Nos. 01-1113 and 01-8356

In the Supreme Court of the United States

JOEL HAGEN, PETITIONER

v.

UNITED STATES OF AMERICA

TREVOR BJORKMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether petitioners' sentences violate *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because they were based on drug quantities that were not alleged in the indictment.

2. Whether, in enhancing petitioner Hagen's offense level under Sentencing Guidelines § 2D1.1(b)(1) for possession of firearms, the district court correctly held that petitioner bears the burden of proving that it was clearly improbable that the firearms were connected with the offense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A31)[1] is reported at 270 F.3d 482.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 2001. The petition for a writ of certiorari in

[1] References to "Pet. App." refer to the appendix to the petition in No. 01-1113.

No. 01-1113 was filed on January 28, 2002, and the petition in No. 01-8356 was filed on January 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering guilty pleas in the United States District Court for the Western District of Wisconsin, petitioners were each convicted of conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a) and 846.[2] Petitioner Hagen was sentenced to 155 months' imprisonment and fined $40,000, petitioner Bjorkman to 146 months' imprisonment, petitioner Paul Gunderson to 148 months' imprisonment, petitioner Fearing to 105 months' imprisonment, and petitioner Dennis Gunderson to 125 months' imprisonment. All five petitioners were also sentenced to five years of supervised release following their terms of imprisonment. The court of appeals affirmed. Pet. App. A1-A31.

1. In 1996, petitioners Hagen and Paul Gunderson became partners in a drug operation that bought marijuana from Mexican sources through contacts in Arizona and then transported it to Minnesota. Petitioners Dennis Gunderson, Bjorkman, and Fearing were drivers who transported 100-pound loads of marijuana from Arizona to Hagen's and Paul Gunderson's residences, where the marijuana was repackaged and then sold to customers. Pet. App. A1-A2; Gov't C.A. Br. 11-12.

In early 1997, Hagen and Paul Gunderson ended their partnership. Thereafter, Paul and Dennis Gunderson

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[2] Petitioner Hagen also pleaded guilty to criminal forfeiture of $286,900 pursuant to 21 U.S.C. 853 (1994 & Supp. V 1999).

continued to obtain marijuana from their Mexican sources in Arizona, using a new set of drivers. After a search warrant was executed at his residence in June 1997, Paul Gunderson sold the operation to Dennis and another individual. Meanwhile, Hagen and co-defendant Scot Hendricks used couriers, included Fearing, to obtain marijuana from Arizona throughout the summer of 1998. The marijuana was repackaged at Hagen's residence before it was divided for sale by Hagen and co-defendant Hendricks. Pet. App. A2-A3; Gov't C.A. Br. 12-13.

In August 1998, search warrants were executed at various locations in Minnesota and Wisconsin. During a search of Hagen's Minnesota residence, law enforcement agents found $122,640, two handguns, a clip loaded with hollow-point bullets, a scale, and drug packaging materials. The two handguns were found together with $12,000 in cash in a basement safe. Pet. App. A3, A12-A13; Gov't C.A. Br. 14, 23-24.

2. Petitioners and two co-defendants were charged in a multi-count superseding indictment. Count One charged that petitioners and the two co-defendants conspired to possess marijuana with intent to distribute it, and to distribute "marijuana, a Schedule I controlled substance * * *." Superseding Indictment 1.

Pursuant to written plea agreements, petitioners each pleaded guilty to this count. The plea agreement for each petitioner provided that he was subject to a mandatory minimum five-year sentence and a maximum 40-year sentence, and the district court reconfirmed those penalties at each petitioner's plea hearing. In addition, the plea agreements of petitioners Bjorkman, Paul Gunderson, and Fearing set forth the quantities of marijuana that the government believed

to be properly attributable to each. Pet. App. A3-A5; Gov't C.A. Br. 6-8.

3. At sentencing, the district court found that petitioner Hagen was responsible under the Sentencing Guidelines for between 700 and 1000 kilograms of marijuana, resulting in a base offense level of 30 under Guidelines § 2D1.1(c)(5). Hagen Judgment 7. The court increased the offense level by two levels under § 2D1.1(b)(1) for possession of firearms, finding that it was "not clearly improbable" that the two handguns found in the basement safe in Hagen's residence were connected with the offense.[3] *Ibid.* Before sentencing, Hagen had submitted affidavits from two individuals who stated that they owned the handguns and had stored them at Hagen's residence. Pet. App. A13. The district court found that it did not matter who owned the handguns because there was "substantially more than a preponderance of the evidence * * * that Joel Hagen was in possession of the firearm which was located in the basement where marijuana processing was performed, where indeed the safe was held, where there was money in the safe attributable to the drug." Sentencing Tr. 22-23. Accordingly, the court concluded that Hagen had not carried his burden of showing that it was clearly improbable that the handguns were connected with the offense. *Id.* at 23.

After making other adjustments to the offense level, the court determined that Hagen's Guidelines' range was 168-210 months' imprisonment, based on a total

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[3] Guidelines § 2D1.1(b)(1) requires a two-level enhancement of the offense level "[i]f a dangerous weapon (including a firearm) was possessed[.]" Application note 3 in the commentary to § 2D1.1(b)(1) provides that "[t]he adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense."

offense level of 33 and a criminal history category of III. Hagen Judgment 7. Granting the government's motion for a downward departure pursuant to Guidelines § 5K1.1, the court sentenced Hagen to 155 months' imprisonment. *Id.* at 2, 7.

The district court found that petitioner Bjorkman was responsible under the Sentencing Guidelines for 163.6 kilograms of marijuana, resulting in a base offense level of 26 under Guidelines § 2D1.1(c)(7). Bjorkman Judgment 7. After reducing the offense level under Guidelines § 3E1.1 for acceptance of responsibility, the court determined that Bjorkman's Guidelines' range was 92-115 months' imprisonment, based on a total offense level of 23 and a criminal history category of VI. *Ibid.* The court decided to depart upward from the Guidelines' range because Bjorkman's criminal history category did not adequately reflect the likelihood that he would engage in future criminal conduct. *Id.* at 8. Accordingly, the court sentenced Bjorkman to 146 months' imprisonment. *Id.* at 2.

The district court found that petitioner Paul Gunderson was responsible under the Sentencing Guidelines for 862 kilograms of marijuana, resulting in a base offense level of 30 under Guidelines § 2D1.1(c)(5). P. Gunderson Judgment 7. After making adjustments to the base offense level, the court determined that Gunderson's Guidelines' range was 168-210 months' imprisonment, based on a total offense level of 33 and a criminal history category of III. *Ibid.* The court granted the government's motion for a downward departure pursuant to Guidelines § 5K1.1 and sentenced Gunderson to 148 months' imprisonment. *Id.* at 2, 7.

The district court found that petitioner Fearing was responsible under the Sentencing Guidelines for 386 kilograms of marijuana, resulting in a base offense level

of 26 under Guidelines § 2D1.1(c)(7). Fearing Judgment 7. After making adjustments to the base offense level, the court determined that Fearing's Guidelines' range was 84-105 months' imprisonment, based on a total offense level of 25 and a criminal history category of IV. *Ibid.* The court sentenced Fearing to 105 months' imprisonment. *Id.* at 2.

The district court found that petitioner Dennis Gunderson was responsible under the Sentencing Guidelines for 808 kilograms of marijuana, resulting in a base offense level of 30 under Guidelines § 2D1.1(c)(5). D. Gunderson Judgment 7. After making adjustments to the base offense level, the court determined that Gunderson's Guidelines' range was 121-151 months' imprisonment, based on a total offense level of 30 and a criminal history category of III. *Ibid.* The court sentenced Gunderson to 125 months' imprisonment. *Id.* at 2.

4. On appeal, petitioners argued, for the first time, that their sentences were imposed in violation of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because they exceeded the otherwise applicable statutory maximum based on a fact, drug quantity, that was not alleged in the indictment. Pet. C.A. Br. 16-28.

The court of appeals affirmed. Pet. App. A1-A31. It rejected petitioners' argument that *Apprendi* required automatic reversal of their sentences because the superseding indictment failed to allege drug quantity. *Id.* at A5-A10. Relying on circuit precedent, the court ruled that "[i]f the indictment does not include type or quantity, and the defendant does not object, then review is for plain error * * *, and not for any different standard (such as lack of jurisdiction or failure to state an offense)." *Id.* at A10. Because "[n]one of the [petitioners] even *assert[ed]* that he was responsible

for less than 100 kilograms of marijuana," the court concluded that "no injustice has been done and the requirements for reversal on plain-error review have not been met." *Ibid.*

The court of appeals also upheld the district court's enhancement of petitioner Hagen's offense level under Sentencing Guidelines § 2D1.1(b)(1) for possession of the two handguns. Pet. App. A10-A14. Based on circuit precedent, the court rejected Hagen's claim that the government, rather than the defendant, bears the burden of proving that it was not clearly improbable that the weapons were connected to the offense. *Id.* at A10-A12. The court also rejected Hagen's claim that he had met this burden. *Id.* at A12-A13. The court explained that "[g]iven that the guns were found in a residence where drugs were delivered and handled, that they were found in close proximity to the proceeds from the crime, and that drug paraphernalia was also found in the house, the [district] court did not clearly err in awarding the § 2D1.1(b)(1) enhancement to Hagen." *Id.* at A13.[4]

DISCUSSION

1. Petitioners renew their contention (01-1113 Pet. 9; 01-8356 Pet. 6-11) that their sentences violate *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because they exceed the statutory maximum sentences to which they were subject based on an indictment charging a marijuana offense without specifying the drug quantities that were involved in the offense. That claim, which was not raised in the district court, is essentially the same claim as is before the Court in *United States* v. *Cotton*, No.

[4] The court of appeals rejected several other claims raised by individual petitioners, which they do not renew here.

01-687 (argued Apr. 15, 2002). Accordingly, the petitions in this case should be held pending the decision in *Cotton* and then disposed of as appropriate in light of that decision.

2. Petitioner Hagen (01-1113 Pet. 9-13) contends that his offense level was improperly enhanced under Sentencing Guidelines § 2D1.1(b)(1) for possession of the two handguns found during the search of his residence. He argues that the courts below erred in placing the burden on him to prove that it was clearly improbable that the weapons were connected with the offense.

Petitioner's contention turns on the interpretation of application note 3 in the commentary to Guidelines § 2D1.1(b)(1), which provides that the two-level enhancement for possession of a dangerous weapon "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." Like the Seventh Circuit, the majority of the other courts of appeals have interpreted the application note to mean that, although the government initially bears the burden of proving that a defendant possessed a weapon in a place where drugs were present, the defendant must then show that it is clearly improbable that the weapon was connected with the offense in order not to be subject to the enhancement. See, *e.g.*, *United States* v. *Marmolejo*, 106 F.3d 1213, 1216 (5th Cir. 1997), cert. denied, 525 U.S. 1056 (1998); *United States* v. *Hall*, 46 F.3d 62, 63 (11th Cir. 1995); *United States* v. *Roberts*, 980 F.2d 645, 647 (10th Cir. 1992); *United States* v. *Corcimiglia*, 967 F.2d 724, 727-728 (1st Cir. 1992); *United States* v. *Restrepo*, 884 F.2d 1294, 1296 (9th Cir. 1989); *United States* v. *McGhee*, 882 F.2d 1095, 1097-1099 (6th Cir. 1989). The Eighth Circuit, on the other hand, has held that "in

order for § 2D1.1(b)(1) to apply, the government has to prove by a preponderance of the evidence that it is not clearly improbable that the weapon had a nexus with the criminal activity." *United States* v. *Richmond*, 37 F.3d 418, 419 (8th Cir. 1994), cert. denied, 513 U.S. 1178 (1995); see also *United States* v. *Bost*, 968 F.2d 729, 732 (8th Cir. 1992).[5]

Notwithstanding this conflict among the circuits, further review by this Court is unwarranted. To begin with, the conflict is not implicated in this case, since application of the Eighth Circuit's standard likely would not have produced a different outcome. The government proved that petitioner Hagen possessed the two handguns in his residence during the conspiracy, that marijuana had been delivered to the residence and repackaged in the basement, that the handguns had been stored together with $12,000 in drug proceeds in the basement safe, and that drug paraphernalia was present in the residence simultaneously with the handguns. Pet. App. A13; Gov't C.A. Br. 24-25. Such overwhelming evidence of a probable nexus between the handguns and the drug conspiracy would be sufficient to show that it was not clearly improbable that the firearms were connected with the marijuana conspiracy. Cf. *United States* v. *Betz*, 82 F.3d 205, 210-211 & n.4 (8th Cir. 1996) (noting that enhancements imposed under § 2D1.1(b)(1) have been upheld by the Eighth Circuit in a number of cases with facts similar to those found here).

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[5] The Third Circuit has not taken a position either way. In *United States* v. *Price*, 13 F.3d 711, 733 (1994), cert. denied, 514 U.S. 1023 (1995), the Third Circuit assumed without deciding that the government bears the burden of proof for purposes of deciding that case.

In any event, a conflict over a question of Guidelines interpretation would best be left for resolution by the Sentencing Commission, rather than by this Court. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). Accordingly, petitioner Hagen's individual sentencing claim merits no further review.

CONCLUSION

With respect to petitioners' claim that their enhanced sentences are unconstitutional, the petitions for a writ of certiorari should be held pending the decision in *United States* v. *Cotton*, No. 01-687, and then disposed of as appropriate in light of that decision. In all other respects, the petitions should be denied.

Respectfully submitted.

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