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No. 20-2220

IN THE SUPREME COURT OF THE UNITED STATES

DON R. TURNER, JR.,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

DON TURNER, JR.,
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Petitioner, pro se

QUESTIONS PRESENTED

1. WHETHER DEFENDANT(S) RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING SENTENCING IN WHICH COUNSEL FAILED TO BRIEF OR PRESERVE THE SUPREME COURT'S RULING ENUNCIATED IN ALLEYNE V. UNITED STATES, WHICH RESULTED IN AN ERRONEOUS INCREASE IN THE MANDATORY MINIMUM SENTENCED, WITHOUT THE REQUISITE JURY'S FINDING?
2. WHETHER THE DISTRICT COURT COMMITTED PLAIN ERROR WHEN IT IMPOSED A LIFE SENTENCE TO DEFENDANT(S) IN VIOLATION OF THE SUPREME COURT'S RULING IN ALLEYNE V. UNITED STATES?
3. WHETHER THE DISTRICT COURT ERRED BY A PREPONDERANCE OF THE EVIDENCE STANDARD IN FINDING DEFENDANT(S) RESPONSIBLE FOR A DRUG TYPE AND QUANTITY NOT SUBMITTED TO OR FOUND BY THE JURY, IN VIOLATION OF THE RULE ANNOUNCED IN ALLEYNE?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED	I.
TABLE OF CONTENTS	II.
TABLE OF AUTHORITIES	III
PARTIES TO THE PROCEEDING	1.
OPINIONS BELOW	1,2
JURISDICTIONAL STATEMENT	2,
CONSTITUTIONAL AND STATUTORY PROVISIONS	3,
STATEMENT OF THE CASE	4,
REASONS FOR GRANTING CERTIORARI	4,
I. Certiorari Should be Granted because of the Importance of the Constitutional Questions Presented and because The Eighth Circuit's decision is clearly Erroneous and Affects Petitioner's Fundamental Constitutional Rights	5,6,7
ARGUMENT	7

TABLE OF CONTENTS -

1. WHETHER DEFENDANT(S) RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING SENTENCING IN WHICH COUNSEL FAILED TO BRIEF OR PRESERVE THE SUPREME COURT'S RULING ENUNCIATED IN ALLEYNE V. UNITED STATES, WHICH RESULTED IN AN ERRONEOUS INCREASE IN THE MANDATORY MINIMUM SENTENCED, WITHOUT THE REQUISITE JURY'S FINDING? 7,
2. WHETHER THE DISTRICT COURT COMMITTED PLAIN ERROR WHEN IT IMPOSED A LIFE SENTENCE TO DEFENDANT(S) IN VIOLATION OF THE SUPREME COURT'S RULING IN ALLEYNE V. UNITED STATES? 9,
3. WHETHER THE DISTRICT COURT ERRED BY A PREPONDERANCE OF THE EVIDENCE STANDARD IN FINDING DEFENDANT(S) RESPONSIBLE FOR A DRUG TYPE AND QUANTITY NOT SUBMITTED TO OR FOUND BY THE JURY, IN VIOLATION OF THE RULE ANNOUNCED IN ALLEYNE? 10

Conclusion 11,

CERTIFICATE OF SERVICE/MAILING 12,

Erickson v. Pardus, 551 U.S. 89, 92 (2007) 1
Haines v. Kerner, 404 U.S. 519, 520-21 (1972) 1
Hohn v. United States, 524 U.S. 236, 239-40 (1998) 2
United States v. Turner, 781 F.3d 374 (8th Cir. 2015) 4
Ross v. Moffitt, 417 U.S. 600 (1974) 5
Skidmore v. Swift & Company, 323 U.S. 134 (1944) 5
Williams v. Lee, 358 U.S. 217 (1959) 5
Schlup v. Delo, 513 U.S. 298, 301 (1995) 5
Selva v. Collins, 494 U.S. 108 (1990) 5
Montana v. Kennedy, 366 U.S. 308, 309 (1961) 5
Washington v. United States, 357 U.S. 348 (1958) 5
Massachusetts v. Sheppard, 468 U.S. 981, 988 (1984) 6
Florida v. Rodriguez, 496 U.S. 1, 12 (1984) 6
Dolan, ~~512 U.S. at 383~~ 6
Estelle v. Gamble, 429 U.S. 97, 115 (1976) 6
Sanchez-Llamas v. Oregon, 548 U.S. 331, 334-35 (2006) 6
Rumsfeld v. Padilla, 542 U.S. 426, 455 (2004) 6
Elk Grove Unified School Dist. v. Newdon, 542 U.S. 1, 5 (2004) 6
Alleyne v. United States, 133 S.Ct. 1251, 186 L.Ed 314 (2013) 8, 9, 10,
Griffith v. Kentucky, 479 U.S. 314, 328 107 S.Ct. 708, 93 L.Ed
2d 649 (1987) 8

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, Don R. Turner, Jr., a federal prisoner serving a Life Sentence without parole at U.S.P. McCreary, Pine Knot, Kentucky, would respectfully request that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Eighth Circuit ruling not to issue a Certificate of Appealability ("COA") affirming Petitioner's criminal conviction and Life sentence from the U.S. District Court for the Eastern District of Missouri (South-eastern Division).

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are Petitioner, Don Turner, Jr., and the United States of America, the latter being represented by the United States Department of Justice. Petitioner is acting pro se in this action and would respectfully request liberal construction of his pleadings. Erickson v. Pardus, 551 U.S. 89, 92 (2007) ("[a] document filed pro se is to be liberally construed..."); Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam).

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit issued a Judgment / Order denying Petitioner's application for Certificate of Appealability ("COA") on December 3, 2020, which is reproduced as Appendix A-2. See United States v. Turner, Appeal No. 20-2220,

Petitioner filed a timely Petition for Panel Rehearing, which the Eighth Circuit Court of Appeals denied in an order dated February 11, 2021, which is reproduced as (Appendix A-1).

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on December 03, 2020 (Appendix A-2). A Petition for Panel Rehearing was denied on February 11, 2021, (Appendix A-1).

The Eighth Circuit Court of Appeals below had proper jurisdiction to entertain Petitioner's criminal appeal pursuant to Title 28 U.S.C. § 1291. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254 (1), and pursuant to Hohn v. United States, 524 U.S. 236, 239-40 (1998) (Justices of the Supreme Court has jurisdiction to issue COA in § 2255 cases).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States 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, 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 offense 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. (emphasis added)

United States 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 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 the Assistance of Counsel for his defense.

Title 28, United States Code, Section 2255(b)

Unless the [§ 2255] motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

After being found guilty by a jury of conspiracy to possess 5 Kilograms or more with the Intent to Distribute, Aiding and Abetting, and Distribution, Turner was sentence to a term of Life imprisonment on the Conspiracy Count, and 360 months on both the Aiding and Abetting, and Distribution Count to run concurrently on July 11, 2013.

The Eighth Circuit Court of Appeals affirmed Turner's conviction and sentence in an unpublished opinion.. see United States v. Turner, 781 F.3d 374 (8th cir. 2015).

Thereafter, Turner filed his pro se motion to vacate under 28 U.S.C. § 2255 with exhibits attached, which was filed in the United States District Court of Missouri, Southeastern Division, and assigned civil case number 1:16-CV-00268-JAB.

On _____, the District Court (Honorable Judge Ross) summarily denied Turner's § 2255 motion without a hearing and denied Turner a Certificate of Appealability (COA) as well. Turner filed a timely motion to Alter/Amend Judgment pursuant to Rule 59(e), F. R. CIV. P, on

- A timely Notice of Appeal ("NOA"), along with an application to proceed in forma pauperis ("IFP") and Certificate of Appealability ("COA") submitted pro se to the Eighth Circuit in October of 2020. On December 3, 2020 the Eighth Circuit denied Turner's (COA) request. (see Appendix). On February 11, 2021, the Eighth Circuit Court of Appeals denied Turner's pro se Petition for Rehearing. (see Appendix A-1). This Petition for Writ of Certiorari follows in timely fashion.

REASONS FOR GRANTING CERTIORARI

I. CERTIORARI SHOULD BE GRANTED BECAUSE OF THE IMPORTANCE OF THE QUESTIONS PRESENTED AND BECAUSE THE EIGHTH CIRCUIT'S DECISION IS CLEARLY ERRONEOUS AND AFFECTS PETITIONER'S FUNDAMENTAL CONSTITUTIONAL RIGHTS.

Even though it has been stated numerous occasions that this Court is not primarily concerned with the correction of errors committed by lower courts, the erroneousness of a circuit court's opinion remains a factor in deciding whether to grant certiorari. Ross v. Moffitt, 417 U.S. 600 (1974); Skidmore v. Swift & Company, 323 U.S. 134 (1944); Williams v. Lee, 358 U.S. 217 (1959).

Although the erroneousness of the Eighth Circuit's decision affirming the District Court's summary denial of Turner § 2255 motion may not be the determinative factor for granting a writ of Certiorari in this case, it should be a factor meriting weight in the Court's decisional process. Skidmore, 323 U.S. at 136-38.

A further basis for granting certiorari in this particular case would be that the lower Court's erroneous decision represents a substantial and severe hardship and fundamental miscarriage of justice. Cf. Schlup v. Delo, 513 U.S. 298, 301 (1995) (granting certiorari to "protect against miscarriage of justice"); Selva v. Collins, 494 U.S. 108 (1990) (same); Montana v. Kennedy, 366 U.S. 308, 309 (1961) (certiorari granted "in view of the apparent harshness of the result entailed [by lower court's decision]"); Washington v. United States, 357 U.S. 348 (1958).

Despite this Court's general reluctance to grant certiorari to correct an erroneous decision by a Circuit Court of Appeals, the does often grant review simply to correct an error committed by a lower court as a reflection of the Supreme Court's error-correction function in exercising its supervisory powers over the federal judiciary system. See Massachusetts v. Sheppard, 468 U.S. 981, 988 (1984); Florida v. Rodriguez, 446 U.S. 1, 12 (1984) (granting certiorari "to undertake de novo review of the factual findings of a [lower court] that misapprehended controlling principles of [14th Amendment] law"); Dolan, 512 U.S. at 383.

Moreover, the fact that there are many more reversals than affirmations following this Court's grant of certiorari would further indicate that the Court is more likely to grant certiorari when it believes the lower court's decision may be erroneous. Estelle v. Gamble, 429 U.S. 97, 115 (1976) ("the Court seldom takes a case to merely reaffirm the law").

Finally, in conjunction with Turner's grounds for granting certiorari and the importance of questions presented in this case serves to further enhance cause for granting writ of certiorari. See Sanchez-Llamas v. Oregon, 548 U.S. 331, 334-35 (2006) ("we granted the petition for certiorari in significant part because of the importance of questions presented"); Rumsfeld v. Padilla, 542 U.S. 426, 455 (2004) (certiorari should be granted due to the "profound importance [of questions] to the Nation"); Elk Grove Unified School Dist. v. Newdon, 542 U.S. 1, 5 (2004) ("In light of the obvious importance

of decision we granted certiorari"). As this Honorable Court will see from the facts of this case, the questions presented are of substantial importance to this Court's § 2255 case law and justify certiorari being granted.

ARGUMENTS

1. WHETHER DEFENDANT(S) RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING SENTENCING IN WHICH COUNSEL FAILED TO BRIEF OR PRESERVE THE SUPREME COURT'S RULING ENUNCIATED IN ALLEYNE V. UNITED STATES, WHICH RESULTED IN AN ERRONEOUS INCREASE IN THE MANDATORY MINIMUM SENTENCED, WITHOUT THE REQUISITE JURY(S) FINDING ?

This petitioner alleges an issue which may have not been raised on prior appeal or Sentencing by the attorney appointed to petitioner at those times. If the issue are or were meritorious, then the question of whether or not the trial (or appeal) attorney was ineffective must be evaluated by this Court; To include the question of whether or not there was a tactical or other consideration by that attorney which was the reason for failing to raise an otherwise meritorious issue.

This question cannot be answered on the record as it exists; and an answer can only come from this Court's Supervisory Power to remand back to the 8th Circuit Court of Appeals for further consideration. As such, examining the trial / appeal attorney in open Court with cross examination at an evidentiary hearing requested by petitioner,

It is worth noting that this case involves a change in Constitutional law, occurring after Petitioner's trial, but before his Sentencing Hearing on July 11, 2013. The record will reveal that on June 17, 2013, the Supreme Court decided Alleyne v. United States, 133 S.Ct. 1251, 186 L.Ed 314 (2013). Alleyne, enunciated a New Constitutional rule that was significant to Petitioner's case at the time of his sentencing but was not applied.

The problem the lower Courts are avoiding is that the Life term of imprisonment was applied approximately (27 days) "after" the Supreme Court's ruling in Alleyne. This ruling should have been applied retroactively to Petitioner's case, as his case was not yet final nor pending direct review. As "A new rule for the conduct of criminal prosecution is to be applied retroactively to all cases, state or federal pending on direct review or not yet final, with no exception for cases in which new rules constitutes a 'clear break' with the past". see Griffith v. Kentucky, 479 U.S. 314, 328 107 S.Ct. 708, 93 L.Ed. 2d 649 (1987) (emphasis added).

With this in mind the question(s) again become was Counsel ineffective for failing to bring the district Court's attention upon the New Supreme Court's ruling and preserve the same for direct appeal, and whether the credibility of the witness argument raised by Counsel deprived Petitioner of an fair appellate review. Petitioner has attached the Petition for Panel Rehearing And Suggestion for Rehearing By En Banc Court in support of the importance of raised questions. see Appendix A-3.

Wherefore, Mr Turner moves this Honorable Court to grant certiorari and to remand back to the lower Courts to take testimony from prior Counsel to answer whether the issues placed before the Court were ignored or not pursued for a specific articulable reason, which could then be evaluated for whether or not effective assistance had been afforded to petitioner.

Petitioner has asserted that the authorities and law on the issue related to "Alleyne" are new law, post-dating his trial and sentencing such that they are not waived or defaulted. Alternatively, if the Court should find that a reasonable defense Counsel at the time of Petitioner Sentencing should have raised the issue, then Mr. Turner asserts that it was per se ineffective assistance for his attorney to not have raised the issue.

2. WHETHER THE DISTRICT COURT COMMITTED PLAIN ERROR WHEN IT IMPOSED A LIFE SENTENCE TO DEFENDANT(S) IN VIOLATION OF THE SUPREME COURT'S RULING IN ALLEYNE V. UNITED STATES?

Petitioner, urges this Honorable Court to apply the plain error review, here because the district court has engaged in judicial fact findings in direct violation of the Fifth and Sixth Amendments, despite the given language of this Court's opinion in Alleyne v. United States, 133 S.Ct 2151, 2155, 186 L.Ed 2d 314(2013).

Here, the district court erred by sentencing him under § 841(a)(1), (b)(1)(A) and 851, without obtaining the jury's findings of an

'individually attributable' amount of cocaine of at least 5 kilograms of powder cocaine or 280 grams of crack cocaine.

The district court's 'Alleyne error' has undoubtedly affected Petitioner's substantial rights given the language in this Court's opinion in Alleyne.

3. WHETHER THE DISTRICT COURT ERRED BY A PREPONDERANCE OF THE EVIDENCE STANDARD IN FINDING DEFENDANT(S) RESPONSIBLE FOR A DRUG TYPE AND QUANTITY NOT SUBMITTED TO OR FOUND BY THE JURY, IN VIOLATION OF THE RULE ANNOUNCED IN ALLEYNE?

Petitioner and his two co-defendants were improperly subjected to a life sentence which has been, but cannot be avoided as the district court has clearly erred. As the district court made a drug quantity finding by a preponderance of evidence which subjected Petitioner and co-defendants to an increased statutory minimum sentence.

It is worth noting that Petitioner and his co-defendants were held responsible for 8.4 kilograms of Crack Cocaine based on the judge-found facts (a preponderance of the evidence standard). The problem here is the actual charge is for Powder Cocaine, not crack cocaine as the amount charge in the indictment is the amount for the entire conspiracy. That amount nor the 8.4 kilograms of crack cocaine can serve as the threshold drug quantity for defendant(s) maximum sentence.

The record will reveal that Petitioner and two Co-defendants were charged with a Conspiracy offense involving 5 kilograms or more of 'POWDER COCAINE', (not) crack Cocaine. The jury's verdict indicated that Petitioner was found guilty of a Conspiracy involving 5 kilograms or more of Powder Cocaine as charged. Further the jury's verdict did not include the drug quantity Individually Attributable to Petitioner, or his Co-defendants for the purpose of establishing the threshold statutory sentencing range, nor did it include 8.4 kilograms of crack cocaine.

The Alleyne error is inescapable here as the drug quantity attributable were determined by the district court, not the jury and were found by a preponderance of the evidence. It is important to emphasize the Fact Petitioner was never charged with Crack-Cocaine in the Conspiracy, but held responsible for 8.4 kilograms of Crack Cocaine after the guilty verdict which stated powder cocaine.

CONCLUSION

WHEREFORE, Turner respectfully prays that a Justice of this Court will find one or more of the above questions as debatable among jurists of reason and vote to issue a writ of certiorari and issue COA on the questions presented for review.

Respectfully submitted on this 5th day of May, 2021.

Don R. Turner, Jr.,
Don R. Turner, Jr.,
Petitioner, Pro Se

CERTIFICATE OF SERVICE / MAILING

I, Don R. Turner, Jr., do hereby state under penalty of perjury [28 U.S.C. § 1746] that I have this day served the opposing party with a true copy of the attached "Petition For A Writ of Certiorari" and filed such by mailing the same in the U.S. Mail with First Class postage at USP McCreary and addressed as follows:

Clerk of the Court
United States Supreme Court
One First Street N.E.
Washington, DC 20543

U.S. Attorney's Office
555 Independence, Suite 3000
Cape Girardeau, Missouri
63703

Done this 5th day of May, 2021.

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