UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	U.S.C.A. No. 06-50649
	)	
Plaintiff-Appellee,	)	U.S. D.C. No. 06CR0745-GT
	)	
v.	)	
	)	
CARINA S. PRECIADO,	)	
	)	
Defendant-Appellant.	)	
	)	

I.

INTRODUCTION

Ms. Preciado challenged her sentence as unreasonable at the time of her sentencing itself, [ER 52], and on appeal. She has not yet briefed the issue, however, as she anticipated that the Supreme Court's then pending cases of *Rita v. United States*, __ U.S. __, 2007 WL 1772146 (June 21, 2007), and *Claiborne v. United States*, 127 S. Ct. 2245 (2007), would guide her analysis. In light of the recent decision in *Rita*, Ms. Preciado offers the following arguments in support of her position that her sentence cannot be affirmed as reasonable.[1]

[1] Ms. Preciado acknowledges that this area of the law remains in flux. Guidance is not forthcoming in *Claiborne*, which was rendered moot by Mr. Claiborne's death. *See* 127 S. Ct. 2245. Nor has this Court resolved the issues on which it granted en banc review in *United States v. Carty*, 462 F.3d 1066 (9th Cir. 2006) (granting rehearing en banc). Nonetheless, Ms. Preciado presses forward now as her oral argument date is fast approaching, and because the *Carty* matters seem

A majority of the Supreme Court has recognized that substantive reasonableness review -- the sort of review envisioned by the majority of the Justices in *Rita*[2] -- violates the Sixth Amendment when the determination of reasonableness turns on a district court's resolution of a factual issue. *See Rita*, 2007 WL 1772146 at *23 (Scalia, J., concurring in part and concurring in the judgment); *Cunningham v. California*, 127 S. Ct. 856, 880-81 (2007) (Alito, J., dissenting).[3] Here, Ms. Preciado's 30 month sentence can only be found to be reasonable through reliance upon the district court's (erroneous) factual finding that she used her minor children to facilitate her offense. Stated another way, when Ms. Preciado's sentence is evaluated in light of the facts determined consistently with the Sixth Amendment -- which limits this Court's consideration to those facts admitted in her guilty plea -- her sentence must be reversed as unreasonable.

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unlikely to address the arguments she advances.

[2] *See Rita*, 2007 WL 1772146 at *6; *id.* at *17 (Stevens, J., concurring).

[3] Justice Scalia's *Rita* opinion was joined by Justice Thomas. Justice Alito's *Cunningham* dissent was joined by Justices Kennedy and Breyer. Neither the *Rita* nor *Cunningham* majorities joined the issues raised in Justice Scalia's *Rita* opinion and Justice Alito's *Cunningham* dissent.

II.

STATEMENT OF FACTS

Ms. Preciado, an indigent, 26 year old mother of five young children, entered a guilty plea to an information charging importation of approximately 68.35 kilograms of marijuana in violation of 21 U.S.C. §§ 952 and 960. [ER 1, 10-11]. The amount of marijuana that she admitted established a base offense level of 22. *See* USSG § 2D1.1(c)(9).[4] The parties jointly recommended, and the district court agreed to, a 2 level reduction for minor role, *see* USSG § 3B1.2(b); a 3 level reduction for acceptance of responsibility, *see* USSG § 3E1.1; and a 2 level departure pursuant to a fast-track disposition. *See* USSG § 5K3.1. [ER 25, 48]. Due to her probationary status at the time of her offense, her criminal history category was II. [ER 48]. Pursuant to those calculations, the government recommended a range of 21 to 27 months, and a sentence of 21 months.[5]

The district court accepted the parties' calculations, but also assessed an increase of two levels pursuant to USSG § 3B1.4, use of a minor. [ER 33-34].[6] This assessment was based upon the district court's (erroneous) resolution of a disputed

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[4] The parties agreed as to the base offense level. [ER 25].

[5] Pursuant to 18 U.S.C. § 3553(a), Ms. Preciado recommended a sentence of one year and one day. [ER 25-29].

[6] Ms. Preciado has challenged that ruling in the instant appeal.

factual question: whether Ms. Preciado intentionally used her children to effect her offense. Unlike the facts that established the parties agreed-upon recommendations, Ms. Preciado did not admit that she so used her children in her guilty plea or at any other time. Based upon the district court's calculations, the Guideline range was 27 to 33 months. [ER 48-49]. It imposed a sentence of 30 months. [ER 50].

III.

BECAUSE THE REASONABLENESS REVIEW OF MS. PRECIADO'S SENTENCE TURNS ON A DISTRICT COURT'S FACTUAL FINDING, IT VIOLATES THE SIXTH AMENDMENT. THEREFORE, THIS COURT CANNOT AFFIRM MS. PRECIADO'S SENTENCE AS REASONABLE.

The Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), both declared the Sentencing Guidelines unconstitutional and purported to remedy that unconstitutionality by way of severance of the portions of the enacting statutes that made the Guidelines mandatory for district courts. *See id.* at 244, 258-265. In addition to severing out the mandatory nature of the Guidelines, *Booker* also determined that, on appeal, sentences were to be reviewed for "reasonableness." *Id*.

While the *Booker* dust is obviously not yet settled, there are two points that have escaped the controversy surrounding that decision and its aftermath. First, all the Justices agree that a discretionary system by which the district court selects a sentence that is not mandated by any fact determined solely by the district court is constitutional. *See, e.g., Cunningham*, 127 S. Ct. at 866 (citing *Booker*, 542 U.S. at

233) (noting that Justice Stevens' majority *Booker* opinion "acknowledged that the Federal Sentencing Guidelines would not implicate the Sixth Amendment were they advisory...."). Second, while Justice Breyer's majority *Booker* opinion established "a 'reasonableness' standard of review," it did so "[w]ithout attempting any elaborate discussion of that standard...." *See id.* at 867 (citing *Booker*, 542 U.S. at 261). *Accord Rita*, 2007 WL 1772146 at *19 (Scalia, J., concurring) ("precisely what reasonableness review entails is not dictated by *Booker*"). *See also Cunningham*, 127 S. Ct. at 880 n.11 (Alito, J., dissenting) ("We need not map all the murky contours of the post-*Booker* landscape in order to conclude that reasonableness review must mean *something*.") (emphasis in original). With this narrow consensus in mind, Ms. Preciado will discuss *Rita*, focusing on the issues it resolves, and the issues as to which there is at least a five Justice majority that the main *Rita* opinion declined to address.

In *Rita*, the Court was faced with a reasonableness challenge to a 33 month sentence imposed after Mr. Rita was convicted of various counts relating to perjury and obstruction of justice. *See* 2007 WL 1772146 at *3-5. His Guidelines were calculated based upon the perjury conviction, *see id.* at *3-4, and there is no suggestion that Mr. Rita contended that the Guideline calculations were affected by any judicial fact-finding. *See id.* at *3-5.

Rita therefore addressed the question of whether, in a case in which there were

no judicial findings which enhanced the defendant's within-Guidelines' sentence, appellate courts -- not district courts[7] -- could apply a presumption of reasonableness to a "sentence that reflects a proper application of the Sentencing Guidelines." *See id.* at *6. In keeping with its decision in *Booker*, the Court held that "[t]he Court of Appeals will determine the reasonableness of the resulting sentence." *See id*. at *8; *see also id.* at *17 (Stevens, J. concurring) (*Booker* "plainly contemplated that reasonableness review would have a substantive component."). The decision to apply the presumption of reasonableness was informed by the Court's recognition that "it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve [18 U.S.C.] § 3553(a)'s objectives." *See id.* Even so, "a nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence." *See id.* at *10 (emphasis in original). Despite the appellate presumption, district courts remain free to sentence either within or outside the guideline range. *See id.* Thus, *Rita* did not upset the consensus view that district court discretion does not violate the Sixth Amendment.

Ultimately, then, *Rita* concluded that "our opinion in *Booker* made clear that

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[7] The *Rita* Court was so emphatic about this point that it reiterated it later in the opinion. *See id.* at *9 ("We repeat that the presumption before us is an *appellate* court presumption.") (emphasis in original).

today's holding does not violate the Sixth Amendment." *See id.* That holding was that appellate application of a presumption of reasonableness of a guideline sentence that was not based upon judicial fact-finding as to facts not found by the jury or conceded by the defendant was permissible. *See id.* at *6.

Given its inherent limitations, *Rita* plainly does not reach the question here: how is an appellate court to evaluate a sentence such as the one imposed upon Ms. Preciado, which is based upon judicial findings of fact that were not admitted at the guilty plea? Justice Scalia's *Rita* concurring opinion speaks directly to this issue, as does Justice Alito's *Cunningham* dissent. The *Rita* majority contemplates a substantive reasonableness review, one in which a sentence may be found to be too long based upon the supporting facts. *See Rita*, 2007 WL 1772146 at *20 (Scalia, J., concurring). The possibility of such review ensures that "some sentences reversed as excessive will be legally authorized in later cases only because additional judge-found facts are present; and ... some lengthy sentences will be affirmed (i.e., held lawful) only because of the presence of aggravating facts, not found by the jury, that distinguish the case from the mine-run." *Id.* Simply stated, Justice Scalia's "position is that there will be inevitably be *some* constitutional violations under a system of substantive reasonableness review, because there will be some sentences that will be upheld as reasonable only because of judge-found facts." *See id.* at *23 (Scalia, J., concurring) (emphasis in original). *Accord Cunningham*, 127 S. Ct. at 880 n.11

(Alito, J., dissenting) ("If reasonableness review is more than just an empty exercise, there inevitably will be *some* sentences that, absent any judge-found aggravating fact, will be unreasonable.") (emphasis in original).

Justice Scalia's view is strongly supported by the Court's definition of the maximum sentence for the purposes of *Apprendi v. New Jersey*, 530 U.S. 466 (2000): "'the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.'" *Cunningham*, 127 S. Ct. at 865 (quoting *Blakely v. Washington*, 542 U.S. 296, 303 (2004)) (emphasis in original, internal quotations omitted). The consequence of that rule is that "[i]f the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." *Id.* at 869 (citing *Blakely*, 542 U.S. at 305 & n.8). The certainty that some reasonableness inquiries will turn on a judge's finding of "an additional fact" directly implicates that rule.

Justice Scalia described this certain collision with the Sixth Amendment as result of a "the basic problem with a system in which district courts lack full discretion to sentence within the statutory range [due to the constraints of substantive reasonableness review]." *See Rita*, 2007 WL 1772146 at *22. Those constraints necessarily lead to reliance upon facts found by judges, not facts found by juries or admitted by defendants in their guilty pleas.

> Under such a system, for every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant. *Every* sentence higher than that is legally authorized only by some judge-found fact, in violation of the Sixth Amendment. Appellate courts' excessiveness review[8] will explicitly or implicitly accept those judge-found facts as justifying sentences that would otherwise be unlawful.

Id. (emphasis in original). The message is clear: when an appellate court affirms a sentence as reasonable because of a judge-found fact, the defendant's Sixth Amendment rights are violated.

Justice Alito illustrated the same point by observing that, for a hypothetical mail fraud offense, "there must be some sentence that represents the least onerous sentence that would be appropriate in a case in which the statutory elements are mail fraud are satisfied but in which the offense and the offender are as little deserving of punishment as can be imagined." *See Cunningham*, 127 S. Ct. at 880-81 (Alito, J., dissenting). Under *Blakely*, that "sentence is 'the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.'" *See id.* at 881 (quoting *Blakely*, 542 U.S. at 303). If a longer sentence is to be imposed, "*Booker*'s reasonableness review necessarily anticipates that the imposition of sentences above this level may be conditioned upon findings of fact

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[8] Justice Scalia's use of the term "excessiveness review" is no accident: "the Sixth Amendment problem with reasonableness review is created only by the lack of district court discretion to impose *high* sentences...." *See id.* at 881 n.2 (emphasis in original).

made by a judge and not by the jury." *See id.* Thus, substantive reasonableness review "implicit[ly]," *see id.*, requires factual findings that offend the Sixth Amendment. "As a result of such appellate review, the facts of each case limit the sentence that a judge may reasonably impose." *See United States v. Griffin*, __ F. Supp.2d __, 2007 WL 1620526, *11 (D. Mass. June 6, 2007) (citing *Cunningham*, 127 S. Ct. at 876 (Alito, J., dissenting)).[9]

Taken together, the opinions of Justice Scalia (in *Rita*) and Alito (in *Cunningham*), joined by three other Justices and rejected by none, lead to a simple conclusion: appellate courts cannot affirm sentences on "excessiveness review" if that affirmance turns on a judge-found fact. In other words, this Court cannot affirm any sentence that exceeds the maximum reasonable sentence that could be imposed based upon the facts found by the jury or admitted in the guilty plea. Any other course of action offends the Sixth Amendment. *See Rita*, 2007 WL 1772146 at *24 (Scalia, J., concurring) (appellate review based upon judge-found facts violates the Sixth Amendment regardless of whether the facts are those identified "*implicitly*" by

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[9] Justice Scalia explicitly endorsed *Griffin*. *See Rita*, 2007 WL 1772146 at *25 n.5 (Scalia, J. concurring) ("At least one conscientious District Judge has decided to shoulder the burden of ascertaining what the maximum reasonable sentence is in each case based only on the verdict and appellate precedent, correctly concluding that this is the *only* way to eliminate Sixth Amendment problems after *Cunningham* if *Booker* mandates substantive reasonableness review.") (citing *Griffin*, 2007 WL 1620526 at *13-*14) (emphasis in original).

Congress or "if appellate courts really were exercising some type of common-law power to prescribe the facts legally necessary to support specific sentences.") (emphasis in original). *Accord Griffin*, 2007 WL 1620526 at *11-14.

In light of the foregoing analysis, "the dispositive issue becomes what constitutes the statutory maximum for Sixth Amendment purposes." *See Griffin*, 2007 WL 1620526 at *12. Justice Scalia's concern is that in undertaking the substantive reasonableness review, the task of determining the constitutionally-permissible statutory maximum sentence will fall upon appellate courts rather than district courts. *See Rita*, 2007 WL 1772146 at *22 (Scalia, J. concurring) ("The only difference between this system and the pre-*Booker* mandatory Guidelines is that the maximum sentence based on the jury verdict or guilty plea was specified under the latter but must be established by appellate courts, in case-by-case fashion, under the former"). Justice Scalia's endorsement[10] of Judge Young's approach in *Griffin*, however, suggests that the constitutional analysis need not turn solely on a "case-by-case" analysis by the appellate courts. Indeed, Justice Breyer's *Rita* opinion virtually compels a Guideline-centric approach.

Griffin considered several possibilities for a constitutional maximum: (1) the

[10] *See Rita*, 2007 WL 1772146 at *25 n.5.

maximum term allowed by statute; (2) the minimum term allowed by statute; or (3) a judicially determined range based on jury-found or defendant-admitted facts." *See Griffin*, 2007 WL 1620526 at *12. *Griffin* "easily" rejected the first option, citing, *inter alia*, the certainty that some fact other than an element must be necessary to justify a sentence at the statutory maximum and the tension that such an approach would create with the parsimony principle. *See id.* (citing 18 U.S.C. § 3553(a)). The second alternative -- the statutory minimum -- was also easily rejected. *See id.* at *13 (citing *Cunningham*, 127 S. Ct. at 868 and *Booker*, 543 U.S. at 261). That conclusion is hardly controversial; adopting that approach would likely result in a maximum sentence of probation in many instances. The *Griffin* court adopted the third option, recognizing that while the sentencing "range cannot be imposed on the sentencing judge by the Sentencing Guidelines," *see id.* (citing *Booker*, 543 U.S. at 245), those same Guidelines "may ... advise a sentencing judge as to a reasonable range of penalties." *See id.* Judge Young's analysis was later confirmed in *Rita*: "it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve [18 U.S.C.] § 3553(a)'s objectives." *See Rita*, 2007 WL 1772146 at *8. *Griffin* thus employed that "rough approximation of sentences that might achieve § 3553(a)'s objectives," *see id.*, to hold that "[t]he upper term of [the Guideline] range constitutes the [*Cunningham*/*Blakely*] statutory maximum," *see Griffin*, 2007 WL 1620526 at *13 (citing *Cunningham*, 127 S. Ct. at 863-64 and

Blakely, 542 U.S. at 303), so long as that range is constitutionally determined, i.e., determined "solely by facts found by a jury beyond a reasonable doubt and reflected in its verdict," *see id.*, or by facts "'admitted by the defendant.'" *Cunningham*, 127 S. Ct. at 865.

Griffin also stated that sentencing courts should consider the "ever-developing body of common-law," *see* 2007 WL 1620526 at *13, but that statement did not take into account *Rita*'s statement that the Guideline range is "a rough approximation of sentences that might achieve § 3553(a)'s objectives." *See Rita*, 2007 WL 1772146 at *8. Thus, absent compelling evidence of a common-law trend suggesting that a particular Guideline does not produce such a "rough approximation" after a full Guideline calculation, the high end of the constitutionally-determined Guideline range represents the *Cunningham*/*Blakely* statutory maximum.

This Court is free to adopt the foregoing analysis because the lead *Rita* opinion did not reach it: "[t]he one comfort to be found in the Court's opinion ... is that it 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." *See Rita*, 2007 WL 1772146 at *23 (Scalia, J., concurring).[11] Justice Scalia is

[11] *See also id*. at *17 (Stevens, J. concurring) (recognizing that substantive reasonableness review may lead to review of sentences for Sixth Amendment violations though *Rita* did not present such a case).

correct: Justice Breyer's lead opinion did not meet the challenge posed by his concurring opinion. *See id.* at *10.[12] Rather, Justice Breyer's opinion criticized Justice Scalia's reliance on hypotheticals and speculated that the concerns he raised "will not 'raise a multitude of constitutional problems.'" *See id.* (quoting *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005)). *See also id.* at *17 (Stevens, J., concurring) (reserving the questions posed by Justice Scalia for another day).

Justice Alito's *Cunningham* dissent received the same treatment: the *Cunningham* majority simply ducked it. *See Cunningham*, 127 S Ct. at 867 n.13 ("It is neither necessary nor proper now to join issue with Justice Alito on this matter."). *See also Rita*, 2007 WL 1772146 at *20 (Scalia, J., concurring and concurring in the result) (observing that "the Court did not explain *why* Justice Alito was incorrect...") (emphasis in original). In short, the Supreme Court has never rejected the approach set forth above. Rather, a majority of the Members of the Court have endorsed it.

IV.

THE MAXIMUM CONSTITUTIONAL SENTENCE FOR MS. PRECIADO IS 27 MONTHS, A MAXIMUM THAT WAS EXCEEDED HERE.

[12] It is not surprising that Justice Breyer's *Rita* opinion did not disagree with that of Justice Scalia. Justice Scalia's *Rita* concurrence adopts much of Justice Alito's *Cunningham* dissent, which Justice Breyer joined. Justice Breyer's *Rita* opinion was joined by Justices Alito and Kennedy. Thus, all three of the Justices propagating the views expressed in Justice Alito's *Cunningham* dissent joined Justice Breyer's *Rita* opinion. Nothing in the latter opinion disavows the previously stated views of those three Justices.

The analysis set forth above compels the conclusion that the *Cunningham*/*Blakely* statutory maximum here is 27 months, high end of the Guideline range jointly recommended by the parties. The sentence imposed here, 30 months, can only be justified by reliance upon the district court's resolution of a factual dispute regarding Ms. Preciado's purported use of her children to facilitate her offense. Because this Court must rely upon a factual issue that was neither resolved by a jury nor admitted by Ms. Preciado, it cannot constitutionally affirm her sentence. *See generally Rita*, 2007 WL 1772146 at *23-24 (Scalia, J., concurring). Therefore, this Court must reverse Ms. Preciado's sentence as unreasonable and remand for resentencing.

V.

CONCLUSION

This Court should vacate Ms. Preciado's sentence as unreasonable and remand for resentencing.

Respectfully submitted,

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