No. 01-766

In the Supreme Court of the United States

RICKEY BROWNLEE, 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

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's sentence violates *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 01-766

RICKEY BROWNLEE, 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

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is unpublished, but the judgment is noted at 265 F.3d 1062 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2001. A petition for rehearing was denied on August 30, 2001 (Pet. App. B1). The petition for a writ of certiorari was filed on November 28, 2001. 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 Florida, petitioner was convicted of conspiring to distribute cocaine and heroin (21 U.S.C. 846) (Count 1), possessing cocaine with the intent to distribute it (21 U.S.C. 841(a)(1)) (Count 5), conspiring to launder proceeds of drug trafficking activities (18 U.S.C. 1956(h)) (Count 7), money laundering (18 U.S.C. 1956(a)(1)(B)(i)) (Count 8), and three counts of engaging in monetary transactions of more than $10,000 using drug proceeds (18 U.S.C. 1957) (Counts 9-11).[1] The district court sentenced him to two terms of life imprisonment on Counts 1 and 5, two terms of 20 years' imprisonment on Counts 7 and 8, and three terms of ten years' imprisonment on Counts 9-11, all to be served concurrently and to be followed by a ten-year period of supervised release. The district court also fined petitioner $1 million. The court of appeals affirmed. Pet. App. A1-A12.

1. In the 1980s and 1990s, petitioner controlled a drug trafficking business in Opa-Locka, Florida. After his release from prison in 1993, petitioner re-established control over his drug organization, but attempted to insulate himself from meeting with law enforcement officers posing as potential drug customers by using middlemen to distribute his narcotics. Eventually, petitioner was arrested after several of these middlemen identified petitioner as their source and after law enforcement officers obtained a recording of petitioner negotiating the terms on which he would sell heroin to a

[1] The jury acquitted petitioner of four substantive drug distribution offenses. See Pet. App. A3.

potential customer who was also an FBI informant. See generally Gov't C.A. Br. 6-19.

2. On February 5, 1999, petitioner was indicted on a multi-count indictment. Count 1 of the indictment charged petitioner with conspiring to distribute cocaine and heroin between July 1986 and June 1998. Count 5 charged him with possessing cocaine with the intent to distribute it on December 17, 1996. Neither count contained an allegation of drug quantity, and the issue of drug quantity was not submitted to the jury. See Pet. App. A9.

Before trial, the government filed an information under 21 U.S.C. 851 setting forth petitioner's two prior felony drug convictions. See Pet. App. A9 n.2. Because of those prior convictions, petitioner's maximum sentence for a cocaine or heroin offense was 30 years' imprisonment without regard to drug quantity. See 21 U.S.C. 841(b)(1)(C) (1994 & Supp. V 1999).

3. Following petitioner's convictions, the probation office prepared his presentence report (PSR). The PSR concluded that the Count 1 conspiracy offense involved more than 150 kilograms of cocaine and that the Count 5 substantive offense involved two kilograms of cocaine. Petitioner challenged the PSR's finding on Count 1, but did not challenge the Count 5 finding. See Pet. App. A9-A10. Relying on the PSR, the district court determined that petitioner's total offense level was 43, his criminal history category was VI, and his indicated Guidelines range was life imprisonment. See 11/9/99 Judgment and Commitment Order 8.

4. The court of appeals affirmed petitioner's conviction and sentence. Pet. App. A1-A12. It noted (*id.* at A10) that, because petitioner had raised his claim under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), for the first time on appeal, that claim was reviewed for plain

error. The court also noted (Pet. App. A10) that the government had conceded that the *Apprendi* error was plain because petitioner's life sentences exceeded the 30-year maximum sentence provided by 21 U.S.C. 841(b)(1)(C) (1994 & Supp. V 1999) for defendants with prior felony drug convictions without regard to drug quantity. The court, however, agreed with the government's contention that, in light of overwhelming and undisputed trial evidence of drug quantities sufficient to support the life sentences, petitioner could not show that the error affected his substantial rights. See Pet. App. A10-A11. In addition, relying on its prior decisions in *United States* v. *Nealy*, 232 F.3d 825, 829 (11th Cir. 2000), cert. denied, 122 S. Ct. 552 (2001), and *United States* v. *Candelario*, 240 F.3d 1300, 1307 (11th Cir.), cert. denied, 121 S. Ct. 2535 (2001), the court of appeals summarily rejected petitioner's claim that the *Apprendi* error was a jurisdictional defect or structural error that required per se reversal. See Pet. App. A10 n.3.[2]

ARGUMENT

Relying on this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), petitioner contends (Pet. 11-22) that it was error to increase the statutory maximum sentence to which he was subject based on a drug quantity that was not charged in his indictment. As petitioner correctly observes (Pet. 17-22), there is a

[2] The court of appeals also rejected petitioner's challenges to certain evidentiary rulings by the district court (see Pet. App. A3-A6) and to the government's use of an overlapping state drug conspiracy conviction to prove his federal drug conspiracy offense (see *id.* at A6-A9). Petitioner has not pursued those claims in this Court.

conflict in the circuits on that question, and this Court has granted review to resolve it. See *United States* v. *Cotton*, cert. granted, 122 S. Ct. 2535 (2002) (to be argued Apr. 15, 2002) (No. 01-687). Nevertheless, even if petitioner's *Apprendi* claim were accepted in *Cotton*, the district court would still be required to impose consecutive sentences in order to achieve the practical equivalent of the sentence petitioner now challenges. Accordingly, the petition need not be held for the decision in *Cotton*.

Under the Federal Sentencing Guidelines, if no count of conviction by itself is sufficient to authorize imposition of the full Guidelines sentence, the district court is required to run the terms imposed on separate counts consecutively to the extent necessary to achieve the Guidelines sentence. Sentencing Guidelines § 5G1.2(d); see 18 U.S.C. 3584; *United States* v. *Gallego*, 247 F.3d 1191, 1200 n.19 (11th Cir. 2001), cert. denied, 122 S. Ct. 820 (2002). Petitioner received a life sentence in accordance with the term prescribed by the Sentencing Guidelines. But if the district court determined that it was unable to sentence petitioner to life imprisonment on either of the drug count convictions because of the absence of drug quantities from the indictment, it would be required to impose a 130-year prison sentence by running petitioners counts of conviction consecutively. That sentence would be functionally equivalent to the sentences actually imposed.

The indictment in this case was sufficient to charge petitioner with the two complete federal drug crimes of which he was convicted, without regard to the particular quantity of drugs involved in each offense. Each of these drug offenses has an authorized sentence, after *Apprendi*, of at least 30 years' imprisonment for a recidivist, even in the absence of any allegation or jury

finding of drug quantity. See 21 U.S.C. 841(b)(1)(C) (1994 & Supp. V 1999); see also *Apprendi*, 530 U.S. at 490 ("*Other 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.") (emphasis added). Petitioner was also convicted of conspiracy to launder proceeds of drug trafficking activities under 18 U.S.C. 1956(h), an offense that carries a maximum sentence of 20 years' imprisonment. See 18 U.S.C. 1956(a)(1). He was also convicted under 18 U.S.C. 1956(a)(1)(B)(i) of money laundering, an offense that carries a maximum sentence of 20 years' imprisonment. Finally, he was convicted under 18 U.S.C. 1957 on three counts of engaging in monetary transactions of more than $10,000 using drug proceeds, each count carrying a maximum sentence of 10 years' imprisonment. See 18 U.S.C. 1957(b)(1). These sentences—two each of 30 years' imprisonment, two each of 20 years' imprisonment, and three each of 10 years' imprisonment—consecutively total 130 years' imprisonment.

The majority of the courts of appeals that have addressed the issue have held that consecutive sentencing under Guidelines § 5G1.2(d) is mandatory. *United States* v. *Buckland*, 277 F.3d 1173, 1183 (9th Cir. 2002) (en banc); *United States* v. *Price*, 265 F.3d 1097, 1108 (10th Cir. 2001); *United States* v. *Angle*, 254 F.3d 514, 518-519 (4th Cir.) (en banc), cert. denied, 122 S. Ct. 309 (2001) (No. 01-5838); *Gallego*, 247 F.3d at 1200 n.19; *United States* v. *White*, 240 F.3d 127, 135 (2d Cir. 2001); *United States* v. *Sturgis*, 238 F.3d 956, 960 (8th Cir.), cert. denied, 122 S. Ct. 182 (2001) (No. 00-10804); *United States* v. *Page*, 232 F.3d 536, 544-545 (6th Cir. 2000), certs. denied, 532 U.S. 935, 1023 and 1056 (2001) (Nos. 00-8491, 00-7751, 00-8611 & 00-9401); cf. *United*

States v. *Parolin*, 239 F.3d 922, 930 (7th Cir.), cert. denied, 121 S. Ct. 2538 (2001) (No. 00-9999). Two circuits have determined that the district court has discretion to run sentences consecutively or concurrently under Sentencing Guidelines § 5G1.2(d). See *United States* v. *Vasquez-Zamora*, 253 F.3d 211, 214 (5th Cir. 2001); *United States* v. *Bradford*, 246 F.3d 1107, 1114 (8th Cir. 2001). But the Eighth Circuit has granted rehearing en banc to reconsider the issue. *United States* v. *Diaz*, 270 F.3d 741 (2001) (granting rehearing en banc). In the Fifth Circuit, the government has a pending petition seeking en banc reconsideration. Gov't Pet. for Reh'g, *United States* v. *Randle*, 259 F.3d 319 (5th Cir. 2001). Accordingly, there is at this time no clear conflict in the courts of appeals over this interpretation of Sentencing Guidelines § 5G1.2(d).

Nor, if a clear conflict did exist, would the question of Guidelines interpretation be a matter best resolved by this Court, rather than the Sentencing Commission. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). In any event, this particular case—where petitioner has failed even to raise the Guidelines issue—would not be an appropriate vehicle for resolution of that issue.[3]

---

[3] The issue is also presented in several other petitions for certiorari pending in this Court. See, e.g., *Kentz* v. *United States*, No. 01-7238 (filed Nov. 5, 2001).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

THOMAS M. GANNON
Attorney

MARCH 2002