

No. 05-10634

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR MANUEL GUZMAN-BALBUENA, 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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QUESTION PRESENTED

Whether the court of appeals erred in ruling that petitioner's sentence, which was within the advisory Sentencing Guidelines range, was reasonable.

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OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2006. The petition for a writ of certiorari was filed on April 24, 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 Virginia, petitioner was convicted of

illegal reentry after deportation, in violation of 8 U.S.C. 1326. He was sentenced to 70 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed petitioner's sentence. Pet. App. 1a-3a.

1. Petitioner is a native of Mexico. He has illegally reentered the United States on at least three occasions, after having been deported to Mexico in May 1995, September 1997, and June 2002. Gov't C.A. Br. 2-3. Before the third deportation, he was convicted in state court of distributing cocaine and sentenced to 52 months of imprisonment. Id. at 3; C.A. App. 95. Petitioner was most recently discovered in this country in April 2004, in a jail in Culpeper County, Virginia. Gov't C.A. Br. 3.

2. In August 2004, a federal grand jury in the Western District of Virginia charged petitioner with illegal reentry after deportation. He pleaded guilty to the charge. Gov't C.A. Br. 3-4.

3. The Presentence Investigation Report (PSR) determined that petitioner's total offense level was 21, based on a base offense level of 8, a 16-level increase for his cocaine distribution conviction, and a 3-level decrease for acceptance of responsibility. PSR ¶¶ 9-18; see Sentencing Guidelines §§ 2L1.2(a), (b)(1)(A), 3E1.1. The PSR also determined that petitioner had 11 criminal history points (because he had eight prior convictions and committed the offense of conviction less than two years after release from prison), which placed him in criminal

history category V. PSR ¶¶ 20-33; see Sentencing Guidelines §§ 4A1.1(a)-(e). His resulting Sentencing Guidelines range was 70 to 87 months of imprisonment. PSR ¶ 51.

4. Petitioner did not object to the PSR's calculations, and, at a sentencing hearing on January 12, 2005, he asked to be sentenced at the low end of the Guidelines range. See C.A. App. 39, 41-42; see also id. at 42 ("we're not asking to depart downward"). The district court, finding "nothing overly remarkable" about petitioner or his offense, adopted the findings in the PSR and sentenced petitioner to 70 months of imprisonment. Id. at 43.

That same day, unbeknownst to either counsel at the time of the hearing, 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), 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 (citations omitted). The Court also severed the appellate-review standards in 18 U.S.C. 3742(e), 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)." Booker, 543 U.S. at 261.¹

¹ Section 3553(a) provides as follows:

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

Two weeks after petitioner's initial sentencing, the district court, at petitioner's request, held a hearing to "reconsider the matter * * * under the new advisory framework." C.A. App. 64. The court again adopted the findings in the PSR, id. at 66-67, and, after argument and in consideration of the post-Booker advisory Guidelines, resentenced petitioner to 70 months of imprisonment. Id. at 68-75. The court noted that it could "consider a wider variety" of factors than it could have considered before Booker, id. at 73, but it found that a 70-month sentence was still appropriate in light of petitioner's persistent recidivism. See id. at 74-75 (noting that petitioner has illegally reentered three different times: "you keep repeating the same criminal behavior";

the applicable category of defendant as set forth in the 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.

"we haven't been able to deter you"; "you need to be punished for past transgressions * * * you've violated the law, and you've done so repeatedly").

5. In an unpublished, per curiam opinion, the court of appeals affirmed petitioner's sentence as reasonable. Pet. App. 1a-3a. The court explained that the district court "imposed a sentence within the advisory guideline range and below the statutory maximum for the offense and considered the relevant factors under [18 U.S.C.] § 3553." Pet. App. 3a. The court further explained that petitioner had "identifie[d] no persuasive reason why the sentence imposed was not reasonable." Ibid.

ARGUMENT

Petitioner contends (Pet. 8-21) 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. That claim lacks merit and does not warrant this Court's review.

1. As an initial matter, this case is not an appropriate vehicle to decide the issue pressed by petitioner, because the court of appeals' unpublished, per curiam opinion did not apply a presumption of reasonableness in affirming petitioner's sentence. See Pet. App. 1a-2a. Indeed, petitioner himself concedes that the court did "not explicitly rely on the presumption." Pet. 8. As petitioner acknowledges, the Fourth Circuit first adopted the

presumption approach in United States v. Green, 436 F.3d 449, 457, cert. denied, 126 S. Ct. 2309 (2006), which was decided two weeks after the court of appeals issued its decision in petitioner's case.

2. Since Booker, several courts of appeals (including the Fourth Circuit) have held that a sentence within a properly calculated Guidelines range is presumptively reasonable on appellate review. 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., Terrell, 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 344 (observing that fact-finding under the Guidelines is “individualized,” “extensive,” and “designed to give the sentencing court a comprehensive overview of the defendant”).

3. Petitioner contends (Pet. 17-18) that it is inconsistent with Booker for a court of appeals to accord a Guidelines sentence a presumption of reasonableness. On the contrary, nothing in Booker suggests that it is inappropriate for a court of appeals to treat a sentence within the advisory Guidelines range as presumptively reasonable on appellate review. The Court in Booker expressly stated that, after its decision, the Sentencing Commission will “remain[] in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.” 543 U.S. at 264. “The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing,” and “[t]he courts of appeals [will] review [those] sentencing decisions for reasonableness.” Ibid. Thus, the Court explained, the Guidelines will “promote uniformity in the sentencing process” and “help[] to avoid excessive sentencing disparities.” Id. at 263-264. Given Booker’s recognition of the important role of the Guidelines in fostering uniformity and of the function of appellate review in “tend[ing] to iron out sentencing differences,” id. at 263, it is entirely in

keeping with Booker to assume that a sentence within the Guidelines range is reasonable and to require a party challenging such a sentence to demonstrate why it is not.

4. Petitioner further contends (Pet. 18-19) that the effect of applying a presumption of reasonableness to a Guidelines sentence is to make the Guidelines effectively mandatory, and thus unconstitutional. That contention also lacks merit.

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] unreasonable," 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 contrary, "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, 126 S. Ct. 2050 (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, 126 S. Ct. 2054 (2006).

A district court's obligation is to sentence based on consideration of the factors in 18 U.S.C. 3553(a). See, e.g., United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005). A 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).

5. Petitioner also contends (Pet. 19-21) that applying a presumption of reasonableness violates the SRA by according greater weight to the Guidelines than to the other sentencing factors listed in Section 3553(a). Nothing in the SRA, however, states that each of those factors must be given equal weight or prohibits courts from giving substantial weight to the Guidelines. On the contrary, giving the Guidelines substantial weight fully accords with Section 3553(a). The sentences recommended by the Guidelines themselves take into account the range of factors that Section 3553(a) requires courts to consider in imposing sentence. Section 991(b) of Title 28 of the United States Code expressly requires the Sentencing Commission, when formulating the Guidelines, to take

into account the factors listed in Section 3553(a)(2). See 28 U.S.C. 991(b)(1)(A). And other provisions of the SRA effectively require the Commission to consider the remaining factors.² As the First Circuit has explained, “the guidelines cannot be called just ‘another factor’ in the statutory list,” because “they are the only integration of the multiple factors” in Section 3553(a). United States v. Jiménez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (en banc); see United States v. Shelton, 400 F.3d 1325, 1332 n.9 (11th Cir. 2005) (“[T]he factors the Sentencing Commission was required to use in developing the Guidelines are a virtual mirror image of the factors sentencing courts are required to consider under Booker and § 3553(a).”); United States v. Buchanan, 449 F.3d 731, 735–736 (6th Cir. 2006) (Sutton, J., concurring) (noting that Congress directed the Commission “to consider many of the same factors (if not effectively all of the same factors) in developing sentencing guidelines that § 3553(a) directs sentencing courts to consider”).

² Compare 28 U.S.C. 994(c) (requiring the Commission to consider the circumstances of the offense in formulating the Guidelines) and 28 U.S.C. 994(d) and (e) (requiring the Commission to consider various offender characteristics in formulating the Guidelines) with 18 U.S.C. 3553(a)(1) (requiring sentencing judges to consider “the nature and circumstances of the offense and the history and characteristics of the defendant”); compare also 28 U.S.C. 991(b)(1)(B) (requiring the Commission to establish sentencing practices and policies that “avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct”) with 18 U.S.C. 3553(a)(6) (requiring sentencing judges to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”).

Moreover, Section 3553(a)(6) requires sentencing courts to strive to avoid unwarranted sentencing disparities, and "the guideline range * * * is the principal means of complying with" that goal. United States v. Smith, 445 F.3d 1, 6 (1st Cir. 2006). If courts do not anchor their analysis to the Guidelines sentencing ranges, then it is difficult to see how they can comply with the command of Section 3553(a)(6).

6. Although the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have held that a Guidelines sentence is presumptively reasonable, see p. 7, supra, the First, Second, Third, and Eleventh Circuits have not. Petitioner contends (Pet. 14-16) that this Court should grant review to resolve the disagreement, but there is no present need for the Court to resolve any tension that may exist among the courts of appeals on the issue.

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 (2d Cir. 2006); and the First Circuit has said that the Guidelines "continue * * * to be an important consideration * * * on appeal," Jiménez-Beltre, 440 F.3d at 518. 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 17 months, and the courts of appeals have just begun to evaluate post-Booker sentences. Accordingly, even if there were material differences among the standards applied by the courts of appeals in reviewing sentences for unreasonableness, it would be premature for this Court to address 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 the 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) (the meaning of reasonableness and the procedures to be employed by the courts will "evolve on a case-by-case basis"), cert. denied, 126 S. Ct. 1110 (2006).

7. 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 violates the Sixth and Fourteenth Amendments by permitting sentencing judges to impose enhanced sentences based on facts not found by the jury or admitted by the defendant. The petition in this case need not be held pending the disposition of Cunningham, however, because the federal Guidelines system is unlike the California sentencing scheme.

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), 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). 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 * * * and 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).

Unlike the California law, which is "worded in mandatory language," Black, 113 P.3d at 544, the Sentencing Reform Act, 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).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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