No. 00-550

In the Supreme Court of the United States

DANIEL STEYSKAL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court committed plain error by sentencing petitioner in accordance with 21 U.S.C. 841(b)(1)(C) (1994 & Supp. IV 1998), when the quantity of drugs that petitioner conspired to possess and distribute, in violation of 21 U.S.C. 846, was not alleged in the indictment or found by the jury.

2. Whether petitioner was denied his Sixth Amendment right to effective assistance of counsel when the district court admitted testimony connecting a witness to petitioner through their representation by the same attorney.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unpublished, but the decision is noted at 221 F.3d 1345 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 4) was entered on July 5, 2000. The petition for a writ of certiorari was filed on October 2, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of conspiracy to distribute and to possess with intent to

distribute marijuana, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 846 (Count I), and of conspiracy to distribute and to possess with intent to distribute anabolic steroids, also in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 846 (Count II). Pet. App. 1, 5-6. He was sentenced to 210 months' imprisonment, to be followed by five years' supervised release. *Id.* at 8-10. The court of appeals affirmed. *Id.* at 1-3.

1. Petitioner was the head of a multi-state drug distribution network that operated out of Omaha, Nebraska. The operation came to light when law enforcement officers seized a half-pound of marijuana from an individual who identified petitioner as his source. Gov't C.A. Br. 2-4.

The ensuing investigation revealed that petitioner often used couriers to transport marijuana. Three of the couriers agreed to cooperate in the investigation, including by providing the names of other couriers used by petitioner. They identified one of those couriers as John Britton, a resident of California, who had recently been arrested in Wyoming driving a rental car with 180 pounds of marijuana in the trunk. According to one of the cooperating couriers, the marijuana was destined for petitioner. Gov't C.A. Br. 9-10.

The investigation culminated in a search of petitioner's residence. Law enforcement officers seized approximately one kilogram of marijuana, anabolic steroids, and four firearms. They also found drug records and a ledger with the names of several persons, including two of the cooperating couriers and one Louis Palazzo. Gov't C.A. Br. 13-14.

2. A federal grand jury returned a two-count indictment charging petitioner with conspiring to distribute marijuana and steroids. The indictment did not allege a

specific or threshold quantity of either substance. Pet. App. 5-6.

Before trial, the government subpoenaed John Britton, the alleged courier, as a potential witness. The government also filed a motion to compel Britton's testimony if he invoked his Fifth Amendment privilege against self-incrimination with respect to his Wyoming prosecution. Fifteen minutes after the government filed that motion, Louis Palazzo of Las Vegas, Nevada, filed an application for admission to the court *pro hac vice* to represent petitioner. Pet. App. 47, 49, 51.

On the morning that the trial was to begin, the district court learned that Palazzo had previously represented Britton. The court subsequently convened a hearing on whether Palazzo's representation of petitioner created a conflict of interest. Palazzo acknowledged that he had served as counsel to Britton in connection with his Wyoming arrest. Palazzo asserted that no conflict would exist in his representation of both petitioner and Britton, because any cross-examination of Britton in petitioner's case would be conducted by Palazzo's co-counsel. Pet. App. 46-52.

In response to questioning by the district court, petitioner stated that he wanted to be represented by Palazzo, that he would object if Palazzo was not allowed to remain as his counsel, and that he waived any potential conflict arising from Palazzo's previous representation of Britton. Pet. App. 53-54. The court therefore allowed Palazzo to remain as co-counsel in petitioner's case. *Id.* at 54.

The government called Britton as a witness at petitioner's trial. Britton, testifying under a grant of immunity, admitted that he knew petitioner. But Britton denied that the marijuana he was transporting at the time of his arrest was petitioner's. Gov't C.A. Br. 20-21.

The government then sought to link Britton to petitioner by establishing that they had the same attorney. The district court overruled petitioner's objection, based on Federal Rules of Evidence 402 and 403, to the introduction of testimony about Palazzo's representation of Britton. Pet. App. 55-58.[1] During closing argument, the government suggested that Britton protected petitioner because they were both represented by Palazzo. *Id.* at 66.

The jury found petitioner guilty on both counts. At sentencing, the district court found that petitioner's crimes involved 868.3234 kilograms of marijuana and an undetermined amount of steroids. Pet. App. 17. The court sentenced petitioner to concurrent terms of 210 months' imprisonment on the marijuana count and 60 months' imprisonment on the steroid count. *Id.* at 8-9.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-3.

The court of appeals rejected petitioner's contention that he was denied his Sixth Amendment right to counsel because the jury was permitted to learn that one of his attorneys also represented a government witness. Pet. App. 2. At the outset, the court observed that petitioner "arguably" waived any right to challenge any alleged conflict of interest, because petitioner had "insisted * * * that he be permitted to have counsel of his choice" and had "expressly waived any potential or actual conflict." *Ibid.* The court acknowl-

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[1] Petitioner cites (Pet. 9-11) a series of questions asked by the prosecutor about Britton's relationship with Palazzo. The district court *sustained* objections to several of those questions, disallowing any testimony on whether Britton paid for Palazzo's representation, whether Britton obtained Palazzo's name from petitioner, and how Britton chose Palazzo as his counsel. See Pet. App. 56-57; Trial Tr. 444.

edged that the admission of testimony concerning Palazzo's dual representation of petitioner and Britton "was problematic" and the prosecutor's reference to the dual representation during closing argument "may have been inopportune." *Ibid.* But the court concluded, based on "the record as a whole," that the testimony and argument "could not have affected the jury's verdict and therefore did not deprive [petitioner] of a fair trial." *Ibid.*

The court of appeals rejected petitioner's challenge to the district court's calculation of the quantity of drugs involved in his offense. Pet. App. 3. The court found that "[t]here was sufficient, credible testimony regarding the amount of drugs involved in the crimes," and that "sufficient evidence linked the shipments of drugs to [petitioner]." *Ibid.*

DISCUSSION

1. Petitioner contends (Pet. 3-6), for the first time in this Court, 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 the quantity of drugs involved in his offenses. 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.

a. Petitioner's drug offenses were subject to the graduated penalties set forth in 21 U.S.C. 841(b) (1994 & Supp. IV 1998). Petitioner's 210-month sentence on count one for conspiracy to distribute marijuana was authorized by Section 841(b)(1)(C), which provides a maximum term of imprisonment of 20 years for drug

offenses involving at least 50 kilograms of marijuana. Petitioner's sentence was not authorized, however, by Section 841(b)(1)(D), which provides "a term of imprisonment of not more than 5 years" for a defendant who has been found guilty of a drug offense involving *any* quantity of marijuana. Consequently, the 210-month sentence that petitioner received on count one depended on an increase in the statutory maximum sentence based on a fact (*i.e.*, that the offense involved 50 kilograms or more of marijuana) that the jury was not instructed to find beyond a reasonable doubt. Imposition of a sentence above five years based on the district court's drug quantity determination was thus error under this Court's decision in *Apprendi*.[2]

b. Petitioner did not raise his constitutional claim in the courts below. His claim therefore may be considered only for plain error. Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461 (1997); *United States* v. *Swatzie*, 228 F.3d 1278, 1281 (11th Cir. 2000); *United States* v. *Nordby*, 225 F.3d 1053, 1060 (9th Cir. 2000); *United States* v. *Meshack*, 225 F.3d 556, 575 (5th Cir. 2000). The error in imposing a 210-month term of imprisonment based on quantity findings made by the district 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"). A

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[2] Petitioner's 60-month sentence on count two is permissible under *Apprendi*. Under Section 841(b)(1)(D), a defendant is subject to a maximum term of five years' imprisonment for offenses involving any quantity of a Schedule III controlled substance, a category that includes steroids. See Pet. App. 5-6.

showing that the district court committed "plain error" in sentencing petitioner will not entitle him 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.

Petitioner may be hard pressed to meet that standard given that the court of appeals has already found that "[t]here was sufficient, credible testimony regarding the amount of drugs involved in the crimes." Pet. App. 3. The quantity of marijuana found by the district court—868.3234 kilograms—is more than 17 times the amount necessary to trigger an enhanced sentence under Section 841(b)(1)(C). It is thus questionable whether the failure to require the jury to determine the amount of marijuana involved either affected substantial rights, see *Neder* v. *United States*, 527 U.S. 1, 7 (1999), or seriously affected the fairness, integrity, or public reputation of judicial proceedings, see *Johnson*, 520 U.S. at 470.

Nevertheless, it would be appropriate to allow petitioner an opportunity to make the requisite showings to the court of appeals in the first instance. The case should, therefore, be remanded for further consideration.

2. Petitioner also contends (Pet. 7-16) that he was denied his Sixth Amendment right to effective assistance of counsel, because the jury was permitted to learn that one of his attorneys had represented a government witness in the case. Petitioner does not suggest that the court of appeals' resolution of that question creates any conflict among the circuits. Nor

does he assert any conflict with any decision of this Court.[3]

This case does not present the propriety under the Sixth Amendment of the admission of evidence of Palazzo's dual representation, which is the issue that petitioner seeks to raise in this Court. The court of appeals held the admission of that evidence, while "problematic," did not cause petitioner to "suffer[] such prejudice so as to warrant reversal of his conviction." Pet. App. 2. Based on its examination of "the record as a whole," the court concluded that the government's introduction and use of that evidence "could not have affected the jury's verdict and therefore did not deprive [petitioner] of a fair trial." *Ibid.*[4] That fact-bound determination of the absence of prejudice does not merit this Court's review.

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[3] Instead, petitioner claims (Br. 15) that the decision below conflicts with the Eighth Circuit's own decision in *Dawan* v. *Lockhart*, 31 F.3d 718 (1994), a case that is readily distinguishable from this one on its facts. For example, the court of appeals found in that case (see *id.* at 721-722), unlike in this one (see Pet. App. 2), that defense counsel's conflict of interest actually detracted from his performance at trial. In any event, an intracircuit conflict, if one existed, would appropriately be left for resolution by the Eighth Circuit itself. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

[4] The court of appeals also suggested that, because petitioner had expressly waived any conflict of interest arising from Palazzo's dual representation of petitioner and Britton, petitioner had "arguably" waived any Sixth Amendment challenge based on the jury's learning of that dual representation. Pet. App. 2.

CONCLUSION

The petition for a writ of certiorari should be granted on question one only, the judgment below vacated, and the case remanded to the court of appeals 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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