

NO. 23-5584

IN THE
UNITED STATES SUPREME COURT

RAYMOND L. ROGERS, pro se - PETITIONER

VS.

UNITED STATES OF AMERICA - RESPONDENT(S)

ON PETITION FOR A REHEARING CERTIORARI PETITION
TO THE

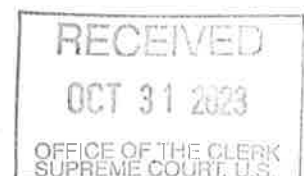
UNITED STATES TENTH CIRCUIT COURT OF APPEALS

PETITION FOR A REHEARING

RAYMOND L. ROGERS, pro se

P.O. BOX 3000 - MEDIUM

FORREST CITY, AR 72336



GROUND(S) PRESENTED

- I. IS THE PETITIONER ENTITLED TO RELIEF PURSUANT-TO THIS COURT'S DECISION IN ALLEYNE v. UNITED STATES, 570 U.S 99, 108, 133 S. CT. 2151, 186 L.ED. 2d 314 (2013)?
- II. DID THE KANSAS DISTRICT COURT'S ACTION OF CONSTRUCTIVELY AMENDING THE CRIMINAL OFFENSE IN THE GRAND JURY'S FIRST SUPERSEDING INDICTMENT DEPRIVE YOUR PETITIONER OF A SUBSTANTIAL RIGHT IN ACCORDANCE WITH THE FIFTH AND SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION ?

GROUND(S), FACTS AND LAW IN SUPPORT OF
CERTIORARI GRANT

GROUND(S) I: IS PETITIONER ENTITLED TO RELIEF BASED ON THIS UNITED STATES SUPREME COURT'S HOLDING IN ALLEYNE v. UNITED STATES, 570 U.S. 99, 108, 133 S. CT. 2151, 186 L. ED. 2D 314 (2013)?

FACT(S): Your Petitioner presents this substantial ground of which was not presented in his original initial Certiorari request for relief from his criminal convictions and sentences that he should be granted Certiorari relief in light of this United States Supreme Court's precedent Alleyne v. United States, 570 U.S. 99, 108, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), which in-fact over-ruled Harris v. United States, 536 U.S. 545 122, S. Ct. 2406, 153 L. Ed. 2d 524 (2002). Your Petitioner's case and the facts establishing the sentence he received for his 18 U.S.C.S. § 924(c) conviction is certainly similar to the facts establishing the sentence Alleyne received for which this court held in defendant Alleyne's case to be unconstitutional because the judge's finding of an "element" that increased the penalty which was not submitted to the jury and found by the jury during Alleyne's criminal trial violates the Federal Constitution's Sixth Amendment.

In your Petitioner's case at matter he was tried in the Kansas District Court upon a charge pursuant-to 18 U.S.C.S § 924(c) after the Kansas District Court had actually [dismissed] the grand jury's June 21, 2011, First Superseding Indictment, on a Motion to Dismiss filed in the District Court of Kansas by the United States of America's prosecuting attorney. While

instructing the petit jury during your Petitioner's criminal trial, the district court's jury instruction on the 18 U.S.C.S § 924(c) gun charge only contained the "element" of [possession] which subject your Petitioner to a sentence of five years to life. During the sentencing phase the Kansas District Court sentenced your Petitioner to 84 months of imprisonment after the judge determined a firearm had been [brandished] during the charged crime. The "element" of [brandishing] was never presented the court's jury instructions or found by the jury during your Petitioner's criminal trial. See ATTACHMENT A, JURY INSTRUCTION NO. 19.

On April 5, 2013, the Tenth Circuit Court of Appeals AFFIRMED your Petitioner's convictions and sentences. On June 07, 2013, your Petitioner filed a writ of certiorari petition to this United States Supreme Court challenging the Tenth Circuit Court's April 5, 2013, decision. See (Supreme Court Certiorari No. 23-5584). Exactly 10 days after your Petitioner filed his certiorari request this Supreme Court decided the case Alleyne v. United States, 570 U.S. 99, 108, 133 S. Ct. 2151 (2013). Although the case Harris v. United States, 536 U.S. 545, 122 S. Ct. (2002), which allowed the sentencing judge to find aggravating or mitigating facts during the sentencing phase was controlling precedent at the time of your Petitioner's sentencing phase, this United States Supreme Court held in Alleyne v. United States, 570 U.S. 99 S. Ct. (2013), that Harris is over-ruled. See Alleyne, supra 570 U.S 99 S. Ct. (2013).

Because your Petitioner's sentencing facts on his § 924(c) gun conviction is exactly the same facts this Supreme Court found

in Alleyne v. United States, 570 U.S. 99 S. Ct. 2151 (2013), to be in violation of the Sixth Amendment in the United States Constitution and because "stare decisis" entitles your Petitioner to the benefit of the Alleyne decision, and because your Petitioner's case is in the "pipe line" of the Alleyne decision being that "finality" had not attached to your Petitioner's case at the time this United States decided Alleyne being that your Petitioner's "timely" filed certiorari petition was still pending in this Supreme Court undecided, your Petitioner is requesting for this Supreme Court to find that his § 924(c) gun sentence of 84 months because of the district Court's finding that a gun was [brandished] after the petit jury only determined that a gun was [possessed] in light of jury instruction No. 19 violates your Petitioner's sixth amendment right and VACATE the Tenth Circuit Court's April 5, 2013, decision and REMAND his case back to the Circuit Court for a further determination as to whether your Petitioner is entitled to resentencing based on this Supreme Court's holding of Alleyne v. United States, supra, 570 U.S. 99 S. Ct. 2151 (2013). This Court has held numerous of times that the failure to apply a newly declared constitutional rule to criminal cases pending on direct review at the time a decision is announced, violates basic norms of constitutional adjudication. The integrity of evenhanded justice requires that this court's Alleyne decision be applied retroactively to all who are similarly situated, such as your Petitioner's. Because this court's Alleyne decision is in fact an intervening circumstance of a substantial or controlling effect that comes after your Petitioner filed his "timely" certiorari petition your Petitioner is asking that even-handed

judicial justice be done in his case and he be granted certiorari along with judicial relief from his 84 months § 924(c) gun sentence. Your Petitioner should only be sentenced to 60 months in accordance with his petit jury's finding that he [possessed] not [brandished] a firearm during the crime. The § 924(c) [possession] "element" carries a mandatory minimum sentence of 60 months, not 84 months as your Petitioner is sentenced to. If your petitioner is granted the 24 months off his § 924(c) sentence in light of Alleyne's constitutional safe-guard sentencing decision your Petitioner will be do to get out of federal prison sometime in 2025 instead of 2027. Again, "finality" had not attached to your Petitioner's criminal direct review at the time Alleyne was decided. By "finality" this court means sentence pronounced, direct appeal exhausted and either the time for supreme court certiorari expired or certiorari "denied" by this court. Your Petitioner's certiorari petition was filed in this court on June 7, 2013, and denied on October 10, 2023, by ORDER of this court. See (No. 23-5584). Alleyne v. United States, supra, 570 U.S 99 S. Ct. 2151 (2013) was decided on June 17, 2013. Alleyne presents an intervening circumstance of a substantial controlling effect of constitutional law.

II.

WHETHER OR NOT YOUR PETITIONER WAS DEPRIVED OF A
SUBSTANTIAL RIGHT AFTER THE KANSAS DISTRICT
COURT CONSTRUCTIVELY AMENDED THE GRAND JURY'S
CHARGED OFFENSE IN ITS INDICTMENT?

FACT(S): Your Petitioner presents this substantial ground of which was not presented in his original initial Certiorari request for relief from his criminal convictions and sentences due to the "Constructive Amendment" violation incurred in his criminal case. A review of the record in your Petitioner's criminal case shows that he was held to answer for an infamous crime for which he was never indicted by a grand jury for violating. Both record indictments in your Petitioner's criminal case shows that the grand jury indicted your Petitioner for UNARMED BANK ROBBERY in violation of 18 U.S.C.S. § 2113(a). Yet during your Petitioner's criminal trial the Kansas District Court charged the jury through its jury instructions No. 18 with the offense of ARMED BANK ROBBERY in violation of 18 U.S.C.S. § 2113(d). See ATTACHMENT A, JURY INSTRUCTION No. 18. The Kansas District Court's jury instruction no. 18 track a charge of which no grand jury found that your Petitioner had violated. This jury instruction constitutes a "constructive amendment" of the grand jury's charges and the instruction violates your Petitioner's Fifth Amendment Due Process Right to only be held accountable for a charge found by a grand jury, and the Sixth Amendment right to be informed of the charges presented by a grand jury. These two rights are "substantial" rights which could not be taken away by the District Court through its jury instructions. See Ex parte Bain, 121 U.S. 1, 30 L. Ed 849, 7 S. Ct. 781 (1887). Your Petitioner's criminal trial was for an offense not found in either of the record indictments. The trial court's jury instruction no. 18 modified the charge in both returned indictments found by the grand jury before the district court [dismissed]

the grand Jury's June 21, 2011, First Superseding Indictment. The modification of the grand jury's charge destroyed your Petitioner's 'substantial' right in the Due Process Clause of the Fifth Amendment for which this court has held that the provision "no person shall be held to answer for an infamous crimes unless presented on an indictment found by a grand jury" to be [jurisdictional] in nature. Your Petitioner's Sixth Amendment right to "notice" was also destroyed by the Kansas District Court's jury instruction no. 18 which charges an offense that he could not prepare a defense against because he was not aware of it before his criminal trial proceeded to a determination.

Because this "constructive amendment" violation is jurisdictional in nature, and jurisdiction can never be waived or forfeited, See Mackin v. United, 29 L. Ed 909, 117 U.S. 348 (1886); also see Ex parte Wilson, 29 L. Ed 89, 114 U.S. 418 (1885). In Stirone v. United States, 361 U.S. 212, 4 L. Ed 2d 252, 80 S. Ct. 270 (1960), the Supreme Court held that a court cannot change the charging part of an indictment without violating the Fifth Amendment. No procedural principle is more familiar than that a constitutional right, 'or a right of any sort,' "may not be forfeited... by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it'". As the Stirone court said, "the issue was whether the [defendant] was convicted of an offense not charged in the indictment." 361 U.S. at 213, 4 L. Ed 2d 252, 80 S. Ct. 270 (Emphasis added).

A comparison of the grand jury's indictment attached hereto as ATTACHMENT A (First Superseding Indictment), compared to the district court's trial jury instruction no. 18 attached hereto

as ATTACHMENT A (Jury Instructions No. 18), clearly shows that crime presented in the trial court's jury instruction no. 18 is a modified offense of what the grand jury charged in your Petitioner's indictment. Compare First Superseding Indictment Count 1 to Jury Instruction No. 18. The forth aggravating "element" presented in jury instruction no. 18 which reads as follows:

"puts in jeopardy the life of any person by the use of a dangerous weapon or device..." (See Jury Instruction No. 18) This element tracks the language of the offense for ARMED BANK ROBBERY of which your Petitioner was never charged by the grand jury in either of its December 7, 2010, Original Indictment, nor its June 21, 2011, First Superseding Indictment. Wherefore, the trial court's jury instruction no. 18 modified the grand jury's charge in its indictment which presents a "constructive amendment" violation that has deprived your Petitioner of a 'substantial' right embedded in the Fifth and Sixth amendments of our United States of America Constitution. (Compare Jury Instruction No. 18 to Documented Record Indictment(s) attached hereto as ATTACHMENT A).

REQUESTED RELIEF

Your Petitioner is requesting for this Supreme Court of the United States of America to take NOTICE of these substantial violations concerning your Petitioner's Fifth and Sixth Amendments Constitutional "rights", and GRANT his Certiorari Petition so this Court can GRANT him the relief he is ENTITLED to.

Respectfully Requested,

RAYMOND L. ROGERS, pro se.

CERTIFICATE OF SERVICE

I, RAYMOND L. ROGERS, certify (declare, state, or verify) that I have served one true copy of this forthcoming [Petition for a Rehearing of Certiorari in Case No. 23-5584] upon the Clerk's Office in the United States Supreme Court located at 1 First Street, Washington, DC 20543-0001, after being deposited in the internal legal mail system located at FCC Forrest City Correctional Complex, after having being affixed with First-Class pre-paid U.S. postage on this 18th day, in October 2023.

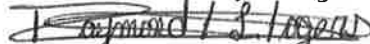
Respectfully Signed,



RAYMOND L. ROGERS.

I, swear under penalty of perjury of laws of the United States of America that the facts presented in my Petition For a Rehearing of Certiorari request filed in cause No. 23-5584 is true to the best of my knowledge and that facts of when I served this Rehearing Petition upon the Clerks Office of the United States of America is true and correct, in accordance with 28 U.S.C.S. § 1746 Declaration. On October 18, 2023.

Respectfully Signed,



RAYMOND L. ROGERS