No. 01-687

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LEONARD COTTON, MARQUETTE HALL, LAMONT THOMAS, MATILDA HALL, JOVAN POWELL, JESUS HALL, AND STANLEY HALL, JR.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases:	Page
Arizona v. *Fulminante*, 499 U.S. 279 (1991)	7
Johnson v. *United States*, 520 U.S. 461 (1997)	6, 7
Neder v. *United States*, 527 U.S. 1 (1999)	6
United States v. *Buckland*:	
259 F.3d 1157 (9th Cir. 2001)	8
265 F.3d 1085 (9th Cir. 2001)	8
United States v. *Cabrera-Teran*, 168 F.3d 141 (5th Cir. 1999)	2
United States v. *Daniels*, 973 F.2d 272 (4th Cir. 1992), cert. denied, 506 U.S. 1086 (1993)	2
United States v. *Doggett*, 230 F.3d 160 (5th Cir. 2000), cert. denied, 121 S. Ct. 1152 (2001)	9
United States v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999)	2
United States v. *Kelly*, No. 00-2705, 2001 WL 1545672 (3d Cir. Dec. 5, 2001)	8
United States v. *Longoria*, No. 00-50405 (5th Cir. Aug. 30, 2001)	9
United States v. *Mechanik*, 475 U.S. 66 (1986)	7
United States v. *Murphy*, 762 F.2d 1151 (1st Cir. 1985)	2
United States v. *Olano*, 507 U.S. 725 (1993)	7
United States v. *Pernillo-Fuentes*, 252 F.3d 1030 (9th Cir. 2001)	2
United States v. *Prentiss*, 256 F.3d 971 (10th Cir. 2001)	2
United States v. *Sanchez*, 269 F.3d 1250 (11th Cir. 2001)	8-9
United States v. *Spinner*, 180 F.3d 514 (3d Cir. 1999)	2
United States v. *Thomas*, No. 98-1050, 2001 WL 1579993 (Dec. 12, 2001)	3, 8
Witte v. *United States*, 515 U.S. 389 (1995)	5

Statutes and regulation: Page

8 U.S.C. 1326 2
18 U.S.C. 81 2
18 U.S.C. 1029(a)(5) 2
18 U.S.C. 1152 2
18 U.S.C. 1512(a)(1) 3
18 U.S.C. 1951 2
21 U.S.C. 841 ..... 2, 3, 8, 9
21 U.S.C. 841(b) 6, 8
21 U.S.C. 841(b)(1) 8
21 U.S.C. 841(b)(1)(A) 6, 8
21 U.S.C. 841(b)(1)(A)(iii) 4
21 U.S.C. 841(b)(1)(B) 8
21 U.S.C. 841(b)(1)(B)(iii) 5
21 U.S.C. 846 ..... 2, 3, 8, 9
26 U.S.C. 5861(e) 2
U.S. Sentencing Guidelines:
§ 2D1.1(c)(1) 4
§ 2D1.1(c)(2) 4
§ 2D1.1(c)(3) 4
§ 2D1.1(c)(4) 4

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Respondents acknowledge (Br. in Opp. 3) a circuit conflict on the question presented by the petition: whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence requires a court of appeals automatically to vacate the enhanced sentence, even when the defendant did not object in the district court, the government introduced overwhelming evidence at trial supporting that fact, and the defendant had notice before trial that the fact could be used to seek an enhanced sentence. Respondents and their amici have offered no persuasive reason why the Court should not resolve that conflict in this case.

1. Respondents mistakenly assert (Br. in Opp. 3) that the circuit conflict involves only "a relatively limited universe of federal criminal cases that were pending in the district court or were on direct appellate review when the Court issued the decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)." As explained in the petition (at 20-22), the question whether the omission of an essential allegation from an indictment invariably requires reversal is not limited to the context of pre-*Apprendi* federal drug prosecutions under 21 U.S.C. 841 and 846. Such omissions may occur for a variety of reasons, including an intervening clarification of the law by an appellate court or a mistake by a prosecutor in drafting an indictment.[1]

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[1] See, *e.g.*, *United States* v. *Prentiss*, 256 F.3d 971 (10th Cir. 2001) (en banc) (per curiam) (indictment charging arson in Indian Country, in violation of 18 U.S.C. 81 and 1152, failed to allege Indian and non-Indian status of victim and defendant); *United States* v. *Pernillo-Fuentes*, 252 F.3d 1030 (9th Cir. 2001) (indictment charging attempted entry into the United States following deportation, in violation of 8 U.S.C. 1326, failed to allege specific intent element); *United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999) (indictment charging interference with commerce by extortion, in violation of 18 U.S.C. 1951, failed to allege that defendant acted knowingly or willfully); *United States* v. *Spinner*, 180 F.3d 514 (3d Cir. 1999) (indictment charging access device fraud, in violation of 18 U.S.C. 1029(a)(5), failed to allege that transactions affected interstate commerce); *United States* v. *Cabrera-Teran*, 168 F.3d 141 (5th Cir. 1999) (indictment charging entry into the United States following deportation, in violation of 8 U.S.C. 1326, failed to allege that defendant previously had been arrested); *United States* v. *Daniels*, 973 F.2d 272 (4th Cir. 1992) (indictment charging unlawful transfer of firearm, in violation of 26 U.S.C. 5861(e), failed to allege that firearm was transferred in violation of Chapter 53 of title 26), cert. denied, 506 U.S. 1086 (1993); *United States* v. *Murphy*, 762 F.2d 1151 (1st Cir. 1985) (indictment charging use of threats to influence testimony of witness in a

In light of the continuing importance of the question presented, the conflict involving prosecutions under Sections 841 and 846 warrants review. Since the petition for certiorari was filed, the Second Circuit, sitting en banc, has adopted an approach similar to that of the Fourth Circuit here, reversing an enhanced sentence under Section 841 on plain-error review. *United States* v. *Thomas*, No. 98-1051, 2001 WL 1579993 (Dec. 12, 2001). At least three other circuits have taken a contrary approach, affirming sentences on plain-error review notwithstanding the omission from the indictment of a fact essential to the enhanced sentence. See Pet. 18-21 (citing cases). That conflict is ripe for resolution by this Court.

2. Respondents make the assertion (Br. in Opp. 4-5) that, contrary to the implication of the question presented in the petition, they did "object to the[ir] sentences in the district court" based on the quantity of drugs attributable to them. Respondents did not, however, make a legally or factually relevant objection. They raised an objection to their sentences under the Sentencing Guidelines. They did not raise any constitutional objection in the district court to the omission of drug quantity from the indictment (or to the court's failure to submit the question of drug quantity to the petit jury). The constitutional claim that they raised for the first time in the court of appeals was thus reviewable only for plain error.

Moreover, respondents did not dispute that their conspiracy offense involved at least 50 grams of cocaine base, the threshold amount that triggers a maximum

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judicial proceeding, in violation of 18 U.S.C. 1512(a)(1), failed to identify the judicial proceeding in which the defendants sought to influence testimony).

sentence of life imprisonment under 21 U.S.C. 841(b)(1)(A)(iii). In light of the evidence at trial, no question could have been raised that the offense involved that threshold amount of cocaine base. The evidence included some 380 grams of cocaine base that had been seized by law-enforcement officers during the arrests of the conspirators and the searches of their residences. See Pet. App. 28a (Wilkinson, C.J., dissenting) (noting that "none of [the respondents] disputed the amount of crack actually seized by the police officers and federal agents").

Instead, respondents merely disputed the determination in the Presentence Reports (PSRs) that their base offense level under the Sentencing Guidelines was 38, the level applicable to offenses involving 1.5 kilograms or more of cocaine base. See Guidelines § 2D1.1(c)(1). They argued that their base offense level should be reduced to 32, 34, or 36, but each of those levels entails responsibility for at least 50 grams of cocaine base. See Guidelines § 2D1.1(c)(2), (3) and (4).[2]

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[2] Lamont Thomas, for example, argued that his base offense level should be 34, pointing out that only "500 grams of actual cocaine base" was seized by law-enforcement officers. 2/26/99 Thomas Sent. Tr. 3-9; Addendum to Thomas PSR 1. Marquette Hall argued that his base offense level should be 36, because he was "responsible for less than 1.5 kilograms of cocaine base." Addendum to Marquette Hall PSR 2; 2/12/99 Marquette Hall Sent. Tr. 6-8. See also 2/12/99 Cotton Sent. Tr. 9-13, 15 (arguing that Cotton's base offense level should be 34 based on the "approximately 400 grams [of cocaine base] that was actually seized"); 3/5/99 Stanley Hall Sent. Tr. 8-12 (arguing that Stanley Hall's base offense level "more likely than not ought to be a 32"). Jesus Hall argued that a base offense level of 36 would be "a more appropriate guideline level." 2/26/99 Jesus Hall Sent. Tr. 4. During his sentencing allocution, Jesus Hall also argued that he was not a member of the conspiracy, and thus could be sentenced based only

It is irrelevant for present purposes that respondents disputed their responsibility for the full 1.5 kilograms of cocaine base attributed to them by the PSRs. Those disputes related only to the term of imprisonment that was warranted for each respondent under the Sentencing Guidelines. See *Witte* v. *United States*, 515 U.S. 389, 399-404 (1995) (recognizing that 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 "within the range authorized by statute"). Respondents did not contest the crucial fact that raised the *statutory* maximum to life imprisonment—*i.e.*, that the offense involved at least 50 grams of cocaine base. It was the omission of *that* fact from the indictment that gives rise to the claim on which respondents prevailed in the court of appeals.

Respondents' further contention that they were not on "notice that the government could seek an enhanced sentence" (Br. in Opp. 5) is unfounded. Like other defendants who were indicted before *Apprendi*, respondents could not reasonably have expected that their

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on the "ounce quantities of [powder] cocaine" that he actually distributed. *Id.* at 29-44. The premise of that argument had already been rejected by the jury, which found him guilty of the conspiracy offense notwithstanding his denials.

Of the two respondents who received 30-year sentences, see 21 U.S.C. 841(b)(1)(B)(iii), Matilda Hall merely argued that the amount of cocaine base attributable to her was "well below $1^{1}/_{2}$ kilograms." 3/4/99 Matilda Hall Sent. Tr. 48-49. Jovan Powell "incorporate[d] the arguments" of the other defendants as to why the base offense level should be lower than 38, but acknowledged that "he ha[d] a few grams [of cocaine base] in his sweat pants" when he was arrested. 3/4/99 Powell Sent. Tr. 2, 27. In fact, the amount of cocaine base in his sweat pants exceeded 50 grams. See Pet. App. 28a (Wilkinson, C.J., dissenting).

sentences for the drug conspiracy offense would be limited to the lowest statutory maximum. As Chief Judge Wilkinson observed in dissent, it is "difficult to believe that [respondents] lacked notice that they faced [Section 841(b)'s] strictest penalties," especially since the original indictment in the case expressly charged them with participation in a conspiracy involving at least 50 grams of cocaine base and the government presented evidence that the conspiracy involved a quantity of cocaine base that supported "the elevated penalties available under" Section 841(b)(1)(A). Pet. App. 28a-29a.

3. Respondents devote the remainder of their brief to arguing that the court of appeals' decision is correct on the merits. That would not provide any basis for denying review of a question of such significance to the federal criminal justice system. Respondents cannot, and do not, dispute that the circuits are in irreconcilable conflict over the question presented in this case. See Pet. 18-21 (discussing conflict). That conflict will not be resolved without this Court's intervention.

Respondents contend (Br. in Opp. 8-9) that the omission of an element, or sentence-enhancing fact, from an indictment is a "structural" error—*i.e.*, an error that "*necessarily* render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder* v. *United States*, 527 U.S. 1, 9 (1999). But this Court has "found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.'" *Id.* at 8 (quoting *Johnson* v. *United States*, 520 U.S. 461, 468 (1997)). This is not one of them. If the failure to obtain a petit jury finding on an offense element may be excused as harmless, as this Court held in *Neder*, then the failure to obtain a grand jury determination on an offense element (or other es-

sential fact) may also be excused as harmless. A court of appeals would engage in the same sort of analysis in both contexts, examining whether the evidence establishing the omitted element was overwhelming and whether the defendant contested the element while on notice of the need to do so. In neither context would the inquiry "defy analysis by 'harmless error standards.'" *Arizona* v. *Fulminante*, 499 U.S. 279, 309 (1991).

Alternatively, respondents contend (Br. in Opp. 9-10) that a sentence that exceeds the statutory maximum term that is applicable without reference to the fact omitted from the indictment always requires reversal under the plain-error standard because it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 732 (1993) (citations omitted). But the Court held in *Johnson* that the failure to obtain a petit jury finding on an offense element does not necessarily require reversal on plain-error review. See 520 U.S. at 469-470. The same is true with respect to the failure to obtain a finding on an offense element from a grand jury, a body whose findings are always subject to examination by the trier of fact under a heightened standard of proof. See *United States* v. *Mechanik*, 475 U.S. 66, 70 (1986).

4. Amici National Association of Criminal Defense Lawyers et al. urge (Br. 4) that the Court defer resolution of the question presented in the petition until it resolves "a number of jurisprudentially antecedent" questions. The questions identified by amici are, however, analytically distinct from the question presented in the petition. Moreover, they have been resolved consistently and correctly by the courts of appeals since *Apprendi*.

Amici contend (Br. 5-10, 16-17 & n.17) that the Court should address whether the threshold drug quantities in Section 841(b)(1) may (or must), consistent with Congress's intent, be treated as offense elements that must be charged in the indictment and proved to the jury beyond a reasonable doubt; amici also suggest that, if Congress intended that drug quantity is a sentencing factor, the question arises whether Sections 841 and 846 are facially unconstitutional under *Apprendi*. No circuit conflict currently exists on the questions raised by amici. The courts of appeals have uniformly concluded that Section 841(b) may constitutionally be implemented in accordance with *Apprendi*. See *United States* v. *Kelly*, No. 00-2705, 2001 WL 1545672 at *2 & n.3 (3d Cir. Dec. 5, 2001) (upholding constitutionality of Section 841 and citing decisions of six other circuits); see also *Thomas*, 2001 WL 1579993, at *4 (describing *Apprendi*'s effect on Section 841 prosecutions).[3] The courts have concluded that nothing in the text, structure, or history of Section 841 precludes threshold drug quantities from being charged in an indictment and proved to a jury beyond a reasonable doubt, and that *Apprendi* requires that threshold drug quantities be treated in that manner when used to enhance the statutory maximum penalty. The courts of appeals have taken somewhat different routes to that conclu-

[3] Although a panel of the Ninth Circuit held in *United States* v. *Buckland*, 259 F.3d 1157 (2001), that Sections 841(b)(1)(A) and (B) are "facially unconstitutional" under *Apprendi* because they authorize an increase in the statutory maximum sentence based on drug-quantity determinations to be made by a court by a preponderance of the evidence, the Ninth Circuit granted rehearing en banc in that case and ordered that the panel opinion not be cited as precedent in the Ninth Circuit. 265 F.3d 1085 (2001).

sion.[4] But they have not reached substantively different results. There is no need for this Court to address those issues in order to resolve the issue presented in the petition.

In any event, the question presented in the petition is not limited to drug cases under Sections 841 and 846 (see Pet. 20-21; p. 2 & note 2, *supra*). The harmless-error and plain-error questions that divide the circuits merit this Court's review because of their wider ramifications.[5]

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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[4] Compare *United States* v. *Sanchez*, 269 F.3d 1250, 1268 (11th Cir. 2001) (en banc) ("*Apprendi* does not affect our prior statutory construction of § 841(b) as setting forth purely sentencing factors"), with *United States* v. *Doggett*, 230 F.3d 160, 164 (5th Cir. 2000) (court was "constrained by *Apprendi*" to overrule prior decisions holding that "Congress did not intend drug quantity to be an element of the crime" under Section 841), cert. denied, 121 S. Ct. 1152 (2001). The Fifth Circuit has granted rehearing en banc in two cases in which it has asked for supplemental briefing on, among other things, whether it should reconsider *Doggett*'s holding that *Apprendi* "appl[ies] to offenses under 21 U.S.C. § 841." Memorandum to Counsel at 1, *United States* v. *Longoria*, No. 00-50405 (5th Cir. Aug. 30, 2001).

[5] Amici also raise various challenges to the merits of the plain-error/harmless-error analysis urged by the United States in the petition and adopted by the First, Seventh, and Eleventh Circuits. Such arguments, like the similar arguments of respondents, provide no reason to deny review in this case.