No. 07-226

In the Supreme Court of the United States

SERGIUS A. RINALDI, 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 the district court abused its discretion in concluding that petitioner had not demonstrated a "fair and just reason," Fed. R. Crim. P. 11(d)(2)(B), to warrant withdrawal of his guilty plea before sentence had been pronounced.

2. Whether the imposition of a $500,000 fine, which was above the advisory-Guidelines range but within the statutory maximum, was impermissibly based on judicial factfinding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) appears at 461 F.3d 922. Two relevant earlier decisions of the court of appeals appear at 280 F.3d 1103 and 351 F.3d 285. The orders of the district court denying petitioner's motion to withdraw his guilty plea (Pet. App. A17-A29) and denying petitioner's motion to reconsider that order (Pet. App. A30-A47) appear, respectively, at 246 F. Supp. 2d 992 and 347 F. Supp. 2d 594.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2006. A petition for rehearing was denied on November 6, 2006. 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 guilty plea in the United States District Court for the Central District of Illinois, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341, and obstruction of justice, in violation of 18 U.S.C. 1518. Pet. App. A1. The district court sentenced him to 21 months of imprisonment and imposed a fine of $500,000. *Ibid.* The court of appeals affirmed. *Id.* at A1-A16.

1. Petitioner is an orthodontist with two offices in central Illinois. Pet. App. A2. His patients included wards of the state under the protection of the Illinois Department of Children and Family Services (DCFS) and individuals who received Medicaid assistance through the Illinois Department of Public Aid (IDPA). *Ibid.* From 1994 to 2001, petitioner submitted claims for payment to these two state agencies; some of his claims were for services he had not rendered. *Ibid.*

2. In January 2001, petitioner received a grand jury subpoena for records about his billings, including his original case files and forms for certain patients, appointment books and logs, patient sign-in sheets, and records of cancellations. Pet. App. A2. When those records were not produced, the government presented evidence at a contempt hearing that petitioner had concealed the files and documents after receiving the subpoena, and the petitioner was found to be in contempt and ordered to be imprisoned and fined until the material was produced. *Ibid.* The court of appeals affirmed that ruling. See *In re Grand Jury Proceedings*, 280 F.3d 1103 (7th Cir. 2002).

3. On November 8, 2001, a federal grand jury in the Central District of Illinois indicted petitioner on 13 counts for "executing a scheme to defraud the Medicaid system in the state of Illinois and obstructing justice."

Pet. App. A2. During the course of pretrial discovery, the government provided petitioner with a document entitled "Dental Policy Clarification," which was a policy statement prepared by David Spinner, a contract administrator with the State of Illinois; it stated that a dentist may bill Medicaid for reimbursement under a "bundled fee," or flat-rate system, "whether he sees the patient or not." *Id.* at A9, A42.

In late February 2002, petitioner, with the aid of counsel, entered into a written plea agreement whereby he agreed to plead guilty to one count of mail fraud and one count of obstruction of justice. Pet. App. A2. On March 5, 2002, an amended plea agreement was filed that corrected some typographical errors. *Id.* at A17.

The government thereafter wrote a letter to defense counsel, dated March 5, 2002, explaining that the IDPA

> has disavowed [the Spinner] memorandum and clarified that in all instances, IDPA would deny payment for any claim for orthodontia service when a child is *not* physically present to receive the service. The "final" word on that subject came from Steven Bradley, the head of the Bureau of Comprehensive Health Services for IDPA. According to Mr. Bradley, that has always been the policy of IDPA and [Spinner] is simply wrong.

Pet. App. A9.

Later the same day, petitioner, with the aid of counsel, pleaded guilty at a hearing. Pet. App. A43. During the hearing, the prosecutor, Patrick Hansen, set forth the following factual basis for the plea:

> AUSA Hansen: Were the case to go to trial, your Honor, the Government would show that during the years 1994 through 2001, Sergius Rinaldi was an

> orthodontist practicing from offices in Springfield and Edwardsville, Illinois. Among his clients were wards of the State of Illinois under the protection of the [*sic*] or custody of the Illinois Department of Children and Family Services, DCFS, as well as those receiving Medicaid assistance from the Illinois Department of Public Aid, IDPA. During this period of time, the Defendant would bill DCFS and Medicaid for services regarding these patients which included monthly adjustments to braces. Among the bills submitted to DCFS and IDPA were bills for services he did not perform including several of these monthly adjustments.
>
> The Government's evidence would also include at least two occasions when Dr. Rinaldi billed for putting braces on children which was not done by Rinaldi.

Pet. App. A22-A23. The district court then engaged petitioner in the following colloquy:

> The Court: Very well. Mr. Rinaldi, did you listen closely?
>
> Mr. Rinaldi: Yes, I did.
>
> The Court: Did you understand Mr. Hansen's words?
>
> Mr. Rinaldi: Yes, I did.
>
> The Court: Were you following along as the Court was also following along in paragraph 16 of the amended plea agreement?
>
> Mr. Rinaldi: Yes, I did.

The Court: Do you dispute, disagree with any of the statements made by Mr. Hansen?

Mr. Rinaldi: No.

The Court: Very well. Did you do what Mr. Hansen said you did?

Mr. Rinaldi: Yes.

The Court: Very well. From 1994 through 2001, were you an orthodontist in the Springfield and Edwardsville area, and did you have clients that were DCFS wards and Medicaid patients?

Mr. Rinaldi: Yes, I did.

The Court: As part of your duties as an orthodontist, do you have monthly—did you bill for monthly adjustments for braces?

Mr. Rinaldi: Yes, I did.

The Court: Did you also bill for actual braces being applied?

Mr. Rinaldi: Yes, I did.

The Court: As stated by Mr. Hansen, did you bill —through these two entities, did you bill for work that you did not perform?

Mr. Rinaldi: Yes, I did.

The Court: Specifically as to Count I, did you do the billing as specified, the billing of September 19th, 2000 monthly adjustment for work on August 9, 2000 for a patient with the initials that goes by JB, work that you did not perform?

Mr. Rinaldi: Best of my memory I did, yeah.

> The Court: Very well. That claim would have been submitted through the U.S. mail?
>
> Mr. Rinaldi: Yes.
>
> The Court: That is the ordinary course of your business?
>
> Mr. Rinaldi: Yes, uh-huh.
>
> The Court: Very well. Would you have been paid by a check that would be sent through U.S. mail?
>
> Mr. Rinaldi: Yes.
>
> The Court: And submitted these claims you knew were false, correct, sir?
>
> Mr. Rinaldi: Yes.

Pet. App. A24-A25.

Later in the colloquy, petitioner confirmed his counsel's on-the-record representations that they had reviewed and discussed "in depth," among other things, "the discovery provided by the Government," and "any defenses he may have" to the charges. Pet. App. A27. The court then accepted petitioner's plea. The sentencing hearing was initially scheduled for the June 24, 2002, but was repeatedly deferred.

4. a. On January 29, 2003, before sentencing, petitioner moved to withdraw his guilty plea based upon a two-prong claim of actual innocence. Pet. App. A31. Petitioner principally argued that, at the time of his plea, he was "under the impression that the IDPA only paid for orthodontic procedures on a 'fee for service' basis," meaning that it paid only for services that were "actually performed." *Id.* at A18. Under that view, an orthodontist who "submitted an invoice for services not actually performed would be committing fraud." *Id.* at

A19. Petitioner alleged that after he entered his plea, he "discovered" that he had actually submitted invoices using a bundled-fee, or flat-rate, system, thus allowing him (in his view) to receive payment regardless of whether services had actually been rendered, in which case the submission of claims for services not performed would not necessarily be fraudulent. *Ibid.* Alternatively, petitioner claimed that any mistakes he made in record-keeping and billing were the result of his newly diagnosed, but pre-existing, DSM IV condition of Adult Attention Deficit Disorder (AADD), which he alleged "prevented him from forming the requisite criminal intent at the time of the offenses." *Id.* at A31.

The district court denied petitioner's motion, concluding that his alleged "discoveries" "should have occurred a year ago before [he] took a solemn oath and testified he was guilty of the crimes charged." Pet. App. A19. With respect to the bundled-fee issue, the court held that "the information on which [petitioner] bases his argument was known at the time he entered his guilty plea," *id.* at A20, and thus did not amount to a "fair and just reason" for withdrawing the plea. In particular, the court noted that "there is no allegation that [petitioner] did not know, after practicing for over two decades, how he billed IDPA," that petitioner himself admitted that he possessed the Spinner policy memorandum "at the time he entered his plea," and that "a defendant is not entitled to withdraw his plea merely because he has reevaluated the evidence." *Id.* at A21. In short, petitioner could not "now successfully argue that a new look at evidence, which was available at the time of his guilty plea, is a 'fair and just reason' to withdraw." *Ibid.* Indeed, the court found, petitioner's motion "flies in the face of the testimony he provided at the change of plea

hearing." *Id.* at A22. And, after reviewing those statements, the court concluded that whether petitioner submitted bills using a fee-for-service or bundling-fee arrangement ultimately "makes no difference" in light of his sworn admissions that he "knowingly submitted false claims." *Id.* at A25. The court also rejected petitioner's AADD-based arguments for withdrawal. *Id.* at A26.

b. Petitioner asked the district court to reconsider the denial of his motion to withdraw the guilty plea, and the district court ordered petitioner to undergo a custodial psychological exam to gauge the veracity of his AADD claim. Pet. App. A31-32. Petitioner filed an interlocutory appeal contesting the custodial exam, and on December 1, 2003, the court of appeals reversed the order. See *United States* v. *Rinaldi*, 351 F.3d 285 (7th Cir. 2003). On remand, petitioner consented to a non-custodial psychological examination. Pet. App. A32. A series of expert witnesses submitted reports about petitioner's mental capacity to form the requisite intent to submit fraudulent bills and obstruct justice. *Ibid.*

After reviewing the reports and the entirety of the record, the district court issued an order on December 9, 2004, denying petitioner's motion to reconsider. Pet. App. A30-A47. The court held that the presence of the AADD symptoms did not deprive petitioner of the capacity to form the requisite mens rea. *Id.* at A34-A40. The court also adhered to its prior finding that the bundled-fee issue did not amount to new evidence justifying a withdrawal of the plea. *Id.* at A40-A47. Petitioner filed a motion to reconsider the denial of his motion to reconsider, which also was denied. *Id.* at A54.

5. Before sentencing, the Probation Office prepared a presentence investigation report (PSR). As relevant here, the PSR calculated a combined adjusted offense

level of 14, which included an adjustment based on the amount of loss. PSR ¶ 26; Sentencing Guidelines § 2B1.1(b)(1)(C). When combined with a criminal history category of I, petitioner's range of imprisonment under the Sentencing Guidelines was 15 to 21 months. PSR ¶ 71.

Relying on a statement of net worth executed and submitted by petitioner that demonstrated total assets exceeding $2.37 million (PSR ¶ 66), the PSR concluded that petitioner had "the ability to pay a fine." PSR ¶ 69. With an offense level of 14, the PSR noted that petitioner's fine range under the Guidelines was $4000 to $40,000, see PSR ¶ 82; Sentencing Guidelines § 5E1.2(c)(3), but that the statute authorized a maximum fine of $250,000 per count, see PSR ¶ 79; 18 U.S.C. 3571(b)(3).

6. The sentencing hearing was held over the course of three days in October 2005. Pet. App. A5. Both sides filed sentencing memoranda and, at the hearing, they "represented their evidence submitted in consideration of the motion to reconsider [petitioner's] motion to withdraw his guilty plea," including factual testimony about his "having removed records from his office after receiving the government subpoena," and expert testimony about his ability to form criminal intent. *Id.* at A5-A6. In addition, Spinner himself testified that the policy statement he had prepared was "an erroneous interpretation" of an internal manual, that it was produced "only in response to the government's discovery request," that it "was never distributed to dental providers during the period in which [petitioner] perpetrated his fraud," and that "it was disavowed by [Spinner's] superiors within a month of its being offered to the government." *Id.* at A9.

The district court concluded that the disavowed Spinner memorandum was "irrelevant" and emphasized that the bundled-fee issue was "never discussed prior to, or during, the time of the fraud." Pet. App. A10. In calculating petitioner's sentence, it adopted the recommendations of the PSR and found an offense level of 14, with a criminal history category of I, yielding an advisory-Guidelines range of 15 to 21 months of imprisonment. *Id.* at A58. After examining the factors in 18 U.S.C. 3553(a) (Supp. V 2005), the court rejected both parties' requests for departures from that range, and sentenced petitioner to 21 months of imprisonment. Pet. App. A58-A63.

The court also concluded that, "[b]ased upon [petitioner's] financial profile, it appears that he does have the ability to pay a fine," 10/18/05 Sent. Tr. 692, and it ordered petitioner to pay a "fine of $500,000, being $250,000 on each" of the two counts of conviction. Pet. App. A63-A64. The court explained that, in its view, petitioner committed "a terrible crime against the people of Illinois" by "bilk[ing] the taxpayers out of a tremendous amount of money." *Id.* at A15. At the sentencing hearing, the court expressed concern about whether the sentence would serve as an adequate deterrent, and its postsentencing opinion emphasized that, "pursuant to 18 U.S.C. 3553(a)(6), a fine within [the Guidelines range] would not adequately reflect the seriousness of the offense or provide just punishment for the offense." Pet. App. A15-A16, A64. Petitioner did not object to the fine.

7. The court of appeals affirmed. Pet. App. A1-A16. The court began by emphasizing that, because petitioner's guilty plea had been accepted by the court, "withdrawal was available only upon his showing of a

'fair and just reason' to do so." *Id.* at A6-A7 (quoting Fed. R. Crim. P. 11(d)(2)(B)). The court emphasized that "[g]uilty pleas are not to be treated as a strategic maneuver by the parties, and we presume the verity of the defendant's statements made at a Rule 11 colloquy." *Id.* at A7. The court also explained that the district court's factual findings about the adequacy of petitioner's grounds for seeking to withdraw his plea were to be examined "for clear error." *Ibid.* Applying these standards, the court found that the district court had not abused its discretion in denying petitioner's motion to withdraw his plea. *Id.* at A8 ("Given the weight of the evidence from the medical experts, we cannot find that the district court clearly erred in holding that [petitioner] failed to present credible evidence of being incapable to form the specific intent necessary to carry out [the] crimes as charged."); *id.* at A10 ("[W]e are definitively not persuaded that the district court made a mistake in its evidentiary findings on either of [petitioner's] claims to demonstrate a fair and just reason to withdraw his plea.").

The court of appeals also affirmed the imposition of the $500,000 fine.[1] The court observed that, because the fine "was more than twelve times the Guidelines suggestion, * * * the district court's reasons must be particularly compelling" to render it reasonable. Pet. App. A15; see *id.* at A13 ("The greater the divergence, the greater the justification we seek to aid our review."). The court of appeals found that the district court's oral

[1] As an initial matter, the court of appeals rejected petitioner's argument that the district court incorrectly adopted the findings in the PSR, noting that "it is well settled Circuit case law that such findings need be made by a preponderance of the evidence only, not beyond a reasonable doubt." Pet. App. A13 n.1.

and written statements in support of the fine "evidenced [the district court's] open concern for the magnitude of [petitioner's] fraud, the difficulty encountered in ascertaining the full extent of the impact—the fault for which lay with [petitioner's] admitted obstruction of justice—and the possibility that [petitioner] may have benefitted from that obstruction." *Id.* at A16. The court thus upheld the fine as reasonable. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 9-16) that the court of appeals erred in concluding that the district court did not abuse its discretion in denying petitioner's motion to withdraw his guilty plea. Petitioner asserts that he is "legally innocent" (Pet. 14) of the mail-fraud charge because his claims for reimbursement were not fraudulent by virtue of his bundled-fee arrangement. The court of appeals correctly rejected that fact-bound contention, and further review of that case-specific holding is not warranted. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a [writ of] certiorari to review evidence and discuss specific facts.").

Petitioner does not dispute (Pet. 14) that a defendant who seeks to withdraw his guilty plea before sentencing must demonstrate a "fair and just reason." Fed. R. Crim. P. 11(d)(2)(B). And petitioner is correct (Pet. 14) that, as a general matter, the Seventh Circuit has recognized that "[b]eing legally innocent of a crime is a fair and just reason to withdraw a guilty plea," but it has also cautioned that "a blanket claim of innocence does

not mandate the court to allow the defendant to withdraw his plea" unless that claim is "supported by credible evidence." *United States* v. *Gomez-Orozco*, 188 F.3d 422, 425 (1999).

In this case, petitioner simply contends that the lower courts erred in concluding that one of the specific reasons he advanced in support of his request—the nature of his billing arrangement—was not credible. Petitioner is mistaken. Indeed, as the district court itself recognized, the nature of the billing arrangement was "irrelevant" in light of the fact that it had never been discussed before or during the fraud. Pet. App. A10. Given petitioner's sworn admissions that he knowingly submitted false claims, the undisputed fact that he had a copy of the now-repudiated Spinner memorandum before he pleaded guilty, and the fact that he discussed all possible defenses with counsel before pleading guilty, the district court acted well within its broad discretion in refusing to allow petitioner to second-guess his decision to plead guilty.

2. Petitioner contends (Pet. 16-21) that the court of appeals erred in upholding the district court's imposition of a $500,000 fine because, in petitioner's view, the imposition of a fine beyond the Guidelines range is invalid when it is "based on facts found and determined by the sentencing court," Pet. 21, rather than facts "found by the jury beyond a reasonable doubt." Pet. 18. Petitioner is incorrect.

Relying on *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004), this Court held in *United States* v. *Booker*, 543 U.S. 220 (2005), that the mandatory federal sentencing guidelines implicated the rule 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 be admitted by the defendant or proved to a jury beyond a reasonable doubt. *Id.* at 244. By making the Sentencing Guidelines advisory rather than mandatory, however, *id.* at 245, *Booker* remedied the constitutional problem presented by the Guidelines. Now, the maximum sentence authorized by a defendant's guilty plea or the jury's verdict in federal criminal cases is the *statutory* maximum for the offense. Thus, under *Booker*, as long as the sentencing judge imposes a sentence within the statutory range, basing the sentence on judge-found facts is constitutionally permissible. Accordingly, to the extent petitioner contends that the imposition of an above-Guidelines fine on each count violated his Sixth Amendment rights, see Pet. 16-18, his argument misapprehends *Booker* and the advisory status of the Sentencing Guidelines.[2]

Petitioner notes (Pet. 18) that the court of appeals, in accordance with *Booker*, reviewed his fine for substantive reasonableness, and that, because the fine exceeded the advisory-Guidelines range, the court of appeals applied its rule of proportionality—that is, that "[t]he greater the divergence [from the Guidelines range], the greater the justification we seek to aid our review." Pet. App. A13; see Pet. 18. Petitioner, however, does not

[2] Although petitioner is challenging the fine, rather than his term of imprisonment, because *Booker* rendered "the whole of the Guidelines advisory, it stands to reason that the Guidelines' fine requirements were likewise rendered advisory." *United States* v. *Rattoballi*, 452 F.3d 127, 139 (2d Cir. 2006); see also *United States* v. *Riley*, 493 F.3d 803, 811 (7th Cir. 2007) (affirming the district court's order imposing a fine below the advisory-Guidelines range); *United States* v. *Huber*, 404 F.3d 1047, 1063 (8th Cir. 2005) (recognizing that, in the wake of *Booker*, district courts may deviate from the Guidelines range in imposing a fine).

challenge that proportionality principle, nor does he appear to challenge the court of appeals' determination (Pet. App. A15) that the district court had given "particularly compelling" reasons for its decision to impose a fine above the advisory-Guidelines range. There is, accordingly, no reason for the Court to hold this petition pending its decision in *Gall* v. *United States*, No. 06-7949 (argued Oct. 2, 2007), in which this Court is considering a defendant's challenge to the proportionality principle. In addition to petitioner's failure to raise such a claim below or in this Court, *Gall* is unlikely to assist petitioner even if the defendant prevails in that case. Here, petitioner benefitted from the proportionality principle because it required the fine to be justified by "compelling" reasons. Any holding in *Gall* extending greater deference to a district court to sentence outside the Guidelines range, as the defendant in *Gall* argues should be the case, would not help petitioner. And the court of appeals' fact-bound ruling that the reasons for the fine were "particularly compelling" is correct and does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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