No. 06-778

In the Supreme Court of the United States

STEPHEN REMY MUELLER, 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 18 U.S.C. 2252A(b)(1) (Supp. IV 2004), which imposes a five-year mandatory minimum term of imprisonment for receiving child pornography, is advisory in light of *United States* v. *Booker*, 543 U.S. 220 (2005), such that a court may now impose a sentence of probation.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 463 F.3d 887.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2006. The petition for a writ of certiorari was filed on December 4, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of Guam to one count of receiving child pornography, in violation of 18 U.S.C.

2252A(a)(2)(A).[1] Pet. App. 2a-3a. He was sentenced to five years of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. *Id.* at 11a.

1. Between May 10 and 19, 2004, petitioner used his office computer to access and download digital images depicting child pornography. Presentence Report para. 6 (PSR). A co-worker, using petitioner's computer, followed a suspicious link and discovered a web site promoting child pornography and featuring an image of an underage girl in a lace nightgown. *Id.* para. 13. The co-worker asked a network administrator to make a copy of the hard drive and surrendered the original to federal agents. *Id.* para. 14. An inspection of the hard drive revealed that petitioner had entered terms like "little Lolita girls" into Internet search engines, *id.* para. 19, and the temporary Internet files on the hard drive included banner ads for sites like "Child-Galaxy," which advertises pictures of "Little Girls 6-14 yo." *Id.* para. 17. Unallocated clusters on the hard drive contained "numerous other photos of pre-pubescent girls in various poses, exposing their genital areas in a lewd and lascivious manner and engaging in sexual activity with adult males." *Ibid.* Investigators ultimately discovered more than 500 images of child pornography on petitioner's hard drive. *Id.* para. 27.

Petitioner pleaded guilty to one count of receiveing child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A). As part of his plea agreement, he admitted that he received and possessed digital images of mi-

[1] A second charge, of receiving obscene visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. 1466A(a)(1) (Supp. IV 2004), was dismissed pursuant to the plea agreement. PSR para. 4.

nors that had traveled in interstate or foreign commerce, knowing those images constituted or contained child pornography. The images depicted graphic intercourse, lascivious simulated sexual intercourse where the genitals, breast or pubic area of the minor was exhibited, and graphic or simulated lascivious exhibition of the genitals or pubic area of minors. Petitioner admitted saving the images on his computer for review at a later time. PSR para. 6.

Petitioner was sentenced several months after this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005). His PSR calculated a sentencing range of 46 to 57 months of imprisonment under the advisory Sentencing Guidelines. PSR para. 84. Under 18 U.S.C. 2252A(b)(1) (Supp. IV 2004), however, a first-time offender who knowingly receives child pornography "shall be fined under this title and imprisoned not less than 5 years and not more than 20 years." Accordingly, the statutory minimum sentence of five years became the guideline sentence. *Id.* paras. 83, 85 (citing United States Sentencing Guidelines § 5G1.1(b) (Guidelines)). The PSR stated that "[p]robation is not authorized as the statute sets a mandatory minimum sentence of five years, therefore, the statute expressly precludes a sentence of probation. *Id.* para. 89 (citing 18 U.S.C. 3561(a)(2)).

Before the district court, petitioner asked for a sentence of probation, arguing that he had not paid anyone for the images he downloaded. PSR Addendum 1; Pet. 4. The court held that the mandatory minimum sentence of five years, set forth in 18 U.S.C. 2252A(b)(1) (Supp. IV 2004), prohibited a sentence of probation. Pet. App. 3a. The court also denied petitioner's motion for release pending appeal, explaining that "[c]learly, the reason

why I'm doing this is because * * * if there was not a mandatory minimum, I would be giving him some time in any event, I would not be giving him probation without time. So he might as well start serving his time." E.R. 20-21.

2. On appeal, petitioner argued that he was eligible for a sentence of probation because his offense did not satisfy any of the exceptions set forth in Section 3561(a), which provides that:

> A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—
>
> (1) the offense is a Class A or Class B felony and the defendant is an individual;
>
> (2) the offense is an offense for which probation has been expressly precluded; or
>
> (3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.

18 U.S.C. 3561(a). Because petitioner was convicted on only one count of receiving child pornography, a Class C felony, PSR para. 83, subsections (1) and (3) of Section 3561(a) do not preclude a sentence of probation. Petitioner argued that, notwithstanding the five-year statutory minimum sentence, Section 2252A(b)(1) does not "expressly preclude[]" a sentence of probation within the meaning of Section 3561(a)(2), pointing to several criminal statutes that specifically address the availability of probation. See, *e.g.*, 18 U.S.C. 2332b(c)(2) ("Notwithstanding any other provision of law, the court shall not place on probation any person convicted of a violation of this section."). Petitioner conceded that the Sen-

tencing Guidelines do not authorize a sentence of probation for his offense of conviction, compare PSR para. 84 (noting that "the applicable guideline range is in Zone D of the Sentencing Table"), with Guidelines § 5B1.1(a) comment. (n.2) (authorizing parole only when the Guidelines sentencing range falls in Zones A or B), but emphasized that *Booker* had rendered the Sentencing Guidelines advisory.

The court of appeals disagreed, holding that petitioner had committed an offense "for which probation has been expressly precluded" within the meaning of Section 3561(a)(2). Pet. App. 4a. It acknowledged that some criminal statutes preclude probation with more explicit language than Section 2252A. *Id.* at 7a-8a (citing 18 U.S.C. 844(h), 924(c)(1)). It noted, however, that those statutes predated the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 211, 98 Stat. 1837, which created the United States Sentencing Commission and called for the promulgation of federal sentencing guidelines. "By compelling contrast," the court of appeals found, when Section 2252A was amended the Sentencing Guidelines "were in place and were binding on district courts," and precluded probation under these circumstances. Pet. App. 8a.[2] Based on this "chronological legislative context," the court of appeals found it "quite clear[]" that Congress intended to preclude a sentence of parole for receiving child pornography. *Id.* at 8a-9a. Indeed, one of the central aims of the Prosecuto-

[2] Congress enacted Section 2252A(b)(1) in 1996, see Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, § 101(a) [Tit. I, § 121], 110 Stat. 3009-26, and added the five-year mandatory minimum sentence for receiving child pornography in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 103(a)(3)(D), 117 Stat. 653.

rial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, 117 Stat. 650, was to set higher statutory minimum sentences for child pornography offenses and "to remove discretion from sentencing judges to depart downward from the minimum sentence." Pet. App. 9a.

The court of appeals also rejected petitioner's reliance on *United States* v. *Booker*, 543 U.S. 220 (2005). That decision held that the mandatory Sentencing Guidelines violated the Sixth Amendment, but did not question the constitutionality of statutory minimum sentences and rendered the Guidelines advisory only because that remedy was "the one most consistent with congressional intent." Pet. App. 10a (citing *Booker*, 543 U.S. at 244, 246). The court of appeals took a similar approach, finding an "express preclusion of probation" in an attempt to "honor congressional intent in this context." *Id.* at 11a. To do otherwise, the court of appeals recognized, would defy "a clear congressional mandate" and would "subordinate a legitimate legislative action to the law of unintended consequences." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 7-11) that the remedial holding of *United States* v. *Booker*, 543 U.S. 220 (2005), which rendered the Guidelines advisory, permits district courts to impose a sentence of probation instead of a mandatory minimum term of imprisonment required by statute. The court of appeals correctly rejected that argument, and no court of appeals has ruled otherwise. A criminal statute that directs the court to impose a minimum term of imprisonment "expressly preclude[s]" a sentence of probation within the meaning of 18 U.S.C. 3561(a)(2). The advisory Guidelines regime installed by

Booker does not authorize courts to disregard mandatory minimum terms directed by Congress. Further review by this Court is unwarranted.

Petitioner was convicted under Section 2252A(b)(1), which provides that first-time offenders who knowingly receive child pornography "shall be fined under this title and imprisoned not less than 5 years and not more than 20 years." 18 U.S.C. 2252A(b)(1) (Supp. IV 2004). That language expressly precludes a sentence of probation because it provides that the defendant "shall be * * * imprisoned" for at least five years. Under the Sentencing Reform Act of 1984, 18 U.S.C. 3551 *et seq.*, a sentence of imprisonment necessarily precludes a sentence of probation. See 18 U.S.C. 3551(b) (providing that individuals found guilty of an offense "shall be sentenced * * * to" (1) "a term of probation," (2) "a fine," or (3) "a term of imprisonment," and specifying that fines, forfeiture, notice to victims, and restitution may be imposed in addition to the required sentence); 28 U.S.C. 994(a)(1)(A) (directing the Sentencing Commission to promulgate guidelines for use by sentencing courts in "determin[ing] whether to impose a sentence to probation, a fine, or a term of imprisonment"); *Booker*, 543 U.S. at 258 (noting that Section 3551, which "describ[es] authorized sentences as probation, fine, or imprisonment," remains "perfectly valid"); *United States* v. *Granderson*, 511 U.S. 39, 43 n.3 (1994) ("The Sentencing Reform Act of 1984, for the first time, classified probation as a sentence."); Pet. App. 5a.

Petitioner notes (Pet. 6) that several criminal statutes preclude a sentence of probation by literally referring to a prohibition against probation. See, *e.g.*, 21 U.S.C. 841(b)(1)(B) (2000 & Supp. IV 2004) ("Notwithstanding any other provision of law, the court shall not

place on probation or suspend the sentence of any person sentenced under this subparagraph.").[3] He argues that, as a consequence of Section 3561(a), any statute that calls for a mandatory minimum prison term without using comparable language permits a sentence of probation. No court has accepted petitioner's novel theory of Section 3561(a), see Pet. 11 (characterizing the issue as a "question of first impression"), and the court of appeals correctly rejected it. See Pet. App. 11a (declining to construe Section 2252A(b) in a manner that would cause "unintended consequences"). The availability of explicit language that precludes probation does not mean that Congress failed to expressly preclude a sentence of probation in Section 2252A(b)(1), which unequivocally requires a term of imprisonment of at least five years. Many federal criminal statutes impose "mandatory minimum" prison sentences. *Harris* v. *United States*, 536 U.S. 545, 569-570 (2002) (Breyer, J., concurring). In a system that treats imprisonment and probation as mutually exclusive sentences, a mandatory minimum term of imprisonment "expressly" precludes probation within the meaning of Section 3561(a)(2).

By contrasting Section 2252A(b)(1) with other criminal statutes that contain an express statement about probation, petitioner imputes to Congress a conscious decision to permit a sentence of probation as punishment for transporting, producing, receiving, or distributing child pornography. The court of appeals correctly

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[3] Congress has used similar language for offenses involving explosives, 18 U.S.C. 844(h); firearms, 18 U.S.C. 924(c)(1)(D)(i); armor-piercing ammunition, 18 U.S.C. 929(b); and acts of terrorism, 18 U.S.C. 2332b(c)(2); as well as drug import and export offenses, 21 U.S.C. 960(b)(1) (2000 & Supp. IV 2004); and drug offenses within federal prisons, 42 U.S.C. 14052(c).

rejected that suggestion as inconsistent with legislative intent. Pet. App. 9a-10a. One of the central goals of the PROTECT Act, which added the five-year mandatory minimum to Section 2252A, was to limit sentencing courts' discretion to impose light sentences for offenses involving child exploitation. *Id.* at 9a; S. Rep. No. 2, 108th Cong., 1st Sess. 19 (2003) (describing PROTECT Act provisions "designed to increase jail sentences in cases where children are victimized by sexual predators" and to impose "tough, mandatory minimum sentences"); H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 51 (2003) (explaining that the PROTECT Act's "[i]ncreased mandatory minimum sentences are responsive to real problems of excessive leniency in sentencing under existing law"). As the court of appeals recognized (Pet. App. 11a), permitting a sentence of probation for a violation of Section 2252A(a)(2) would contravene "a clear congressional mandate."

Petitioner's reliance (Pet. 7) on *Booker*, 543 U.S. at 245, is misplaced. Petitioner does not invoke the merits holding of *Booker*, *viz.*, that mandatory Sentencing Guidelines violated this Court's "bright-line rule" that, other than a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Cunningham* v. *California*, 127 S. Ct. 856, 868 (2007) (quoting *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000)). Rather, he relies on the remedial holding of *Booker*, *viz.*, that the Guidelines are now "effectively advisory." *Booker*, 543 U.S. at 245. That holding means that, to the extent that the Sentencing Guidelines prohibited sentences of probation otherwise authorized by statute, that limitation is no longer mandatory. But *Booker* had no effect on *statutory* man-

datory minimum sentences or *statutory* preclusions of probation. *Booker* severed only two provisions of the Sentencing Reform Act of 1984: 18 U.S.C. 3553(h) and 3742(c). 543 U.S. at 245. It did not alter independent statutory sentencing provisions. Indeed, even when the Guidelines were mandatory, they did not authorize courts to disregard a statutory minimum term of imprisonment and impose a sentence of probation. The same is true today. See, *e.g.*, *United States* v. *Duncan*, 413 F.3d 680, 683-684 (7th Cir. 2005) (*Booker* had no effect on statutory mandatory minimum sentences and, in ordering resentencing under advisory Guidelines, stating that "the district court still would have no discretion to sentence [the defendant] on the firearm offense to less than the statutory thirty-year minimum"); *United States* v. *Shelton*, 400 F.3d 1325, 1333 n.10 (11th Cir. 2005) (ordering resentencing under advisory Guidelines, but "emphasiz[ing] that the district court was, and still is, bound by the statutory minimums").[4] Because the remedial holding of *Booker* had no effect on statutory mandatory minimums, it did nothing to alter the express statutory preclusion of probation as a sentence for receiving child pornography under Section 2252A(a)(2).

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[4] Congress has authorized district courts to sentence below the statutory minimum in only two circumstances, both expressly set forth in 18 U.S.C. 3553 (2000 & Supp. IV 2004). First, Section 3553(e) grants courts a "[l]imited authority to impose a sentence below a statutory minimum" upon the government's motion, where the defendant has provided "substantial assistance in the investigation or prosecution of another person." 18 U.S.C. 3553(e) (2000 & Supp. IV 2004). Second, Section 3553(f), the so-called "safety valve" provision, directs courts to impose a sentence "without regard to any statutory minimum sentence" for certain drug offenses, provided the defendant satisfies various criminal history and offense conduct requirements. 18 U.S.C. 3353(f).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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