No. 01-762

# In the Supreme Court of the United States

FELIX GALEGO, AKA ICA, AND LAZARO GALLEGO, JR., AKA GAMBA, PETITIONERS

*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

THEODORE B. OLSON
*Solicitor General*
*Counsel of Record*
MICHAEL CHERTOFF
*Assistant Attorney General*
KARIN B. HOPPMANN
*Attorney*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether petitioners' sentences for drug-trafficking offenses should be reversed on plain-error review under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because they exceed the otherwise-applicable statutory maximum based on a fact that was not alleged in the indictment or proved to the jury beyond a reasonable doubt.

2. Whether *Apprendi* v. *New Jersey* requires a district court to calculate a defendant's sentence under the federal Sentencing Guidelines based solely on facts that were found by the jury beyond a reasonable doubt.

TABLE OF CONTENTS



TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page



Statutes and rules:

# In the Supreme Court of the United States

No. 01-762

FELIX GALEGO, AKA ICA, AND LAZARO GALLEGO, JR., AKA GAMBA, PETITIONERS

*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

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 247 F.3d 1191.

### JURISDICTION

The judgment of the court of appeals was entered on April 13, 2001. A petition for rehearing was denied on August 3, 2001 (Pet. App. 21-22). On September 26, 2001, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 10, 2001. The petition for a writ of certiorari was filed on November 29, 2001. 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, petitioners were

each convicted of conspiracy to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846, and attempted robbery affecting interstate commerce, in violation of 18 U.S.C. 1952. In addition, petitioner Lazaro Gallego was convicted of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841, and robbery affecting interstate commerce, in violation of 18 U.S.C. 1951; petitioner Felix Gallego was convicted of a second count of attempted robbery affecting interstate commerce, in violation of 18 U.S.C. 1952, and of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Lazaro Gallego was sentenced to life imprisonment; Felix Gallego was sentenced to 384 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1-20.

1. Petitioners, who are brothers, were members of a "rip-off" gang in South Florida that stole drugs and money from drug dealers. Gang members would identify a suspected drug dealer as a target and conduct surveillance of the target's operation, often making small drug purchases to discover where the target kept his drugs and money. Gang members, sometimes posing as police officers, would then kidnap members of the target's operation or commit home invasions or robberies to obtain the target's drugs and money. Pet. App. 4; Lazaro Gallego Presentence Report (PSR) 6-25; Felix Gallego Revised PSR 6-25.

Lazaro Gallego was personally involved in several of the gang's operations. For example, he participated in an armed robbery in late 1992 or early 1993 that yielded 5 kilograms of cocaine, a kidnapping and home invasion in April 1993, and a robbery of a "stash house" in December 1994 that yielded 326 kilograms of cocaine,

25 kilograms of which were allocated to him for his part in the robbery. Lazaro Gallego PSR 11-13, 21.

Felix Gallego also participated in several gang operations, including the April 1993 kidnapping and home invasion. In addition, he took part in a home invasion and robbery in February 1993 in which the victim turned out to be the neighbor of a drug dealer, not a drug dealer himself. Felix Gallego Revised PSR 11-13.

2. On October 9, 1996, a federal grand jury in the Southern District of Florida returned a second superseding indictment charging petitioners and other members of the gang with various crimes. Both petitioners were charged with conspiracy to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846, and with attempted robbery affecting interstate commerce, in violation of 18 U.S.C. 1952 (the Hobbs Act). Lazaro Gallego was also charged with one count of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841, and one count of robbery affecting interstate commerce, in violation of 18 U.S.C. 1952. Felix Gallego was also charged with a second count of attempted robbery, in violation of 18 U.S.C. 1952, and one count of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c).

The second superseding indictment did not allege that petitioners' drug conspiracy offense or Lazaro Gallego's substantive drug offense involved any specific or threshold quantity of cocaine. See Second Superseding Indictment 2, 18 (alleging that those offenses involved "a mixture and substance containing a detectable amount of cocaine"). The "overt acts" section of the conspiracy count did, however, allege several incidents involving specific quantities of cocaine. See, *e.g.*,

*id.* at 9 (alleging that Lazaro Gallego and co-conspirators took 326 kilograms of cocaine from a stash house in December 1994).

At trial, petitioners and their co-defendants did not ask that the jury be instructed to find the quantities of cocaine involved in their offenses, and the district court gave no such instruction. The jury found petitioners guilty on all counts.

3. In petitioners' PSRs, the Probation Office determined that Lazaro Gallego's offenses involved at least 150 kilograms of cocaine and that Felix Gallego's offenses involved between 50 and 150 kilograms of cocaine. The Probation Office noted that both petitioners were subject to a maximum term of life imprisonment under 21 U.S.C. 841(b)(1)(A), because their drug offenses involved at least 5 kilograms of cocaine. Lazaro Gallego PSR 26, 38; Felix Gallego Revised PSR 26, 38.

At sentencing, the district court accepted the Probation Office's findings with respect to the quantities of cocaine involved in petitioners' offenses. Accordingly, the court determined that, under the Sentencing Guidelines, Lazaro Gallego's sentencing range was life imprisonment and Felix Gallego's sentencing range was 292 to 365 months' imprisonment. The court sentenced Lazaro Gallego to concurrent terms of life imprisonment on the two drug-trafficking counts and 240 months' imprisonment on the Hobbs Act count. The court sentenced Felix Gallego to a total of 384 months' imprisonment consisting of concurrent terms of 324 months on the drug conspiracy count and 240 months on the two Hobbs Act counts and a consecutive term of 60 months on the firearms count. 8/22/97 Lazaro Gallego Sent. Tr. 37-38, 41-42; 7/11/97 Felix Gallego Sent. Tr. 2-10.

4. While the case was on appeal, this Court held in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), 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." For the first time on appeal, petitioners claimed that the district court violated *Apprendi* by imposing sentences for the drug-trafficking offenses that exceeded the otherwise-applicable statutory maximum based on a fact, drug quantity, that was not alleged in the indictment or found by the jury beyond a reasonable doubt.

The court of appeals evaluated petitioners' *Apprendi* claims under the plain-error standard of review. The court relied on its earlier decision in *United States* v. *Candelario*, 240 F.3d 1300, 1303-1306 (11th Cir.), cert. denied, 121 S. Ct. 2535 (2001), which held that the plain-error standard applies to *Apprendi* claims not raised in the district court. The court thus considered whether petitioners could establish that (1) there was error; (2) that was plain; (3) that affected their substantial rights; and (4) that "seriously affected the fairness, integrity, or public reputation of judicial proceedings." Pet. App. 6 (citing *Johnson* v. *United States*, 520 U.S. 461, 467 (1997)).

The court of appeals held that petitioners could satisfy the first two components of the plain-error standard. The court explained that the district court committed error, which was plain in light of *Apprendi*, in sentencing petitioners to terms of more than 20 years' imprisonment, the maximum sentence prescribed by 21 U.S.C. 841(b)(1)(C) for drug offenses involving any detectable quantity of cocaine. Pet. App. 10, 12.

The court of appeals also held, however, that neither petitioner could show that the error affected his substantial rights. With respect to Lazaro Gallego, the court reasoned, based on the trial testimony, that no

rational jury could have convicted him of possession of cocaine obtained in the December 1994 robbery of the stash house, as the jury in this case did, without also determining that he possessed at least 5 kilograms of that cocaine, the amount necessary to trigger a sentence of life imprisonment under 21 U.S.C. 841(b)(1)(A). The court noted that Lazaro Gallego had not presented any evidence to dispute his co-conspirators' trial testimony that he received 25 kilograms of cocaine from the December 1994 robbery. With respect to Felix Gallego, the court observed that he admitted at sentencing to possessing at least 4 kilograms of cocaine during an October 1993 robbery, which exceeds the amount necessary to trigger a sentence of up to 40 years' imprisonment under 21 U.S.C. 841(b)(1)(B). The court also noted that Felix Gallego's admission was consistent with the trial testimony of a co-conspirator. Accordingly, the court held that petitioners were not entitled to reversal of their sentences under the plain-error standard. Pet. App. 10-14.

**ARGUMENT**

1. Petitioners contend (Pet. 13-18) that their enhanced sentences for drug trafficking offenses were imposed in violation of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because they depend on a fact, drug quantity, that was not alleged in the indictment or found by the jury beyond a reasonable doubt. Petitioners raised no such challenge in the district court. On January 4, 2002, this Court granted certiorari in *United States* v. *Cotton*, No. 01-687, to consider the appropriate analysis of *Apprendi* challenges, raised for the first time on appeal, to sentences that exceed the otherwise-applicable statutory maximum based on a fact not alleged in the indictment. To the extent that peti-

tioners have suggested areas of tension among the circuits in the application of the plain-error standard to *Apprendi* claims, the Court's decision in *Cotton* may resolve any such tension.[1]

The Court should not, however, hold the petition in this case for disposition in light of *Cotton*. Even if the Court were to adopt the Fourth Circuit's approach in *Cotton*, rather than the approach urged by the government, petitioners' sentences still would not require reversal under the plain-error standard. That is because petitioners, unlike the respondents in *Cotton*, were convicted of multiple offenses, the sentences for which could (and should under the Sentencing Guidelines) run consecutively to produce the same sentences that petitioners actually received.

a. Under Section 5G1.2(d) of the Sentencing Guidelines, if no count of conviction is sufficient by itself to authorize imposition of the full sentence prescribed by the Guidelines, the district court is required to run the terms on separate counts consecutively to the extent necessary to achieve the Guidelines sentence.[2] See 18

---

[1] In addition, although petitioners claim (Br. 13-15) that the Court should resolve a circuit conflict over whether the defendant or the government bears the burden of persuasion on the third component of the plain-error standard when the error became clear only after the district court proceedings, that claim does not merit the Court's review for the reasons given in our brief in opposition in *O'Brien* v. *United States*, No. 00-896. The Court denied certiorari in that case. 121 S. Ct. 2241 (2001). We are providing petitioners' counsel with a copy of our brief in opposition in *O'Brien*.

[2] Section 5G1.2(d) provides:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run

U.S.C. 3584 (permitting imposition of consecutive sentences). Consequently, where a defendant has been convicted of multiple offenses, most circuits, including the Fourth Circuit, have affirmed sentences imposed in violation of *Apprendi* if the permissible maximum sentences for those offenses, run consecutively, would equal or exceed the defendant's actual total sentence. See *United States* v. *Angle*, 254 F.3d 514, 518-519 (4th Cir.) (en banc), cert. denied, 122 S. Ct. 309 (2001); accord, *e.g.*, *United States* v. *Kentz*, 251 F.3d 835, 842 (9th Cir. 2001), petition for cert. pending, No. 01-7238 (docketed Nov. 5, 2001); *United States* v. *Sturgis*, 238 F.3d 956, 960-961 (8th Cir.), cert. denied, 122 S. Ct. 182 (2001); *United States* v. *Price*, 265 F.3d 1097, 1108-1109 (10th Cir. 2001) (collecting cases), petition for cert. pending, No. 01-8242 (docketed Jan. 30, 2002).

There is no conflict on this issue that warrants the Court's review at this time. Two circuits have taken a different approach to whether Guidelines § 5G1.2(d) can support affirmance of a sentence despite an *Apprendi* error. See *United States* v. *Vasquez-Zamora*, 253 F.3d 211, 214 (5th Cir. 2001) (holding that district court has discretion whether to run sentences consecutively or concurrently and remanding for district court to exercise its discretion); *United States* v. *Bradford*, 246 F.3d 1107, 1114-1115 (8th Cir. 2001) (per curiam) (similar). But the Eighth Circuit has granted rehearing en banc to consider the issue, see *United States* v. *Diaz*, 270 F.3d 741 (2001) (granting rehearing en banc in relevant part of decision reported as *United States* v. *Sherman*,

---

consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

262 F.3d 784 (2001)), and the government has asked the Fifth Circuit to reconsider en banc the position taken in *Vasquez-Zamora* that stacking is discretionary, see Gov't Pet. for Reh'g in *United States* v. *Randle*, 259 F.3d 319 (2001).

b. Here, Lazaro Gallego was convicted of four separate offenses, each of which carried a statutory maximum sentence of 20 years' imprisonment, without regard to drug quantity (or any other fact that was not alleged in the indictment or proved to the jury beyond a reasonable doubt). He was subject to a sentence of life imprisonment under the Sentencing Guidelines. The district court would therefore have been required under Guidelines § 5G1.2(d) to run his sentences on the four counts consecutively for a total sentence of 80 years, the effective equivalent of a sentence of life imprisonment since he was 26 years old at the time of sentencing.

Similarly, Felix Gallego was convicted of three offenses, each of which carried a statutory maximum sentence of 20 years' imprisonment, in addition to the Section 924(c) offense, which carried a five-year consecutive sentence. He was subject to a sentence of 324 months' imprisonment under the Sentencing Guidelines for the first three offenses. The district court would therefore have been required to run his sentences for those offenses consecutively, in part, for a total sentence of 324 months' imprisonment (plus the consecutive 60 months' imprisonment under Section 924(c)).

Thus, regardless of the outcome in *Cotton*, neither petitioner would be entitled to a sentence lower than the one to which he is currently subject. There is no reason in these circumstances for the Court to hold the petition for disposition in light of *Cotton*.

2. Petitioners also contend (Pet. 18-22) that Felix Gallego's sentence was unlawful under *Apprendi* because the district court, rather than the jury, made the drug quantity determination that was used to calculate his sentencing range under the Sentencing Guidelines. As noted, the Court held in *Apprendi* 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." 530 U.S. at 490. Petitioners seek to extend that rule to facts that increase a defendant's Guidelines sentencing range, but not his statutory maximum sentence. The court of appeals correctly declined to do so. See Pet. App. 18.

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" 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"). *Apprendi* did not hold otherwise. See *Apprendi*, 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 Sentencing Guidelines simply "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 *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). A district court retains the authority 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)). Because the Guidelines leave the sentencing court with significant discretion to impose a sentence within the statutory range, and because specific offense characteristics and sentencing adjustments under the Guidelines cannot increase the statutory maximum penalty for a criminal offense, *Apprendi* does not support a challenge to the constitutionality of the Guidelines. 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").

The courts of appeals have consistently rejected efforts to apply *Apprendi* to findings under the Sentencing Guidelines. See, *e.g.*, *United States* v. *Baltas*, 236 F.3d 27, 40-41 (1st Cir.), cert. denied, 532 U.S. 1030 (2001); *United States* v. *Garcia*, 240 F.3d 180, 184 (2d Cir.), cert. denied, 121 S. Ct. 2615 (2001); *United States* v. *DeSumma*, 272 F.3d 176, 181 (3d Cir. 2001); *United States* v. *Kinter*, 235 F.3d 192, 198-202 (4th Cir. 2000), cert. denied, 532 U.S. 937 (2001); *United States* v. *Doggett*, 230 F.3d 160, 166 (5th Cir. 2000), cert. denied, 531 U.S. 1177 (2001); *United States* v. *Munoz*, 233 F.3d 410, 413-414 (6th Cir. 2000); *Hernandez* v. *United States*, 226 F.3d 839, 841-842 (7th Cir. 2000); *United*

*States* v. *Chavez*, 230 F.3d 1089, 1090 (8th Cir. 2000); *United States* v. *Hernandez-Guardado*, 228 F.3d 1017, 1024-1027 (9th Cir. 2000); *United States* v. *Heckard*, 238 F.3d 1222, 1235-1236 (10th Cir. 2001); *United States* v. *Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000), cert. denied, 122 S. Ct. 552 (2001); *In re Sealed Case*, 246 F.3d 696, 698-699 (D.C. Cir. 2001). Accordingly, the issue does not warrant the Court's review, particularly under the plain-error standard applicable in this case.[3]

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
*Solicitor General*
MICHAEL CHERTOFF
*Assistant Attorney General*
KARIN B. HOPPMANN
*Attorney*

FEBRUARY 2002

[3] In *Harris* v. *United States*, No. 00-10666, this Court granted review (Dec. 10, 2001) to decide whether brandishing a firearm, which results in an increased mandatory minimum sentence under 18 U.S.C. 924(c)(1)(A), must be charged in an indictment and proved beyond a reasonable doubt. The features of the Guidelines discussed in the text differentiate the constitutional question in *Harris* from any constitutional challenge to the Guidelines. This case therefore need not be held for *Harris*.