NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY RAY WELCH

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2D1.1(b)(5) of the United States Sentencing Guidelines provides that "[i]f (A) the offense involved the importation of ... methamphetamine or the manufacture of ... methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment [for a mitigating role], increase by 2 levels." Although the text of the guideline provision clearly requires scienter on the part of the defendant, the Fifth Circuit case law is an outlier which holds that such an increase applies even where the defendant has no scienter regarding the source of the methamphetamine. Should this Court resolve this circuit split and clarify whether scienter is required before the two-level increase may be applied?

PARTIES TO THE PROCEEDINGS

Anthony Ray Welch is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

TABLE OF CONTENTS

INDEX TO THE APPENDICES

TABLE OF AUTHORITIES

Page

FEDERAL CASES

FEDERAL STATUTES

SENTENCING GUIDELINES

OTHER SOURCES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Anthony Ray Welch, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Welch*, 762 Fed. Appx. 188 (5th Cir. Mar. 26, 2019)(unpublished), and is provided in the Appendix to the Petition. [Appendix A]. The judgment of conviction and sentence was entered March 23, 2018 and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on March 26, 2019. [Appendix A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Proceedings Below

On September 20, 2017, Petitioner Anthony Ray Welch ("Mr. Welch" or "Appellant") was charged by superseding indictment with conspiracy to possess with intent to distribute a controlled substance (21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A). [ROA.29]; *see* 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A).

On October 27, 2017, Mr. Welch entered his plea of guilty before the district court to the offense as set forth in the indictment. [ROA.111]. On March 23, 2018, Mr. Welch was sentenced by the trial court to a term of imprisonment of 235 months. [ROA.61]. Mr. Welch filed notice of appeal on April 17, 2018. [ROA.66].

B. Statement of the Facts

On September 20, 2017, Mr. Welch was charged by indictment with conspiracy to possess with intent to distribute a controlled substance (21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A)). Mr. Welch entered a plea of guilty to the charge, [ROA.111], and was subsequently sentenced by the district court to a term of imprisonment of 235 months. [ROA.61]. Prior to assessing that sentence, the court accepted the findings in the

Presentence Report ("PSR") and found that Mr. Welch had an offense level of 35 and a criminal history category of IV, which yielded a guideline range of between 235 to 293 months incarceration. [ROA.126]. Included in those calculations was a two-level increase under U.S.S.G. § 2D1.1(b)(5) in the offense level based on the government's finding that the offense involved the importation of methamphetamine. [ROA.146]. Mr. Welch objected to the two-level increase under U.S.S.G. § 2D1.1(b)(5). [ROA.125].

In the trial court's sentencing soliloquy, the court stated that "I'm going to sentence within the guideline range, the advisory guideline range, but I'm going to sentence at the very bottom of that range ... " [ROA.130]. Thus, the trial court sentenced Mr. Welch to a sentence of 235 months, which was at the bottom of the guideline range of 235 to 293 months as calculated by the trial court [ROA.130]. However, had the two-level increase under § 2D1.1(b)(5) not been calculated, the Mr. Welch's total offense level would have been 33, rather than 35, which, when indexed with his criminal history category of IV would have yielded a guideline range of 188-235 months. *See* U.S.S.G. Chapter 5, Part A, Sentencing Table.

Had the trial court thus used the guideline range which did not include the two-level importation increase under § 2D1.1(b)(5), the bottom-of-the-guideline-range sentence assessed would have been 188 months rather than the 235 months assessed by the trial court. *See* U.S.S.G. Chapter 5, Part A, Sentencing Table.

C. The Appeal

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, contending that the two-level importation increase under § 2D1.1(b)(5) required scienter regarding the importation of the methamphetamine on the part of the defendant. The court summarily rejected this claim as foreclosed by Fifth Circuit precedent. *See* [Appendix A] (citing *United States v. Serfass*, 684 F.3d 548, 552 (5th Cir. 2012).

REASON FOR GRANTING THE PETITION

The opinion of the Fifth Circuit demonstrates the circuit split regarding the the two-level importation increase under § 2D1.1(b)(5), as other courts of appeal do hold that scienter is required regarding the importation of the methamphetamine on the part of the defendant.

In rejecting the theory that the enhancement at issue here has no scienter requirement, one circuit court of appeals has noted the Fifth Circuit's solitary stance on the issue,

> Only one circuit has approved the government's proffered reading of U.S.S.G. § 2D1.1(b)(5) that would dispense with the requirement that the defendant actually know the drugs were imported. In *United States v. Serfass*, the Fifth Circuit stated that the plain language of § 2D1.1(b)(5) supports the conclusion that the increase applies to "a defendant who possesses methamphetamine that had itself been unlawfully imported" regardless of whether he or she had actual knowledge of the importation. 684 F.3d 548, 553 (5th Cir. 2012). We decline to adopt the Fifth Circuit's conclusion here ....

United States v. Job, 871 F.3d 852, 871 (9th Cir. 2017).

The Tenth Circuit has likewise noted the Fifth Circuit's position regarding scienter, although in doing so the Tenth Circuit found that the defendant before it knew that the methamphetamine had been imported. *See United States v. Redifer*, 631 Fed.Appx. 548, 565 (10th Cir.

2015)(unpublished) (citations omitted); *see also United States v. Valdez*, 723 Fed.Appx. 624, 627 (10 Cir. 2018)(unpublished)(same).

The history and language of the 2D1.1(b)(5)(A) and (B)enhancement clearly suggests a *mens rea* element is included and that knowledge of importation is required. Section 2D1.1(b)(5)(A) and (B) does not apply the 2-level increase for an offense that "involved" the importation of methamphetamine if the defendant is subject to an adjustment under Section 3B1.2 (Mitigating Role).

The mitigating role provision of the guidelines provides a range of downward adjustments "for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant." U.S.S.G. §3B1.2, Application Note 3(A). If the § 2D1.1(b)(5) enhancement is truly a "strict liability" provision, it isn't logical to not apply the enhancement simply because a defendant was less involved than others. This exemption from the application of the enhancement for those less culpable clearly suggests that the enhancement has a *mens rea* element--those less involved are less likely to have actual knowledge of where the methamphetamine came from and are not "involved" in importation.

The enhancement should not be applied to Mr. Welch without proof of knowledge of importation. The U.S. Sentencing Commission has expressly stated that the importation enhancement was "directed" at importation activity. *See* U.S.S.G. Appendix C, Amend. 555 (November, 1997). To enhance Mr. Welch's sentence by two levels in no way serves the purpose of a provision "directed" at importation activity where he had no knowledge of importation. This exemption for those less involved suggests that there is a *mens rea* element.

Moreover, where the sentencing enhancement provision is ambiguous, as §2D1.1(b)(5) is, the doctrine of lenity should be applied. It is settled that the rule of lenity applies not only to the substantive scope of criminal prohibitions, but also to questions about the severity of sentencing. *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *see generally* Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 513 (Spring 2002) (nearly half of all recent cases in which the Supreme Court has invoked the rule of lenity have been sentencing cases); *accord Leocal v. Ashcroft*, 543 U.S. 1, 11 n. 8 (2004) (the rule of lenity applies where a statute has both criminal and noncriminal applications); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n. 10

(1992) (same).

Second, this Court's recent holding in *Elonis v. United States*, __U.S.__, 135 S.Ct. 2001 (2015), tends to support the argument that § 2D1.1(b)(5) requires that the defendant had to know the methamphetamine was imported. That case involved Anthony Elonis, who posted rap lyrics on his Facebook page that contained graphically violent language and imagery concerning his estranged wife, co-workers, elementary-school students, and state and local law enforcement. *See id.* at 2004–07. Concluding that a reasonable person would foresee that Elonis' posts would be interpreted as a threat, a jury convicted Elonis of violating 18 U.S.C. § 875(c), which makes it a federal crime to transmit in interstate commerce "any communication containing any threat ... to injure the person of another." *Id.* at 2007 (citation omitted)(internal quotation marks omitted). The United States Court of Appeals for the Third Circuit affirmed Elonis' conviction. *See id.*

This Court reversed. *See id.* In an opinion that the Honorable John G. Roberts, Chief Justice of the United States, authored, this Court began its analysis by noting that the dictionary definitions of threat do not set forth an intent requirement. *See id.* at 2008 ("These definitions ... speak

to what the statement conveys[,] not to the mental state of the author"). The Chief Justice explained, however, that the "'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with'" such a requirement. *Id.* at 2009 (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)). Instead, the Chief Justice noted, courts must read a *mens rea* requirement into such statutes to "separate wrongful conduct from otherwise innocent conduct." *Id.* at 2010 (internal quotation marks omitted). Chief Justice Roberts said that this rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal" and that a defendant must be "blameworthy in mind" before he can be found guilty. *Id.* at 2009 (internal quotation marks omitted). Chief Justice Roberts said that the trial judge erred in using a reasonable person standard, because that standard did not require proof that Elonis was aware of his wrongdoing. *See id.* at 2009–12. Not specifying the intent that § 875(c) requires, the Chief Justice said only that "negligence is not sufficient." *Id.* at 2013.

The same argument fits neatly to the facts here. The PSI does not even suggest that Mr. Welch had any knowledge of the methamphetamine's origin that the PSI claimed he obtained from

Frantzen. [ROA.144]. As Chief Justice Roberts stated, "wrongdoing must be conscious to be criminal" and that a defendant must be "blameworthy in mind" before he may be punished for his actions. *See id.* at 2009.

This Court should therefore grant *certiorari* to address the circuit split identified above and to clarify the law surrounding this frequently-occurring sentencing enhancement.

CONCLUSION

Petitioner respectfully prays that this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to whichshe may justly entitled.

Respectfully submitted this 6th day of August, 2019.

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