No. 00-366

In the Supreme Court of the United States

DENISE DEGROAT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed plain error at sentencing when it held petitioner responsible for nine ounces of crack cocaine.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rules:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is unpublished, but the decision is noted at 211 F.3d 1270 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2000. The petition for a writ of certiorari was filed on July 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to possess cocaine base (crack) with the intent to distribute it, in violation of 21 U.S.C. 846, and of obstructing justice, in violation of 18 U.S.C. 2232(b). The district court sentenced her to a term of 192 months' imprisonment, to be followed by a four-year period of supervised release. The court of appeals affirmed in part and reversed in part. Pet. App. 1-29.

1. Petitioner was a police officer in Saginaw, Michigan. Her brother Celester DeGroat and Eugene Beaver had been childhood friends in California. Celester eventually moved to Michigan. In January 1993, on a return trip to California to visit his mother, Celester told Beaver, who was also a drug dealer, about the drug business that he and his friends were operating in Saginaw. He also told Beaver that his sister was a Saginaw police officer who would let them know if they were being watched or an investigation was underway. Pet. App. 36-37; Gov't C.A. Br. 5.

Celester and Beaver subsequently approached Beaver's friend, Terry Gear, from whom they obtained nine ounces of crack. In January 1993, Beaver hid the drugs in a pillow and transported them by bus to Saginaw. Beaver, Celester, and a third man then went to a house on Ninth Street where they met several of Celester's drug trafficking associates, who were known collectively as the Fourth and Kirk Posse (4KP) after the intersection that was the primary location for their retail drug sales. Celester distributed Beaver's crack to his associates in one-ounce baggies. That evening, petitioner came to the house and told Celester to stop

selling drugs from that location because it was under police surveillance. See Pet. App. 37; Gov't C.A. Br. 5-6.

Although a number of people affiliated with the 4KP were arrested in October 1994, the group's drug trafficking operations continued through 1995 and most of 1996. On one occasion in August 1996, petitioner warned one of the gang members, Alfreda Brewer, not to sell drugs to an individual whom petitioner recognized as an undercover police officer. Petitioner, Celester, and others were ultimately arrested in October 1996. See Pet. App. 4, 41-43; Gov't C.A. Br. 6-19.

2. Following the jury's verdict, the probation office prepared petitioner's Presentence Report (PSR). See Pet. App. 30-53. The PSR determined that petitioner was responsible for 255.15 grams (nine ounces) of crack, based on Beaver's first delivery to the 4KP in January 1993. *Id.* at 43. The PSR calculated petitioner's total offense level as 36, which included a base offense level of 34, a two-level reduction because petitioner was a minor participant in the drug conspiracy offense, a two-level increase for abusing a position of public trust, and a two-level increase for obstructing justice. *Id.* at 44-45. The PSR further determined that petitioner's criminal history category was I and her Guidelines sentencing range was 188-235 months' imprisonment. See *id.* at 45, 50.

Petitioner did not object to the PSR's attribution to her of the nine ounces of crack cocaine. Instead, she urged the district court to depart downward from the Guidelines range on the grounds that (1) she was not directly involved in the sale of any controlled substances, and (2) she would have received a lesser sentence if she had been convicted of the same offenses in state court. See Addendum to PSR, at 1-4 (Dec. 10,

1997); Pet. Sent. Mem. 1-2 (Dec. 24, 1997). In response, the government argued that the grounds advanced by petitioner were not appropriate bases for a downward departure. See Gov't Sent. Mem. 1-4 (Jan. 12, 1998). The government suggested, however, that petitioner might be sentenced under the obstruction-of-justice Guideline, Section 2J1.2, which would have produced a sentencing range of 97-121 months' imprisonment. See Gov't Sent. Mem. 4-5 (Jan. 12, 1998).

At sentencing, the district court confirmed that petitioner had not objected to the PSR, and had instead relied solely on her departure motion. Pet. App. 70. The court then rejected the government's suggestion that petitioner might be sentenced under the obstruction-of-justice Guideline, finding that petitioner was not a mere accessory after the fact, but had directly facilitated the 4KP's drug distribution activities. Sent. Tr. 6-8 (Jan. 15, 1998). The court observed that "[t]he jury deliberated long and hard on this matter, considering fairly and properly introduced evidence[,] and fairly and properly[,] based upon overwhelming, clearly supported evidence, they found [petitioner] guilty." *Id.* at 15. The court also stated that it "d[id] not accept the proposition that [petitioner] * * * did things that amount to less than direct participation in drug distribution." *Id.* at 17. The court found that a downward departure was unwarranted and imposed a sentence of 192 months' imprisonment. *Ibid.*

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1-29. Petitioner argued that the evidence did not support her obstruction-of-justice and drug conspiracy convictions, see Pet. C.A. Br. 5-13; that the district court was biased against her, see *id.* at 14-22; and that the district court had committed plain error in holding her responsible for nine ounces of crack

without determining that the amount was within the scope of her conspiratorial agreement, *id.* at 23-27. The government argued that petitioner had waived her sentencing claim, explaining that because petitioner had not objected to the PSR's recommendations, "the district court had no reason to explain his findings or to develop the record further." Gov't C.A. Br. 73.

After oral argument in the court of appeals, petitioner filed a supplemental brief in which she contended that the government had not shown that a seizure was imminent when she warned Brewer not to sell drugs to the undercover officer, and that the evidence therefore was insufficient to establish a violation of 18 U.S.C. 2232(b).[1] See Pet. Supp. C.A. Br. 1-4. The government responded that the statute applies broadly to "possible" searches or seizures. See Gov't Supp. C.A. Br. 5-8.

The court of appeals reversed petitioner's conviction under Section 2232(b) and remanded for a new trial. The court held that the district court had committed plain error when it instructed the jury that the undercover officer's intended purchase of crack from Brewer was a "seizure" of the drug. See Pet. App. 11-13.[2] The

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[1] Section 2232(b) provides:

> Whoever, having knowledge that any person authorized to make searches and seizures has been authorized or is otherwise likely to make a search or seizure, in order to prevent the authorized seizing or securing of any person, goods, wares, merchandise or other property, gives notice or attempts to give notice of the possible search or seizure to any person shall be fined under this title or imprisoned not more than five years, or both.

[2] On June 20, 2000, after the decision of the court of appeals, the district court dismissed the Section 2232(b) charge against petitioner on the government's motion. See Mot. and Order for Dismissal 1.

court rejected all of petitioner's other claims without specifically addressing her contention that the district court had committed plain error at sentencing in holding her responsible for nine ounces of crack. See *id.* at 1-2, 8-10, 13-14, 21-23, 28.

ARGUMENT

1. Petitioner contends (Pet. 2-7) that the district court committed plain error at sentencing by accepting the PSR's attribution to her of nine ounces of crack cocaine (the amount transported by Beaver on his first trip to Saginaw in January 1993) without making particularized findings as to the scope of petitioner's conspiratorial agreement. Petitioner acknowledges (*e.g.*, Pet. 5-6) that she did not contest the quantity of drugs attributed to her until the case was on appeal. Accordingly, she must establish that the court's finding constituted plain error under Federal Rule of Criminal Procedure 52(b), which requires a showing that (1) there was error, (2) the error was "plain," (3) the error "affect[ed] substantial rights," and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 732-737 (1993). Petitioner's claim lacks merit and does not warrant this Court's review.

a. Because petitioner did not dispute the PSR's attribution to her of nine ounces of crack, the district court was not required to make particularized findings about the scope of her conspiratorial agreement. Federal Rule of Criminal Procedure 32(c)(1) provides that "[f]or each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing." At the sentencing hearing, peti-

tioner merely urged the court to depart downward from the presumptive sentencing range established by the Guidelines. See Pet. App. 70. She neither disputed the PSR's attribution to her of nine ounces of crack nor offered any evidence that would cast doubt on the PSR's drug quantity assessment. Because the quantity of drugs attributable to petitioner was not a "matter controverted" by the parties, the district court had no obligation to develop the record with respect to that question. See *United States* v. *Catucci*, 55 F.3d 15, 19 (1st Cir. 1995) (absent a claim of factual inaccuracy, Rule 32 requirements are not implicated).

b. Even if the district court's failure to make particularized findings as to the scope of petitioner's agreement were erroneous, that error would not warrant correction under Rule 52(b). Petitioner cannot show that any error affected her substantial rights, or that it seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). The attribution to petitioner of nine ounces of crack cocaine was amply supported by the government's proof. Trial evidence that the district court characterized as "overwhelming," Sent. Tr. 15 (Jan. 15, 1998), established that petitioner played a real, though minor, role in the 4KP drug conspiracy over a four-year period from 1993 to 1997. See Gov't C.A. Br. 5-6, 12-16.

If anything, the PSR's attribution to petitioner of nine ounces of crack—the amount involved in the January 1993 transaction in which she warned Celester not to sell the drugs from the house on Ninth Street (see pp. 2-3, *supra*)—substantially understated the amount of crack that she could have reasonably foreseen as a member of the 4KP conspiracy during the relevant four-year period. The government's evidence

showed that in addition to providing her co-conspirators with information about police activities over that period, petitioner was present during multiple retail drug sales by her co-conspirators at a busy, open-air drug market in July, August, and September 1996, see Gov' C.A. Br. 13-16; was present when illegal drugs were used or prepared for distribution, see *id.* at 16; and provided a co-conspirator with the name of a drug source, see *ibid.* Cf. Guidelines § 1B1.3(a)(1)(B) (conspirators should be sentenced on the basis of all reasonably foreseeable acts of others committed in furtherance of jointly undertaken criminal activity). Accordingly, the district court's attribution to petitioner of nine ounces of crack without making particularized findings as to the scope of her agreement did not violate her substantial rights, did not seriously affect the fairness, integrity, or public reputation of judicial proceedings, and was not plain error. See Fed. R. Crim. P. 52(b); *Johnson*, 520 U.S. at 466-467.[3]

c. Contrary to petitioner's suggestion (Pet. 2-4), the decision of the court of appeals in this case does not conflict with decisions of other circuits. None of the cases

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[3] Petitioner's argument (see Pet. 6-7) that her sentence represented a miscarriage of justice because she never handled or sold drugs is wholly without merit. The handling or selling of drugs is not an element of a drug conspiracy offense under 21 U.S.C. 846. It is enough that (1) an agreement to distribute drugs existed between two or more persons, (2) the defendant knew of the object of the conspiracy, and (3) the defendant knowingly joined or participated in the illegal venture. See, *e.g.*, *United States* v. *Matthews*, 168 F.3d 1234, 1245 (11th Cir.), cert. denied, 120 S. Ct. 199, 438, and 454 (1999). Here the district court correctly found, on the basis of "overwhelming" evidence, see Sent. Tr. 15 (Jan. 15, 1998), that petitioner had joined the illegal 4KP venture and had facilitated its activities by informing her co-conspirators of relevant law enforcement efforts.

on which petitioner relies holds that, in the absence of an objection by the defendant, a sentencing court commits plain error by failing to make particularized findings as to the scope of a drug conspirator's agreement. Indeed, none of those cases involves a claim of plain error at sentencing.

3. Several weeks after the court of appeals decided petitioner's case, this Court issued its decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000). *Apprendi* holds, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363. Although the district court in this case did sentence petitioner based on the court's own finding as to drug quantity, nothing in *Apprendi* calls into question the constitutionality of the sentence that petitioner received.

A jury found petitioner guilty of conspiring to possess cocaine base, a Schedule II controlled substance under 21 U.S.C. 812(c) (Sch. II (a)(4)). See 21 U.S.C. 846. Federal law authorizes "a term of imprisonment of not more than 20 years [240 months]" for a defendant who, like petitioner, has been found guilty of a drug offense involving *any* quantity of a Schedule II controlled substance. 21 U.S.C. 841(b)(1)(C) (1994 & Supp. IV 1998). Petitioner was sentenced to a term of 192 months' imprisonment, a sentence that was within the statutory maximum established by Section 841(b)(1)(C).

Thus, although the involvement of certain threshold drug quantities may trigger the applicability of higher maximum sentences under Section 841(b), petitioner's 192-month sentence was authorized by that statute without regard to the specific quantity of cocaine base

involved in her offense. Accordingly, *Apprendi* provides no basis for an argument that the term of imprisonment imposed on petitioner was unconstitutional. See *United States* v. *Doggett*, 230 F.3d 160, 165 (5th Cir. 2000); *United States* v. *Aguayo-Delgado*, 220 F.3d 926, 932-934 (8th Cir.), cert. denied, No. 00-6746 (Nov. 27, 2000). This Court has recently denied several petitions for certiorari raising similar challenges to sentences imposed under 21 U.S.C. 841 (1994 & Supp. IV 1998) that were within the lowest applicable statutory maximum under Section 841(b)(1)(C). See, *e.g.*, *Rios-Quintero* v. *United States*, 121 S. Ct. 301 (2000) (No. 99-9905); *Anthony* v. *United States*, 121 S. Ct. 313 (2000) (No. 00-5188); *Littles* v. *United States*, 121 S. Ct. 81 (2000) (No. 99-8992); *Foye* v. *United States*, 121 S. Ct. 153 (2000) (No. 99-10143); *Medina* v. *United States*, 121 S. Ct. 157 (2000) (No. 99-10173).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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