No. 07-529

In the Supreme Court of the United States

RANDOLPH GEORGE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied the plain-error standard to petitioner's sentencing claim under *United States* v. *Booker*, 543 U.S. 220 (2005).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-23a) is reported at 420 F.3d 991. The opinion of the district court (Pet. App. 3a-4a) is unreported. The post-remand opinion of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted in 226 Fed. Appx. 771.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2007. A petition for rehearing was denied on July 2, 2007 (Pet. App. 26a). The petition for a writ of certiorari was filed on October 1, 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 Northern District of California, petitioner was convicted of two counts of filing false income tax returns for 1991 and 1992 (Counts One and Two), in violation of 26 U.S.C. 7206(1), and one misdemeanor count of willful failure to file an income tax return for 1993 (Count Three), in violation of 26 U.S.C. 7203. Pet. App. 5a. Petitioner was sentenced to concurrent terms of 15 months of imprisonment on Counts 1 and 2 and 12 months of imprisonment on Count 3, to be followed by one year of supervised release. The court also imposed a $20,000 fine and $125 in special assessments and ordered payment of $70,000 in restitution. Pet. App. 5a-6a, 24a-25a.

While petitioner's direct appeal was pending, this Court decided *Blakely* v. *Washington*, 542 U.S. 296 (2004), and *United States* v. *Booker*, 543 U.S. 220 (2005). The court of appeals affirmed petitioner's convictions but ordered a limited remand of petitioner's case pursuant to *United States* v. *Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc) (*Ameline II*). On remand, the district court determined that it would not have imposed a materially different sentence had it known that the Sentencing Guidelines were advisory. The court of appeals affirmed. Pet. App. 1a-4a, 21a-23a.

1. Between 1990 and 1994, petitioner served as a court-appointed receiver for five financially troubled radio stations. Pet. App. 6a-7a. His fees, which were negotiated with the interested parties and approved by the court at the start of the receivership, were paid on an interim basis during the administration of the receivership, usually monthly. *Ibid.* In addition to brokerage commissions and income from other sources, petitioner

was paid $90,001.42 in receiver fees in 1991, $125,432.66 in 1992, and $154,595 in 1993. *Id.* at 7a. Petitioner did not file tax returns reporting the 1991 and 1992 receivership income until 1995, and petitioner never filed a return reporting the receivership income from 1993. *Ibid.* Petitioner's returns for 1991, 1992, and 1994 failed to report a total of $347,029.08 in receiver fees. *Id.* at 7a-8a.

In July 1996, an Internal Revenue Service agent interviewed petitioner regarding his 1991 and 1992 returns. Petitioner did not disclose to the agent his employment as a receiver or the receiver fees he had received in 1991 and 1992. Pet. App. 8a. During a second interview in February 1997, petitioner admitted earning the receiver fees, but did so only after he was confronted with a fraudulent tax return—which listed the receiver fees as petitioner's personal income—that petitioner had submitted to a lender in 1994 in support of a mortgage application. *Ibid.*

2. On August 30, 2001, a grand jury sitting in the Northern District of California returned an indictment charging petitioner with two counts of willfully making and subscribing false income tax returns, in violation of 26 U.S.C. 7206(1), and one count of willful failure to file an income tax return, in violation of 26 U.S.C. 7203. On November 13, 2002, after a jury trial, petitioner was found guilty of all counts. 04-10307 Gov't C.A. Br. 2-3.

3. On May 19, 2004, the district court sentenced petitioner pursuant to the then-mandatory Sentencing Guidelines. 06-10275 Gov't C.A. Br. 3. The Presentence Investigation Report calculated total tax losses of $145,685, which resulted in an offense level of 15. The district court rejected that recommendation and instead accepted a stipulation between petitioner and the

government that the tax loss was "more than $70,000 but less than $120,000, resulting in a base offense level of 14." Pet. App. 22a, 27a. Petitioner's resulting Guidelines range was 15 to 21 months. The district court denied petitioner's motion for a downward departure based on extraordinary family circumstances. The district court sentenced petitioner to concurrent terms of 15 months of imprisonment on the false return counts and 12 months of imprisonment on the failure to file count, to be followed by one year of supervised release. The court imposed a $20,000 fine and ordered payment of $70,000 in restitution and $125 in special assessments. Petitioner raised no objection to the district court's application of the then-mandatory Sentencing Guidelines. *Id.* at 5a-6a; 06-10275 Gov't C.A. Br. 3-7.

4. On appeal, petitioner challenged the sufficiency of the evidence supporting his convictions, the correctness of the district court's jury instructions, and the district court's denial of his motion for new trial. 04-10307 Pet. C.A. Br. 10-35, 45-53. With respect to sentencing, petitioner challenged the district court's tax-loss calculation and claimed that the district court's determination of tax loss violated the Sixth Amendment. Petitioner relied on two then-recent decisions: *Blakely* v. *Washington*, 542 U.S. 296 (2004) (holding that the Sixth Amendment was violated by enhancement of a sentence based on judicial fact finding under a state determinate-sentencing scheme), and *United States* v. *Ameline*, 376 F.3d 967 (9th Cir. 2004) (holding that *Blakely*'s reasoning applied to the federal Sentencing Guidelines), amended and superseded on reh'g, 400 F.3d 646, amended and superseded on reh'g en banc, 409 F.3d 1073 (9th Cir. 2005). Petitioner did not challenge the district court's denial of his motion for a downward departure or argue

that his sentence was unreasonable. 04-10307 Pet. C.A. Br. 36-45; 06-10275 Gov't C.A. Br. 7.

5. While petitioner's appeal 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 judicially found facts under mandatory federal Sentencing Guidelines. *Id.* at 226-244. To remedy that Sixth Amendment problem, *Booker* made the Guidelines "effectively advisory." *Id.* at 245. It did so by severing and excising 18 U.S.C. 3553(b)(1), which made the Guidelines mandatory, and 18 U.S.C. 3742(e) (2000 & Supp. V 2005), which "set[] forth standards of review on appeal" and "contain[ed] critical cross-references" to Section 3553(b)(1). *Booker*, 543 U.S. at 259-260. The Court ruled that federal sentences would be reviewed for "unreasonable[ness]." *Id.* at 261 (brackets in original). See *Gall* v. *United States*, No. 06-7949 (Dec. 10, 2007), slip op. 3.

The Court recognized that *Booker* would apply to all cases on direct review. *Booker*, 543 U.S. at 268. The Court also stated that it did not "believe that every appeal will lead to a new sentencing hearing," because it "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." *Ibid.*

6. In *Ameline II*, *supra*, the Ninth Circuit addressed the application of the plain-error standard of review to unpreserved *Booker* error. The Court held that a defendant shows constitutional "error" that is "plain" when a sentencing judge enhances a sentence "in reliance upon judge-made findings under the then-mandatory guidelines." 409 F.3d at 1078. The "more vexing"

inquiry was the third prong of plain-error review: whether and how a defendant would carry the burden of showing that his substantial rights were affected by the error. *Ibid.* The Ninth Circuit "surmise[d] that the record in very few cases will provide a reliable answer to the question of whether the judge would have imposed a different sentence had the Guidelines been viewed as advisory." *Id.* at 1079. The court of appeals thus held:

> [W]hen we are faced with an unpreserved *Booker* error that may have affected a defendant's substantial rights, and the record is insufficiently clear to conduct a complete plain error analysis, a limited remand to the district court is appropriate for the purpose of ascertaining whether the sentence imposed would have been materially different had the district court known that the sentencing guidelines were advisory. If the district court responds affirmatively, the error was prejudicial and failure to notice the error would seriously affect the integrity, fairness and public reputation of the proceedings. The original sentence will be vacated by the district court, and the district court will resentence the defendant. If the district court responds in the negative, the original sentence will stand, subject to appellate review for reasonableness.

Id. at 1074-1075.[1]

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[1] The Second, Seventh, and District of Columbia Circuits also employ a limited remand procedure as part of their plain-error review of unpreserved *Booker* errors. See *United States* v. *Crosby*, 397 F.3d 103, 120 (2d Cir. 2005); *United States* v. *Paladino*, 401 F.3d 471, 483-484 (7th Cir.), cert. denied, 546 U.S. 849 (2005); *United States* v. *Coles*, 403 F.3d 764, 769-771 (D.C. Cir. 2005).

7. On August 23, 2005, the court of appeals affirmed petitioner's convictions and rejected petitioner's argument that the district court's tax loss calculation was based on judicial factfinding. Because the court could not "determine whether the district court would have imposed a materially different sentence under a discretionary sentencing regime," however, the court ordered a limited remand pursuant to *Ameline II*. Pet. App. 21a-23a. See *United States* v. *Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) (holding that *Ameline II* remand is warranted in cases of both constitutional and nonconstitutional unpreserved *Booker* error).

8. On remand, the district court received written submissions from the parties and, on April 12, 2006, held a hearing. Petitioner renewed his challenge to the district court's original calculation of the applicable Guidelines range. 06-10275 Gov't C.A. Br. 8. The district court observed that the *Ameline II* remand had "the limited purpose of determining what [the court] would do now that the Guidelines are advisory." *Id.* at 9. The district court considered the evidence in the record, the arguments of counsel, the advisory sentencing Guidelines, and all of the factors provided in 18 U.S.C. 3553(a). The court stated that it did not "consider the Guidelines calculations to be presumptive. The Guidelines are a factor, and [the court] considered them with all of the other factors set forth in [Section] 3553." 06-10275 Gov't C.A. Br. The district court then assessed the mitigating factors raised by petitioner—his family circumstances, his history, and his characteristics. The court also considered the fact that it "would be prepared to find by any standard that's required, including beyond a reasonable doubt, that [petitioner] was not truthful on the [witness] stand." *Id.* at 10. The court announced that it was

"satisfied that the sentence that was imposed at the time [of the original sentencing] was the appropriate sentence in this case." *Ibid.* The court confirmed that it had "considered all of the factors and the advisory system in which we now operate." *Ibid.*

9. The court of appeals affirmed. Pet. App. 1a-2a.

a. The court first determined (Pet. App. 2a) that its review was governed by *United States* v. *Combs*, 470 F.3d 1294 (9th Cir. 2006), petition for cert. pending, No. 07-6958 (filed Oct. 5, 2007). In *Combs*, the Ninth Circuit reviewed a district court's decision to reinstate its original sentence following an *Ameline II* remand. The court noted that "[a]t no time during his first appeal did defendant challenge the reasonableness of his sentence," and that its ruling "applies only to defendants in Combs's particular situation." 470 F.3d at 1295.

As to such defendants, the court further noted that it was required to consider an issue of first impression: "[b]y what standard do[es] [the court] review a district court's determination, made during the course of an *Ameline* remand, that it would have imposed the same sentence under an advisory Guidelines system?" *Combs,* 470 F.3d at 1296. The court observed that the only guidance on that issue provided by *Ameline II* was its statement that "the original sentence will stand, subject to appellate review for reasonableness." *Ibid.* (quoting *Ameline II*, 409 F.3d at 1074-1075). The court did not interpret that language in *Ameline II* to require the same "reasonableness review [that the court] conduct[s] on post-*Booker* sentences," because "[s]uch full-blown reasonableness review presupposes that the judge sentenced defendant under a post-*Booker* regime, where the judge must take into account all the factors enumerated in" 18 U.S.C. 3553(a). *Combs*, 470 F.3d at 1296.

The court noted that a "*limited Ameline* remand * * * does not contemplate that the district judge will engage in a full post-*Booker* resentencing, *unless* he first determines that the sentence would have been materially different under an advisory Guidelines system." *Id.* at 1296-1297. If the district court determines that the same sentence would have been imposed, the court wrote, "defendant's plain error claim will have failed for lack of prejudice, and defendant would not seem entitled to review of his sentence at all." *Id.* at 1297.

Because *Ameline II* nevertheless "allows for appeal of the re-imposed sentence and instructs [the court] to review that sentence for 'reasonableness,'" the court of appeals held in *Combs* that the standard to be applied is: "Whether the district judge properly understood the full scope of his discretion in a post-*Booker* world." *Combs*, 470 F.3d at 1297. The court explained that a district court's determination that it would have imposed the same sentence under an advisory Guidelines system is meaningful only if the judge "understood his powers and responsibilities under [that] system." *Ibid.* The court noted that "[a] more demanding inquiry would turn every *Ameline* remand into a full-blown resentencing, and would thus be contrary to *Ameline*'s central holding that defendants whose sentences are being reviewed for plain error are entitled only to a limited remand." *Ibid.*

b. Applying *Combs*, the court of appeals noted that, during the limited remand hearing in petitioner's case, the sentencing judge had stated:

> The purpose [of the remand] is to determine at this time whether the court would impose or should impose a sentence in some significant way different from the sentence that was imposed earlier . . . . I think I made it clear—if I need to say so—I want to

> make clear that I won't consider the guidelines calculations to be presumptive. The Guidelines are a factor.

Pet. App. 2a. The court of appeals concluded that the district judge "understood her discretionary powers under an advisory Guidelines system" and that the district judge's "decision to retain the original sentence was reasonable." *Ibid.* (quoting *Combs*, 470 F.3d at 1297).

ARGUMENT

Petitioner raises two challenges to the manner in which the court of appeals applied plain-error review to defaulted sentencing claims under *United States* v. *Booker*, 543 U.S. 220 (2005). The transitional issues that petitioner raises are of rapidly diminishing importance, as the transitional cases to which they apply have virtually all been resolved. Further review is therefore not warranted.[2]

1. Petitioner contends (Pet. 7-9) that the court of appeals erred by failing to review the substantive reasonableness of his sentence. He argues that the court's failure to do so conflicts with *United States* v. *Booker*, *supra*, and *Rita* v. *United States*, 127 S. Ct. 2456 (2007). That contention lacks merit and does not warrant review.

Neither *Booker* nor *Rita* addressed the manner in which plain-error review should be applied to unpreserved claims of *Booker* error. In *Booker*, the Court announced the "reasonableness" standard of review that would apply to federal sentences prospectively but also

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[2] The same issues are presented in the petition for writ of certiorari in *Combs* v. *United States*, No. 07-6958 (filed Oct. 5, 2007).

made clear that it "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." *Booker*, 543 U.S. at 268. *Booker* did not explain how courts should apply the plain-error test in this context. See *United States* v. *Paladino*, 401 F.3d 471, 484 (7th Cir.) (noting that this Court in *Booker* "made no ruling, express or implied," on the proper standard of plain-error analysis), cert. denied, 546 U.S. 849 (2005). And in *Rita*, the Court reviewed a post-*Booker* sentence and determined that appellate courts conducting "reasonableness" review may apply a presumption of reasonableness to a sentence imposed within a properly calculated Guidelines range. *Rita*, 127 S. Ct. at 2459. *Rita* did not address the plain-error standard at all. Thus, petitioner's argument (Pet. 8-9) that the court of appeals' decision conflicts with *Booker* and *Rita* is without merit.

2. Nor is review warranted based on petitioner's contention (Pet. 5-7) that the Ninth Circuit's decision, which followed *Combs*, conflicts with decisions of other circuits that employ a limited remand procedure in connection with plain-error review. It is true that the Second and Seventh Circuits have reviewed the substantive reasonableness of sentences reaffirmed in a limited remand and have not held that a defendant's failure to challenge the reasonableness of his sentence in an initial appeal forecloses such review. See *United States* v. *Williams*, 475 F.3d 468, 476 (2d Cir. 2007) (noting that challenge to the reasonableness of the length of a sentence "usually" is not ripe for review until after a limited remand and that law of the case "usually" will not prevent a defendant from obtaining reasonableness review of length of sentence on appeal following limited remand);

Paladino, 401 F.3d at 484 (where sentencing court reimposes original sentence in limited remand, sentence will be affirmed "provided that" it is reasonable).[3] But even assuming a conflict exists among these courts, review is not warranted.

In the wake of *Booker*, the courts of appeals have adopted varying approaches to reviewing unpreserved claims of *Booker* error. For example, rather than ordering a limited remand, some circuits have held that, when the reviewing court cannot determine from the original record whether the sentencing error was prejudicial, the defendant has not carried his burden under the plain-error test and is not entitled to relief. See *United States* v. *Antonakopoulos*, 399 F.3d 68, 80 (1st Cir. 2005); *United States* v. *Mares*, 402 F.3d 511, 521-522 (5th Cir.), cert. denied, 546 U.S. 828 (2005); *United States* v. *Pirani*, 406 F.3d 543, 552 (8th Cir.) (en banc), cert. denied, 546 U.S. 909 (2005); *United States* v. *Rodriguez*, 398 F.3d 1291, 1301 (11th Cir.), cert. denied, 545 U.S.

[3] Petitioner also cites *United States* v. *Robinson*, 503 F.3d 522 (6th Cir. 2007), and *United States* v. *Hughes*, 401 F.3d 540 (4th Cir. 2005), but those cases are distinguishable. The limited remand in *Robinson* was not ordered in the context of plain-error review of an unpreserved *Booker* claim. Instead, the remand was ordered before *Booker* was decided, and its purpose was to permit the district court to make factual findings in support of aspects of its Guidelines calculation. *Robinson*, 503 F.3d at 526. While the case was on remand, *Booker* was decided. The district court therefore "resentence[d] Robinson in accordance with *Booker*." *Id.* at 527-528. In that context, the court ruled that the defendant "ha[d] not waived his right to raise *Booker* claims," and it reviewed the substantive reasonableness of the resulting sentence. *Id.* at 528-531. In *Hughes*, the Fourth Circuit, applying plain-error review, vacated the defendant's sentence and remanded for a full post-*Booker* resentencing. *Hughes*, 401 F.3d at 545. On the pages of the opinion to which petitioner cites (Pet. 6), the court merely recited the "reasonableness" standard of review announced in *Booker*. *Id.* at 546-547.

1127 (2005). This Court, however, has repeatedly declined to resolve the circuit conflict on the broader 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). There is no reason, therefore, for the Court to address a narrower issue within that same area, *i.e.*, the post-remand standard of review that should be applied by the subset of circuits that employ a limited remand procedure.

Review is particularly unwarranted now. The issue presented is of little current and progressively diminishing importance because it involves the standard to be applied by appellate courts in reviewing sentences originally imposed before *Booker*. The limited remand procedure should rarely or never occur in cases in which sentence was imposed after *Booker* because district courts are now treating the Guidelines as advisory, and any treatment of them as mandatory would almost certainly elicit an objection.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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