No. 05-1257

In the Supreme Court of the United States

TONY M. LISTER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal court of appeals, on review pursuant to *United States* v. *Booker*, 543 U.S. 220 (2005), should treat a sentence within the advisory Sentencing Guidelines range as presumptively reasonable.

2. Whether the district court violated petitioner's Fifth and Sixth Amendment rights by relying on uncharged "relevant conduct" in calculating petitioner's advisory Guidelines range.

3. Whether the district court clearly erred, when calculating petitioner's advisory Guidelines range, by denying petitioner a downward adjustment for acceptance of responsibility.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulations and rule:

Constitution, statutes, regulations and rule—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 432 F.3d 754.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 2005. The petition for a writ of certiorari was filed on March 28, 2006. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Wisconsin, petitioner was convicted of distributing more than five grams of cocaine base, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 405 months of imprisonment, to be followed

by five years of supervised release. Pet. App. 1-2, 7; 12/16/04 Sent. Tr. 16. The court of appeals affirmed. Pet. App. 1-15.

1. In December 2001, a drug-dealer-turned-informant called petitioner and asked to buy one and a half ounces of cocaine base for $1100. That same day, petitioner arranged for the sale and delivery of the drugs. Pet. App. 2; Gov't C.A. Br. 7.

2. In May 2004, a federal grand jury returned an indictment charging petitioner with distributing more than five grams of cocaine base, in violation of 21 U.S.C. 841(a)(1). A superseding indictment also charged petitioner with participating in a drug trafficking conspiracy. In October 2004, pursuant to an agreement with the government, petitioner pleaded guilty to the original distribution charge. Pet. App. 2; Gov't C.A. Br. 7.

3. Meanwhile, in a non-immunized interview with law enforcement agents in May 2004, petitioner admitted to distributing at least 1.8 kilograms of cocaine base during the prior four years. Presentence Investigation Report (PSR) paras. 25-26, 34. He stated that he started producing the drug five years earlier with the help of his "cook," Torrence Sims, who converted each ounce of powder cocaine obtained by petitioner into an ounce of cocaine base or "crack." PSR para. 26. Petitioner admitted that he sold an ounce and a quarter of crack every week for approximately one year, *ibid.*, which the PSR found amounted to more than 1.84 kilograms. PSR para. 34.

4. In preparing the PSR, the Probation Officer, relying principally on petitioner's admissions about his drug trafficking, concluded that petitioner should be held responsible for 1.84 kilograms of cocaine base. PSR paras. 34, 35; see PSR para. 41 (recommending a base

offense level of 38 under the Sentencing Guidelines). The PSR noted that this was "the most conservative estimate," because two of petitioner's confederates—Sims, his "cook" and partner, and Derrick Gosha, another regular customer—attributed far greater quantities of crack to petitioner in interviews with investigators. PSR para. 35; see PSR paras. 16, 32 (Sims admitted that he bought some 4.12 kilograms of crack and an equal amount of cocaine from petitioner between 2001 and 2003); PSR paras. 12, 33 (Gosha reported buying 5.62 kilograms of crack from petitioner between 1999 and 2001).

Based on the drug quantity of 1.84 kilograms of crack, and a three-point reduction in offense level for acceptance of responsibility, the PSR assigned petitioner a total offense level of 35. PSR paras. 47, 48; see Sentencing Guidelines § 3E1.1. Because petitioner had an extensive criminal history—13 previous convictions, including a 1998 conviction for possession with intent to distribute cocaine—and committed the instant offense while on probation for the cocaine conviction, the PSR placed him in criminal history category IV. See PSR paras. 53-69. Those determinations resulted in a Guidelines sentencing range of 235 to 293 months of imprisonment. PSR para. 107.

At sentencing, petitioner's lawyer objected to the drug quantity attributed to petitioner, arguing that petitioner's admissions to investigators involved his drug trafficking before his 1998 cocaine conviction. See Pet. App. 4. In an addendum to the PSR, the Probation Officer disagreed with counsel's interpretation of petitioner's statements. See PSR Add. 7 (noting that, at the May 2004 interview, petitioner said he started producing crack five years earlier, which would have been 1999);

ibid. (petitioner said he sold crack while he was employed at a clothing store, which was between 2000-2002); see also PSR paras. 12, 16, 32-34 (other witnesses corroborated that, between 1999 and 2003, petitioner trafficked in more than 1.84 kilograms of crack).

The district court asked petitioner whether he had read the PSR, his lawyer's objections, and the addendum to the PSR, and petitioner said that he had. See Sent. Tr. 2. The court and petitioner then engaged in the following exchange:

> The Court: And are you in agreement with those challenges which have been made on your behalf?
>
> [Petitioner]: Basically I rely on my lawyer for that, Your Honor.
>
> The Court: Then you don't agree with him, is that what you're saying?
>
> [Petitioner]: Yeah. I basically just rely on him for it.
>
> The Court: Are you accepting the challenges as offered by your lawyer?
>
> [Petitioner]: I basically just rely on him to just—
>
> The Court: Did he tell you that you should not accept his recommendations?
>
> [Counsel]: Well, Your Honor, I'm not going to let my client answer a question that invades attorney-client privilege.

The Court: Well, is he able to make an answer to this?

[Counsel]: He has not been charged with anything that would constitute relevant conduct in this case and he is going to exercise his Fifth Amendment privilege as to those matters.

Id. at 3.

The district court held that the defense objection to the PSR's drug-quantity determination was frivolous, and that petitioner therefore did not merit the three-level Guidelines reduction for acceptance of responsibility. 12/16/04 Sent. Tr. 13-14; see Guidelines § 3E1.1, comment. (n.1(a)) ("[A] defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility."). Without the reduction, petitioner's total offense level under the Guidelines was 38, which resulted in a sentencing range of 324 to 405 months of imprisonment. Pet. App. 6.

The district court sentenced petitioner to 405 months of imprisonment. Pet. App. 1-2, 7. The court stated that, in light of *Blakely* v. *Washington*, 542 U.S. 296 (2004), and the Seventh Circuit's decision in *United States* v. *Booker*, 375 F.3d 508 (2004), aff'd, 543 U.S. 220 (2005), it was imposing the sentence "consistent with the provisions set forth in 18 [U.S.C.] 3553(a)," rather than under the Guidelines. See 12/16/04 Sent. Tr. 5; see also *id.* at 5, 15 (referring to the Guidelines as a "reliable indicator" of an appropriate sentence). The court found that, despite petitioner's prior involvement with the criminal justice system, he "has remained undeterred from participating in new criminal conduct," *id.* at 12-13,

and that a sentence of 405 months is necessary to "achieve the societal interest of punishing and deterring [petitioner] as well as protecting the community." *Id.* at 15. The court further noted that "[t]his is probably the most significant amount of cocaine base that has been brought to this Court's attention for perhaps as long as it can recall and the Court does believe that a most significant sentence is necessary." *Ibid.* The court indicated that, but for the contrary advice of the Guidelines, it would have been inclined to sentence petitioner to the maximum 40-year sentence. *Ibid.*

"[I]n the event the guidelines [were ultimately] determined to be constitutional," 12/16/04 Sent. Tr. 15, the district court also imposed the same term of 405 months of imprisonment as an alternative sentence, which the court determined by treating the Guidelines as mandatory. *Id.* at 15-16.

5. Petitioner appealed his sentence. While the 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 judicial fact-finding 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), 18 U.S.C. 3551 *et seq.* *Booker*, 543 U.S. at 258-265. The first was 18 U.S.C. 3553(b)(1) (Supp. III 2003), 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) (2000 & Supp. III 2003), 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.[1]

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[1] Section 3553(a) provides:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the

The court of appeals rejected all of petitioner's challenges to his sentence. Pet. App. 1-15. The court rejected petitioner's claim that the district court erred in relying on uncharged relevant conduct in calculating petitioner's offense level under the advisory Guidelines. See *id.* at 11 ("*Booker* and its predecessor cases did not limit such judicial factfinding in the sentencing context * * * [but] held that a Sixth Amendment problem arises where the sentence exceeds the statutory maximum of the charged crime or where the term is imposed under a mandatory sentencing scheme.") (citation omitted); *ibid.* (district court properly calculated petitioner's advisory Guidelines range "based upon his guilty plea, relevant conduct, and criminal history * * * [and] then reviewed the § 3553(a) factors to choose a discretionary sentence within that range"). The court of appeals further held that petitioner's due process right to be "sen-

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guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code[;]

* * * * *

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code[;]

* * * * *

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. 3553(a) (2000 & Supp. III 2003).

tenced on the basis of accurate information" was satisfied by the district court's reliance on petitioner's own admissions in calculating his relevant conduct. *Id.* at 14 (citation omitted).

The court of appeals also held that the 405-month sentence imposed by the district court was not unreasonable. The court of appeals first observed that a sentence within a properly calculated Guidelines range is "entitled to a rebuttable presumption of reasonableness" on appellate review. Pet. App. 10 (quoting *United States* v. *Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005)). After reviewing the sentencing transcript, the court of appeals concluded that the district court had adequately considered and justified its sentence based on the Section 3553(a) factors. Pet. App. 11-12. The court of appeals explained that the district court had taken into account petitioner's history with drugs, his failed attempts at rehabilitation, his criminal history, and the quantity of drugs he had admitted distributing, and that the court had reasonably determined that a 405 month sentence was necessary to "achieve the societal interest of punishing and deterring [petitioner] as well as protecting the community." *Id.* at 12 (quoting 12/16/04 Sent. Tr. 15).

Finally, the court of appeals rejected petitioner's claim that the district court erroneously refused to grant him an acceptance-of-responsibility reduction when calculating the sentencing range recommended by the Guidelines. The court of appeals noted that a defendant's guilty plea is typically evidence of his having accepted responsibility, Pet. App. 8, and that a defendant may remain silent about relevant conduct without losing the acceptance-of-responsibility adjustment, *ibid.* The court also noted, however, that a defendant who falsely denies or frivolously contests relevant conduct acts in a

"manner inconsistent with acceptance of responsibility." *Ibid.* (quoting Guidelines § 3E1.1, comment. (n.1(a))). Relying on circuit precedent, the court stated that a defendant may not circumvent that rule by remaining silent and allowing his attorney to make frivolous challenges on his behalf. Pet. App. 8 (citing *United States* v. *Purchess*, 107 F.3d 1261, 1268-1269 (7th Cir. 1997)). Here, the court found, the district court repeatedly questioned petitioner in an attempt to ascertain whether he understood and agreed with his lawyer's factual challenges to the PSR, but "[i]n each response, * * * [petitioner] eschewed a simple answer for what may only be described as an attempt at legal hair-splitting, ultimately frustrating the court's determination." Pet. App. 9; see *id.* at 10 (noting that, given petitioner's level of education, "[h]is reluctance to answer in a straightforward manner * * * may be more readily attributed to conscious choice rather than incomprehension"). The court of appeals therefore concluded that the district court did not commit clear error in finding that petitioner had failed to accept responsibility for his crimes. *Id.* at 10.

ARGUMENT

1. Petitioner contends (Pet. 3-11) that, on review pursuant to *United States* v. *Booker*, 543 U.S. 220 (2005), a federal court of appeals should not treat a sentence within the advisory Sentencing Guidelines range as presumptively reasonable. The court of appeals correctly concluded otherwise, and this Court's review of that conclusion is not warranted.

a. Since *Booker*, several courts of appeals have held that a sentence within a properly calculated Guidelines range is "presumptively reasonable" on appellate re-

view. *E.g.*, *United States* v. *Terrell*, 445 F.3d 1261, 1264-1265 (10th Cir. 2006); *United States* v. *Johnson*, 445 F.3d 339, 341-344 (4th Cir. 2006); *United States* v. *Williams*, 436 F.3d 706, 708 (6th Cir. 2006); *United States* v. *Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States* v. *Tobacco*, 428 F.3d 1148, 1151 (8th Cir. 2005); *United States* v. *Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). Those courts have relied on a variety of reasons, including that the Guidelines (1) incorporate the sentencing objectives found in 18 U.S.C. 3553(a), see, *e.g.*, *Terell*, 445 F.3d at 1265 (noting that "the Guidelines are generally an accurate application of the factors listed in § 3553(a)"); (2) are the product of extensive study and revision, reflecting the considered judgment of experts, Congress, and sentencing judges across the country, see, *e.g.*, *Mykytiuk*, 415 F.3d at 607 ("The Sentencing Guidelines represent at this point eighteen years' worth of careful consideration of the proper sentence for federal offenses."); and (3) yield sentences that are based on comprehensive, individualized fact-finding, see, *e.g.*, *Johnson*, 445 F.3d at 343-344 (observing that fact-finding under the Guidelines is "individualized," "extensive," and "designed to give the sentencing court a comprehensive overview of the defendant").

b. Petitioner contends (Pet. 5-9) that the effect of applying a presumption of reasonableness to a Guidelines sentence is to make the Guidelines effectively mandatory and thus unconstitutional. That is incorrect.

If a sentence within the Guidelines range is treated as presumptively reasonable, "it does not follow that a sentence *outside* the guidelines range [will be] *un*reasonable," *United States* v. *Myers*, 439 F.3d 415, 417 (8th Cir. 2006) (emphasis added), or even that such a sentence will be *presumptively* unreasonable. On the con-

trary, "there is no presumption of *unreasonableness* that attaches to a sentence that varies from the range." *United States* v. *Jordan*, 435 F.3d 693, 698 (7th Cir.), cert. denied, No. 05-10331 (May 15, 2006); accord *United States* v. *Reinhart*, 442 F.3d 857, 864 (5th Cir. 2006); *United States* v. *Foreman*, 436 F.3d 638, 644 (6th Cir. 2006). And it is *that* presumption, not the presumption that a Guidelines sentence is reasonable, that "would transform an 'effectively advisory' system * * * into an effectively mandatory one." *United States* v. *Moreland*, 437 F.3d 424, 433 (4th Cir.) (quoting *Booker*, 543 U.S. at 245), cert. denied, No. 05-10393 (May 15, 2006); see *United States* v. *Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005) ("reasonableness is a range, not a point").

A district court's obligation is to sentence based on consideration of the factors in 18 U.S.C. 3553(a) (2000 & Supp. III 2003). See, *e.g.*, *United States* v. *Dean*, 414 F.3d 725, 729 (7th Cir. 2005). A district court may not impose *any* sentence, whether within or outside the Guidelines range, unless the sentence is supported by those factors. See, *e.g.*, *United States* v. *Duhon*, 440 F.3d 711, 716 (5th Cir. 2006), petition for cert. pending, No. 05-11144 (filed May 18, 2006); *United States* v. *Denton*, 434 F.3d 1104, 1113 (8th Cir. 2006). For that reason, even a sentence within the Guidelines range will not automatically be affirmed as reasonable. See, *e.g.*, *United States* v. *Lazenby*, 439 F.3d 928, 933-934 (8th Cir. 2006) (finding Guidelines sentence unreasonable).

c. Although the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have held that a Guidelines sentence is presumptively reasonable on appellate review, see pp. 10-11, *supra*, the First, Second, Third, and Eleventh Circuits have not. Petitioner contends (Pet. 9-11) that this Court should grant review to resolve that

disagreement, but there is no present need for the Court to decide whether a Guidelines sentence should be treated as presumptively reasonable.

First, it is far from clear that the standards employed by the First, Second, Third, and Eleventh Circuits are materially different from a presumption of reasonableness, such that there will be different results in cases with similarly situated defendants. The Eleventh Circuit has said that a Guidelines sentence is "ordinarily" reasonable, *United States* v. *Talley*, 431 F.3d 784, 788 (2005); the Third Circuit has said that a sentence within the Guidelines range is "more likely" to be reasonable than a sentence outside the range, *United States* v. *Cooper*, 437 F.3d 324, 332 (2006); the Second Circuit has said that a Guidelines sentence will be reasonable "in the overwhelming majority of cases," *United States* v. *Fernandez*, 443 F.3d 19, 27 (2006); and the First Circuit has said that the Guidelines "continue * * * to be an important consideration * * * on appeal," *United States* v. *Jiménez-Beltre*, 440 F.3d 514, 518 (2006) (en banc). In each of those cases, moreover, the court of appeals found that the Guidelines sentence at issue was reasonable. See *Fernandez*, 443 F.3d at 34; *Jiménez-Beltre*, 440 F.3d at 519-520; *Cooper*, 437 F.3d at 332; *Talley*, 431 F.3d at 788. Whatever the differences in terminology, therefore, there is universal agreement that a sentence within a properly calculated Guidelines range will usually be reasonable.

Second, *Booker* has been the law for only 16 months, and the courts of appeals are just beginning to evaluate post-*Booker* sentences. Accordingly, even if there were material differences in the standards applied by the courts of appeals in reviewing sentences for unreasonableness, it would be premature for this Court to ad-

dress the issue. The lower courts are still in the early stages of developing and refining the standards governing the imposition and review of post-*Booker* sentences, and, as those courts themselves recognize, those standards are continuing to evolve. See, *e.g.*, *Jiménez-Beltre*, 440 F.3d at 521 (Torruella, J., concurring) ("As the case law develops, the standards we announce today will evolve."); *United States* v. *Castro-Juarez*, 425 F.3d 430, 431 (7th Cir. 2005) (evaluation of the "reasonableness" of a sentence is "a process that continues to evolve in our decisions applying *Booker*"); *United States* v. *Webb*, 403 F.3d 373, 383 (6th Cir. 2005), cert. denied, 126 S. Ct. 1110 (2006) (the meaning of reasonableness and the procedures to be employed by the courts will "evolve on a case-by-case basis").

d. On February 21, 2006, this Court granted a writ of certiorari in *Cunningham* v. *California*, No. 05-6551, to decide whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments. Because the federal Guidelines system is unlike the California sentencing scheme at issue in *Cunningham*, the petition in this case need not be held pending the disposition of that case.

Under California law, the statute defining a criminal offense typically specifies three possible terms of imprisonment: a lower term, a middle term, and an upper term. See *People* v. *Black*, 113 P.3d 534, 538 (Cal. 2005), petition for cert. pending, No. 05-6793 (filed Sept. 28, 2005). California's Determinate Sentencing Law provides that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or

mitigation of the crime," Cal. Penal Code § 1170(b) (West 2004), and a rule issued under the Law provides that a court may impose the upper term "only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation," Cal. R. Ct. 4.420(b) (2006). Aggravating and mitigating circumstances may be established by a preponderance of the evidence, *ibid.*, and, in determining the "relevant facts," the court may consider "the record in the case, the probation officer's report, other reports including * * * statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, * * * and any further evidence introduced at the sentencing hearing," Cal. Penal Code § 1170(b) (West 2004).

Unlike the California law, which is "worded in mandatory language," *Black*, 113 P.3d at 544, the SRA, as modified by *Booker*, is not a determinate sentencing law. The federal Guidelines are "effectively advisory," *Booker*, 543 U.S. at 245, and federal sentences are ultimately based on the factors in 18 U.S.C. 3553(a) (2000 & Supp. III 2003).

2. Petitioner also renews his contention (Pet. 11-17) that the district court violated his constitutional rights by calculating his advisory Guidelines range based on "relevant conduct" that was proved to the court by a preponderance of the evidence. The court of appeals correctly rejected that claim, and it does not warrant further review.

This Court has repeatedly held that a court may, consistent with the Constitution, select a sentence from within a statutory range based on uncharged conduct that has been proved to the court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S.

511, 514-515 (1998) (even if jury convicted defendant of cocaine-only conspiracy, judge may impose higher Guidelines sentence based on finding that defendant's conduct included crack-related activities); *United States* v. *Watts*, 519 U.S. 148, 154-157 (1997) (per curiam) (court may consider conduct constituting an offense of which defendant was acquitted, and application of preponderance standard at sentencing generally satisfies due process) (citing *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-92 (1986)); *Witte* v. *United States*, 515 U.S. 389 (1995) (consideration of "relevant conduct" under the Sentencing Guidelines is not "punishment" for an uncharged offense); *Nichols* v. *United States*, 511 U.S. 738, 747 (1994) ("a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come") (internal quotation marks and citation omitted); *Williams* v. *New York*, 337 U.S. 241, 246 (1949) (courts have traditionally "practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law").[2]

Booker did not disturb that settled precedent. In accordance with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004), *Booker* held that any fact, other than a prior conviction, necessary to support a sentence exceeding "the maximum authorized" by a guilty plea or jury verdict must

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[2] See also 18 U.S.C. 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

be admitted by the defendant or proved to a jury beyond a reasonable doubt. 543 U.S. at 244. By modifying the SRA to make the Sentencing Guidelines advisory, rather than mandatory, however, *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 does not violate the Sixth Amendment. See *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 retain the authority to consider uncharged, relevant conduct proven by a preponderance of the evidence. See *United States* v. *Lauder*, 409 F.3d 1254, 1269 (10th Cir. 2005) ("after *Booker*, it is now universally accepted that judge-found facts by themselves do not violate the Sixth Amendment"); *e.g.*, *United States* v. *Giaquinto*, 441 F.3d 195, 197 (3d Cir. 2006); *Alonzo*, 435 F.3d at 553; *United States* v. *Vaughn*, 430 F.3d 518, 527 (2d Cir. 2005), cert. denied, 126 S. Ct. 1665 (2006); *United States* v. *Price*, 418 F.3d 771, 787-788 (7th Cir. 2005); *United States* v. *Magallanez*, 408 F.3d 672, 684-685 (10th Cir.), cert. denied, 126 S. Ct. 468 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 126 S. Ct. 432 (2005).

Petitioner was sentenced within the 40-year statutory maximum applicable to his crime by a court that did not consider itself bound by the Guidelines and that based petitioner's sentence on the Section 3553(a) factors. The uncharged conduct that the court considered in imposing the sentence was established principally by petitioner's own admissions—which, as the court of appeals found, petitioner "chose not to disavow" or otherwise contradict. Pet. App. 14. The court of appeals correctly concluded that petitioner's sentence accorded with the Constitution, and there is no reason for this Court to revisit that conclusion.

3. Petitioner also argues (Pet. 17-21) that the district court erred, when calculating petitioner's advisory Guidelines range, in denying him credit for acceptance of responsibility. That fact-bound claim does not warrant this Court's review.

The Guidelines provide for a sentencing credit if "the defendant clearly demonstrates acceptance of responsibility for his offense." Sentencing Guidelines § 3E1.1(a). As the court of appeals explained, a guilty plea is typically persuasive evidence of a defendant's acceptance of responsibility, but it does not entitle the defendant to the credit. See Pet. App. 8; Sentencing Guidelines § 3E1.1 comment. (n.3). A defendant who "falsely denies, or frivolously contests, relevant conduct that the court determines to be true" may be found to have acted in a "manner inconsistent with acceptance of responsibility." Pet. App. 8 (quoting Sentencing Guidelines § 3E1.1, comment. (n.1(a))).

A defendant may remain silent about his relevant conduct without forfeiting the acceptance-of-responsibility credit. See Guidelines § 3E1.1, comment. (n.1(a)). But, as the Seventh Circuit has sensibly held, a defen-

dant may not circumvent the Guidelines' limits on the credit by invoking his right to silence while having his lawyer make frivolous challenges on his behalf to the relevant-conduct findings. See *United States* v. *Purchess*, 107 F.3d 1261, 1268-1269 (1997). In accordance with *Purchess*, the district court tried to determine whether petitioner endorsed his lawyer's challenges to the PSR before the court decided whether to grant petitioner the acceptance-of-responsibility credit. See p. 10, *supra*. The court of appeals concluded that petitioner made a "conscious choice" to frustrate that determination by "eschew[ing] a simple answer" to the court's questions and engaging in "legal hair-splitting." Pet. App. 9-10. Based on that conclusion, the court of appeals correctly held that the district court did not clearly err in finding that petitioner had not accepted responsibility. See *Purchess*, 107 F.3d at 1269 (reviewing under clear error standard a finding that the defendant had not accepted responsibility and observing that such a finding is "uniquely suited to the intuition and experience of the district judge"). No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2006