No. 07-1154

In the Supreme Court of the United States

STEPHEN DALE MCCLELLAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court violated petitioner's Sixth Amendment rights by finding facts, by the preponderance of the evidence, that increased petitioner's advisory Sentencing Guidelines range.

2. Whether the court of appeals properly reviewed petitioner's sentence for reasonableness.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not published in the *Federal Reporter* but is reprinted in 257 Fed. Appx. 654.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2007. The petition for a writ of certiorari was filed on March 10, 2008. 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 North Carolina, petitioner was convicted of conspiracy to possess in excess of 1.5 kilograms of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 841 (2000 & Supp.

V 2005) and 18 U.S.C. 846. He was sentenced to 36 months of imprisonment, to be followed by three years of supervised release. Pet. App. A2, A10, A12. In an alternative judgment, petitioner was sentenced to 121 months of imprisonment, to be followed by three years of supervised release. *Id.* at A23, A25. The court of appeals remanded for resentencing in accordance with the alternative judgment. *Id.* at A1-A5.

1. Petitioner, along with six others, was charged with conspiracy to possess in excess of 1.5 kilograms of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. 841 (2000 & Supp. V 2005) and 18 U.S.C. 846. Pet. App. A2. At trial, petitioner admitted that he was addicted to methamphetamine and had possessed 20 grams of the illegal drug, but he denied participating in the more extensive conspiracy that government witnesses described. C.A. App. 44-45; Pet. App. A41-A43.

A jury found petitioner guilty; it additionally found by special verdict that the conspiracy involved at least 1.5 kilograms of a substance containing methamphetamine, but that the government did not prove beyond a reasonable doubt that petitioner knew or could have reasonably foreseen that the conspiracy involved that amount. The jury was not asked to make any additional findings as to the amount of drugs attributable to petitioner. *Id.* at A33.

The Presentence Investigation Report (PSR) calculated the base offense level to be 34, based on the 1.5 kilogram drug quantity attributed to the conspiracy. With a criminal history category of I, petitioner's sentencing range under the Guidelines was 151 to 188 months of imprisonment. Pet. App. A33. The district court rejected the PSR calculations and concluded that it could sentence petitioner based only on the 20 gram

drug quantity that petitioner had admitted to possessing. Under that assumption, the base offense level was 20 and the Guidelines sentencing range was 33 to 41 months. The court sentenced petitioner to 36 months of imprisonment. *Id.* at A33-A34.

2. The government appealed and the court of appeals reversed and remanded for resentencing. It held that petitioner's sentence was unreasonable because the district court had failed to calculate the advisory Guidelines range using all methamphetamine amounts properly attributable to petitioner under the advisory Guidelines and thus had imposed sentence as the result of an incorrect application of the Guidelines. Pet. App. A35-A37 & n.*.

3. On remand, the district court entered two amended judgments. One amended judgment reimposed a sentence of 36 months of imprisonment, reflecting an advisory Guidelines range of 33 to 41 months based on the drug quantity that petitioner had admitted. In the district court's view, that was the "correct" range and a 36-month sentence was "reasonable" because a defendant could only be held responsible for a drug quantity that is found by a jury or admitted by the defendant. Pet. App. A52-A54.

The court simultaneously issued an alternative amended judgment that imposed a sentence of 121 months of imprisonment. The court explained that the alternative sentence responded to the court of appeals' "directive for the Court to make its own findings" as to the drug quantity attributable to petitioner. Pet. App. A54. Based on the evidence at trial and as contained in the PSR, the court found that petitioner "knew, understood and foresaw the involvement of the conspiracy in the amount of at least 500 grams [of methamphet-

amine]." *Ibid.* The resulting offense level of 32 produced an advisory Guidelines range of 121 to 151 months, which the court concluded "provide[d] an appropriate window for the imposition of a reasonable sentence." *Id.* at A55.

The court made clear that, in imposing the alternative sentence of 121 months of imprisonment, it had considered the factors in 18 U.S.C. 3553(a) (2000 & Supp. V 2005):

> So, there are two judgments. The first will be imposing the original judgment. The alternative judgment, if the Court [of Appeals] finds that I have the authority to find facts by a preponderance of the evidence. Having sat at the trial and reviewed the papers filed in the case, the Court, by a preponderance of the evidence determines that an appropriate amount was 500 grams and imposed the alternative judgment * * * on the basis of offense level 32, and then taking again into consideration [*United States* v.] *Booker*, [543 U.S. 220 (2005),] the fact that the Guidelines are no longer mandatory, and 3553(a).

Pet. App. A55-A56.

4. The government appealed the amended judgment imposing a sentence of 36 months of imprisonment. The court of appeals held that, under the Fourth Circuit's post-*Booker* precedent, the district court was required to make findings on drug quantity in applying the advisory Guidelines. Pet. App. A4. It reasoned that "a district court does not violate the Sixth Amendment by making factual findings as to drug quantity by a preponderance of the evidence as long as the fact-finding does not enhance the sentence beyond the maximum term specified in the substantive statute." *Ibid.* Accordingly,

it vacated the amended judgment and remanded for resentencing "in accordance with the district court's alternative amended judgment." *Ibid.* On remand, the district court resentenced petitioner to 121 months of imprisonment. 1:04-cr-0074-LHT-DLH-5 Docket entry No. 223 (W.D. N.C. Jan. 8, 2008).

ARGUMENT

Petitioner contends (Pet. 9-12) that the court of appeals violated his Sixth Amendment rights when it remanded with instructions to impose an alternative sentence based on judicial factual findings that increased his advisory Sentencing Guidelines range. He also contends (Pet. 12-17) that the court of appeals' review for reasonableness was inconsistent with this Court's decision in *Gall* v. *United States*, 128 S. Ct. 586 (2007), and that its remand instructing the district court to impose the alternative amended judgment denied the district court the opportunity to consider whether an out-of-Guidelines sentence was warranted in light of the factors in 18 U.S.C. 3553(a) (2000 & Supp. V 2005). Those contentions are without merit, and further review is not warranted.[1]

1. a. Petitioner was sentenced under advisory Guidelines in accordance with *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* held that any fact (other than a prior conviction) necessary to support a sentence ex-

[1] This petition for a writ of certiorari is technically interlocutory, because it seeks review of the court of appeals' remand to the district court for resentencing. Ordinarily, the interlocutory posture of a case "of itself alone furnishe[s] sufficient ground for the denial" of a petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Here, however, the scope of the remand was limited to the ministerial task of imposing the specific sentence dictated by the court of appeals.

ceeding 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 severing provisions of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1987, to make the Guidelines advisory rather than mandatory, *Booker* remedied the constitutional problem presented by mandatory federal Sentencing Guidelines: the maximum sentence authorized by the jury verdict in federal criminal cases is now the statutory maximum for the offense under the United States Code. As long as the sentence imposed does not exceed that statutory maximum, the court may constitutionally impose sentence based on facts it finds by a preponderance of the evidence. See *id.* 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"). Here, the maximum sentence authorized by the jury verdict was 20 years of imprisonment, see 21 U.S.C. 841(b)(1)(C) (Supp. V 2005), more than the 121 months to which petitioner was sentenced.

The Court reaffirmed in *Cunningham* v. *California*, 127 S. Ct. 856, 866 (2007), that "there was no disagreement among the Justices" that judicial fact-finding under advisory Sentencing Guidelines "would not implicate the Sixth Amendment." And, in *Rita* v. *United States*, 127 S. Ct. 2456, 2465-2466 (2007), the Court again confirmed that its "Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." See *id.* at 2467 (noting *Booker*'s recognition that fact-finding by judges does not

implicate the constitutional issues confronted in that case if the Guidelines are not "binding").

Since *Booker*, the courts of appeals have uniformly held that a sentencing judge generally may find, by a preponderance of the evidence, facts relevant to determining the advisory Guidelines range. See, *e.g.*, *United States* v. *Grier*, 475 F.3d 556, 567-568 (3d Cir.) (en banc), cert. denied, 128 S. Ct. 106 (2007); *United States* v. *Kilby*, 443 F.3d 1135, 1140 (9th Cir. 2006); *United States* v. *Garcia*, 439 F.3d 363, 369 (7th Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 525-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Yeje-Cabrera*, 430 F.3d 1, 23 (1st Cir. 2005); *United States* v. *Morris*, 429 F.3d 65, 72 (4th Cir. 2005), cert. denied, 127 S. Ct. 121 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 683-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Yagar*, 404 F.3d 967, 972 (6th Cir. 2005); *United States* v. *Mares*, 402 F.3d 511, 519 & n.6 (5th Cir.), cert. denied, 546 U.S. 828 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005).

b. Petitioner relies on Justice Scalia's statement in *Rita* that the Court's opinion in that case does "not rule out as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea," Pet. 11 (quoting *Rita*, 127 S. Ct. at 2479 (Scalia, J., concurring in part and concurring in the judgment)); see *Gall*, 128 S. Ct. at 602-603 (Scalia, J., concurring). He contends that his Sixth Amendment rights were violated because his sentence "would not be mandated by the Fourth Circuit but for the existence of a judicial finding of drug quantity." Pet. 11-12. As an initial matter, the Fourth Circuit did not "mandate" a particular sentence;

rather, it determined that the district court's alternative sentence reflected a correct application of the Guidelines (taking into account the district court's own drug quantity findings) *and* a correct exercise of discretion under Section 3553(a) and *Booker*. See pp. 4-5, *infra*. The court of appeals did not decree that the quantity findings *required* a higher sentence.

In any event, for the reasons explained above, as long as the sentencing court's legal discretion extends to the maximum established by the United States Code, any such as-applied Sixth Amendment challenge must fail. And even if an as-applied challenge were available, petitioner could not establish that his 121-month sentence would be unreasonable for the drug conspiracy found by the jury. Cf. *Rita*, 127 S. Ct. at 2473 (Stevens, J., concurring). This Court has recently denied review in several cases that involved similar claims, see, *e.g.*, *Bradford* v. *United States*, 128 S. Ct. 1446 (2008); *Alexander* v. *United States*, 128 S. Ct. 1218 (2008), and the same result is warranted here, especially because petitioner did not raise an as-applied challenge to the alternative amended judgment in the court below, and the court of appeals did not address such a challenge in its opinion. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks and citation omitted).

2. a. Petitioner contends (Pet. 12-15) that the court of appeals' decision ordering entry of the alternative judgment was inconsistent with *Gall*, *supra*, because it treated the Guidelines sentence as presumptively correct and failed to assess reasonableness in light of the

Section 3553(a) factors. That argument is without merit for two reasons.

First, petitioner did not cross-appeal the alternative sentence; nor did he challenge the 121-month sentence as unreasonable in his response to the government's appeal. As a result, the court of appeals was asked neither whether the 121-month sentence was reasonable nor whether the district court adequately addressed the Section 3553(a) factors. Instead, the court of appeals considered only the question raised in the government's appeal and correctly held that the district court erred in failing to make a judicial finding of drug quantity in sentencing petitioner to 36 months of imprisonment.

Second, petitioner's reliance on *Gall* is misplaced because the alternative 121-month sentence was within, not outside, the properly calculated Guidelines range. To the extent that the court of appeals treated that Guidelines sentence as "presumptively correct," Pet. 15, this Court's decision in *Rita* establishes that an appellate court may do so consistent with the Sixth Amendment. 127 S. Ct. at 2465 ("[T]he courts of appeals' 'reasonableness' presumption * * * simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable.").

b. Finally, petitioner contends that the court of appeals "ordered the district court to impose a guideline sentence to the exclusion of all other factors." Pet. 17. The district court, however, recognized its authority to impose an out-of-Guidelines sentence and stated that it had "considered the factors noted in 18 U.S.C. § 3553(a)." Pet. App. A55. "[T]aking * * * into consideration *Booker*, the fact that the Guidelines are no lon-

ger mandatory, and 3553(a)," *id.* at A56, the district court concluded that the Guidelines range of 121-151 months "provide[d] an appropriate window for the imposition of a reasonable sentence." *Id.* at A55. See *Rita*, 127 S. Ct. 2468 ("[W]hen a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical.").

The district court made clear that, if the court of appeals determined that the district court had the authority to sentence petitioner based on judicial findings of drug quantity, then the alternative sentence should be imposed. Pet. App. A55-A56 ("So, there are two judgments. The first will be imposing the original judgment. The alternative judgment, if the Court [of Appeals] finds that I have the authority to find facts by a preponderance of the evidence."). Under those circumstances, the court of appeals properly ordered the district court to resentence petitioner to the alternative sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2008