

Case No. 05-8956

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

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Christopher L. Temple,

Petitioner,

vs.

United States of America,

Respondent

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

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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The Solicitor General, on behalf of the United States, fails to provide any convincing reasons in his "Brief for the United States in Opposition" of May, 2006 why this Court should deny review of the questions presented by Petitioner. Simply put, the Solicitor General fundamentally and spectacularly misapprehends and misapplies this Court's judgment in U.S. v. Booker, 160 L.Ed 2d 621 (2005) as well as its predecessor case law including, but not limited to, Blakely v. Washington, 159 L.Ed 2d 403 (2004) and Apprendi v. New Jersey, 147 L.Ed 2d 435 (2000).

Thus, the points he raises fail as a matter of law. Additionally, he misrepresents facts concerning Petitioner's sentencing and the posture Petitioner adopted concerning the applicable law to his sentence. Finally, the Solicitor General's reasons why this Court should consider Petitioner's questions barred are unconvincing.

In the interests of brevity -- and in the belief that previous filings in this case are more than sufficient for this Court to identify the Solicitor General's numerous errors of law and mischaracterizations -- Petitioner will limit himself here to the most key of those errors raised in the brief in opposition.

I. THE SOLICITOR GENERAL MISAPPREHENDS BOOKER AND ITS PREDECESSORS, AND IS THEREFORE WRONG IN HIS ARGUMENTS AS A MATTER OF LAW

At the core of the Solicitor General's case as to why the sentence imposed on Petitioner did not violate Petitioner's constitutionally-protected rights or run afoul of this Court's mandates in Booker and its several predecessors is his fundamental misapprehension of what this Court has ruled.

The Solicitor General characterizes as without merit or warranting this Court's review Petitioner's claim -- as somewhat misrepresented by the Solicitor General -- "...that the district court could not, consistent with the Sixth Amendment, base the sentence on facts that the court had found by a preponderance of the evidence." (Soc. Gen.'s Brief, page 6; Emphasis added.) "That contention is incorrect," states

the Solicitor General on page 7 of his brief. Citing examples from several circuit courts of appeals ruling post-Booker, he adds, "Nothing in Booker calls into question that established practice."

The Solicitor General is wrong on two counts.

First -- even if this Court's opinion did not specifically address this point -- it is implicit in Booker that facts not found by a jury beyond a reasonable doubt or admitted to by a defendant cannot be the basis for enhancements under the federal sentencing guidelines.

In Apprendi, this Court ruled that, under the Constitution's Sixth Amendment, "...a criminal defendant is entitled to a jury determination that the defendant is guilty beyond a reasonable doubt of every element of the crime with which the defendant is charged..." (Apprendi at 438.) In Blakely, this Court reiterated Apprendi in making it applicable to the "statutory maximum" penalty for a crime, i.e. "...the maximum the judge could impose without any additional findings..." (Blakely at 406.) Thus, whether a jury verdict or plea agreement, only those facts found beyond a reasonable doubt or admitted to by a defendant could be the basis for sentence without violating the Fifth and Sixth Amendments. Finally, in Booker, this Court held that "The right to a jury trial under the Federal Constitution's Sixth Amendment, as construed in Blakely v. Washington...applied to the Federal Sentencing Guidelines..." (Booker at 624; Emphasis added.)

A basic algebraic formula -- and uncontested fact -- is that "If  $A = B$  and  $B = C$ , then  $A = C$ ." In basing itself on Blakely which, in turn, logically followed Apprendi, it was unnecessary for Booker to explicitly state the reasonable doubt standard in its holding, in contrast to preponderance.

Nevertheless, this Court's opinion did so make that distinction; here, Petitioner could reasonably ask whether the Solicitor General has ever even read it. Writing for the Court, Justice Stevens on several occasions identified the proof beyond a reasonable doubt standard as still the proper one for calculations under the guide-

lines. Going back to Blakely and discussing an enhancement found to be unconstitutional, the Court said, "The determination that the defendant acted with deliberate cruelty, like the determination in Apprendi that the defendant acted with racial malice, increased the sentence that the defendant could have otherwise received. Since this fact was found by a judge using a preponderance of the evidence standard, the sentence violated Blakely's Sixth Amendment rights." (Booker at 643; emphasis added.)

Referring back to its opinion in Jones v. U.S., 143 L.Ed 2d 311 (1999), the Court zeroed in on what was truly at issue in Booker. "...The constitutional safeguards that figure in our analysis concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment; these are the safeguards going to the formality of notice, the identity of the factfinder, and the burden of proof..." (Booker at 649, quoting Jones; emphasis added.)

Finally, the Court concludes its "merits" opinion in Booker by again tying it to Apprendi, including the "reasonable doubt" standard from that opinion; one ultimately derived from the Constitution. For good measure -- and as Petitioner pointed out in his previous filings -- Justice Thomas forcefully asserted that, where the guideline calculations are concerned -- the Sentencing Commission is wrong in stating that a preponderance standard can be used by a judge in finding facts that increase a guideline range; see Booker at 697, FN No. 6.)

The Solicitor General confuses and interchanges "sentence" and "guideline calculations." That this Court in its "remedial" opinion effectively made guideline ranges advisory rather than mandatory in no way changes or overrules the manner in which the guideline range must be arrived at. The Solicitor General is simply wrong that the Court effectively ruled in a way that calculations under the guidelines can be based on facts found by a judge based on a preponderance of the evidence.

Further, it is questionable whether even the ultimate sentence imposed on a defendant after a guideline range is properly/constitutionally calculated can deviate

too far from that range without putting Booker's remedial opinion in tension with the Court's holding in Lewis v. U.S., 135 L.Ed 2d 590 (1996.) Reading it, one can (and Petitioner does) contend that any upward "variance" in a sentence after the proper guideline range is arrived at which exceeds six months STILL DOES violate the rights which Apprendi, Blakely and Booker sought to vindicate; to the extent that the "remedial" opinion in Booker goes beyond this, it conflicts with Lewis. In any event, there can be no question that the Court's holding in Lewis bolsters Petitioner's contention as to how the "merits" majority in Booker MUST be construed. After all, whether the guideline range is viewed as mandatory or advisory, it IS mandatory that judges still properly find that range.

II. THE SOLICITOR GENERAL'S ARGUMENTS THAT THIS COURT SHOULD CONSIDER  
PETITIONER'S QUESTIONS BARRED ARE UNCONVINCING.

At page 8 of his brief in opposition, the Solicitor General, resting on this Court's holding in N.C.A.A. v. Smith, 525 U.S. 459, suggests that it should not grant certiorari. He bases this position on the Court's statement in that case that it does "not decide in the first instance issues not decided below." (N.C.A.A. at 470.)

Here, the Solicitor General seems to confuse "raised" with "decided." Both the sentencing court and the U.S. Court of Appeals for the Seventh Circuit did indeed decide as to Petitioner's claims -- preserved at sentencing and raised on appeal -- that his guideline range must have been calculated based solely on facts admitted in his plea agreement, and that additional facts found by the sentencing judge based on the preponderance of the evidence were not to have been used in calculating his range under the guidelines. To be sure, both of those lower courts considered and rejected Petitioner's arguments and this Court's "merits" opinion in Booker in reaching a contrary -- and unconstitutional -- decision. (See Petition for Cert. ps. 4-7, App. A1-A4 and App. E3-E6.) The Solicitor General's claim here is without merit.

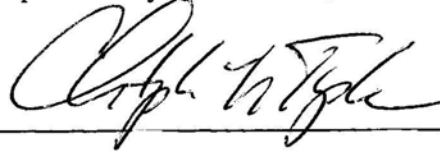
In any event, this Court has broad latitude to review questions it deems proper even if they are not properly raised by the parties: see the Annotation, "What Issues Will the Supreme Court Consider, Though Not, or Not Properly, Raised by the Parties"

at 42 L.Ed 2d 946. Among some the Court might find beyond those questions raised in the Petition for Certiorari are those in his rejected Petition for Rehearing at the Seventh Circuit (see. Petition for Cert. ps. App. C6 - C11.)

In summation, the Solicitor General has failed to make a convincing argument for this Court to deny certiorari. Implicitly, it seems to be that since the Justice Department and virtually all federal district and appellate courts are reading Booker the same (albeit wrong) way, that should be good enough. Petitioner imagines that this Court has a certain sense of "deja vu," given the unanimous misreading of Apprendi and the attitude of courts and prosecutors toward that misreading (see for one example Schardt v. Payne, 414 F.3d 1025, at 1035; 9th Cir.-2005) prior to this Court's finding in Blakely.

As stated in his supplemental brief of May 15, 2006 (p.6), Petitioner believes that this Court should -- and prays and petitions that it will -- reassert the rule of law over this "sentencing culture." On the basis of this reply, his original petition for a writ of certiorari and his supplemental brief, Petitioner respectfully asks again that this Court grant his petition for a writ of certiorari.

Respectfully submitted,



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Christopher L. Temple, Petitioner

August 10, 2006