

NO. \_\_\_\_\_

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IN THE

SUPREME COURT OF THE UNITED STATES

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ROBERT GENE RAND,

*Petitioner,*

vs.

UNITED STATES OF AMERICA

*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Pursuant to a Plea Agreement, Dr. Rand pled guilty to one count of involuntary manslaughter in violation of 18 U.S.C. § 1112(a) and one count of distribution of a controlled substance in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 21 C.F.R. § 1306.04. At sentencing, the District Court found that Dr. Rand was not entitled to a two-level reduction in his offense level for acceptance of responsibility under U.S.S.G. § 3E1.1(a). On appeal, the Ninth Circuit affirmed the District Court decision based on its own independent factual findings.

Dr. Rand presents the following question to this Court:

Whether a circuit court errs by affirming a district court's decision regarding the applicability of the United States Sentencing Guidelines based on the circuit court's own independent factual findings.

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner Robert Gene Rand respectfully requests that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit.

### **OPINIONS BELOW**

The Ninth Circuit's Memorandum decision was not published, but is included in the Appendix at App. 1a.

### **JURISDICTION**

The Ninth Circuit entered judgment on February 22, 2019, and denied rehearing on May 24, 2019. (App. 1a, App. 5a) This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **STATUTES AND CONSTITUTIONAL PROVISION INVOLVED**

This case does not involve interpretation of statutory or constitutional provisions.

### **STATEMENT OF THE CASE**

This Petition challenges the Ninth Circuit's decision affirming the District Court's conclusion that Dr. Rand was not entitled to a reduction in his offense level for acceptance of responsibility in accordance with U.S.S.G. § 3E1.1. The Ninth Circuit's decision was based on independent appellate fact-finding.

#### **A. Proceedings at the District Court**

During the time period relevant to this case, Dr. Rand was a family care physician practicing in Reno, Nevada. Dr. Rand treated everything from sore

throats to patients with multiple chronic illnesses. Dr. Rand also treated patients for addiction.

This case involved prescriptions that were written by Dr. Rand for medications such as oxycodone and fentanyl. The government generally alleged that certain prescriptions were not for a legitimate medical purpose or in the usual course of professional practice. And, the government alleged that a prescription written by Dr. Rand for oxycodone caused the death of a patient.

Before the District Court, Dr. Rand was charged with the following: (1) one count of conspiracy to distribute and possess with intent to distribute controlled substances in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), 841(b)(1)(E), and 846, and 21 C.F.R. 1306.04 (Count 1); (2) seven counts of distribution of a controlled substance in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 21 C.F.R. § 1306.04 (Counts 2, 3, 4, 5, 6, and 7); and (3) two counts of distribution of a controlled substance resulting in serious bodily injury or death in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 21 C.F.R. § 1306.04 (Counts 8 and 9). CR 7.<sup>1</sup> Dr. Rand pled not guilty to the charges.

On July 17, 2017, Dr. Rand signed a Waiver of Indictment, and a Superseding Information was filed. The Superseding Information charged Dr. Rand with one count of involuntary manslaughter for the death of a patient in violation of 18 U.S.C. § 1112(a) and one count of distribution of a controlled substance to a different patient in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 21 C.F.R. §

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<sup>1</sup> “CR” refers to the Ninth Circuit Clerk’s Record on Appeal (by docket number).

1306.04.

On July 17, 2017, the parties also entered into a Plea Agreement. As part of the Plea Agreement, Dr. Rand agreed to plead guilty to the charges in the Superseding Information. In exchange, the government agreed not to bring any additional charges and to move to dismiss any other pending charges at the time of sentencing.

On October 19, 2017, Dr. Rand met with the Assistant United States Attorney prosecuting his case along with agents from the Drug Enforcement Administration and the Federal Bureau of Investigation for the purpose of determining whether he qualified for a two-level reduction in his offense level under the “safety-valve.” *See U.S.S.G. §§ 2D1.1(b)(17), 5C1.2.* Law enforcement officers took notes throughout the interview. The contents of the notes were documented and a report was created, which was meant only as a “synopsis and [] not intended to be verbatim.” The report does not identify what questions Dr. Rand was asked nor does it purport to include the entirety of Dr. Rand’s responses.

Dr. Rand’s sentencing hearing occurred on November 20, 2017. At the sentencing hearing, the government argued that Dr. Rand did not accept responsibility because he allegedly falsely denied relevant conduct. The government based its position off of statements made by Dr. Rand during the Safety Valve Proffer and in Dr. Rand’s Sentencing Memorandum.

The District Court concluded that Dr. Rand was not entitled to an adjustment of the offense level for acceptance of responsibility. App. 8a. The District Court

reasoned as follows:

During the proffer, Dr. Rand did not admit that he prescribed some of the oxycodone to [R.W.] not for a legitimate medical purpose, or not in the usual course of professional conduct. In fact, he stated the contrary; that he did not knowingly prescribe opiate medication. He told the government that without - - that he did not knowingly prescribe not for a legitimate medical purpose or not in the usual course of professional conduct. He told the government that he believed [R.W.] was trying to manipulate him. And that while [R.W.] was, I quote, "getting huge amounts of medicine," unquote, he claims that he believes the amount of opiate medication prescribed was not unreasonable.

This amounts, to me, to not truthfully admitting the offense conduct for Count Two; or, at best, it amounts to frivolously contesting the relevant conduct.

App. 8a-9a. The Court also believed that Dr. Rand's statement that he prescribed Narcan to R.W. out of concern for overdose was inconsistent with Dr. Rand's statement that he did not believe the amount of medication he prescribed was unreasonable. App. 11a. Thus, the District Court's findings related entirely to statements contained in the Safety Valve Proffer that related to distribution of a controlled substance (Count Two).

Based on its findings, the District Court calculated Dr. Rand's Guidelines range without giving him a three-level adjustment for acceptance of responsibility. The Court sentenced Dr. Rand to a concurrent term of imprisonment of ninety-six (96) months for involuntary manslaughter (Count One) and one hundred twenty (120) months for distribution of a controlled substance (Count Two).

## B. Proceedings at the Ninth Circuit

On appeal, Dr. Rand argued that the District Court's factual findings

regarding acceptance of responsibility are clearly erroneous because they are not supported by evidence in the record. The standard of review required the Ninth Circuit panel to determine whether the District Court's factual findings are supported by evidence in the record. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S. Ct. 1504, 1511–12 (1985).

On February 22, 2019, the Ninth Circuit issued its Memorandum decision. App. 1a. In rejecting Dr. Rand's argument, the Ninth Circuit reasoned as follows:

On the merits, the district court's holding that Rand failed to meet his burden of proving that he qualified for an acceptance of responsibility reduction under U.S.S.G. § 3E1.1 was not clearly erroneous. *See United States v. Rodriguez*, 851 F.3d 931, 949 (9th Cir. 2017) (explaining the burden and standard of review); *see also Cox v. Dep't of Soc. & Health Servs.*, 913 F.3d 831, 840 (9th Cir. 2019) ("[W]e may affirm on any ground supported by the record, even if it differs from the district court's rationale."). "[F]alsely den[ying], or frivolously contest[ing], relevant conduct that the court determines to be true" is "inconsistent with acceptance of responsibility," U.S.S.G. § 3E1.1 cmt. n.1(A), as is "plac[ing] responsibility on others" for one's unlawful actions, *United States v. Doe*, 778 F.3d 814, 827 (9th Cir. 2015); *see also United States v. Osinger*, 753 F.3d 939, 949 (9th Cir. 2014). During his safety valve proffer and in his sentencing memorandum, Rand falsely denied or frivolously contested offense conduct by stating that he believed at the time that his prescribing practices were reasonable. Those statements also reflected an attempt to shift blame for his criminal conduct onto his patients. It does not matter whether Rand's statements contested the specific examples of unlawful conduct set forth in his plea agreement, as those examples were illustrative, not exhaustive.

App. 2a-3a.

The panel's decision was based entirely on findings that were never made by the District Court. Specifically, the District Court never made the following findings relied upon in the Memorandum:

(1) "Rand failed to meet his burden of proving that he qualified for an acceptance of responsibility reduction under U.S.S.G. § 3E1.1. . ." *Id.*

(2) During his safety valve proffer and in his sentencing memorandum,

(a) "Rand falsely denied or frivolously contested offense conduct by stating that he believed at the time that his prescribing practices were reasonable." *Id.*

(b) "Those statements also reflected an attempt to shift blame for his criminal conduct onto his patients."

*Compare id. with App.9a-11a.*

On March 6, 2019, Dr. Rand filed a Petition for Panel Rehearing and Rehearing En Banc in which he argued that the Ninth Circuit's decision violated this Court's decision in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 106 S. Ct. 1527, 89 L. Ed. 2d 739 (1986). The Ninth Circuit denied the Petition on May 24, 2019. App. 5a.

### **REASONS FOR GRANTING THE PETITION**

This Petition raises an important question concerning whether a circuit court can affirm the District Court's decision regarding the application of the Sentencing Guidelines based on the circuit court's own appellate fact finding.

**A. Acceptance of Responsibility Pursuant to U.S.S.G. § 3E1.1(a) is a Factual Determination Within the Province of the District Court**

In sentencing a criminal defendant, "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49, 128 S. Ct. 586, 596, 169 L. Ed. 2d 445 (2007)

(citing *Rita v. United States*, 551 U.S. 338, 347–48, 127 S. Ct. 2456, 2463, 168 L. Ed. 2d 203 (2007)).

The Guidelines provide for a reduction in the offense level when a defendant “clearly demonstrates acceptance of responsibility for his offense.” U.S.S.G. § 3E1.1(a). “The primary goal of the reduction is to reward defendants who are genuinely contrite.” *United States v. McKinney*, 15 F.3d 849, 853 (9th Cir. 1994). If a defendant’s statements and conduct make it clear that he has genuinely accepted responsibility and his contrition is sincere, he is entitled to a reduction. *United States v. Cortes*, 299 F.3d 1030, 1038 (9th Cir. 2002). “The defendant bears the burden of showing that he has accepted responsibility for his actions.” *United States v. Ramos-Medina*, 706 F.3d 932, 940 (9th Cir. 2013) (citing *United States v. Cortes*, 299 F.3d 1030, 1038 (9th Cir. 2002)). The District Court’s determination is entitled to great deference. *United States v. Fellows*, 157 F.3d 1197, 1202 (9th Cir. 1998); U.S.S.G. § 3E1.1, Application Note 5.

The law places the authority in the District Court to make the factual determination of whether a defendant accepts responsibility. The court of appeals “shall accept the findings of fact of the district court unless they are clearly erroneous and. . . shall give due deference to the district court’s application of the guidelines to the facts.” 18 U.S.C.A. § 3742<sup>2</sup>; *see also United States v. Cortes*, 299 F.3d 1030, 1037 (9th Cir. 2002) (citing *United States v. Villasenor-Cesar*, 114 F.3d 970, 973 (9th Cir. 1997)). A factual finding is clearly erroneous if it is unsupported

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<sup>2</sup> In this case, the District Court did not make any findings based on credibility determinations.

by evidence in the record. *See United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc) (factual findings are clearly erroneous when they are “without ‘support in inferences that may be drawn from the facts in the record’ ”) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 577, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)). Thus, Dr. Rand’s appeal tasked the Ninth Circuit with determining whether the District Court’s factual findings were supported by the evidence in the record.

**B. The Ninth Circuit Erred by Engaging in Appellate Fact Finding**

Rather than determine whether the District Court’s findings were supported by the record, the Ninth Circuit affirmed the District Court based on its own appellate fact finding. The Ninth Circuit’s decision violates this Court’s Opinion in *Icicle Seafoods*.

In *Icicle Seafoods*, this Court emphatically stated that an appellate court errs when it makes factual findings of its own. *Icicle Seafoods* 475 U.S. at 714; *see also Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 856 (1982) (concluding that the court of appeals erred by substituting its interpretation of the evidence for that of the trial court). In that case, the court of appeals was required to review the lower court’s decision pursuant to Fed. R. Civ. P. 52(a), which imposes a clearly erroneous standard to findings of fact. *Id.* However, in reaching its decision, the appellate court did not “ever mention any of the factual findings of the District Court, much less discuss or analyze them.” *Id.* at 713. Instead, the Court of Appeals reviewed the record independently and made its own independent factual findings. *Id.*

This Court concluded that the “Court of Appeals was mistaken to engage in such fact-finding.” *Id.* at 714. This Court explained as follows:

If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were “clearly erroneous” within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court’s factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court’s judgment. **But it should not simply have made factual findings on its own.**

*Id.* (emphasis added). Because the appellate court engaged in improper fact finding, its decision was vacated and remanded for further proceedings. *Id.* at 715.

In this case, the District Court denied Dr. Rand an adjustment based solely on statements Dr. Rand made regarding Count 2 during the Safety Valve Proffer. App. 9a-10a. The District Court specifically made three findings: (1) in the Safety Valve Proffer, Dr. Rand allegedly did not admit that that some of the oxycodone prescription to R.W. was not for a legitimate medical purpose; (2) that Dr. Rand stated R.W. was trying to manipulate him; and (3) that Dr. Rand did not believe the amount of medication he prescribed to R.W. was unreasonable. App. 9a-10a.

The Ninth Circuit’s Memorandum decision did not address any of these factual findings. Instead, the Memorandum relied upon three new findings that were never made by the District Court:

(1) “Rand failed to meet his burden of proving that he qualified for an acceptance of responsibility reduction under U.S.S.G. § 3E1.1. . . .” *Id.*

(2) During his safety valve proffer and in his sentencing memorandum,

(a) "Rand falsely denied or frivolously contested offense conduct by stating that he believed at the time that his prescribing practices were reasonable." *Id.*

(b) "Those statements also reflected an attempt to shift blame for his criminal conduct onto his patients."

App. 2a-3a.

Specifically, the District Court did not base its decision on Dr. Rand's failure to meet his burden. Instead, the District Court affirmatively found that statements made by Dr. Rand during the Safety Valve Proffer evidence untruthfulness or frivolously contesting relevant conduct. App. 9a-10a. Similarly, the District Court never concluded that any statement made by Dr. Rand in the *Sentencing Memorandum* was untruthful or frivolously contested relevant conduct.<sup>3</sup> Finally, the District Court never concluded that Dr. Rand failed to accept responsibility by stating he believed his prescribing practices were reasonable or by shifting blame for his criminal conduct to his patients.

This Court has not addressed the issue of appellate fact finding in the context of the district court's application of the sentencing guidelines. However, the rule announced in *Icicle Seafoods* is even more important in criminal cases when a party's liberty is at stake. Thus, the Court should take this opportunity to address whether the Ninth Circuit properly affirmed the District Court's decision on acceptance of responsibility based on the Ninth Circuit's own fact finding. Dr. Rand

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<sup>3</sup> Indeed, district courts sit in a unique position that allows them to weigh evidence. *Inwood Labs.*, 456 U.S. at 855 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)).

submits that the Ninth Circuit erred by engaging in its own independent appellate fact finding.

### **CONCLUSION**

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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