No. 01-1536

In the Supreme Court of the United States

JAMES G. BOSWELL, 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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QUESTION PRESENTED

Whether petitioner's life sentence on a drug conspiracy count constituted plain error.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported, but the judgment is noted at 29 Fed. Appx. 572 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a) was entered on November 30, 2001. On February 19, 2002, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 15, 2002, and the petition was filed on that date. 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 Northern District of Florida, petitioner was convicted of conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846, and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). He was sentenced to consecutive terms of life imprisonment on the drug conspiracy count and 60 months' imprisonment on the firearm count, to be followed by five years of supervised release.[1] The court of appeals affirmed. Pet. App. 1a-2a.

1. During the 1990s, petitioner was the ringleader of a cocaine-trafficking organization based in Lebanon, Kentucky, that purchased cocaine from co-defendant Frank Merold in Florida. At petitioner's direction, co-defendants Terry Glasscock, Aaron Glasscock, and Walter Penick purchased the cocaine in Florida and then brought it to Kentucky. Gov't C.A. Br. 4, 8-12. Between 1994 and 1996, Penick made at least 30 trips to Florida during which he purchased 18 kilograms or more of cocaine for petitioner. *Id.* at 8. Between late 1997 and March 1999, Penick and Terry Glasscock purchased 40-50 kilograms of cocaine for petitioner at least every couple of months except during a three-month period. *Id.* at 9. In addition, in the mid-1990s, Edward Delmoral supplied petitioner with 115 kilograms of cocaine. *Id.* at 12. Petitioner and employees of his liquor store sold the cocaine to customers at a shed near the store. *Id.* at 10–11.

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[1] Petitioner was also fined $4 million and ordered to criminally forfeit certain real property and bank accounts pursuant to 21 U.S.C. 853. Pet. App. 8a-9a.

On March 9, 1999, Merold and co-defendant Christopher Reed offered to buy 50 kilograms of cocaine from a confidential informant and an undercover agent. The next day, petitioner gave Penick and Aaron Glasscock $900,000 to purchase the cocaine. Penick and Glasscock traveled to Florida in a green Dodge pick-up truck with the $900,000 hidden in a secret compartment, and they obtained a room at a motel where Merold and Reed were staying. Gov't C.A. Br. 5-8.

On March 11, 1999, after the undercover agent called Merold to confirm the deal, Merold and Reed drove the pick-up truck to the woods and removed the $900,000 from the secret compartment. They were arrested when they left the woods. Law enforcement agents found $900,055 on the back seat of the truck and a handgun under the back seat. Gov't C.A. Br. 7. Shortly thereafter, agents arrested Penick and Glasscock in their motel room, and they found a handgun in Glasscock's duffel bag. *Id.* at 7-8.

2. Count One of the Superseding Indictment charged that petitioner and the five co-defendants conspired "to possess with the intent to distribute and to distribute cocaine, a controlled substance." Superseding Indictment 1-2. Before trial, petitioner and the co-defendants moved for a bill of particulars identifying the quantity of cocaine involved in the conspiracy, as well as the quantity attributable to each defendant. The district court denied the motion. Pet. C.A. Br. 2-3, 25-26; Gov't C.A. Br. 19, 34.

At the end of trial, neither petitioner nor the co-defendants requested that the jury be instructed to find the quantity of cocaine involved in the conspiracy. The district court gave no such instruction. Gov't C.A. Br. 18-19.

3. The Presentence Investigation Report (PSR) found that petitioner was responsible for 1215 kilograms of cocaine, resulting in a base offense level of 38 under the United States Sentencing Guidelines (Guidelines). PSR ¶ 45. The PSR added a four-level enhancement under Guidelines § 3B1.1(a) for petitioner's leadership role in the offense and a two-level enhancement under Guidelines § 3C1.1 for obstruction of justice. *Id.* ¶¶ 48, 50. With a total offense level of 44 and a criminal history category III, petitioner's Guidelines range on the drug conspiracy count was life imprisonment. Guidelines Sentencing Table.

Petitioner objected to the PSR's calculation of the quantity of cocaine for which he was responsible. He also argued that the Sentencing Guidelines should be disregarded and that he was entitled to a downward departure from the Guidelines range on the ground that imposition of a life sentence would be "cruel and unusual punishment" under the Eighth Amendment. Pet. 4; Pet. C.A. Br. 26-27.

The district court adopted the PSR's factual findings and determined the Guidelines range to be life imprisonment. Pet. App. 10a. The court sentenced petitioner to consecutive terms of life imprisonment on the drug conspiracy count and 60 months' imprisonment on the firearm count.[2] *Id.* at 5a.

4. On appeal, petitioner claimed for the first time that his life sentence on the drug conspiracy count violated *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Jones* v. *United States*, 526 U.S. 227 (1999), because the quantity of drugs involved in the conspiracy was not charged in the indictment or proved to the jury

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[2] The consecutive five-year sentence on the firearm count was required by 18 U.S.C. 924(c)(1)(D)(ii). See Guidelines § 2K2.4.

beyond a reasonable doubt.[3] Pet. C.A. Br. 14-32; Pet. C.A. Reply Br. 1-5. In response, the government argued that the error in the imposition of a sentence based on a fact, drug quantity, that was not charged in the indictment or proved to the jury at trial did not satisfy the plain-error standard of review. Gov't C.A. Br. 30-38.

The court of appeals summarily affirmed. Pet. App. 1a-2a.

ARGUMENT

Petitioner contends (Pet. 5-16) that his life sentence on the drug conspiracy count was unconstitutional because the quantity of drugs involved in the conspiracy was not charged in the indictment or proved to the jury beyond a reasonable doubt at trial. Because petitioner did not raise any *Apprendi*-type challenge to his sentence in the district court, the court of appeals correctly reviewed that challenge under the plain-error standard of Federal Rule of Criminal Procedure 52(b). See *United States* v. *Cotton*, 122 S. Ct. 1781 (2002); *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). Petitioner asserts (Pet. 13) that the error was preserved. While petitioner requested that the government clarify the drug quantity amounts it intended to prove and objected to the quantity determination in the PSR, petitioner never objected to the imposition of an enhanced *statutory* sentence based on that quantity determination and made no Fifth or Sixth Amendment claim. The relevant error at issue here—the imposition of an enhanced sentence based on a fact that was not charged in the indictment or proved to the jury—was

[3] Petitioner raised several other claims in the court of appeals, but he does not renew them here.

not raised by the petitioner in the district court. See *Cotton*, 122 S. Ct. at 1786 n.3.

In order for an appellate court to correct an error that was not raised in the trial court, there must be (1) an "error," (2) that is "plain," (3) that "affect[s] substantial rights," and (4) that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 466-467. Under that standard, the district court's error in imposing a sentence above the otherwise-applicable statutory maximum, while "plain" in light of *Apprendi*, did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.[4] In *Cotton*, this Court held that the error in imposing an enhanced sentence based on a drug quantity that was not alleged in the indictment does not affect the fairness, integrity, or public reputation of judicial proceedings when the evidence of drug quantity is overwhelming and essentially uncontroverted. 122 S. Ct. at 1786. *Cotton* also makes clear that the same analysis applies under *Johnson* to the failure to secure a jury finding on drug quantity. Petitioner was sentenced under 21 U.S.C. 841(b)(1)(A)(ii), which requires a threshold quantity of five kilograms or more of cocaine to trigger a maximum life sentence. In this case, there was overwhelming evidence establishing that threshold quantity. The reverse sting transaction alone involved petitioner's attempt to purchase 50 kilograms of cocaine for $900,000. Petitioner makes no

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[4] Petitioner claims that the error did seriously affect the fairness, integrity, or public reputation of judicial proceedings, Pet. 14, and suggests that the Second Circuit would so hold on the facts of this case, *ibid.* (citing *United States* v. *Thomas*, 274 F.3d 655 (2d Cir. 2001)(en banc)). *Thomas*, however, was decided before this Court's decision in *Cotton*, and the approach taken in *Thomas* does not survive *Cotton*.

serious contention otherwise. The court of appeals' application of the plain-error principles to the facts of this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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