

No._____

IN THE SUPREME COURT OF THE UNITED STATES

SHANNON WILSON, PETITIONER

V.

UNITED STATES OF AMERICA

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

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QUESTION PRESENTED FOR REVIEW

Whether the plain language of Application Note 9 to sentencing guidelines §2D1.1(c) requires a sentencing court to calculate the amount of pill-form methamphetamine involved in an offense using the drug quantity per pill set out in the Table.

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Shannon Wilson asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on November 6, 2023.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the courts below.

OPINION BELOW

The unpublished opinion of the court of appeals is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on November 6, 2023. This petition is filed within 90 days after entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

U.S. SENTENCING GUIDELINE INVOLVED

Application Note 9 to U.S. Sentencing Guidelines §2D1.1(C) provides “Determining Quantity Based on Doses, Pills, or Capsules.—If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (e.g., 100 doses of Mescaline at 500 milligrams per dose = 50 grams of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.”

STATEMENT

Petitioner Shannon Wilson pleaded guilty to knowingly possessing a firearm after conviction of a felony offense, in violation of 18 U.S.C. § 922(g)(1).¹ After Wilson entered his plea, a probation officer prepared a presentence report making recommendations about the application of the advisory U.S. sentencing guidelines to Wilson's case. The base offense level for a felon-in-possession offense is usually set through guidelines §2K2.1. Section 2K2.1(c)(1)(A) provides, however, that, when a defendant "possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense," the base offense level "should be determined under §2X1.1 if application of that guideline results in a higher offense level."

The probation officer determined that the §2X1.1 cross-reference applied in Wilson's case because a bag found in Wilson's car following his arrest contained methamphetamine pills. The probation officer believed Wilson's possession of the pills was akin to a drug-distribution offense. The gross weight of the methamphetamine pills in the bag was 361 grams, which produced a base offense level of 28 under the mixture-or-substance rule that generally applies under the Drug Quantity Table of guidelines §2D1.1(c). As offense level 28 was higher than the base offense level that applied under §2K2.1, the probation officer recommended that it be

¹ The district court exercised jurisdiction under 18 U.S.C. § 3231.

used. With other adjustments, the probation officer concluded that Wilson's total offense level should be 27.

Wilson had a criminal history category of VI. A criminal history category of VI and an offense level of 27 yielded an advisory sentence range of 130 to 162 months' imprisonment. The statutory maximum for a § 922(g) offense at the time Wilson committed his offense was 10 years' imprisonment. *See* 18 U.S.C. § 924(a)(2); *cf.* 18 U.S.C. § 924(a)(8) (amending punishment for offenses committed after June 25, 2022).

Wilson objected to the offense-level calculation. He argued that the mixture-or-substance rule did not apply to methamphetamine that was in pill form. He contended that the proper way to determine the weight of pill-form methamphetamine was by using the specified dosage weight in the "Typical Weight Per Unit Table" found in Application Note 9 to §2D1.1(c). That Per-Unit Table provides a weight-per-pill figure to be used for specified drugs in pill form; methamphetamine in pill form is one of the specified drugs. U.S.S.G. §2D1.1(c), application note 9. Only after a weight is determined using the Per-Unit Table is an offense level determined by reference to the Drug Quantity Table. Under the Table, the number of pills that Wilson possessed yielded a total of 4.78 grams of methamphetamine and a base offense level of 22. U.S.S.G. §2D1.1(c)(9).

The government disagreed. It claimed the mixture-or-substance rule applied. It made no effort to show that the 5mg weight per pill used in the Per-Unit Table

understated the actual amount of methamphetamine in the pills seized in this case. The district court overruled Wilson's objection and adopted the offense-level calculations in the presentence report. It sentenced Wilson to 110 months' imprisonment.

Wilson appealed, challenging the district court's refusal to use the Per-Unit Table. The Fifth Circuit rejected the appeal and affirmed Wilson's sentence. It held that Application Note 9 and its Per-Unit Table did not create an exception to the general mixture-or-substance rule. Appendix 6-7. The court of appeals also declined to use the definition of controlled substance set out in 21 U.S.C. § 802(6). Appendix 6-7. Despite the language of Application Note 9, the court decided that Note 9 "simply reflects the Commission's judgment that the per-unit weight of the relevant mixture or substance [containing methamphetamine] cannot be estimated with sufficient precision so as to justify using the preferred approach" of using mixture weight." Appendix at 7-8 (quoting *United States v. Shabazz*, 933 F.2d 1029, 1034 (D.C. Cir, 1991)).

REASONS FOR GRANTING THE WRIT

BECAUSE THE FIFTH CIRCUIT'S DECISION FAILS TO GIVE EFFECT TO THE PLAIN LANGUAGE OF THE GUIDELINES, THE COURT SHOULD GRANT CERTIORARI.

The plain language of a law is the beginning and ending point of statutory interpretation when that language is clear. *See, e.g., United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989). As the Court has taught “when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’” *King v. Burwell*, 576 U.S. 473, 486 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). The courts must, if possible, give effect to all relevant statutory language. *Cf. Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 174 (2009). In this case, the court of appeals failed to give effect to the plain language of Application Note 9 to guidelines §2D1.1(c). The result of that failure will be prison sentences substantially longer than called for by the guidelines for those, like Wilson, who possess methamphetamine in pill form.

Application Note 9 to U.S. Sentencing Guidelines §2D1.1(c) contains the Typical Weight Per-Unit Table. This Per-Unit Table provides an exception to the usual method of determining the weight of a controlled substance under §2D1.1(c). Section 2D1.1(c) measurements usually include the weight of any mixture or substance containing a controlled substance. The Per-Unit Table, however, is to be used for specific, listed drugs. One of the specific, listed drugs is methamphetamine

in pill form, the drug Wilson possessed. For methamphetamine in pill form the amount of controlled substance for which the defendant is responsible is determined using the weight per pill set out in the Per-Unit Table, not the weight of the total mixture or substance.

The district court, however, declined to use the Per-Unit Table, and the court of appeals upheld that decision. That ruling was wrong. Contrary to the Fifth Circuit’s ruling, Appendix 6-10, the plain language of the Per-Unit Table sets out an exception to the general mixture-or-substance rule of the Drug Quantity Table. The “typical rules of statutory interpretation” govern the application of the sentencing guidelines. *United States v. Stanford*, 883 F.3d 500, 511 (5th Cir. 2018) (citing *United States v. Koss*, 812 F.3d 460, 473 (5th Cir. 2016)). In determining the application and meaning of the guidelines, the Court starts with the guidelines’ plain language. The determination ends on that step, as long as the language is unambiguous and the result the language produces is not absurd. *Ron Pair Enterprises*, 489 U.S. at 241; see also *Franco v. Mabe Trucking Company, Inc.*, 7 F.4th 388, 392 (5th Cir. 2021) (stating rule). Plain-meaning analysis gives the words used in a statute their “ordinary or natural” meaning, *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), while also accounting for “the language and design of the statute as a whole.” *Allen v. Vertafore, Inc.*, 28 F.4th 613, 617 (5th Cir. 2022). The courts read statutory language to “give effect, if possible, to every clause and word of a statute.” *Williams v. Taylor*, 529 U.S. 362, 404 (2000).

The plain language of Application Note 9 shows that the Per-Unit Table is to be used when sentencing a defendant for methamphetamine in pill form. This is so because the plain language of Application Note 9 and of the Per-Unit Table state the Table is to be used, the Table specifically includes methamphetamine in pill form, and the Per-Unit Table and its explanation make clear that it is to be used when the weight of the actual “controlled substance” is not known. U.S.S.G. §2D1.1(c), application note 9.

It's true that section 2D1.1(c) generally uses a mixture-or-substance method in determining drug weight for sentencing purposes. Under that method, the weight of the mixture becomes the weight of the controlled substance, even if the mixture or substance contains only a small amount of controlled substance. This mixture-or-substance rule applies “[u]nless otherwise specified[.]” U.S.S.G. §2D1.1(c), application note (A) to Drug Quantity Table.

The plain language of the Per-Unit Table of Application Note 9 “otherwise specifies” a different method for particular controlled substances in particular forms. Rather than use the mixture-or-substance rule, the Per-Unit Table specifies the weight to be used for the actual controlled substance in the particular forms it lists. For each of the listed drug forms, a weight of the controlled substance per unit is established. U.S.S.G. §2D1.1(c), application note 9.

The Application Note provides in full “Determining Quantity Based on Doses, Pills, or Capsules.—If the number of doses, pills, or capsules *but not the weight of the*

controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the *controlled substance* (e.g., 100 doses of Mescaline at 500 milligrams per dose = 50 grams of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for *certain controlled substances*. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.” U.S.S.G. §2D1.1(C), application note 9 (emphases added).

The Application Note’s language makes plain that the Per-Unit Table is to be used when the weight of the “controlled substance” in the listed drug forms is not known. “Controlled substance” means the active drug. We learn this from 21 U.S.C. § 802(6), which states “[t]he term “controlled substance” means a drug or other substance, or immediate precursor included in schedule I, II, III, IV, or V of part B of this subchapter.” We also learn this from the Drug Quantity Table, which recognizes the distinction between the controlled substance and a mixture or substance containing a controlled substance. U.S.S.G. §2D1.1(C), application note A to Drug Quantity Table. The Drug Quantity Table in creating the general rule of determining drug weight under the guidelines counts the mixture or substance in weight, but in so doing recognizes the legal distinction between a controlled substance (which need only be present in detectable amount) and a mixture or substance containing the controlled substance. U.S.S.G. §2D1.1(C), application note A to Drug Quantity Table. That is, the plain language of the mixture-or-substance rule reflects that a mixture

or substance is not actually a controlled substance, but the rule nonetheless counts it as part of the controlled substance for guideline purposes. U.S.S.G. §2D1.1(C), application note A.

By contrast, the plain language of Application Note 9 and the Per-Unit Table counts only the actual, legally defined, controlled substance. The Application Note uses the phrase the “weight of the controlled substance[.]” U.S.S.G. §2D1.1(c), application note 9. This plainly means the weight of the actual substance controlled, in Wilson’s case methamphetamine. *See* 21 U.S.C. § 802(6) (defining controlled substance); § 812 (methamphetamine a Schedule II controlled substance).

This plain meaning of the term controlled substance as including only the substance must be the meaning used in the Per-Unit Table. In the absence of Application Note 9 and the Per-Unit Table, the general mixture-or-substance rule of the Drug Quantity Table would apply, and the weight of the pill containing the methamphetamine would count as part of a mixture. Note 9 thus changes the general rule, contrary to the court of appeals’ reasoning. Appendix 6-10.

Other plain language in the Application Note reinforces this reading. The clear instruction to multiply the number of doses, pills, or capsules by the typical weight per dose in the table shows that the focus of the method is on the weight of the actual controlled substance. There would be no need to specify a weight per dose if the relevant weight was the weight of the pill. There would be no reason to multiply by the specified weight if the weight of the entire pill counted. Thus, the plain language

makes clear that the weight of the pill is not to be used. In fact, it could not be clearer. The note at the bottom of the Per-Unit Table provides that for “*controlled substances marked with an asterisk the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance.*” U.S.S.G. §2D1.1(c), application note 9, table (italics original). The plain meaning of the Per-Unit Table is that it and its controlled-substance weights are to be used for pill-form methamphetamine.

Another aspect of Application Note 9 buttresses this interpretation. The Application Note states that the Per-Unit Table applies to “certain controlled substances.” This language is important in two ways. First, it makes plain that the Per-Unit Table applies to the controlled substances specified, that is, made certain, in the Table. Those controlled substances include methamphetamine when it occurs in pill form. *See* U.S.S.G. §2D1.1(c), application note 9, Per-Unit Table. Second, the plain language relates back structurally to the “otherwise specified” language of the general §2D1.1 rule. The limitation of the Per-Unit Table to “certain controlled substances” in the context of the general §2D1.1 rule reads most naturally as a carving out of these particular forms of these particular substances from the general mixture-or-substance rule. *Cf. Leocal*, 543 U.S. at 9 (language should be given natural reading); *United States v. Vogel Fertilizer Co.*, 455 U.S. 15, 26 (1982) (structure of a statute sheds light on its meaning).

Despite the plain language and structure of §2D1.1(c) and application notes A and 9, the Fifth Circuit declared that “the plain language of application note 9 does

not create an exception to the general mixture-or substance rule[.] Appendix 10. The court decided that Application Note 9, rather than meaning what it plainly says, meant only that the Per-Unit Table values should be used when the mixture-or substance weight was unknown. Appendix 7.

This interpretation defies the language of Note 9, its structure, and the practicalities of real life. As shown above, the Note is clearly creating an exception and it is clearly focused on the total weight of the actual controlled substance, not any mixture or substance. Finally, the Fifth Circuit's unknown weight interpretation makes no sense. The only way the weight of the mixture-or-substance would be unknown is if the government declined to weigh the mixture it seized. Otherwise, using a scale, a commonly available and simple tool, the government would simply need to weigh the pills seized and report their weight to the sentencing court. Giving meaning to the plain language of Application Note 9 means recognizing that it carves out an exception to the mixture-or-substance rule and “otherwise specifie[s]” a method of calculating drug quantity for the listed forms of the listed controlled substances. The Fifth Circuit failed to do so. Its failure will result in unwarranted imprisonment for Wilson and other defendants. The Court should prevent that from happening by granting certiorari and addressing the meaning of the guideline.

Conclusion

FOR THESE REASONS, Petitioner asks that the Court grant a writ of certiorari and review the judgment of the court of appeals.

/s/ PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: January 10, 2024.