No. 06-9864

In The
Supreme Court of the United States

STEVEN SPEARS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

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I. The Government Misconstrues Congressional Will, the Controlling Statute, and the Dangers of Disparity.

The government has embraced the reasoning of the Eighth Circuit in opposing the petition for certiorari. (Brief in Opposition at p. 9) In the decision below, the Eighth Circuit essentially held that when considering crack cocaine cases, sentencing judges are bound by the guidelines even after *United States v. Booker*, 543 U.S. 220 (2005): "A judge's personal views regarding the sentencing commission's recommendations cannot supplant Congress's refusal to adopt those recommendations." *United States v. Spears,* 469 F. 3d 1166, 1177-78 (8th Cir. 2006). Such a limitation runs directly against this Court's remedy in *Booker*, which made the guidelines advisory rather than mandatory. Moreover, the method of undermining the *Booker* remedy articulated by the government improperly construes Congressional will, misreads the controlling statute, and uses disparities as a scare tactic.

A. Discernment of congressional will post-*Booker* supports judicial discretion, not mandatory guidelines.

The government asserts that Congress' will must be respected and claims that it is Congress' will that the 100-to-1 ratio be followed. (Br. in Opp. at p. 9) In 2004, before *United States v. Booker*, 543 U.S. 220 (2005), this would have been a winning argument. At that time, such Congressional will was plainly

expressed through statute — 18 U.S.C. § 3553(b), which directed that (with certain exceptions) a sentencing court "shall" impose a sentence within the guideline range, and the guideline range for crack incorporated the 100-to-1 ratio.

It is not 2004. In 2005, *Booker* struck § 3553(b), making the guidelines advisory. There is still a law through which Congress directs the 100-to-1 ratio be followed: The mandatory minimum sentences set out in 21 U.S.C. § 841(b). However, that law was expressly followed by the sentencing court below, which sentenced Spears to the mandatory minimum term. *Spears,* 469 F.3d at 1169. Thus, the trial court followed the law where it was mandatory and considered but rejected the guideline where it was advisory. In a post-*Booker* world, this is not error.

If Congress desires, it can revive 18 U.S.C. § 3553(b) and make the 100-to-1 ratio mandatory again through very simple legislation. Most easily, the legislature could amend 18 U.S.C. § 3553 to include a requirement of jury findings on sentencing issues, thus making 18 U.S.C. § 3553(b) (which has not been repealed) constitutional again. Congress has not done so, despite this Court's express invitation to do so in *Booker*, where the remedial opinion noted that "The ball now lies in Congress' court. The National Legislature is equipped

to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice." *Booker*, 543 U.S. at 266.

Thus, the government is wrong in asserting that a mandatory 100-to-1 ratio (other than mandatory minimums) is the will of Congress. Were that the will of Congress, that body would have accepted the invitation of this Court in *Booker* and passed legislation embodying and expressing that will in a way that took into account Sixth Amendment concerns. It has not done so, and in the absence of such action it is wrong to claim that Congress wants something it has refused to enact into law.

In the absence of such Congressional action, a sentencing judge must turn to the legislation that is on the books. That statute is 18 U.S.C. 3553(a), which directs consideration of many factors beyond the guideline range.

B. The government seeks to conflate 18 U.S.C. §§ 3553(a)(1) and 3553(a)(2)(A).

According to the Solicitor General, the trial court in this particular case must adhere to the 100-to-1 ratio contained in the guidelines. Given that the 100-to-1 ratio is nothing more and nothing less than an evaluation of the seriousness of crack offenses relative to powder offenses, this is inconsistent with a plain reading of 18 U.S.C. § 3553(a)(2)(A), which directs a district judge to

consider "the seriousness of the offense." Like it or not, the statute Congress has left in place not only allows, but *directs* the sentencing court to reconsider the harshness of the 100-to-1 ratio as a gauge of the seriousness of crack offenses relative to another type of offense.

Nor can the government's reading of the statute be salvaged by interpreting "seriousness of the offense" to refer to the individualized nature and circumstances of the particular case because that is already separately accounted for as a factor, in 18 U.S.C. § 3553(a)(1). To conflate them, as the government would like, makes one or the other redundant contrary to the rules of statutory construction. *Colautti v. Franklin,* 439 U.S. 379, 392 (1979).

In short, the government wants the lingering spirit of Congress' will to be honored where it no longer exists in law (18 U.S.C. § 3553(b)), but does not want the intent of Congress where currently expressed through statute (18 U.S.C. § 3553(a)(2)(A)) to be given its plain meaning.

C. The government's fear of "irrational disparities" is unfounded as a basis to undermine *Booker*.

The government worries that giving 18 U.S.C. § 3553(a) its plain meaning will create "irrational disparities" among sentences if the crack guidelines become truly advisory as *Booker* requires. (Br. in Opp. at pp. 10-11) As this Court recognized in *Booker*, one cost of advisory guidelines would inevitably be

uniformity — a uniformity that was born of the mandatory nature of the pre-*Booker* guidelines. 543 U.S. at 263. There is no avoiding the simple physics of sentencing: Giving judges more discretion creates more disparity. The choice to make the guidelines advisory, however, has already been made, and Congress has not acted to alter the resulting process.

II. Direct Conflict Among the Circuits Warrants Resolution of this Issue by this Court.

The government does not flatly deny that there is a circuit split on the issue presented here and concedes that there is "tension" between the circuits and that the reasoning of the D.C. Circuit is "hard to reconcile" with the Eighth Circuit's decision below. (Br. in Opp. at pp. 13, 15-16) Nonetheless, the government contends that this case "does not warrant this Court's resolution at this time." (Br. in Opp. at 13) Petitioner disagrees.

The Eighth Circuit held that the trial court erred by granting a variance "based solely on its rejection of the 100:1 quantity ratio." *Spears*, 469 F.3d at 1178. In contrast, the Third Circuit, in *United States v. Gunter*, 462 F.3d 237 (3d Cir. 2006), held that a court should have known that it could do exactly that, so long as it first acknowledged the 100-to-1 ratio and its effect before rejecting it:

> Post-*Booker* a sentencing court errs when it believes that it has no discretion to consider the crack/powder cocaine differential incorporated in the Guidelines — but not demanded by 21 U.S.C. § 841(b) — as simply advisory at step three of the post-*Booker* sentencing process (imposing the actual sentence after considering the relevant § 3553(a) factors).

462 F.3d at 249.

The D.C. Circuit, in turn, embraced the reasoning of the Third Circuit and expressly rejected the argument based on disparities that the government raises again here. *United States v. Pickett*, 475 F.3d 1347, 1356 (D.C. Cir. 2007). While *Gunter* and *Pickett* both involve a decision where a trial judge felt he did not have the ability to vary from the guidelines in the absence of individualized circumstances, and the decision here involves a judge who did feel he had that power, the issue is the same: Can a judge vary from the guidelines (and, necessarily, the 100-to-1 ratio built into those guidelines) in the absence of individualized circumstances?

This issue should be resolved as soon as possible, as the divergence of opinions is likely to deepen as time goes on. The Sentencing Commission has proposed amendments to the sentencing guidelines which would slightly lower crack sentences. *See* "Amendments to The Sentencing Guidelines" pp. 42-47, available at http://www.ussc.gov/2007guid/finalamend07.pdf. The goal of these

amendments is to place the guideline ranges for crack offenses so that they straddle the mandatory minimums rather than sit above them. *Id.* at 47.

The proposed amendments would not resolve the issue here, because they would still allow a court to maintain the 100-to-1 ratio within the guideline range and would be subject to the same holding by the Eighth Circuit. Rather, because these amendments allow district courts to dip slightly below 100-to-1 but do not wholly abandon that ratio, they make the issue in this case all the more pressing, as it may encourage more sentencing courts to reject the 100-to-1 ratio without running outside of the guideline range despite the prevailing (but not unanimous) precedents of the Courts of Appeal. If this amendment is enacted, it will not resolve the issue here — it would not authorize the kind of variance given here, or change the analysis of the Eighth Circuit. Rather, this amendment will make the Eighth Circuit's ruling (and similar precedents in other circuits) even more problematic in practice if clarification is not provided by this Court in support of the *Booker* remedy.

III. This Case is Properly Presented for Review.

The posture of this case does not preclude review. Spears appealed the district court's final judgment. The Eighth Circuit Court of Appeals affirmed the conviction but reversed and remanded the case for resentencing in the district

court. Thus, Spears does not seek review of an appeal of an interlocutory order but rather, seeks review of an appeal of a final judgment.[1] (Petition at pp. 2-5) Notably, this Court recently granted review under nearly identical circumstances in *Claiborne v. United States*, 127 S.Ct. 738 (2006) (granting review of an appeal reversing and remanding a case to the district court for resentencing). Thus, the posture of this case does not furnish grounds for denial of the petition.

Denying the petition will not promote judicial efficiency in this case. This case presents a single point of legal error. Spears' position is correct, and if this Court grants review, then the case may be resolved using the minimum amount of judicial resources possible. But if, as the Government requests (Br. in Opp. at pp. 4-5), the Court denies the petition despite the merits, solely because of the procedural posture, precious judicial resources will be squandered. Spears' case would proceed through resentencing. If he receives a longer sentence because

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[1] Even if, as the Government suggests, the decision below was interlocutory, which it is not, this Court has granted review of interlocutory decisions in criminal cases. *Solorio v. United States*, 483 U.S. 435 (1987); *Oliver v. United States*, 466 U.S. 170 (1984); *Bates v. United States*, 522 U.S. 23 (1997). Furthermore, the cases the government cites in support of the proposition that the posture in Spears "furnishe[s] sufficient ground for the denial of certiorari" (Br. in Opp. at p. 5) fall into one of two categories. The first category includes cases seeking review of an appeal from a trial order before final judgment. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *American Constr. Co. v. Jacksonville Ry.*, 148 U.S. 372 (1893). The second category is comprised of one case in which the petitioner sought review of an appeal that "vacated" the trial court's final order. *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993).

the district court abides by the Eighth Circuit's original en banc decision, he will again appeal to the Eighth Circuit.[2] The Eighth Circuit will, in all likelihood, write an opinion affirming the decision. And finally, Spears will return, predictably, to the steps of this Court seeking review on the identical point of error that this Court has the ability to resolve now. Thus, in order to promote judicial economy, the Court should review this case now instead of later.

CONCLUSION

The petition for a writ of certiorari should be granted.

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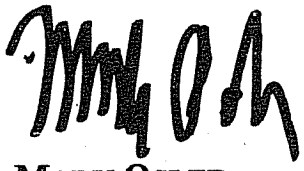
[2] Spears' sentence was already at the statutory mandatory minimum for his offense. Thus, he may not receive a lower sentence on another ground in this case. The only way to avoid another appeal after remand, therefore, is if Spears received an identical sentence on a different ground. The district court was skeptical about that prospect. (Sentencing Tr. at pp. 28-29)

Respectfully submitted,



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