No. 00-965

In the Supreme Court of the United States

TONY RAVELO, 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 plain error by sentencing petitioner to life imprisonment in accordance with 21 U.S.C. 960(b)(3) (1994 & Supp. IV 1998), based on the court's finding that petitioner's offense involved at least 150 kilograms of cocaine.

2. Whether petitioner is entitled to reversal of his conviction on the ground that the indictment failed to allege the quantity of drugs involved in his offense.

3. Whether the district court, in the absence of a jury finding as to the drug quantity involved in the offense, erred in enhancing petitioner's offense level under the Sentencing Guidelines based on the court's drug quantity determination at sentencing.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 27-43) is not reported, but the decision is noted at 229 F.3d 1166 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 59) was entered on July 31, 2000. A petition for rehearing was denied on September 8, 2000 (Pet. App. 58). The petition for a writ of certiorari was filed on December 7, 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 Southern District of Alabama, petitioner was convicted of conspiring to import cocaine into the United States, in violation of 21 U.S.C. 963. Pet. App. 12-13. He was sentenced to life imprisonment. *Id.* at 14. The court of appeals affirmed. *Id.* at 27-43.

1. Petitioner participated in a scheme to import a large quantity of cocaine from Panama into the United States by concealing the cocaine within secret compartments in one or more recreational speed boats. Pet. App. 28-30. An indictment issued by a federal grand jury charged that petitioner and three co-defendants

> did willfully, knowingly and unlawfully combine, conspire, confederate and agree with each other and with divers other persons * * * to * * * unlawfully import more than eight hundred kilograms of cocaine, a Schedule II controlled substance, into the United States of America from the Republic of Panama, in violation of Title 21, United States Code, Section 952(a).

Id. at 8.[1] Section 952(a) of Title 21 states categorically, without reference to the quantity of drugs involved, that "[i]t shall be unlawful to import into" the United States any Schedule I or II controlled substance. 21 U.S.C. 952(a). Section 960(b) of Title 21 establishes

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[1] All references in this brief to "the indictment" refer to the second superseding indictment on which petitioner was ultimately found guilty by the jury. See Pet. App. 7-11. The pertinent language in the conspiracy count, however, remained the same in all versions of the indictment. See *id.* at 1-3 (initial indictment); *id.* at 4-6 (first superseding indictment).

penalties for the importation offense based on (*inter alia*) the type and quantity of drugs involved. 21 U.S.C. 960(b) (1994 & Supp. IV 1998). Section 963 provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. 963.

2. Following a jury trial, petitioner was convicted on the conspiracy charge. Pet. App. 12-13. The jury was not required to determine the quantity of cocaine involved in the conspiracy. See Pet. 22 n.15 (explaining that the pertinent instruction required the jury to find that the importation of "a measurable amount of the controlled substance" was the object of the conspiracy).

The district court sentenced petitioner to life imprisonment. Pet. App. 14. Under 21 U.S.C. 960(b)(1)(B), a defendant convicted of an importation offense involving five kilograms or more of a mixture or substance containing a detectable amount of cocaine is subject to "a term of imprisonment of not less than 10 years and not more than life." The district court found at sentencing that petitioner "was involved with at least 150 kilograms of cocaine during the conspiracy." Pet. App. 24; see Sentencing Guidelines (Guidelines) § 2D1.1(c)(1) (establishing a base offense level of 38 for drug offenses involving 150 kilograms or more of cocaine).

3. The court of appeals affirmed. Pet. App. 27-43. As relevant here, the court of appeals rejected petitioner's argument that the evidence was insufficient to support the district court's drug quantity determination at sentencing. *Id.* at 40-42. In a petition for rehearing, petitioner argued for the first time that his life sentence was invalid because the district court

rather than the jury had determined the quantity of drugs involved in his offense. *Id.* at 51-55. The petition for rehearing was denied. *Id.* at 58.

DISCUSSION

1. Petitioner argues (Pet. 20-23) that his life sentence was imposed in violation of this Court's decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), because the district court rather than the jury determined the quantity of drugs involved in his offense. In *Apprendi*, the Court held 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.

Petitioner's drug importation offense was subject to the graduated penalties set forth in 21 U.S.C. 960(b) (1994 & Supp. IV 1998). See 21 U.S.C. 963 (providing that one who conspires to import cocaine is subject to the same penalties that are established for the substantive offense). Section 960(b)(3) authorizes "a term of imprisonment of not more than 20 years" for a covered offense involving *any* amount of cocaine. 21 U.S.C. 960(b)(3) (1994 & Supp. IV 1998). Section 960(b)(2) increases the statutory maximum to 40 years' imprisonment when the offense involves 500 grams or more of a mixture or substance containing a detectable amount of cocaine. 21 U.S.C. 960(b)(2) (1994 & Supp. IV 1998). Section 960(b)(1), in turn, authorizes a maximum term of life imprisonment where the offense involves five kilograms or more of such a mixture or substance. 21 U.S.C. 960(b)(1) (1994 & Supp. IV 1998).

Petitioner was sentenced to life imprisonment, pursuant to Section 960(b)(1), based on the district court's finding that his offense involved 150 kilograms or more

of cocaine. The jury, however, was not asked to make any determination on the quantity of drugs involved in petitioner's offense. Imposition of a sentence of more than 20 years' imprisonment on the basis of a drug quantity determination made by the district court was error under this Court's decision in *Apprendi*.

Petitioner, however, did not raise his constitutional claim in the district court. The claim therefore may be reviewed only for plain error. Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *United States* v. *Meshack*, 225 F.3d 556, 575 (5th Cir. 2000), cert. denied, 121 S. Ct. 834 (2001); *United States* v. *Nordby*, 225 F.3d 1053, 1060 (9th Cir. 2000). The error in imposing a life sentence based on drug quantity findings made by the district court at sentencing is "plain," in that it is "clear" or "obvious" after the decision in *Apprendi*. See *Johnson*, 520 U.S. at 467-468 ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration."); *Nordby*, 225 F.3d at 1060. A showing that the district court committed "plain error" in sentencing petitioner will not entitle him to relief, however, unless he can also demonstrate both that the error "affect[ed] substantial rights" and that it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)). Under the circumstances, it would be appropriate to allow petitioner an opportunity to make the requisite showings to the court of appeals in the first instance.

2. Petitioner contends (Pet. 23-26) that his conviction should be reversed because the indictment failed to allege the specific quantity of cocaine that petitioner conspired to import. He argues (Pet. 26) that

"the district court was without jurisdiction to try or sentence [petitioner], because the grand jury did not charge [petitioner] with an essential element of the offense charged." That claim was not presented to the courts below and is therefore reviewable only under a plain-error standard. In any event, the claim lacks merit.

The indictment in this case did allege a drug quantity that was more than sufficient to support an enhanced sentence under 21 U.S.C. 960(b)(1) (1994 & Supp. IV 1998). Under that provision, a defendant is exposed to a maximum term of life imprisonment where the offense involves, *inter alia*, five kilograms or more of a mixture or substance containing cocaine. In this case, the indictment alleged that petitioner participated in a conspiracy to "knowingly and intentionally unlawfully import more than *eight hundred kilograms of cocaine*, a Schedule II controlled substance, into the United States of America from the Republic of Panama, in violation of Title 21 United States Code, Section 952(a)." Pet. App. 8 (emphasis added). Even if petitioner were correct that an allegation as to quantity is necessary to impose an enhanced sentence, see Pet. 21, the indictment in this case alleged more than the five kilograms of cocaine necessary to support a maximum life sentence under Section 960(b)(1).[2]

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[2] The district court found at sentencing that petitioner "was involved with at least 150 kilograms of cocaine during the conspiracy." Pet. App. 24. That amount, though less than the figure alleged in the indictment, is also more than sufficient to support an enhanced sentence under Section 960(b)(1). And an indictment is not deemed to be constructively amended simply because the proof supports some but not all of the quantity alleged. Cf. *United States* v. *Miller*, 471 U.S. 130 (1985) (no violation of the Fifth Amendment Grand Jury Clause when a jury finds guilt based on

Moreover, even if petitioner were correct in characterizing drug quantity as an element of the enhanced drug importation and conspiracy offenses,[3] and even if the indictment in this case had contained no allegation as to drug quantity, there would be no basis for reversal of petitioner's conviction. As we explain above (see pp. 2, 4, *supra*), conspiracy to import *any* amount of cocaine is a federal crime punishable by up to 20 years' imprisonment. Thus, without regard to any reference to drug quantity, the indictment in this case alleged every element of a federal offense. The absence of any allegation as to drug quantity could at most (but see note 3, *supra*) constitute a failure to allege an essential element of the *enhanced* offense. But whatever effect

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trial proof that supports a fraudulent scheme that is significantly narrower than, but included in, the scheme described in the indictment).

[3] We disagree with petitioner's contention that the quantity of a controlled substance involved in an importation conspiracy is an element of the offense. The specific quantity of a controlled substance involved in an importation offense becomes relevant only in applying 21 U.S.C. 960(b) (1994 & Supp. IV 1998), which is entitled "Penalties." The quantity of drugs involved in a violation of Section 963 is a statutory sentencing factor, not an element of the offense with which a defendant is charged. Nothing in *Apprendi* alters that analysis. *Apprendi* did not hold that every fact that increases the maximum sentence for a crime is an element of the offense. Rather, the Court held that because sentencing factors that increase the statutory maximum penalty are "functional equivalent[s]" of offense elements, they must be found by the jury beyond a reasonable doubt. See 120 S. Ct. at 2365 n.19 ("[W]hen 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."). Nor did *Apprendi*, which involved a challenge to a state conviction, present any issue concerning the sufficiency of an indictment. See *id.* at 2355 n.3.

the absence of such an allegation might have on the district court's authority to impose the graduated penalties established by 21 U.S.C. 960(b)(1) and (2) (1994 & Supp. IV 1998), it could provide no basis for reversal of petitioner's conviction.[4]

3. Contrary to petitioner's suggestion (Pet. 27), there was no error under *Apprendi* in the district court's calculation of petitioner's Sentencing Guidelines offense level based on the court's determination that the offense involved 150 kilograms or more of cocaine. See Guidelines § 2D1.1(c)(1) (establishing a base offense level of 38 where the offense involves 150 kilograms or more of cocaine). 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 sentence ultimately imposed falls within the range authorized by statute, 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" the type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon amount and kind").

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[4] Petitioner also observes (Pet. 24) that the indictment in this case did not cite any of the specific penalty provisions in 21 U.S.C. 960 (1994 & Supp. IV 1998). The language of the indictment alleged facts sufficient to charge the offense, however, and the lack of a specific citation to the penalty provision is not significant. See Fed. R. Crim. P. 7(c)(3) (providing that even a citation to the wrong statute in an indictment is not grounds for reversal of a conviction unless the defendant was misled to his prejudice).

The Sentencing 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. *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see also *United States* v. *Watts*, 519 U.S. 148, 155-157 (1997) (per curiam). Moreover, district courts have the power to "depart from the applicable Guideline 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)). *Apprendi* does not cast doubt on the continuing vitality of those precedents. 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*, 523 U.S. at 515). Because specific offense characteristics and sentencing adjustments under the Guidelines cannot lead to the imposition of a punishment above the statutory maximum, see Guidelines § 5G1.1(a); *Edwards*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines"), and because the Guidelines leave the sentencing court with significant discretion to choose an appropriate sentence within the statutory range, the use of judicial findings of fact as predicates for Guidelines sentencing creates no constitutional infirmity.

CONCLUSION

With respect to the first question presented in the petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals 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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FEBRUARY 2001