

19-62420 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

IMANOL PINEDA PENALOZA

Petitioner

v

UNITED STATES OF AMERICA

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

Imanol Pineda Penaloza
FCI MANCHESTER
PO BOX 4000
Manchester, KY 40962
Pro Se

Digitized by srujanika@gmail.com

Based on the above, the 'basic setup' is based on the following sequence of events:

you should not be too hasty in this matter, until you have consulted your physician.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The judgment of the United States District Court, Eastern District of Kentucky at Lexington, appears at Appendix A to the petition and is unpublished.

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix B and is unpublished.

The order denying Petitioner's Motion for Rehearing En Banc of the United States Court of Appeals for the Sixth Circuit appears at Appendix C and is unpublished.

JURISDICTION

The Sixth Circuit Court of Appeals affirmed the sentence on 8/2/2019. A timely Petition for Rehearing was denied on 9/4/2019. A copy of the order denying rehearing appears at Appendix C. The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution states:

'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.'

18 USC 3661 states:

'No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.'

18 USC 3553(b)(1) states:

'Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'

United States Sentencing Guideline Manual 6A1.3(a) states:

'When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.'

STATEMENT OF THE CASE

On March 1, 2018, Petitioner Penalosa was indicted by a federal grand jury for conspiring to distribute a mixture or substance containing cocaine in violation of 21 USC 841 (a)(1) and 846. Petitioner was also charged with possession with intent to distribute 500 grams of cocaine in violation of 21 USC 841(a)(1).

On May 23, 2018, a jury found Petitioner guilty of both charged offenses. During the sentencing phase, Federal Probation Services calculated Petitioner's base offense level at 34, finding that he was responsible for distributing at least 50 kilograms of cocaine. The district court further found that Petitioner would be subjected to a leader/organizer enhancement, and a possession of a dangerous weapon enhancement. Neither of these 'finding' were based upon a finding by the jury, nor supported by evidence beyond a reasonable doubt.

Petitioner was ultimately sentenced to 340 months of imprisonment. A timely notice of appeal was filed, and Petitioner's direct appeal was denied on 8/2/19. A timely petition for rehearing en banc was denied on 9/4/19. This timely petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

In Booker, the United States Supreme Court held that the Sixth Amendment rights articulated in Blakely v Washington, 542 US 296 (2004), apply to the sentencing guidelines. Through the majority opinion in Blakely, and two separate majority opinions in Booker, the Court informed the legislative and judicial branches of the United States government that the guideline system of sentencing may only be imposed under one of two circumstances. One of these was if the existing system was given the optic of being 'advisory'. The other option was to stop sentencing defendants based on nothing more than mere allegations using a so-called 'preponderance standard' in violation of defendant's Sixth Amendment rights. The Court held that rendering the guidelines 'advisory' was the preferred option. As a matter of history, policy, and common sense, the best sentencing system is one that is both mandatory and fully accommodates Sixth Amendment rights.

I. Congress Never Intended An 'Advisory' System That Violates The Sixth Amendment

The United States Supreme Court based the decision to render the Sentencing Guidelines 'advisory', by deleting the mandatory provisions in 18 USC 3553(b)(1), on the supposition that given the choice, Congress would not have enacted a mandatory system that requires sentences to be based solely on facts proven beyond a reasonable doubt. However, Congress was never presented with this question. More importantly, for purposes of determining the viability of the 'advisory' system now in place, Congress was never called upon to choose between an 'advisory' system or a 'beyond a reasonable doubt' mandatory system. Nevertheless, the Court amended the system to reflect it's belief, at the time, as to what Congress would have done. However, the founding fathers would have probably disagreed with the Court's ruling. A number of organizations and American citizens would also disagree with the Court's decision to continue sentencing defendants based on allegations and so-called 'facts' without first being proven beyond a reasonable doubt. Because a majority of federal sentences fall within the 'advisory' guideline range

determined almost solely by a judge, treating the Guidelines as 'advisory' does not cure the Sixth Amendment violation that has been occurring for decades. Any 'fact' that increases a defendant's sentence, even if only by a single day, should be proven beyond a reasonable doubt and the resulting guideline range treated as mandatory. This will make the federal criminal justice system in line with the Sixth Amendment while also bringing uniformity back to the federal system.

II. History Of The Act Requires Mandatory Guidelines

The history of the Sentencing Reform Act dictates that any federal sentencing system must be mandatory. As Senators Hatch, Kennedy, and Feinstein noted in their amicus brief in Booker:

'The 1984 Act represents the most comprehensive effort ever undertaken by Congress to reform the federal sentencing system. It is the product of more than a decade of interbranch and bipartisan legislative efforts in both Houses of Congress...Since 1984, Congress has continued to monitor this area of law and has made revisions to the sentencing guidelines system through amendments to the 1984 Act and other legislation.

See Brief of Amici Curiae, United States v Booker, 125 S Ct 738 (2005).

As Justice Stevens made clear in dissent, 'Congress explicitly rejected as a model for reform the various proposals for advisory guidelines that have been introduced in past Congresses'. Booker, 125 S Ct 738 (Stevens,J,dissenting). The mandatory aspect of the guidelines contributed the most to uniformity, the central goal of the Act. While Congress has not actively sought to reinstate a mandatory system, the most effective way of achieving uniformity, the current 'advisory' system violates Blakely and the Sixth Amendment. Most federal sentences still fall within 'advisory' guidelines- based on unproven conduct.

In Booker, the Court held: 'The approach, which we now adopt, would make the Guidelines advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct-a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.' See Booker, 125 S Ct 738. This assertion is made despite the obvious fact that what distinguishes a mandatory system from a discretionary one is that the former

compels uniformity while the latter creates disparity. Even more importantly, when a sentence is imposed based on a defendant's alleged 'real conduct', instead of 'convicted conduct' as intended by the forefathers and the Constitution, the presumption of innocence guaranteed by the constitution is eviscerated. Only a finding of guilt beyond a reasonable doubt regarding a specific allegation can overcome the presumption of innocence. Under the current 'advisory' system only requiring a so-called 'preponderance' of evidence, adopted by the Court in Booker, this presumption does not exist.

One need only look to the legislative history of the Sentencing Reform Act and the public debate that accompanied its consideration to appreciate that discrepancies in sentencing had begun to erode confidence in the judiciary. Thus, Congress had reached the conclusion that mandated uniformity in sentencing was preferable to the disparities arising out of the exercise of judicial 'discretion', which in turn was the cause of great public concern. Indeed, if this history alone is not sufficient to convince even the greatest skeptic that discretion leads to widely divergent sentencing, one need only review the discrepancy in sentencing in the wake of Booker based on the same offense of conviction and supported only by a 'preponderance' of evidence. This reveals that sentencing can only be uniform if mandated guidelines are applied and that all enhancements be proven beyond a reasonable doubt. Booker should be overturned and this type of system put in its place.

III. Sentencing Enhancements Should Require Proof Beyond A Reasonable Doubt

The Sentencing Guidelines, and the Supreme Court in *United States v Watts*, 519 US 148 (1997), provide that the burden of proof for establishing a sentencing is a mere 'preponderance' of the evidence. See US Sentencing Guidelines Manual 6A1.3. In doing so, the Court also relied upon 18 USC 3661, which holds that judges may consider all background, character, and conduct in imposing an appropriate sentence. The Guidelines further provide that the rules of evidence do

not apply to evidence put forth by the government in support of sentence enhancements. See 6A1.3(a). The only requirement imposed on this so-called 'evidence' is that it has 'sufficient indicia of reliability'. This standard is so low that any allegations put forth by the government are found to be considered as 'proof' that the allegation occurred. Any such 'proof' put forth is found to be 'reliable' while exculpatory evidence put forth by a defendant is almost always held to be 'unreliable' and is disregarded.

A defendant's Sixth Amendment rights are violated when judicial 'factfinding', under an extremely relaxed burden of proof, is permitted, especially when combined with the nonapplication of the rules of evidence. Logic and common-sense dictate that a judge cannot constitutionally enhance a defendant's sentence based on nothing more than mere allegations put forth by the government and not be in violation of Blakely without a more exacting standard of proof and the application of the rules of evidence. Under Blakely and Booker, the Sixth Amendment is the guiding principle applicable to factfinding at sentencing. Thus, the Sixth Amendment protections of a higher burden of proof and the application of the rules of evidence should be applied.

The government has argued in the past that any change in the burden of proof regarding sentencing enhancements would disrupt the guideline system so significantly that the Guidelines as a whole would fail. This claim is without merit. The burden of proof is not a significant aspect of the overall interdependency of the various components of the Guidelines. Adjusting the burden of proof and applying the rules of evidence will simply require the government to actually prove facts of an alleged crime beyond a reasonable doubt and that is admissible. Such changes would result in more just sentences-not precipitate a failure in the system as the government would have us believe.

As a practical matter, the evidence necessary to support sentencing enhancements should have to be proven beyond a reasonable doubt and subjected to the rules

of evidence. If a defendant is charged with possessing drugs and possessing a firearm, and the government agrees to dismiss the firearm charge in exchange for avoiding trial, the defendant should not then be sentenced to the same sentence he would have been had he been convicted of both offenses. In cases regarding drug amounts distributed, the government should have to actually prove, beyond a reasonable doubt, the amount of drugs distributed or possessed. Allowing courts to 'estimate' the amount of drugs involved in an offense results in sentences being based on nothing more than presumptions and assumptions-a clear violation of the Sixth Amendment.

The clear purpose of Blakely, and the correct opinion of Booker, was to ensure that each fact necessary to support a sentence be proven under the rules of evidence and beyond a reasonable doubt. This should have had the greatest impact in the area of so-called 'relevant conduct', an area of federal law that has long been criticized by many civil rights organizations and American citizens. The Court's ruling in McMillan v Pennsylvania, 477 US 79 (1986) and the 'remedial' opinion in Booker were decided wrong and should be overruled by the Court.

IV. This Is An Issue Of National Importance And Should Be Heard

The decision to permit courts to continue violating defendant's Sixth Amendment rights by rendering the application of the Sentencing Guidelines 'advisory' was wrongly decided and constitutes a national issue of grave importance. The issue raised in this petition, if heard by the Court, would resolve the conflict between Blakely, Booker, and McMillan, and would reinstate the constitutional rights provided by the United States Constitution if decided in Petitioner's favor.

Conclusion

For the reasons described above, this petition for a writ of certiorari should be granted to resolve the conflict between Supreme Court precedents and to correct the Sixth Amendment violations that have been occurring nationwide for many decades by sentencing American citizens for alleged crimes they have not been found guilty

beyond a reasonable doubt of committing. It is time to put the presumption of innocence guaranteed by the United States Constitution back into our federal courts.

Respectfully Submitted,
Imanol Pineda Penaloza
FCI MANCHESTER
PO BOX 4000
Manchester, KY 40962