would provide the government with information that "may pertain to the offense for which he is there, and therefore, if that is true, then the safety valve would apply." 11/28/05 Tr. 17-18, 32. Based on that proffer, the court continued the hearing to give petitioner additional time to satisfy the safety valve requirements. *Id.* at 33-34.

On December 16, 2005, the district court reconvened the resentencing hearing. The government advised the court that petitioner had met with the government and that, in its opinion, petitioner was now eligible for a safety valve reduction. 12/16/05 Tr. 2. The court agreed and reduced petitioner's offense level from 40 to 38, which resulted in an advisory Guidelines range of 235 to 293 months of imprisonment. *Id.* at 3-5. Petitioner's counsel reiterated his argument that the court could not

enhance petitioner's sentence based on extra-verdict facts, but counsel acknowledged that his view "is not the law in the federal courts." *Id.* at 7.

Petitioner's counsel also requested that the court impose a below-Guidelines sentence because of petitioner's "age, his health, his 85-year-old mother and nine-year-old son," and because of the "disparity" between the treatment of crack and powder cocaine under the Guidelines. 12/16/05 Tr. 5-6, 11.[2] Before imposing sentence, the court informed petitioner:

> Your biggest problem is the nature of your conviction, and the drugs involved, and your role in that offense. Not as role is defined by the guidelines, but . . . what you did with regard to the offense and the co-defendant.
>
> In your favor, you have no prior criminal record, of any sort, to speak of. Your family situation, I think those are factors the Court can and will consider, but your mother's health and your son's situation, your medical situation, are not extraordinary. Many people who I see have similar or worse family situations.

*Id.* at 10. In response to counsel's argument about the powder-crack differential, the court stated:

> Well, I don't frankly see that as being a basis for a reduction in sentence in this case, in particular. The defendant was convicted of both powder cocaine and crack cocaine, and the . . . the statutory dis-

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[2] Under the Guidelines, the offense level (but not the sentencing range) applicable to a particular quantity of crack cocaine is equal to the offense level applicable to a quantity of powder cocaine that is one hundred times as great. See Guidelines § 2D1.1(c) (drug quantity table).

> tinction between powder cocaine and crack cocaine has always been in effect during the commission of this offense. You know, he commits the offense as he does, and I don't see the fact that there's a difference between the penalties for powder and crack as being a mitigating factor.

*Id.* at 12. The court then sentenced petitioner to 235 months of imprisonment, to be followed by four years of supervised release. *Id.* at 14.

6. Petitioner appealed his sentence. As relevant here, petitioner raised three arguments. First, he argued that *Booker*'s remedial opinion, as it has been applied, violates the Sixth Amendment, because it has resulted in the de facto mandatory application of the Guidelines. Second, he argued that due process requires that any fact used to increase substantially a defendant's sentence be proved beyond a reasonable doubt. Third, he argued that the district court appeared to have erroneously concluded that it lacked discretion to take into account the differential treatment of crack and powder cocaine under the Guidelines. Pet. C.A. Br. 9-11.

The court of appeals affirmed petitioner's sentence. Pet. App. 1-5. The court held that it was bound to follow *Booker* and that, "[u]nder an advisory Guidelines scheme, a judge may enhance a defendant's sentence based upon facts found by the judge at sentencing using the preponderance of the evidence standard." *Id.* at 4. In addition, citing *United States* v. *Williams*, 456 F.3d 1353, 1364-1367 (11th Cir. 2006), cert. dismissed, No. 06-7352 (June 28, 2007), the court stated that it "already ha[d] rejected the argument that the disparity between crack and powder cocaine sentences should be a factor in determining a reasonable sentence." Pet. App. 4-5.

**DISCUSSION**

Petitioner raises three issues. Although the first two issues do not warrant this Court's review, the Court recently granted review in *Kimbrough* v. *United States*, No. 06-6330, to address the third issue—whether a district court has authority to sentence below the advisory Sentencing Guidelines range to counteract the Guidelines' more severe treatment of crack cocaine as compared to powder cocaine offenses. Accordingly, the petition for a writ of certiorari in this case should be denied with respect to the first two issues, and, with respect to the third issue, should be held pending the Court's decision in *Kimbrough* and then disposed of as appropriate in light that decision.

1. Petitioner first renews his contention (Pet. 5-6) that the remedial opinion in *United States* v. *Booker*, 543 U.S. 220 (2005), has resulted in a de facto Sixth Amendment violation because, in practice, the lower federal courts continue to apply the Guidelines in a mandatory fashion. That contention does not warrant this Court's review because it is not true as a general matter, and because, in any event, the district court did not treat the Guidelines as mandatory in petitioner's case.

It is universally recognized after *Booker* that the Guidelines are advisory, and district courts have discretion to impose non-Guidelines sentences under the factors identified in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). If any further confirmation of that legal principle were needed, this Court provided it in *Rita* v. *United States,* No. 06-5754, 2007 WL 1772146 (June 21, 2007). *Rita* makes clear that, where the sentencing judge and the Commission's range agree, a court of appeals may apply a presumption that the sentence is reasonable.

*Id.* at *6. *Rita* necessarily recognizes that there is no flaw, constitutional or otherwise, in a district court's reasoned application of independent judgment, based on the facts it has found, to sentence within the Guidelines range. It follows that the statistics to which petitioner alludes (Pet. 5) concerning the prevalence of within-Guidelines sentences provide no cause for constitutional concern.

In any event, when resentencing petitioner, the district court repeatedly stated that the Guidelines are advisory and that it could impose a sentence below the applicable Guidelines range. See, *e.g.*, 11/28/05 Tr. 9-11, 26, 28, 34; 12/16/05 Tr. 5, 10. The court recognized, consistent with *Booker*, that "while [it] is required to consider the guidelines, it is also required to consider the other statutory factors [in 18 U.S.C. 3553(a)]." 12/16/05 Tr. 5; accord *id.* at 10. And the court did precisely that. After adjusting petitioner's Guidelines range downward based on the safety valve provision, the court assessed the nature of petitioner's offense, his record and rehabilitative efforts in prison, and the personal and family circumstances that he cited in mitigation. *Id.* at 10-12. The court's decision to impose a Guidelines sentence, albeit at the bottom of the applicable range, reflected its determination that petitioner had played a major part in a serious drug conspiracy. *Id.* at 10 ("Your biggest problem is the nature of your conviction, and the drugs involved, and your role in that offense."); *id.* at 13-14 ("I still come back to the . . . the nature of the case, and the facts that the jury found, and that the Court has found."). The court also determined that the 235-month sentence was "sufficient, but not greater than necessary to comply with the purposes of sentencing set forth in [18 U.S.C.] 3553." *Id.* at 15. Because the district court

clearly did not treat the Guidelines as mandatory, further review of petitioner's claim that the *Booker* remedy has resulted in de facto mandatory Guidelines is not warranted.

2. Petitioner also contends (Pet. 12-17) that the Due Process Clause requires proof beyond a reasonable doubt of facts that increase a defendant's advisory Guidelines range. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review of petitioner's contention is not warranted.

a. This Court has made clear that a court may, consistent with the Constitution, select a sentence from within a statutory range based on facts found by the court by a preponderance of the evidence. See *United States* v. *Watts*, 519 U.S. 148, 156-157 (1997) (per curiam) (holding that a sentencing court may base its sentence on conduct of which the defendant was acquitted "so long as that conduct has been proved by a preponderance of the evidence," and that "application of the preponderance standard at sentencing generally satisfies due process") (citing *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-92 (1986)); see also *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (ruling that a sentencing judge was authorized to determine that the offense involved crack even if the jury had convicted the defendants of a conspiracy involving only cocaine); *Witte* v. *United States*, 515 U.S. 389, 400-401 (1995) (noting that this Court's cases "authoriz[e] the consideration of offender-specific information at sentencing without the procedural protections attendant at a criminal trial" because "such consideration does not result in 'punishment' for such conduct").

*Booker* did not disturb that settled precedent. In accordance with *Apprendi* v. *New Jersey* , 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004), *Booker* held that any fact, other than a prior conviction, necessary to support a sentence exceeding "the maximum authorized" by a guilty plea or jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. 543 U.S. at 244. By severing provisions of the SRA to make the Guidelines advisory, rather than mandatory, however, *Booker* remedied the constitutional problem presented by the Guidelines: now, the "maximum [sentence] authorized" by the jury verdict in federal criminal cases is the statutory maximum for the offense under the United States Code.[3] Thus, so long as the sentencing judge imposes a sentence within the statutory range, sentencing based on judge-found facts by a preponderance of the evidence is constitutionally permissible. See *id.* at 233 (noting that, "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant"); *id.* at 240-241 (reviewing *Edwards*, *Watts*, and *Witte* and concluding that "[n]one of our prior cases is inconsistent with today's decision").

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[3] Petitioner cites (Pet. 13) Justice Thomas's statement, in his opinion dissenting in part in *Booker*, that "[t]he Fifth Amendment requires proof beyond a reasonable doubt, not by a preponderance of the evidence, of any fact that increases the sentence beyond what could have been lawfully imposed on the basis of the facts of facts found by the jury or admitted by the defendant." 543 U.S. at 319 n.6 (Thomas, J., dissenting in part). Because the Guidelines are now advisory, however, fact-finding under the Guidelines does not increase a defendant's sentence "beyond what could have been lawfully imposed on the basis of facts found by the jury or admitted by the defendant."

The Court recently recognized that "[t]his Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." *Rita*, 2007 WL 1772146, at *9; see *id.* at *10 (noting *Booker*'s recognition that fact-finding by federal judges in the application of the Guidelines would not implicate the constitutional issues confronted in that case if the Guidelines were not "binding"). Similarly, the due process principles invoked by petitioner do not prohibit a sentencing court from relying on facts that it has found by a preponderance of the evidence to increase a defendant's sentence within the applicable statutory range.

b. Petitioner erroneously contends (Pet. 11-12) that this Court's decision in *Cunningham* v. *California*, 127 S. Ct. 856 (2007), calls that conclusion into doubt. In *Cunningham*, the Court held that California's Determinate Sentencing Law violates the Sixth and Fourteenth Amendments. *Id.* at 871. Under California law, the statute defining a criminal offense typically specifies three possible terms of imprisonment: a lower term, a middle term, and an upper term. *Id.* at 861. California's Determinate Sentencing Law provides that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." *Ibid.* (quoting Cal. Penal Code § 1170(b) (West Supp. 2006)). A rule issued under that law provides that "[t]he middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation." *Id.* at 862 (brackets in original) (quoting Cal. Ct. R. 4.420(a) (West 2006)). Aggravating and mitigating circumstances are defined as "facts" and may be established by a prepon-

derance of the evidence. *Id.* at 862-863. In determining those "facts," the court may consider "the trial record; the probation officer's report; statements in aggravation or mitigation submitted by the parties, the victim, or the victim's family; 'and any further evidence introduced at the sentencing hearing.'" *Id.* at 862 (quoting Cal. Penal Code § 1170(b) (West Supp. 2006)).

This Court concluded that the middle term, not the upper term, specified in California's statutes is the relevant statutory maximum for *Apprendi* purposes. *Cunningham*, 127 S. Ct. at 871. Because California's Determinate Sentencing Law "authorizes the judge, not the jury, to find facts permitting an upper term sentence," the Court held that it violates the Sixth Amendment. *Ibid.* In doing so, the Court stated that California's system "does not resemble the advisory system the *Booker* Court had in view" because "judges are not free to exercise their 'discretion to select a specific sentence within a defined range.'" *Id.* at 870 (quoting *Booker*, 543 U.S. at 233). The Court reiterated that the SRA, as modified by *Booker*, does not violate the Sixth Amendment. See *ibid.* (stating that "'[m]erely advisory provisions,' recommending but not requiring 'the selection of particular sentences in response to differing sets of facts,' all Members of the Court agreed, 'would not implicate the Sixth Amendment.'" *Ibid.* (quoting *Booker*, 543 U.S. at 233). Petitioner's reliance on *Cunningham* is therefore mistaken.

c. Since *Booker*, the courts of appeals have consistently held that a sentencing judge may generally find facts relevant to determination of the advisory Guidelines range by a preponderance of the evidence. See *United States* v. *Grier*, 475 F.3d 556, 565 (3d Cir. 2007) (en banc), petition for cert. pending, No. 06-11486 (filed

May 22, 2007); *United States* v. *Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006); *United States* v. *Garcia*, 439 F.3d 363, 369 (7th Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 526 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Yeje-Cabrera*, 430 F.3d 1, 23 (1st Cir. 2005); *United States* v. *Morris*, 429 F.3d 65, 72 (4th Cir. 2005), cert. denied, 127 S. Ct. 121 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Pirani*, 406 F.3d 543, 551 n.4 (8th Cir.) (en banc), cert. denied, 546 U.S. 909 (2005); *United States* v. *Yagar*, 404 F.3d 967, 972 (6th Cir. 2005); *United States* v. *Mares*, 402 F.3d 511, 519 & n.6 (5th Cir.), cert. denied, 546 U.S. 828 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005).[4]

In the absence of a conflict in the circuits, the court of appeals' conclusion that the preponderance standard applies to facts that increase a defendant's advisory Guidelines range does not warrant this Court's review. The Court recently denied a petition for a writ of certiorari raising the same issue in *Welch* v. *United States*,

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[4] Both before and after *Booker*, the Ninth Circuit has taken the position that facts that "ha[ve] an 'extremely disproportionate effect on the sentence relative to the offense of conviction' " must be proved by "clear and convincing evidence." *United States* v. *Staten*, 466 F.3d 708, 717-720 (2006) (brackets in original) (quoting *United States* v. *Peyton*, 353 F.3d 1080, 1088 (9th Cir. 2003) and *United States* v. *Mezas de Jesus*, 217 F.3d 638, 642 (9th Cir. 2000)). Because petitioner did not advocate that position in the courts below and does not press that position even in this Court, this case is not an appropriate vehicle for the Court to decide whether the Ninth Circuit's position is correct. Moreover, petitioner has not contended that the outcome of his sentencing would have been any different under the Ninth Circuit's rule, and there is no reason to believe that it would have been.

127 S. Ct. 552 (2006), and there is no reason for a different result here.

3. Petitioner further contends (Pet. 17-19) that, pursuant to *Booker*, a federal district court has the authority to impose a sentence below the advisory Guidelines range in order to counteract the Guidelines' more severe treatment of crack cocaine as compared to powder cocaine offenses. On June 11, 2007, this Court granted a writ of certiorari in *Kimbrough* v. *United States*, No. 06-6330, to address that question. It is not at all clear that the district court in this case believed that it lacked authority to reduce petitioner's sentence because of the crack/powder differential under the Guidelines. Rather, it appears that the court found no basis in the facts of this case to reduce petitioner's sentence for that reason. See pp. 6-7, *supra*. Nonetheless, in affirming petitioner's sentence, the court of appeals relied on its precedent that the Guidelines' differential treatment of crack and powder cocaine offenses is not a proper sentencing factor. Accordingly, the petition for a writ of certiorari should be held pending the Court's resolution of *Kimbrough*, and then disposed of as appropriate in light of the decision in that case.

## CONCLUSION

With respect to the first two questions presented, the petition for a writ of certiorari should be denied. With respect to the third question presented, the petition should be held pending the Court's decision in *Kimbrough* v. *United States*, No. 06-6330, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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