No. 18-5770

IN THE
Supreme Court of the United States

JOHN DENTON ROUSE, JR.,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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REPLY TO THE BRIEF IN OPPOSITION

Donna Lee Elm
Federal Defender

Ali Kamalzadeh, Counsel of Record
Research and Writing Attorney
Florida Bar No. 0115995
Federal Defender's Office
201 South Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338
Facsimile: (407) 648-6765
E-mail: Ali_Kamalzadeh@fd.org

REPLY TO THE BRIEF IN OPPOSITION

For the foregoing reasons, the petition should be granted.

I. A Conflict Exists Between the Eleventh Circuit and the State of Florida, the Results of Which Treat Individuals Differently who are Charged in Drug Cases

The United States asserts, "[t]he decision below does not conflict with *Greenwade*,[1] and it does not conflict with any decision of this Court or another court of appeals." Response at 7. However, the Eleventh Circuit itself, in its decision below stated that it "[could] not adopt the bright-line rule from *Greenwade* because it conflicts with [its] prior precedent in *United States v. Baggett*, 954 F.2d 674, 677–78 (11th Cir. 1992)." *United States v. Rouse*, 732 F. App'x 853, 857 (11th Cir. 2018). Moreover, the Eleventh Circuit's decision in *Baggett* and the string cites the United States relies on in support of its response all fail to address the impact of *Alleyne v. United States*, 570 U.S. 99 (2013) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as all of the circuit decisions pre-date *Alleyne*.

Thus, the United States' response misconstrues the issue raised by Mr. Rouse in his petition. That is, whether the process of commingling creates an unjustifiable risk to due process when law enforcement combines and weighs the contents of bags that are similar in appearance, but do not contain controlled substances, with bags that do contain controlled substances, the weight of which triggers the requisite statutory minimum mandatory sentence. Petition at 8-9. Rather, the United States frames the issue, as a challenge to the sufficiency of circumstantial evidence in

[1] *Greenwade v. State*, 124 So. 3d 215 (Fla. 2013).

support of a criminal conviction. Response at 7-8.

The United States' reliance on all 11 circuit court cases pre-date *Alleyne* and do not address the issue of misidentification ***and*** commingling triggering a statutory minimum mandatory sentences. Rather, the majority of circuit cases relied on by the United States deal with sufficiency of evidence in identification of an illicit substance when no substance existed. Thus, the United States relied upon circumstantial evidence to support the criminal conviction and ***not*** the actual weight of the controlled substance in question. *See United States v. Walters*, 904 F.2d 765, 770 (1st Cir. 1990); *United States v. Gaskin*, 364 F.3d 438, 460 (2d Cir. 2004); *Griffin v. Spratt*, 969 F.2d 16, 22 n.2 (3d Cir. 1992); *United States v. Durham*, 464 F.3d 976, 984-985 (9th Cir. 2006); *Baggett*, 954 F.2d at 677–78.

The remainder of cases cited by the United States relies on identification of controlled substances through historical market sales or post-market sales. *See United States v. Dolan*, 544 F.2d 1219, 1221-1222 (4th Cir. 1976); *United States v. Osgood*, 794 F.2d 1087, 1095 (5th Cir. 1986); *United States v. Wright*, 16 F.3d 1429, 1439 (6th Cir. 1994); *United States v. Sanapaw*, 366 F.3d 492, 496 (7th Cir. 2004); *United States v. Cole*, 537 F.3d 923, 927 (8th Cir. 2008); *United States v. Sanchez DeFundora*, 893 F.2d 1173, 1175-1176 (10th Cir. 1990). The issue presented here in Mr. Rouse's case, where white-like filler substances are combined with pre-market cocaine to create an aggregate weight and then testified to as a market ready controlled substance that triggers a statutory minimum sentence.

II. Constitutional Protections Apply Equally to Federal Individuals as it does to State Individuals to Prove Drug Quantity

Florida has a statutory structure that punishes individuals who are charged with trafficking in certain drug quantities, so to do Federal statutes. *Compare* Fla. Stat. § 893.135(1)(b)(1)-(2) *with* 21 U.S.C. §§ 841(b)(1)(A) (such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life) and 841(b)(1)(B) (such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years).

Here, Mr. Rouse did not have an opportunity to raise a due process defense when law enforcement commingled multiple packages that created an aggregate weight triggering a five-year mandatory minimum sentence pursuant to § 841(b)(1)(B). There is no reason why individuals charged in Federal court should be treated differently than individuals charged with similar drug trafficking offenses in State court. The bright-line rule under *Greenwade* requiring law enforcement to chemically test any substance before combining the contents to meet a minimum statutory threshold if there is an identifiable danger of misidentification is not a burdensome application for this Court to consider.

Moreover, *Greenwade* cautions that the rule only applies when the substance is one that poses an identifiable danger of misidentification. Indeed, as discussed earlier Officer Cook misidentified the substances seized at Mr. Rouse's residence, testified that he doesn't go to court without lab verification, and that on more than one occasion he believed he had submitted a mixture or substance containing a

detectable amount of drugs and was informed that mixture of substance contained nothing. *See supra* pp. 32-33.

This Court, in order to effectuate both the statutory and congressional intent behind 21 U.S.C. §§ 841(a) and 841(b), should hold that in order to establish beyond a reasonable doubt that individually wrapped packets meet the statutory threshold for weight in prosecutions, the government must chemically prove that each individually wrapped packet contains at least a detectable amount of mixture of a controlled substance before it may combine the contents and determine whether those contents meet the statutory threshold for weight.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

Donna Lee Elm
Federal Defender

/s/ Ali Kamalzadeh
Ali Kamlzadeh
Research and Writing Attorney
Florida Bar No. 0115995
Federal Defender's Office
201 S. Orange Avenue, Suite 300
Orlando, FL 32801
Telephone: (407) 648-6338
Facsimile: (407) 648-6095
E-mail: Ali_Kamalzadeh@fd.org
Counsel of Record for Petitioner