

Case No. 05-8956

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2006

Christopher L. Temple,

Petitioner,

vs.

United States of America,

Respondent

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

PETITION FOR REHEARING and CERTIFICATION

Christopher L. Temple, Petitioner
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P.O. Box 1000
Duluth, MN 55814

The Petitioner Christopher L. Temple, Pro se, hereby petitions this Court pursuant to Supreme Court Rule 44.2 to rehear and reconsider its order of November 6, 2006 denying his Petition for a Writ of Certiorari. Attached to and made a part of this Petition is Petitioner's Certification that it meets the requirements of the Rule.

Delivering the opinion of this Court in Blakely v. Washington, 159 L.Ed 2d 403 (2004), Justice Scalia offered an "absurd" hypothetical situation that might ensue if not for this Court's decisions in the recent past (specifically in that context Apprendi v. New Jersey, 147 L.Ed 2d 435 (2000)) supporting criminal defendants' rights under the Fifth and Sixth Amendments to the Constitution.

Justice Scalia wrote, in part,

"Those who would reject Apprendi are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors--no matter how much they may increase the punishment--may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it--or of making an illegal lane change while fleeing the death scene. **Not even Apprendi's critics would advocate this absurd result.**" (Blakely at 415, **emphasis added.**)

Apprendi was, of course, logically applied to the State of Washington's sentencing regimen by Blakely. In turn, this Court then applied these holdings and those which supported them to the federal sentencing guidelines in U.S. v. Booker, 160 L.Ed 2d 621 (2005). Writing for the Court in the last of these, Justice Breyer indicated that both this "merits" opinion (relating to calculations under the guidelines) and the "remedial" opinion (making a proper guideline range advisory within the broader framework of the Sentencing Reform Act) applied to all cases then on direct review (and, presumably, to sentencings from Booker forward) (see Booker at 665; Petitioner's May 17, 2006 Supplemental Brief at ps. 2-3.)

Yet, in the federal system at least, Booker's merits opinion has become a dead letter as--for now--are the Fifth and Sixth Amendments.

And the "absurd" has thus become the reality.

Since Petitioner filed his Petition for a Writ of Certiorari with this Court, the U.S. Court of Appeals for the Eighth Circuit has given birth to precisely the kind of outrage hypothesized by Justice Scalia. In U.S. v. Rashaw, 170 Fed. Appx. 986 (8th Cir.-2006) that court affirmed a lower court's blatantly unconstitutional sentence. As explained by U.S. District Judge Young (D. Mass.) in his opinion in U.S. v. Kandirakis, 441 F.Supp.2d 282 (D.Mass.-2006),

"Rashaw had been convicted 'on two counts of being a felon in possession of a firearm and of one count of possessing an unregistered firearm.' Id. at 986. The district court in calculating the Guidelines, however, set the Guidelines offense level based on 'evidence' that Rashaw had, in another incident and with another gun, committed a double murder. Rashaw had never been charged with these crimes, much less convicted. Id. The resulting Guidelines range being higher than the statutory maximum, the court sentenced Rashaw to three consecutive ten-year terms. Id. The Eighth Circuit affirmed this sentence as reasonable..." (Kandirakis at 302-303, FN. 41.)

Not to be outdone, the Seventh Circuit has rewritten Booker to come up with its own absurdity. In U.S. v. Reuter, 463 F.3d 792 (Sept. 19, 2006) that court affirmed a sentence as well for a murder adjudicated at sentencing; this took a guidelines range of 105 months (maximum) for the conspiracy conviction that did exist up to a guideline level of 360 months.

The Seventh and Eighth Circuits are sadly not alone in taking matters into their own hands to overturn the merits majority of Booker and numerous of its predecessors. Other circuits which have determined that enhancements to a guideline sentencing range can be based on facts found by a sentencing court on a mere preponderance of the evidence rather than found by a jury beyond a reasonable doubt or admitted by a defendant in a

plea agreement are the D.C. Circuit in U.S. v. Dorcely, 454 F.3d 366 (D.C. Cir.- July 21, 2006); U.S. v. Gates, 461 F.3d 703 (6th Cir.-August 24, 2006) and U.S. v. Faust, 456 F.3d 1342 (11th Cir.-July 21, 2006). These and other courts' reading of Booker have made everything--even acquitted conduct--fair game for guideline enhancements.

The legal rationale of these courts is demonstrably at odds with Booker. In another case--U.S. v. Okai, 454 F.3d 848 (8th Cir.-July 20, 2006)--the Eighth Circuit in ruling that sentencing courts are required to apply sentencing enhancements within the guidelines based on judges finding facts by a preponderance of the evidence, said its justification was in U.S.S.G. Sec. 6A1.3(a) (Okai at 852.) Booker rejected this as evidenced by the merits majority itself and as clarified by Justice Thomas (see Booker at 697, FN 6; Petition for Certiorari p. 6.) Appallingly, this holding by the Eighth Circuit reversed a sentencing court which had actually gotten things right!

All this--together with the Seventh Circuit's disposition of Petitioner's case-- goes to Question One presented in the Petition for Certiorari. This is a compelling issue; not only for Petitioner (who, due to the unConstitutional nature of his sentencing, was sentenced based on a guideline range of 87-108 months rather than the six months called for in his plea agreement) but for untold thousands of criminal defendants. This blatant rewriting, if not de facto overturning, of this Court's opinion in Booker as well as several of its predecessor cases certainly meets the criteria of Rule 10(c) of the Rules of this Court, and should prompt this Court to grant certiorari.

Also fairly newly at issue is more of a developing "circuit split" on the way in which guideline calculations are made. As Petitioner writes this, two circuits-- the Third and Ninth--have law which, while also not fully in compliance with the Constitution and this Court's law--are at odds with the others.

In U.S. v. Staten, 450 F.3d 384 (9th Cir.-June 7, 2006) the Ninth Circuit has taken the position that, "...when a sentencing factor has an extremely disproportionat effect on the sentence relative to the conviction, the government must prove such a factor by clear and convincing evidence, instead of a preponderance." (Staten at 385.)

The Third Circuit has essentially taken the same position in U.S. v. Kikumura, 918 F.2d 1084 (3rd Cir.-1990.) The fate of Kikumura, however, was put in play by U.S. v. Grier, 449 F.3d 558 (3rd Cir.-June 6, 2006.) Initially, a split panel overturned Kikumura and held that Booker allows for such guideline-enhancing facts to be found merely by a preponderance of the evidence. That court has since granted a petition and will rehear the case en banc to determine what the proper standard should be.

Petitioner contends that, now, Supreme Court Rule 10(a) is also increasingly a reason why the Court should not delay, and should grant his Petition for Certiorari before any further harm--literally--is done to not only him and his liberty, but to that of countless others who continue to be sentenced unConstitutionally.

Lower federal and appellate courts--and, most certainly, federal prosecutors--seem once again to be engaged in an "exercise of hope" such as that recently referred to by Justice Souter during arguments in Burton v. Stewart, (No. 05-9222, argued Nov. 7, 2006.) Similarly to the old saw that "a lie repeated often enough becomes the truth," they hope that their reading of Booker's remedial majority as overturning not only Booker's merits opinion vis a vis guideline calculations but several others to allow guideline enhancements based on impermissible factors becomes de facto "law" and reinforces their sentencing culture (see Supp. Brief of Petitioner, p. 6.)

This culture and its continuing usurpation of power is being allowed to carry the day--to the detriment of untold thousands, including Petitioner. The lower courts have no right to overturn this Court's precedents in order to defend their unConstitutional status quo; "...it is the Supreme Court's prerogative alone to overrule one of its own precedents." See State Oil Co. v. Khan, 139 L.Ed 2d 199 (1997.)

Paraphrasing Justice Scalia in one of his comments during the recent oral arguments in Cunningham v. California, (No. 05-6551, argued Oct. 11, 2006), Petitioner --as well as many people being sentenced based on uncharged, dismissed, acquitted and or otherwise faulty conduct--certainly hopes that this Court is astounded to find that the current environment, as evidenced herein, is what it has wrought in the

disposition of Booker. Can this Court really have intended for its jurisprudence to take us right back to the "absurd" hypothetical offered by Justice Scalia in Blakely and make it a reality?

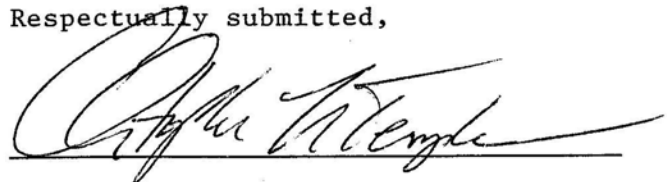
Petitioner reminds the Court that he is neither addressing nor challenging the "remedial" holding in Booker; certainly not in Question One of his Petition for Certiorari, which this instant Petition speaks to. The proper usage of that remedial opinion will be taken up by the Court in two cases it granted review on earlier this month.

Petitioner's case affords an appropriate vehicle for the Court to defend the merits holding of Booker. It is understandable that Booker's remedial holding would need clarification; how much more does a much more straightforward merits holding of Booker need to be reiterated in light of the "exercise of hope" (to be charitable) designed to completely nullify it?

The dispute concerning the guideline calculations underlying Petitioner's sentence (the overwhelming majority of those enhancements were based on unconstitutional findings) is at the same time stark and practically unchallenged; the sentencing judge in Petitioner's case admitted that the facts she ultimately used to multiply his guideline range by at least a factor of four times were not found by a jury or admitted by Petitioner (see Petition for Certiorari ps. 4-7.)

Once again, Petitioner prays that this Court will take the side of law as opposed to the sentencing culture which, simply put, cannot come to grips with the notion that this Court meant what it said in Apprendi, Blakely, Booker and their predecessors. Wherefore, he petitions this Court, asking it to grant a rehearing of his case and, ultimately, grant his Petition for a Writ of Certiorari.

Respectfully submitted,



Christopher L. Temple - Petitioner

November 29, 2006