No. --

IN THE

SUPREME COURT OF THE UNITED STATES

Rolando Humphrey,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether district courts may determine without the aid of a jury that a sentence above the statutory minimum is "not greater than necessary" to achieve the goals enumerated at 18 U.S.C. §3553(a)(2)?

PARTIES

Rolando Humphrey is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Rolando Humphrey , respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court entered judgment of conviction and sentence August 4, 2017, [Appx. A], which was summarily affirmed by an unpublished opinion of the United States Court of Appeals for the Fifth Circuit on July 11, 2018, [Appx. B].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on July 11, 2018. [Appx. B]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> **Criminal actions--Provisions concerning--Due process of law and just compensation clauses.**
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> **Rights of the accused.**
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

During a planned traffic stop, police found a little more than a kilogram of cocaine the car of Petitioner Rolando Humphrey. *See* (ROA.246).[1] He told them where it was in the car, and then agreed to an interview. *See* (ROA.246). During that interview, Mr. Humphrey admitted a prior purchase of five to seven kilograms. *See* (ROA.246). Fatefully, and without any discernible benefit, he also admitted pattern of smaller scale drug dealing over two years. *See* (ROA.246). Specifically, he admitted selling 1/4 of a kilogram two or three times a week for two years. *See* (ROA.246).

Mr. Humphrey pleaded guilty to one count of possessing a detectable amount of cocaine with intent to distribute it. *See* (ROA.47-48). This charge a carried a maximum term of imprisonment of 20 years. *See* 21 U.S.C. §841. A Presentence Report (PSR) found that the Guidelines recommended this maximum sentence of 20 years, a conclusion it reached in no small part due to the drug quantity. *See* (ROA.259). The PSR used the repeated 1/4 kilogram deliveries of unseized cocaine to assign Mr. Humphrey a drug quantity in excess of 27 kilograms. *See* (ROA.246-248). This produced a base offense level of 32, to which the PSR added enhancements for firearm possession, maintaining a drug-involved premises, and obstruction of justice. *See* (ROA.250-251). Coupled with a criminal history category of IV, the final offense level produced a recommended Guideline range in excess of the statutory maximum. *See* (ROA.259).

The defense objected to the drug quantity, among other aspects of the Guideline calculation. *See* (ROA.265-267). The Objection pointed to Note Five of USSG §2D1.1. *See* (ROA.265-267). This Note calls on the district court to determine whether the drugs seized from the defendant adequately reflect "the scale of the offense." *See* (ROA.265-267). The defense argued that the better way to approximate the scale of the offense in this case was to consider the amounts typically dealt, or the most dealt at any one time, not to add small quantities repetitively trafficked over long periods. *See* (ROA.265-267).

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[1]Record citations are included in hopes that they are of use to the government in answering the Petition or the Court in evaluating it.

The district court overruled this Objection, *see* (ROA.210-211), and the defense pressed a similar claim under 18 U.S.C. §3553(a), *see* (ROA.221-222). The court, however, imposed a Guideline sentence of 240 months imprisonment. *See* (ROA.228).

Petitioner appealed again to the United States Court of Appeals for the Fifth Circuit, contending that the district court's drug quantity finding was excessive. The court rejected this claim and affirmed. *See* [Appendix B].

REASON FOR GRANTING THE PETITION

Hurst v. Florida, __U.S.__, 136 S.Ct. 616 (2016) forbids the use of judicially determined drug quantities to increase the range of reasonable sentences.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that any fact other than a prior conviction that increased the defendant's maximum sentence must be proven to a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. In *United States v. Booker*, 543 U.S. 220 (2005), it applied this holding to the then-mandatory federal sentencing Guidelines, finding that judges may not make the factual findings that alter the maximum of a mandatory Guideline range. *See Booker*, 543 U.S. at 226. To remedy the constitutional violation, this Court severed the provision of the United States Code making the federal Guidelines mandatory. *See id.* at 245-246. The *Booker* opinion did not, however, leave the district courts free to impose any sentence within the statutory range in all cases. *See id.* at 259-264. Rather, the district court is now required to calculate an advisory range, to apply the factors enumerated at 18 U.S.C. §3553(a), and to impose a sentence no greater than necessary to achieve certain sentencing goals. *See id; Gall v. United States*, 552 U.S. 38, 50-51 (2007). Should the sentencing court fail to perform that task in a substantively reasonable fashion, the sentence may be reversed by the court of appeals. *See Booker*, 543 U.S. at 261-264; *Gall*, 552 U.S. at 50-51. The facts underlying this analysis may be made by a judge, provided the judicial fact-finding is not clearly erroneous. *See Gall*, 552 U.S. at 51.

The district court sentenced Mr. Humphrey to the statutory maximum term of imprisonment based largely on its own conclusion that 27 kilograms represented the scale of the offense. That practice is not consistent with *Hurst*, at least in cases where the statutory maximum would not be a reasonable sentence based on the elements alone.

Mr. Hurst was sentenced to death by a Florida judge, following an advisory verdict by a jury. *See Hurst*, 136 S.Ct. at 620. Under Florida law, a defendant convicted of capital murder may not receive a death sentence unless a trial judge finds one of 16 enumerated aggravating factors. *See* F.S.A. §921.141(5). A Florida death sentence also requires the further finding "[t]hat sufficient aggravating circumstances exist ... and [t]hat there are insufficient mitigating circumstances to

outweigh the aggravating circumstances." F.S.A. §921.141(3). Notwithstanding the existence of an advisory jury, this Court held that the Florida scheme violated the Sixth Amendment. *See Hurst*, 136 S.Ct. at 621. Of particular importance for current federal cases, the Court premised its Sixth Amendment holding on the reality that, under Florida law, "[t]he trial court alone must find 'the facts ... [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Id*. at 622 (quoting F.S.A. §921.141(3)).

The findings "that sufficient aggravating circumstances exist" to impose the death penalty and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances," is not analytically distinguishable from the finding required by 18 U.S.C. §3553(a), namely that the sentence is "sufficient, but not greater than necessary, to comply with the purposes set forth in" 18 U.S.C.§ 3553(a)(2), including punishment, deterrence, protection of the public, and provision of training and medical care. Both the Florida findings that authorize a death sentence and the finding required by 18 U.S.C. §3553(a) embody a value judgment – neither represents a simple, value-neutral finding of historical fact.[2] Both the Florida system and the federal post-*Booker* system require that the necessary findings be made explicitly. *See* F.S.A. §921.141(3); 18 U.S.C. §3553(c). And both provide appellate review of both the underlying historical facts and the resulting sentencing judgment. *See* F.S.A. §921.141(3); *Booker*, 543 U.S. at 261-264; *Gall*, 552 U.S. at 50-51. There is no material difference between the structure of the Florida system held unconstitutional in *Hurst* and the federal system at issue here. When the district court imposes a sentence exceeding the statutory minimum, its finding that the sentence is no greater than necessary to achieve the goals named at §3553(a)(2) should be made by a jury beyond a reasonable doubt. The findings of historical fact that

[2]Although the Florida system provides a limited set of facts upon which a higher sentence (the death penalty) may be based, while the federal system is more open-ended, this distinction has already been held irrelevant for Sixth Amendment purposes. *See Blakely v. Washington*, 542 U.S. 296, 305 (2004)("Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence.")

support this conclusion should likewise be made by a jury beyond a reasonable doubt.

This Court should grant *certiorari* to address this conflict as to the constitutional protections due at sentencing in the federal system. It is true that the argument was not pressed below in its constitutional form. The present case might therefore be an inappropriate vehicle to address the issue. The issue recurs incessantly and should, Petitioner submits, be addressed quickly in some case before this Court. In the event that this Court grants certiorari to address the issue and rules in favor of Petitioner's position here, any error would become plain and reversible. *See Henderson v. United States*, __U.S. __, 133 S.Ct. 1121 (2013). In that event, the appropriate course would be to hold the instant Petition, vacate the judgment below, and remand in light of the forthcoming authority. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

CONCLUSION

Petitioner respectfully prays that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to which she may justly entitled.

Respectfully submitted this 9th day of October, 2018.

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