

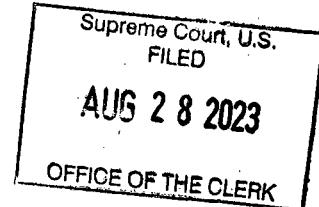
IN THE  
SUPREME COURT OF THE UNITED STATES.

No. \_\_\_\_\_

ORIGINAL

23-6943

MICHAEL LAWRENCE KERLIN  
Petitioner,

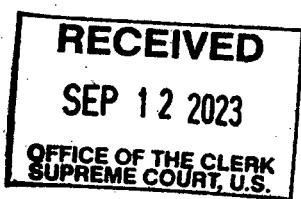


-against-

UNITED STATES OF AMERICA  
Respondent

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

Michael Lawrence Kerlin  
Reg. No. 92994-083  
Federal Correctional Institution  
P.O. Box 2000  
Joint Base MDL/NJ 08640



QUESTIONS PRESENTED

1. Whether a cross reference which has a disproportionate effect on the sentence requires a higher standard of proof than mere proponderence.
2. Whether lack of evidence should be a pathway to conviction for a crime of a greater severity than one to which evidence is presented.

PARTIES

The Petitioner, is Michael Lawrence Kerlin ("Mr. Kerlin") acting pro se, is a prisoner at the Federal Correctional Facility of Fort Dix located in Joint Base/MDL, NJ. The Respondent is the United States of America.

Table of Authorities

McMillan v. Pennsylvania, 477 U.S. 79 (1986)

United States v. Booker, 543 U.S. 220 (2005)

United States v. Grubbs, 585 F.3d 793 (4th Cir. 2009)

United States v. Hammon, 381 F.3d 316 (4th Cir. 2004)

United States v. Pineda-Dolan, 514 F.3d 1089 (9th Cir. 2010)

DECISION BELOW:

The decision of the United States Court of Appeals for the Fourth Circuit is reported at and a copy is attached as Appendix A to the petition (A.1).

The order of the district court for Virginia is not reported. A copy is attached as Appendix B to the petition (A.2).

Jurisdiction

The judgment of the United States of Appeals for the Fourth Circuit was entered in, United States v. Michael Lawrence Kerlin, 2023 U.S. App. LEXIS 3597 (4th Cir. 2022)(unpublished). An order denying a petition for rehearing was entered in, United States v. Lawrence Kerlin, 2023 U.S. App. LEXIS 14006 (4th Cir. 2023), petition for rehearing en banc (unpublished), and a copy of that order is attached as Appendix A to the petition (A.3). Jurisdiction is confirmed by 28 U.S.C. Section 1254(1).

Constitutional Amendment Provision Involved

This case involves Amendment V to the United States Constitution, which provides:

no person shall "be deprived of life, liberty, or property, without due process of law ...."

Statement of the Case

In November 2015, Mr. Kerlin called 911 to report that he had found Wendy Hinkle ("Ms. Hinkle") unconscious after she snorted heroin at his residence. Ms. Hinkle passed away a few days later.

Six months later, after finding the dead body of Ms. Hull in his home, Mr. Kerlin moved the body to his office using a trash container and dolly. While waiting for his secretary's help to move Ms. Hull's body and car back to her home Mr. Kerlin was arrested. (Mr. Kerlin pled guilty to the state of Virginia for moving the body of Ms. Hull and served 1 year.) After the body was found a few days later by Mr. Kerlin's father, officers searched Mr. Kerlin's house and found Ms. Hull's car, purse, and phone.

A medical examiner could not conclusively determine the cause and manner of Ms. Hull's death. Multiple "illicit drugs," including cocaine and heroin, were found in Ms. Hull's blood. J.A. 302. But, the autopsy report also noted that Ms. Hull had "multiple blunt force head Injuries," and that suffocation could not be ruled out because of her position in the container. Id. The examiner also found several "natural patholog[ies]" that could have contributed to her death, including "an enlarged heart" and arterial and cerebral plaque buildup.

Id; see also J.A. 207-13.

One of Mr. Kerlin's employees at Dixie Fuel told investigators that she called him and learned that Ms. Hull had died and was at the gas station. The employee said Mr. Kerlin asked her for help moving Ms. Hull's car from his garage back to Ms. Hull's house.

An inmate who was housed in the same Virginia jail with Mr. Kerlin alleged Mr. Kerlin had stated to him he had "shot up" Ms. Hull with heroin, she overdosed and did not call for help because he would be charged with murder. Mr. Kerlin denied that he had "shot up" Ms. Hull with heroin. Mr. Kerlin's denial was conclusively supported by the medical examiner who found no signs of

needle punctures on Ms. Hull's body. Mr. Kerlin did acknowledge that he had shared drugs with Ms. Hull on May 5, 2016.

Adam Rose, a convicted drug dealer (Case number CR91020731-00), provided testimony that he was at Mr. Kerlin's house on May 6, 2016, and observed Ms. Hull cleaning the kitchen.

Looking for answers after finding Ms. Hull dead, Mr. Kerlin called Adam Rose. Adam Rose testified that on May 7, 2016, he spoke to Mr. Kerlin, and Mr. Kerlin told him that he "thought" what had happened earlier in the week had happened again. (Measha Williams had almost overdosed with Adam Rose earlier in the week).

On February 21, 2021, Mr. Kerlin pled guilty to maintaining a drug premises, distribution of heroin, and unlawful user of controlled substances in possession of a firearm.

#### BASIS FOR FEDERAL JURISDICTION

This case raises a question of interpretation of the Due Process Clause of the Fifth Amendment to the United States Constitution. The district court had jurisdiction under the general federal question jurisdiction conferred by 28 U.S.C. 1331.

#### REASON FOR GRANTING THE WRIT

##### A. Conflicts with Decisions of Other Courts

The Fourth Circuit Court of Appeals has held that post United States v. Booker, 543 U.S. 220, 125 S.ct. 738, 160 L. Ed. 2d 621 (2005) that Booker nullified "[w]hatever theoretical validity may have attached to the McMillan

[tail wagging the-dog] exception." United States v. Grubbs, 585 F.3d 293 793, 801 (4th Cir. 2009). Whereas, the Ninth Circuit Court of Appeals has adopted a conflicting position where a court cross references and it has a disproportionate effort on sentence underlining the cross reference then it must be heard by clear and convincing evidence. United States v. Pineda-Douan, 614 F.3d 1019, 1041 (9th Cir. 2010).

#### B. Importance of the question presented

##### 1. Cross Reference Due Process Concerns

Mr. Kerlin contends that for the cross reference of second-degree murder to pass constitutional muster the Government by a higher standard of proof is warranted because application of the cross reference substantially increased his guidelines range. McMillian v Pennsylvania, 477 U.S. 79, 87-88, 106 S. Ct 2411, 91 L. Ed. 2d 67 (1996), the Supreme Court suggested a higher standard of proof should apply where the finding of certain facts would greatly enhance the defendant's sentence. Also, relying on subsequent Supreme Court precedent, the Fourth Circuit Court of Appeals recognized that "[p]roof by a preponderance of evidence is sufficient as long as the enhancement is not 'a tail which wags the dog of the substantive offense.'" United States v. Montgomery, 262 F.3d 233, 249 (4th Cir. 2001)(quoting United States v. Watts, 519 U.S. 148, 156 n.s 117 S, Ct 633, 136 L. Ed. 2d 554 (1997)(quoting McMillan)); see also United States v. Hammond, 381 F.3d 316, 345-55 (4th Cir. 2004)(“While this court has taken the language of McMillan as an indication that the Due Process Clause imposes some limitations on the use of sentencing factors proven only by a preponderance of the evidence, we have never defined those limits and have

never declared a sentence invalid on the basis that a sentencing factor was established by an inadequate standard of proof." (citations omitted)), vacated, 543 U.S. 1097, 125 S. Ct. 1051, 106 L. Ed. 2d 997 (2005).

However, post United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005) this Court has held that Booker nullified "[w]hatever theoretical validity may have attached to the McMillan [tail-wagging-the-dog] exception." United States v. Grubbs, 585 F.3d 793, 801 (4t Cir. 2009). Mr. Kerlin asserts this Court should review its precedent in Grubbs as the case sub judice illustrates the due process concerns that arise when a cross-reference increases the low end of the guideline range by a astronomical and absurd 1400 percent and increase the high end of the guideline range an equally absurd 2300 percent based on a preponderance of the evidence standard. Mr. Kerlin suggests that the Framers who enshrined the "beyond reasonable doubt standard" in our Constitution would have never allowed such an affront to due process, neither should this Court.

## 2. Lack of Causation

There was no direct conclusive evidence that anything Mr. Kerlin did or did not do resulted in Ms. Hull's death. Moreover, the alleged circumstantial evidence was woefully inadequate for the district court to draw a permissible inference that Mr. Kerlin caused Ms. Hull's death.

Although the burden of proof in the case always rests with the Government, the Government and the district court seemed to proceed as Mr. Kerlin had the burden. Mr. Kerlin did not have to prove that his action(s) did not cause Ms. Hull's death. Rather, the burden was on the Government. The mere unfortunate fact that Ms. Hull died was not enough. The Government had to come forward

with sufficient evidence to prove that Mr. Kerlin's conduct resulted in Ms. Hull's death which it failed to do.

The relevant evidence supports Mr. Kerlin's position. The uncontroverted historical fact is that Adam Rose, a convicted drug dealer, had visited at least a day after Mr. Kerlin had shared heroin Ms. Hull. Evidence shows Mr. Kerlin was away on errands at the time of Adam Rose's visit with Ms. Hull.

Moreover, there was no permissible inference that Mr. Kerlin injected Ms. Hull with heroin. On the contrary, objective medical evidence conclusively confirms he did not. Likewise, there was no permissible inference that Mr. Kerlin injected Ms. Hinkle with heroin other than the self-serving opinion of Meesha Williams, a convicted violent felon. In short, one can neither assume nor draw a reasonable inference that Mr. Kerlin's conduct resulted in Ms. Hull's death from narrative fact "A," that Ms. Hull died, one may not infer fact "B" that Mr. Kerlin caused Ms. Hull's death. For a passage of a narrative fact to form an inferred fact to be valid, it must be at a minimum a reasonable probability the conclusion flows from the evidentiary datum because of experience in human affairs. The district court's impermissible inference of ultimate fact under these circumstances was to substitute the experience of logical probability for what can only be described as "mere speculation."

The district court drew an inference that because Ms. Hull was seen alive in Kerlin's home, and then, died in Mr. Kerlin's home, that Mr. Kerlin was somehow responsible for her death. Such an inference may not be reasonably drawn here. It is an example of what is described as the "Fallacy of Drawing an Affirmative Conclusion from a Negative Premise." Cepi, Introduction To Logic 221 (7th ed. 1986). See also D. Fisher, Historians Fallacies, 47 (70) ("The fallacy of negative proof attempt to sustain a factual proposition

merely by negative evidence."). This type of reasoning is unacceptable because of the difficulty in sustaining a factual proposition merely by negative evidence.

The correct method for the district court, or any court, was to find affirmative evidence that Mr. Kerlin had caused Ms. Hull's death. This is absolutely necessary if logical order is to be preserved in our legal system. The district court's requiring Mr. Kerlin to disprove various negatives was an impossible task for Mr. Kerlin. The Government's tactics of putting forth several possibilities for Ms. Hull's death turned Mr. Kerlin's prosecution into a game of "whack-a-mole." Indeed, now that Mr. Kerlin has irrefutably disproven the one possibility he could objectively "whack" of the Government's injection possibilities theory as Ms. Hull's cause of death then other possibilities popped up that required that Mr. Kerlin to disprove negatives--an impossible task.

The mere fact that Ms. Hull died while she was a guest in Mr. Kerlin's home does not ipso facto mean that she died as a result of anything Mr. Kerlin did or did not do. Accordingly, Mr. Kerlin's conviction requiring him to dispose of negatives cannot stand.

### 3. Lack of Evidence

Had the Medical examiner conclusively determined Ms. Hull's death was the result of an overdose from drugs and the Court determined that these drugs were provided by Mr. Kerlin then he could have been convicted of the "death or serious bodily harm" cross reference. This lack of evidence allows the prosecution to present a scenario to which the Medical Examiner could only say

she "couldn't rule out." This does not even meet the preponderance of evidence burden of proof.

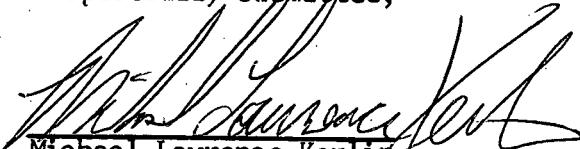
This circumvention for the need of proof paved the way for the more severe conviction of the second degree murder cross reference which carries more harsh penalties in the Bureau of Prisons including the exclusion of many program benefits.

#### CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

This the 28 day of August, 2023

Respectfully submitted,



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