No. 09-5370

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS VAZQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's sentence is procedurally unreasonable because the district court imposed sentence on the premise that it lacked authority to vary from the advisory Sentencing Guidelines range based on a policy disagreement with the career offender guideline, U.S.S.G. § 4B1.1.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B7) is reported at 558 F.3d 1224.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 2009 (Pet. App. B1). A petition for rehearing was denied on April 24, 2009. The petition for a writ of certiorari was filed on July 15, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B), and 846. He was sentenced to 110 months of imprisonment. On the government's appeal, the court of appeals vacated petitioner's sentence and remanded for resentencing. On remand, the district court sentenced him to 180 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. B1-B6; Gov't C.A. Br. 2.

1. Petitioner and his co-defendant agreed to purchase three kilograms of cocaine from a confidential informant working with the Drug Enforcement Administration. Petitioner was arrested after he gave the informant $18,000 in exchange for a substance that he believed to be cocaine. Gov't C.A. Br. 3-4.

Petitioner entered into a plea agreement with the government and pleaded guilty to the single charge in the indictment. Before sentencing, the probation office prepared a Presentence Report (PSR) attributing three kilograms of cocaine to petitioner. PSR ¶ 15. That amount, the probation office noted (ibid.), would normally result in a base offense level of 28 under the Guidelines' drug-quantity table, Guidelines § 2D1.1(c)(6). The probation office further reported that petitioner had six criminal

convictions for a total of 12 criminal history points, which would normally result in a criminal history category of V. PSR ¶¶ 28-34.

But because (a) petitioner was 18 or older at the time of the instant cocaine offense; (b) the offense was a controlled substance offense; and (c) petitioner had two prior convictions for controlled substances offenses and a conviction for a crime of violence, the probation office determined that petitioner was to be sentenced as a career offender under Sentencing Guidelines § 4B1.1. PSR ¶¶ 23, 35. Under the table set forth in Section 4B1.1(b), petitioner's base offense level was 34. That level was then reduced to 32 for his acceptance of responsibility. PSR ¶¶ 23-26. As "in every case" (Sentencing Guidelines § 4B1.1(b)) involving the career-offender provision, petitioner's criminal history category was VI. PSR ¶ 35. In light of these calculations, the probation office assessed an advisory imprisonment range of 210 to 262 months. Id. ¶ 59.

At sentencing, the district court stated that, while petitioner qualified as a career offender, his criminal history did not warrant that designation. The court noted that petitioner's two prior drug convictions occurred more than 15 years ago and resulted in concurrent 18-month sentences and that petitioner's statutory-rape conviction occurred in 1995 and was consensual. Pet. App. A4. The court also expressed disagreement with the policy reflected in Section 4B1.1 because it created "a quantum

leap in the guideline calculation" that was not always justified. Id. at A3 (internal quotation marks omitted). The court sentenced petitioner to 110 months of imprisonment, which was the bottom of the advisory Guidelines range absent the career offender enhancement. Id. at A4.

2. In 2005, before this Court's decisions in Gall v. United States, 552 U.S. 38 (2007), and Kimbrough v. United States, 552 U.S. 85 (2007), the government appealed, and the court of appeals vacated the sentence. It held that the district court procedurally erred when it varied from the advisory Guidelines based on "the court's disagreement with the Guidelines, an impermissible factor." Pet. App. A6. It further concluded that the error was not harmless and remanded the case for resentencing. Id. at A6-A7.

3. On remand, petitioner argued that, under this Court's intervening decisions in Gall and Kimbrough, the district court could disagree with the career offender provisions on policy grounds, and he asked the court to resentence him to no more than the 110-month sentence that the court previously had imposed. 1/30/2008 Sent. Tr. 4-6, 8. In a written opinion, the district court opined that the career offender provisions of the Guidelines may be "immune from the policy criticisms otherwise permissible" under Kimbrough because Guidelines § 4B1.1 is "a product of direct congressional expression" rather than implied congressional policy, as was the 100:1 crack/powder cocaine disparity at issue in

Kimbrough. Mem. Sentencing Op. 2. While the Guidelines were therefore, in the court's view, "unassailable from a policy standpoint," the court noted that application of those Guidelines to the particular facts of the case was advisory. Ibid. The court sentenced petitioner to a below-Guidelines term of 180 months of imprisonment "[b]ased upon the facts before it, and without regard to any policy concerns the Court may have about the application of 4B1.1 in this case." Ibid. The district court made clear at sentencing that "if I were allowed to consider what I consider to be the unjust application of 4(b)1.1 in this case, I would impose a sentence lower than 180 months." 1/30/2008 Sent. Tr. 18.

4. On appeal, petitioner argued that the district court procedurally erred in refusing to consider its disagreement with Guidelines § 4B1.1. The court of appeals affirmed the sentence. Pet. App. B1-B7. The court concluded that Kimbrough did not overrule its precedent in United States v. Williams, 456 F.3d 1353 (11th Cir. 2006), cert. dismissed, 551 U.S. 1160 (2007), which held that Guidelines § 4B1.1 "encapsulates the congressional policy articulated in 28 U.S.C. § 994(h) that 'repeat drug offenders receive sentences 'at or near' the enhanced statutory maximums set out in § 841(b),'" Pet. App. B4-B5 (quoting Williams, 456 F.3d at 1370), and that a district court may not ignore that congressional policy, id. at B5. "To the contrary," the court continued, this Court in Kimbrough "expressly made a distinction between the

Guidelines' disparate treatment of crack and powder cocaine offenses -- where Congress did not direct the Sentencing Commission to create this disparity -- and the Guideline's punishment of career offenders -- which was explicitly directed by Congress." Ibid. Accordingly, Kimbrough "cannot be read to create a conflict with our Williams decision, nor to suggest that district courts may base their sentencing decisions on any disagreement they have with the policy behind the career offender guidelines, which are directly driven by congressional pronouncement." Ibid. The court indicated that its conclusion was consistent with the views of the First, Seventh, and Eighth Circuits. Ibid. (citing United States v. Harris, 536 F.3d 798, 812 (7th Cir. 2008); United States v. Clay, 524 F.3d 877, 878-879 (8th Cir. 2008); United States v. Jimenez, 512 F.3d 1, 9 (1st Cir. 2007), cert. denied, 128 S. Ct. 2920 (2008)). Finally, the court observed that the district court had, in fact, imposed a sentence below the Guidelines range, thus demonstrating that it understood that the career offender guideline was advisory apart from policy disagreements. Id. at B6.

DISCUSSION

Petitioner contends (Pet. 13-26) that the court of appeals erred by concluding that a district court is precluded from disagreeing with the career offender guideline on policy grounds because that guideline is "the result of direct congressional expression." Pet. App. B6 (internal quotation marks omitted). In

the court of appeals, the United States argued that this Court's decision in Kimbrough v. United States, 552 U.S. 85 (2007), was consistent with the Eleventh Circuit's earlier holding in United States v. Williams, 456 F.3d 1353 (11th Cir. 2006), cert. dismissed, 551 U.S. 1160 (2007), that sentencing courts are not free to disagree with the congressional policy reflected in Section 4B1.1. Gov't C.A. Br. 18-22 (Oct. 3, 2008). As petitioner observes (Pet. 27-29), that view of the career offender guideline is inconsistent with the current position of the United States, as the government has explained to other courts and is further explained below. See, e.g., Pet. App. C1-C2 (withdrawing argument and explaining the position of the United States that "[i]n light of the holding of Kimbrough * * * , a sentencing court is not precluded from imposing a non-Guidelines sentence based on a policy disagreement with the career offender guideline"). In this case, the district court stated that it would have imposed a lower sentence if it were permitted to consider "policy concerns the Court [had] about the application of 4B1.1 in this case." Mem. Sentencing Op. 2. See also 1/30/2008 Sent. Tr. 18 (court would have granted lower sentence if free to disagree with "the unjust application of [Guidelines §] 4(b)1.1 in this case"). The Court therefore should grant the petition, vacate the judgment of the court of appeals, and remand for further proceedings in light of the position of the United States asserted in this brief.

1. This Court held in Kimbrough that, under United States v. Booker, 543 U.S. 220 (2005), "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant" that the disparity between the Guidelines' treatment of crack and powder cocaine offenses "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." 552 U.S. at 110. The court of appeals concluded, nonetheless, that Kimbrough supported the Eleventh Circuit's Williams decision because the Court in Kimbrough drew a distinction between implicit congressional policies and those congressional policies that have been specifically incorporated in statutory directives to the Commission. See Pet. App. B5 (citing Kimbrough, 552 U.S. at 103). The court of appeals' reliance on Kimbrough is misplaced.

In the passage from Kimbrough cited by the court of appeals, the Court was responding to the government's argument that, by adopting disparate maximum and minimum sentences for crack and powder cocaine, Congress had "implicitly require[d] the Commission and sentencing courts to apply the 100-to-1 ratio." 552 U.S. at 102 (internal quotation marks and citation omitted) (emphasis added). The Court disagreed, observing that "[t]he statute says nothing about the appropriate sentences within these brackets" of minima and maxima, "and we decline to read any implicit directive into that congressional silence." Ibid. The Court went on to

observe that "[d]rawing meaning from silence is particularly inappropriate here, for Congress has shown that it knows how to direct sentencing practices in express terms. For example, Congress has specifically required the Sentencing Commission to set Guidelines sentences for serious recidivist offenders 'at or near' the statutory maximum." Ibid. (quoting 28 U.S.C. 994(h) (emphasis added)). See ibid. (citing 28 U.S.C. 994(i), which provides that "[t]he Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment" for specified offenders).

Kimbrough's reference to Section 994(h) as an example of Congress directing "the Sentencing Commission" to adopt a Guideline reflecting a particular policy, 552 U.S. at 103, did not suggest that Congress had bound sentencing courts through Section 994. The court of appeals' reliance on Kimbrough's reference to Section 994(h) therefore depends on the additional, unstated, premise that congressional directives to the Sentencing Commission are equally binding on sentencing courts. That premise is incorrect. See United States v. Sanchez, 517 F.3d 651, 663 (2d Cir. 2008) ("Section 994(h) * * * , by its terms, is a direction to the Sentencing Commission, not to the courts * * * . While 21 U.S.C. § 841(b) expressly establishes the minimum and maximum prison terms that the court is allowed to impose for violations of § 841(a), there is no statutory provision instructing the court to

sentence a career offender at or near the statutory maximum." (emphasis added)). Indeed, it is fundamentally inconsistent with the remedial scheme adopted in Booker, 543 U.S. at 259-260. The decision in that case did not simply render certain aspects of the Guidelines advisory; instead, the Court concluded that it was not "possible to leave the Guidelines as binding" in some cases and advisory in others. Id. at 266. Sentencing courts are also free to disagree with the advisory Guidelines on policy grounds, subject to reasonableness review on appeal. See Kimbrough, 552 U.S. at 108-111. A view that a sentencing court cannot disagree with the policy of the career offender guideline, but can make only individualized variances, Pet. App. B6, is inconsistent with this Court's conception of the nature of the advisory Guidelines regime under Booker and Kimbrough. See Spears v. United States, 129 S. Ct. 840, 843 (2009) (per curiam) (reiterating that district courts have authority to vary from the "Guidelines based on policy disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case" and noting that "[t]he latter proposition was already established pre-Kimbrough, see [Booker, 543 U.S. at 245-246], and the Government conceded as much in Kimbrough").

Congress might have issued a directive to sentencing courts to sentence career offenders at or near the maximum sentences authorized, but it has not done so. Rather, in Section 994(h), it

directed the Commission to specify a particular consequence in a guideline. See United States v. Michael, 576 F.3d 323, 328 (6th Cir. 2009) ("By its terms, [Section 994(h)] tells the Sentencing Commission, not the courts, what to do."); Sanchez, 517 F.3d at 663 (Section 994(h) "is a direction to the Sentencing Commission, not to the courts."). Under Booker, all guidelines are advisory, and the very essence of an advisory guideline is that a sentencing court may, subject to appellate review for reasonableness, disagree with the guideline in imposing sentencing under Section 3553(a). "A district court may lawfully conclude, therefore, that the policies underlying the career-offender [guideline] * * * yield a sentencing 'greater than necessary' to serve the objectives of sentenc[ing]." Michael, 576 F.3d at 327 (quoting 18 U.S.C. 3553(a); other internal quotation marks omitted).[1]

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[1] Notably, the court of appeals' approach would seem to require the courts to analyze each Guideline or subsection of a guideline to determine whether it derives from a specific policy directive from Congress to the Commission. Numerous provisions in Section 994 provide (to a greater or lesser degree) direction to the Commission on the extent of imprisonment warranted for various classes of offenders. See, e.g., 28 U.S.C. 994(e) and (i). Congress has also repeatedly enacted legislation requiring the Commission to ensure that various enhancements are reflected in the Guidelines for a variety of offenses. See, e.g., Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (amending the Guidelines relating to child pornography offenses); U.S. Sentencing Comm'n, The History of the Child Pornography Guidelines 38-39 (Oct. 2009) (describing changes to Guidelines §§ 2G2.2, 2G2.4). Distinguishing between mandatory and non-mandatory Guidelines in the way the court of appeals proposes is directly contrary to the Booker Court's conclusion that "Congress would not have authorized a mandatory system in some cases and a nonmandatory system in others, given the administrative complexities that such a system

2. Contrary to the court of appeals' assertion, Pet. App. B5, its broad holding that sentencing courts are prohibited from varying from the career offender guidelines based on policy disagreements has not been embraced by any other court. Several courts have expressly rejected that view. See United States v. Gray, 577 F.3d 947, 950 (8th Cir. 2009) ("the district court gave no indication that it failed to understand its authority to vary from the career-offender guideline" on the basis of "policy considerations, including disagreements with the guidelines"); Michael, 576 F.3d at 327-328 (expressly disagreeing with the decision in this case); United States v. Boardman, 528 F.3d 86, 87 (1st Cir. 2008); Sanchez, 517 F.3d at 663-665. Cf. United States v. Friedman, 554 F.3d 1301, 1311-1312 & n.13 (10th Cir. 2009) (recognizing court's authority to disagree with career offender guidelines but concluding that district court's (unreasonable) sentence was not based on that disagreement).

The cases that the court of appeals cited as similar do not stand for the proposition that a district court is precluded from disagreeing with the career offender guidelines. Those cases held only that the sentences imposed upon those defendants, whose advisory Guidelines ranges were calculated under Section 4B1.1's career offender guideline, were unaffected by Kimbrough's holding on the advisory status of the crack/powder guideline in Section

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would create." 543 U.S. at 266.

2D1.1(c). See United States v. Harris, 536 F.3d 798, 812-813 (7th Cir. 2008) (agreeing with Sanchez that Section 4B1.1 is no "less advisory for a district judge than the other sentencing guidelines," but holding that district courts cannot disagree with the statutory maximum sentences set by Congress to which Section 4B1.1 looks as its starting point, including the disparate maximum sentences for crack and powder cocaine); United States v. Jimenez, 512 F.3d 1, 8 (1st Cir. 2007) (defendant's advisory range "would have been the same" under the career offender guideline regardless of whether the substance he possessed was crack or powder cocaine), cert. denied, 128 S. Ct. 2920 (2008). Cf. United States v. Clay, 524 F.3d 877, 878-879 (8th Cir. 2008) (Sentencing Commission's amendment to Section 2D1.1's quantity table concerning crack "did not change the career offender provision in § 4B1.1 and thus would not lower Clay's sentencing range"). None of those decisions adopts, or even supports, the court of appeals' rule that Section 994(h)'s direction to the Sentencing Commission deprives sentencing courts of the power to disagree with the career offender guideline on a policy basis. Indeed, as noted above, two of the three circuits that the court of appeals cited as having adopted a similar rule to its own have in fact rejected that approach in

other decisions. See Gray, 577 F.3d at 950; Boardman, 528 F.3d at 87.[2]

The government had argued in pre-Kimbrough cases that courts could not disagree with the policy of the career offender guideline in sentencing under advisory Guidelines. See, e.g., U.S. Br., United States v. Williams, No. 05-13205-JJ (11th Cir. filed Oct. 3, 2005). But the government acknowledged in oral argument in this Court in Rita v. United States, No. 06-5754 (argued Feb. 20, 2007), that courts had some freedom to disagree with the Guidelines, see Tr. 34-35, and after this Court's decision in Rita v. United States, 551 U.S. 338 (2007), the government filed briefs in this Court in Gall and Kimbrough making clear that district courts can impose sentence based on a policy disagreement with the Guidelines, including the career offender guideline. In its brief in Gall, the government acknowledged that "a variance [from the advisory Guidelines range] may be justified either by atypical facts, by persuasive policy reasons for concluding that the Guidelines do not

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[2] The Seventh Circuit has recently reaffirmed its holding in Harris that "a district court may not disagree specifically with the statutory [crack/powder] disparity embedded in § 4B1.1." United States v. Welton, 583 F.3d 494, 499 (2009). The court went on to make "clear" its view that "the fact that a district court may not disagree specifically with the statutory disparity [between crack and powder] embedded in § 4B1.1 does not mean that the court may only impose a sentence that is within the career offender Guidelines range" or that "§ 4B1.1 is any less advisory for a district judge than the other sentencing guidelines." Ibid.; see also ibid. (quoting Sanchez, 517 F.3d at 663 ("there is no statutory provision instructing the court to sentence a career offender at or near the statutory maximum" in accordance with § 4B1.1)).

appropriately reflect Section 3553(a)'s sentencing factors, or by a combination of facts and policy considerations." U.S. Br. at 35, Gall v. United States, No. 06-7949 (Aug. 2007). And in Kimbrough, the government made clear that its position was that, while Congress can issue direct instructions to sentencing courts, "[w]hen the Commission acts under * * * congressional guidance," such as the instruction concerning career offenders in 28 U.S.C. 994(h), "the guidelines it produces are, under Booker, best understood as advisory. A district court may therefore sentence based on policy considerations that differ from those reflected in the Guidelines (subject to reasonableness review on appeal)." U.S. Br. at 29, Kimbrough v. United States, No. 06-6330 (Aug. 2007). The government specifically referred to the career offender guideline in that discussion. Id. at 28.

The government adhered to the view that courts may sentence based on a disagreement with the career offender guideline (subject to reasonableness review on appeal) in post-Kimbrough briefs filed in the courts of appeals. See, e.g., U.S. Supp. Mem. at 13-17, United States v. Harris, No. 07-2195 (7th Cir. May 6, 2008); Corrected Resp. of the U.S. to Def's Pet. for Reh'g En Banc at 8-9, United States v. Funk, No. 05-3708 (6th Cir. Oct. 9, 2008); U.S. Br. at 14-15, United States v. Welton, No. 08-3799 (7th Cir. May 11, 2009); see also United States v. Welton, 583 F.3d 494, 503 &

n.2 (7th Cir. 2009) (Williams, J., dissenting) (citing the government's briefs in Welton and Funk).

3. The court of appeals should have an opportunity to reconsider its judgment in light of the position stated by the United States in this brief. As noted above, see pp. 6-7, supra, the government's brief before the panel in this case urged the court to adhere to the holding in Williams and argued that this Court's opinion in Kimbrough did not undermine the validity of Williams. For the reasons stated above, the position of the United States now is that this Court's analysis and holding in Kimbrough displaces the holding in Williams. Although petitioner advised the court in his en banc petition that the United States had argued in other cases a position different from that taken in the government's brief before the panel, the en banc court did not have the benefit of hearing a full exposition of the government's position on that issue. A remand would allow the court of appeals to consider the issue again in light of the views of the United States stated in this brief.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further proceedings in light of the position of the United States asserted in this brief.

Respectfully submitted.

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