No. 02-1228

In the Supreme Court of the United States

SCOTT SHREFFLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

NINA GOODMAN
Attorney

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

QUESTION PRESENTED

Whether the Double Jeopardy Clause barred petitioner's prosecution for distribution of heroin, after the court of appeals reversed his previous conviction for conspiracy to distribute heroin on the ground that the evidence was insufficient to prove the existence of an agreement between petitioner and another person to distribute drugs.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 02-1228

SCOTT SHREFFLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6-9) is not published in the *Federal Reporter*, but is available at 47 Fed. Appx. 140. The opinion of the district court (Pet. App. 10-20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2002. The petition for a writ of certiorari was filed on December 24, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the Middle District of Pennsylvania returned a superseding indictment charging petitioner with 20 counts of distribution of heroin, in

violation of 21 U.S.C. 841. Petitioner moved to dismiss the indictment on the ground, *inter alia*, that the Double Jeopardy Clause barred the prosecution. The district court denied the motion. Pet. App. 10-20. The court of appeals affirmed. *Id.* at 6-9.

1. From December 1996 to May 1999, petitioner purchased heroin in Philadelphia and resold it to numerous buyers in Lewistown, Pennsylvania. Most of petitioner's customers were young people, and several of them were 16 years old or younger. Gov't C.A. Br. 6-11; *United States* v. *Pressler*, 256 F.3d 144, 150-151 (3d Cir.), cert. denied, 534 U.S. 1013 (2001).

2. In May 1999, a federal grand jury returned an indictment charging petitioner and eight co-defendants with conspiracy to distribute heroin, in violation of 21 U.S.C. 846. Gov't C.A. Br. 3. After a jury trial, petitioner was convicted on the conspiracy count. Pet. App. 6. The jury also returned a special verdict finding that petitioner and a co-defendant conspired to distribute heroin to persons under 21 years of age. Gov't C.A. Br. 3.

At sentencing, the district court found that petitioner had distributed between 69 and 113 grams of heroin. Applying a preponderance of the evidence standard, the court also found that two of petitioner's customers had overdosed on heroin that he had provided and had suffered serious bodily injury as a result. The latter finding produced a base offense level of 38 under Sentencing Guidelines § 2D1.1(a)(2), which applies where "the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance." Other enhancements increased petitioner's offense level to 42. His criminal history category was V, resulting in a Guidelines range of 360 months of imprisonment to life imprisonment. The district court

sentenced petitioner to 360 months of imprisonment. *Pressler*, 256 F.3d at 148-149.

The court of appeals reversed, holding that the evidence was insufficient to support petitioner's conspiracy conviction because "the [g]overnment never established the existence of an agreement between [petitioner] and someone else." *Pressler*, 256 F.3d at 147. The court observed, however, that the evidence "showed here that [petitioner] obtained and distributed a large amount of heroin." *Ibid.* According to the court, if the government had charged petitioner with distribution of heroin, "the evidence at trial [would have been] more than sufficient to convict" him of that offense. *Id.* at 156.

3. In July 2001, the grand jury returned a one-count indictment charging petitioner with distribution of heroin, in violation of 21 U.S.C. 841(a)(1). Pet. App. 7; 7/11/01 Indictment 1-2. The grand jury subsequently returned a superseding indictment charging petitioner with 20 counts of distributing heroin. Pet. App. 7. Two of the counts alleged that the offenses "resulted in [the user] overdosing and suffering serious bodily injury." 12/12/01 Superseding Indictment 2, 20. Petitioner moved to dismiss the indictment, arguing, *inter alia*, that his prosecution for the substantive drug offenses was barred by the Double Jeopardy Clause because of his prior conviction and sentence for conspiracy to commit those offenses. Pet. App. 7; Gov't C.A. Br. 19-21.

a. The district court denied the motion. Pet. App. 10-20. Relying on this Court's decision in *United States* v. *Felix*, 503 U.S. 378 (1992), the district court explained that "the Double Jeopardy Clause does not bar successive prosecutions of a conspiracy offense and any underlying substan[tive] offense since the two crimes

are not the same offense for double jeopardy purposes." Pet. App. 11. The court added that "the Double Jeopardy Claus[e] does not bar a second prosecution simply because the government uses the same evidence in both trials." *Id.* at 13 (citing *Dowling* v. *United States*, 493 U.S. 342 (1990)). The court also rejected petitioner's reliance on the doctrine of collateral estoppel, explaining that, although "it was established in the first prosecution that [petitioner] had not agreed with anyone to distribute heroin, * * * that fact[] does not bar the instant" prosecutions for the substantive offense of distributing heroin. *Id.* at 15.

Finally, the court rejected petitioner's contention that trying and sentencing him for substantive offenses involving serious bodily injury would violate his double jeopardy rights because, first, his conspiracy sentence had previously been enhanced for causing serious bodily injury, and, second, the court had previously found that petitioner's conduct caused serious bodily injury only by a preponderance of the evidence, thereby implicitly finding that those facts were not established beyond a reasonable doubt. The district court explained that, because petitioner's conviction and sentence for the conspiracy offense had been vacated on appeal, "he would not suffer a second punishment if a jury in this case found the same facts." Pet. App. 16. The court also explained that its finding at sentencing by a preponderance of the evidence that petitioner's conduct had resulted in serious bodily injury did not amount to a determination that the government would be unable to satisfy "the higher standard of reasonable" doubt. *Id.* at 17.

b. The court of appeals affirmed "for the reasons substantially set forth in the written opinion of the District Court." Pet. App. 9. The court ruled that the

substantive drug offenses are not the same offense as—or lesser included offenses of—the conspiracy offense for which petitioner had previously been prosecuted, "but rather, [are] entirely distinct crimes." *Id.* at 8. The court also explained that the district court's finding by a preponderance of the evidence at sentencing on the conspiracy charge that petitioner's conduct caused serious bodily injury was "not equivalent to a finding that the reasonable doubt burden could not be met at trial." *Id.* at 9.

ARGUMENT

Petitioner renews his contention (Pet. 2-5) that his prosecution for substantive heroin distribution offenses is barred by the Double Jeopardy Clause because of his previous prosecution for conspiracy to distribute heroin. That claim lacks merit and does not warrant review.

1. The applicable test for determining whether two offenses are distinct for double jeopardy purposes, as set forth in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), turns on "whether each offense contains an element not contained in the other." *United States* v. *Dixon*, 509 U.S. 688, 696 (1993). A substantive offense such as distribution of heroin requires proof of an element—actual commission of the substantive crime—that is not included in a conspiracy offense. Conversely, a conspiracy offense requires proof of an element—an agreement among two or more people to commit the substantive crime—not included in the underlying substantive crime. Accordingly, as this Court has frequently recognized, "a substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes." *United States* v. *Felix*, 503 U.S. 378, 389 (1992); see *Garrett* v. *United States*,

471 U.S. 773, 778 (1985); *Iannelli* v. *United States*, 420 U.S. 770, 777-779 (1975); *United States* v. *Bayer*, 331 U.S. 532, 542 (1947).

Petitioner seeks to distinguish *Felix* (Pet. 5) on the basis that, in *Felix*, the conspiracy prosecution followed —rather than preceded—the prosecution for the substantive offense. As the Eleventh Circuit has explained, however, the applicability of the rule recognized in *Felix* does not depend on the order of the prosecutions. *United States* v. *Eley*, 968 F.2d 1143, 1147 (1992) (rejecting double jeopardy challenge to prosecution for substantive offenses after conspiracy conviction, and noting that Court's decision in *Felix* "does not appear to place any emphasis upon the order of conviction"); see also *United States* v. *Williams*, 155 F.3d 418, 420-422 (4th Cir.) (no double jeopardy bar to prosecution for murder in aid of racketeering after conviction for conspiracy to commit that offense), cert. denied, 525 U.S. 1058 (1998).[1]

Petitioner errs in relying (Pet. 5) on this Court's observation in *Felix* that "[t]he actual crimes charged in each case were different in both time and place; there was absolutely no common conduct linking the alleged offenses." *Felix*, 503 U.S. at 385. The Court addressed two distinct double jeopardy issues in *Felix* arising from separate charges in the same indictment: (1) whether the defendant's prosecution for conspiracy was barred by his previous conviction on a substantive drug

---

[1] There also is no merit to petitioner's suggestion (Pet. 3-4) that the government is barred from prosecuting him for the substantive offenses because those charges could have been brought in the original indictment. As this Court has made clear, as long as the *Blockburger* test is satisfied, the government "is entirely free to bring [its prosecutions] separately." *Dixon*, 509 U.S. at 705.

charge, see 503 U.S. at 387-391; and (2) whether his prosecution for substantive drug offenses was barred by his previous conviction, see *id.* at 384-387. The observation of this Court relied on by petitioner pertained only to the latter issue, which is not relevant here. In rejecting the double jeopardy challenge to the conspiracy count, the Court reaffirmed the "established doctrine that a conspiracy to commit a crime is a separate offense from the crime itself." *Id.* at 391.

2. Petitioner's reliance on principles of collateral estoppel (Pet. 5) also lacks merit. The Double Jeopardy Clause incorporates aspects of the doctrine of collateral estoppel, so as to bar a prosecution that would require the relitigation of ultimate factual issues that were resolved against the government in an earlier prosecution. *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970). An acquittal on one charge precludes the government from later bringing a second charge, however, only if the acquittal "determine[d] an ultimate issue"—*i.e.*, a fact that the government must prove beyond a reasonable doubt—in the second case. *Dowling* v. *United States*, 493 U.S. 342, 347-348 (1990); see *Ashe*, 397 U.S. at 443-445.

In reversing petitioner's conspiracy conviction, the court of appeals found only that the government's proof of an agreement between petitioner and another person was insufficient. See *Pressler*, 256 F.3d at 147, 157. The court specifically noted that "the evidence at trial was more than sufficient to convict" petitioner of distribution of heroin. *Id.* at 156; see *id.* at 150 ("[t]here is no question that [petitioner] distributed a sizeable amount of heroin"). Because an agreement to distribute heroin is not an element of the substantive offenses with which petitioner is now charged, the doctrine of collateral estoppel does not bar his prosecution for those offenses.

See *Dowling*, 493 U.S. at 348 (rejecting claim that prior acquittal barred second prosecution where the "acquittal did not determine an ultimate issue in the present case"); cf. *Sealfon* v. *United States*, 332 U.S. 575, 578-580 (1948) (defendant's acquittal on conspiracy charge at first trial required reversal of conviction for aiding and abetting at second trial because both prosecutions required proof of an agreement between the defendant and a co-defendant that "was necessarily adjudicated in the former trial to be non-existent").[2]

3. Petitioner contends (Pet. 3-4) that because the district court calculated his offense level for the conspiracy conviction based in part on its finding that two of petitioner's customers suffered serious bodily injury from overdosing on heroin that he supplied, he has already been "prosecuted *and* punished" for conduct charged in the current indictment. This Court has made clear, however, that a court's consideration of uncharged conduct in selecting an appropriate sentence for the crime of conviction does not constitute "punishment" for that conduct for purposes of the Double Jeopardy Clause. *Witte* v. *United States*, 515 U.S. 389, 395-404 (1995); see also *United States* v. *Watts*, 519 U.S. 148, 154-157 (1997) (per curiam) (court imposing

---

[2] There is no merit to petitioner's claim (Pet. 5) that the doctrine of res judicata bars his current prosecution. In criminal cases, the res judicata doctrine provides that, "[w]here a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication * * * is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence." *United States* v. *Oppenheimer*, 242 U.S. 85, 88 (1916) (citation omitted). Petitioner offers no authority for applying res judicata in the criminal context to preclude his prosecution for an offense with which he has not been previously charged.

sentence for one offense may take into account conduct underlying counts on which the defendant was acquitted); *Williams* v. *Oklahoma*, 358 U.S. 576, 584-586 (1959).

Petitioner errs in relying on this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).[3] According to petitioner, the district court violated the *Apprendi* rule when it imposed a sentence "beyond the statutory maximum" (Pet. 4) on his conspiracy conviction based on a finding by a preponderance of the evidence that petitioner's conduct resulted in serious bodily injury to his customers. *Apprendi*, however, does not bear on petitioner's double jeopardy claim. As the district court explained (Pet. App. 14), because petitioner's conviction and sentence for the conspiracy offense were vacated by the court of appeals, his current prosecution does not expose him to successive punishments.

Petitioner also contends (Pet. 4 n.1) that the district court's finding under the preponderance standard that his distribution of heroin caused serious bodily injury amounted to an "implicit acquittal." The court of ap-

---

[3] Petitioner also invokes Justice Scalia's dissent in *Monge* v. *California*, 524 U.S. 721 (1998), on the basis that it is "now the prevailing view in light of *Apprendi*." Pet. 2. The reasoning of the dissent in *Monge* cannot assist petitioner where *Apprendi* itself does not. In any event, the dissent in *Monge* addressed a resentencing after, at the first sentencing, the evidence failed to establish a prior conviction that would have raised the maximum sentence. Whatever the correct outcome on those facts, cf. *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998); *Apprendi*, 530 U.S. at 489-490, here, there is no finding that the evidence at petitioner's first sentencing was insufficient to establish that petitioner's distribution of heroin caused serious bodily injury. See *Pressler*, 256 F.3d at 157 n.7.

peals correctly rejected that claim, explaining that the district court's "determination at sentencing that the preponderance of the evidence burden was met is not equivalent to a finding that the reasonable doubt burden could not be met at trial." Pet. App. 9; see *id.* at 16-17 (district court explained that it did not find "that the government had only established this factor by a preponderance of the evidence" and "did not consider whether the government could satisfy the higher standard of reasonable [doubt]").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

NINA GOODMAN
Attorney

APRIL 2003