No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DUCAN FANFAN

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

2. If the answer to the first question is "yes," the following question is presented: Whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Miscellaneous: Page

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The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari before judgment in a case pending on appeal to the United States Court of Appeals for the First Circuit.

OPINION BELOW

The sentencing proceedings in this case (App., *infra*, 1a-13a) are not reported.

JURISDICTION

The judgment of the district court (App., *infra*, 16a-21a) was entered on June 30, 2004. The notice of appeal (App, *infra*, 27a) was filed on July 16, 2004. The case was docketed in the court of appeals on July 19, 2004, as No. 04-1946. App., *infra*, 27a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions involved are set forth in an appendix to the petition. App., *infra*, 28a-63a.

STATEMENT

1. The underlying facts

On June 11, 2003, respondent was charged in an indictment in the District of Maine with conspiring to distribute and to possess with intent to distribute 500 or more grams of cocaine, in violation of 21 U.S.C. 846. The maximum penalty for that offense is life imprisonment. In connection with an ongoing investigation, a narcotics agent arrested Donovan Thomas, who had previously delivered cocaine to an informant and was returning to collect money for the delivery. Thomas agreed to cooperate and stated that respondent was his source of supply for the cocaine. Thomas arranged to purchase additional cocaine from respondent. When respondent arrived at a Burger King restaurant to complete the transaction, he was arrested. Agents found 1.25 kilograms of cocaine and 281.6 grams of cocaine base in respondent's vehicle. Presentence Report (PSR) 6.

2. The district court proceedings

After a jury trial, respondent was found guilty. In response to the question on the verdict form, "Was the amount of cocaine 500 or more grams?," the jury checked "Yes." App., *infra*, 15a.

At sentencing on June 28, 2004, the court found that the evidence supported the calculation in the PSR of drug quantity (2.5 kilograms of cocaine powder and 281.6 grams of cocaine base) as relevant conduct attri-

butable to respondent under the Sentencing Guidelines. Sent. Tr. 80; see PSR 7-8. That resulted in a base offense level of 34 under Sentencing Guidelines § 2D1.1(c)(3). App., *infra*, 2a. The court found that a two-level enhancement under Guidelines § 3B1.1(c) for defendant's role as an organizer, leader, manager, or supervisor in the criminal activity was also warranted. *Ibid.* The court determined that respondent's criminal history category was I, producing a sentencing range under the Guidelines of 188-235 months of imprisonment. *Ibid.*

Before imposing sentence, however, the court considered the effect of this Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), rendered four days earlier. The court declined to await further briefing on that subject, App., *infra*, 3a, noting that, "if th[e] reasoning of *Blakely* applies here, all the jury verdict permits us to conclude in this case is that [respondent] was guilty of a conspiracy and that it involved at least 500 grams of cocaine powder." *Id.* at 5a. On that basis, the court found that respondent would have a base offense level of 26—the level applicable to offenses involving 500 grams of cocaine—and that no other Guidelines enhancements could be justified. At that level, the court found that respondent's sentencing range would be 63-78 months of imprisonment—"[i]n other words, five or six years instead of 15 or 16 years." *Id.* at 6a. The court concluded that "it is unconstitutional for [the court] to apply the federal guideline enhancements in the sentence of [respondent]" and that "[t]o do so would unconstitutionally impinge upon [respondent's] Sixth Amendment right to a jury trial as explained by *Blakely*." *Id.* at 11a. The court sentenced respondent to 78 months of imprisonment, the

maximum sentence permissible under the Guidelines range the court had found applicable. *Id.* at 13a.

The government filed a motion to correct sentence under Federal Rule of Criminal Procedure 35(a). App., *infra*, 23a-26a. The government argued that the court had committed clear error in concluding that this Court's decision in *Blakely* applies to the federal Sentencing Guidelines. The government also argued that the court had committed clear error "by severing out sections of the Guidelines that it believed violated the principles of *Blakely*, and applying the remaining sections." *App.*, *infra*, 23a. The government explained that "the Guidelines cannot constitutionally be applied piecemeal as the Court did at [respondent's] sentencing," because "[s]uch an application distorts the operation of the sentencing system in a manner that was not intended by Congress or the United States Sentencing Commission." *Id.* at 24a. The court denied the motion. *Id.* at 22a.

3. Proceedings on appeal

On July 16, 2004, the government filed a notice of appeal to the United States Court of Appeals for the First Circuit. App., *infra*, 26a. The court of appeals has jurisdiction pursuant to 18 U.S.C. 3742(b). The government's notice of appeal was timely filed within the 30 days allowed by Federal Rule of Appellate Procedure 4(b)(1)(B). The appeal was docketed in the court of appeals on July 19, 2004, as No. 04-1946. App, *infra*, 27a. The case is therefore "in the court[] of appeals" within the meaning of 28 U.S.C. 1254. See Robert L. Stern, et al., *Supreme Court Practice* § 2.4, at 75 (8th ed. 2002).

REASONS FOR GRANTING THE PETITION

This Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), has profoundly unsettled the federal criminal justice system. *Blakely* held that a Washington state sentence was imposed in violation of the Sixth Amendment jury-trial right because the sentencing judge was permitted to find an aggravating fact that authorized a higher sentence than the state statutory guidelines system otherwise permitted. 124 S. Ct. at 2537-2538. The Court noted that "[t]he Federal Guidelines are not before us, and we express no opinion on them." *Id.* at 2538 n.9. The Court's decision in *Blakely*, however, has "cast a long shadow over the federal sentencing guidelines." *United States* v. *Booker*, 2004 WL 15385858, at *1 (7th Cir. July 9, 2004), petition for cert. pending (filed July 21, 2004). In particular, it has roiled the federal courts by raising doubts about the constitutionality of routine Guidelines sentencing procedures, employed for 15 years since *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989), under which sentencing judges find the facts necessary to arrive at a Guidelines sentencing range for each defendant.

The government is today filing petitions for certiorari in this case and in *Booker*, *supra*, as companion vehicles for this Court's consideration of the implications of *Blakely* for federal sentencing. Further review is warranted in both cases, on an expedited basis, in order to provide authoritative answers to the questions presented and to provide guidance on how to conduct the thousands of federal criminal sentencings that are scheduled each month.

A. Review Of The Implications Of *Blakely* For Federal Criminal Justice Is Warranted

The government's petition for certiorari in *Booker* recounts in detail the conflict in the circuits that has arisen on whether *Blakely* applies to the Guidelines. *Booker* Pet. 11-14. It also explains the importance of the second question presented in both cases: *i.e.*, the issue of how, if the rule in *Blakely* applies to the federal Sentencing Guidelines, sentencing is to be conducted in federal cases in which *Blakely*'s interpretation of the Sixth Amendment invalidates application of certain Guidelines provisions. *Booker* Pet. 14-19.

The resolution of those questions cannot be delayed. Without answers to those questions, federal criminal justice will remain in a state of confusion about the manner in which federal sentences are to be determined in the thousands of criminal cases that go to sentencing each month. If this Court holds that *Blakely* does not apply to the Guidelines, then courts will uniformly return to the familiar Guidelines sentencing procedures that prevailed before *Blakely*. Alternatively, if this Court holds that *Blakely* does apply to the Guidelines, the proper conduct of sentencing turns on the answer to the second question: whether the Guidelines may continue to be used in cases in which judicial factfinding required by the Guidelines would violate the Sixth Amendment. That issue of severability, and of the procedural implications of *Blakely*, is of considerable consequence to sentencing procedures nationwide. A decision from this Court is required to settle the matter.

B. This Case Squarely Presents The Issues Surrounding The *Blakely* Controversy On Which This Court's Guidance Is Needed

This case squarely raises both of the issues presented. The district court determined that *Blakely* applies to the Guidelines. It then imposed sentence based on its conclusion that the Guidelines as a whole could continue to govern federal sentencing, although in a truncated fashion and not in their intended manner. App., *infra*, 1a-13a. The court thus refused to apply Guidelines enhancements for drug quantity and respondent's role in the offense because, the court held, to do so "would unconstitutionally impinge upon [respondent's] Sixth Amendment right to a jury trial as explained by *Blakely*." *Id.* at 11a. On that basis, the court sentenced respondent to 78 months of imprisonment (from a 63-78 month sentencing range), rather than sentencing respondent within the 188-235 months range that it concluded the Guidelines would otherwise require. *Id.* at 7a. The case thus squarely presents both the question whether federal sentencing practice is unconstitutional under *Blakely* and, if so, how sentencing should be conducted.

C. Certiorari Should Be Granted Both Here And In *United States* v. *Booker*

In *Booker*, *supra*, the Seventh Circuit held that *Blakely* applies to the Guidelines and precludes their normal operation in cases in which judicial factfinding would increase the defendant's maximum sentence under the Guidelines. *Booker* Pet. App. 8a-9a. The court then remanded the question of severability and other remedial issues to the district court. *Id.* at 13a. The government's petition for certiorari in *Booker* presents the same questions that are presented here. Because the petition in *Booker* seeks review of a decision

of a court of appeals, it offers the opportunity for review of the issues through the Court's customary certiorari procedure.

In this case, unlike *Booker*, the court of appeals has not yet reviewed the judgment. But this case has the advantage of arising from a decision in which the sentencing court resolved both questions presented in the petition. This case thus provides an appropriate companion to *Booker* for this Court to consider, in a concrete context, the implications of *Blakely* for federal sentencing.

Simultaneous grants of review here and in *Booker* are warranted. Granting certiorari in both cases would protect against any possibility that later impediments to review in one or the other case might prevent timely resolution of the issues. Assurance that the Court will have a vehicle in which to reach and resolve the important issues presented, and thereby reduce or eliminate the uncertainty that is currently ravaging the federal sentencing system, is warranted in light of what one court has called "an impending crisis in the administration of criminal justice in the federal courts." *United States* v. *Penaranda*, 2004 WL 1551369, at *7 (2d Cir. July 12, 2004) (en banc), certification docketed, No. 04-59 (July 13, 2004).

D. A Grant Of Certiorari Before Judgment And Expedited Consideration Is Warranted In The Exceptional Circumstances Of This Case

1. A petition for a writ of certiorari before judgment in a case pending in a court of appeals will be granted "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11. This case satisfies that strict criterion.

On several occasions, this Court has granted certiorari before judgment when necessary to obtain expeditious resolution of exceptionally important legal questions. Most notably, the Court granted certiorari before judgment in *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989), in which, as in this case, the constitutionality of the federal sentencing scheme was at issue. The Court also granted certiorari before judgment in *Gratz* v. *Bollinger*, 539 U.S. 244, 259-260 (2001); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981) (Iran hostage agreement); *United States* v. *Nixon*, 418 U.S. 683 (1974) (subpoena to the President); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (steel seizure case); and *Ex parte Quirin*, 317 U.S. 1 (1942) (President's assignment to a military tribunal of jurisdiction over the trial of belligerent saboteurs).* See generally James Lindgren & William R. Marshall, *The Supreme Court's Extraordinary Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259. The constitutionality of federal sentencing practice in light of *Blakely* concerns a subject of equal national importance and warrants certiorari before judgment in this case.

2. In light of the urgent need for this Court's resolution of the questions presented and the thousands —or even tens of thousands—of criminal sentencings

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* See *Barefoot* v. *Estelle*, 463 U.S. 880 (1982) (certiorari before judgment to decide standards governing stay of execution pending litigation of habeas petition); *Clark* v. *Roemer*, 501 U.S. 1246 (1991) (granting certiorari before judgment and summarily vacating and remanding case for further consideration in light of intervening Supreme Court decision). In addition to *Gratz*, the Court has granted certiorari before judgment in other cases where cases presenting similar issues had already been accepted for review. See, *e.g.*, *Taylor* v. *McElroy*, 358 U.S. 918 (1958); *Bolling* v. *Sharpe*, 344 U.S. 873 (1952); *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946).

that will be thrown into doubt until such resolution can be achieved, this Court should expedite consideration of the petition and, if review is granted, the case on the merits. The need for expedition is so great that this Court should set a timetable that permits argument to be held before the Court's scheduled argument sessions in the October 2004 Term. The government today is filing a motion for expedited consideration in this case and in *Booker*, *supra*, proposing schedules for the Court's hearing of the cases. The motion proposes a schedule under which the Court would order responses to the petitions to be filed in time for this Court to decide whether to grant certiorari by August 2. If certiorari is granted on that date, the government proposes that the Court give each side two weeks for its principal brief on the merits (the government's briefs would be due on August 16, respondents' briefs due on August 30). The government's reply briefs would be due on September 8, and the Court could then hear oral argument on September 13. That schedule would permit the Court to return a degree of stability to the federal sentencing system at the earliest possible date. An alternative schedule would permit argument on the first day of oral argument in the October 2004 term.

CONCLUSION

The petition for a writ of certiorari should be granted.

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