No. 00-1442

In the Supreme Court of the United States

ERIC R. MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether in sentencing a defendant for a drug conspiracy offense a court may constitutionally take into account its finding, by clear and convincing evidence, that the defendant committed a murder during the course of the conspiracy.

2. Whether the district court committed reversible error by sentencing petitioner in accordance with 21 U.S.C. 841(b)(1)(A), in the absence of any indictment allegation or jury finding beyond a reasonable doubt concerning the quantity of drugs involved in petitioner's offense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B14) is reported at 234 F.3d 319. A previous opinion of the court of appeals (Pet. App. A1-A31) is reported at 157 F.3d 1067.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2000. The petition for a writ of certiorari was filed on March 2, 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 Western District of Wisconsin, petitioner was convicted of conspiring to distribute cocaine and

marijuana, and to possess those drugs with the intent to distribute them, in violation of 21 U.S.C. 846 and 21 U.S.C. 841. He was sentenced to life imprisonment. The court of appeals affirmed.

1. In the fall of 1995, the FBI and local law enforcement agents were investigating drug trafficking in northwestern Wisconsin and the disappearance and possible murder of three individuals who were thought to be connected to the drug trafficking. During that investigation, the authorities learned of the activities of Gordon Hoff, Sr. (Hoff), and his son Gordon, otherwise known as "Rock." In November 1995, a federal grand jury sitting in the Western District of Wisconsin charged Hoff with intimidating a witness and Rock with conspiring to distribute controlled substances. Pet. App. A2.

Hoff agreed to cooperate with the government in exchange for a promise to dismiss the witness tampering charge and not to bring other charges against Hoff. The government's obligations were contingent on Hoff's not having been directly involved in the commission of a homicide. Hoff then made incriminating statements to investigators and led them to the dead body of Dan Oestreich. He alleged that Rock had murdered both Oestreich and another man, Kirk Larson, because Rock believed that they were informants. He admitted helping Rock dispose of Oestreich's body. Hoff said he believed that Rock had also murdered Dennis Fenner, but that he could not confirm that suspicion. He told investigators that he did not use cocaine and had never been involved in the sale of cocaine, but that Rock was active in cocaine and marijuana trafficking. He identified petitioner, a cocaine user, as a potential source of further information about Rock. Pet. App. A2-A3.

Petitioner also agreed to make "a complete and truthful statement . . . regarding [his] knowledge of and involvement in criminal offenses including, but not limited to, controlled substance trafficking," in exchange for the government's promise not to use statements made under the agreement against him in criminal proceedings. Pet. App. A3-A4 (court's alteration.) Petitioner admitted that he had bought small quantities of drugs from Rock on several occasions, but he did not mention any other drug activity. He denied that he knew anything about the disappearance of Dennis Fenner. *Id.* at A4.

Interviews with Rock, Rock's girlfriend, Hoff's daughter, and one of Hoff's drug customers ultimately disclosed that both petitioner and Hoff had in fact been active members of a long-term conspiracy to distribute cocaine and marijuana. The government further determined that petitioner had murdered Dennis Fenner, at Hoff's direction, because Hoff believed that Fenner planned to provide authorities with information about Hoff's drug dealing. Concluding that neither petitioner nor Hoff had provided the complete and truthful information required by their immunity agreements, the government sought, and a grand jury returned, an indictment charging Hoff and petitioner with conspiracy to possess and distribute illegal drugs. The government thereafter determined that Hoff had murdered Oestreich, again because Hoff believed that Oestreich was a police informant. Investigators also uncovered further evidence of extensive trafficking in cocaine and marijuana by Hoff and petitioner. Pet. App. A4-A5.

Rock also entered into an agreement with the government, under which he pleaded guilty to a federal drug charge in connection with his dealings with petitioner and Hoff. He received a ten-year sentence

for that crime. In addition, Rock pleaded guilty to state charges in connection with the Larson murder, for which he was sentenced to 20 years in prison. Pet. App. A6-A7.

2. a. At the trial of petitioner and Hoff, Rock testified that Hoff had begun supplying him with drugs for resale in 1991, and also had supplied petitioner with drugs for resale. In 1993, Rock gave Hoff a stolen motorcycle in exchange for the right to sell drugs to petitioner. Eventually, Rock began to obtain drugs from sources other than his father. On one occasion, petitioner acted as a courier for Rock, transporting a kilogram of cocaine from Indiana to Wisconsin. Several other witnesses testified about petitioner's involvement in drug trafficking. The jury found both petitioner and Hoff guilty of conspiracy to distribute controlled substances in violation of 21 U.S.C. 846. Pet. App. A7-A8. Petitioner did not ask that the jury be asked to make any finding with respect to the quantity of drugs involved in the conspiracy, and the judge did not require such a finding.

b. Petitioner's presentence report (PSR) indicated that his statutory sentencing range was ten years' to life imprisonment, under 21 U.S.C. 841(b)(1)(A), because the offense involved more than five kilograms of cocaine. PSR ¶ 63. The PSR stated the government's contentions that the total quantity of drugs involved in the offense was 5.7 kilograms of uncut cocaine and 191.8 kilograms (422 pounds) of marijuana. PSR ¶ 16. Petitioner objected to the amount of drugs attributed to him, but he did not question the district court's power to determine his statutory and Guidelines sentencing ranges on the basis of the court's findings with respect to drug quantity. Addendum to PSR 2 (Nov. 14, 1996); see Pet. 12.

The district court found that the conspiracy involved approximately six kilograms of cocaine. Pet. App. A8. That finding would ordinarily have set petitioner's base offense level at 32 under United States Sentencing Guidelines § 2D1.1(c). See Pet. App. A9. The court found, however, "by clear and convincing evidence," that petitioner "was the one that actually shot Dennis Fenner"; petitioner acted at Hoff's direction, the court found, but petitioner "was the actual murderer." 12/20/96 Sent. Tr. 166; see Pet. App. A9. Concluding that the murder was relevant conduct with respect to petitioner's drug conspiracy, see Guidelines §§ 1B1.3(a), 3D1.2(b), the court followed the cross-reference in Section 2D1.1(d)(1) and applied the Guideline for first-degree murder, Section 2A1.1. That Section provides for a base offense level of 43. Although that offense level is the highest recognized under the Guidelines, see Guidelines Ch. 5, Pt. A (Sentencing Table), the court added two levels for obstruction of justice, resulting in a total offense level of 45. Pet. App. A9. With an offense level of 45 and a criminal history category of III, the Guidelines required that petitioner be sentenced to life imprisonment, and the district court imposed that sentence. *Ibid.*

The court similarly determined by clear and convincing evidence that Hoff had murdered Oestreich, and had directed petitioner to murder Fenner. See 12/20/96 Tr. 163-167. As with petitioner, the court followed the cross-reference in Guidelines § 2D1.1(d)(1), applied the first-degree murder guideline (Section 2A1.1), and sentenced Hoff to life imprisonment.

c. The court of appeals reversed petitioner's conviction and remanded his case for retrial. Pet. App. A1-A31. The court agreed with petitioner that the district court should have instructed the jury it could not find

him guilty of conspiracy on the basis of a "mere buyer-seller relationship." *Id.* at A9-A14.

The court affirmed Hoff's conviction and life sentence. It rejected his argument that it was unconstitutional to determine his Guidelines sentencing range under the provision for first degree murder because, in Hoff's view, "no person should be sentenced for murder without first being convicted of murder after a jury trial." Pet. App. A29. The court reasoned that Hoff's sentence "was within the expressly stated statutory maximum for his offense of conviction," which was "governed by 21 U.S.C. § 841(b)(1)(A)(ii)," and that in selecting a sentence within the statutory range the sentencing court was entitled to consider uncharged conduct related to the offense of conviction. *Id.* at A29-A30. Taking such conduct into account in determining an appropriate sentence for the offense of conviction was not, the court explained, the same as punishing the defendant for the uncharged conduct. *Ibid.*

3. After retrial, a second jury found petitioner guilty. Petitioner waived his right to a new PSR, but the probation office prepared a supplement in which it reiterated that petitioner's offense "carried a maximum possible penalty of life imprisonment," and indicated that new information made available since petitioner's first trial did not affect the original Guidelines calculations. Supplement to PSR 1, 4.

The district court again imposed a life sentence. In a detailed statement of reasons incorporated in the judgment order, see Pet. App. E1-E4, the court noted that it had "previously determined, to which objection is not being offered, that [petitioner] was involved in the distribution of 5.7 kilograms of uncut cocaine and

422 pounds of marijuana." *Id.* at E1.[1] Relying on the prior transcripts "and the failure of [petitioner] to provide any contrary evidence whatsoever at sentencing," the court found "by clear and convincing evidence [that] this [petitioner] shot and killed Dennis Fenner in April 1994 pursuant to a previous plan with co-defendant Hoff, Sr. and assisted his two co-conspirators in the disposition of Fenner's body by burning so as to advance the drug distribution conspiracy of which he was a part." *Id.* at E3. The court again followed the cross-reference in Guidelines § 2D1.1, applied the first-degree murder Guideline, and determined that the Guidelines dictated a sentence of life imprisonment. 4/9/99 Sent. Tr. 106. The court made clear that it believed such a sentence was appropriate:

> The guidelines only go to 43 and I believe there's probably no authority to go to 45 because there isn't a 45 on the scale as best the Court can find. But if indeed there were, [petitioner] would be a 45. There's nowhere you can go beyond life. It isn't life plus two. It's life without parole. And the Court believes it is indeed fitting to provide that sentence to this defendant.

Ibid.; see also Pet. App. E4.

Petitioner objected to the use of the first-degree murder Guideline, both on the ground that the evidence did not establish his participation in the murder and on the ground that taking the murder into account would violate his rights to due process and to a jury trial on any charge of murder. See Pet. 11. He did not object to

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[1] Although petitioner was retried in the same district court, different judges presided over the first and second proceedings. See Pet. App. B9.

the district court's drug-quantity findings, or to the determination that he was subject to a statutory maximum sentence of life imprisonment. See Pet. 12.

4. The court of appeals affirmed. Pet. App. B1-B14. The court first rejected petitioner's claim that his trial counsel rendered ineffective assistance by not asking for a mistrial or a cautionary instruction when a witness made a reference to "murder cases." *Id.* at B10-B12. The court then addressed petitioner's contention that the evidence was insufficient to support a sentencing determination that he had committed a murder in the course of the drug conspiracy. *Id.* at B12-B13. Having reviewed the relevant evidence in some detail, *id.* at B2-B9, the court found no reason to disturb, under a clear-error standard, the district court's credibility determinations or its ultimate factual finding. *Id.* at B12-B13.

In a paragraph at the end of his principal brief, petitioner preserved his argument that "because he was never charged or convicted by a jury of murder, his constitutional right to due process was violated" when the district court followed the cross-reference in Guidelines § 2D1.1 and used the first-degree murder Guideline to determine his sentence. Pet. C.A. Br. 29. Petitioner noted that he had made the same argument on his first appeal, and that while the court had reversed his conviction on other grounds, it had "reject[ed] the same argument, made on behalf of Hoff." *Ibid.*; see Pet. App. A29-A31. In a subsequent letter to the court of appeals dated July 12, 2000, and filed pursuant to Federal Rule of Appellate Procedure 28(j), petitioner brought to the court's attention this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), which he noted might "support his argument as found" in this final portion of his brief. Pet. App. F1.

In its opinion, issued on December 4, 2000, the court of appeals noted petitioner's argument "that sentencing him pursuant to the first-degree murder guideline violated his right to due process, given that the jury convicted him solely of conspiring to distribute narcotics." Pet. App. B13. The court rejected that argument "for the same reasons" set out in its decision affirming Hoff's sentence, without mentioning *Apprendi*. *Ibid.*

ARGUMENT

1. Petitioner first contends (Pet. 14-16) that application of the Sentencing Guidelines in this case violated his due process and jury trial rights because the Guidelines sentence for petitioner's drug conspiracy conviction was increased by the district court's finding that petitioner murdered Dennis Fenner during the course of the conspiracy. That claim is without merit for the reasons we explained in our brief in opposition in the case of petitioner's co-defendant, Gordon Hoff, Sr., in which the Court previously denied review. See *Hoff* v. *United States*, 526 U.S. 1070 (1999) (No. 98-7238). Nothing in the Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), changes the constitutional analysis of petitioner's Guidelines claim, for the reasons set out at pages 6-8 of our response to the petition for a writ of certiorari in *Brown* v. *United States*, No. 00-6846, judgment vacated and case remanded for reconsideration in light of *Apprendi*, 121 S. Ct. 1072 (2001). We have provided petitioner with copies of our briefs in *Hoff* and *Brown*.

2. Petitioner also argues (Pet. 17-19) that the life sentence imposed by the district court is unconstitutional under *Apprendi*, because the indictment against him did not allege, and the jury was not asked to find, that the conspiracy at issue involved any particular or

threshold quantity of drugs. In *Apprendi* the Court held, as a matter of constitutional law, 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. Petitioner did not raise this claim at sentencing or in the court of appeals, and it may therefore be reviewed now, if at all, only for plain error. See Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461 (1997); *United States* v. *Olano*, 507 U.S. 725 (1993).

Petitioner's life sentence is authorized by 21 U.S.C. 841(b)(1)(A)(ii), which authorizes a term of life imprisonment for offenses involving five kilograms or more of cocaine. See Pet. App. E1. That sentence is not authorized, however, by 21 U.S.C. 841(b)(1)(C), which authorizes a term of imprisonment of "not more than 20 years" for offenses involving any detectable quantity of cocaine. Because petitioner's sentence exceeds the maximum sentence authorized by statute without a jury finding on the quantity of drugs involved, imposition of that sentence was error under *Apprendi*. That error is also "plain," in that it became "clear" or "obvious" after this Court's decision in *Apprendi*. See *Johnson*, 520 U.S. at 467-468 ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration.").[2]

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[2] Petitioner also contends (Pet. 17-18) that his sentence exceeds the punishment range authorized under an indictment that alleges a conspiracy under 21 U.S.C. 846 to violate 21 U.S.C. 841(a)(1), without alleging any particular quantity of drugs involved in the offense. *Apprendi*, a state case, did not separately address or resolve issues involving the requirements of indictments. See *Apprendi*, 530 U.S. at 477 n.3. Because our suggested disposition of

Petitioner is not entitled to relief under the plain-error standard unless he can also demonstrate both that the error "affect[ed] substantial rights" and that it "'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson*, 520 U.S. at 467 (quoting *Olano*, 507 U.S. at 732). Petitioner would be hard-pressed to satisfy that standard, given the district court's finding at petitioner's first sentencing that his offense involved more than five kilograms of uncut cocaine (as well as 422 pounds of marijuana), see Pet. App. A8, and its reaffirmation of that finding at the second sentencing without any objection from petitioner, *id.* at E1.[3] Cf. *United States* v. *Robinson*,

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this case does not turn on whether the failure to charge drug quantity in the indictment is an independent error in this case, we do not address that argument further.

[3] The court of appeals noted evidence that petitioner participated in the conspiracy from 1991 to 1995, obtaining supplies of drugs "on an almost daily basis" beginning in 1993, Pet. App. B2, and that on at least one occasion he transported a kilogram of cocaine for the conspiracy, *id.* at A7. The testimony at petitioner's second trial showed, for example, that in 1993 petitioner was "selling a lot of drugs" for Hoff, and that he then became a distributor for Rock. R. 315, at 32. For several months in 1994, Rock obtained one ounce (28 grams) per week from Hoff. *Id.* at 35-36. From the summer of 1994 until September of 1995, Rock obtained cocaine for the conspiracy from a source in Indiana, making about nine trips and starting and increasing from smaller quantities (two ounces, or approximately 56 grams) to kilogram loads and then a final two-kilogram trip. *Id.* at 36-39. During this period, Rock told another witness that petitioner was "one of his best sellers." *Id.* at 175. In October 1995, Hoff provided Rock with 12 ounces (approximately 340 grams) of cocaine. *Id.* at 53. This and other similar evidence formed the basis for the district court's finding that the conspiracy involved at least 5.7 kilograms of *uncut* cocaine. Pet. App. E1. Rock further testified that Hoff taught him to cut the cocaine by adding a half-gram of filler to each gram of

No. 99-4071, 2001 WL 475935 (7th Cir. May 3, 2001) (plain-error review of *Apprendi* claims relating to drug quantity); *United States* v. *Brough*, 243 F.3d 1078, 1080 (7th Cir. 2001) (same); *United States* v. *Patterson*, 241 F.3d 912 (7th Cir. 2001) (same). Nonetheless, in a number of previous cases in which petitioners have raised similar *Apprendi* claims for the first time in this Court, we have suggested that it would be appropriate to allow the court of appeals to consider whether the petitioner could make the showings required to justify plain-error relief. See, *e.g.*, U.S. Br. at 6, *Brown* v. *United States*, *supra* (No. 00-6846).[4]

That approach does not appear to be warranted in this case. Petitioner's second sentencing hearing took place on April 9, 1999, two weeks after the announcement of this Court's decision in *Jones* v. *United States*, 526 U.S. 227 (1999)—which, as petitioner notes, "foreshadowed" the constitutional holding in *Apprendi*. Pet. 13 (quoting *Apprendi*, 530 U.S. at 476). Petitioner nonetheless did not object at sentencing to the district court's imposition of a life sentence in the absence of indictment allegations or jury findings concerning drug

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cocaine. R. 315, at 25-26. Because 21 U.S.C. 841(b)(1)(A)(ii) authorizes a life sentence for crimes involving five kilograms or more of any "mixture or substance containing a detectable amount" of cocaine, the appropriate measure would be the amount of *cut* cocaine peddled by the conspiracy, which would be approximately one-third greater than the uncut amount.

[4] In most such cases courts of appeals have conducted a plain-error review on remand. See, *e.g.*, *Patterson*, *supra*. In at least one case, however, a court has declined to consider the issue on the ground that this Court's remand did not relieve the defendant of the consequences of his failure to raise the issue in his initial briefing on appeal. See *United States* v. *Ardley*, 242 F.3d 989 (11th Cir. 2001).

quantity. Nor did he raise any such claim in his briefs on appeal, which were filed several months after *Jones*, but do not even cite that case. Petitioner did bring the decision in *Apprendi* to the court of appeals' attention shortly after it was handed down, but only in a letter under Rule 28(j) of the Federal Rules of Appellate Procedure, and only as support for the quite different argument, preserved in his brief, that his rights were violated when the district court used its findings concerning an uncharged murder to enhance his Guidelines sentencing range. Thus, petitioner never presented to the court of appeals the argument based on *Apprendi* that he now makes in this Court; and while the court of appeals did not render its decision until December 4, 2000, it did not sua sponte consider or resolve any *Apprendi* claim, although by that time it was thoroughly familiar with the *Apprendi* holding and its implications for federal drug cases. See, *e.g.*, *United States* v. *Smith*, 223 F.3d 554, 563-566 (7th Cir. 2000) (decided August 17, 2000, and discussing effect of *Apprendi* on question presented), petitions for cert. pending, Nos. 00-7021, 00-7070, 00-7085 & 00-8082; *United States* v. *Nance*, 236 F.3d 820, 822-826 (7th Cir. 2000) (argued September 28, 2000, and decided December 29, 2000, addressing a new argument under *Apprendi* added "with the permission of th[e] court," and applying *Apprendi* to sentencing under 21 U.S.C. 841), petition for cert. pending, No. 00-9633.

Under these circumstances, it seems unlikely that the lack of any discussion of *Apprendi* in the court of appeals' opinion was simply inadvertent. Rather, the court may well have treated the issue as waived. Nor is there reason for this Court to excuse petitioner's failure to raise his present *Apprendi* claim before the court of appeals, or to relax the normal rule that a new claim of

error may not appropriately be raised for the first time in this Court. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Accordingly, while we have suggested in other, somewhat similar cases that the Court grant the petition, vacate the judgment of the court of appeals, and remand for further consideration in light of *Apprendi*, in light of the specific history of this case and petitioner's failure to take advantage of his opportunity to raise an *Apprendi* claim in the court of appeals, we do not suggest that course in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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