IN THE SUPREME COURT OF THE UNITED STATES

No. 06-8498

TERRANCE BEAL, PETITIONER

v.

UNITED STATES OF AMERICA

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

SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES

The United States respectfully submits that, in the wake of the Court's decision in Claiborne v. United States, No. 06-5618 (June 4, 2007), vacating the judgment of the court of appeals as moot in light of Claiborne's death on May 30, 2007, the Court should grant the petition for a writ of certiorari in this case. In addition, the federal criminal justice system would greatly benefit from this Court's consideration of the merits of this case on an expedited basis. If the Court wishes to render a decision

this Term, the parties have agreed to a proposed schedule for expedited briefing that would permit the Court to do so.[1]

This case squarely raises the same legal issue that this Court granted certiorari to decide in Claiborne: whether it is consistent with United States v. Booker, 543 U.S. 220 (2005), for a court of appeals reviewing a sentence for reasonableness to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances. In addition, this case arises from the same judicial circuit as Claiborne and involves a court of appeals' decision reversing a downward variance after applying the same legal principles as in Claiborne, viz., that "the farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be," Beal Pet. App. 4 (internal quotation marks and citations omitted), and that "[a]n extraordinary reduction must be supported by extraordinary circumstances," ibid. (quoting United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005)). See J.A. 90-91 in Claiborne, No. 06-5618 (applying the identical legal principles).

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[1] In Petitioner's Motion for Disposition of Case as Presented or, in the Alternative, for Granting Certiorari in an Appropriate Case such as Beal v. United States, submitted in Claiborne v. United States, No. 06-5618 (filed June 1, 2007), counsel for petitioner Beal, the Federal Public Defender for the Eastern District of Missouri, suggested in the alternative that this Court grant review in Beal. This memorandum responds to that request.

The federal criminal justice system has a great need for this Court's guidance concerning the nature and scope of review of out-of-guidelines sentences under Booker. This Court's own docket reflects a number of cases that raise this issue, but the dockets of the courts of appeals contain a far greater number of cases whose resolution depends on the legal principles that this Court announces. Many of those cases are being held pending the Court's decisions on the issues it granted certiorari to decide in Rita and Claiborne. That backlog will continue to grow if this Court is unable to address the proportionality principle until next Term. In addition, this Court's analysis of the reasonableness of out-of-range sentences will almost certainly have a significant impact on day-to-day sentences in the district courts and on the government's decisions on which cases to appeal. In light of the reality that the federal district courts sentence more than 70,000 defendants each fiscal year, and that, in fiscal year 2006, approximately 14% of those cases reflected variances under Booker, the impact of this Court's decision will be considerable.

Counsel for petitioner agrees with the government that expedited resolution of this case is in the overall interest of the administration of justice. The parties also agree that accelerated briefing is feasible in light of the fact that the merits of the proportionality principle have been briefed and argued in Claiborne. The remaining issue in Beal concerns the reasonableness

of the sentence imposed in this case. The parties agree that they could effectively address that issue in simultaneous, expedited briefs. Simultaneous briefs on the reasonableness of the sentence imposed in Beal could be filed by June 15, 2006, and the case submitted on those briefs (unless the Court desired to receive reply briefs or to hear oral argument). That schedule would permit a decision to be rendered in Beal this Term. Alternatively, the Court should grant review and set the case for argument as early in the October 2007 Term as is feasible.

A. The Petition For Certiorari In Beal v. United States Provides An Appropriate Vehicle For This Court To Address The Issues It Granted Certiorari To Decide In Claiborne

The Court granted review in Claiborne on the following questions:

> 1) Was the district court's choice of below-Guidelines sentence reasonable?
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> 2) In making that determination, is it consistent with United States v. Booker, 543 U.S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

As in Claiborne, the petitioner in Beal received a below-Guidelines sentence based on the district court's evaluation of the factors in 18 U.S.C. 3553(a). And, as in Claiborne, the court of appeals reversed, holding that the justifications the district court gave were not "compelling" enough to justify a sentence "substantially below" the advisory Guidelines range. Pet. App. 1, 7. The facts

in Beal also provide a suitable vehicle for the Court to address the issues that were presented in Claiborne.[2]

1. Petitioner pleaded guilty to an indictment charging him with distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1). The charge was based on petitioner's sale, on October 9, 2003, of 4.8 grams of cocaine base to an undercover officer. When he was arrested on the federal charges, officers recovered a total of 11 grams of cocaine base from his person. Pet. App. 1-2.

At sentencing, based on petitioner's two prior Missouri state court felony convictions for controlled substance offenses, the district court determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1. Application of the career offender provision yielded a criminal history category of VI, see Guidelines § 4B1.1(b), which, when combined with an offense

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[2] Other cases on the Court's docket also present similar issues, but none provides a better vehicle than Beal for resolution of the questions the Court granted review to consider in Claiborne. See, e.g., United States v. Grinbergs, 470 F.3d 758, 761-762 (8th Cir. 2006) (reasons offered by district court "fall short of providing the justification required for a departure [or variance] of this degree"), pet. for cert. pending, No. 06-10045 (filed Mar. 8, 2007); United States v. McDonald, 461 F.3d 948, 956 (8th Cir. 2006) (factors on which district court relied "do not constitute the type of compelling justifications necessary to justify a variance of the magnitude awarded here"), pet. for cert. pending, No. 06-8086 (filed Nov. 28, 2006); United States v. Davis, 458 F.3d 491, 499 (6th Cir. 2006) (district court's "explanations for deviating from [the Guidelines] range fail to justify the magnitude of the variance"), pet. for cert. pending, No. 06-7784 (filed Nov. 13, 2006).

level of 31, produced an advisory Guidelines range of 188 to 235 months of imprisonment. Pet. App. 2-3, 12-13.

The district court determined that a sentence within the advisory Guidelines range would be "greater than necessary to achieve the sentencing goals" in 18 U.S.C. 3553(a). Pet. App. 26. The court noted that petitioner, who had received suspended sentences for his two prior state-court convictions, had "never spent any actual * * * time in jail." Id. at 25. Nevertheless, the court stated, the career offender provision would treat petitioner, who was not the "most hardened criminal" the court had sentenced, "exactly the same as if he had done two different ten-year sentences in the federal prison." Id. at 25-26, 28-29. The court concluded that application of the career offender guideline would be "simply overkill" and would "work an injustice." Id. at 26, 29. The court then imposed a sentence of 84 months of imprisonment. Id. at 29.

2. The government appealed, contending that "the sentence [w]as unreasonable under United States v. Booker, 543 U.S. 220 (2005)." Pet. App. 1. Agreeing with the government, the court of appeals vacated the sentence and remanded for resentencing. Id. at 1-7. The court noted that "[u]nder Booker, the district court 'must take the advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a).'" Pet. App. 3 (quoting United States v. Claiborne, 439 F.3d 479, 480 (8th Cir.

2006), vacated as moot, No. 06-5618 (June 4, 2007)). The court observed that sentences within the advisory Guidelines range are "presumptively reasonable," but that sentences outside the range will also be found reasonable so long as the sentencing court provides an "appropriate justification under the factors specified in Section 3553(a)." Pet. App. 4 (quoting United States v. Bradford, 447 F.3d 1026, 1028 (8th Cir. 2006)). The greater the extent of the variance from the Guidelines range, the court stated, "the more compelling the justification" that is required. Id. at 4 (quoting United States v. McMannus, 436 F.3d 871, 874 (8th Cir. 2006)). In particular, "[a]n extraordinary reduction must be supported by extraordinary circumstances." Ibid. (quoting United States v. Dalton, 404 F.3d 1029, 1032 (8th Cir. 2005)).

Applying those principles, the court of appeals held that the considerations on which the district court relied were not "compelling enough" to justify the extent of the variance from the Guidelines range, and that the 84-month sentence was therefore unreasonable. Pet. App. 7. The court acknowledged the district court's "concern that the predicate offenses that result in career offender status are not the same for all defendants," but concluded that the court "placed too much weight on the lenient sentences" petitioner received for his prior felony convictions. Id. at 6. The court noted that Congress had directed the Sentencing Commission to "assure that the guidelines specify a sentence to a

term of imprisonment at or near the maximum term authorized" for career offenders, see 28 U.S.C. 994(h), and reasoned that "the variance in this case is so great that it does not give appropriate deference to the congressional policy on career offenders." Pet. App. 6. The court also concluded that petitioner's conduct since his prior convictions did not warrant such a substantial variance, noting that the district court had found that petitioner's behavior after participating in a residential drug treatment program in 2002 and 2003 had been "very inconsistent" with the goals of the program. Id. at 7; see id. at 27-28 (district court commented that petitioner did "have a chance" and "blew it after that program").

3. The legal issue concerning the proportionality of a variance to the applicable advisory guidelines range in Beal is identical to that formulated by the Court in Claiborne. The petition in Beal articulates that issue as follows: "On reasonableness review, is it consistent with Booker to require that a sentence substantially below the Guidelines range be supported by extraordinary or compelling circumstances?" Pet. i. The remaining issue in each case is whether the sentence imposed is reasonable. That determination turns on the application on the Section 3553(a) factors to the facts of the case. Both Claiborne and Beal involve drug offenses (the most common offense sentenced in the federal system) and both involve substantial variances based on the district courts' belief that the advisory sentencing range was

excessive in light of the purposes of sentencing. The district court in each case also focused on the defendant's criminal history and drew a comparison with other cases the court had sentenced, as grounds for varying from the range. In light of those factors, the government agrees with petitioner that "the close similarity of the facts and decisions of the district courts and appellate panels in Claiborne and Beal makes the latter case an efficient and effective vehicle to resolve the urgent issues presented in Claiborne."[3]

B. The Court's Resolution Of Beal This Term Would Greatly Benefit The Administration Of Criminal Justice

This Court's orders granting certiorari in Rita v. United States, No. 06-5754, and Claiborne appeared to represent an effort to resolve comprehensively the appellate standards for reasonableness review under Booker. The status of reasonableness review is perhaps the most pressing legal issue facing federal criminal justice today. Rita and Claiborne represented the two paradigms encountered by the appellate courts: review of within-range sentences and review of outside-the-range sentences. While

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[3] Motion for Disposition of Case as Presented or, in the Alternative, for Granting Certiorari in an Appropriate Case such as Beal v. United States, filed in Claiborne v. United States, No. 06-5618 (filed June 1, 2007), at 11. The petition in Beal also formulates a more specific issue relating to the interplay of the Guidelines limitations on downward departures and the reasonableness of a sentence under Section 3553(a). See 06-8498 Pet. i ("Is the Guidelines prohibition on downward departures of more than one criminal history category for career offenders relevant to assessing the reasonableness of a non-Guidelines sentence imposed under 3553(a)?"). That specific issue is subsumed within an analysis of the reasonableness of Beal's sentence.

a decision in Rita will illuminate the proper analysis of within-range sentences, it seems unlikely that the facts of Rita would allow the Court to explicate the standards for appellate review of outside-the-range sentences. Yet a proper understanding of those standards is critical to the functioning not only of federal appellate review but also of district court sentencing.

Numerous cases are pending on this Court's docket that involve whether courts of appeals properly reversed downward variances, but those cases represent only the tip of an iceberg. The courts of appeals are continuing to issue some decisions in appeals by the government and defendants from variances, but many such cases are also being held in abeyance pending this Court's resolution of the issues it granted review to decide in Claiborne.[4] As the government informed the Court in Rita, between February 1, 2005, and September 30, 2006, district courts imposed more than 14,000 below-Guidelines sentences. U.S. Br. in Rita at 36. The

[4] Indeed, the en banc Ninth Circuit undertook to review comprehensively the appropriate methodology for sentencing and appeals under Booker in United States v. Zavala, 443 F.3d 1165, reh'g en banc granted, 462 F.3d 1066 (2006), and United States v. Carty, 453 F.3d 1214 (2006), reh'g en banc granted, 462 F.3d 1066 (2006), but, after hearing argument, the en banc court vacated submission of those cases pending the decision of this Court in Rita and Claiborne. Order, Dec. 6, 2006, United States v. Carty, (No. 05-10200) and United States v. Zavala (No. 05-30120). The result is that the Ninth Circuit, the largest circuit in the country, handling approximately 13,794 cases annually, or 19% of all criminal cases (see 2006 Sourcebook of Federal Sentencing Statistics 2-7 (Table 1)), has deferred giving guidance on this vital issue.

government stated that it had appealed the reasonableness of something less than 300 cases from that universe. Ibid. Assuming that the government continues to appeal approximately 2% of downward variances, scores of sentences, and likely hundreds of years of prison time, will turn on this Court's analysis of appellate review of substantial variances.[5]

Even greater effects are likely to be felt at the district court level. While the issues formulated in Claiborne focus on appellate review, district courts will certainly look to the principles articulated by this Court to assess the interplay between the Guidelines and the other Section 3553(a) factors. The Court's analysis could thus affect both the frequency and the degree of variances from advisory Guidelines sentences. The government and defendants will also likely key their arguments to the Court's analysis. And, just as "plea bargaining takes place in the shadow of (i.e., with an eye towards the hypothetical result) of a potential trial," Booker, 543 U.S. at 255, plea bargaining

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[5] In FY 2006, district courts imposed more than 70,187 sentences. Approximately 61.7% were Guidelines sentences, while approximately 13.7% fell outside the Guidelines range. United States Sentencing Commission, 2006 Sourcebook of Federal Sentencing Statistics 74-75 (2007). That figure includes upward and downward variances under Booker, upward and downward departures, cases in which the district court invoked its discretion under Booker and entered an upward or downward departure, and other cases in which the court entered a non-Guidelines sentences. See id. at 79 n.3. It excludes government-sponsored below-Guidelines sentences, including cases involving substantial-assistance and early-disposition departures.

also takes place with a view towards the anticipated results at sentencing. The Court's analysis will thus have an effect on negotiated dispositions, which occur in the vast majority of criminal cases. The government's decisions on which cases to appeal will also turn heavily on this Court's analysis of reasonableness review of variances from the Guidelines. For all of those reasons, a decision this Term would provide much-needed guidance for the criminal justice system and avoid the potential need for repeated consideration by the courts of appeals of individual sentences or repeated re-sentencings by district courts.

C. Expedited Briefing In Beal Can Permit This Court To Decide The Case This Term

Because of the full briefing of the legal issues in Claiborne, and because of the parties' familiarity with the issues bearing on the reasonableness of the sentence in this case, the parties agree that expedited briefing limited to the issue of the reasonableness of Beal's sentence is feasible. The parties agree that simultaneous 20-page briefs limited to the issue of reasonableness could be filed by June 15, 2007 (i.e., one week after issuance of the Court's order granting certiorari, if the Court considers this case at its June 7, 2007, conference and issues an order granting certiorari the next day). The parties also agree that the case could be submitted based on that briefing (and the briefing in Claiborne) without reply briefs or oral argument, unless the Court so requests.

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For the foregoing reasons, the Court should grant certiorari on the same questions formulated in Claiborne. If the Court wishes to resolve Beal this Term, it should order expedited briefing due June 15, 2007, limited to the issue of the reasonableness of the sentence. Alternatively, the Court should grant review and set the case for argument as early in the October 2007 Term as possible.

Respectfully submitted.

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