No. 08-469

In the Supreme Court of the United States

DEVON HOWARD TOEPFER, 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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QUESTIONS PRESENTED

1. Whether the district court violated petitioner's Fifth and Sixth Amendment rights when, in determining his sentence, it relied on relevant conduct that underlay counts on which he had been acquitted.

2. Whether the district court committed reversible plain error because it failed to consider the factors under 18 U.S.C. 3553(a) before imposing sentence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2008. The petition for a writ of certiorari was filed on October 7, 2008. 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 Southern District of Florida, petitioner was convicted of several crimes arising from his involvement in a conspiracy to grow and distribute marijuana. Pet. App. 2a, 14a-15a. He was sentenced to 140 months

of imprisonment. *Id.* at 16a. The court of appeals affirmed. *Id.* at 1a-13a.

1. From 1994 to 2003, petitioner and several co-conspirators operated ten marijuana "grow houses" across southern Florida. Petitioner funded and oversaw the operation, recruited individuals to the conspiracy, and taught them how to grow marijuana. Presentence Report ¶¶ 4-15, 21, 22 (PSR). After a grand jury began to investigate the conspiracy, petitioner also gave diazepam (Valium) pills to two co-conspirators who had been called to testify so that they could take the pills before testifying. *Id.* ¶ 15.

On March 29, 2005, a grand jury returned a 15-count superseding indictment against several of the conspirators. Petitioner was charged with the following: conspiring to manufacture and possess with intent to distribute marijuana, in violation of 21 U.S.C. 846 (Count 1); manufacturing and possessing with intent to distribute marijuana, in violation of 21 U.S.C. 841 (Counts 2 and 4); attempting to distribute marijuana, in violation of 21 U.S.C. 841 (Count 3); possessing with intent to distribute marijuana, in violation of 21 U.S.C. 841 (Count 5); tampering with witnesses, in violation of 18 U.S.C. 1512 (Count 8); distributing diazepam, in violation of 21 U.S.C. 841 (Counts 9 and 10); conspiring to launder money, in violation of 18 U.S.C. 1956 (Count 11); and making material false statements to a lending institution, in violation of 18 U.S.C. 1014 (Counts 14 and 15). The government also alleged that Counts 1 and 2 involved at least 1000 marijuana plants, which, if proved, would have mandated a 10-year minimum term of imprisonment. 21 U.S.C. 841(b)(1)(A)(vii).

Petitioner went to trial on all counts. On the morning of the first day of trial and immediately before

swearing in the jury, the district court told petitioner that "I did want to let you know the lay of the land before we proceed." 12/5/05 Tr. 3.[1] The court then informed petitioner of the sentencing ramifications if the jury were to find that he was responsible for at least 1000 marijuana plants under Counts 1 or 2: the court would have "no discretion" as to the sentence, petitioner would be sentenced to at least ten years of imprisonment, and the court "would be bound to any finding that the jury makes." *Ibid.* Petitioner said he understood those consequences. *Ibid.*

A 14-day trial ensued, at the end of which the jury found petitioner guilty on four counts: conspiring to manufacture and possess with intent to distribute marijuana, in violation of 21 U.S.C. 846 (Count 1); manufacturing and possessing with intent to distribute marijuana, in violation of 21 U.S.C. 841 (Count 2); and distributing diazepam, in violation of 21 U.S.C. 841 (Counts 9 and 10). Pet. App. 14a-15a. The jury also found that Counts 1 and 2 had involved more than 100 but fewer than 1000 marijuana plants. *Id.* at 8a. The jury acquitted petitioner on the remaining counts. *Id.* at 15a.

Petitioner faced a statutory maximum term of imprisonment of 40 years each on the two marijuana convictions, 21 U.S.C. 841(b)(1)(B), and three years each on the two diazepam convictions, 21 U.S.C. 841(b)(2). The Presentence Report recommended that petitioner be sentenced to a term of 121 to 151 months of imprisonment. PSR ¶ 72. That recommendation was based, in part, on the PSR's finding by a preponderance of the evidence that petitioner was responsible for 3744 mari-

[1] The record contains two transcripts of the December 5, 2005 proceedings, each with different pagination. The cited material is from the transcript filed as Dist. Ct. Docket Entry 394.

juana plants. *Id.* ¶ 22; PSR Add. 1-2. That finding resulted in a base-offense level of 26. PSR ¶ 32.[2]

At sentencing, petitioner objected to the PSR because it had considered acquitted conduct in determining his advisory Sentencing Guidelines range. In his view, that was inconsistent with *United States* v. *Booker*, 543 U.S. 220 (2005). 4/19/06 Tr. 6, 19, 30-31. The government disagreed, cited Eleventh Circuit authority indicating the court's responsibility to consider relevant conduct, and emphasized that the court should "consider the statutory factors within 18 U.S.C. 3553(a), the ten different factors I am sure the Court is familiar with." *Id.* at 15-16. The court rejected petitioner's objection, accepted the PSR's computation, and, after stating that it had considered the "pre-sentence report which contains the advisory guidelines and the statutory factors," sentenced petitioner within the Guidelines range to 140 months of imprisonment. *Id.* at 31-32. Petitioner made no objections to the court's sentencing procedures. *Id.* at 33.

2. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-13a. As is relevant here, the court rejected petitioner's claim that the district court violated his Fifth and Sixth Amendment rights by considering acquitted conduct at sentencing. The court of appeals held that "[b]ecause the district court applied the guidelines in an advisory manner * * * and did not exceed the statutory maximum allowed by the jury verdict, the [sentencing] court did not violate [petitioner's] Fifth or Sixth Amendment rights

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[2] According to the PSR, the jury held petitioner responsible beyond a reasonable doubt for 661 marijuana plants. PSR ¶ 22. Had the PSR based its recommendation on that figure, petitioner's base-offense level would have been 22.

by calculating his sentence based on judge-found facts, including acquitted conduct." Pet. App. 7a (citing *Rita* v. *United States*, 127 S. Ct. 2456, 2465-2466 (2007); *Booker*, 543 U.S. at 264; *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005)). The court also rejected petitioner's claim, raised for the first time on appeal, that the district court failed to consider the sentencing factors in 18 U.S.C. 3553(a). Applying plain-error review, the court assumed plain error but held that petitioner "cannot show that the error affected his substantial rights" because he "points to no evidence in the record showing that if the district court had explicitly considered the § 3553(a) factors, the court would have imposed a different sentence." Pet. App. 9a-10a.

ARGUMENT

1. Petitioner renews his claim (Pet. 7-15) that the district court violated his Fifth and Sixth Amendment rights by considering acquitted conduct at sentencing. The court of appeals correctly rejected that contention, and its decision accords with the decision of every other court of appeals. This Court's review is therefore not warranted.

a. In *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), this Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157. The Court noted that, "under the pre-Guidelines sentencing regime, it was 'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted,'" *id.* at 152 (citation omitted), and that "[t]he

Guidelines did not alter this aspect of the sentencing court's discretion," *ibid.*

Although *Watts* specifically addressed a challenge to consideration of acquitted conduct based on double jeopardy principles, the clear import of the Court's decision is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution. See *Watts*, 519 U.S. at 157. That principle predated the Sentencing Guidelines, see *id.* at 152, and it fully applies to the advisory guidelines put into place by *United States* v. *Booker*, 543 U.S. 220 (2005).

Contrary to petitioner's contentions (Pet. 10-13), this Court's decisions in *Booker* and subsequent cases confirm that there is no constitutional infirmity in a judge basing the defendant's sentence, within the statutory maximum, on conduct that was not found by the jury. That is true whether the conduct was not charged at all or whether it formed the basis of charges on which the jury did not find the defendant guilty.

Booker and cases elaborating on that decision make clear that, under the advisory Guidelines regime currently in place, judicial fact-finding to impose a sentence within the statutory maximum set forth in the United States Code does not violate the Sixth Amendment. As the Court explained in *Booker*:

> We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. * * * For 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.

543 U.S. at 233 (citations omitted). This Court reaffirmed in *Cunningham* v. *California*, 549 U.S. 270

(2007), that "there was no disagreement among the Justices" that judicial fact-finding under the Sentencing Guidelines "would not implicate the Sixth Amendment" if the Guidelines were advisory. *Id.* at 285. And, in the Court's recent decision in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), the Court again confirmed that its "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." *Id.* at 2465-2466; see *id.* at 2467 (noting *Booker*'s recognition that fact-finding by federal judges in application of the Guidelines would not implicate the constitutional issues confronted in that case if the Guidelines were not "binding") (quoting *Booker*, 543 U.S. at 233).

In discussing the type of information that the sentencing court could consider under an advisory Guidelines regime, *Booker* made no distinction between acquitted conduct and other relevant conduct. See, *e.g.*, 543 U.S. at 252 (emphasizing the need to consider all relevant conduct to achieve "the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways"). To the contrary, after emphasizing the judge's "broad discretion in imposing sentence within a statutory range," *id.* at 233, *Booker* cited *Watts* for the proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found *unproved* (beyond a reasonable doubt)," *id.* at 251.

Consistent with those principles, the district court was allowed to find petitioner accountable for 3744 marijuana plants and to sentence him in accordance with that finding to 140 months of imprisonment, which is well within petitioner's 40-year statutory maximum term of

imprisonment. The court was not precluded from doing so by the jury's finding that the government had not proved beyond a reasonable doubt that the conspiracy involved 1000 or more marijuana plants. See p. 3, *supra*. That finding in no way prevents the sentencing court from determining that petitioner's accountability for 1000 or more marijuana plants was established by the preponderance of the evidence. The preponderance standard is a lower threshold of proof, and it is entirely consistent for the judge to find that threshold satisfied even if the jury found that the proof falls short of eliminating reasonable doubt. *Watts*, 519 U.S. at 156. The jury's finding on drug quantity does not prevent the district court from reaching its conclusions at sentencing. And it would be incongruous to deny a district court the ability to rely on its findings when the court would be free to make the same findings if drug quantity had never been charged at all.

b. This Court's review is particularly unwarranted because, as petitioner acknowledges (Pet. 9), there is no conflict among the circuit courts on this issue. Since *Booker*, every court of appeals with criminal jurisdiction has held that a district court may consider acquitted conduct at sentencing. See *United States* v. *Jimenez*, 513 F.3d 62, 88 (3d Cir.), cert. denied, 128 S. Ct. 2460 (2008); *United States* v. *Ashworth*, 247 Fed. Appx. 409, 409-411 (4th Cir. 2007), cert. denied, 128 S. Ct. 1738 (2008); *United States* v. *Mendez*, 498 F.3d 423, 426-427 (6th Cir. 2007);[3] *United States* v. *Hurn*, 496 F.3d 784,

[3] After *Mendez*, the Sixth Circuit issued an opinion adhering to that ruling but suggested that the defendant petition for rehearing en banc on the question whether the use of acquitted conduct at sentencing violates *Booker*. *United States* v. *White*, 503 F.3d 487, 487 (2007). On November 30, 2007, the Sixth Circuit withdrew the panel opinion in

788 (7th Cir. 2007), cert. denied, 128 S. Ct. 1737 (2008); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 128 S. Ct. 1736 (2008); *United States* v. *Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States* v. *Farias*, 469 F.3d 393, 399 & n.17 (5th Cir. 2006), cert. denied, 127 S. Ct. 1502 (2007); *United States* v. *Dorcely*, 454 F.3d 366, 371 (D.C. Cir.), cert. denied, 127 S. Ct. 691 (2006); *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 525-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 684-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005). This Court has also repeatedly denied petitions for a writ of certiorari raising this issue,[4] including after its recent decisions in *Rita*, *supra*, and *Gall* v. *United*

White and granted rehearing en banc. See *ibid.* Because the panel decision in *Mendez* remains in effect, however, there is no current conflict in the lower courts, and this Court's review is not warranted.

[4] See, *e.g.*, *Edwards* v. *United States*, 127 S. Ct. 1815 (2007) (No. 06-8430); *Dorcely* v. *United States*, 127 S. Ct. 691 (2006) (No. 06-547); *Armstrong* v. *United States*, 549 U.S. 819 (2006) (No. 05-1548); *Lynch* v. *United States*, 549 U.S. 836 (2006) (No. 05-10945); *Magluta* v. *United States*, 548 U.S. 903 (2006) (No. 05-952).

States, 128 S. Ct. 586 (2007).[5] There is no reason for a different result in this case.[6]

2. Petitioner also seeks review (Pet. 16-23) of the court of appeals's application of plain-error review to the district court's failure to consider the sentencing factors under 18 U.S.C. 3553(a). Review of that claim is unwarranted.

a. The court of appeals held that the district court's alleged error did not affect petitioner's "substantial rights" — and therefore was not reversible — because petitioner could "point[] to no evidence in the record showing that if the district court had explicitly considered the § 3553(a) factors, the court would have imposed a different sentence." Pet. App. 10a. As an initial matter, that holding does not warrant review because the district court did not fail to consider the Section 3553(a) factors. The parties' arguments focused on various

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[5] See, *e.g.*, *Morris* v. *United States*, 128 S. Ct. 2502 (2008) (No. 07-1094); *Douglas* v. *United States*, 128 S. Ct. 1875 (2008) (No. 07-8765); *Hurn* v. *United States*, 128 S. Ct. 1737 (2008) (No. 07-605); *Mercado* v. *United States*, 128 S. Ct. 1736 (2008) (No. 07-5810); *Smith* v. *United States*, 128 S. Ct. 1737 (2008) (No. 07-7432); *Wemmering* v. *United States*, 128 S. Ct. 1737 (2008) (No. 07-7739); *Ashworth* v. *United States*, 128 S. Ct. 1738 (2008) (No. 07-8076); *Freeman* v. *United States*, 128 S. Ct. 1750 (2008) (No. 07-9368).

[6] Petitioner, relying on this Court's decision in *Smith* v. *Massachusetts*, 543 U.S. 462 (2005), also argues that the district court violated his Fifth Amendment due process rights when it imposed the 140-month sentence despite petitioner's "reliance on the trial court's plea-related advice." Pet. 13. *Smith*, however, spoke only to the Fifth Amendment's Double Jeopardy clause and thus does not bear on this case.

Petitioner also incorrectly states (Pet. 12 n.8) that the court of appeals's decision requires sentencing courts to account for acquitted conduct that is proved by a preponderance of the evidence. That issue is not raised in this case. The court plainly held only that the district court did not err by relying on acquitted conduct. Pet. App. 7a-8a.

guidelines enhancements and the consideration of acquitted conduct, but in the course of that discussion, the government stated that Eleventh Circuit authority required the court to consider the factors in 18 U.S.C. 3553(a), with which, the government was sure, the court was "familiar." 4/19/06 Tr. 15-16. And, before announcing its sentence, the court explained that it had considered the presentence report, which contained the advisory guidelines calculations as well as material bearing on the "statutory factors," and determined to impose a Guidelines sentence. *Id.* at 31-32.

The courts of appeals are unanimous that a district court need not specifically advert to the Section 3553(a) factors or run through them by rote, in checklist fashion. See, *e.g.*, *United States* v. *Johnson*, 534 F.3d 690, 695 (7th Cir. 2008) (noting that "a district court judge need not apply all § 3553(a) factors in a systematic or checklist fashion") (internal quotation marks and citation omitted); *United States* v. *Kirchhof*, 505 F.3d 409, 413 (6th Cir. 2007) ("If the record demonstrates that the sentencing court addressed the relevant factors in reaching its conclusion, the court need not explicitly consider each of the § 3553(a) factors or engage in a rote listing or some other ritualistic incantation of the factors."); *United States* v. *Smith*, 440 F.3d 704, 707 (5th Cir. 2006) ("[A] checklist recitation of the section 3553(a) factors is neither necessary nor sufficient for a sentence to be reasonable."). Here, while the district court did not specifically enumerate the application of the Section 3553(a) factors, the court was plainly aware of them. It heard the parties' arguments in the course of the sentencing (none of which specifically referred to the Section 3553(a) factors, other than the comment by the government noted above), and it imposed a sentence within

the Guidelines range. That consideration of the Section 3553(a) factors was sufficient. As in *Rita*, the court "must have believed that there was not much more to say." 127 S. Ct. at 2469. While the court "might have said more," where, as here, the context and record make clear that the court must have thought that the Guidelines sentence was appropriate in this "conceptually simple" case, *ibid.*, no more is required. Because the court did not err, petitioner would not be entitled to relief under any view of the plain-error doctrine.

On the issue of plain error, petitioner contends (Pet. 16-23) that the courts of appeals disagree on whether a district court's failure to treat the Sentencing Guidelines as advisory is reversible plain error absent a showing that the district court would have imposed a different sentence but for that error. See Pet. 19 & n.12. That question has no bearing on petitioner's case, see Pet. App. 7a (noting that "the district court applied the guidelines in an advisory manner"), and therefore does not justify this Court's review.

In any event, review of that question is not warranted because it is of rapidly diminishing importance, as the transitional cases to which it applies have virtually all been resolved. In the wake of *Booker*, the courts of appeals have adopted varying approaches to reviewing unpreserved claims of *Booker* error. This Court, however, has repeatedly declined to resolve the circuit conflict on the issue of the proper application of the plain-error test to *Booker* error. See, *e.g.*, *Rodriguez* v. *United States*, 545 U.S. 1127 (2005) (No. 04-1148). There is no reason for a different result here.

b. Petitioner suggests (Pet. 22-23) that the court of appeals's holding conflicts with this Court's decision in

United States v. *Dominguez Benitez*, 542 U.S. 74 (2004). That is incorrect.

In *Dominguez Benitez*, the Court stated that a defendant may show that an unpreserved error affected his "substantial rights" only if he can "show a reasonable probability that, but for the error," the outcome of his proceeding would have been different. 542 U.S. at 83. The court of appeals followed that reasoning when it held, based on the sentencing record, that there was *no probability* that the district court would have imposed a different sentence but for its alleged failure to consider the 18 U.S.C. 3553(a) factors. See Pet. App. 10a ("[Petitioner] points to *no evidence* in the record that if the district court had explicitly considered the § 3553(a) factors, the court would have imposed a different sentence.") (emphasis added). Moreover, the court of appeals, in its plain-error discussion, relied on its earlier decision in *United States* v. *Rodriguez*, 398 F.3d 1291 (11th Cir.), cert. denied, 545 U.S. 1127 (2005). See Pet. App. 9a. *Rodriguez*, in turn, relied on *Dominguez Benitez* in holding that the "standard for showing [an error affecting substantial rights] is the familiar reasonable probability of a different result formulation, which means a probability 'sufficient to undermine confidence in the outcome.'" 398 F.3d at 1299 (quoting *Dominguez Benitez*, 542 U.S. at 83). Accordingly, there is no merit to petitioner's suggestion that the decision below conflicts with *Dominguez Benitez*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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