

No. 05-10634

IN THE
SUPREME COURT OF THE UNITED STATES

VICTOR MANUEL GUZMAN-BALBUENA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioner, Victor Manuel Guzman-Balbuena, respectfully submits this reply brief pursuant to Supreme Court Rules 15.6 and 33.2(b), and requests that a writ of certiorari issue to review the judgment below. In the alternative, he requests that the petition be held pending the Court's decision in *Cunningham v. California*, No. 05-6551.

ARGUMENT

1. The government first asserts that Petitioner's case is not an appropriate one in which to address the legality of the presumption of reasonableness. Gov't Br.

at 6. While Petitioner has acknowledged that the court of appeals did not explicitly state that it was employing the presumption of reasonableness to affirm his sentence, the court certainly did so implicitly, as is clear both from the language of the court's opinion and from the fact that the court rejected Petitioner's argument that the advisory guideline could not be treated as presumptively reasonable.

2. The government further asserts that consideration by this Court of the legality of the presumption of reasonableness is premature. Gov't Br. at 13, 14. It is not too early. First, of the twelve federal appellate courts that consider criminal sentencing issues, eleven have staked out a position regarding reasonableness. Only the Court of Appeals for the D.C. Circuit has not addressed the issue at all. *See* U.S. Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 27 (Mar. 2006), available at http://www.ussc.gov/booker_report/Booker_Report.pdf. The split is clear. Thus, it is not at all premature to review the issue.

Moreover, to the extent that the government suggests that there may not be any material difference in the formulation of the circuits' various standards, Gov't Br. at 13, it is suggesting that all the circuits to address the issue are treating the advisory guideline range as presumptively reasonable. The possibility that the courts are in agreement, however, does not diminish the importance of the questions presented by this case. To the contrary, if all the circuits employ a presumption that is illegitimate,

that only increases the importance of the issue. Of course, Petitioner disagrees with the government's assertion that there is no material difference in the approaches taken by the various courts of appeals, and certiorari should be granted for this reason as well.

3. While acknowledging that this Court has granted a writ of certiorari in *Cunningham v. California*, No. 05-6551, *cert. granted*, 126 S. Ct. 1329 (Feb. 21, 2006), to address the constitutionality of a presumptive sentencing scheme, the government tries to distinguish the scheme in that case from the federal scheme that took effect as a result of the Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). Its efforts are unavailing.

Under California law as written, the punishment for John Cunningham's offense of conviction was six, nine, or twelve years of imprisonment, with the middle term required absent facts in aggravation or mitigation. The sentencing court found aggravating facts by a preponderance of the evidence and sentenced Cunningham to the upper term of twelve years. Although this sentence appears to be a clear violation of *Blakely v. Washington*, 542 U.S. 296 (2004), the California Court of Appeal affirmed the sentence, relying on *People v. Black*, 113 P.3d 534 (Cal. 2005). In *Black*, the California Supreme Court held that the California system did not violate *Blakely* because, it said, California's sentencing law gave sentencing courts "discretion" to sentence to the lower, middle, or upper term, with the middle term

being “presumptive” and the upper term being the “statutory maximum” for Sixth Amendment purposes. *Id.* at 543-45.

In opposing Cunningham’s petition for a writ of certiorari, the State of California argued that the California system is indistinguishable from the federal sentencing system left in place after *Booker*, in that the presumptive middle sentencing range is functionally equivalent to the “‘reasonableness’ constraint” placed on federal courts by the *Booker* decision. Brief in Opposition of the State of California at 8-9, 10, 2005 WL 3783460 (filed Dec. 12, 2005) (No. 05-6551). Despite the opposition, this Court saw fit to grant Cunningham’s petition for review of California’s presumptive system. Thus, it is clear that the Court deems the constitutionality of a presumption of reasonableness to be worthy of review. Petitioner asks, therefore, that if the Court does not grant his petition for a writ of certiorari, it hold his case pending its decision in *Cunningham*.

4. The heart of the government’s argument in opposition to the petition is that the Sentencing Guidelines already take into account the factors that district courts are required by 18 U.S.C. § 3553(a) to consider in selecting an appropriate sentence in a given case. *See* Gov’t Br. at 7, 8, 10-12. This proposition, upon which the courts adopting the presumption of reasonableness rely, is demonstrably false on several levels.

First, as to the four purposes of sentencing expressed in § 3553(a)(2), *see* Gov’t Br. at 10-11, although Congress directed the Commission to assure that they were met, *see* 28 U.S.C. § 991(b)(1)(A),¹ the original Commission considered only two of them, “just deserts” and “crime control” – and could not agree on which one should predominate. U.S. Sentencing Guidelines Ch. 1, Pt. A(3) (1988). That Commission solved its “philosophical dilemma” by adopting an “empirical approach that uses data estimating the existing sentencing system as a starting point.” *Id.* However, it then did not follow that approach. Instead, it implemented sentences “significantly more severe than past practice” for “the most frequently sentenced offenses in the federal courts,” including fraud, drug trafficking (above what the mandatory minimum laws required), immigration offenses, robbery of an individual, murder, aggravated assault,

¹ According to the Senate Report, Congress did not expect that all four purposes would drive the sentence in every case, but that the guidelines would direct and allow judges to evaluate the importance and effect of the statutory purposes in individual cases. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 77 (1983) (“In setting out the four purposes of sentencing, the Committee has deliberately not shown a preference for one purpose of sentencing over another in the belief that different purposes may play greater or lesser roles in sentencing for different types of offenses committed by different types of defendants. The Committee recognizes that a particular purpose of sentencing may play no role in a particular case. The intent of subsection (a)(2) is to recognize the four purposes that sentencing in general is designed to achieve, and to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case.”); *see also id.* at 59-60 (“[T]he bill sets forth the four basic purposes of criminal sanctions. It requires the Sentencing Commission to consider these purposes in developing sentencing guidelines and policy statements. It further requires sentencing judges to consider them in imposing sentences.”).

and rape. U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (1987); U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 47 (Nov. 2004), available at http://www.ussc.gov/15_year/15year.htm (hereafter *Fifteen Year Report*). Since 1987, the Commission has amended the Guidelines nearly 700 times, only four of which reduced sentence severity.²

Second, as to the Guidelines' incorporation of the remaining factors, Gov't Br. at 11, on their face, the Guidelines simply do not – and cannot – take into account all of the applicable sentencing factors for a given offense. As the Sentencing Commission has said repeatedly, it is not possible to write a single set of guidelines that take into account all factors that are potentially relevant to sentencing decisions. *See* U.S. Sentencing Guidelines, Ch. 1, Pt. A(4)(b) (1988); U.S. Sentencing

² In 2001, the Commission reduced the enhancement for some aggravated felonies in § 2L1.2 from 16 to 12 or 8 levels, *see* U.S.S.G. App. C., amend. 632, and revised the money laundering guidelines by calibrating sentences to the seriousness of underlying criminal conduct, *see* U.S.S.G. App. C., amend. 634. In 1995, at Congress' direction, the Commission provided a two-level reduction for some offenders who meet safety valve criteria, expanded it to all qualified offenders in 2001, capped the quantity-based offense level at 30 for those who receive a mitigating role adjustment in 2002, but then *increased* the cap to 30, 31, 33, or 34 depending on the offense level, based on "concerns" about "proportionality" in 2004. *See* U.S.S.G. App. C, amends. 515, 624, 640, 668. The Commission has also recommended reducing the 100:1 powder to crack ratio on three occasions, offering an amendment once.

Commission, *Report to Congress: Downward Departures from the Federal Sentencing Guidelines* 3-4 (Oct. 2003), available at <http://www.ussc.gov/departtrpt03/departtrpt03.pdf>.

The only offender characteristic included in the calculation of the guideline range is the aggravating one of criminal history. As Justice Breyer has explained, some Commissioners argued that factors such as age, employment history, and family ties should be included as mitigating factors, but the decision was made to leave them out – again because the Commissioners could not agree. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 19-20 (1988).

No other offender characteristics have been added to the determination of the offense level, though the Commission’s research demonstrates that age, current or previous marriage, employment history, educational level, abstinence from drug use, first offender status, and being drug offender all predict a reduced risk of recidivism.³ At the same time, the Commission has prohibited, discouraged or restricted most

³ U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004), available at http://www.ussc.gov/publicat/Recidivism_General.pdf; U.S. Sentencing Commission, *Recidivism and the First Offender* (May 2004), available at http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf; U.S. Sentencing Commission, *A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score* (Jan. 2005), available at <http://www.ussc.gov/publicat/RecidivismSalientFactorCom.pdf>.

offender characteristics as grounds for downward departure, contrary to past practice, Breyer, *supra*, at 19, beyond what Congress directed,⁴ and beyond what the original Commission intended.⁵

⁴ Congress directed the Commission to assure that the guidelines were “entirely neutral” as to race, sex, national origin, creed, and socioeconomic status, and to reflect the “general inappropriateness” of education, vocational skills, employment record, family ties, and community ties. *See* 28 U.S.C. §§ 994(d), (e). The Commission has prohibited consideration of drug or alcohol dependence and gambling addiction (§ 5H1.4), lack of guidance as a youth and similar circumstances indicating a disadvantaged background (§ 5H1.12), personal financial difficulties or economic pressures on a trade or business (§ 5K2.12), diminished capacity if the offense involved a threat of violence or was caused by voluntary use of drugs or other intoxicants (§ 5K2.13), post-sentencing rehabilitation (§ 5K2.19), a single aberrant act if the defendant had any “significant prior criminal behavior” even if so remote or minor that it was uncounted by the criminal history rules, or if the instant offense was drug trafficking subject to a mandatory minimum (§ 5K2.20); has strictly discouraged consideration of age (§ 5H1.1), education and vocational skills (§ 5H1.2), mental and emotional conditions (§ 5H1.3), physical condition or appearance (§ 5H1.4), employment record (§ 5H1.5), family ties and responsibilities (§ 5H1.6), and military, civic, charitable or public service, and good works (§ 5H1.11); and has erected multiple detailed requirements for consideration of victim’s conduct (§ 5K2.10), lesser harms (§ 5K2.11), coercion and duress (§ 5K2.12), diminished capacity (§ 5K2.13), voluntary disclosure (§ 5K2.16), and aberrant behavior (§ 5K2.20).

⁵ *See* U.S. Sentencing Guidelines, Ch. 1, Pt. A(4)(b) (1988) (“With [the] specific exceptions” of § 5H1.10 (race, sex, national origin, creed, religion, socioeconomic status), the third sentence of § 5H1.4 (drug dependence or alcohol abuse), and the last sentence of § 5K2.12 (personal financial difficulties and economic pressures on a trade or business), “the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.”).

Third, as to unwarranted disparity, Gov't Br. at 12, the Guidelines – through judicial fact-finding by a preponderance of evidence in the form of relevant conduct determinations – have in fact increased disparity rather than reducing it, as the Sentencing Commission has acknowledged. For example, in regard to the quality of evidence of drug quantity, the Commission has stated that “research suggested significant disparities in how [the relevant conduct] rules were applied,” and “questions remain about how consistently it can be applied,” given that “disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators.” *Fifteen Year Report* at 50. The relevant conduct provisions are also inconsistently applied because of “ambiguity in the language of the rule, discomfort with the role of law enforcement in establishing relevant conduct, and discomfort with the severity of sentences that often result from inclusion of all relevant conduct in guidelines determinations.” *Id.* at 87.⁶ Finally, judges, prosecutors, and defense counsel circumvent the rules because they feel that their

⁶ For example, in a sample test administered by Commission researchers for the Federal Judicial Center, probation officers applying the relevant conduct rules sentenced three defendants in widely divergent ways, ranging from 57 to 136 months for one defendant, to 37 to 136 months for the second defendant, to 24 to 136 months for the third defendant. See Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 10 Fed. Sent. Rep. 16 (July/August 1997).

overemphasis on quantity, relative neglect of offender characteristics, and overly harsh severity levels are unjust. *Id.* at 32, 87.

In short, although the government claims that “[i]f 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),” Gov’t Br. at 12, the government ignores the fact that Congress never intended the disparity inquiry to end with a determination of the Guideline sentence. As the 1977 Senate Judiciary Committee Report explained, “the key word in discussing unwarranted sentence disparities is ‘unwarranted’” and the “Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records.” S. Rep. No. 605, 95th Cong., 1st Sess. 1161 (1977).

Even more significantly, as the principal source of legislative history for the Sentencing Reform Act explained, “[t]he Committee does not intend that the Guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the Guidelines in an appropriate case.” S. Rep. No. 225, 98th Cong., 1st Sess. 52 (1983). Moreover, “[t]he purpose of the Sentencing Guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, *not* to eliminate the thoughtful imposition of individualized

sentences.” *Id.* (emphasis added). But, as explained above, in formulating and further developing the Guidelines, the Sentencing Commission has done just that by precluding any “comprehensive examination of the characteristics of the particular offense and the particular offender.” *Id.* at 53. Thus, using the Guidelines as the measure of disparity is contrary to congressional intent, even under the original Sentencing Reform Act.

5. Accordingly, it is in large part because the Sentencing Guidelines do not in fact account for all of the factors in § 3553(a) that this Court’s review of the presumption of reasonableness is necessary. By applying a presumption of reasonableness to the Guideline range, the appellate courts have elevated the “advisory” Guidelines factor to a status that is unsupported by the statute following the excision of § 3553(b)(1) by the *Booker* decision.

As the Sentencing Commission has explained, sentencing guideline systems range along a continuum from “advisory,” to “presumptive,” to “mandatory,” depending on the standards governing when a judge may depart from the recommended guideline range and the extent of appellate review of such departures. *Fifteen Year Report* at 7. The original version of the Sentencing Reform Act would have made the guidelines “advisory.” In language now codified as 18 U.S.C. § 3553(a), the sentencing judge would “consider” the guideline range along with other relevant factors and impose a sentence that was sufficient but not greater than

necessary to achieve the purposes of sentencing. The ultimate sentence would be reviewed for unreasonableness. During the legislative debates, however, § 3553(b) was added, requiring the sentencing judge to impose a sentence within the Guideline range absent a circumstance of a kind or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines. Section 3553(b) thus made the guidelines “presumptive” rather than “advisory.” *See* 124 Cong. Rec. 209, 382-83 (1978); S. Rep. No. 225, 98th Cong., 1st Sess. 52 n.193 (1983); *Fifteen Year Report* at 7-9, 16-18; *United States v. Booker*, 543 U.S. 220, 293 & n.12 (Stevens, J., dissenting); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 238, 245-46 (1993).

In making the “advisory” guideline range “presumptively reasonable,” those appellate courts adopting the presumption have effectively reinstated the presumption provision that the *Booker* Court excised as a matter of statutory intent and interpretation in order to make the Sentencing Reform Act comply with the Sixth Amendment. *United States v. Booker*, 543 U.S. 220, 259 (2005) (excising § 3553(b)(1)). Thus, those courts have demonstrated what Justice Scalia predicted might occur, to wit, that some appellate courts would take reasonableness review as a signal that nothing had changed. *Id.* at 311-12 (Scalia, J., dissenting).

Even worse, those courts have answered Justice Scalia’s question, “Will appellate review for ‘unreasonableness’ preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges?” *Id.* at 313 (Scalia, J., dissenting). Their answer is “yes,” on both the constitutional and statutory levels. Perhaps most troubling of all, by basing the presumption of reasonableness on the premise that the Guidelines incorporate all of the § 3553(a) factors, those courts have made “the guidelines more mandatory than they were before *Booker*” as then there is “no rationale for *ever* deviating from the guideline range.” Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 Ariz. St. L.J. ____ (forthcoming 2006) (emphasis in original). Accordingly, the Court should review the legitimacy of the appellate presumption of reasonableness.

CONCLUSION

For the reasons given above and in his initial petition, Petitioner requests that this Court grant a writ of certiorari. In the alternative, he request that the petition be held pending the Court’s decision in *Cunningham v. California*, No. 05-6551.

Respectfully submitted,

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