

No. _____

In the
Supreme Court of the United States

Rickey Cole,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether facts that affect the minimum or maximum reasonable federal sentence must be found by a grand jury, placed in the indictment, and proven to a jury beyond a reasonable doubt?

PARTIES TO THE PROCEEDING

Petitioner is Rickey Cole, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rickey Cole seeks 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The unpublished opinion of the Court of Appeals is reported at *United States v. Cole*, 801 Fed. Appx. 291 (5th Cir. Aril 14, 2020)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on April 14, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

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 defence.

Section 3553(a) of Title 18 provides:

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to [section 994\(a\)\(1\) of title 28](#), United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#)); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to [section 994\(a\)\(3\) of title 28](#), United States Code, taking into account any amendments made to such guidelines or

policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#));

(5) any pertinent policy statement—

(A)

issued by the Sentencing Commission pursuant to [section 994\(a\)\(2\) of title 28](#), United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under [section 994\(p\) of title 28](#)); and

(B)

that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[\[1\]](#)

(6)

the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7)

the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

A. Trial Proceedings

Petitioner Rickey Cole pleaded guilty to one count of possessing a firearm following a felony conviction. *See* (Record in the Court of Appeals, at 33-38). The indictment in his case alleged the possession of three firearms, making no claim of any additional felony, nor of a high-capacity magazine. *See* (Record in the Court of Appeals, at 22). In pleading guilty, the defendant admitted possessing one firearm, again making no mention of any other firearm, nor of any other felony committed therewith, nor of any high-capacity magazine. *See* (Record in the Court of Appeals, at 37).

A Presentence Report (PSR), however, found that the defendant possessed three firearms, that one of them had a high-capacity magazine, and that he used firearms in connection with drug dealing. *See* (Record in the Court of Appeals, at 155-156). These findings raised the base offense level from 14 to 26, which was then reduced three levels for acceptance of responsibility to 23. *See* (Record in the Court of Appeals, at 155-156); USSG §2K2.1. Coupled with a criminal history category of II, this produced a Guideline range of 51-63 months imprisonment. *See* (Record in the Court of Appeals, at 1641); USSG Ch. 5A. In the absence of these findings, the final offense level would have been 12 (following a two point reduction for acceptance of responsibility), and the Guideline range would have been just 12-18 months imprisonment. *See* USSG §3E1.1(b); USSG Ch. 5A.

The defense filed a Request for Downward Variance asking for a sentencing within the range of 12-18 months imprisonment. This Request argued that the Guideline sentence enhancements had unreasonably multiplied the punishment beyond that applicable to the basic offense. Counsel renewed the argument at sentencing over ten pages of oral advocacy. *See* (Record in the Court of Appeals, at 131-141). That presentation began with a reference to *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), as counsel argued that the sentence enhancements had become a tail that wagged the dog of the substantive offense:

Your Honor, I won't restate my argument. My written argument is, I think, pretty complex, and I know you've received it. I will kind of just summarize it, if you will.

I think it was McMillan probably two decades ago where the Supreme Court had mentioned about this bit of concern, I guess, about the sentencing tail wagging the substantive dog. And that's, in a nutshell, kind of what my argument is...

(Record in the Court of Appeals, at 131). Counsel then discussed each of the enhancements, arguing that they collectively expanded the punishment beyond that applicable to the “underlying offense.” (Record in the Court of Appeals, at 131-141). He concluded with a request “for the 12 to 18 months ... something like that.” (Record in the Court of Appeals, at 141).

The court imposed sentence of 51 months, the bottom of the Guideline range it found applicable. *See* (Record in the Court of Appeals, at 144).

B. Court of Appeals

Petitioner appealed, contending that after *Haymond v. United States*, ___U.S.__, 139 S.Ct. 2369 (2019), the facts that elevated his sentence more closely

resemble elements of an aggravated offense than mere “sentencing factors.” He thus argued that they should have been placed in the indictment, and found by a jury beyond a reasonable doubt.

The court of appeals thought that Petitioner’s trial court advocacy failed to preserve the claim. *See* [Appendix A]. It then affirmed for want of a showing of plain error. *See* [Appendix A].

REASONS FOR GRANTING THE PETITION

This Court should rectify the widespread deprivation of constitutional rights occasioned by judicial fact-finding of facts that affect the maximum or minimum reasonable sentence.

Other than the fact of a prior conviction, any fact that increases the defendant's maximum punishment must be found by a jury beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The same rule applies to facts that increase the minimum punishment. *See Alleyne v. United States*, 570 U.S. 99, 102 (2013). In *United States v. Booker*, 543 U.S. 220 (2005), this Court found that any federal sentence must be a reasonable application of 18 U.S.C. §3553(a) in light of the facts proven to the sentencing court. A sentence that is not reasonable in light of these factors must be reversed. *See Booker*, 543 U.S. at 259-264. Further, a sentencing court may be reversed if its findings of facts are clearly erroneous. *See Gall v. United States*, 552 U.S. 38, 50 (2007).

It follows from this that any fact affecting the maximum or minimum reasonable punishment in a case must be found by a jury beyond a reasonable doubt. The court below, however, held that only those facts altering a mandatory range of punishment established by statute constitute elements of the offense, subject to the jury trial and reasonable doubt guarantees. *See United States v. Bazemore*, 839 F.3d 379, 393 (5th Cir. 2016). That is clearly wrong. *Booker* rejects any limitation of *Apprendi* to statutory maximums – the maximums at issue in *Booker* arose from Guidelines promulgated by an independent agency, not statutes. *See Booker*, 543 U.S.

237-238 (“In our judgment the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance. In order to impose the defendants' sentences under the Guidelines, the judges in these cases were required to find an additional fact...”). As such, it is now clear that any maximum or minimum punishment triggers the *Apprendi* guarantee.

This Court should accept certiorari to rectify the deprivation of constitutional rights flowing from this misunderstanding of *Apprendi*. The present case does not involve preserved error, and accordingly may not be an ideal vehicle. In the event that it does grant *certiorari* to resolve this issue, however, it should hold the instant case, and grant *certiorari*, vacate the judgment below, and remand for further proceedings in light of the outcome. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

The present case likely involves constitutional error. Here, the trial judge found many facts that altered the maximum and minimum reasonable sentence even though they had not been placed in the indictment: that Petitioner possessed a high-capacity magazine, that he possessed three guns rather than one, and that he possessed the gun in connection with drug trafficking *See* (Record in the Court of Appeals, at 155-156). Because these finding affect the extent of punishment and deterrence necessary in the case, it is essential to any reasonable application of 18 U.S.C. § 3553(a), not to mention the Guidelines. They should have been placed in the indictment and proven to a jury beyond a reasonable doubt.

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.

Respectfully submitted this 10th day of September, 2020.

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