No. 06-5618

SUPREME COURT OF THE UNITED STATES

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

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, CASE NUMBER 06-8498

Assistant Federal Public Defender Michael Dwyer, counsel of record for Petitioner Mario Claiborne, moves for disposition of Petitioner's case as presented to this Court. Alternatively, he suggests that this Court grant certiorari in an appropriate case, such as *Beal v. United States,* case number 06-8498. In *Beal,* a petition for certiorari is currently pending before this Court from the United States Court of Appeals for the Eighth Circuit and, like Claiborne, Beal is represented by the Federal Public Defender for the Eastern

District of Missouri. In support, Petitioner's counsel states:

Facts

This Court granted certiorari in Petitioner's case and in *Rita v. United States,* case number 06-5754, on November 3, 2006. The Court set argument in both cases on February 20, 2007, and took both cases under submission following the argument. On May 30, 2007, before this Court could issue decisions in these cases, Mario Claiborne died. His counsel filed a Suggestion of Death the following day, notifying the Court of this fact.

Argument

It would appear that the normal course of action in this Court when a petitioner in a criminal case dies while his or her case remains pending is to vacate the order granting the writ of certiorari and dismiss the petition. *See Mosely v. United States* , 525 U.S. 120 (1998) (per curiam); *Dove v. United States,* 423 U.S. 325 (1976) (per curiam). Such a disposition in this case would, however, be unnecessary and inappropriate, in light of this Court's simultaneous granting of writs of certiorari in *Claiborne* and Rita. Accordingly, Petitioner's counsel requests that the Court issue its decision in this case as presented notwithstanding Petitioner's death.

By joining *Rita* and *Claiborne* for briefing and argument, this Court manifested emphatically its desire for comprehensive resolution of issues concerning proper application of the federal sentencing law in light of the

constitutional and remedial opinions in *United States v. Booker,* 543 U.S. 220 (2005).

The questions posed in the cases bear this out. In *Rita*, the Court posed three issues: (1) Was the District Court's choice of within-guidelines sentence reasonable? (2) In making that determination, is it consistent with *United States v. Booker,* 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences? (3) If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. § 3553(a) factors that might justify a lesser sentence?

In *Claiborne,* the Court asked counsel to address two issues: (1) Was the district court's choice of below-Guidelines sentence reasonable? (2) In making that determination, is it consistent with *United States v. Booker,* . . ., to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

That the Court granted certiorari in these two factually independent cases, and requested briefing on these two sets of interrelated but distinct issues concerning the proper application of *Booker* and 18 U.S.C. § 3553(a), seemingly reflects a desire to comprehensively resolve the difficult issues surrounding post-*Booker* application of the Guidelines. *Rita* alone does not present the Court with the same opportunity to resolve issues concerning the reasonableness of below-guidelines sentences or the Eighth Circuit's extraor-

dinary circumstances rule. Accordingly, if the Court decides *Rita,* but dismisses *Claiborne*, significant and constantly recurring issues in the post-*Booker* application of federal sentencing law may remain unresolved.[1] Comments and questions during oral argument in *Rita* and *Claiborne* highlighted that the linkages between the two cases were essential to understanding the Court's intent in *Booker*. *See Rita v. United States*, oral argument transcript, at 33, 48, 49, 50. Dismissal of *Claiborne* at this stage – if it prevents the Court from reaching the issues in that case – would deprive the federal criminal justice system of urgently needed guidance and coherence.

This Court's prior dismissal of cases upon death of the petitioner such as in *Mosley v. United States,*525 U.S. 120 (1998)(per curiam), appears to be predicated on a conclusion that death renders the case moot. *See Durham v. United States,* 401 U.S. 481, 483 (1971) (Marshall, J., dissenting) (arguing that petitioners' death should result in the case being dismissed as moot rather than the writ granted and the decision below vacated), *overruled by Dove,* 423 U.S. at 325 (overruling *Durham* and dismissing petition after petitioner's death). It is far from clear, however, that this Court's

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1. The Eighth Circuit continues to cite *Claiborne* for the presumption of reasonableness and the extraordinary circumstances rule, concerning sentences that were below the Guideline ranges. See, e.g., *United States v. Pepper,* 2007 WL 1461407 (8th Cir. May 21, 2007); *United States v. Miller,* 484 F.3d 964 (8th Cir. 2007); *United States v. Gonzalez-Alvarado*, 477 F.3d 648 (8th Cir. 2007).

mootness doctrine derives from jurisdictional limits set in the Constitution's Article III. As former Chief Justice Rehnquist stated in *Honig v. Doe,* 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring):

> If it were indeed Art. III which--by reason of its requirement of a case or controversy for the exercise of federal judicial power--underlies the mootness doctrine, the "capable of repetition, yet evading review" exception relied upon by the Court in this case would be incomprehensible. Article III extends the judicial power of the United States only to cases and controversies; it does not except from this requirement other lawsuits which are "capable of repetition, yet evading review." If our mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, we would have no more power to decide lawsuits which are "moot" but which also raise questions which are capable of repetition but evading review than we would to decide cases which are "moot" but raise no such questions.

Id. After surveying the mootness doctrine, former Chief Justice Rehnquist concluded:

> The logical conclusion to be drawn from these cases, and from the historical development of the principle of mootness, is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, **it is an attenuated connection that may be overridden where there are strong reasons to override it.** The "capable of repetition, yet evading review" exception is an example. So too is our refusal to dismiss as moot those cases in which the defendant voluntarily ceases, at some advanced stage of the appellate proceedings, whatever activity prompted the plaintiff to seek an injunction. . . . I believe that we should adopt an additional exception to our present mootness doctrine for those cases where the events which render the case moot have supervened since our grant of certiorari or noting of probable jurisdiction in the case. Dissents from denial of certiorari in this Court illustrate the proposition that the roughly 150 or 160 cases which we decide each year on the merits are less than the number of cases warranting review by us if we are to remain, as Chief

> Justice Taft said many years ago, "the last word on every important issue under the Constitution and the statutes of the United States." **But these unique resources-the time spent preparing to decide the case by reading briefs, hearing oral argument, and conferring-are squandered in every case in which it becomes apparent after the decisional process is underway that we may not reach the question presented. To me the unique and valuable ability of this Court to decide a case-we are, at present, the only Art. III court which can decide a federal question in such a way as to bind all other courts-is a sufficient reason either to abandon the doctrine of mootness altogether in cases which this Court has decided to review, or at least to relax the doctrine of mootness in such a manner as the dissent accuses the majority of doing here.** I would leave the mootness doctrine as established by our cases in full force and effect when applied to the earlier stages of a lawsuit, but I believe that once this Court has undertaken a consideration of a case, an exception to that principle is just as much warranted as where a case is "capable of repetition, yet evading review."

Id. at 331-32 (emphasis added).

Claiborne fits the pragmatic, prudential doctrine that former Chief Justice Rehnquist urged on the Court. This Court, the parties, amici, and the government have invested considerable time and resources addressing urgent issues that will continue to bedevil the federal criminal justice system if they remain unresolved. Further, the government cannot in any sense be prejudiced if the Court intended to reverse the Eighth Circuit's decision in *Claiborne* with directions to affirm the district court's sentence. Such a ruling would render the case final in every sense of the word and Petitioner's

absence would in no way affect this result.[2] *See United States v. Morton,* 635 F.2d 723, 725 (8th Cir. 1980) (death of defendant abated the punishment of an uncollected fine, but not the conviction and judgment). But, such a result would offer an immediate benefit to the judicial system as a whole by providing the comprehensive answers that this Court presumably contemplated when it granted certiorari simultaneously in *Rita* and *Claiborne*.

Notwithstanding Petitioner's untimely death, collateral consequences remain. This Court, in *In re Winship*, 397 U.S. 358 (1970), stressed the stigma associated with a criminal conviction as a basis, coequal with the loss of liberty, to justify the beyond a reasonable doubt standard. *See id.* at 363. *Booker*, 543 U.S. at 230-34, following *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000), and *Blakely v. Washington,* 542 U.S. 296 (2005), held that the content of a criminal conviction consists of the facts inherent in a jury's verdict or embraced by a defendant's plea and prohibited courts from enhancing or aggravating this content through factual findings at sentencing. In *Claiborne,* the Eighth Circuit violated this rule through its own fact finding – for which there was no record evidence whatsoever – and aggravated the stigma of Claiborne's conviction beyond the facts inherent in his plea of guilty: "Substantially reducing the resulting guidelines range sentence based

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2. Obviously, if the Court intended to remand the case for further proceedings in the District Court, Petitioner's death would render further litigation impossible.

upon drug quantity is unreasonable **because it is a fair inference that Claiborne distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police**." *United States v. Claiborne,* 439 F.3d 479, 481 (8th Cir. 2006) (emphasis added). This additional stigma, wholly inconsistent with this Court's reasoning in *Booker,* would stand unresolved. That stigma would undoubtedly diminish the viability and value of any wrongful death action that Claiborne's family might now pursue. Thus, even for Claiborne in this criminal case, collateral consequences remain to be addressed.

For these reasons, this Court should dispose of Claiborne's case as it is presented. Disposition would benefit the system as a whole, conserve judicial resources, and foster much needed coherence and consistency in federal sentencing.[3]

In the alternative, should this Court decide that it cannot dispose of Claiborne's case as presented, counsel asks that the Court grant the petition for certiorari to the Eighth Circuit Court of Appeals pending in *Terrence Beal v. United States*, No. 06-8498 (petition for certiorari filed December 21, 2006).[4] The second question this Court asked the parties to brief in

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3. As noted, such a disposition would not prejudice Claiborne. *See Morton,* 635 F.2d at 725.

4. There are, of course, innumerable cases presenting issues similar to those in *Claiborne* that are pending before this Court. This Court's decision in *United States v. Carter,* 530 U.S. 255, 260 n.1 (2000), suggests

Claiborne became the first question in Beal's petition for a writ of certiorari: "[I]s it consistent with *Booker* to require that a sentence substantially below the Guidelines range be supported by extraordinary or compelling circumstances?" *See Beal v. United States*, No. 06-8498, Petition for a Writ of Certiorari to the Eighth Circuit at I.

Beal poses the same questions that are before the Court in *Claiborne*, and the sentencing record and appellate analysis closely parallel *Claiborne*. Both involve prosecutions for possessing crack cocaine: Beal pled guilty to the distribution of 4.8 grams of cocaine base to an undercover officer, less than half of one gram's difference from the 5.26 grams of cocaine base involved in Claiborne's conviction. Beal's criminal history consisted of two offenses for which he received concurrent terms of probation, but because they qualified as controlled substance offenses under the career offender guideline, his guideline range was 188-to-235 months. The district court sentenced Beal to 84 months, finding that the severe enhancement under the career offender guideline "work[ed] an injustice" against Beal, who did not appear to be "the most hardened criminal [the court] ever had." *United States v. Beal*, 463 F.3d 834, 835 (8th Cir. 2006) The judge observed that

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that continuity of counsel may be a relevant consideration in the grant of a certiorari. The opinion in *Carter* addressed the same issue that had been raised and left unaddressed in *Mosley* due to the death of the petitioner. *Id.* at 260 n.1. Both Mosley and Carter were represented in the Supreme Court by the same attorney.

Beal's prior offenses sharply contrasted with the record of a career offender who had already served two ten-year sentences in federal prison. *Id*. Echoing the sentencing judge's concerns in *Claiborne* that a guideline sentence "would be tantamount to throwing [him] away," the district court in Beal judged that a career offender sentence of 15 to 20 years "is simply overkill. It's not necessary for punishment, it's not necessary for deterrence of others, and it's not necessary to protect the public from this defendant." *Id.* at 836. As did the sentencing judge in *Claiborne,* the district court in Beal imposed "a lower [than the guideline] sentence that is still a significant sentence [that meets] the sentencing objectives." *Id*.

Citing its decision in *Claiborne,* the Eighth Circuit in *Beal* held that the personal history and characteristics cited by the district court were insufficiently extraordinary to justify the variance, just as it did in *Claiborne.* It vacated the judgment and remanded for resentencing as in *Claiborne. Compare* 463 F.3d at 836-38 *with* 439 F.3d at 481. The Eighth Circuit also faulted the district court for failing to grant "appropriate deference to the congressional policy on career offenders" by which it meant Congress's directives to the Sentencing Commission to assure the guidelines specified terms at or near the maximum sentence for defendants previously convicted of two mor more controlled substance offenses. *Id*. at 837. The court of appeals stated that while there may be cases in which other section 3553(a)

factors predominate over the career offender guideline, Beal's was not such a case. *See id.*

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*. Because of his representation of Claiborne, the Federal Public Defender for the Eastern District of Missouri could expeditiously prepare *Beal* for briefing and argument.

WHEREFORE, counsel of record for Petitioner Claiborne requests: (1) that the Court decide the case as presented or, alternatively, (2) grant certiorari in *Beal* or another appropriate case for prompt resolution of the issues before the Court in *Claiborne*.

Dated June 2, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Assistant Federal Public Defender Michael Dwyer certifies that on June 2, 2007, he served one copy of this Motion to Request Disposition of the Case as Presented or, Alternatively, Granting Certiorari in an Alternative Case Such as *Beal v. United States,* Case Number 06-8498 by first class mail, postage prepaid, upon the Solicitor General for the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C., 20530-0001, counsel for Respondent.

Dated June 2, 2007.

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Michael Dwyer