No. 06-378

In the Supreme Court of the United States

WILLIAM THURSTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether facts that increase a defendant's sentence within the advisory guidelines range must be proved beyond a reasonable doubt.

2. Whether the standards applied by the court of appeals in reviewing petitioner's sentence for unreasonableness are inconsistent with *United States* v. *Booker*, 543 U.S. 220 (2005).

3. Whether the court of appeals correctly determined that the district court erred in imposing a sentence substantially lower than the advisory guidelines range in order to prevent unwarranted disparity between petitioner, who went to trial, and his co-defendant, who pleaded nolo contendere.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 456 F.3d 211. A previous judgment of the court of appeals (Pet. App. 230a-233a) is unreported. The original opinion of the court of appeals (Pet. App. 238a-300a) is reported at 358 F.3d 51. The opinion of the original district judge recusing himself (Pet. App. 302a-305a) is reported at 286 F. Supp. 2d 70.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2006. The petition for a writ of certiorari was filed on September 14, 2006. 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 District of Massachusetts, petitioner was convicted of conspiracy to commit Medicare fraud, in violation of 18 U.S.C. 371. He was originally sentenced to three months of imprisonment, to be followed by 24 months of supervised release. The court of appeals affirmed the conviction but vacated the sentence and remanded for resentencing. Pet. App. 238a-300a. Following this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), petitioner was resentenced to the same term. The court of appeals again remanded, with instructions to impose a sentence of at least 36 months of imprisonment. Pet. App. 1a-19a.

1. During the late 1980s and early 1990s, petitioner served as an executive for Damon Clinical Laboratories (Damon), a corporation that supplied clinical laboratory testing services for health care providers. Medicare reimburses clinical laboratories only for services that are medically necessary for the treatment of the beneficiary's condition. 42 U.S.C. 1395y(a)(1)(A). Petitioner conspired with several others to manipulate Damon's service options to encourage physicians to order unnecessary blood tests for Medicare beneficiaries. By including rarely needed tests for ferritin in a battery of frequently ordered tests, and by falsely informing physicians that the tests did not impose additional costs, petitioner and his co-conspirators manipulated physicians into ordering the unneeded tests, which were then billed to Medicare. During one five-month period, Damon billed Medicare for 9730 ferritin tests, resulting in an increased revenue to Damon of $205,000, when doctors would have ordered only 127 such tests had they known

that they did not need to be ordered along with a group of standard procedures. Pet. App. 2a; Gov't C.A. Br. 3-5.

At petitioner's first sentencing in June 2002, the district court determined that petitioner's base offense level was six; it added 14 levels after finding that he intended a fraud of more than $5 million; it added two more levels for more than minimal planning, and four levels because he was an organizer or leader of extensive criminal activity. The court refused to credit petitioner for acceptance of responsibility, and it did not rule on the government's claim that petitioner had committed perjury at trial and therefore merited an obstruction-of-justice enhancement. The court's Guidelines calculation resulted in a total offense level of 26, which, when combined with a criminal history category of I, yielded a Sentencing Guidelines range of 63 to 78 months of imprisonment. Because the statutory maximum sentence was five years, however, the effective Guidelines sentence was sixty months. Pet. App. 316a; PSR ¶¶ 57-66, 69, 90-91; Gov't C.A. Br. 7-8; see 18 U.S.C. 371.

The district court departed downward to three months of imprisonment, to be followed by 24 months of supervised release, with the first three months to be served in home detention. The court departed based on petitioner's "record of charitable work" and because of the disparity that would otherwise result between petitioner's sentence and that of his co-defendant, who pleaded guilty and received a sentence of three years of probation. Pet. App. 325a, 345a-346a. With respect to the latter ground for departure, the court reasoned as follows (*id.* at 325a):

> We have a situation here where coconspirator Isola, the president of Damon and the architect, at least the prime architect of this conspiracy, received a

> sentence of three years probation, and it is, in my judgment, a violation of the fundamental purpose of the Sentencing Commission Guidelines to impose a sentence which is not at least somewhat similar to that incurred by a conspirator who was more involved in the conspiracy [than] this defendant.

2. Petitioner appealed his conviction and the government appealed the sentence. The court of appeals affirmed petitioner's conviction and reversed the sentence. Pet. App. 238a-300a. The court of appeals rejected both grounds for the departure. Petitioner's good works did not justify the district court's departure, the appellate court concluded, because the Guidelines discouraged departures on that basis unless the good works are "exceptional," and the record in this case did not support a finding that petitioner's good works were exceptional. *Id.* at 292a-298a. The court of appeals reasoned (*id.* at 295a):

> It is hardly surprising that a corporate executive like [petitioner] is better situated to make large financial contributions than someone for whom the expenses of day-to-day life are more pressing; indeed, business leaders are often expected, by virtue of their positions, to engage in civic and charitable activities. Those who donate large sums because they can should not gain an advantage over those who do not make such donations because they cannot.

The court of appeals also held that the district court lacked the authority to depart because of the disparity in sentence between petitioner and his co-defendant, absent some circumstances not adequately considered by the Sentencing Commission. *Id.* at 291a-292a. Finally, the court of appeals reversed the district court's

failure to impose a fine, in light of the requirement in Sentencing Guidelines § 5E1.2(a) for a fine in all cases except where a defendant establishes his inability to pay. *Id.* at 299a-300a.

3. Petitioner filed a petition for a writ of certiorari, and while the petition was pending, this Court decided *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial factfinding under mandatory federal Sentencing Guidelines. As a remedy for that constitutional infirmity, the Court severed two provisions of the Sentencing Reform Act of 1984 (SRA). 543 U.S. at 258-265. The first was 18 U.S.C. 3553(b)(1), 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), which had served to reinforce the mandatory character of the Guidelines. The Court replaced that provision with a general standard of review for "unreasonableness," 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.

4. On January 24, 2005, this Court vacated the court of appeals' judgment and remanded the case for further consideration in light of *Booker*. Pet. App. 237a. After additional briefing, the court of appeals concluded that petitioner had shown plain error in his sentencing and remanded to the district court for re-sentencing under the now-advisory Guidelines, noting that *Booker* did not

affect the court's earlier holding that the district court must comply with the applicable statute with respect to the imposition of a fine. Pet. App. 230a-233a.

Because the original sentencing judge had recused himself after the first remand from the court of appeals (Pet. App. 302a-305a), the case was reassigned to a different district judge. That judge resentenced petitioner to the same term of imprisonment as before—three months—and also imposed a $25,000 fine. *Id.* at 21a-29a, 187a.

The district court began with the original Guidelines range of 63 to 78 months. Pet. App. 207a-208a. The court then determined that, with the Guidelines as advisory only, it could consider the disparity in sentences imposed on co-defendants as a factor under 18 U.S.C. 3553(a). Pet. App. 212a. The court found that petitioner and Isola were similarly situated and should receive similar sentences for several reasons: they were involved in the same scheme, of which Isola was the principal architect; Isola entered a nolo contendere plea and did not "unequivocally accept responsibility;" the court had found that petitioner did not commit perjury at trial, so that could not be a basis for distinguishing the two; and the government itself had suggested that petitioner and Isola were similarly situated by offering both men the same plea deal, which would have allowed a probationary sentence for each of them. The district court therefore found that the only difference between petitioner and Isola was that petitioner went to trial. *Id.* at 197a, 207a, 209a-216a. The district court determined that the "six months in confinement, * * * three months in community confinement, [and] three months in home detention as part of his supervised release" that petitioner had already served, was "sufficient to recognize

the difference between pleading guilty or entering a nolo plea." *Id*. at 216a-217a.

The court also concluded that three months of imprisonment would adequately reflect the seriousness of the crime, particularly in light of "the government's plea bargain with Isola and the offer it made to [petitioner] of * * * a probationary sentence." Pet. App. 215a-216a. Finally, the court concluded that a short prison term would adequately deter other white collar criminals, because the most significant message to such potential offenders was the decision to impose any prison time. *Id*. at 217a. Accordingly, the court imposed the same term of imprisonment as had been previously imposed, along with a fine of $25,000. *Id*. at 218a-220a. In its Statement of Reasons, the court stated that "the sentence is a variance from the Guidelines (a non-Guideline sentence) based on the §3553(a) factors, including particularly the need to avoid unwarranted disparity with a co-defendant and the need to promote respect for the law." *Id*. at 43a.

5. The government appealed, and the court of appeals again vacated petitioner's sentence and remanded for resentencing. Pet. App. 1a-19a.

The court of appeals noted that, although the Sentencing Guidelines are no longer mandatory, district courts are still required to take them into account, together with the other sentencing factors in 18 U.S.C. 3553(a), after first calculating the applicable Guideline range. Pet. App. 8a. Where, as here, the court observed, the only dispute is not about the procedures employed but the substantive result, it would review the sentence for reasonableness, with emphasis on the need "for a plausible explanation and a defensible overall result." *Ibid*. (quoting *United States* v. *Jiménez-Beltre*,

440 F.3d 514, 519 (1st Cir. 2006) (en banc), petition for cert. pending, No. 06-5727 (filed Aug. 4, 2006)). The court further explained that it considered the Guidelines an important consideration in sentencing, because they represent an integration of multiple sentencing factors and because they were issued by the Sentencing Commission, the expert agency in charge of developing them. *Id.* at 8a-9a. Accordingly, the court of appeals would consider "the reasonableness of a below-guideline sentence on a sliding scale," with a more compelling justification required the more a sentence departs from the Guidelines range. *Id.* at 9a.

Applying those principles, the court of appeals held that the sentence imposed in this case was unreasonable. Pet. App. 9a-19a. The court concluded that the reasons offered for the sentence, which reflected a 95 per cent deviation from the advisory Guidelines range, did "not warrant the major variance." *Id.* at 9a.

First, the court of appeals was not persuaded that petitioner and his co-defendant were in fact similarly situated and therefore deserving of similar sentences. The law has long recognized, the court noted, that it is appropriate for a defendant who pleads guilty to receive a benefit compared to one who goes to trial, and that such a distinction does not unfairly burden a defendant's exercise of his right to a jury trial. Pet. App. 10a-12a. Furthermore, the court noted, the district court emphasized only the disparities between co-defendants and did not adequately consider the need to encourage nationwide uniformity in sentencing. *Id.* at 9a-10a.

Second, the court of appeals determined that the district court had erred in assessing the seriousness of the crime by focusing on the government's pretrial offer of a lenient plea deal to petitioner, instead of exercising its

"independent obligation to assess the seriousness of [petitioner's] offense." Pet. App. 12a-14a. Finally, the court of appeals held that it was inappropriate for the district court to base its sentence on its own view of a general deterrence policy for white-collar crimes, instead of on specific facts in petitioner's case indicating that a three-month sentence would adequately deter similar crimes. It is for Congress and the Sentencing Commission to set across-the-board sentencing policies, the court of appeals explained, and the exercise of judicial discretion should be based on case-specific circumstances, not on overall sentencing policy. In this case, the district court's view in fact departed from the policies established by Congress and the Sentencing Commission, which have determined that penalties in recent years for white-collar crimes have been too lenient. *Id.* at 14a-16a.

Because petitioner's sentence had already twice been vacated, the court of appeals went on to provide more specific guidance for the district court on remand. After a review of the reasons that could support a below-Guidelines sentence and other reasons supporting "a stiff penalty," the court of appeals concluded that "a sentence of fewer than 36 months' imprisonment would fail reasonableness review in the present circumstances." Pet. App. 16a-19a.

The court of appeals also summarily rejected as foreclosed by its precedents petitioner's claim that *Booker* requires that facts found by the district court in support of sentencing enhancements must meet a beyond-a-reasonable-doubt standard of proof. Pet. App. 6a n.4.

ARGUMENT

1. Petitioner renews (Pet. 12-17) a contention made in the court of appeals that the district court violated his right to due process by finding facts that increased his advisory Sentencing Guidelines range under the preponderance-of-the-evidence standard instead of beyond a reasonable doubt. He claims that the standard of proof required by the Fifth Amendment remains an open question and should be resolved by this Court. That contention is incorrect, and review by this Court is unwarranted.

This Court has repeatedly made clear that a district 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 "application of the preponderance standard at sentencing generally satisfies due process") (citing *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-92 (1986)); see *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (holding that the sentencing court was authorized to determine that the offense involved crack even if the jury had convicted defendants of a conspiracy involving only cocaine); *Witte* v. *United States*, 515 U.S. 389, 400-401 (1995) (noting that the 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 extending *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004), to the Sentencing Guidelines, *Booker* held that any fact, other than a prior conviction, necessary to support a mandatory Guidelines 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. But by excising 18 U.S.C. 3553(b)(1) and 3742(e) to make the Sentencing Guidelines advisory rather than mandatory, *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. Thus, as 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. *Booker*, 543 U.S. 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 239-241 (reviewing *Edwards*, *Watts*, and *Witte* and concluding that "[n]one of our prior cases is inconsistent with today's decision").

Since *Booker*, the courts of appeals have consistently held that sentencing judges may generally find, by a preponderance of the evidence, facts relevant to determination of the advisory Guidelines range. See, *e.g.*, *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, 526-527 (2d Cir. 2005), cert. denied, 126 S. Ct. 1665 (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, 126 S. Ct. 468 (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, 126 S. Ct. 43 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 126 S. Ct. 432 (2005). The decision below is thus consistent with this Court's decisions, and there is no conflict of authority that would warrant further review of the matter.

2. Petitioner also contends (Pet. 17-30) that the standards applied by the court of appeals in reviewing his below-Guidelines sentence for unreasonableness are inconsistent with *Booker*. Specifically, he argues (Pet. 17-23) that the court of appeals gives undue weight to the Guidelines range when reviewing sentences for unreasonableness, an approach that he claims resembles too closely the mandatory sentencing scheme that *Booker* found unconstitutional; and he contends (Pet. 23-30) that the court of appeals unduly restricted the district court's discretion to impose a sentence well below the Guidelines range to prevent unwarranted disparity between co-defendants.

On November 3, 2006, this Court granted certiorari in *Claiborne* v. *United States*, No. 06-5618, and *Rita* v. *United States*, No. 06-5754, to address various aspects of sentencing procedure under *Booker*, including, in *Claiborne*, the standards to be applied in reviewing a below-Guidelines sentence for unreasonableness. Accordingly, the Court should hold the petition with respect to Questions 2 and 3 pending the Court's resolu-

tion of *Claiborne* and *Rita*, and dispose of it as appropriate in light of the decisions in those cases.

CONCLUSION

With respect to the first question presented in the petition for a writ of certiorari, which concerns the standard of proof for factual findings at sentencing, the petition should be denied. With respect to Questions 2 and 3 of the petition, which concern the standards for reviewing a sentence for unreasonableness, the Court should hold the petition pending its decisions in *Claiborne* and *Rita*, and then dispose of the petition on these questions as appropriate in light of the decisions in those cases.

Respectfully submitted.

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