

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

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**KENDALE WELBORN,**

*Petitioner*

v.

**UNITED STATES OF AMERICA**

*Respondent*

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**On Petition for A Writ of Certiorari from the United States Court of Appeals  
for the Sixth Circuit**

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**PETITION FOR WRIT OF CERTIORARI  
With Appendix**

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## **QUESTION PRESENTED FOR REVIEW**

The Appellant's Appeal was denied on April 29, 2022 by the Sixth Circuit Court of Appeals. In this case, the Appellant raises one (1) issue for determination by this Honorable Court. The Defendant objected to use of Methamphetamine Actual as the drug to determine the Guideline Offense Level and thus the potential sentence, the Defendant here was charged in the Indictment with the distribution of 500 grams or more of Methamphetamine Mixture. In the Plea Agreement signed by the Defendant in this case and he pled guilty to the specific count of distribution of 500 grams or more of Methamphetamine Mixture. That only when it became time for sentencing purposes in the Presentence Report, the Government used the penalty provided in the United States Sentencing Guidelines for the drug Methamphetamine Actual. Here the Appellant entered into a plea agreement based on Methamphetamine Mixture not Methamphetamine Actual a substantially different drug with a specific purity level which greatly increased his potential sentence based on Guideline, however, this did not raise the mandatory minimum or maximum sentence, but raise his Guideline Range. This fact is contrary to the *Apprendi* decision and the *Alleyne* decision, the US Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013) which both held that any fact that raises the defendant's potential sentence is an

Element of the Crime and is a jury question, not a question for the Court. In *Alleyne* the Court said,

As noted, the essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury. It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that 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. One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction, *Alleyne v. United States*, 570 U.S. 99 (2013).

This Court has made it clear that facts that increase a defendant's statutory maximum or minimum sentences are Elements of the Crime itself and that must be proved to a jury, however, the Court has not applied this same standard to judicial fact finding that results in the Guideline Range being higher while the sentence may be above the minimum but below the maximum sentence, that should not apply here, here the Defendant was charged with a specific crime, that of

Methamphetamine Mixture distribution, the punishment standard is much less stringent than Methamphetamine Actual and is in fact a separate drug with different penalties, further, that the type of drug should be an Element of the Crime/Indictment itself if it increases the potential sentence, especially in this case where he was charged with a crime involving Methamphetamine Mixture and pled guilty to the same crime involving Methamphetamine Mixture rather than Methamphetamine Actual that was used to compute his Guideline Range and greatly increased his potential sentence.

## **LIST OF PARTIES**

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## **OPINIONS BELOW**

1. Opinion, United States Court of Appeals for the Sixth Circuit, *United States of America v. Kendale Welborn*, C.A. No. 21-5425, April 29, 2022, (not recommended for full text publication).
2. Judgment in a Criminal Case, United States District Court for the Eastern District of Tennessee at Chattanooga, *United States of America v. Kendale Welborn*, District Court No. 4:20-CR-00004, April 21, 2021.

## **JURISDICTIONAL STATEMENT**

The United States Court of Appeals for the Sixth Circuit entered its Opinion in this case on April 29, 2022. This Court's jurisdiction is invoked under Title 28 U.S. Code 1254 (1). Rule 13 of the Supreme Court allows ninety (90) days within which to file a Petition for Writ of Certiorari after entry of the Judgment by the Appellate Court or the denial of a Petition for Rehearing, whichever is later. Accordingly, this Petition is timely filed.

The Petitioner, Kendale Welborn, respectfully prays that a Writ of Certiorari issue to review the Judgment of the District Court and the Opinion of the United States Court of Appeals for the Sixth Circuit. In that Opinion, the Sixth Circuit Affirmed the District Court and found no error in the sentence of the Petitioner.

## **CONSTITUTIONAL PROVISIONS INVOLVED**

Sixth Amendment to the US Constitution.

## **STATEMENT OF THE CASE AND RELEVANT FACTS**

The Appellant in this case was Indicted on February 19, 2020 with a four-count Incident, charging the Appellant with a violation two counts, Count One: Possession with the Intent to Distribute Methamphetamine, knowingly and intentionally distribute 500 grams of a mixture and substance containing a detectable amount of Methamphetamine, a Schedule II controlled substance, 21 USC § Sections 841(a)(1) and 841(b)(1)(A) and 846 this was a conspiracy charge.

He was also charged in a Second Count with Possession of the Intent to Distribute Mixture of Substance containing a detectable amount of Methamphetamine, a Schedule II controlled substance, in violation of 21 USC § Sections 841(a)(1) and 841(b)(1)(C). The date of this offense was March 10, 2019.

The Appellant entered into a Plea Agreement with the Government to plea to Count One, the charge of distribution of 500 or more grams of Methamphetamine Mixture. The Change of Plea Hearing was taken in front of the Honorable Magistrate Judge Christopher H. Steger on July 28, 2020.

The Presentence Investigative Report was filed on October 29, 2020 in regards to the Appellant, Kendale Welborn. The Appellant filed a Notice of Objections on November 17, 2020. The Government filed no Notice of Objections to the Presentence Report, a (Presentence Investigative Report, Addendum, Sealed)

was filed on November 19, 2020.

The Sentencing Hearing took place on April 16, 2021 before the Honorable District Judge Travis R. McDonough. The Defendant's Guideline Range was determined to be one hundred and sixty-eight (168) to two hundred and ten (210) months, based on a Total Offense Level of thirty-one (31) and a Criminal History of five (5) based on the Presentence Investigative Report. The Appellant in this case had filed a Motion for a Variance, based on several issues, the Motion for a Variance was granted. The Appellant was sentenced to one hundred and forty (140) months and was given a period of three (3) years of supervised release, the Judgement was entered in this case in the District Court on April 21, 2021, a timely Notice of Appeal was then filed by the Appellant, Kendale Welborn, on April 22, 2021 and the 6<sup>th</sup> Circuit Court of Appeals made a ruling denying the appeal of the Appellant on April 29, 2022 and the Petition for Writ of Certiorari to the US Supreme Court was filed within the ninety (90) days allowed under Supreme Court Rule 13.

## ARGUMENT

Mr. Welborn entered into his Plea Agreement to Count One. In the plea he pled to the specific charge that he was charged with in the Indictment. That was the First Count which was a charge of Conspiracy to Distribute 500 grams or more of Methamphetamine Mixture. The Appellant entered into a Plea Agreement with the Government where he pled guilty to Count One which charged Conspiracy to Distribute 500 grams or more of Methamphetamine Mixture. A Presentence Report was then prepared, the Presentence Report computed the Sentence based on Methamphetamine Actual rather than that of Methamphetamine Mixture that he pled to.

Prior to the US Supreme Court's decision in *Apprendi v. New Jersey*, 530 US 466 (2000) it was well settled that the quantity of contraband possessed was not an essential element of the offense and pertinent only for sentencing. Since the *Apprendi* decision, this Court ruled that Sixth Amendment required that the quantity of drugs is an element of the offense itself and must be proved beyond a reasonable doubt where the quantity possessed may determine the minimum and maximum of penalties, further the Supreme Court has held that any fact except the fact of a prior conviction that increases the penalty beyond the prescribed Statutory

Maximum is an element of the offense that must be found by a jury beyond a reasonable doubt, *Apprendi v. New Jersey*, 530 US 466 (2000).

The *Alleyne* decision, which was issued June 17, 2013, found that any fact that by law increases the penalty for a crime is an element that must be submitted to the jury and found beyond a reasonable doubt. The case goes on to say,

a fact that increases a sentencing floor, thus, forms an essential ingredient of the offense,

the Court then states,

Moreover, it is impossible to dispute that facts increasing the legally prescribed floor aggravate the punishment,  
*Alleyne v. United States*, 570 U.S. 99 (2013).

In this case the kind of drug should also be considered as an element of the offense when it raises the Guideline Range and that this is something that should be proven to a jury and not determined by the Judge, the fact that the Defendant was specifically charged with the possession of a Mixture and Substance of Methamphetamine and pled to that same offense. The *Apprendi* case said that the Sixth Amendment requires that a factual determination authorizing an increase in

the prison sentence for an offense must be made by a jury on the basis of proof beyond a reasonable doubt. While *Apprendi* only dealt with the maximum, here the Defendant's sentence was increased based upon differentiation between Methamphetamine Actual and Methamphetamine Mixture sentencing guidelines. The Sixth Amendment, under the *Apprendi* decision and *Alleyne* decision and their progeny should require what kind of Methamphetamine drug that a Defendant accused of is an element of the offense. A mixture of Methamphetamine, is treated more leniently than Methamphetamine Actual and this fact alone should be an Element of the Crime if it increases the potential sentence under *Alleyne* especially in this case where he was charged with a mixture of Methamphetamine and pled guilty to the same crime but Methamphetamine Actual was used in sentencing.

Mr. Welborn asks this Honorable Appellant Court to declare as unconstitutional, the United States Sentencing Guidelines applicable to Methamphetamine offenses under the Sixth Amendment, which treat quantities of Methamphetamine Actual and ICE more harshly than the same quantities of a mixture containing a detectable amount of Methamphetamine. The Appellant, Kendale Welborn, requests that the Court apply the Guidelines for Methamphetamine Mixture in this case for his sentence and to all Methamphetamine offenses.

In a seminal case of *United States v. Booker*, 543 US 220, 245 (2005), the Supreme Court held that the United States Sentencing Guidelines are “effectively advisory” and that they “serve as one factor that Courts must consider in determining the appropriate sentence.” The US Supreme Court Case of *Kimbrough v. US*, 552 US 85, 90 (2007) found that while the Guidelines are advisory, the Guidelines remain the “starting point and the initial benchmark” for sentencing. *Gall v. United States*, 552 U.S. 38, 49-50 (2007), that case held that a District Court’s failure to calculate the Appellant’s Guideline Range correctly is a “serious procedural error.” The Guidelines that are the issue here are those that determining a Appellant’s Base Offense Level according to the quantity and purity of Methamphetamine involved. *See USSG § 2D1.1(c)* Drug Quantity Table. Base Offense Levels for Federal drug crimes are calculated according to the Drug Quantity Table in the Guidelines, which uses a graduated scale based on the type and quantity of the drugs involved. Methamphetamine is quantified based on purity levels and is divided into three (3) categories.

The Guidelines refer to three categories of Methamphetamine according to relative purity; Methamphetamine Mixture, Methamphetamine Actual, and ICE. Mr. Welborn argues that this Court should find as unconstitutional under the Sixth Amendment, the 10:1 ratio between quantities of Methamphetamine Actual and

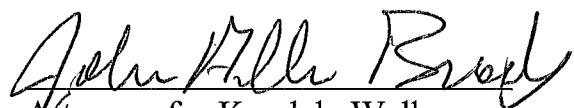
Methamphetamine Mixture in the Guidelines unless appropriately charged. In this case, the Appellant agrees that he would still be of a possession and distribution of 500 grams or more of Methamphetamine Mixture, the same crime he was charged with in his Indictment, the same one he pled guilty to, however the Presentence Report itself changed the drug, the effect of this action would result in this Appellant's Base Offense Level increasing to thirty-four (34) Methamphetamine Actual from thirty (30) with Methamphetamine Mixture. We would request that the Court declare as unconstitutional under the Sixth Amendment, the Guidelines applicable to Methamphetamine offenses and find that the Guideline Range was incorrectly determined and that is a serious procedural error that demands this Court grant our Writ of Certiorari and overturn the 6<sup>th</sup> Circuit ruling.

## **CONCLUSION**

In conclusion based on the following facts, the Petitioner respectfully prays that this Court issue a Writ of Certiorari to review the substantial and important Federal issues outlined above and to reverse the decision out of the Sixth Circuit Court of Appeals and the Judgment of the United States District Court, Eastern District of Tennessee in Chattanooga.

Respectfully submitted,

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**IN THE UNITED STATES SUPREME COURT**

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**APPENDIX**

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