No. 08-1374

In the Supreme Court of the United States

CHRIS ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in a drug conspiracy prosecution under 21 U.S.C. 846, the imposition of an enhanced sentence based on the quantity of drugs involved in the offense requires the jury to find the quantity of drugs attributable to the conspiracy as a whole, or the quantity of drugs attributable to the defendant himself.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 547 F.3d 632.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 2008. A petition for rehearing was denied on February 5, 2009 (Pet. App. 32). The petition for a writ of certiorari was filed on May 5, 2009. 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 Tennessee, petitioner was convicted of one count of conspiring to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. 846, and two counts of using a communications

facility to facilitate the distribution of controlled substances, in violation of 21 U.S.C. 843(b). He was sentenced to life imprisonment. Pet. App. 21-22. The court of appeals affirmed. *Id.* at 1-20.

1. In December 2003, petitioner entered into "a business relationship" with Juan Valentin "in which the two of them worked together to sell cocaine." Pet. App. 3. After that, Valentin sold cocaine to petitioner "once or twice a week," in amounts ranging from one to nine ounces, with four-and-one-half ounces being the most typical quantity. *Ibid.*; C.A. App. 315-318. Valentin sometimes extended credit to petitioner to make the purchases. Pet. App. 3. At trial, the jury heard a series of intercepted telephone conversations from an 88-day period during 2005. During those conversations, petitioner and Valentin discussed the sale of at least 38.5 ounces of cocaine and referred repeatedly to other conversations that were not recorded. *Id.* at 3 n.2; C.A. App. 263, 297-298, 334-336. Valentin testified that he and petitioner also used text messages, which were not intercepted by the wiretap, to conduct their drug business and that they did so about as often as they spoke via phone. *Id.* at 239-241.

Valentin and petitioner worked together in other ways as well. On one occasion, petitioner accompanied Valentin to Memphis to pick up "a couple kilos" of cocaine, Pet. App. 3, and the recorded conversations make clear that petitioner was aware of other cocaine-buying trips by Valentin and others, C.A. App. 266-267, 271, 280-282, 308-309, 311-312. Petitioner introduced Valentin to Troy Allison, who bought a quarter of a kilogram of cocaine from Valentin during their first meeting and "ultimately buil[t] up to" buying a kilogram at a time and making at least one two-kilogram purchase. Pet.

App. 3 n.1. Valentin asked and petitioner agreed to help Valentin collect money from several people to whom Valentin had sold cocaine on credit. *Id.* at 4; C.A. App. 261-262, 265-267, 277-278, 293-296. Petitioner also warned Valentin about police investigations into Valentin's activities, and the two conferred about how Valentin could retrieve $30,000 in drug proceeds from an impounded car. Pet. App. 4; C.A. App. 267-271.

2. A grand jury returned a 53-count superseding indictment against petitioner and 18 others. Count 1 charged all of the defendants with conspiring to distribute "five kilograms or more" of cocaine between December 2003 and March 2006. Superseding Indictment 1-2; Pet. App. 2. In September 2006, the government gave notice under 21 U.S.C. 851(a)(1) that it intended to seek enhanced statutory penalties against petitioner based on his two prior felony drug convictions. See 9/26/2006 Notice of Intent to Use Prior Convictions to Enhance Punishment; see 21 U.S.C. 841(b)(1)(A) (providing that a person who is convicted of a drug trafficking offense involving five or more kilograms of cocaine and has "two or more prior convictions for a felony drug offense * * * shall be sentenced to a mandatory term of life imprisonment").

In its charge to the jury, the district court described the elements of a conspiracy offense, see 10/3/06 Tr. 266-269, and stated that "the government must prove [each] * * * element[] beyond a reasonable doubt," *id.* at 266. The court told the jury that if it found that petitioner was "guilty of the offense charged in Count 1, you must then determine whether that offense involved the particular quantity of drugs charged in the indictment." Pet. App. 4. The court noted that the verdict form "asked you to answer some questions about the amount of the

mixture and substance containing a detectable amount of cocaine hydrochloride in this offense," and it stated that the jury "should only answer yes to one of th[ose] questions * * * if you determine * * * that the government has proven beyond a reasonable doubt that the offense involved the specified quantity * * * listed in the question." *Id.* at 4-5. Petitioner did not object to those instructions or to the verdict form.

During its deliberations, the jury sent a note to the court inquiring: "Does [petitioner] simply have to have knowledge of the selling of 5 kilos or does he have direct involvement with selling 5 kilos." 10/3/06 Communications with the Court. Defense counsel asserted that "knowledge is required," that "the answer should be yes," and that "as a matter of law you can't be convicted of a conspiracy if you just don't know." Pet. App. 43. In its response to the jury's question, the court stated that "the essence of the conspiracy is the agreement, not the accomplishment of the act" and that, "[c]oncerning the drug quantities, you are merely to determine what quantity was involved in the conspiracy the defendant participated in, in the event you find he participated in a conspiracy." *Id.* at 45.

The jury found petitioner guilty on the conspiracy count, as well as two other counts. Pet. App. 6, 21. On the verdict form, the jury checked "Yes" in response to the question: "Do you, the jury, unanimously find the Government has proved beyond a reasonable doubt that the offense charged in Count 1 of the Indictment involved five kilograms or more of a mixture or substance containing cocaine hydrochloride?" *Id.* at 5-6; Verdict Form 1.

The probation officer prepared a Presentence Investigation Report (PSR). The PSR determined that peti-

tioner was a "career offender" under Guidelines § 4B1.1(a) and (b), see PSR paras. 74, 80, which produced an advisory Guidelines range of 360 months to life imprisonment, see PSR para. 94. The PSR also concluded, however, that petitioner was subject to a mandatory term of life imprisonment under 21 U.S.C. 841(b)(1)(A) in light of the jury's drug-quantity finding and his two previous felony drug convictions, which meant that "the effective guideline range is life." PSR para. 94. In his written Response to Pre-Sentence Report, petitioner objected to the use of his previous convictions for sentencing purposes because they had not been found by either the grand jury or the petit jury. Addendum to the PSR; Response to Pre-Sentence Report. Petitioner did not, however, object to the use of the jury's drug-quantity finding for purposes of determining his sentence.

At the sentencing hearing, petitioner argued that he was not the person who had been the subject of the two convictions relied upon by the government. 4/5/07 Tr. 4, 36-38. The district court rejected that contention, and found that petitioner "is the defendant whose convictions are listed in the presentence report." *Id.* at 38. The district court also rejected petitioner's argument that, under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), his prior convictions had to be found by the jury, rather than by the court. 4/5/07 Tr. 42-43. At that point, petitioner conceded that a life sentence was mandatory "under the statute, 21 U.S.C. 841," and the district court sentenced petitioner to life imprisonment. *Id.* at 43-44. At no point during the sentencing hearing did petitioner object to the use of the jury's drug-quantity finding for purposes of determining his sentence.

3. On appeal, petitioner argued that the district court had erred, both in its initial instructions and in its response to the jury's question, in charging the jury that it was required to determine the amount of cocaine involved in the conspiracy as a whole rather than the amount of cocaine that was foreseeable to him personally. See Pet. C.A. Br. 10, 12-16. As a remedy, petitioner sought either reversal of his conspiracy conviction, see *id.* at 16, or a remand for resentencing under 21 U.S.C. 841(b)(1)(C), which covers offenses involving an indeterminate quantity of cocaine, see Pet. C.A. Br. 16.

The court of appeals rejected petitioner's contention and upheld his conviction and sentence. Pet. App. 6-13. The district court's instructions had "tracked the language of" 21 U.S.C. 841(b)(1)(A), see Pet. App. 7, which provides for an enhanced sentence "[i]n the case of a violation * * * *involving* * * * 5 kilograms or more" of cocaine, 21 U.S.C 841(b)(1)(A)(ii) (emphasis added). The court of appeals explained that 21 U.S.C. 846, the drug-conspiracy statute, provides that conspirators "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the * * * conspiracy," and that 21 U.S.C. 841(a)(1), which describes the underlying substantive offense, makes it "unlawful for any person knowingly or intentionally—to . . . distribute . . . a controlled substance." Pet. App. 7. Accordingly, the court of appeals determined that the district court properly "instructed the jury that the relevant quantity determination is of the quantity involved in the violation of 21 U.S.C. § 841(a)—in this case, a conspiracy to distribute cocaine." *Id.* at 8.

The court of appeals determined that neither its own decision in *United States* v. *Pruitt*, 156 F.3d 638 (6th Cir. 1998), cert. denied, 525 U.S. 1091, and 526 U.S. 1012 (1999) nor *Pinkerton* v. *United States*, 328 U.S. 640 (1946), required a different result. See Pet. App. 8-10. The court acknowledged "that a conspirator is liable for the substantive offenses of his conspirators only if those offenses are, among other things, reasonably foreseeable to him." *Id.* at 9 (citing *Pinkerton*, 328 U.S. at 647-648). But the court explained that "this principle is distinct from the equally established rule that conspiracy is an inchoate offense that needs no substantive offense for its completion," *ibid.*, and it noted that *Pruitt* had "distinguished culpability for the conspiracy itself from culpability for the substantive offenses of co-conspirators," *id.* at 10.

The court of appeals also rejected petitioner's assertion that the district court's drug-quantity instructions violated *Apprendi*. Pet. App. 10-13. The court explained that "the 'fact' that increases the default penalty for a conspiracy to distribute drugs is the quantity of drugs involved in the conspiracy," and it noted that "[m]ost other circuits have agreed that *Apprendi* is satisfied where the jury finds, beyond a reasonable doubt, the quantity of drugs involved in the conspiracy as a whole." *Id.* at 11; see *id.* at 12 (citing cases). The court of appeals stated "there can be no *Apprendi* error" in this case because the jury's quantity finding, in conjunction with petitioner's two prior convictions, had "triggered a mandatory life sentence." *Ibid.* As a result, "the district court had no occasion to determine the amount * * * of drugs for which [petitioner] was personally responsible because there was no range within

which the court had discretion to choose a sentence." *Ibid.*[1]

ARGUMENT

Petitioner contends (Pet. 7-16) that he was not subject to an enhanced sentence under 21 U.S.C. 841(b)(1)(A) because the jury was asked to determine the amount of drugs involved in the conspiracy as a whole rather than those that were reasonably foreseeable to him. That claim does not merit further review.

1. a. Petitioner's argument is contrary to the plain language of the drug statutes. The drug-conspiracy statute states that conspirators "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the * * * conspiracy." 21 U.S.C. 846. As relevant here, 21 U.S.C. 841(a)(1) makes it "unlawful for any person knowingly or intentionally * * * to * * * distribute * * * a controlled substance." Section 841(b), in turn, establishes the penalties for "any person who violates subsection (a)," and states that those penalties turn on the type and amount of drugs "involv[ed]" in the "violation." 21 U.S.C. 841 (b)(1)(A). The statutes thus make clear that, in drug-distribution conspiracy cases, the statutory maximum depends on the type and amount of drugs involved in the conspiracy. No language in either statute suggests that the statutory maximum varies depending on the amount of drugs that are reasonably foreseeable to each individual conspirator.

b. The court of appeals' reading of the statutes is consistent with "the long established rule that," in substantive drug-trafficking cases, "the government need

[1] The court of appeals also rejected various other claims that petitioner does not renew in this Court. See Pet. App. 13-20.

not prove that the defendant knew the * * * *amount* of [the] controlled substance" involved in his offense. *United States* v. *Carranza*, 289 F.3d 634, 644 (9th Cir.), cert. denied, 537 U.S. 1037 (2002); see *ibid.* (stating that this rule survives *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)); see also *United States* v. *Gamez-Gonzalez*, 319 F.3d 695, 699-700 (5th Cir.) (citing cases), cert. denied, 538 U.S. 1068 (2003). Because the government is not required to prove that the defendant knew the particular quantities involved in a prosecution for the underlying substantive offense, it likewise should not be required to establish such knowledge or foreseeability in a prosecution for conspiracy to commit that offense. Cf. *United States* v. *Feola*, 420 U.S. 671, 696 (1975) (stating that "where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a mens rea requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense").

c. *United States* v. *Cotton*, 535 U.S. 625 (2002), also supports the decision below. In *Cotton*, this Court held that the imposition of life sentences on defendants convicted of conspiracy under 21 U.S.C. 846 did not warrant relief under the plain-error standard, even though the drug amount was not alleged in the indictment or found by the jury, because the "overwhelming" and "essentially uncontroverted" evidence showed that "the conspiracy involved at least 50 grams of cocaine base." 535 U.S. at 633. The Court's analysis focused on the drug quantity involved in the conspiracy as a whole. Three separate times the Court referred to the fact that "the conspiracy involved at least 50 grams of cocaine base." *Ibid.*; see *ibid.* (evidence "revealed the conspiracy's involvement with far more than 50 grams of cocaine

base"); *id.* at 633 n.3 ("the relevant quantity for purposes of *Apprendi*" was the amount of cocaine "that the conspiracy involved"). Nothing in the Court's reasoning suggested that the statutory penalties for the conspiracy would vary depending on the quantity of cocaine base attributable to each defendant. To the contrary, the Court stated that "the relevant quantity for purposes of *Apprendi*" was the amount of cocaine "that the conspiracy involved." *Ibid.*

d. Contrary to petitioner's suggestion (see Pet. 9-10), *Edwards* v. *United States*, 523 U.S. 511 (1998), supports the court of appeals' conclusion that the statutory maximum for a drug conspiracy is determined based on the drug type and quantity involved in the conspiracy as a whole. As the First Circuit explained in *Derman* v. *United States*, 298 F.3d 34, cert. denied, 537 U.S. 1048 (2002), *Edwards* holds that

> [A]s long as (1) the jury finds beyond a reasonable doubt that a defendant participated in a conspiracy, and (2) the Court sentences him within the statutory maximum *applicable to that conspiracy*, the court may "determine both the amount and the kind of 'controlled substances' for which the defendant should be held accountable—and then . . . impose a sentence that varies depending upon amount and kind."

Id. at 42 (brackets omitted) (quoting *Edwards*, 523 U.S. at 513-514); see *Edwards*, 523 U.S. at 515 (noting that the petitioners' sentences did not exceed "the maximum that the statutes permit for a cocaine-only conspiracy").

As the First Circuit further explained, *Apprendi* "did not purport to overrule *Edwards*." *Derman*, 298 F.3d at 42. Instead, the two decisions are "easily harmonized." *Ibid.* "[I]n a drug conspiracy case, the jury should de-

termine the existence *vel non* of the conspiracy as well as any facts about the conspiracy that will increase the possible penalty for the crime of conviction beyond the default statutory maximum." *Ibid.* Then, "once the jury has determined that the conspiracy involved a type and quantity of drugs sufficient to justify a sentence above the default statutory maximum and has found a particular defendant guilty of participation in the conspiracy, the judge lawfully may determine the drug quantity attributable to that defendant and sentence him accordingly" within the applicable statutory maximum set by "the jury's conspiracy-wide drug quantity determination." *Id.* at 43.[2] As the court of appeals recognized (Pet. App. 12), so long as this procedure is followed, "there can be no *Apprendi* error."

e. The court of appeals also correctly rejected petitioner's reliance (Pet. 14-15) on *Pinkerton* v. *United States*, 328 U.S. 640 (1946). *Pinkerton* holds that a defendant is substantively liable for the reasonably foreseeable criminal acts of a co-conspirator in furtherance of the conspiracy. *Id.* at 647-648. As the court of appeals recognized, however, "[t]he principles outlined in *Pinkerton* . . . have no applicability to a conviction under § 846." Pet. App. 9 (quoting *United States* v. *Col-*

[2] Petitioner errs in suggesting (Pet. 11) that the First Circuit has retreated from its holding in *Derman*. The very decision upon which petitioner relies reaffirms that *Derman* remains the law of the First Circuit. See *United States* v. *Nelson-Rodriguez*, 319 F.3d 12, 46, cert. denied, 539 U.S. 928, 540 U.S. 831, and 540 U.S. 845 (2003); see also *United States* v. *Mercado Irizarry*, 404 F.3d 497, 504 (2005) ("As the case law of this circuit has made abundantly clear, the maximum statutory penalty available to the district court at sentencing for a defendant convicted of a drug conspiracy is based on the drug quantity and amount reflected in the jury verdict attributable to the conspiracy as a whole.").

lins, 415 F.3d 304, 313 (4th Cir. 2005)). This Court has affirmed repeatedly that "conspiracy is a distinct offense from the completed object of the conspiracy," *Garrett* v. *United States*, 471 U.S. 773, 778 (1985), and "that conspiracy is an inchoate offense that needs no substantive offense for its completion." Pet. App. 9-10 (citing *Iannelli* v. *United States*, 420 U.S. 770, 777 & n.10 (1975)); see *United States* v. *Jiminez Recio*, 537 U.S. 270, 274-275 (2003) (conspiracy may be proved based on the unlawful agreement, regardless of whether the substantive offense is committed); *United States* v. *Shabani*, 513 U.S. 10, 13-14 (1994) (holding that no overt act is necessary for conspiracy liability under Section 846). A drug conspirator's liability rests on his agreement, and once it is established that he knowingly and voluntarily became a part of a conspiratorial agreement, he is liable for the full scope of the conspiracy that he joined. Accordingly, "[a]lthough a 'small-time' drug seller may not be responsible for all the transactions or actions of his associates, he is responsible for the conspiracy in which he participated." Pet. App. 10.

f. Petitioner also observes (Pet. 12) that the Sentencing Guidelines "impose a foreseeability limitation on relevant conduct." The question here, however, involves the proper interpretation of a statute. The text of Section 841 imposes no such limitation, and the Court has described as "dubious" the assumption that the meaning of a statute's text can be deduced from different language in the Guidelines. *Smith* v. *United States*, 508 U.S. 223, 231 (1993).

2. Petitioner argues (Pet. 7-9) that this Court's review is warranted because the court of appeals' decision

conflicts with decisions of other courts of appeals.[3] Although there is disagreement, this case is not an appropriate vehicle for resolving it.

a. As petitioner notes (Pet. 7-8), the decision below conflicts with *United States* v. *Collins*, *supra*. In *Collins*, the Fourth Circuit held that, in order to impose the enhanced statutory maximums in 21 U.S.C. 841(b) on a defendant convicted of a drug conspiracy, a jury must determine the quantity of drugs attributable to that particular defendant based on the co-conspirator liability principles set forth in *Pinkerton*. See *Collins*, 415 F.3d at 311-314. The Ninth Circuit reached a similar conclusion in *United States* v. *Banuelos*, 322 F.3d 700 (2003), which held that, when a defendant pleads guilty to a drug conspiracy, *Apprendi* requires the district court to determine beyond a reasonable doubt the quantity of drugs attributable or reasonably foreseeable to the defendant in order to subject him to the enhanced statutory penalties in 21 U.S.C. 841(b)(1). See 322 F.3d at 704-705.[4] In contrast, the majority of the courts of ap-

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[3] Petitioner's assertion (Pet. 15) that the court of appeals' decision "violated the spirit if not the letter of its" own previous decision in *United States* v. *Pruitt*, 156 F.3d 638 (6th Cir. 1998), cert. denied, 525 U.S. 1091, and 526 U.S. 1012 (1999), provides no basis for further review. The court of appeals specifically distinguished *Pruitt* (Pet. App. 8-9), and an intracircuit conflict would not warrant a grant of certiorari in any event. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

[4] As petitioner observes (Pet. 8-9), *Banuelos* cited the Ninth Circuit's previous decision in *United States* v. *Becerra*, 992 F.2d 960 (1993), which *Banuelos* summarized as holding that a district "court may not impose [a] statutory mandatory minimum without finding that 'a particular defendant had some connection with the larger amount on which the sentencing is based or that he could reasonably foresee that such an amount would be involved in the transactions of which he was guilty.'"

peals that have considered the question have held, in accord with the court of appeals in this case, that the statutory maximum penalty in a drug conspiracy case turns on the jury's determination of the type and quantity of drugs involved in the conspiracy as a whole.[5]

For the reasons stated above, the majority view is correct and *Collins* and *Banuelos* are incorrect. The *Collins* and *Banuelos* courts did not examine the language of the drug statutes, nor did they discuss the well-reasoned, contrary decisions of other courts of appeals. *Collins* did not adequately explain why *Pinkerton* principles should apply in determining the penalty for conviction of a drug conspiracy; indeed, *Collins* itself recognized that "*Pinkerton* principles are relevant when a conspirator is charged with a substantive offense arising from the actions of a coconspirator, not when a conspirator is charged with conspiracy." 415 F.3d at 313.[6]

Banuelos, 322 F.3d at 704 (quoting *Becerra*, 992 F.2d at 967 n.2). Petitioner does not assert that the court of appeals' decision conflicts with *Becerra*, however, or any other circuit decisions involving the requirements for imposing an enhanced *minimum* sentence under 21 U.S.C. 841(b). See note 6, *infra*.

[5] See *United States* v. *Seymour*, 519 F.3d 700, 709-710 (7th Cir.), cert. denied, 129 S. Ct. 527 (2008); *United States* v. *Stiger*, 413 F.3d 1185, 1192-1193 (10th Cir.), cert. denied, 546 U.S. 1049 (2005); *United States* v. *Phillips*, 349 F.3d 138, 140-143 (3d Cir. 2003), vacated on other grounds by *Barbour* v. *United States*, 543 U.S. 1102 (2005); *United States* v. *Knight*, 342 F.3d 697, 709-712 (7th Cir. 2003), cert. denied, 540 U.S. 1227 (2004); *United States* v. *Turner*, 319 F.3d 716, 721-723 (5th Cir.), cert. denied, 538 U.S. 1017 (2003); *Derman*, 298 F.3d at 42-43.

[6] Petitioner also suggests (Pet. 12) that this case is different from the typical one because here the conspiracy-wide quantity finding not only resulted in "an elevated statutory maximum" but also "mandated a life sentence as a *minimum* punishment." Although petitioner did not raise the point in the district court, the court of appeals, or his petition

b. Although there is a conflict in the circuits, this case is not an appropriate vehicle for resolving it. First, petitioner has not properly preserved the claim on which he seeks this Court's review. Petitioner did not object

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for a writ of certiorari, the district court's imposition of a mandatory life sentence based on the jury's conspiracy-wide drug-quantity finding also appears to conflict with another line of cases addressing the criteria for triggering mandatory minimum sentences under the federal drug statutes. In *United States* v. *Colon-Solis*, 354 F.3d 101, 103 (2004), for example, the First Circuit held that although "the applicable statutory maximum" in a drug-conspiracy case is based on conspiracy-wide drug quantity, a district court may not sentence a particular conspirator to a mandatory minimum sentence unless it makes a "specific finding, supportable by a preponderance of the evidence, ascribing the triggering amount to that coconspirator." Accord *United States* v. *O'Neal*, 362 F.3d 1310, 1316 (11th Cir. 2004), vacated on other grounds by *Sapp* v. *United States*, 543 U.S. 1106 (2005). But see *United States* v. *Rivera*, 411 F.3d 864, 866-867 (7th Cir.), cert. denied, 546 U.S. 966 (2005). In a pre-*Apprendi* series of cases, moreover, several courts of appeals held that a sentencing court must apply *Pinkerton* principles to make a defendant-specific determination of a drug conspirator's culpability before sentencing him to a mandatory minimum under Section 841(b). See, *e.g.*, *United States* v. *Swiney*, 203 F.3d 397, 405-406 (6th Cir.) (citing cases), cert. denied, 530 U.S. 1238, and 530 U.S. 1268 (2000).

For the reasons discussed in the text, those decisions are inconsistent with the plain language of the drug statutes and they wrongly transfer *Pinkerton*'s rule permitting conspirators to be held liable for a co-conspirator's *substantive* offenses to the very different question of what sentence may be imposed on a conspirator for the *conspiracy* itself. In addition, because the language of the drug statutes makes no distinction between the findings necessary to trigger enhanced maximum and minimum sentences, no textually sound basis justifies using a conspiracy-wide amount to set the maximum sentence, but a defendant-specific amount to establish a minimum sentence. At any rate, any claim directed specifically at the mandatory minimum sentence would be forfeited in light of petitioner's failure to raise the issue at any point during this litigation, and any conceivable error would be harmless as well. See pp. 16-18, *infra*.

to the district court's jury instructions or to the verdict form, both of which told the jury that it was to determine whether the conspiracy as a whole "involved" at least five kilograms of cocaine. See Pet. App. 4. In response to the jury's question, defense counsel argued that "knowledge is required" and asserted "that the answer should be yes." *Id.* at 43. But defense counsel did not argue in favor of a foreseeability standard (as petitioner seemingly does now, see Pet. 14-16), and the jury's question could not be answered "yes," as it posed alternative possible formulations. See 10/3/06 Communications with the Court ("Does [petitioner] simply have to have knowledge of the selling of 5 kilos or does he have direct involvement with selling 5 kilos."). And after the jury returned its verdict, petitioner never argued that the district court could not rely on the jury's drug-quantity finding for purposes of calculating his statutory sentencing range. To the contrary, petitioner *conceded* that he was subject to a mandatory life term after the district court rejected his objections to considering his prior convictions. 4/5/07 Tr. 43-44. As a result, petitioner's claim is reviewable only under the plain-error standard, see Fed. R. Crim. P. 52(b), and, even if petitioner could demonstrate "error," he could not satisfy his burden of showing that it was "clear" or "obvious." *United States* v. *Olano*, 507 U.S. 725, 734 (1993).

Second, even if petitioner's claim were preserved, any possible error in this case would have been harmless. Because petitioner was tried alone, the evidence focused on his particular involvement in the cocaine-distribution conspiracy. Cf. *United States* v. *Nelson-Rodriguez*, 319 F.3d 12, 46-47 (1st Cir.) (noting possible need for defendant-specific "special interrogatories" about drug quantity in cases about "complex conspira-

cies involving multiple transactions of different amounts of drugs imported at different times, with a shifting cast of actors"), cert. denied, 539 U.S. 928, 540 U.S. 831, and 540 U.S. 845 (2003). That evidence overwhelmingly showed that petitioner either knew or could reasonably have foreseen that the conspiracy of which he was a member involved five or more kilograms of cocaine.

As Valentin testified, he typically sold petitioner four-and-a-half ounces of cocaine once or twice a week for several years. Pet. App. 3. Even a single sale of four ounces per week would have been sufficient, after just 45 weeks, to reach the five-kilogram threshold that is necessary to trigger an enhanced sentence under 21 U.S.C. 841(b)(1)(A)(ii).[7]

At any rate, the evidence also showed that petitioner's involvement in the conspiracy went far beyond his own purchases from Valentin. In addition to those weekly transactions, petitioner accompanied Valentin on a trip to pick up "a couple kilos," Pet. App. 3, and the recorded conversations show that he was aware of other such trips, C.A. App. 266-267, 271, 280-282, 308-309, 311-312. Petitioner introduced Valentin to another person who ended up purchasing cocaine in kilogram quantities, see Pet. App. 3 n.1, agreed to help Valentin collect money from other buyers, *id.* at 4; C.A. App. 261-262, 265-267, 277-278, 293-296, and conferred with Valentin about how Valentin could retrieve $30,000 in drug proceeds from an impounded car, Pet. App. 4; C.A. App. 267-271. Under those circumstances, any possible error in failing to ask the jury to decide whether it was fore-

[7] One ounce is equivalent to 28.35 grams. See Guidelines § 2D1.1, comment. 10 (measurement conversion table). Accordingly, four ounces is equivalent to 113.4 grams, and 45 sales of 113.4 grams would produce a combined weight of 5.103 kilograms.

seeable to petitioner that the conspiracy of which he was a part involved five or more kilograms of cocaine was harmless beyond a reasonable doubt. See *Neder* v. *United States*, 527 U.S. 1, 10-11 (1999).[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2009

[8] To the extent that the jury's question is relevant to the harmless-error inquiry (see Pet. 6, 16), it favors the government, not petitioner. The phrasing of the question—"Does [petitioner] *simply* have to have knowledge of the selling of 5 kilos or does he have direct involvement with selling 5 kilos" (emphasis added)—appears to presuppose that petitioner had the relevant knowledge.