No. 06-629

In the Supreme Court of the United States

JORGE ALBERT DIAZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004), applies retroactively to cases on collateral review.

2. Whether this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), applies retroactively to cases on collateral review.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 12a-13a) is unreported. The opinion of the district court (Pet. App. 1a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2006. The petition for a writ of certiorari was filed on June 27, 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 Eastern District of New York, petitioner was convicted of conspiring to distribute five kilograms or more of cocaine and of attempting to possess with intent to distribute five kilograms or more of cocaine,

both in violation of 21 U.S.C. 846. He was sentenced to 210 months of imprisonment to be followed by five years of supervised release. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 2a.

Petitioner filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. The district court denied petitioner's motion and denied him a certificate of appealablility (COA). Pet. App. 1a-11a. The court of appeals also denied petitioner's application for a COA. *Id.* at 12a-13a.

1. Petitioner, Maza-Bohos, and others conspired to distribute cocaine. Unbeknownst to the conspirators, the suppliers of the cocaine were government agents. Government agents met Maza-Bohos at a restaurant where they discussed plans for the delivery of 100 kilograms of cocaine to Maza-Bohos. After a series of cellular phone calls between petitioner and Maza-Bohos, petitioner rented a car and drove it to the restaurant. Petitioner then waited outside the restaurant. Maza-Bohos told the government agents that they should deliver the cocaine in a car supplied by Maza-Bohos. Maza-Bohos further informed the agents that petitioner was his partner and that petitioner and the car were outside the restaurant. The agents agreed to Maza-Bohos's plan for the delivery of the cocaine. Gov't C.A. Br. 3-5.[1]

The agents and Maza-Bohos then went outside the restaurant to meet petitioner. One of the agents asked petitioner if he was Maza-Bohos's partner, and petitioner confirmed that he was. Petitioner told the government agents that he wanted to get the car back between five and six o'clock the next morning. The agents

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[1] "Gov't C.A. Br." refers to the government's court of appeals' brief in petitioner's appeal from his conviction and sentence (No. 02-1369).

agreed and left in the rental car. Petitioner and other conspirators were then arrested. Gov't C.A. Br. 6-7.

2. A federal grand jury in the Eastern District of New York returned a four-count indictment charging petitioner and seven co-defendants with various drug offenses. See Dkt. Entry 33 (No. 1:00-cr-00851). At trial, the government introduced portions of several co-defendants' guilty-plea allocutions to establish the existence of a conspiracy. The allocutions were redacted to omit any direct or indirect reference to petitioner. The jury found petitioner guilty of one count of conspiring to distribute five kilograms or more of cocaine and one count of attempting to possess with intent to distribute five kilograms or more of cocaine. Pet. App. 2a, 4a, 8a-11a; Pet. Section 2255 Motion 5; 62 Fed. Appx. 391 (2003).

At sentencing, the district court found that petitioner was responsible for 100 kilograms of cocaine. Based on that finding, the court sentenced petitioner to 210 months of imprisonment, to be followed by five years of supervised release. Pet. App. 2a.

3. On appeal, petitioner argued that the district court had erred by admitting evidence of a prior drug conviction and by instructing the jury on conscious avoidance. Petitioner also argued that *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), should be extended to require the jury to find that he had personal knowledge of the quantity of drugs involved in the conspiracy and attempted possession. Petitioner did not raise any Confrontation Clause challenge to the admission of his co-conspirators' allocutions. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 2a-3a; 62 Fed. Appx. 391 (2003).

4. Petitioner subsequently filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. In his motion, petitioner raised three claims: (1) that his sentence violated the Sixth Amendment under *United States* v. *Booker*, 543 U.S. 220 (2005), because the district court increased the Guidelines sentence based on judicial factfinding; (2) that the admission of his co-defendants' guilty-plea allocutions violated petitioner's Sixth Amendment right to confront the witnesses against him under *Crawford* v. *Washington*, 541 U.S. 36 (2004); and (3) that the failure of his trial counsel to redact an indirect reference to petitioner in one of the guilty-plea allocutions denied petitioner the right to effective assistance of counsel. Pet. App. 1a-11a.

The district court denied petitioner's motion. The court held that petitioner's *Booker* and *Crawford* claims were barred because neither decision applies retroactively to cases on collateral review. Pet. App. 3a-6a. The court rejected petitioner's ineffective-assistance claim because the allocution at issue had not implicated petitioner either directly or indirectly, and petitioner therefore could not establish either constitutionally deficient performance or prejudice. *Id*. at 6a-11a. The district court also held that petitioner was not entitled to a COA on those claims. *Id*. at 11a.

5. Petitioner filed an application for a certificate of appealability with the court of appeals. The court denied the application, holding that petitioner had failed to make a "substantial showing of the denial of a constitutional right." Pet. App. 12a-13a (quoting 28 U.S.C. 2253(c)(2)).

ARGUMENT

1. Petitioner seeks review of the question whether *Crawford* applies retroactively to claims on collateral review. That question is currently before the Court in *Whorton* v. *Bockting*, No. 05-595 (argued Nov. 1, 2006). Petitioner requests that the Court hold the petition in this case pending the decision in *Bockting*.

The Court need not hold the petition in this case pending the decision in *Bockting*. Even if the Court were to hold *Crawford* retroactive in *Bockting*, petitioner could not ultimately benefit from that ruling. That is because petitioner procedurally defaulted on his Confrontation Clause claim, and petitioner cannot satisfy the standards for overcoming that procedural default.

While petitioner asserts (Pet. 10) that he raised his Confrontation Clause claim in the district court, he failed to raise that claim on direct appeal. By failing to raise the claim on direct appeal, petitioner procedurally defaulted that claim. *Bousley* v. *United States*, 523 U.S. at 614, 621 (1998).

To overcome a procedural default, a petitioner must show either (1) cause for the default and actual prejudice or (2) actual innocence. *Bousley*, 523 U.S. at 623. Petitioner cannot satisfy either component of the cause and prejudice standard, and he also cannot establish actual innocence.

Cause for failing to raise a constitutional claim may exist "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Reed* v. *Ross*, 468 U.S. 1, 16 (1984). That was not the case here. The reconsideration of the Court's Confrontation-Clause jurisprudence undertaken in *Crawford* had long been advocated by jurists, litigants, and commentators.

See, *e.g.*, *Crawford*, 541 U.S. at 60-61; *Lilly* v. *Virginia*, 527 U.S. 116, 140-143 (1999) (Breyer, J., concurring); *White* v. *Illinois*, 502 U.S. 346, 363-366 (1992) (Thomas, J., concurring in part and concurring in the judgment). The interpretation of the Confrontation Clause that was ultimately adopted in *Crawford* was therefore reasonably available to petitioner.

Nor can petitioner demonstrate "actual prejudice." The allocutions at issue did not refer to petitioner and were admitted solely for the purpose of proving the existence of a conspiracy. Moreover, other evidence established both the conspiracy and petitioner's participation in it. See Pet. App. 10a-11a; Gov't C.A. Br. 3-7; 62 Fed. Appx. at 393. The admission of the allocutions therefore did not cause actual prejudice to petitioner.

Petitioner also cannot escape his procedural default through a claim of actual innocence. "To establish actual innocence, petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623 (citation and internal quotation marks omitted). Given the evidence against petitioner, no such showing can be made here.

The government did not raise petitioner's procedural default below. But that does not mean that the Court should consider petitioner's defaulted claim. A court has discretionary authority to deny petitioner relief based on procedural default even when the government has failed to raise the issue of default at the earliest opportunity. Cf. *Day* v. *McDonough*, 126 S. Ct. 1675, 1681-1684 (2006). Because petitioner plainly defaulted on his Confrontation Clause claim, there is no reason for the Court to consider it. To the extent that the Court concludes otherwise, however, it should hold the petition in

this case pending the decision in *Brockting* and then dispose of the petition as appropriate in light of that decision.

2. Petitioner contends (Pet. 11-12) that *United States* v. *Booker*, 543 U.S. 220 (2005), applies retroactively to cases on collateral review. He contends further (Pet. 11) that his petition should be held pending this Court's decision in *Burton* v. *Waddington*, No. 05-9222 (argued Nov. 7, 2006), because that decision will determine the outcome of his case. Petitioner's contentions lack merit.

A number of petitions for a writ of certiorari have recently presented the claim that *Booker* should apply retroactively to cases on collateral review. As the government has explained in its brief in opposition to one of those petitions, that claim does not warrant this Court's review. See U.S. Br. in Opp. at 6-11, *Guzman* v. *United States*, 127 S. Ct. 495 (2006) (No. 06-5662).[2] All 11 courts of appeals that have addressed the issue have correctly concluded that *Booker* is not retroactive because it is a new rule of criminal procedure and is not a "watershed" rule. Since the denial of a writ of certiorari in *Guzman*, this Court has denied review in several other cases raising identical claims. See, *e.g.*, *Newborn* v. *United States*, No. 06-5289; *Davis* v. *United States*, No. 06-5538; *Puzey* v. *United States*, No. 06-5541; and *Humphrey* v. *United States*, No. 06-5543 (cert. denied Nov. 13, 2006).

There is no reason to hold the petition pending this Court's decision in *Burton*, *supra*, which presents the question whether *Blakely* v. *Washington*, 542 U.S. 296 (2004), is retroactive. Petitioner would not directly benefit from a decision holding *Blakely* retroactive, because

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[2] We have provided petitioner with a copy of the government's brief in *Guzman*.

Blakely expressly declined to decide whether the rule in that case applied to the Federal Sentencing Guidelines. *Blakely*, 542 U.S. at 305 n.9. Further, as the government explained in its brief in *Guzman* (U.S. Br. in Opp. at 10-11 (No. 06-5662)), the question whether *Booker* is retroactive to cases on collateral review presents distinct issues from the question whether *Blakely* applies retroactively.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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