

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

ALLEN GOOSSEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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May 1, 2018

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

ALLEN GOOSSEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

QUESTION PRESENTED FOR REVIEW

Are the Fifth and Sixth Amendments violated by imposition of sentences many times longer would otherwise be found substantively reasonable that are based on uncharged conduct findings made under the preponderance standard?

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

ALLEN GOOSSEN,

Petitioner,

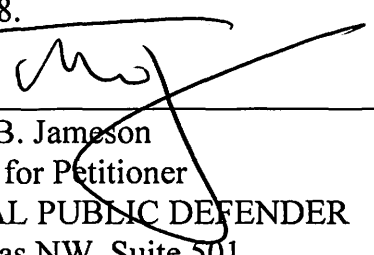
vs.

UNITED STATES OF AMERICA,

Respondent.

DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Thomas B. Jameson, Federal Public Defender for the District of New Mexico, declare under penalty of perjury that I am a member of the bar of this court and counsel for Petitioner Allen Goossen and that I caused to be mailed a copy of the petition for writ of certiorari to this court by first class mail, postage prepaid by depositing the original and ten copies in an envelope addressed to the Clerk of this Court, in the United States Post Office at 1135 Broadway Blvd. NE, Albuquerque, New Mexico, at approximately 5:36 p.m. on the 1st day of May 2018.



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

Petitioner Allen Goossen respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming his sentence.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, *United States v. Goossen*, 10th Cir. No. 16-2252, 2018 WL 635997 (10th Cir. 2018), affirming Mr. Goossen's sentence, was filed January 31, 2018. That opinion is attached as Appendix A to this petition. The Amended Judgment in a Criminal Case, dated November 9, 2016, is attached as Appendix B. The transcript of the district court's overruling of Mr. Goossen's objection to the increase to his sentence is attached as Appendix C.

JURISDICTIONAL STATEMENT

The district court had jurisdiction of this case under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction of the appeal of the district court's ruling pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The Tenth Circuit entered its judgment affirming Mr. Goossen's sentence on January 31, 2018. Pursuant to Supreme Court Rule 13.1 and 13.3, this petition is timely filed if filed on or before May 1, 2018.

FEDERAL LAWS AT ISSUE

The federal constitutional provisions involved in this case are the Fifth and Sixth Amendments. The Fifth Amendment provides in part:

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

The Sixth Amendment provides in part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . , to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . .

STATEMENT OF THE CASE AND FACTS

Defendant-Appellant Allen Goossen was charged by indictment filed in the United States District Court for the District of New Mexico, with one count of heroin distribution, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Count 1), and one count of possession with intent to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) (Count 2). The indictment made no allegation of Mr. Goossen's involvement in the death of Bryan Sutton.

Mr. Goossen pleaded guilty without the benefit of a plea agreement. There was no mention at the plea hearing of the death of Bryan Sutton. The factual basis presented by the government and admitted by Mr. Goossen stated that in December 2014, Mr. Goossen sold about six grams of heroin to an undercover officer. When he was arrested for that heroin sale, he was found to be in possession of about six packaged grams of heroin that he admitted he intended to sell.

The probation officer calculated Mr. Goossen's guidelines' range, based upon his total offense level of 13 and criminal history category II, as 15-21 months. The statutory maximum term of imprisonment was 20 years. The probation officer advised the district court to impose a sentence within the advisory guidelines' range.

The presentence report ("PSR") noted, as offense behavior that was not relevant conduct, that Mr. Goossen was called for help on November 30, 2013, by his friend, Bryan Sutton, who was in the throes of severe heroin withdrawal. Mr. Goossen went to

Mr. Sutton's home and found him very intoxicated. In response to a desperate plea from Mr. Sutton, Mr. Goossen injected him with heroin. Mr. Sutton became unresponsive shortly thereafter and was rushed to the hospital, where he died shortly thereafter. The autopsy report indicated the presence of heroin in Mr. Sutton's system when he died.

During the proceedings in this case, Mr. Goossen faced pending state charges related to Mr. Sutton's death. The state case was unresolved at the time of Mr. Goossen's sentencing in this case.

With respect to the charges in this case, the PSR recounted Mr. Goossen's sale of heroin in December 2014 and the discovery of heroin on his person during a January 2015 traffic stop. Mr. Goossen admitted to a detective that he sold heroin and that the heroin found on him was packaged for sale. There was no indication of Mr. Goossen's involvement with other individuals in trafficking drugs.

Prior to sentencing, the government requested an upward departure or variance based on Mr. Goossen's distribution of heroin after the death of Bryan Sutton. Mr. Goossen responded that a sentencing increase based on conduct related to Mr. Sutton's death more than a year before the conduct that resulted in the charges in this case would violate the Fifth and Sixth Amendments because it was unrelated to the offenses of conviction and he had not been charged, had not admitted, and had not been found guilty beyond a reasonable doubt of conduct related to Mr. Sutton's death. He pointed out that the government had not charged him under 21 U.S.C. § 841(b)(1)(C), which provides for

a mandatory minimum 20-year sentence “if death or serious bodily injury results from the use of” specified controlled substances.

Mr. Goossen argued that a sentencing increase based on Mr. Sutton’s death would be improper because it occurred more than a year before the undercover heroin sales underlying the offenses of conviction and did not involve the same course of conduct. Further, he contended that any relevant conduct used to enhance a sentence must be based on the offense of conviction and he had not been convicted of any conduct related to Mr. Sutton’s death.

The government argued that because Mr. Sutton’s death resulted from heroin distribution, it was part of the “offense of conviction.” The government maintained that an upward variance would be constitutional so long as it did not alter the statutory mandatory minimum or maximum sentences.

The district court held an evidentiary hearing and heard testimony from three witnesses about the events leading up to Bryan Sutton’s death. Tanya Orpi , Sutton’s friend who was with him before he died, testified that on November 29, 2013, she and Sutton drank heavily. Mr. Sutton informed Ms. Orpi that he was no longer allowed to see his son because of his heavy drinking.

Ms. Orpi spent that night at Mr. Sutton’s house. During that night, he got cold sweats and vomited “a lot,” at least five times. She saw blood in his vomit. Eventually, he fell asleep on the floor near the toilet.

The next morning, Ms. Orpi and Mr. Sutton resumed drinking and drank heavily as the day progressed. Another friend, Chris, arrived around noon and the three of them traveled by car to the residence of someone he knew and bought prescription pills. Chris gave some of the prescription pills to Mr. Sutton.

That night, Mr. Sutton was again stricken with vomiting attacks. He became ill from heroin withdrawal. He grew panic-stricken and said he felt like he would die. He made a phone call, pleading for help getting heroin.

In response to Sutton's call, Mr. Goossen came with a friend, Dusty Taylor, to Mr. Sutton's house. Mr. Sutton was slumped over the toilet when Mr. Goossen got there and incapable of injecting himself. While Ms. Orpi held Mr. Sutton's hand, Mr. Goossen injected Mr. Sutton with heroin from a preloaded syringe.

Mr. Sutton reacted immediately with pleasure, then slumped over between the toilet and the wall with his eyes rolled back in his head. His breathing slowed and he became unresponsive. Mr. Goossen sprayed a nasal spray into Mr. Sutton's nose in an attempt to revive him, to no avail. Although they rushed him to the hospital, Mr. Sutton never regained consciousness.

The Medical Investigator ruled that Sutton's death was caused by the combined lethal effects of alcohol and heroin. Dr. Lori Proe testified that Sutton "probably would not have died when he did" if he had not been injected with heroin. Under some circumstances, the level of alcohol in his blood by itself could have been fatal.

The district court found that, based on a total offense level 12 and criminal history category II, the guidelines' range was 12-18 months. App. C at 19-20, 22-23, 56-57. It found that Mr. Goossen injected heroin that "led directly to Mr. Sutton's death." *Id.* at 50. The court decided that an upward departure would be inappropriate. *Id.* at 14. Pointing to Mr. Goossen's heroin distribution after Mr. Sutton's death and citing the need to afford adequate deterrence to criminal conduct and to protect the public from further crimes, *id.*, the court varied upward 15 levels and imposed concurrent sentences of 90 months, to run consecutive to Mr. Goossen's state sentence. *Id.* at 50-51.

Mr. Goossen objected to the sentence as procedurally and substantively unreasonable, *id.* at 56, pointing out that if the death of Mr. Sutton had resulted in his conviction of involuntary manslaughter, he would have faced, at most, a sentence of 33 months. *Id.* at 57. He argued that his sentence was procedurally and substantively unreasonable and resulted in unwarranted sentencing disparities. *Id.* at 58-59. All heroin dealers are aware that heroin "is a lethal drug that can kill people." *Id.* at 58. Mr. Goossen emphasized the unfairness of a drastic upward variance based on facts not brought to the grand jury, admitted by him, or proven beyond a reasonable doubt. *Id.* at 58-59.

Mr. Goossen appealed his sentence, arguing that the extreme sentencing increase, based on conduct of which he had not been found guilty, violated his Fifth and Sixth

Amendment rights. In an unpublished decision, the Tenth Circuit rejected Mr. Goossen's challenge to the constitutionality of his sentence. App. A at 2.

ARGUMENT FOR ALLOWANCE OF THE WRIT

This Court should grant certiorari in this case to settle an important question of federal constitutional law concerning whether the Fifth and Sixth Amendments permit imposition of sentences many times longer would otherwise be found substantively reasonable based on uncharged conduct findings made under the preponderance standard.

A. Legal Background.

Mr. Goossen pleaded guilty to one count of heroin distribution and one count of possession with intent to distribute heroin. Those offenses took place in late 2014 and early 2015. As the district court found, his guidelines' range for those offenses was 12-18 months. The district court varied upward 15 levels and imposed concurrent sentences of 90 months, to run consecutive to whatever state sentence would be imposed in the pending case related to Mr. Sutton's death. The court indicated that the sentence was based on the need for deterrence and protection of the public. App. C at 50. There is no question that the extreme variance turned on the court's finding that Mr. Goossen injected the heroin that led to Mr. Sutton's death on November 30, 2013.

Distribution of heroin resulting in death is a crime punishable under 21 U.S.C. § 841(b)(1)(C).¹ Although he was not charged with heroin distribution resulting in death

¹ A defendant convicted of heroin distribution resulting in death is subject to a sentence from twenty years to life. The "death results" enhancement is an element that must be submitted to the jury and found beyond a reasonable doubt. *Burrage v. United States*, 123

and did not receive the sentence that applies upon such a conviction, Mr. Goossen was effectively found to have committed that offense. He received a sentence that was five times higher than the top of the guidelines' range that applied to the offenses of conviction. The judicially found facts had a far greater impact on Mr. Goossen's sentence than the guidelines' range corresponding to the offenses to which he pleaded.

More than a year separated the uncharged conduct and the convicted offenses in this case. Mr. Goossen was not engaged in drug trafficking in relation to Mr. Sutton's death; his actions resulted from his misguided response to his friend's plea for help. Feeling deathly ill from severe heroin withdrawal, Mr. Sutton had called Mr. Goossen and pleaded with Mr. Goossen to bring him heroin. In a tragic effort to aid his friend, Mr. Goossen went to Mr. Sutton's home and found him very intoxicated. Because Mr. Sutton was unable to inject himself and begged Mr. Goossen to do it for him, Mr. Goossen injected Mr. Sutton with heroin. Despite Mr. Goossen's frantic efforts to revive Mr. Sutton, Mr. Sutton died soon thereafter.

The government did not establish "a strong relationship" between the death of Mr. Sutton and the convicted offenses in this case; it showed only that both involved heroin.

As the government requested, the district court tied the upward variance to Mr. Goossen's distribution of heroin subsequent to Mr. Sutton's death. App. C at 50. It related the upward variance under 18 U.S.C. § 3553(a) to the offenses of conviction in

S.Ct. 881, 887 (2014).

this case by pointing to the need to afford adequate deterrence to criminal conduct and to protect the public from further crimes. The fivefold sentence increase was not justified by the manner in which Mr. Goossen distributed heroin more than a year after Mr. Sutton died. Had the court imposed such a drastic upward variance without the finding that Mr. Goossen was responsible for Mr. Sutton's death, the sentence would almost certainly have been overturned as substantively unreasonable.

When he entered his plea, Mr. Goossen had no way of knowing that the government would seek a sentence many times longer than the guidelines' range based on his conduct in relation to Mr. Sutton's death. Mr. Goossen had no prior drug convictions; the PSR reported a one-time cocaine sale in 2012 to a confidential informant in Farmington, New Mexico, about which nothing further was known.

B. The Court of Appeals' Ruling Contravenes Important Rights Protected under the Fifth and Sixth Amendments.

The Sixth Amendment protects the right to trial by jury "in all criminal prosecutions," as well as the fundamental right of a defendant "to be informed of the nature and cause of the accusation...." in order to adequately defend against it. The Fifth Amendment protects against the deprivation of liberty "without due process of law." "[A] person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend." *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). *See also In re Oliver*, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense-a right to his day in

court-are basic in our system of jurisprudence.”); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)(“It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.”).

As the Tenth Circuit recognized in *United States v. Allen*, 488 F.3d 1244 (10th Cir. 2007), while sentencing courts are afforded considerable discretion, they “may not discard the advisory Guideline range and impose sentence, instead, on the basis of evidence of the defendant’s uncharged, unrelated misconduct, whether actually committed or contemplated for the future.” *Id.* at 1262. The defendant in *Allen* pleaded guilty to possession with intent to distribute methamphetamine. He received a sentence more than twice the top of the guidelines’ range based on evidence that he had expressed a desire to kidnap, rape, and murder young girls and had taken steps toward that end. The court of appeals reversed, pointing to a “relatedness principle” that requires a “strong relationship” between the uncharged conduct and the crime of conviction. *Id.* at 1255. While sentencing courts may weigh prior criminal conduct in assessing a defendant’s history and characteristics, they “may not sentence a defendant for an entirely different, and far more serious, crime” than the offense of conviction. *Id.* at 1260.

This Court echoed the court of appeals’ rationale in *Allen* in its decision in *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151 (2013). It found it “obvious” that “a defendant could not be convicted and sentenced for assault, if the jury only finds the facts

for larceny, even if the punishments prescribed for each crime are identical.” *Id.* at 2162. This Court relied on its prior decision upholding the constitutionality of Pennsylvania’s Mandatory Minimum Sentencing Act in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), where it concluded that the statute “gives no impression of having been tailored to permit the [sentencing factor] to be a tail which wags the dog of the substantive offense.” *Id.* at 88. While Mr. Goossen was not charged with or convicted of heroin distribution resulting in death, he was effectively sentenced for conduct amounting to that crime.

The lower courts have limited this Court’s *Alleyne* holding to facts which increase the statutory minimum and maximum punishments. *See, e.g., United States v. Zar*, 790 F.3d 1036, 1054-55 (10th Cir.), *cert. denied*, 136 S.Ct. 562 (2015); *United States v. Cassius*, 777 F.3d 1093, 1097 (10th Cir.), *cert. denied*, 135 S.Ct. 2909 (2015). As this Court explained in *Alleyne*, however, sentencing a defendant for a crime different than the one that was charged and admitted or found by the jury violates constitutional principles even if the sentence falls within the statutory maximum. The fact that Mr. Goossen received a lower sentence than would have been imposed had he been charged with heroin distribution resulting in death and found guilty beyond a reasonable doubt does not render his punishment constitutional.

In dissenting from the denial of certiorari in *Jones v. United States*, 135 S.Ct. 8 (2014)(Mem.), Justices Scalia, Thomas, and Ginsburg condemned the notion that “all

sentences below the statutory maximum are substantively reasonable.” *Id.* at 9. They wrote:

We have held that a substantively unreasonable penalty is illegal and must be set aside. *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed. 2d 445 (2007). It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge.

Id. at 8 (Scalia, Thomas, and Ginsburg, J.J., dissenting from denial of certiorari)(emphasis in original). *See also Rita v. United States*, 551 U.S. 338, 374 (2007)(Scalia, J., concurring) (a sentence may be substantively unreasonable where it would be “reasonable only because of the existence of judge-found facts”).

The jury’s critical role in our criminal justice system is subverted by asking it to decide only whether “the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.” *Blakely v. Washington*, 542 U.S. 294, 307 (2004) (emphasis in original). Imposition of a sentence five times the top of the applicable guidelines’ range based on a judicial finding of criminal conduct that was not charged, admitted, or proved beyond a reasonable doubt undermines fundamental Fifth and Sixth Amendment protections.

As the Tenth Circuit recognized in *Allen*, under the mandatory Guidelines, sentencing judges were “limited to enhancements based on conduct related to the offense of conviction and previous convictions, or to departures based on previous convictions

and adult misconduct similar to the offense . . .” *Allen*, 488 F.3d at 1262. Because the purpose of *United States v. Booker*, 543 U.S. 220 (2005), was “to bring our sentencing system closer to the norms of the Sixth Amendment,” *id.*, it would make no sense to conclude that the advisory guidelines permit a defendant to be charged and found guilty of one crime and sentenced for another. *Id.* The considerable discretion afforded to the district court under *Booker* did not permit it to “discard the advisory Guideline range and impose sentence, instead, on the basis of evidence of the defendant’s uncharged, unrelated misconduct, whether actually committed or contemplated for the future.” *Id.*

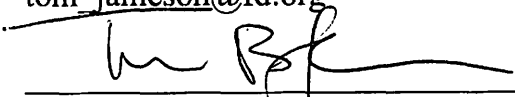
This Court should grant certiorari in this case in order to afford guidance to the lower courts and ensure their proper application of the fundamental principles underlying the Fifth and Sixth Amendments to the United States Constitution.

CONCLUSION

For the reasons stated above, Petitioner Allen Goossen requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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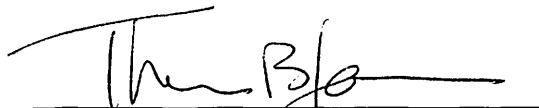
vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, Thomas B. Jameson, Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this court and, as counsel for Allen Goossen, I caused to be mailed copies of the motion for in forma pauperis and the petition for writ of certiorari by first class mail, postage prepaid to the Solicitor General, Department of Justice, 950 Pennsylvania Ave. NW, Room 5614, Washington, DC 20530, and to be sent electronic copies of the foregoing by e-mail at supremectbriefs@usdoj.gov, on this 1st day of May, 2018.



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