No. 00-1771

In the Supreme Court of the United States

DAVID WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), the district court was required to apply the federal Sentencing Guidelines based solely on facts that were found by the jury beyond a reasonable doubt.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 235 F.3d 858.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2000. On March 9, 2001, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including April 21, 2001. On April 11, 2001, Justice Souter again extended the time within which to file a petition, to and including May 21, 2001. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the District of New Jersey, petitioner was convicted of distributing heroin, in violation of 21 U.S.C. 841(a). He was sentenced to 85 months' imprisonment, to be followed by three years of supervised release, and fined $5000. The court of appeals affirmed.

1. In four transactions between April and June 1998, petitioner supplied a total of 67.2 grams of heroin, bearing the brand name "Assassin," to an undercover agent and a cooperating witness.[1] On October 8, 1998, federal agents and local officers went to petitioner's last known address, an apartment on Hawthorne Place in Montclair, New Jersey, to execute a warrant for his arrest. Petitioner's son was in the apartment when the agents arrived, and he consented to a search of the apartment.

The search revealed 293.4 grams of heroin, ink pads and stamps bearing the name "Assassin," glassine bags stamped "Assassin," a scale with white powder residue on the weighing surface, cutting agents, drug packaging paraphernalia, and $49,991 in cash. The agents also found a bag containing 311.2 grams of cocaine. Petitioner's son told the agents that his father rented the apartment for him, but that the drugs, cash and drug paraphernalia belonged to petitioner. Petitioner was

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[1] On April 14, petitioner sold 200 bags containing 11.8 grams of 72% pure heroin to the undercover purchasers for $1320. On April 28, petitioner sold 300 bags containing 21 grams of 70% pure heroin to the undercover purchasers for $1980. On May 4, petitioner sold 300 bags containing 18.5 grams of 59% pure heroin to the undercover purchasers for $1980. On June 2, petitioner sold 250 bags containing 15.9 grams of 58% pure heroin to the undercover purchasers for $1650. Gov't C.A. Br. 3-5.

arrested at another location later that day. 235 F.3d at 859; Gov't C.A. Br. 6-8.[2]

2. A grand jury in the District of New Jersey returned a 14-count indictment against petitioner and two co-defendants. Petitioner was charged in five counts. Count 1 charged that petitioner conspired to distribute, and to possess with the intent to distribute, "more than 100 grams of heroin," in violation of 21 U.S.C. 846. C.A. App. 17. Counts 5, 7, 8 and 9 charged that petitioner distributed unspecified quantities of heroin on four separate occasions, in violation of 21 U.S.C. 841(a)(1). C.A. App. 19-20.

Pursuant to a written agreement, petitioner agreed to plead guilty to Count 7 and to forfeit the $49,991 that had been seized from the Hawthorne Place apartment, and the government agreed to dismiss the other counts of the indictment. C.A. App. 10-16. The plea agreement stated that the statutory maximum term of imprisonment for the offense charged in Count 7 was 20 years' imprisonment. *Id.* at 11. The agreement further provided that "[t]he sentencing judge may impose the maximum term of imprisonment * * * that [is] consistent with the Sentencing Reform Act and the Sentencing Guidelines, up to and including the statutory maximum term of imprisonment * * *." *Ibid.*

As part of the plea agreement, petitioner and the government stipulated that the quantities of heroin involved in the distributions charged in Counts 5, 8 and 9 were "relevant conduct," under Sentencing Guidelines § 1B1.3, for purposes of calculating petitioner's base offense level under Guidelines § 2D1.1. C.A. App. 15.

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[2] Petitioner's appendix does not contain a complete version of the court of appeals' opinion. See Pet. App. 14a. We therefore cite to the published opinion at 235 F.3d 858.

The parties further stipulated that the appropriate base offense level was 22, based on a total quantity of 67.2 grams of heroin, and that petitioner was entitled to a three-level downward adjustment, under Guidelines § 3E1.1, for acceptance of responsibility. C.A. App. 15-16. The plea agreement provided, however, that these stipulations "cannot and do[] not bind the sentencing court, which may make independent factual findings and may reject any or all of the stipulations entered into by the parties." *Id.* at 12.

3. The presentence report (PSR) determined that the "relevant conduct" for which petitioner was accountable included not only the 67.2 grams of heroin to which the parties had stipulated, but also the 293.4 grams of heroin and the 311.2 grams of cocaine that had been seized from the Hawthorne Place apartment. PSR paras. 123-125, at 28; *id.* at para. 201, at 40. Based on that determination, the PSR recommended a base offense level of 28, to be reduced by three levels for acceptance of responsibility. PSR paras. 119-120, 126, 133-134, at 27-29; *id.* at 43 (Addendum). With a total offense level of 25 in criminal history category III, petitioner's Guidelines range was 70-87 months' imprisonment. PSR para. 200, at 40.

Petitioner objected to the inclusion of the quantities of heroin and cocaine seized from the Hawthorne Place apartment in the calculation of his base offense level. In response, the probation office supplemented the PSR with a written statement signed by, and FBI reports of oral statements made by, petitioner's son. PSR Memo. 1-20; see Gov't C.A. Br. 13.

The district court adopted the findings and determinations set out in the presentence report. C.A. App. 50, 52-53. Based on petitioner's concession that the FBI agents, if called, would testify in accordance with their

reports, *id.* at 43-44, the court found that "[i]t [was] clear from the submission of [the] Probation [office] and the FBI reports * * * that the larger amount, the amount in the apartment, should be attributed to [petitioner]." *Id.* at 50. The court sentenced petitioner to 85 months' imprisonment.

4. The court of appeals affirmed. 235 F.3d 858. The court rejected petitioner's argument that his 85-month sentence was imposed in violation of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). The court concluded that the increase in petitioner's Guidelines sentencing range based on the drugs seized at the apartment did not violate *Apprendi*, because petitioner's final sentence did not exceed the 20-year maximum term authorized by 21 U.S.C. 841(b)(1)(C) (1994 & Supp. V 1999) for the offense to which petitioner pleaded guilty. 235 F.3d at 862-863. The court also concluded that *Apprendi* did not forbid the district court to take the additional drugs into account in setting petitioner's sentence within the 20-year maximum, merely because an offense involving the higher quantity of drugs could also have carried a higher sentence under a different subsection of Section 841(b). *Id.* at 863-865.

ARGUMENT

Petitioner contends (Pet. 12-16) that his 85-month sentence for distributing heroin is unconstitutional under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because in applying the federal Sentencing Guidelines the district court took into account, as "relevant conduct," quantities of drugs for which petitioner did not admit responsibility when he pleaded guilty. 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 did not raise any *Apprendi*-type claim in the district court. His present claims are therefore reviewable only for plain error. See Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461 (1997). To meet that standard, a defendant must show that there was error; that the error was "plain"; that it "affect[ed] substantial rights"; and that it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." See *Johnson*, 520 U.S. at 467 (citation omitted).

1. Petitioner's heroin-trafficking offense was subject to sentencing in accordance with the graduated penalties set forth in 21 U.S.C. 841(b) (1994 & Supp. V 1999). Section 841(b)(1)(C) authorizes "a term of imprisonment of not more than 20 years" for a drug offense involving *any* quantity of a Schedule I controlled substance such as heroin. Petitioner was sentenced to 85 months' imprisonment. Accordingly, the district court's determination of drug quantity for purposes of applying the Sentencing Guidelines did not "increase[] the penalty for [petitioner's] crime beyond the prescribed statutory maximum," 530 U.S. at 490, and there was no error under *Apprendi*.

The court of appeals correctly rejected petitioner's argument that *Apprendi* should be extended to findings concerning "relevant conduct" under Section 1B1.3 of the Sentencing Guidelines, which may increase a defendant's Guidelines range, but have no effect on the applicable statutory range. See 235 F.3d at 862-863. This Court has upheld the use and operation of the Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and it 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) (Guidelines "instruct *the judge* * * * to determine" facts that establish the Guidelines sentencing range, such as type and quantity of drugs under Guidelines § 2D1.1(c).). *Apprendi* does not hold otherwise. See 530 U.S. at 497 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"—such as the amount of contraband involved in an offense—that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *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). Moreover, a district court has 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)). The Guidelines thus leave the sentencing court with significant discretion in imposing a sentence within the statutory range. And specific offense characteristics and sentencing adjustments under the Sentencing Guidelines can never cause a

sentence to exceed the applicable statutory maximum. 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"). Accordingly, nothing in *Apprendi* suggests that use of the Guidelines is constitutionally problematic.[3]

Every other regional court of appeals has agreed with the Third Circuit's conclusion in this case that *Apprendi* does not apply to findings that simply help determine what sentencing range is applicable under the Guidelines, without changing the statutory maximum or minimum penalty for the offense. See, *e.g.*, *In re Sealed Case*, 246 F.3d 696, 698-699 (D.C. Cir. 2001); *United States* v. *Garcia*, 240 F.3d 180, 184 (2d Cir.), cert. denied, 121 S. Ct. 2615 (2001) (No. 00-10197); *United States* v. *Heckard*, 238 F.3d 1222, 1235-1236 (10th Cir. 2001); *United States* v. *Baltas*, 236 F.3d 27 (1st Cir.), cert. denied, 121 S. Ct. 1982 (2001) (No. 00-9291); *United States* v. *Kinter*, 235 F.3d 192, 198-202 (4th Cir. 2000), cert. denied, 121 S. Ct. 1393 (2001) (No. 00-8591); *United States* v. *Munoz*, 233 F.3d 410, 413-414 (6th Cir. 2000); *United States* v. *Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000), petition for cert. pending, No. 01-5152 (filed July 5, 2001); *United States* v. *Chavez*, 230 F.3d 1089, 1090 (8th Cir. 2000); *United States* v. *Doggett*, 230 F.3d 160, 166 (5th Cir. 2000), cert. denied, 121 S. Ct. 1152 (2001) (No. 00-7819); *United States* v. *Hernandez-Guardado*, 228 F.3d 1017, 1024-1027 (9th

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[3] The conclusion that *Apprendi* does not affect the Guidelines as they presently operate makes it unnecessary to address petitioner's further argument (Pet. 17-19) that even "substitution of a proof beyond a reasonable doubt standard would [not] be [a] constitutionally sufficient" way to implement the Guidelines' "relevant conduct" provisions.

Cir. 2000); *Hernandez* v. *United States*, 226 F.3d 839, 841-842 (7th Cir. 2000). There is no reason for this Court to consider the issue.[4]

2. Petitioner also suggests (Pet. 14-16), and the court of appeals considered and rejected (235 F.3d at 863-865), an argument that *Apprendi* applies here because the quantity of heroin that the district court determined should be attributed to petitioner for purposes of sentencing under the Guidelines would, had it been charged and proved as part of the offense of

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[4] The original opinion in *United States* v. *Fields*, 242 F.3d 393, 397-398 (D.C. Cir. 2001), which petitioner cites (Pet. 15), suggested that *Apprendi* applied to the determination of facts relevant only to the application of the Sentencing Guidelines. On rehearing, however, the court corrected its "loose language" and reiterated that "*Apprendi* does not apply to enhancements under the Sentencing Guidelines when the resulting sentence remains within the statutory maximum." *United States* v. *Fields*, 251 F.3d 1041, 1043-1044 (D.C. Cir. 2001). The other cases petitioner cites (Pet. 15) do not support his position. In *United States* v. *Sullivan*, 255 F.3d 1256, 1264-1265 (2001), superseding 242 F.3d 1248 (2001), the Tenth Circuit held (as it had in *Heckard*, *supra*) that *Apprendi* does not apply to sentencing factors that increase a defendant's Guidelines range but do not increase the statutory maximum. *Nealy*, *supra*, and *Doggett*, *supra*, hold the same. *United States* v. *Harris*, 243 F.3d 806, 808-810 (4th Cir. 2001), petition for cert. pending, No. 00-10666 (filed June 18, 2001), and *United States* v. *Sandoval*, 241 F.3d 549, 550-551 (7th Cir. 2001), refused to apply *Apprendi* to facts that set a mandatory minimum sentence without increasing the statutory maximum. *United States* v. *Gatewood*, 230 F.3d 186, 192 (6th Cir. 2000) (en banc), holds that *Apprendi* does not apply to prior convictions that enhance a defendant's sentence under the federal "three strikes" statute. And *United States* v. *Terry*, 240 F.3d 65, 74 (1st Cir.), cert. denied, 121 S. Ct. 1965 (2001) (No. 00-1587), held in the alternative that, on particular facts, failure to submit drug quantity to the jury did not require reversal for plain error.

conviction, have led to a statutory sentencing range of 5-40 years' imprisonment. That range is higher than the range of 0-20 years' imprisonment that is authorized by Section 841(b)(1)(C) for the offense to which petitioner pleaded guilty.

Any such argument rests on a confusion between statutory and Guidelines sentencing. Petitioner pleaded guilty to a charge of distributing an unspecified quantity of heroin on a particular occasion. The offense in fact involved distribution of 21 grams of heroin on April 28, 1998. See note 1, *supra*. Under 21 U.S.C. 841(b)(1)(C) (1994 & Supp. V 1999), petitioner could not have been sentenced to more than 20 years' imprisonment for that offense, even before *Apprendi*. Any factual determinations the district judge made at sentencing, whether about "relevant conduct" (including the overall amount of drugs for which petitioner might be held responsible) or about petitioner's history or character, could only serve to help the judge determine at what point petitioner should be sentenced within the statutory range of 0-20 years' imprisonment. Accordingly, the district court's decision to take into account quantities of drugs not specifically contemplated by the parties' plea agreement did not in any sense "increase[] petitioner's [sentencing] exposure from 0-20 years to 5-40 years." Pet. 14. This case provides no factual basis for any *Apprendi* argument

based on even a theoretical increase in the statutory sentencing range.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] For the same reason, petitioner misplaces his reliance (Pet. 15) on *United States* v. *Ramirez*, 242 F.3d 348 (6th Cir. 2001), which vacated a 20-year mandatory minimum sentence that had been imposed under Section 841(b)(1)(A), even though it did not exceed the maximum of 30 years authorized for a recidivist defendant under Section 841(b)(1)(C). Cf. *United States* v. *Stafford*, No. 99-5706, 2001 WL 818245, at *11 n.9 (6th Cir. July 17, 2001) (noting limitation of *Ramirez*'s holding).