No. 06-1046

In the Supreme Court of the United States

CETEWAYO ASKIA-BRIGGS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether *United States* v. *Booker*, 543 U.S. 220 (2005), announced a new rule under *Teague* v. *Lane*, 489 U.S. 288 (1989).

2. Whether, if *Booker* announced a new rule, it applies retroactively on collateral review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-12a) is not published in the Federal Reporter but is reprinted in 187 Fed. Appx. 540. The opinion of the district court (Pet. App. 13a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2006. A petition for rehearing was denied on October 31, 2006 (Pet. App. 1a). The petition for a writ of certiorari was filed on January 29, 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 Western District of Michigan, petitioner was convicted of conspiring to manufacture cocaine base,

in violation of 21 U.S.C. 846, and of manufacturing cocaine base, in violation of 21 U.S.C. 841(a)(1). Pet. App. 13a. The district court sentenced him to concurrent terms of 240 months of imprisonment on each count of conviction, to be followed by a five-year period of supervised release. *Ibid.* The court of appeals affirmed. *Id.* at 19a-27a.

On March 31, 2003, petitioner moved under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. Pet. 5. On January 7, 2004, the district court denied the motion. Pet. App. 13a-17a. On January 11, 2005, the court of appeals granted a certificate of appealability. *Id.* at 38a-39a. On June 30, 2006, the court of appeals affirmed the denial of petitioner's Section 2255 motion. *Id.* at 2a-12a.

1. On October 19, 1999, police officers arrested petitioner on an outstanding traffic warrant. Pet. App. 19a. After petitioner had been advised of his rights, he admitted to two police officers that he had cooked crack cocaine for two other persons. *Id.* at 20a. Petitioner was indicted on one count of conspiring to manufacture cocaine base, in violation of 21 U.S.C. 846, and one count of manufacturing cocaine base, in violation of 21 U.S.C. 841(a)(1). Pet. App. 20a.

2. On March 20, 2000, a jury found petitioner guilty on both counts. Pet. App. 20a. At trial, the district court instructed the jury that it was not required to find a particular quantity of crack cocaine. *Id.* at 45a. At sentencing, the district court found by a preponderance of the evidence that petitioner's offenses involved at least three kilograms of crack cocaine and that his United States Sentencing Guidelines range, accordingly, was 292-365 months of imprisonment. *Id.* at 42a. In light of this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and out of an "abundance of cau-

tion," the court imposed concurrent sentences of 240 months of imprisonment, the statutory maximum. Pet. App. 42a-43a. See 21 U.S.C. 841 (setting maximum term of imprisonment).

3. Petitioner appealed, and the court of appeals affirmed. Pet. App. 19a-27a. On plain error review, the court of appeals held that the district court had not committed an *Apprendi* error because petitioner's sentence had not exceeded the statutory maximum term of 20 years of imprisonment. *Id.* at 26a-27a. This Court denied review on April 15, 2002. *Id.* at 18a.

4. On March 31, 2003, petitioner filed a Section 2255 motion, claiming that he had received ineffective assistance of counsel because his counsel had not conducted an adequate pretrial investigation and had not advised petitioner of the benefits of pleading guilty. Pet. App. 13a-17a. The district court denied the motion without a hearing. *Id.* at 17a.

5. Petitioner sought a certificate of appealability from the district court on its denial of his Section 2255 motion. The district court denied a certificate of appealability. See 1:03-CV-00215-RHB Docket entry (W.D. Mich. Mar. 16, 2004); C.A. App. 90. On May 5, 2004, petitioner filed a motion in the court of appeals for a certificate of appealability. See 04-1315 Docket entry (6th Cir. May 10, 2004). On July 26, 2004, petitioner filed a motion entitled "Leave to Amend Certificate of Appealability" (Mot.), in which he raised, for the first time in his collateral attack on his conviction, a claim that his sentence was illegal under *Blakely* v. *Washington*, 542 U.S. 296 (2004).[1] On January 11, 2005, the court of ap-

[1] In his motion, petitioner linked (Mot. 3-4) the *Blakely* claim with the *Apprendi* claim that the court of appeals, on direct review, had

peals granted a certificate of appealability on petitioner's ineffective assistance claim and on his *Blakely* claim. Pet. App. 38a-39a.

In his brief on appeal, petitioner reasoned that the intervening decision in *United States* v. *Booker*, 543 U.S. 220 (2005), "govern[ed] *Blakely* claims" and so recharacterized the question in the certificate of appealability as whether *Booker* applies retroactively to cases on collateral review. Pet. C.A. Br. 3 n.1. Because of binding precedent in the Sixth Circuit holding against that view, petitioner's brief did not argue the question but merely preserved petitioner's objection in the event that the binding precedent was reversed. *Ibid*. Accordingly, the government's brief addressed only petitioner's ineffective assistance of counsel claim. See Gov't C.A. Br. 7.

The court of appeals affirmed, holding that petitioner's counsel was not ineffective. Pet. App. 2a-12a. In a footnote noting petitioner's admission that circuit precedent foreclosed his claim that *Booker* should apply retroactively in his case, the court of appeals determined that it "need not further address his challenge to the constitutionality of the guidelines." *Id*. at 3a n.1.

ARGUMENT

Petitioner contends (Pet. 6) that his case presents the question whether this Court's decision in *Booker* is retroactive to cases on collateral review. That question, however, is not properly presented. Even if it were, the courts of appeals all agree that *Booker* is not retroactive, and further review by this Court is not warranted.

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reviewed for plain error, see Pet. App. 26a-27a. Petitioner acknowledged (Mot. 6) that he had not included his *Apprendi* claim in his initial Section 2255 motion.

1. In this Section 2255 proceeding, petitioner raised his sentencing claim for the first time in a supplemental motion for a certificate of appealability in the court of appeals. His original Section 2255 motion in the district court did not challenge his sentencing; petitioner conceded as much in the supplemental motion. See note 1, *supra*. A post-judgment motion raising claims not raised in the original Section 2255 complaint is a second or successive petition. See *Gonzalez* v. *Crosby*, 545 U.S. 524, 531 (2005); see also 28 U.S.C. 2244(b)(2). Because petitioner's supplemental motion was filed in the court of appeals and styled as a request for authorization to raise the new sentencing claim, the motion is best construed as a motion for authorization to file a second or successive petition.[2] See, *e.g.*, *United States* v. *Miles*, 25 Fed. Appx. 773 (10th Cir. 2001); see also 28 U.S.C. 2244(b)(3)(A). A prisoner can file a second or successive collateral petition only if the new claim is based on newly discovered evidence, see 28 U.S.C. 2244(b)(2)(B), 2255 para. 8(1), or if the claim is based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. 2244(b)(2)(A), 2255 para. 8(2). Petitioner's sentencing claim does not satisfy either requirement: it is not based on new evidence, and this

[2] Petitioner's motion should not be construed as a motion to amend his original 2255 complaint because it was filed in the court of appeals, not the district court. See Fed. R. Civ. P. 15. Even if the motion had been filed with the district court, amendment would be untimely. Petitioner had until April 15, 2004—one year from the date that this Court denied his petition for a writ of certiorari (Pet. App. 18a) and his conviction and sentence became final, 28 U.S.C. 2244(d)(1)—to amend his complaint and add new claims, see *Mayle* v. *Felix*, 545 U.S. 644, 650 (2005), but he did not file the motion until July 26, 2004.

Court has not heretofore held *Booker* to be retroactive to cases on collateral review. The court of appeals, accordingly, was without authority to issue the certificate of appealability with respect to petitioner's sentencing claims.[3] See 28 U.S.C. 2244(b)(3)(C).

Even if the court of appeals could have authorized petitioner to file a second or successive application, the district court, not the court of appeals, should have considered petitioner's sentencing claim in the first instance. Until the proper procedures are followed and a proper certificate of appealability has been issued, "federal courts of appeals lack jurisdiction to rule on the merits" of petitioner's sentencing claim. *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003).

2. In any event, petitioner's claim (Pet. 6-26) that *Booker* applies retroactively to his case lacks merit. As the government has explained in its brief in opposition to one of the many petitions raising that same claim, the claim does not warrant this Court's review. See Br. in Opp. at 6-11, *Guzman* v. *United States*, cert. denied, 127 S. Ct. 495 (2006) (No. 06-5662). All of the courts of appeals with criminal jurisdiction have correctly concluded that *Booker* is not retroactive because it is a new rule of criminal procedure and is not a watershed rule, and this Court has denied review in numerous cases raising the issue. There is no reason for a different result here.

Petitioner contends (Pet. 12-15) that review is warranted because the decision of the Supreme Court of

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[3] The government did not waive these procedural objections to petitioner's motion by failing to raise them in the court of appeals. Whether a claim raised on collateral review is second or successive implicates the jurisdiction of the court, see *Burton* v. *Stewart*, 127 S. Ct. 793, 796 (2007), and thus is not subject to waiver. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

Tennessee in *State* v. *Gomez*, 163 S.W.3d 632 (Tenn. 2005), judgment vacated, No. 05-296 (Feb. 20, 2007), is in conflict with the decision of the court of appeals in *Humphress* v. *United States*, 398 F.3d 855 (6th Cir. 2005), on which the court of appeals relied (see Pet. App. 3a n.1) in this case. Petitioner is mistaken. Since the filing of the petition for a writ of certiorari, this Court has vacated the judgment in *Gomez* and remanded the case to the Supreme Court of Tennessee for further consideration in light of *Cunningham* v. *California*, 127 S. Ct. 856, 868-871 (2007). Accordingly, there is now no judgment in *Gomez* that could conflict with *Humphress*. In any event, the question presented in *Gomez* was whether this Court's decision in *Blakely* announced a new rule; the statement in *Gomez*, 163 S.W.3d at 650 n.14, that *Booker* did not announce a new rule was pure dictum.[4]

[4] Contrary to petitioner's suggestion (Pet. 12 n.5), the retroactivity of *Booker* presents distinct issues from the retroactivity of *Blakely*, and resolution of the former question—the only one presented in this case—would be of little help to resolution of the latter. Under *Blakely*, a heightened standard of proof applies to facts that raise the maximum sentence; under *Booker*, because the Guidelines are advisory, no heightened standard of proof applies. The only retroactivity question posed by *Booker* is therefore whether the incremental degree of discretion that federal courts possess under *Booker* warrants treatment of *Booker* as a watershed rule. It clearly does not.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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