No.

---

IN THE

SUPREME COURT OF THE UNITED STATES

---

ALLEN GORION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

---

On Petition for Writ of Certiorari to the
Ninth Circuit Court of Appeals

---

# PETITION FOR WRIT OF CERTIORARI

VERNA WEFALD
65 North Raymond Avenue, Suite 320
Pasadena, California 91103
Telephone: 626-577-2658
Facsimile: 626-685-2562
Email: verna@vernawefald.com

*Counsel of Record*

## QUESTION PRESENTED

Whether certiorari should be granted to set forth some guidelines in determining when a sentence is *unreasonable*?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

No.

---

IN THE

SUPREME COURT OF THE UNITED STATES

---

ALLEN GORION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

---

**PETITION FOR WRIT OF CERTIORARI**

Petitioner Allen Gorion respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed on July 2, 2018. The decision is unpublished.

## OPINION BELOW

On July 2, 2018, the Court of Appeals entered its decision affirming petitioner's drug trafficking convictions and resulting 216 months sentence (18 years). (Appendix A [memorandum decision].) On July 18, 2018, the petition for panel rehearing was denied. (Appendix B.)

## JURISDICTION

On July 18, 2018, the Court of Appeals denied the petition for rehearing. (Appendix B.) Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is due for filing on October 16, 2018. Supreme Court Rules 13(3). Jurisdiction existed in the District Court pursuant to 18 U.S.C. §3231 and in the Ninth Circuit Court of Appeals under 28 U.S.C. §1291.

## STATUTORY PROVISION INVOLVED

18 U.S.C. § 3553(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.

## STATEMENT OF THE CASE

On June 17, 2015, after a dog alert, a postal inspector obtained a warrant to search a suspicious parcel that had arrived from North Hollywood, California addressed to only to "Katherine" at an apartment on Panana Street in Honolulu, Hawaii. Six pounds of methamphetamine were discovered in a toaster oven box inside the package. The drugs were replaced with pseudo methamphetamine ("pseudo meth") and dusted with sirchie powder which is visible only in fluorescent light. The toaster oven with the fake drugs (along with a beeper) were repackaged and delivered to the Panana Street address while police conducted surveillance.

Officers saw a white Subaru driven by Petitioner pull into the parking lot. A man, later identified as codefendant Leland Akau, got out of the passenger seat and went inside the apartment. When the postal inspector delivered the parcel with the pseudo methamphetamine, Akau signed for it. Ten minutes later Akau came back outside and put

a black satchel in the trunk of the Subaru. Akau got back in the passenger seat and the car drove off.

Officers followed the Subaru to Ernest Kaahanui's house. Twenty minutes later the Subaru returned to the Panana Street address. Akau got out and exchanged hand signals with a woman in the parking lot. Petitioner never got out of the car.

Akau was seen putting a box in a dumpster. An officer retrieved the box and found the empty toaster oven box. Akau was arrested after he left in a different car.

Meanwhile Petitioner had driven off by himself. When he was stopped by police, they smelled marijuana inside the car. After taking Petitioner to the police station, officers found a black satchel containing the pseudo meth. Petitioner admitted to dealing small amounts of marijuana. Police also detected sirchie powder on his arms.

There were text messages between Petitioner and Kaahanui in May and June about drug trafficking but none in July. In one text message Petitioner told Kaahanui can you "trust me on this one" to which Kaahanui responded "no way." (1 ER 16.) Petitioner and Akau had phone contact on the day he was arrested but it was unknown what the two spoke about.

At trial, Petitioner testified that he had used marijuana and methamphetamine on a daily basis for years. He denied knowing there was methamphetamine in the trunk of his car and knew nothing about a package arriving from California. He did not know how

the sirchie powder got on his arms. A defense expert testified that sirchie powder can be readily transferred by air and/or from one human being to another without direct contact.

After Petitioner was convicted, in an effort to accept responsibility under the guidelines, he wrote a letter to the court admitting that when he drove off Akau had just told him there were drugs in the car and that he should get rid of them. He apologized for lying but still denied he had anything to do with drug trafficking.

Petitioner also presented evidence that he suffered from severe Attention Deficit Hyperactivity Disorder ("ADHD"), after first being diagnosed when he was four years old. His ADHD caused behavior problems, including fighting. He had difficulty focusing, struggled in school, was learning disabled (most likely dyslexic) and suffered from depression. He was prescribed medicine, including Dexedrine and anti-depressants and also began using marijuana, methamphetamine, and alcohol in the seventh grade. His behavior problems required counseling and even hospitalization. (Sealed ER 70-72.) At the time of his arrest, Petitioner was living in his car.

Forensic psychologist Dr. Marvin Acklin evaluated Petitioner by reviewing his prior medical and psychiatric records, by administering tests, and by speaking with his family. Petitioner was taken off medication at age 14, at which time his behavior problems escalated. His mother believed his substance abuse problems began at that time. (Sealed ER 116.) Given the prevalence of prescribing stimulant medications for children with ADHD,

there is always a concern that this will later cause methamphetamine abuse. Amphetamines are the most abused prescription medications. (Sealed ER 121.)

Dr. Acklin determined that Petitioner had average intellectual functioning but noted that during his interviews he was restless and had a very hard time staying focused. (Sealed ER 117-119.) Dr. Acklin concluded that Petitioner:

> has suffered from ADHD problems since preschool. As a youth, the impact of his ADHD was aggravated by co-morbid Conduct Disorder. His ADHD, based on the consequences for his subsequent life course, would be considered severe. His school failure, conduct disorder, and history of methamphetamine use are directly tied to his hyperactive ADHD. He continues to clinically demonstrate ADHD symptoms. Complicating the ADHD picture is his history of methamphetamine abuse and dependence. Given his high probability of relapse, there is a likelihood that stable and consistent substance abuse treatment and drug abstinence would significantly alter Allen's pattern of self-destructive behavior and reduce his recidivistic risk.

(Sealed ER 122.)

At the sentencing hearing, Dr. Acklin testified to Petitioner's ADHD: "In terms of the symptoms and in terms of the associated impairments and his social, occupational, educational and legal functioning, I would rate it as severe." (4 ER 914.) ADHD is classified as a mental disorder in the DSM-V, and is now thought to be a neurobiological disorder. (4 ER 915.) It is a chronic condition that originates in childhood and lasts for the rest of one's life. (4 ER 918.) Petitioner's probability of relapse was for "a substance abuse disorder." (4 ER 920.) However, if his ADHD were "treated properly, it reduces the probability of substance abuse relapse." (4 ER 922.) Petitioner should be treated for his ADHD primarily by a psychiatrist. He should be treated for his substance abuse disorder as well. (4 ER 923.)

The district court found that Petitioner was not credible when he denied being involved in the drug conspiracy and only found out about the drugs after the fact when codefendant Akua told him to get rid of the drugs. The court did believe the PSR calculation of the guidelines of 262 to 327 months was too harsh, but still imposed a sentence of 216 months. In order to "afford adequate deterrence as well as protect further crimes from the defendant, I believe a substantial sentence is necessary." (4 ER 935.) The sentence was "driven by the fact that he didn't get acceptance of responsibility and he did get obstruction." (4 ER 935.) The court believed that Petitioner's role was less than that of Kaahanui but was not sure whether it was less than Akau. (4 ER 935-936.) The court was certainly aware of Petitioner's severe ADHD but did not focus on it when pronouncing sentence.

On appeal, Petitioner argued that the evidence he was involved in drug trafficking was insufficient. Police had him under surveillance the entire time and he never got out of the car or was seen touching the black bag with drugs in it. He also argued that his 216 months sentence was unreasonable. The Ninth Circuit affirmed. (Appendix A.) In regards to the sentence, the Court of Appeals held that he was not entitled to a 2-4 level reduction for being a minor participant as there was little evidence he was less culpable than Akau. On rehearing, Petitioner pointed out that he did not argue his sentence was unreasonable for failure to be awarded minor role, but rather contended it was unreasonable because he suffered from severe ADHD. The petition for rehearing was denied without comment.

## REASONS FOR GRANTING THE WRIT

## THIS COURT SHOULD GRANT CERTIORARI TO PROVIDE SOME GUIDANCE FOR THE LOWER COURTS TO DETERMINE WHEN A SENTENCE IS UNREASONABLE

This Court has handed down decisions that provide guidance to the lower courts in determining if a sentence is reasonable. It has also provided guidance on ascertaining whether a judge's reasons for imposing a particular sentence are adequate. What is missing from this Court's jurisprudence is some guidance to determine when a sentence is unreasonable. The federal courts of appeals must set aside sentences that are "unreasonable." *Rita v. United States*, 551 U.S. 338, 341 (2007) citing *Booker*, 543 U.S. at 261-263. But there is a dearth of authority to help the appellate courts decide whether a sentence is unreasonable.

This Court has held that: "Appellate review of sentencing decisions is limited to determining whether they are reasonable." *Gall v. United States*, 552 U.S. 38, 46 (2007). Now that the guidelines are only advisory, *United States v. Booker*, 543 U.S. 220 (2005), the district court is required to choose a sentence that is "sufficient, but not greater than necessary, to comply with" 18 U.S.C. § 3553(a)(2).

The circuit courts may apply a presumption of reasonableness to a within guidelines sentence, but that presumption is "not binding." *Rita* at 347. "Nor does the presumption reflect strong judicial deference of the kind that leads appeals courts to grant

greater factfinding leeway to an expert agency than to a district judge." *Ibid.* It simply reflects that the Sentencing Commission and the sentencing judge have reached the same conclusion and increases the likelihood that the sentence is reasonable. *Ibid*. By the same token, "the fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness." *Id.* at 354-355.

In *Rita*, this Court also held that a judge's reasons for imposing the sentence it did, even if "brief" may nevertheless be "legally sufficient." *Id*. at 356.

> The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends on the circumstances. Sometimes a judicial opinion responds to every argument; sometimes it does not; sometimes a judge simply writes the word 'granted' or 'denied' on the face of a motion while relying upon context and the parties' prior arguments to make the reasons clear. The law leaves much, in this respect, to the judge's own professional judgment.

*Rita*, 551 U.S. at 356.

But the sentencing judge should "set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision making authority." *Id.* "Just how much of an explanation this requires, however, depends, as we have said, upon the circumstances of a particular case." *Chavez-Meza v. United States*, ___ U.S. ___, 138 S.Ct. 1959, 1966 (2018) citing *Rita*, 551 U.S. at 357.

Thus far, the Ninth Circuit has found only one sentence to be unreasonable. In *United States v. Amezcua-Vasquez*, 567 F.3d 1050, the Court of Appeals vacated and remanded a sentence for being unreasonable under *Booker v. United States*, 543 U.S. 220 (2005). The defendant pled guilty to illegal entry. His sentence was enhanced by 16 levels due to an aggravated felony for a crime of violence (assault with great bodily injury and attempted manslaughter). *Id*. at 1051-1052. The Ninth Circuit found the enhancement and resulting 52 months sentence to be unreasonable because the aggravated felony was 25 years old. *Id*. at 1054-1055. Under the totality of circumstances, the 16 level enhancement substantially overstated the nature and circumstances of the offense. *Id.* at 1055.

The lower courts are in dire need of assistance in deciding whether a sentence is unreasonable. Petitioner's case presents a good opportunity to hand down some parameters. Although the district court imposed a slightly below guidelines sentence, Petitioner's sentence of 18 years is particularly harsh in light of his *severe* ADHD, his longtime drug addiction and homelessness at the time of the offense, and the failure of the government to prove that he was anything other than the driver of a car for the codefendant who handled the drugs.

## CONCLUSION

For the reasons expressed above, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Date: September 5, 2018 Respectfully submitted,

VERNA WEFALD

*Counsel of Record*