No. --

IN THE

SUPREME COURT OF THE UNITED STATES

BYRON ANTHONY HORN,

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

I. Whether facts that alter the range of "reasonable" federal sentences must be pleaded in the indictment in federal cases?

PARTIES

Byron Anthony Horn, 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, Byron Anthony Horn, 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The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Retiz,* 741 Fed. Appx. 262 (5th Cir. October 31, 2018)(unpublished), and is provided in the Appendix to the Petition. [Appx. A]. The judgment of conviction and sentence was imposed April 6, 2018, and is also provided in the Appendix to the Petition. [Appx. B].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on September 6, 2018. [Appx. A]. 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:

> 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:

> 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

A. Facts and Proceedings in District Court

Petitioner Byron Anthony Horn was charged by superseding information with five counts of bank robbery. He pleaded guilty and admitted three additional robberies but did not waive his appeal. The district court concluded his Guideline range was 78-97 months imprisonment. The court, however, imposed a sentence of 120 months, finding that the defendant's conduct was deliberate, that he terrified the tellers by pretending to have a gun, and that his prior period of sobriety and relapse made him more dangerous to the public. The defense objected to the upward variance as substantively and procedurally unreasonable.

B. The Appeal

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, arguing that the court had violated his rights to jury trial and proof beyond a reasonable doubt by finding facts that changed the range of reasonable sentences. The court of appeals rejected that contention. *See* [Appendix A].

REASONS FOR GRANTING THE PETITION

I. The logical conclusion of *Alleyne v. United States* is that all facts that alter the range of substantively reasonable federal sentences must be treated as elements of the defendant's offense, proven to a jury beyond a reasonable doubt, and pleaded in the indictment. This Court should hold the instant Petition pending the resolution of any case raising the issue on plenary review

The constitution entitles every criminal defendant to "a jury determination that [he or she] is guilty of every element of the crime with which he is charged beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). All elements of an offense must also be placed in the indictment. *See Cotton v. United States*, 535 U.S. 625, 627 (2002). For constitutional purposes, an element is a fact that "expose(s) the defendant to a greater punishment than that authorized by the jury's verdict..." *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2001).

Apprendi v. New Jersey, 530 U.S. 466 (2001), made clear that all facts that increase the maximum punishment must be treated as elements of the offense, and not as mere sentencing factors. *See Apprendi*, 530 U.S. at 490. Subsequently, this Court clarified that the principle extends to facts that increase the maximum of a mandatory Guideline range (*see Blakely v. Washington*, 542 U.S. 296, 302 (2004)), sentencing findings given broad or open-ended definitions by the legislature (*see Cunningham v. California*, 549 U.S. 270 (2007)), and facts that affect the appropriate range of punishment by the mandate of judicial rather than legislative authorities (*see United States v. Booker*, 543 U.S. 220, 237-244 (2005)).

Yet *Harris v. United States*, 536 U.S. 545 (2002), imposed an important limit on *Apprendi*'s holding that all facts must be treated as elements if they "expose the defendant to a greater punishment than that authorized by the jury's verdict." In *Harris*, this Court ruled that facts establishing mandatory minimums need not be proven to a jury beyond a reasonable doubt, because such facts merely limit the judge's "choices within the authorized range." *Harris*, 536 U.S. at 567.

But this Court has recently overruled *Harris. See Alleyne v. United States*, __U.S.__, 133 S.Ct. 2151 (2013). *Alleyne* reasoned that the two key rationale animating *Apprendi* – interposing the jury between the defendant and the government, and allowing the defendant to predict the

punishment from the face of the indictment – apply with equal force to facts that establish mandatory minimums. *See Alleyne*, 133 S.Ct. at 2161. After *Alleyne*, then, "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Id*. at 2155. Given this holding, it is clear that facts that alter the range of reasonable punishments in the federal system must be treated as an element of the defendant's offense.

Following *United States v. Booker*, 543 U.S. 220 (2005), the discretion of federal sentencing judges to sentence within the statutory range is limited by *Booker*'s dictate that the sentence be substantively reasonable in light of the factors codified in 18 U.S.C. §3553(a). *See Booker*, 543 U.S. at 258-265. "Reasonableness" therefore provides a limitation on the sentence independent of the prescribed statutory maximums and minimums for the crime committed. Consequently, under *Booker*, facts that alter the range of "reasonable" sentences also "expose the defendant to a greater punishment than that authorized by the jury's verdict" for the purposes of the Fifth and Sixth Amendments. They accordingly require elemental treatment under *Apprendi*.

Before *Alleyne*, it was possible to maintain that such facts were merely sentencing factors. *Harris*, after all, held that some facts may alter the punishment and yet escape *Apprendi* if they merely limit the judge's "choices within the authorized range." Under *Alleyne*, however, all facts that increase the penalty must be treated as elements of the offense. *See Alleyne*, 133 S.Ct. at 2155. Facts that change the range of sustainable sentences within the statutory range plainly meet this criteria. *Alleyne* emphasized that judges may engage in "factfinding used to guide judicial discretion in selecting a punishment 'within limits fixed by law.'" *Id*. at 2161 (quoting *Williams v. New York*, 337 U. S. 241, 246 (1949)). But in the post-*Booker* federal system, facts that establish the range of reasonable sentences do not merely "guide judicial discretion." Rather, they establish a range of sentences that are permissible, and that can survive appellate review. *See Booker*, 543 U.S. at 258-265.

The sentence imposed in this case will only satisfy the Fifth and Sixth Amendments if this

Court finds it to be reasonable based exclusively on the facts in the indictment. Here, the reasonableness of the 120 month sentence plainly depends on facts that were not placed in the indictment or admitted by the defendant. These include the court's conclusion that Petitioner terrified the tellers by pretending to have a gun, that his conduct was deliberate, and that his prior period of sobriety and relapse increased his danger to the public. To say that the district court's factual findings did not affect the range of reasonable punishments – neither the maximum of the range of reasonable punishment, ***nor its minimum*** – is essentially to say that the entire statutory range is reasonable in every case. Reasonableness review is deferential, but it is not the case that "district courts have a blank check to impose whatever sentences suit their fancy." *See United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008); *see also United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008)(reading *Gall v. United States*, 552 U.S. 38 (2007), to "leave no doubt that an appellate court may still overturn a substantively unreasonable sentence, albeit only after examining it through the prism of abuse of discretion, and that appellate review has not been extinguished."); *accord United States v. Levinson*, 543 F.3d 190, 195-196 (3d Cir. 2008); *United States v. Ofray-Campos*, 534 F.3d 1, 44 (1st Cir. 2008)(using reasonableness review to reverse the sentence); *United States v. Abu Ali*, 528 F.3d 210, 269 (4th Cir. 2008)(same); *United States v. Funk*, 534 F.3d 522, 530 (6th Cir. 2008)(same); *United States v. Shy*, 538 F.3d 933 (8th Cir. 2008)(same).

Petitioner did not raise the issue in district court, a fact that may prove a difficult vehicle problem for a plenary grant of *certiorari*. It is nonetheless appropriate to hold the case and remand in light of any other case that may raise the same claim. In the event that it grants such a Petition while the present case is still pending, it will be appropriate to hold the instant case until the plenary grant is resolved, and then, in the event of a favorable ruling, grant the instant Petition, vacate the judgment below, and remand for reconsideration.

CONCLUSION

Petitioner respectfully submits that this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit and vacate his sentence.

Respectfully submitted this January 29, 2019,

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