No. 00-463

In the Supreme Court of the United States

EDGAR ARNOLD GARCIA, 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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QUESTIONS PRESENTED

1. Whether the district court committed reversible error by sentencing petitioner in accordance with 21 U.S.C. 841(b)(1)(A), in the absence of an allegation as to drug quantity in the indictment.

2. Whether the district court committed reversible error by sentencing petitioner according to the quantity of drugs for which he was responsible under the Sentencing Guidelines and for departing upward from the Guidelines sentencing range because a death had resulted from his conduct, in the absence of allegations as to those facts in the indictment.

3. Whether the doctrine of specialty, under which an extradited defendant may be prosecuted only for the crimes for which he was extradited, precludes the use of facts regarding other crimes in setting the defendant's sentence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 208 F.3d 1258.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2000. A petition for rehearing was denied on June 14, 2000. Pet. App. 22a-23a. The petition for a writ of certiorari was filed on September 12, 2000. 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 Northern District of Florida, petitioner was convicted of conspiring to possess marijuana with

intent to distribute it, in violation of 21 U.S.C. 846, and using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). Pet. App. 10a-11a. He was sentenced to 300 months' imprisonment for the marijuana conspiracy offense and a consecutive 60 months' imprisonment for the firearm offense. *Id.* at 12a. The court of appeals affirmed. *Id.* at 1a-9a.

1. In 1990, petitioner was a principal organizer of a conspiracy to supply marijuana from Texas to co-conspirators in Florida. One of the co-conspirators, Marty Cryer, appropriated about 117 pounds of marijuana for himself and did not pay petitioner for it. Petitioner located Cryer in Chiefland, Florida, and shot him to death on February 20, 1991. Petitioner hid in Texas for about four weeks and then fled to Canada. Pet. App. 2a.

On June 17, 1992, petitioner was indicted in the Northern District of Florida for conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846, possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a), and using and carrying a firearm during and in relation to a drug trafficking offenses, in violation of 18 U.S.C. 924(c). The indictment specified that marijuana was the controlled substance involved in the drug trafficking offenses, but it did not specify the quantity of marijuana, nor did it refer to 21 U.S.C. 841(b), which provides for increased sentence maximums depending on drug quantity. See Gov't C.A. Br. App. Item No. 1, at 1-2. On June 23, 1992, the district court issued a warrant for petitioner's arrest. Pet. App. 2a. Florida state prosecutors also charged petitioner with first degree murder for the death of Cryer. Gov't C.A. Br. 5.

2. On June 17, 1992, petitioner was arrested in Canada by Canadian authorities. Pet. App. 2a. On August 12, 1992, the United States made a formal request to Canada for extradition of petitioner to face prosecution on the charges included in the federal indictment, as well as on the state murder charge. Gov't C.A. Br. 5; Pet. App. 2a. The extradition request specifically recited that petitioner was exposed to imprisonment for up to 40 years under 21 U.S.C. 841(b)(1)(B) for his federal drug conspiracy offense, because it involved more than 100 kilograms of marijuana. Gov't C.A. Br. App. Item No. 1, at 5 (affidavit accompanying extradition request).

In May 1997, after approximately five years of extradition proceedings in Canada, petitioner was extradited. Pet. App. 2a. The extradition was authorized on both the federal and state charges, based on a stipulation by the State of Florida that it would not seek the death penalty for the murder charge. Gov't C.A. Br. 5-6.

3. On July 25, 1997, pursuant to a plea agreement, petitioner pleaded guilty in federal district court to the marijuana conspiracy and firearm offenses charged in the federal indictment. The plea agreement specifically recited that petitioner was exposed to up to 40 years' imprisonment for the marijuana conspiracy charge under 21 U.S.C. 841(b)(1)(B) and to a consecutive five years' imprisonment for the firearm charge. Gov't C.A. Br. 6-7. At the plea hearing, the government filed a document entitled "Factual Basis For Plea," and petitioner acknowledged that the government could present evidence showing that the drug conspiracy entailed far more than the 100 kilogram threshold to invoke that penalty provision. *Id.* at 7. The acknowl-

edged testimony also established petitioner's guilt of Cryer's murder. *Id.* at 8-11.

The district court had the factual basis for the plea read into the record. Gov't C.A. Br. 13. Under oath, petitioner acknowledged that the stated facts were true, except that there were some items of which he had no knowledge. *Ibid.* He admitted his guilt of the federal charges, but declined to address his culpability for Cryer's murder. *Ibid.* Petitioner specifically acknowledged that he understood the penalties to which he was exposed. *Ibid.*

The presentence report (PSR) recommended a base offense level of 28, based upon 1,100 pounds of marijuana and one kilogram of cocaine that were involved in the conspiracy offense and other relevant conduct. Gov't C.A. Br. 14. The PSR also recommended a two-level upward adjustment for obstruction of justice and denial of any credit for acceptance of responsibility. *Id.* at 13-14. The district court overruled petitioner's objections to the PSR and found the PSR to be accurate, with the exception of the cocaine allegation, which was deleted at the government's request. *Id.* at 19. The court found that the sentencing range was 151-188 months' imprisonment. *Ibid.* The court granted the government's request for an upward departure based on Cryer's murder in connection with the drug trafficking conspiracy. *Ibid.* It imposed a sentence of 300 months' imprisonment for the drug conspiracy offense and a consecutive 60 months' imprisonment for the firearm offense. *Ibid.* The court rejected petitioner's claims that the terms of his extradition and the doctrine of specialty precluded the court's consideration at sentencing of either the murder or quantities of marijuana sent from Texas to Louisiana (rather than Florida) as part of the conspiracy. *Id.* at 14-15, 19.

On October 9, shortly after the federal sentencing, petitioner pleaded guilty to second degree murder in Florida state court, pursuant to a plea agreement, and was sentenced to 17 years' imprisonment, to run concurrently with the federal sentence. Pet. 3. At the time the federal district court imposed its sentence, it was aware of petitioner's intent to plead guilty to the state murder charge. Gov't C.A. Br. 14 & n.1.

4. The court of appeals affirmed the district court's sentence. Pet. App. 1a-9a. It rejected petitioner's claim that the conditions of petitioner's extradition precluded the district court from considering as relevant conduct or as grounds for departure either the murder or the shipments of marijuana from Texas to Louisiana, for which petitioner was responsible. *Id.* at 3a-5a. The court recognized that the "doctrine of specialty" protected an extradited person from being prosecuted or punished "for an offense other than that for which extradition has been granted." *Id.* at 3a. But it held that the rule was not violated in this case, because petitioner was prosecuted, convicted, and punished only for the offenses for which extradition was granted. *Id.* at 5a. The court ruled that, when it extradited petitioner, "Canada was well aware of the additional conduct ascribed to [petitioner] and has acquiesced to the procedure by which such conduct is considered in sentencing." *Id.* at 4a. (The court had been advised in the briefing that the Canadian Government had been consulted in petitioner's case and that it had no objection to the district court's consideration of the various facts and circumstances at sentencing. See Gov't C.A. Br. 32-33.) In any event, the court of appeals held that "[t]he question must be resolved in accordance with the law of the United States [although] the law and position of the surrendering

state [Canada] may be considered." Pet. App. 3a-4a. The court found that the doctrine of specialty, as applied by United States courts, was not violated by the sentencing approach taken by the district court, relying on cases establishing that an indictment may be amended after extradition to increase the drug quantity involved and that a court may admit evidence of non-extradited offenses at a trial on extradited offenses. *Id.* at 4a-5a. The court concluded that the doctrine of specialty "does not restrict the scope of proof of other crimes that may be considered in the sentencing process." *Id.* at 5a.[1]

DISCUSSION

1. Petitioner contends (Pet. 22-23), for the first time in this Court, that the 360-month sentence on the drug count was imposed in violation of this Court's decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), because the indictment did not allege the quantity of drugs involved in his offense. In *Apprendi*, the Court held that, as a matter of constitutional law, "[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.

Petitioner was convicted of a drug offense that was subject to sentencing in accordance with the graduated penalties set forth in 21 U.S.C. 841(b). Petitioner's 360-month sentence is authorized by Section 841(b)(1)(B), which provides that, where the offense involves a particular threshold quantity of a controlled substance

[1] The court of appeals also rejected petitioner's claims—not reasserted here—that the district court erred in enhancing his offense level for obstruction of justice and in denying acceptance of responsibility credit. Pet. App. 5a-8a.

(here, 100 kilograms or more of marijuana), the defendant shall be sentenced to a term of imprisonment "which may not be less than 5 years and not more than 40 years." 21 U.S.C. 841(b)(1)(B) (1994 & Supp. IV 1998). Petitioner's sentence is not authorized, however, by Section 841(b)(1)(D), which provides a term of imprisonment of "not more than 5 years" for a drug offense involving any quantity of marijuana up to 50 kilograms. Thus, the sentence imposed on petitioner for possession of a controlled substance with intent to distribute it depended on an increase in the statutory maximum sentence by virtue of a fact (*i.e.*, that the offense involved more than 100 kilograms of marijuana) that was not alleged in the indictment.

In *Apprendi*, this Court stated that "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." 120 S. Ct. at 2365 n.19. Although this case involves a guilty plea rather than a jury verdict,[2] and *Apprendi* did not decide whether facts that enhance a statutory maximum sentence must be charged in the indictment,[3] the court of appeals should be afforded the opportunity in the first instance to determine whether imposition of a sentence above five years in this case on

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[2] *Apprendi* itself also involved a guilty plea to underlying offenses, followed by a penalty enhancement proceeding. See *Apprendi*, 120 S. Ct. at 2352.

[3] *Apprendi*, which involved a challenge to a state conviction, did not present any issue concerning whether a particular fact should have been alleged in an indictment. See *Apprendi*, 120 S. Ct. at 2355 n.3.

the basis of a drug quantity not alleged in the indictment is error under the rationale of *Apprendi*.

We note that, even assuming error in this case, petitioner is not automatically entitled to resentencing to a prison term of "not more than 5 years" pursuant to 21 U.S.C. 841(b)(1)(D) (1994 & Supp. IV 1998). He has never disputed, and does not now dispute, his responsibility for at least 100 kilograms of marijuana. To the contrary, petitioner's plea agreement specifically recited that petitioner was exposed to up to 40 years' imprisonment for the marijuana conspiracy charge under 21 U.S.C. 841(b)(1)(B) (1994 & Supp. IV 1998). Gov't C.A. Br. 6-7. Moreover, at the plea hearing, petitioner acknowledged that the government could present evidence showing that the drug conspiracy entailed far more than the 100 kilogram threshold to invoke that penalty provision. *Id.* at 7. Petitioner has not sought, and does not now seek, dismissal of the indictment as defective. The appropriate disposition of this petition is therefore vacatur of the court of appeals' judgment and remand of the case for further consideration in light of *Apprendi* and plain error analysis. See *Johnson* v. *United States*, 520 U.S. 461 (1997).

2. Petitioner also argues (Pet. 8-23) that the district court's upward departure from the indicated sentence under the Sentencing Guidelines because of his murder of Cryer and the district court's use of a Guidelines range determined in part on the quantity of drugs attributed to petitioner violated *Apprendi*.

Contrary to petitioner's arguments (Pet. 20-21), there was no error under *Apprendi* in the application to petitioner of the Sentencing Guidelines. This Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that so long as the statutory

minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (Guidelines "instruct the judge * * * to determine" type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon amount and kind.").

Apprendi did not hold otherwise. See *Apprendi*, 120 S. Ct. at 2366 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards* v. *United States*, 523 U.S. at 515). The Guidelines merely "channel the sentencing discretion of the district courts and make mandatory the consideration of factors" that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see also *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). District courts have the power to "depart from the applicable Guidelines range if '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.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). Indeed, one of petitioner's complaints in this case is that the district court did not adhere to the Guidelines sentencing range, but instead used its departure authority. Because the Guidelines leave the sentencing court with significant discretion to impose a sentence within the statutory range, and

sentencing adjustments under (or departures from) the Sentencing Guidelines cannot increase the statutory maximum penalty for a criminal offense, *Apprendi* does not support a challenge to the constitutionality of the Guidelines. See Sentencing Guidelines § 5G1.1; *Edwards* v. *United States*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines").

3. Petitioner claims (Pet. 24-30) that it violated the conditions of his extradition from Canada for the district court to determine his sentence in part on the basis of facts regarding his murder of Cryer and his Louisiana drug dealing.

The rule or doctrine of specialty is the principle that a person who has been extradited cannot be tried or punished for an offense other than that for which he has been extradited, without the consent of the country from which he is extradited. See *United States* v. *Alvarez-Machain*, 504 U.S. 655, 659 (1992); *United States* v. *Rauscher*, 119 U.S. 407, 430 (1886). That limitation is specifically incorporated into Article 12 of the extradition treaty between Canada and the United States, which provides, that "[a] person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting State for an offense other than that for which extradition has been granted." Pet. App. 36a.

In this case, petitioner was extradited for prosecution on federal drug and firearm offenses, as well as a state murder charge. He was tried, convicted, and punished in the federal court only for the drug and firearm offenses. It is a basic principle of sentencing that, when relevant uncharged conduct is considered in sentencing for an offense of conviction, the punishment imposed is punishment for the offense of conviction, not

for the uncharged conduct. The "use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime with the authorized statutory limits does not constitute punishment" for the related criminal conduct. *Witte* v. *United States*, 515 U.S. 389, 399 (1995). That is why conduct of which a person has been acquitted may be considered at sentencing for another offense without violating due process or the Double Jeopardy Clause. See *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam).

Petitioner does not cite to any decision, and we have found none, holding that the above-quoted provision of the U.S./Canadian Extradition Treaty (or similar language in any other extradition treaty) limits a court's consideration at sentencing to conduct strictly encompassed by the extradited offenses. To the contrary, the few cases that have addressed this issue, apart from the instant case, have reached the same conclusion as the court below that the rule of specialty does not limit sentencing considerations for extradited offenses. See *United States* v. *Lazarevich*, 147 F.3d 1061 (9th Cir.) (upward departure from Guidelines range for extradited offense based on related non-extradited offense does not violate the rule of specialty), cert. denied, 525 U.S. 975 (1998); *Leighnor* v. *Turner*, 884 F.2d 385 (8th Cir. 1989) (Parole Commission's use of non-extradited conduct in calculating parole release date for extradited conduct did not violate rule of specialty).

Petitioner argues (Pet. 28) that, had he been sentenced in Canada for the drug conspiracy offense for which he was convicted in the federal district court, a Canadian court would not have considered his murder of Cryer or the uncharged drug trafficking activity in

sentencing for the offense of conviction.[4] But the rule of specialty has been understood, as petitioner himself states (Pet. 27), to prohibit prosecution in this country only if "the extraditing country would consider the offense actually tried 'separate.'" *United States* v. *Paroutian*, 299 F.2d 486, 491 (2d Cir. 1962). That rule has never been applied to limit the factors that a court may consider in sentencing a defendant for the offenses for which he was lawfully extradited and tried.[5] In short, U.S. courts do not limit sentencing practices as petitioner claims Canada does, and U.S. courts have never interpreted the rule of specialty as precluding the application of usual sentencing practices.[6]

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[4] Petitioner does not cite to any Canadian legal authority for those propositions. His view of Canadian law, and its application to the extradition treaty, is undermined by the communication received in the district court (and included in the record in this case) from the Office of International Affairs of the Canadian Department of Justice. That letter stated that the considerations proposed for use in sentencing by the district court did not violate the rule of specialty. See Pet. App. 72a-73a.

[5] Petitioner's claim (Pet. 27) that "[t]he Eleventh Circuit's decision in this case stands in marked contrast to the test typically applied" is accordingly mistaken. The Eleventh Circuit correctly held (Pet. App. 9a) that the question "whether consideration [at sentencing] of these two courses of conduct (the murder and the Louisiana dealings) violated the provision in the [extradition treaty]" is one that "must be resolved in accordance with the law of the United States." That holding in no way conflicts with the principle of *Paroutian*, which has to do with determining the offenses for which a defendant can be tried, not what factors may be considered in determining a defendant's sentence.

[6] We also note that petitioner was extradited for trial and punishment for his murder of Cryer, albeit based on a state indictment. Even if the rule of specialty was otherwise applicable in this case, it would not seem to preclude consideration of the murder because that was an offense for which he was extradited.

CONCLUSION

With respect to petitioner's claim that the district court erred by sentencing him in accordance with 21 U.S.C. 841(b)(1)(B) (1994 & Supp. IV 1998) in the absence of an allegation in the indictment that the drug quantity was greater than the 100 kilograms of marijuana necessary to sentence him under that provision, the petition for a writ of certiorari should be granted, the judgment should be vacated, and the case should be remanded for further consideration in light of *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000). In all other respects, the petition should be denied.

Respectfully submitted.

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