No. 00-345

In the Supreme Court of the United States

LUDENCE ALFORD TURNBULL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court committed plain error by sentencing petitioner for drug offenses, in accordance with 21 U.S.C. 841(b)(1)(A) and 21 U.S.C. 960(b)(1) (1994 & Supp. IV 1998), in the absence of jury findings on the quantity of drugs involved in petitioner's offenses or petitioner's role in those offenses.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is unpublished, but the decision is noted at 213 F.3d 634 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2000. On July 21, 2000, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including August 30, 2000, 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 Eastern District of Virginia, petitioner was convicted of conspiracy to import cocaine and cocaine base (crack cocaine), in violation of 21 U.S.C. 963 (Count 1); conspiracy to distribute and to possess with the intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 846 (Count 2); importation of cocaine, in violation of 21 U.S.C. 960 (Count 23); conspiracy to launder money, in violation of 18 U.S.C. 1956(h) (Count 3); and six counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i) (Counts 7, 9, 12, 13, 17, and 19). He was sentenced to concurrent terms of 400 months' imprisonment on Counts 1 and 2, to a concurrent term of 360 months' imprisonment on Count 23, and to concurrent terms of 240 months' imprisonment on Counts 3, 7, 9, 12, 13, 17, and 19, to be followed by ten years' supervised release. The court of appeals affirmed. Pet. App. 1a-28a.

1. Petitioner was a member of a conspiracy that imported cocaine from the Virgin Islands to the Norfolk, Virginia, area between 1994 and 1997. The cocaine, after being transported to the United States, was converted into crack cocaine and distributed by petitioner and other members of the conspiracy. Pet. App. 2a-5a; Gov't C.A. Br. 5-15.

In 1997, a grand jury in the Eastern District of Virginia returned an indictment charging petitioner and 12 co-defendants with conspiracy and related offenses. Gov't C.A. Br. 2. Count 1 alleged that the defendants conspired to "import five (5) kilograms or more of * * * cocaine, and fifty (50) grams or more of * * * cocaine base, commonly known as crack cocaine, both Schedule II narcotic controlled substances," into the

United States. Indictment 2-3. Count 2 alleged that the defendants conspired to distribute and to possess with the intent to distribute the same quantities of cocaine and cocaine base. *Id.* at 18-19. Counts 23 and 24 alleged that, on two separate occasions, petitioner imported and attempted to import "one (1) kilogram of * * * cocaine" into the United States. *Id.* at 35. The indictment also charged petitioner with money laundering conspiracy and with six substantive counts of money laundering. *Id.* at 22-34.

Petitioner did not request an instruction at trial requiring the jury to find the quantity of drugs involved in his offenses, and the court gave no such instruction. The jury found petitioner guilty on the drug conspiracy counts and on one importation count,[1] as well as on the money laundering and money laundering conspiracy counts. Gov't C.A. Br. 3-4.

At sentencing, the district court found that petitioner was responsible for 1.02 kilograms of cocaine base, resulting in a base offense level of 36 under the Sentencing Guidelines. Sent. Tr. 85; see Presentence Report (PSR) ¶ 121 & Worksheet A. The court adjusted petitioner's offense level to 39 under Guidelines § 3B1.1(b) based on his role as a manager or supervisor of the drug trafficking operation. Sent. Tr. 81-83. Petitioner's lengthy criminal history, which included a prior felony drug conviction, placed him in criminal history category IV. *Id.* at 3, 83; see PSR ¶¶ 139-148. The applicable Guidelines sentencing range was 360 months' to life imprisonment. Sent. Tr. 83. The court sentenced petitioner to concurrent 400-month terms of imprisonment on the drug conspiracy counts and to a

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[1] Petitioner was acquitted on the attempted importation count (Count 24). Gov't C.A. Br. 4.

concurrent term of 360 months' imprisonment on the substantive importation count. *Id.* at 106. The court also imposed concurrent 240-month sentences on the money laundering and money laundering conspiracy counts. *Ibid.*

2. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-28a. The court rejected petitioner's challenges to the district court's evidentiary rulings and denial of his motion for severance, as well as his claim that the evidence was insufficient to sustain his conspiracy convictions. *Id.* at 7a-9a, 15a-22a. Petitioner did not argue that the jury was required to determine the quantity of drugs involved in the drug trafficking offenses or his role in those offenses.

DISCUSSION

1. a. Petitioner argues (Pet. 5-8) that his sentence was imposed in violation of this Court's decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), because the jury was not required to find beyond a reasonable doubt the quantity of drugs involved in his offenses and whether he played a supervisory role in the drug conspiracy. In *Apprendi*, the Court held that, as a matter of constitutional law, "[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." *Id.* at 2362-2363.

Petitioner's drug offenses were subject to the graduated penalties set forth in 21 U.S.C. 841(b) and 21 U.S.C. 960(b) (1994 & Supp. IV 1998). Under those provisions, a defendant with a prior felony drug conviction is subject to a maximum sentence of life imprisonment if his offense involves 50 grams or more of cocaine base.

See 21 U.S.C. 841(b)(1)(A)(iii); 21 U.S.C. 960(b)(1)(C). When a defendant with a prior felony drug conviction has been found guilty of a drug offense involving *any* quantity of a Schedule II controlled substance (such as cocaine, see 21 U.S.C. 812), however, Section 841(b)(1)(C) and Section 960(b)(3) authorize "a term of imprisonment of not more than 30 years." Thus, petitioner's 400-month sentence on the drug conspiracy counts depended on an increase in the statutory maximum sentence by virtue of a fact (*i.e.*, that the offense involved 50 grams or more of cocaine base) that was not found by the jury to have been proved beyond a reasonable doubt. Imposition of a sentence above 30 years on the conspiracy counts on the basis of a drug quantity determination made by the court was thus error under this Court's decision in *Apprendi*.[2]

There was no constitutional error under *Apprendi*, however, in the 30-year sentence that petitioner received on the drug importation count. As noted above, Section 960(b)(3) authorizes "a term of imprisonment of not more than 30 years" for a defendant who has been found guilty of a drug offense involving *any* quantity of a Schedule II controlled substance "after a prior conviction for a felony drug offense has become final."

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[2] The district court would have had the statutory authority to run the permissible 30-year terms of imprisonment on the conspiracy counts and the terms of imprisonment that petitioner received on the other counts consecutively, for a cumulative maximum sentence of 230 years' imprisonment. See 18 U.S.C. 3584. The Guidelines address the circumstances under which sentences on multiple counts should run consecutively to achieve the total punishment determined under the Guidelines. See Guidelines § 5G1.2. The constitutionality of a sentence under *Apprendi*, however, turns on whether the sentence on a particular count exceeds the prescribed statutory maximum. 120 S. Ct. at 2354.

Because petitioner's offense involved cocaine, a Schedule II controlled substance, petitioner was subject to a 30-year maximum term on the importation count under Section 960(b)(3), without regard to the specific quantity of cocaine base involved in his offenses.[3] See *United States* v. *Sheppard*, 219 F.3d 766, 768 (8th Cir. 2000) ("In cases where a prior conviction increases the statutory maximum, the use of drug quantity at sentencing will not conflict with *Apprendi* so long as it results in a sentence within the [that statutory] maximum."); *United States* v. *Meshack*, 225 F.3d 556, 577 n.18 (5th Cir. 2000) (affirming sentence that was within the range authorized by the statute "given [the defendant's] prior offenses").

b. Contrary to petitioner's arguments (Pet. 6-7), the district court did not violate *Apprendi* by applying Sentencing Guidelines 3B1.1(b) to enhance petitioner's sentence, within the statutorily authorized range, based on his role in the offense. This Court has upheld the use and operation of the Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that, so long as the statutory minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998)

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[3] Although the 30-year recidivist sentence authorized by Section 960(b)(3) does represent an enhancement over the 20-year maximum authorized by that provision in cases that do not involve recidivists, *Apprendi* did not overrule the Court's holding in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), that Congress may constitutionally treat prior conviction of a crime—here, a "felony drug offense"—as a sentencing factor to be found by the court. *Apprendi*, 120 S. Ct. at 2361-2363, 2366.

(The Guidelines "instruct *the judge* * * * to determine" the type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon amount and kind.").

Apprendi did not hold otherwise. See *Apprendi*, 120 S. Ct. at 2366 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards*, 523 U.S. at 515). The Guidelines merely "channel the sentencing discretion of the district courts" and "make mandatory the consideration of factors" that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. See *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see also *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). District courts have the power to "depart from the applicable Guideline range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). Because the Guidelines leave the sentencing court with significant discretion to impose a sentence within the statutory range, and because specific offense characteristics and sentencing adjustments under the Guidelines cannot increase the statutory maximum penalty for a criminal offense, *Apprendi* does not support a challenge to the constitutionality of the Guidelines. See Guidelines § 5G1.1; *Edwards*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines").

2. Petitioner did not raise his constitutional claim in either court below, and that claim may therefore be considered only under a plain-error standard. Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461 (1997). The error in imposing a 400-month sentence based on quantity findings made by the court at sentencing was "plain," in that it was "clear" or "obvious" after the decision in *Apprendi*. See *Johnson*, 520 U.S. at 467-468 ("where 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"). Petitioner is not entitled to relief, however, unless he can also demonstrate that the error both "affect[ed] substantial rights" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)).

Petitioner may be hard pressed to meet that standard, for two reasons. First, the district court found that petitioner's offenses involved 1.02 kilograms of crack cocaine—more than 20 times the amount required to subject him to a maximum sentence of life imprisonment under Section 841(b)(1)(A)(iii) and Section 960(b)(1)(C). See Sent. Tr. 84. Indeed, the court characterized as "extremely conservative" the presentence report's attribution to petitioner of "at least 500 but less than 1.5" kilograms of cocaine base; "[f]rankly," the court stated, "I could sit here and calculate it much higher than this presentence report, being the trial judge." *Id.* at 51-52. Second, because the court could have imposed consecutive rather than concurrent sentences on the multiple counts on which petitioner was convicted to produce a cumulative maximum sentence of 230 years' imprisonment (see note 2, *supra*), peti-

tioner's total punishment of 400 months' imprisonment could be imposed (and should be imposed under the Guidelines) by running the sentences on those counts consecutively in part. Nevertheless, it would be appropriate to allow petitioner an opportunity to make the requisite showings to the court of appeals in the first instance, and, accordingly, the case should be remanded to the court of appeals for further consideration.

CONCLUSION

With respect to petitioner's claim that the district court erred by sentencing him in accordance with 21 U.S.C. 841(b)(1)(A) and 21 U.S.C. 960(b)(1) (1994 & Supp. IV 1998), in the absence of a jury finding concerning the quantity of drugs involved in his offenses, the petition for a writ of certiorari should be granted, the judgment should be vacated, and the case should be remanded for further consideration in light of *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000). In all other respects, the petition should be denied.

Respectfully submitted.

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