No. 00-1790

# In the Supreme Court of the United States

OSCAR DIAZ, 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 IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether, under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), the district court was required to apply the federal Sentencing Guidelines based solely on the facts that were charged in the indictment and found by the jury beyond a reasonable doubt.

2. Whether *Apprendi* applies to a determination of drug quantity that results in a statutory mandatory minimum sentence, even if that sentence is less than the statutory maximum authorized for the defendant's offense without regard to quantity.

3. Whether the court of appeals was required to vacate petitioner's conviction or his sentence, notwithstanding his failure to raise any *Apprendi*-type claim until he sought rehearing in the court of appeals, because the indictment did not allege that his offenses involved any specific or threshold quantity of drugs.

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-37) is unpublished, but the judgment is noted at 247 F.3d 246 (Table).

### JURISDICTION

The judgment of the court of appeals was entered on January 11, 2001. A petition for rehearing was denied on February 27, 2001. Pet. App. 62. The petition for a writ of certiorari was filed on May 29, 2001 (the day following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and of conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to 20 years' imprisonment, to be followed by ten years of supervised release. The court of appeals affirmed.

1. On April 15, 1999, officers of the South Broward (Florida) Drug Enforcement Unit observed petitioner as he drove to two houses in the Miami area. Pet. App. 18; see Pet. 13. At the second house petitioner met with co-defendants Rafael Morales and Rafael Barreto. The three men then drove in two cars to a nearby shopping center, where petitioner and Barreto made several calls from pay phones and consulted their pagers. Pet. App. 18-19. The three eventually met co-defendant Raphael Chavarry at another shopping center, and all four then went to Barreto's apartment. Within about 15 minutes Chavarry emerged carrying a duffel bag and a smaller bag, and got into his car. DEU officers then approached him and asked what was in the two bags. When Chavarry said the bags contained cocaine, the officers searched the bags. They found seven kilograms of cocaine and $15,800 in the bags, $3,499 on Chavarry's person, and another $38,980 in the car. *Id.* at 19-20.

Other officers then went to the apartment and saw Barreto leaving. The other defendants heard the officers and slammed the front door closed. Morales dropped a plastic bag full of cocaine off the second floor balcony, and petitioner jumped from the balcony but was arrested after a short chase. A subsequent search of the apartment revealed more cocaine and drug

paraphernalia. All told, the police seized just over 14 kilograms of cocaine. Pet. App. 20-21; see Pet. 12.

2. A grand jury charged petitioner with "possess-[ing] with intent to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine," and with conspiring to commit that offense. Pet. App. 1-2. The indictment did not allege that either offense involved any particular or threshold quantity of drugs. *Ibid.* Before trial the government also filed an information under 21 U.S.C. 851(a)(1), notifying petitioner that it intended to rely on one of his prior felony drug convictions to support the imposition of a mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A)(ii)(II). See Pet. App. 21.

The jury found petitioner guilty of both offenses. See Pet. App. 21. The district court determined that petitioner should be held responsible at sentencing for all 14 kilograms of cocaine seized from the conspirators. See *id.* at 34. With a total offense level of 32 and a criminal history category of III, petitioner would ordinarily have had a Guidelines sentencing range of 151-188 months' imprisonment. See *id.* at 15; Sentencing Guidelines Ch. 5 (Sentencing Table). Because of the quantity of cocaine attributed to petitioner, he was subject to sentencing under 21 U.S.C. 841(b)(1)(A)(ii)(II), which, for offenses involving five or more kilograms of cocaine, provides a sentencing range of ten years' to life imprisonment for first-time offenders, and twenty years' to life imprisonment for offenders with a prior felony drug conviction. Petitioner has a prior felony drug conviction, and the district court imposed the mandatory minimum sentence of 20 years' imprisonment. See Pet. App. 15, 22, 36.

3. The court of appeals affirmed. Pet. App. 17-37. The court rejected, among other arguments, peti-

tioner's claims that the district court should not have attributed all 14 kilograms of cocaine to him (*id.* at 34-35), and that the district court had the authority to depart downward from the statutory mandatory minimum sentence (*id.* at 35-36).[1]

In a petition for rehearing, petitioner argued for the first time that his convictions and sentence were unconstitutional because the quantity of cocaine attributed to him at sentencing was not charged in the indictment or found by the jury beyond a reasonable doubt. See Pet. App. 38-61. The court of appeals denied rehearing without comment. *Id.* at 62.

**ARGUMENT**

Relying on *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), petitioner contends that his convictions, or at any rate his sentences, should be vacated because the amount of cocaine for which he was held responsible at sentencing was not alleged in the indictment or found by the jury beyond a reasonable doubt. In *Apprendi* the court held, 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 490.

Although petitioner was sentenced in November 1999 (see Pet. App. 5), more than six months after this Court decided *Jones* v. *United States*, 526 U.S. 227 (1999) (which "foreshadowed" the holding in *Apprendi*, see 530 U.S. at 476), he raised no *Jones*- or *Apprendi*-

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[1] The court also rejected petitioner's challenges to the sufficiency of the evidence (Pet. App. 22-30), to the district court's limitation of cross-examination of a witness (*id.* at 30-32), and to the court's failure to give a theory-of-defense instruction (*id.* at 32-34). Petitioner does not renew those claims here.

type claim either in the district court or in his briefs on appeal. The claims he now advances were first presented to the court of appeals in a petition for rehearing. See Pet. App. 38-61. Petitioner's claims are thus subject, at most, to review for plain error. See Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 466-470 (1997); *United States* v. *Olano*, 507 U.S. 725, 732-736 (1993).

1. Petitioner argues (Pet. 19-23, 26, 30) that every sentencing range defined by the federal Sentencing Guidelines "prescribe[s]" a "statutory maximum" sentence under *Apprendi*, see 530 U.S. at 490. He therefore contends that a defendant must be sentenced within the lowest Guidelines range potentially applicable to the offense of conviction, unless every fact or circumstance that would increase that range has been charged in the indictment and found by the jury beyond a reasonable doubt. See Pet. 23, 30. That argument lacks merit.

This Court has upheld the use and operation of the Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and it 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" facts that establish the Guidelines sentencing range, such as type and quantity of drugs under Guidelines § 2D1.1(c)). *Apprendi* does not hold otherwise. See 530 U.S. at 497 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).

The Guidelines merely "channel the sentencing discretion of the district courts and * * * make mandatory the consideration of factors"—such as the amount of contraband involved in an offense—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). Moreover, a district court has 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)). The Guidelines thus leave the sentencing court with significant discretion in imposing a sentence within the statutory range. And specific offense characteristics and sentencing adjustments under the Sentencing Guidelines can never cause a sentence to exceed the applicable statutory maximum. See Guidelines § 5G1.1; *Edwards*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines"). Accordingly, nothing in *Apprendi* suggests that use of the Guidelines is constitutionally problematic.[2]

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[2] Petitioner's reliance (Pet. 19-22) on *United States* v. *R.L.C.*, 503 U.S. 291 (1992), is misplaced. The question in that case was whether the sentence imposed on a juvenile exceeded the maximum permitted by the special statutes applicable to federal juvenile proceedings. See 18 U.S.C. 5001 *et seq.* The Court held that references in 18 U.S.C. 5037(c), as then in effect, to "the

Every regional court of appeals has rejected the argument that *Apprendi* applies to findings that simply help determine what sentencing range is applicable under the Guidelines, without changing the statutory maximum or minimum penalty for the offense. See, *e.g.*, *In re Sealed Case*, 246 F.3d 696, 698-699 (D.C. Cir. 2001); *United States* v. *Garcia*, 240 F.3d 180, 184 (2d Cir.), cert. denied, 121 S. Ct. 2615 (2001) (No. 00-10197); *United States* v. *Heckard*, 238 F.3d 1222, 1235-1236 (10th Cir. 2001); *United States* v. *Baltas*, 236 F.3d 27 (1st Cir.), cert. denied, 121 S. Ct. 1982 (2001) (No. 00-9291)); *United States* v. *Williams*, 235 F.3d 858, 862-863 (3d Cir. 2000), petition for cert. pending, No. 00-1771 (filed May 21, 2001); *United States* v. *Kinter*, 235 F.3d 192, 198-202 (4th Cir. 2000), cert. denied, 121 S. Ct. 1393 (2001) (No. 00-8591); *United States* v. *Munoz*, 233 F.3d 410, 413-414 (6th Cir. 2000); *United States* v. *Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000); *United States* v. *Chavez*, 230 F.3d 1089, 1090 (8th Cir. 2000); *United States* v. *Doggett*, 230 F.3d 160, 166 (5th Cir. 2000), cert. denied, 121 S. Ct. 1152 (2001) (No. 00-7819); *United States* v. *Hernandez-Guardado*, 228 F.3d 1017, 1024-1027 (9th Cir. 2000); *Hernandez* v. *United States*, 226 F.3d 839, 841-842 (7th Cir. 2000). There is no reason for this Court to consider the issue.

2. Petitioner contends briefly (Pet. 23-24) that his 20-year statutory mandatory minimum sentence violates *Apprendi*, because the jury was not required to find beyond a reasonable doubt that his offenses in-

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maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult" were best construed to incorporate the upper sentencing limits that would be imposed by the Sentencing Guidelines in the case of an adult who committed a comparable crime. That context-specific statutory holding has no bearing here.

volved the five kilograms or more of cocaine that triggered that sentence. See 21 U.S.C. 841(b)(1)(A)(ii)(II). That is incorrect.

In *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), this Court upheld the constitutionality of a sentencing scheme under which any person convicted of certain felonies would be subject to a mandatory minimum penalty of five years' imprisonment if the sentencing judge found, by a preponderance of the evidence, that the defendant visibly possessed a firearm during the commission of the offense. The Court reasoned that such a sentencing scheme "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." *Id.* at 87-88.

*Apprendi* did not disturb the Court's holding in *McMillan*, although it made clear that that holding is limited "to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." 530 U.S. at 487 n.13. Because 21 U.S.C. 841(b)(1)(C) (1994 & Supp. V 1999) provides for a maximum sentence of 30 years' imprisonment for a defendant who, like petitioner, has a prior felony drug conviction, without regard to the amount of cocaine involved in an offense, the prison sentence imposed in this case is consistent with that limitation.

Since *Apprendi*, several courts of appeals have refused to disturb sentences imposed under Section 841(b)'s mandatory minimum sentencing provisions, where the district court made findings that triggered a mandatory minimum sentence, but the sentence im-

posed did not exceed the maximum authorized by statute given the findings that were made by the jury beyond a reasonable doubt. See *United States* v. *Rodgers*, 245 F.3d 961, 965-968 (7th Cir. 2001); *United States* v. *Pratt*, 239 F.3d 640, 646-648 (4th Cir. 2001) (term of supervised release); *United States* v. *Williams*, 238 F.3d 871, 877 (7th Cir.), cert. denied, 121 S. Ct. 2232 (2001) (No. 00-9667); *United States* v. *LaFreniere*, 236 F.3d 41, 49-50 (1st Cir. 2001); *United States* v. *Keith*, 230 F.3d 784, 787 (5th Cir. 2000), cert. denied, 121 S. Ct. 1163 (2001) (No. 00-8077); *United States* v. *Aguayo-Delgado*, 220 F.3d 926, 933-934 (8th Cir.), cert. denied, 121 S. Ct. 600 (2000) (No. 00-6746); see also *United States* v. *Harris*, 243 F.3d 806, 808-810 & n.1 (4th Cir. 2001) (sustaining use of sentencing factors that produce increased mandatory minimum sentences under 18 U.S.C. 924(c)(1)(A) (1994 & Supp. V 1999)); *United States* v. *Sandoval*, 241 F.3d 549, 550-551 (7th Cir. 2001) (same); *United States* v. *Pounds*, 230 F.3d 1317, 1319 & n. 1 (11th Cir. 2000) (same), cert. denied, 121 S. Ct. 1631 (2001) (No. 00-8876).

The Sixth and Ninth Circuits have taken a different approach in reviewing sentences imposed under Section 841(b). In *United States* v. *Ramirez*, 242 F.3d 348, 351-352 (2001), the Sixth Circuit vacated a 20-year mandatory minimum sentence that had been imposed under Section 841(b)(1)(A) and remanded for resentencing, even though the original sentence did not exceed the maximum of 30 years authorized by Section 841(b)(1)(C) for a recidivist defendant whose offense involves any quantity of cocaine. Similarly, in *United States* v. *Velasco-Heredia*, 249 F.3d 963 (2001), the Ninth Circuit vacated a five-year mandatory minimum sentence imposed under Section 841(b)(1)(B), even though that sentence did not exceed the five-year maximum author-

ized by Section 841(b)(1)(D) for trafficking in any quantity of marijuana.[3]

The conflict among these decisions does not warrant review in this case. Decisions after *Ramirez* indicate that the Sixth Circuit recognizes the continued authority of *McMillan* in cases in which a factor limits the court's sentencing discretion within the range otherwise available, without altering the maximum available penalty or creating a separate offense. See *United States* v. *Stafford*, No. 99-5706, 2001 WL 818245, at *10-*11 & n.9 (6th Cir. July 17, 2001) (noting limitations of *Ramirez* line of cases); *United States* v. *Garcia*, 252 F.3d 838, 842-844 (6th Cir. 2001) ("*Apprendi* explicitly applies only in those situations where a factual determination made under a lesser standard of proof than the reasonable doubt standard 'increases the penalty for a crime beyond the [prescribed] statutory maximum.'") (quoting *Apprendi*, 530 U.S. at 490, and distinguishing *Ramirez*); *United States* v. *Strayhorn*, 250 F.3d 462, 470 (6th Cir. 2001). Similarly, in *Velasco-Heredia* the Ninth Circuit made clear that its holding turned on a conclusion that, under Section 841(b), the district court's quantity finding "exposed [the defendant] to a greater statutory maximum punishment, and did not merely limit [the court's] sentencing discretion within a range available under the facts found beyond a reasonable doubt" by the jury. 249 F.3d at 968 (distinguishing *McMillan*); see also *United States* v. *Antonakeas*, No. 99-10002, 2001 WL 682370, at *12 n.11 (9th Cir. June 19, 2001) (finding that an *Apprendi* challenge to a "statutory mandatory *minimum* sentence[]

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[3] The Sixth Circuit denied the government's petition for rehearing en banc in *Ramirez*. A petition for rehearing en banc in *Velasco-Heredia* is pending before the Ninth Circuit.

* * * is foreclosed by *United States* v. *Garcia-Sanchez*, 238 F.3d 1200, 1201 (9th Cir. 2001)"). The conflicting authority is therefore limited to the context of the laddered penalty provisions of Section 841(b). In that context the issue is essentially a transitional one, because, since *Apprendi* was decided, federal prosecutors have routinely charged and proved applicable threshold drug quantities in prosecutions in which sentencing will be governed by those provisions.

In any event, as noted above (see p. 5, *supra*), petitioner's belated *Apprendi* claims are reviewable, at most, for plain error. To be entitled to relief under that standard, petitioner would be required to show that his sentences involved (1) error, (2) that was "plain," (3) that "affect[ed] substantial rights," and (4) that "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 466-467 (citations omitted). At a minimum, any *Apprendi* error involved in sentencing petitioner to a 20-year mandatory minimum term of imprisonment under Section 841(b)(1)(A), without exceeding the 30-year statutory maximum sentence applicable to each of his offenses under Section 841(b)(1)(C), is not "plain," "clear," or "obvious" under current law. See *id.* at 467-468. This Court has not ruled on the issue, and five courts of appeals have held that there is no such error. Moreover, in this case the arresting officers seized 14 kilograms of cocaine—almost three times the amount necessary to trigger petitioner's mandatory minimum sentence—at the time the conspirators, including petitioner, were arrested. See Pet. App. 20-21. Under those circumstances, petitioner could not demonstrate that any error in sentencing him without obtaining a jury verdict on the issue of drug quantity, but within the applicable statutory maximum, either affected his

substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Cf., *e.g.*, *United States* v. *Nance*, 236 F.3d 820, 825-826 (7th Cir. 2000) ("If this jury was going to convict [the defendant] at all—which it plainly did—there is simply no way on this record that it could have failed to find" that the offense involved an enhancing quantity of drugs.), petition for cert. pending, No. 00-9633 (filed Apr. 24, 2001).

3. Petitioner also argues (Pet. 26-30) that his mandatory minimum sentence is unconstitutional under *Apprendi* because the fact that triggered it—drug quantity—was not alleged in the indictment. He contends, further, that such an "indictment" error goes to the "jurisdiction" of the district court to try or sentence him, is not subject to the plain-error rule, and can never be harmless. That argument does not warrant review in this case.

a. First, petitioner's position depends not only on his argument concerning the proper standard of review for indictment errors, but also on his argument that *Apprendi* should be extended to require a jury determination beyond a reasonable doubt of any factual determination that triggers a mandatory minimum sentence. That argument is incorrect for the reasons set out above; and petitioner suggests no reason why it is not subject to the ordinary rules of forfeiture and plain-error review, which he cannot satisfy.

b. In any event, even assuming that, because drug quantity triggered a mandatory minimum sentence in this case, it was constitutional error to omit a quantity allegation from the indictment, this Court has recognized that "most constitutional errors can be harmless." *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (citation omitted). The Court has "found an error to be 'struc-

tural,' and thus subject to automatic reversal, only in a 'very limited class of cases,'" such as those involving a denial of counsel, a biased trial judge, or racial discrimination in jury selection. *Ibid.* (quoting *Johnson*, 520 U.S. at 468). In contrast to those errors that have been held to be "structural," the Court has explained, a jury "instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9. The omission of an element from an indictment, like the omission of an element from a jury instruction in *Neder*, does not necessarily render a criminal proceeding "fundamentally unfair" or "unreliable." See *United States* v. *Prentiss*, No. 98-2040, 2001 WL 788648, at *9-*11 (10th Cir. July 12, 2001) (en banc); *United States* v. *Angle*, No. 96-4662, 2001 WL 732124, at *1-*2 (4th Cir. June 29, 2001) (en banc); *Nance*, 236 F.3d at 825; *United States* v. *Mojica-Baez*, 229 F.3d 292, 309-311 (1st Cir. 2000), cert. denied, 121 S. Ct. 2215 (2001) (Nos. 00-1256, 00-8464 & 00-8634).

Moreover, as this Court made clear in *Johnson*, 520 U.S. at 466, all claimed errors in federal criminal proceedings, regardless of their nature or seriousness, are subject to the plain-error rules set out in Rule 52(b) of the Federal Rules of Criminal Procedure when the defendant does not make a timely objection in the district court. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Olano*, 507 U.S. at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Indeed, even a conclusion that a particular type of error is "structural," or

"so serious as to defy *harmless*-error analysis," suggests only that such error may always "affec[t] substantial rights," thus satisfying the third of the four requirements for plain-error relief. See *Johnson*, 520 U.S. at 468-469 (emphasis added). Under the fourth requirement, a prejudicial error (including a "structural" one) that would clearly be grounds for relief if it was properly preserved is *not* a proper ground for relief if it was *not* preserved, unless it also "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 469-470 (quoting *Olano*, 507 U.S. at 736).

Under *Johnson* and *Neder*, petitioner would not be entitled to resentencing based on the omission of drug quantity from the indictment, even if *Apprendi* were extended to apply to facts that trigger a mandatory minimum sentence within the applicable statutory maximum.[4] Existing law did not require such an allegation at the time of indictment or sentencing in this case, and the error petitioner asserts is not "plain" or "obvious" even after *Apprendi*. See *Johnson*, 520 U.S. at 467-468. Petitioner raised no indictment-based objection when the government sought imposition of the mandatory minimum sentence, and he has never claimed that he lacked fair notice of the government's intentions. See Pet. App. 21. Petitioner objected to the quantity of drugs attributed to him, but the lower courts considered and rejected those objections, finding

[4] There is no basis for petitioner's suggestions (see, *e.g.*, Pet. 26, 28, 30) that *Apprendi* might require that his *convictions* be vacated. Whether or not the indictment should have included quantity allegations as a predicate for imposition of mandatory minimum sentences, it plainly alleged two crimes against the United States, and the jury found petitioner guilty of those offenses.

that petitioner's offenses involved substantially more than the triggering amount. See Pet. App. 34-35. Under these circumstances, even if the failure to charge quantity to support the mandatory minimum sentence were error under an extension of *Apprendi*, petitioner could not satisfy the prerequisites for plain-error relief.[5]

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2001

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[5] Petitioner misplaces his reliance (Pet. 29-30) on *Stirone* v. *United States*, 361 U.S. 212 (1960), and *United States* v. *Tran*, 234 F.3d 798 (2d Cir. 2000). In *Stirone*, the defendant preserved at trial a claim that the jury instructions permitted conviction on a ground that varied from the indictment's allegations, and this Court granted relief. In this case, there is no question that the allegations of the indictment and the proof adduced at trial supported conviction and a sentence up to 30 years' imprisonment for a recidivist, see 21 U.S.C. 841(b)(1)(C), and petitioner made no claim of error in the district court. In *Tran*, the court of appeals held that omission from the indictment of a fact necessary to support conviction for an aggravated crime was "jurisdictional" error. But in another case the en banc court of appeals has indicated that it is reconsidering the soundness of *Tran*. See *United States* v. *Thomas*, 248 F.3d 76 (2d Cir. 2001). And neither *Tran* nor *Stirone* involved the omission from an indictment of facts that supported a mandatory *minimum* sentence.