No. _____

In the Supreme Court of the United States

October Term 2020

TERRY ALLEN MILES,
Petitioner

VS

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

Respectfully submitted,

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Question Presented

Did the trial court violate the 5th and 6th Amendments to the Constitution of the United States in overruling Petitioner's objection to the inclusion of uncharged and unproven allegations of murder during the sentencing hearing.

List of Parties

Appellant: Terry Allen Miles

Federal Public Defender for the Western District of Texas:

Bradford Wayne Bogan, Federal Public Defender

Horatio R. Aldredge, Ass't Federal Public Defender (Trial)

Jose I. Gonzales-Falla, Ass't Federal Public Defender (Trial)

Mark Stevens, Appointed Defense Attorney (Trial)

Ronald L. Goranson, Appointed Defense Attorney (Appeal)

United States Attorney for The Western District of Texas

John F. Bash U.S. Attorney for The Western District of Texas:

Ass't U.S. Attorney Michelle Evette Fernald (Trial)

Ass't U.S. Attorney Matthew B. Devlin (Trial)

Ass't United States Attorney Joseph H. Gay, Jr. (Appeal)

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In the Supreme Court of the United States

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Introduction

Justice Gorsuch began his plurality opinion in United States v. Haymond ___ U.S. ___, 139 S.Ct. 2369, 204 L.Ed.2d 897, (2019) by stating:

> "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government. Yet in this case a congressional statute compelled a federal judge to send a man to prison for a minimum of five years without empaneling a jury of his peers or requiring the government to prove his guilt beyond a reasonable doubt. As applied here, we do not hesitate to hold that the statute violates the Fifth and Sixth Amendments." 139 S.Ct at 2373

He further wrote:

> "Together with the right to vote, those who wrote our Constitution considered the right to trial by jury 'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.' Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (R. Taylor ed. 1977)." 139 S. Ct. at 2375

In this case the sentencing guidelines calculation included an allegation of murder that was uncharged. Further the issue was never presented to the jury nor was it admitted by the Petitioner.

Petitioner is an individual suffering from mental disorders caused by severe brain deformation and head injuries to his frontal, temporal and cerebellar lobes through no fault of the Petitioner. Petitioner is asking this Court to look again at whether the Sentencing Guidelines requirement for district courts to consider uncharged and unproven allegations of other crimes permits sentences that are "substantially unreasonable" and therefore illegal under the Fifth and Sixth Amendments to the Constitution of the United States. Petitioner recognizes that a majority of this Court has not recognized this right yet, but is requesting the Court to re-examine the issue as requested in Justice Scalia's dissenting opinion to the Court failing to grant a writ of certiorari in Jones v. United States, 574 U.S. 948, 135 S.Ct. 8, 190

L.Ed.2d 279 (2014) and as held by plurality opinions in United States v. Hammond, *supra*, and Alleyne v. United States, 570 U.S. 99, 108, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)

Petitioner is asking that the case be remanded to the district court for sentencing hearing where the Sentencing Guidelines are properly calculated.

Opinion Below

The opinion of the circuit court of appeals was not published, and the cause is not yet reported. A copy of the opinion is attached hereto as Appendix A.

Jurisdiction

The opinion affirming petitioner's conviction was entered on November 16, 2020. No petition for rehearing was filed. Mandate was issued on December 8, 2020.

Jurisdiction of this court is invoked pursuant to 28 USC §1254(1)

Constitutional Provisions Involved

United State Constitution, amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a

> Grand Jury, ... 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; ....

United State Constitution, amendment VI:

> 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.

Statement of the Case

On August 21, 2018 Petitioner Miles was charged in a four-count indictment with kidnapping (Counts 1 and 2) contrary to 18 USC §1201(a)(1) and (g)(1), transportation of a minor in interstate commerce with intent to engage in criminal sexual activity (Count 3) contrary to 18 USC § 2423(a) and travel in interstate commerce with intent to engage in illicit sexual conduct (Count 4) contrary to 18 USC §2423(b) (ROA 103-106). Miles pled "not guilty" and a jury trial was held from January 28, 2019 to February 12, 2019. The jury found Miles guilty on

each count. On May 21, 2019 Miles received a life sentence on the first three counts and a sentence of 360 months incarceration on Count 4. (ROA 467; 2447). Notice of appeal was filed on May 22, 2019. (ROA 479-480).

On November 16, 2020 the United States Court of Appeals for the Fifth Circuit affirmed the conviction in an unpublished per curiam opinion.(Appendix A)

The Presentence Report (PSR) increased the base offense level for the convicted offenses from 32 to 42, stating:

> In this case, the evidence at trial revealed that, **based on the preponderance of the evidence,** the defendant kidnapped the victims in connection with, or at the very least, in escape therefrom, the commission of a homicide. According to the guidelines, the most analogous offense is second degree murder, pursuant to U.S.S.G. § 2A1.2(a), which calls for a base offense level of 38, plus four levels. (Emphasis added)

Miles's trial counsel filed a written objection contending that punishing him for "a crime that no grand jury charged, nor a petit jury found him guilty of committing, violates the Fifth and Sixth

Amendment to the US Constitution."[1] The Government responded noting the legal issue had previously been decided negatively to Miles's position.

The issue was preserved at the sentencing hearing. (ROA 2405) The trial court overruled the objection. (ROA 2409) The trial court stated:

> As I stated earlier in this case, this Court is not comfortable with dealing with other serious crimes that were not proved by beyond a reasonable doubt and were not passed upon by a jury. So I consider a guideline sentence under either calculation of life, and I also consider what would be a guideline sentence if the Court could not consider those aggravated factors, which would be 360 months to life. (ROA 2446)

The trail court assessed punishment at life on Counts 1, 2 and 3 and at 360 months confinement on Count 4. (ROA 2447)

The objection was based on the accused's 6th amendment right to trial by jury and was based on Justice Scalia's concurring opinions in Rita v. United States, 551 U.S. 338, 372, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007) (Scalia, J., concurring in part and concurring in the

[1] "2. Miles objects to PSR 34, which applies the cross reference from § 2A4.1 (b) (7) to § 2A1.2 (a), the guideline for second degree murder. Miles was not charged by indictment, nor found guilty by a jury of second-degree murder. To punish Miles for a crime that no grand jury charged, nor a petit jury found him guilty of committing, violates the Fifth and Sixth Amendment to the US Constitution". (ROA 4767)

judgment); and Gall v. United States, 552 U.S. 38, 60, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007) (Scalia, J., concurring). Miles conceded that this argument was foreclosed in the 5th Circuit in United States v. Alonzo, 435 F.3d 551, 553 (5th Cir. 2006). Miles presented the argument to preserve it for appeal to the Supreme Court. *Alonzo* was binding on the panel, absent a contrary decision of the Supreme Court or 5th Circuit en banc reconsideration of the issue. See United States v. Stone, 306 F.3d 241, 243 (5th Cir. 2002).

REASONS FOR GRANTING THE PETITION

It is Petitioner's contention that in order for there to be a constitutional punishment, the Fifth Amendment's Due Process Clause and the Sixth Amendment's right to a jury trial require that each element of a crime be either admitted by the accused or found by the jury from the evidence beyond a reasonable doubt. "The Sixth Amendment provides that those 'accused' of a 'crime' have the right to a trial 'by an impartial jury.' This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *In re Winship*, 397 U.S.

358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The substance and scope of this right depend upon the proper designation of the facts that are elements of the crime." Alleyne v. United States, 570 U.S. 99, 108, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) (plurality opinion)

Petitioner realizes that a majority of this Court has not adopted that standard yet but requests this Court to reconsider Justice Scalia's statements in Jones v. United States, 574 U.S. 948, 135 S.Ct. 8, 190 L.Ed.2d 279 (2014) where he stated:

> "The Sixth Amendment, together with the Fifth Amendment's Due Process Clause, 'requires that each element of a crime' be either admitted by the defendant, or 'proved to the jury beyond a reasonable doubt.' Alleyne v. United States, 570 U.S. ___, ___, 133 S.Ct. 2151, 2154, 186 L.Ed.2d 314, 320 (2013). Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, Apprendi v. New Jersey, 530 U.S. 466, 483, n. 10, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and " must be found by a jury, not a judge," Cunningham v. California, 549 U.S. 270, 281, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007)." (Scalia, J, joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari).

Justice Scalia continued:

> We have held that a substantively unreasonable penalty is illegal and must be set aside. Gall v. United States, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). It unavoidably

> follows that any [190 L.Ed.2d 280] fact necessary to prevent a sentence from being substantively unreasonable--thereby exposing the defendant to the longer sentence--is an element that must be either admitted by the defendant or found by the jury. It may not be found by a judge.
>
> For years, however, we have refrained from saying so. In Rita v. United States, [135 S.Ct. 9] we dismissed the possibility of Sixth Amendment violations resulting from substantive reasonableness review as hypothetical and not presented by the facts of the case. We thus left for another day the question whether the Sixth Amendment is violated when courts impose sentences that, but for a judge-found fact, would be reversed for substantive unreasonableness. 551 U.S. at 353, 127 S.Ct. 2456, 168 L.Ed.2d 203; see also id., at 366, 127 S.Ct. 2456, 168 L.Ed.2d 203 (Stevens, J., joined in part by GINSBURG, J., concurring) (" Such a hypothetical case should be decided if and when it arises"). Nonetheless, the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution does permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range. See, e.g., United States v. Benkahla, 530 F.3d 300, 312 (CA4 2008); United States v. Hernandez, 633 F.3d 370, 374 (CA5 2011); United States v. Ashqar, 582 F.3d 819, 824-825 (CA7 2009); United States v. Treadwell, 593 F.3d 990, 1017-1018 (CA9 2010); United States v. Redcorn, 528 F.3d 727, 745-746 (CA10 2008). (Scalia, J, joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari)

see also, e.g., United States v. Saunders, 826 F.3d 363, 375-78 (7th Cir. 2016) (Manion, J., concurring in part and dissenting in part); United

States v. Canania, 532 F.3d 764, 776-78 (8th Cir. 2008) (Bright, J., concurring); United States v. Grier, 475 F.3d 556, 574 (3d Cir. 2007) (Ambro, J., concurring); United States v. Henry, 472 F.3d 910, 919-22 (D.C. Cir. 2007) (Kavanaugh, J., concurring).

In this case the trial court clearly overruled Petitioner's trial objection to including the allegation in the sentencing guideline calculation of a murder that had not been pled nor had it been submitted to the jury for a factual finding. The Petitioner never admitted committing the alleged murder and pled "not guilty" to the charged offenses.

The fact the trial court said he was uncomfortable considering the enhancement does not correct the error. In Molina-Martinez v. United States, , ___U.S. __ , 136 S.Ct. 1338, 194 L.Ed.2d 444 (2016) Justice Kennedy wrote:

> ... a district court's application of an incorrect Guidelines range can itself serve as evidence of an effect on substantial rights. See, e.g., United States v. Sabillon-Umana, 772 F.3d 1328, 1333 (CA10 2014) (application of an erroneous Guidelines range runs the risk of affecting the ultimate sentence regardless of whether the court ultimately imposes a sentence within or outside that range); United States v. Vargem, 747 F.3d 724, 728-729 (CA9 2014); United States v. Story, 503 F.3d 436, 440 (CA6 2007). [136 S.Ct. 1342] These courts recognize that, in most cases, when a district court

> adopts an incorrect Guidelines range, there is a reasonable probability that the defendant's sentence would be different absent the error. (Quotation marks omitted)

Conclusion

The issue below presents an issue of major importance which should be decided by this Court. The broad issue has been before this Court several times since the Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). See Alleyne v. United States, supra (plurality opinion) and United States v. Haymond, supra, (plurality opinion). Before *Apprendi*, however, this Court had held that facts elevating the minimum punishment need not be proven to a jury beyond a reasonable doubt. See McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) and Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (adhering to McMillan). This Court needs to state specifically what the Fifth and Sixth Amendments mean with reference to punishment for uncharged criminal conduct. The petition in this case provides the Court with an ideal opportunity to consider and resolve the question presented.

Petitioner respectfully prays that writ of certiorari issue to review the decision of the United states Court of Appeals for the Fifth Circuit entered in this cause on November 16, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the Petition for Certiorari was sent by United States mail to on February 5, 2021.

1. Assistant United States Attorney John F. Bash
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RONALD L. GORANSON

Appendix A

Opinion

United States Court of Appeals
for the Fifth Circuit

USA v. Terry Allen Miles
19-50466

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 16, 2020
Lyle W. Cayce
Clerk

No. 19-50466
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

TERRY ALLEN MILES,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:18-CR-39-1

Before BARKSDALE, GRAVES, and OLDHAM, *Circuit Judges.*

PER CURIAM:*

Terry Allen Miles was convicted, following a jury trial, for kidnapping, in violation of 18 U.S.C. § 1201(a)(1) and (g)(1), transportation of a minor with intent to engage in criminal sexual activity, in violation of 18 U.S.C. § 2423(a), and travel with intent to engage in illicit sexual conduct, in

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

violation of 18 U.S.C. § 2423(b). He was sentenced, *inter alia*, to life imprisonment. Miles challenges his convictions, contending the court erred by: instructing the jury that kidnapping can be committed for ransom or reward when there was no such evidence in this case; allowing the Government to introduce testimony that the magistrate judge permitted defendant to discover the interview notes by one of the child victim's therapists out of an abundance of caution and to give defendant every fair chance; and excluding two 911 calls concerning incidents involving the two children's (daughters') mother. He also challenges his sentence, contending his Sixth Amendment rights were violated when the district court overruled his objection to applying the murder cross-reference in the Sentencing Guidelines without a beyond-a-reasonable-doubt jury finding. We affirm.

As Miles concedes, he did not raise the jury-instruction issue in district court. Because the issue was not preserved in district court, review is only for plain error. *E.g., United States v. Broussard*, 669 F.3d 537, 546 (5th Cir. 2012). Under that standard, Miles must show a forfeited plain error (clear or obvious error, rather than one subject to reasonable dispute) that affected his substantial rights. *Puckett v. United States*, 556 U.S. 129, 135 (2009). If he makes that showing, we have the discretion to correct the reversible plain error, but generally should do so only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings". *Id.*

Miles fails to show the requisite clear or obvious error in the jury instruction that kidnapping can be committed, *inter alia*, "for ransom or reward" (instruction used "for ransom, reward, or some purpose or benefit") to the extent it merely tracked the statutory language of 18 U.S.C. § 1201(a). *See id.* The record does not support a finding that the jury determined that Miles had a financial motive—as no such evidence was adduced—or that, but for the court's reference to "ransom or reward", the jury would not have convicted Miles. In the alternative, Miles fails to show

that, in the light of the strong evidence that Miles committed the kidnapping for "some purpose or benefit", any error in the jury instruction affected the outcome of the district-court proceedings. *See id.*

Regarding the challenge to testimony, "evidentiary rulings are reviewed 'for abuse of discretion, subject to harmless error review'". *United States v. Martinez*, 921 F.3d 452, 481 (5th Cir. 2019) (quoting *United States v. Alaniz*, 726 F.3d 586, 606 (5th Cir. 2013)). We need not determine whether the district court abused its discretion by allowing testimony that the magistrate judge permitted defendant to discover the victim's therapy notes "to give the defendant every fair chance", because the error, if any, is harmless. Given the overwhelming evidence of guilt, there is no reasonable possibility that the complained-of evidence might have contributed to Miles' conviction. *See United States v. Kizzee*, 877 F.3d 650, 661 (5th Cir. 2017) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)).

As for the excluded 911 calls, Miles fails to show the district court abused its discretion. *See* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."); *see United States v. Brooks*, 681 F.3d 678, 709 (5th Cir. 2012). The record supports the court's concluding that the 911 calls were either irrelevant to issues in the case or cumulative of prior evidence, including testimony. *See United States v. Rajwani*, 476 F.3d 243, 248 (5th Cir. 2007), *modified*, 479 F.3d 904 (5th Cir. 2007). In any event, given the overwhelming evidence of Miles' guilt, any error in excluding the 911 calls was harmless. *See Kizzee*, 877 F.3d at 661.

Finally, Miles concedes his Sixth Amendment challenge—that his Sixth Amendment rights were violated when the district court applied the

Guidelines' homicide cross-reference to increase his advisory Guidelines sentencing range and sentence without a jury having found the facts necessary to support the cross-reference beyond a reasonable doubt—is foreclosed in this circuit. *See United States v. Alonzo*, 435 F.3d 551, 553 (5th Cir. 2006). The issue is raised only to preserve it for possible further review.

AFFIRMED.