No. 03-645

In the Supreme Court of the United States

JOHN RICHARD KNOCK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a "partners in crime" exception applies to the marital adverse testimony privilege, and whether the petitioner has standing to challenge the district court's application of the exception.

2. Whether an error under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), properly preserved in the district court, is "structural error" under *Arizona* v. *Fulminante*, 499 U.S. 279 (1991).

3. Whether, even if the *Apprendi* error in this case was not "structural error" and was harmless, it nonetheless requires reversal of petitioner's sentence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2003. A petition for rehearing was denied on July 31, 2003 (Pet. App. 12a-13a The petition for a writ of certiorari was filed on October 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury, sitting in the Northern District of Florida, returned a four-count superseding indictment charging petitioner with conspiracy to possess marijuana with the intent to distribute it, conspiracy to

import marijuana, conspiracy to commit money laundering, and criminal forfeiture. Pet. App. 3a, 24a-25a. Following a four-week jury trial, the jury found petitioner guilty as charged. Petitioner was sentenced to life imprisonment and a $4 million fine. Pet. App. 3a. The court of appeals affirmed. Pet. App. 1a-11a.

1. Petitioner, along with co-conspirator Claude Duboc, headed a drug organization that from 1984 to 1993 imported and distributed approximately 790,000 pounds of marijuana and hashish and in turn laundered proceeds from the drug distribution. Co-defendant Albert Thomas Madrid worked directly under petitioner and engaged in offloading and distribution of the marijuana and hashish. Gov't C.A. Br. 9.

Petitioner's organization began to import and distribute large loads of hashish and marijuana in 1984. From 1984 through 1986, petitioner and Duboc also distributed hashish in Canada. Gov't C.A. Br. 9-10. In 1987, petitioner and Duboc directed that an offload crew be organized to unload 30 tons of hashish from one ship onto another vessel and to transport it into the San Francisco, California, area. The drugs were taken to co-defendant Madrid's nearby property, where petitioner and others repackaged the drugs for distribution throughout the United States. *Id.* at 10. In 1988, petitioner and Duboc oversaw the importation into San Francisco of a 56-ton load of marijuana and hashish, which was seized by law enforcement. *Ibid.*

Between 1988 and 1993, petitioner was involved with the importation of multi-ton shiploads of drugs to Canada and Australia and the laundering of millions of dollars in proceeds. Gov't C.A. Br. 10-13. In July 1993, a 17-ton load of marijuana was imported into Washington State, transported to a location near Sacramento, California, and then distributed from there. *Id.* at 13.

From 1993 through 1996, petitioner and his organization were involved in avoiding apprehension, collecting moneys owed for the various drug importations, and laundering the proceeds from those importations. Gov't C.A. Br. 17-19. In March 1994, Duboc informed Julie Roberts, an individual who had earlier been recruited to offload hashish into San Francisco and who later collected money for the organization, see *id.* at 10, 17-18, that he was going to Hong Kong to clean out his accounts there before the authorities arrived. Duboc told Roberts that, if anything happened to him, petitioner would be taking over supervision of the collection of money from an individual named Michael Rogerson, who owed approximately $20 million for importations into the United States and Canada in 1993. *Id.* at 17-18.

On March 10, 1994, Duboc was indicted, and on March 25, 1994, he was arrested in Hong Kong. The next day petitioner called Roberts in New Mexico and told her that he was taking over the collection of the money and he wanted to keep in contact with her. For about six months, Roberts continued to attempt to collect the $20 million from Rogerson and continuously reported her efforts to petitioner. Petitioner and others made suggestions to Roberts about methods to induce Rogerson to pay the money. Gov't C.A. Br. 18.

In February 1996, Roberts surrendered to authorities. She arranged for petitioner to be at a pay phone in Paris, France, on April 17, 1996, to receive a call from her, and at that time petitioner was arrested. Gov't C.A. Br. 19.

After petitioner's arrest, an individual named Steve Abelman, an acknowledged participant in importing marijuana and hashish, possessed a carrying case containing $1 million in Deutschmarks. Abelman stated

that he had been involved in criminal activity in the past with a person named "John" who lived in Hawaii, and that he and "John" had paid people to drive hashish and marijuana across the United States. Petitioner, whose first name is "John," lived in a house in Hawaii. Abelman also stated that he was trying to raise $4 million to help "John" because "John" was in jail in France. Abelman stated that the $1 million had come from John's wife and he was passing it on to someone else. Gov't C.A. Br. 19-20 & n.9.

As early as 1992, Naomi Knock, petitioner's wife, assisted by the same financier who was with Duboc when he was ultimately arrested in Hong Kong, established a foreign company that held over $5 million. During the time that Roberts was in contact with petitioner about collecting the $20 million in drug proceeds, Ms. Knock spoke to Roberts several times and asked Roberts to relay messages to petitioner that she needed money to pay the attorneys representing him. Gov't C.A. Br. 20-21.

2. At trial, the government called Ms. Knock as a witness. Ms. Knock was represented by her own, separate, counsel. Through her counsel, Ms. Knock invoked her Fifth Amendment right against compelled self-incrimination and the husband-wife privileges for confidential communications and adverse spousal testimony. The government immunized Ms. Knock. After a hearing, the court found that Ms. Knock's marital privilege claim was overcome by the exception to both husband-wife privileges applicable when the husband and wife were joint participants in crime. Petitioner's attorney then claimed that he had a conflict that required that a mistrial be declared. The district court denied the motion. Gov't C.A. Br. 21.

Petitioner's sister-in-law, Dana Jafe, testified that in early 1996 a woman delivered a briefcase of money for Ms. Knock, Jafe's sister and petitioner's wife. Jafe informed Ms. Knock of the delivery, and Ms. Knock later took possession of the briefcase. Gov't C.A. Br. 20.

Ms. Knock testified that the briefcase she picked up from Jafe contained $60,000 and that she used the money for attorney fees and for living expenses. With respect to the $1 million Abelman possessed, Ms. Knock testified that she released it to a man who gave it to Abelman and that she did not know the amount of money that she had released. At petitioner's direction, petitioner's attorney waived cross-examination of Ms. Knock. Gov't C.A. Br. 21-22.

ARGUMENT

1. Petitioner argues (Pet. 7-10) that the district court erred in applying the "partners in crime" exception to the adverse spousal testimony privilege and on that basis compelling petitioner's wife to testify at his trial. He also argues (Pet. 10) that the court of appeals erred in holding that he lacked standing to assert a privilege held by his wife.

a. The Eleventh Circuit's decision that a defendant has no standing to challenge on appeal a district court's decision to compel testimony from a testifying spouse is correct and does not conflict with any decision of any other court of appeals. As this Court held in *Trammel* v. *United States*, 445 U.S. 40, 53 (1980), "the witness-spouse alone has a privilege to refuse to testify adversely." Accordingly, the privilege is held by the witness-spouse alone, and the defendant has no standing to challenge the witness-spouse's decision to testify or a district court's order compelling testimony.

The courts of appeals that have addressed the issue have, without exception, held that a defendant lacks standing to challenge on appeal a district court's ruling with respect to a witness-spouse's adverse testimony privilege. See, *e.g.*, *United States* v. *Ramos-Oseguera*, 120 F.3d 1028, 1034 n.1 (9th Cir. 1997), cert. denied, 522 U.S. 1135 (1998), overruled on other grounds, *United States* v. *Nordby*, 225 F.3d 1053 (9th Cir. 2000); *United States* v. *Anderson*, 39 F.3d 331, 350 (D.C. Cir. 1994); *United States* v. *Lofton*, 957 F.2d 476, 47 n.1 (7th Cir. 1992); *Grand Jury Subpoena of Ford* v. *United States*, 756 F.2d 249, 255 (2d Cir. 1985). Cf. *Labbe* v. *Berman*, 621 F.2d 26, 28 & n.3 (1st Cir. 1980) ("Under Massachusetts law, the privilege belongs to the witness spouse, not to the accused, and the accused has no standing to assert error in the court's admission of the privileged testimony.").[1]

Petitioner cites *United States* v. *Smith*, 742 F.2d 398, 401 (8th Cir. 1984), and *United States* v. *Bad Wound*, 203 F.3d 1072, 1074-1075 (8th Cir. 2000), in support of a claim of a circuit split on the question whether the defendant-spouse has standing on appeal to question the district court's application of the privilege. In neither of these cases, however, did the court of appeals

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[1] This Court acknowledged a related standing question in *Wyatt* v. *United States*, 362 U.S. 525, 527 n.3 (1960), where it noted that, because the witness-spouse's testimony, even if wrongly compelled, is admissible and relevant, commentators have "argued that the [defendant] has suffered no injury of which he may complain." The Court stated however, that "as the point has not been briefed or argued, we have thought it appropriate, in view of our disposition of the case on the merits, not to consider the issue of standing, and of course intimate no view on it." *Ibid.* The Court concluded, on the merits, that the district court did not err in compelling the testimony.

address the issue of standing. There is nothing in either opinion to suggest that the question of standing was raised in the court of appeals by either party. The court simply held, in *Smith*, that the witness-spouse's testimony was not adverse to her husband's interest, 742 F.2d at 401, and, in *Bad Wound*, that the witness-spouse had voluntarily waived her privilege, 203 F.3d at 1075. The Eighth Circuit did not reach a conclusion on the standing issue in either case, and there is accordingly no conflict in the circuits on the issue.

b. Petitioner's lack of standing to raise the privilege would preclude the Court from reaching the question he seeks to present about the proper scope of the spousal testimony privilege and the "partners in crime" exception to the privilege. Even if petitioner had standing to raise the question, however, this case would be an inappropriate vehicle for considering whether a "partners in crime" exception should apply to the adverse spousal testimony privilege. Assuming that the district court committed an error in compelling Ms. Knock's testimony, that error was harmless.

In the course of a four-week trial, the government introduced overwhelming evidence that petitioner headed a drug organization that, for nearly a decade, imported and distributed hundreds of tons of marijuana and hashish and laundered the illegal proceeds from that enterprise. See pp. 2-4, *supra*. Ms. Knock's testimony constitutes only nine pages of the more than 2200-page, 15-volume trial transcript. Docket 107-109.

Moreover, Ms. Knock's testimony introduced no new evidence but instead merely corroborated testimony of other witnesses. Ms. Knock testified that she had picked up a suitcase full of cash from her sister. That testimony confirmed the sister's testimony that she had been given a suitcase, which she was told contained

cash, and that she gave it to Ms. Knock. Ms. Knock also testified that, after petitioner's arrest, she had released money to be given to a man named Steve Abelman to pay for her husband's legal fees. That testimony supported testimony by another witness who said Mr. Abelman showed her a suitcase full of $1 million in cash, said it had come from Ms. Knock, and said he was trying to help petitioner get out of prison. Gov't C.A. Br. 21-22.

Ms. Knock's testimony added little to the overwhelming weight of the evidence against petitioner. Therefore, even if the district court erred in compelling Ms. Knock's testimony, the error was harmless as a matter of law.

c. On the merits, the district court did not err in adopting a "partners in crime" exception to the adverse spousal testimony privilege. There is disagreement among the circuits with respect to that exception. Compare *United States* v. *Clark*, 712 F.2d 299, 300-301 (7th Cir. 1983) (adopting exception); *United States* v. *Trammel*, 583 F.2d 1166, 1167-1171 (10th Cir. 1978) (same), aff'd on other grounds, 445 U.S. 40 (1980), with *United States* v. *Ramos-Oseguera*, 120 F.3d at 1042 (rejecting exception); *In re Grand Jury Subpoena*, 755 F.2d 1022, 1025-1028 (2d Cir. 1985), vacated as moot, 475 U.S. 133 (1986); *In re Malfitano*, 633 F.2d 276, 278-279 (3d Cir. 1980) (same). The courts that have adopted the exception, however, have reached the correct conclusion.

As the Court recognized in *Trammel*, the adverse spousal testimony privilege has been sharply criticized. 445 U.S. at 44 (noting that "Professor Wigmore termed it 'the merest anachronism in legal theory and an indefensible obstruction to truth in practice,'" and that "[t]he Committee on Improvements in the Law of

Evidence of the American Bar Association called for its abolition"). At the time of the Court's decision in *Trammel*, seventeen states had abolished the adverse spousal testimony privilege altogether. *Id.* at 49 n.9 (collecting statutes). Since *Trammel*, at least three more states have eliminated the adverse testimony privilege, see Iowa Code Ann. § 622.9 (West 1999); N.M. Stat. Ann. § 38-6-6 (Michie 1998); Utah Code Ann. § 78-24-8 (1996), and one has explicitly adopted a partners-in-crime exception to it, see Ky. R. Evid. 504.

"Testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'" *Trammel*, 445 U.S. at 50 (quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950)). "As such, they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Ibid.* (internal quotation marks and citation omitted).

Trammel identified the modern justification for the privilege as "its perceived role in fostering the harmony and sanctity of the marriage relationship." 445 U.S. at 44. But, as the court of appeals correctly concluded in *United States* v. *Van Drunen*, 501 F.2d 1393, 1396 (7th Cir.), cert. denied, 419 U.S. 1091 (1974), "that goal does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or coconspirator he is creating another potential witness."

The adverse spousal testimony privilege, which allows a witness-spouse to refuse to testify against the defendant-spouse, is closely related to the marital communications privilege, which allows the defendant-

spouse to bar testimony concerning confidential marital communications. Ten courts of appeals have recognized an exception to the marital communications privilege in cases where the husband and wife are joint participants in the underlying offense or where the communications relate to ongoing or future criminal activity involving both spouses. See *United States* v. *Bey*, 188 F.3d 1, 4-5 (1st Cir. 1999); *United States* v. *Short*, 4 F.3d 475, 478 (7th Cir. 1993); *United States* v. *Evans*, 966 F.2d 398, 401 (8th Cir.), cert. denied, 506 U.S. 988 (1992); *United States* v. *Marashi*, 913 F.2d 724, 731 (9th Cir. 1990); *United States* v. *Parker*, 834 F.2d 408, 411 (4th Cir. 1987), cert. denied, 485 U.S. 938 (1988); *United States* v. *Estes*, 793 F.2d 465, 468 (2d Cir. 1986); *United States* v. *Sims*, 755 F.2d 1239, 1243 (6th Cir.), cert. denied, 473 U.S. 907 (1985); *United States* v. *Kapnison*, 743 F.2d 1450, 1455 (10th Cir. 1984), cert. denied, 471 U.S. 1015 (1985); *United States* v. *Ammar*, 714 F.2d 238, 258 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Mendoza*, 574 F.2d 1373, 1381 (5th Cir.), cert. denied, 439 U.S. 988 (1978).[2]

Those courts have reasoned that "where spouses engage in conversations regarding joint ongoing or future patently illegal activity * * * the public's interest in discovering the truth about criminal activity outweigh[s] the public's interest in protecting the privacy of marriage." *Sims*, 755 F.2d at 1243. That analysis applies with equal weight to the adverse spousal testimony privilege: the public's interest in discovering the truth about criminal activity outweighs the public's interest in "fostering the harmony and sanctity of [a]

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[2] All decisions of the Fifth Circuit rendered before October 1, 1981 are binding precedent in the Eleventh Circuit. *Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

marriage relationship" between criminal co-conspirators. *Id.* at 1240 (quoting *Trammel*, 445 U.S. at 44) The district court did not err in adopting the exception.

2. Petitioner contends that his life sentence should be vacated under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because the enhancing fact of drug quantity was not alleged in the indictment or found by the jury beyond a reasonable doubt. In *Apprendi*, this 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." *Id.* at 490. Petitioner urges the Court to grant certiorari in this case to decide whether a properly preserved *Apprendi* error constitutes a structural error under *Arizona* v. *Fulminante*, 499 U.S. 279 (1991). Further review to address that question is unwarranted.

This Court has made clear that "most constitutional errors can be harmless," *Neder* v. *United States*, 527 U.S. 1, 8 (1999) (quoting *Fulminante*, 499 U.S. at 306), and has "found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases,'" such as those involving a complete denial of counsel, a biased trial judge, or racial discrimination in jury selection. *Ibid.* (quoting *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997)).

In *Neder*, the Court held that a district court's failure to submit an element of the offense to the jury is not a structural error. Instead, the Court explained that such an error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." 527 U.S. at 15, 18. The error in this case—the imposition of an enhanced sentence based on a fact that was not specified in the

indictment or submitted to the jury for determination —is analogous to the error in *Neder*. In both contexts, there is no effect on substantial rights, and the error is harmless, when the record reveals that the grand jury and petit jury would have found the omitted fact, if they had been asked to do so.

In *United States* v. *Cotton*, 535 U.S. 625 (2002), the Court applied the plain-error standard of review to the defendants' challenge, raised for the first time on appeal, to the imposition of an enhanced sentence based on drug quantity that was not alleged in the indictment or found by the petit jury. The Court held that a defendant cannot satisfy the fourth component of the plain-error standard, which considers whether the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," when the evidence of drug quantity is "overwhelming" and "essentially uncontroverted." *Id.* at 633 (quoting *Johnson*, 520 U.S. at 470). The Court did not address whether the defendants in *Cotton* could satisfy the third component of the plain-error standard, either because the error was "structural" or because it otherwise affected their substantial rights. See *id.* at 632 & n.2. In concluding that the error did not require reversal, however, the Court observed that, although "the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power," the similarly "important role of the petit jury did not, however, prevent us in *Johnson* from applying the longstanding rule 'that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.'" *Id.* at 634 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)).

Cotton suggests that the imposition of an enhanced sentence based on a fact that was not submitted to the grand jury or the petit jury for determination does not fall within the "very limited class" of "structural" errors that "deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *Neder*, 527 U.S. at 8-9 (internal quotation marks omitted). It follows from *Neder*'s holding and *Cotton*'s reasoning that the error in this case was not structural.

All of the courts of appeals that have considered the question have held that *Apprendi* errors are not structural. See *United States* v. *Stewart*, 306 F.3d 295, 321 (6th Cir. 2002), cert. denied, 537 U.S. 1138 and 1146, and 123 S. Ct. 2074 (2003); *United States* v. *Friedman*, 300 F.3d 111, 127-128 (2d Cir. 2002), cert. denied, 123 S. Ct. 1785 (2003); *United States* v. *Sanchez-Cervantes*, 282 F.3d 664, 670 (9th Cir.), cert. denied, 537 U.S. 939 (2002); *United States* v. *Adkins*, 274 F.3d 444, 454 (7th Cir. 2001), cert. denied, 537 U.S. 891 (2002); *United States* v. *Vazquez*, 271 F.3d 93, 103 (3d Cir. 2001), cert. denied, 536 U.S. 963 (2002); *United States* v. *Anderson*, 236 F.3d 427, 429 (8th Cir.), cert. denied, 534 U.S. 956 (2001); *United States* v. *Nealy*, 232 F.3d 825, 829 (11th Cir. 2000), cert. denied, 534 U.S. 1023 (2001). Cf. *United States* v. *Sanders*, 247 F.3d 139, 150 (4th Cir.) (citing cases in which *Apprendi* errors were evaluated for harmless or plain error and noting that "[n]one of these cases have suggested that failure to submit the question of drug quantities to a jury is structural error"), cert. denied, 534 U.S. 1032 (2001); *United States* v. *Nelson-Rodriguez*, 319 F.3d 12, 48 (1st Cir.) (finding *Apprendi* error harmless), cert. denied, 123 S. Ct. 2589

and 2590, 124 S. Ct. 71 and 118 (2003). Further review is not warranted.

3. Petitioner argues that, even if harmless-error review is generally applicable to *Apprendi* errors and even if the *Apprendi* error in this case was harmless, the court of appeals should nonetheless have reversed petitioner's sentence because, in petitioner's view, the district court "explicitly and purposely refuse[d] to follow the law." Pet. i. Petitioner's characterization of the district court's action is wrong, and further review is unwarranted.

a. Petitioner was convicted, *inter alia*, of conspiracy to possess marijuana with intent to distribute it, an offense that is subject to the graduated penalties set forth in 21 U.S.C. 841(b). Petitioner's sentence was authorized by 21 U.S.C. 841(b)(1)(A), which provides for a sentence of up to life imprisonment for an offense involving 1000 kilograms or more of marijuana. The sentence was not authorized, however, by Section 841(b)(1)(D), which provides for a sentence of up to five years' imprisonment for an offense involving any detectable quantity of marijuana. Petitioner's sentence therefore depended on an increase in the statutory maximum sentence by virtue of a fact—drug quantity—that was not specified in the indictment or found by the jury to have been proved beyond a reasonable doubt. Accordingly, the district court committed error under *Apprendi* in sentencing petitioner to life imprisonment based on a factual determination made by the court at sentencing.

The court of appeals recognized that an *Apprendi* error had occurred in this case. Pet. App. 11a. After undertaking a harmless-error analysis, the court of appeals concluded that "[i]n view of the overwhelming record evidence of the massive drug conspiracy alleged

in this case, no reasonable juror could have found [petitioner] guilty of conspiracy to possess with the intent to distribute marijuana from 1982 [to] 1996 without finding the minimum 1,000 kilograms threshold to impose a life sentence under [Section 841(b)(1)(A)]." *Ibid.* See *id.* at 30a (district court's statement that petitioner "did not dispute the fact that the only evidence submitted to the jury was of shipload-sized loads of marijuana clearly greater than 1000 kilograms").[3] The court of appeals' conclusion was correct, and further review is not warranted.

b. Petitioner argues that the district court "purposefully refuse[d] to apply controlling law," Pet. 17, and that further review is warranted to address whether "the district court committed a good-faith error as opposed to a result-oriented express disregard for the rule of law announced by this Court," Pet. 15.

The district court did not, in petitioner's words, "purposefully refuse to apply controlling law." The district court instead believed that the *Apprendi* error in this case had already occurred prior to sentencing. The court referred to "the *prior* error of this court to instruct the jury regarding drug amounts and the *prior* error of this court in failing to require the jury to find

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[3] The evidence at trial established, *inter alia*, (1) that in 1987, petitioner conspired to transport *30 tons* of hashish into the San Francisco, California, area, for distribution throughout the United States, see R821-192-195, 198-211; (2) that in 1988, petitioner conspired to import a *56-ton* load of marijuana and hashish, and that the load was seized by law enforcement, see R821-222-224; R877-111; R893-3-12; R900-90; and (3) that petitioner's decade-long drug enterprise typically imported and distributed hashish and marijuana in quantities of *30 tons* or more, see R821-18, 202; R876-105-06; R877-52, 73-76, 95, 100-110, 126, 178-81; R880-19-20, 104; R893-3-12.

those drug amounts beyond a reasonable doubt constitute errors." Pet. App. 30a (emphasis added). The district court believed that those "*prior* errors" had to be disregarded as harmless under the terms of Federal Rules of Criminal Procedure 52(a). Pet. App. 30a n.1 (emphasis added). The district court did not believe that its imposition of sentence under Section 841(b)(1)(A) was itself the commission of a new error. There is no basis for petitioner's charge that the district court engaged in a "result-oriented express disregard for the rule of law announced by this Court." Pet. 15.

It turns out that the district court's analysis was mistaken with regard to the timing of the *Apprendi* error, because, as petitioner argues, such an error occurs only at the time a sentence that has not been authorized by the jury's findings is imposed. See Pet. 14-15. Nonetheless, the result of the district court's mistaken analysis was simply that it committed an *Apprendi* error—*i.e.*, it imposed a sentence higher than that which was authorized by the jury's findings. As petitioner himself concedes "[d]istrict court judges operating in good faith are bound to make honest mistakes especially in transitionary periods, and such judges are entitled to the deference accorded by application of the * * * Rule 52(a) standard of review." Pet. 15. The district court in this case made just such an "honest mistake[]" in a "transitiona[l] period[]." Contrary to petitioner's characterizations, there was no "extreme departure from the accepted and usual course of judicial proceedings," Pet. 13, or "disregard for the rule of law," Pet. 15. There is no basis for further review of the fact-based harmless-error issue in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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