No. 19-5574

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY RAY WELCH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court plainly erred by applying a two-level adjustment under Sentencing Guidelines § 2D1.1(b)(5) for an offense that "involved the importation of * * * methamphetamine."

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Welch, No. 17-cr-198 (Mar. 23, 2018)

United States Court of Appeals (5th Cir.):

United States v. Welch, No. 18-10457 (Mar. 26, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A3) is not published in the Federal Reporter but is reprinted at 762 Fed. Appx. 188.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on March 26, 2019. On June 26, 2019, Justice Alito, extended the time within which to file a petition for a writ of certiorari to and including August 23, 2019, and the petition was filed on August 6, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). The district court sentenced petitioner to 235 months of imprisonment, to be followed by five years of supervised release. Pet. App. B1-B2. The court of appeals affirmed. Id. at A2-A3.

1. In 2015 and 2016, petitioner distributed methamphetamine to co-conspirators in the area of Fort Worth, Texas. Presentence Investigation Report (PSR) ¶¶ 7-9. On at least one occasion, petitioner obtained methamphetamine that had been imported from Mexico. PSR ¶¶ 7, 14. Petitioner pleaded guilty to conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A), and 846. PSR ¶¶ 3-4.

Based on the quantity of drugs involved in the offense, the Probation Office's presentence report assigned petitioner a base offense level of 32. PSR ¶¶ 18, 25. The Probation Office recommended a two-level upward adjustment under Sentencing Guidelines § 2D1.1(b)(5), which applies when "(A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under" Section 3B1.2, which applies to a defendant who plays only a minimal role

in an offense. PSR ¶ 28. After other adjustments and reductions, the presentence report recommended an advisory sentencing range of 235 to 293 months of imprisonment. PSR ¶ 101.

Petitioner objected to a two-level upward adjustment under Sentencing Guidelines § 2D1.1(b)(5) solely on factual grounds. He initially contended that the presentence report's statement that he had received methamphetamine imported from Mexico from co-conspirator Holly Frantzen "[i]n 2016," PSR ¶ 14, was factually erroneous because he was in prison in 2016 and thus could not have engaged in such a transaction, C.A. ROA 212. In response, the Probation Office corrected the presentence report to state that petitioner purchased the imported methamphetamine from Frantzen in May 2015. Id. at 199 (citing Frantzen's statements to law enforcement). Given that petitioner was not in custody in May 2015, he amended his objection and argued that the factual basis for the two-level adjustment lacked "sufficient indicia of reliability." Id. at 212, 217.

The district court overruled petitioner's objection, adopted the Probation Office's recommendations, and applied an advisory sentencing range of 235 to 293 months of imprisonment. C.A. ROA 125-126. The court sentenced petitioner to 235 months of imprisonment, which the court believed was "giving [petitioner] somewhat the benefit of the doubt considering [his] history and the criminal activity [he] engaged in." Id. at 130.

2. On appeal, petitioner argued for the first time that the district court had procedurally erred by applying the two-level adjustment in Section 2D1.1(b)(5) without a finding that petitioner knew the methamphetamine involved in his offense was imported. Pet. C.A. Br. 6-15. The Fifth Circuit summarily affirmed in an unpublished per curiam decision, explaining that petitioner's argument was foreclosed by its decision in United States v. Serfass, 684 F.3d 548, cert. denied, 568 U.S. 1016 (2012), which "held that the Section 2D1.1(b)(5) enhancement applies 'regardless of whether the defendant had knowledge of [the drug] importation.'" Pet. App. A3 (quoting Serfass, 684 F.3d at 552) (brackets in original).

ARGUMENT

Petitioner contends (Pet. 5-10) that this Court should grant review to resolve an asserted circuit conflict over whether Sentencing Guidelines § 2D1.1(b)(5) applies only when a defendant knows that the methamphetamine involved in his offense was imported. But the court of appeals' decision was correct, and, in any event, this Court has long explained that the Sentencing Commission is the proper body to resolve any conflicting interpretations of the Sentencing Guidelines. See Braxton v. United States, 500 U.S. 344, 347-349 (1991). This case is a particularly poor vehicle for review because petitioner failed to raise the question presented in the district court, so this Court

could review it only for plain error. See Fed. R. Crim. P. 52(b). No further review is warranted.

1. Sentencing Guidelines § 2D1.1(b)(5) provides that "[i]f (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels." The court of appeals correctly recognized that the methamphetamine importation provision, unlike the "listed chemicals" importation provision, does not turn on a defendant's mens rea.

a. As the court of appeals explained in United States v. Serfass, 684 F.3d 548 (5th Cir.), cert. denied, 568 U.S. 1016 (2012), "[i]n constructing the phrase, 'that the defendant knew were imported unlawfully,' the drafters of the Guidelines employed the plural verb, 'were,'" which corresponds to the plural noun "'chemicals'" and not to the singular nouns "'amphetamine or methamphetamine.'" Id. at 551. Thus, "the drafters expressly included a knowledge element for an offense involving importation of the raw materials, i.e. the listed chemicals, used to manufacture amphetamine or methamphetamine," but "did not * * * include such a scienter requirement for the importation of the end products, i.e., amphetamine or methamphetamine." Id. at 552; see, e.g., State Farm Fire & Cas. Co. v. United States ex rel. Rigsby, 137 S. Ct. 436, 442 (2016) (explaining that "use of explicit

language in one provision cautions against inferring the same limitation in another provision" that lacks such language) (citation and internal quotation marks omitted); Russello v. United States, 464 U.S. 16, 23 (1983) (similar).

Moreover, as the Fifth Circuit correctly explained, reading the knowledge requirement in Section 2D1.1(b)(5) to apply to an offense like petitioner's "would render the language of § 2D1.1(b)(5) unnecessarily repetitive." Serfass, 684 F.3d at 552. Under petitioner's interpretation, Section 2D1.1(b)(5) "would apply to an offense involving 'the importation of amphetamine or methamphetamine . . . that the defendant knew [was] imported unlawfully[.]'" Ibid. (brackets in original). Such a "redundant combination of 'importation' and 'imported' is not only awkward; it is almost certainly not what the Sentencing Commission intended." Ibid.

b. Petitioner contends (Pet. 6) that Section 2D1.1(b)(5)'s exemption of defendants who played only a minimal role in the offense "clearly suggests that" Section 2D1.1(b)(5) "has a mens rea element," because "those less involved are less likely to have actual knowledge of where the methamphetamine came from." That reasoning does not follow. The Commission's decision not to apply Section 2D1.1(b)(5) to defendants who played a minimal role in the offense says nothing about whether knowledge is required for defendants (like petitioner) who do not fall within that exception. As explained above, the Commission knew how to provide a knowledge

requirement in Section 2D1.1(b)(5), and it applied that requirement only to "the manufacture of * * * methamphetamine from listed chemicals that the defendant knew were imported unlawfully." Sentencing Guidelines § 2D1.1(b)(5).

The Sentencing Commission's decision makes sense. The importation of methamphetamine "may well be more problematic than the unlawful importation of precursor chemicals," because "the mere possession of those precursor chemicals is not unlawful unless and until they are turned into methamphetamine." Serfass, 684 F.3d at 552. Section 2D1.1(b)(5) thus sensibly requires knowledge of unlawfulness only with respect to the precursor chemicals.

Contrary to petitioner's suggestion (Pet. 8-10), Elonis v. United States, 135 S. Ct. 2001 (2015), does not support his position. As relevant here, Elonis concluded that when a substantive criminal statute is "silent on the required mental state," the Court will "read into the statute" the "mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" Id. at 2010 (citation omitted). But Section 2D1.1(b)(5) is not "silent on the required mental state," ibid.; as explained above, it specifies that the adjustment applies to "the manufacture of * * * methamphetamine from listed chemicals that the defendant knew were imported unlawfully," Sentencing Guidelines § 2D1.1(b)(5) (emphasis added).

Nor, given the clarity of the Section 2D1.1(b)(5)'s text, is petitioner correct in contending (Pet. 7) that the rule of lenity

-- which applies only if, "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended," United States v. Castleman, 572 U.S. 157, 172-173 (2014) (citation omitted) -- supports his claim. In any event, this Court's decision that vagueness challenges cannot be made to the advisory Sentencing Guidelines, see Beckles v. United States, 137 S. Ct. 886, 895 (2017), casts serious doubt on whether the rule of lenity applies to interpretations of the Guidelines. Like the due process vagueness doctrine, the rule of lenity derives from concerns of fair warning and avoiding arbitrary enforcement, see id. at 892; United States v. Bass, 404 U.S. 336, 348 (1971), that do not apply to the advisory Sentencing Guidelines, Beckles, 137 S. Ct. at 894; see, e.g., United States v. Gordon, 852 F.3d 126, 130 n.4 (1st Cir. 2017) ("[A]s is now clear from Beckles * * * , concerns about statutory vagueness, which underlie the rule of lenity, do not give rise to similar concerns regarding the Guidelines.").

2. Petitioner identities no sound basis for this Court's review.

Petitioner asserts (Pet. 5) that a conflict exists between the Fifth and Ninth Circuits' interpretations of Section 2D1.1(b)(5). But although the Ninth Circuit "decline[d] to adopt the Fifth Circuit's conclusion [in Serfass]," United States v. Job, 871 F.3d 852, 871 (9th Cir. 2017), the Ninth Circuit did not

actually announce any conflicting interpretation of Section 2D1.1(b)(5), and its decision relied in part on case-specific considerations that are not present here. In particular, the Ninth Circuit noted that "the government never advanced [its] argument in the district court and sought to apply [Section 2D1.1(b)(5)] only on the basis of jointly undertaken criminal activity under [Sentencing Guidelines] § 1B1.3," despite the absence of any "district court * * * determinations about the scope of the jointly undertaken criminal activity as required by the Sentencing Guidelines." Id. at 871-872.

The only other court of appeals to have commented on the issue has agreed with the Fifth Circuit's reasoning and suggested, albeit in dicta, that Section 2D1.1(b)(5) "appears to impose a scienter requirement only when the offense involved . . . the manufacture of . . . methamphetamine from listed chemicals that the defendant knew were imported unlawfully." United States v. Beltran-Aguilar, 412 Fed. Appx. 171, 175 n.2 (10th Cir. 2011) (internal quotation marks omitted). And several courts have declined to address the issue because "the government proved by a preponderance of the evidence that [the defendant] knew the methamphetamine was imported," which rendered the question presented here unnecessary to decide. United States v. Redifer, 631 Fed. Appx. 548, 565 (10th Cir. 2015), cert. denied, 136 S. Ct. 1701 (2016); see United States v. Rivera-Mendoza, 682 F.3d 730, 734 (8th Cir. 2012) (similar).

In sum, any disagreement over the proper interpretation of Section 2D1.1(b)(5) is shallow at best. And based on the few published decisions addressing the issue, it appears to arise only infrequently.* In any event, Congress "contemplated that the [Sentencing] Commission," rather than this Court, "would periodically review the work of the [lower] courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton, 500 U.S. at 348 (citing 28 U.S.C. 994(o)). Thus, resolution of any "conflicting judicial decisions" that might exist is a matter for consideration by the Sentencing Commission, not this Court. Ibid.; see, e.g., Buford v. United States, 532 U.S. 59, 66 (2001) (reiterating Braxton); Neal v. United States, 516 U.S. 284, 290 (1996) (same); Stinson v. United States, 508 U.S. 36, 46 (1993) (same).

3. Furthermore, this case would not provide an appropriate vehicle for addressing the question presented because petitioner did not preserve in the district court any claim that Section 2D.1(b)(5) required a finding that he knew the imported methamphetamine involved in his trafficking offense was imported. Rather, petitioner challenged whether "sufficient indicia of reliability" supported the presentence report's statement that he had received imported methamphetamine from Frantzen. C.A. ROA

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* Another petition for a writ of certiorari seeking review of the Fifth Circuit's position on this issue is pending. See Ramirez-Anguiano v. United States, No. 19-5929 (filed Sept. 5, 2019).

217; see p. 3, supra. Because the issue petitioner asks this Court to review was "not timely raised in district court," his claim is forfeited, and this Court could grant relief only if it identified "plain error" in the decision below. United States v. Olano, 507 U.S. 725, 731 (1993) (citation omimtted).

To establish plain error, petitioner would have to show not only that the decision below was erroneous, but also that the error was "'clear'" or "'obvious,'" affected his "'substantial rights,'" and "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" Olano, 507 U.S. at 734, 736 (citation omitted). Petitioner has not attempted to make such a showing, and he could not. At a minimum, the error he asserts is neither "'clear'" nor "'obvious,'" and he has not shown that requiring knowledge of importation would create a reasonable probability of a different result. Id. at 734.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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