

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

KURTIS LEE WORTLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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March 6, 2018

QUESTION PRESENTED

Whether the Ninth Circuit's case law now conflicts with existing precedent where a defendant receives a four-level enhancement based on speculative allegations from the government concerning prior charges that were dismissed and that do not suggest Petitioner was emboldened per existing Ninth Circuit, Seventh Circuit, and Supreme Court case law.

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Petitioner, Kurtis Lee Wortley, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

1. The memorandum disposition of the Ninth Circuit Court of Appeals styled as *United States v. Wortley*, 705 Fed.Appx. 649 (9th Cir. December 8, 2017) is unreported. A copy of it is attached in the Addendum to this petition at pages 1-2.

2. No written decision regarding the district court's denial of Petitioner's objection to the four-level sentence enhancement exists. The district court's

reasoning for imposing a four-level enhancement on Petitioner, which was affirmed by the Ninth Circuit, is in the Addendum at pages 3-12.

JURISDICTION AND TIMELINESS OF THE PETITION

The Ninth Circuit's memorandum disposition was filed on December 8, 2017 (Addendum at pages 1-2). Petitioner did not file a petition for rehearing. This Court's jurisdiction arises under 28 U.S.C. §1254(1). Petitioner's petition is timely because it was placed in the United States mail, first class postage pre-paid, on March 6, 2018, within the 90 days for filing under the Rule of this Court (*see* Rule 13, ¶1).

UNITED STATES SENTENCING GUIDELINES PROVISION INVOLVED

This case involves the following United States Sentencing Guidelines provisions:

A four-level enhancement shall be applied if the defendant

used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense.

USSG §2K2.1(b)(6)(B).

Relevant conduct includes

all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant .

. . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

USSG §1B1.3(a).

STATEMENT OF THE CASE

(A) General case overview.

1. Petitioner was indicted for being a felon in possession of a firearm in violation of 18 U.S.C. §922(g)(1). He eventually pled guilty to the charge and proceeded to sentencing. In particular, Petitioner pled to the fact that law enforcement searched his vehicle based on a tip provided by Petitioner's wife and that law enforcement found a "High Standard, model Sport King, .22-caliber pump-action rifle laying on the back seat of the car."

2. At issue during the sentencing hearing was the four-level enhancement delineated in Petitioner's presentence report (PSR) pursuant to USSG §2K2.1(b)(6)(B) for Petitioner allegedly having used a firearm in connection with two other felonies—criminal endangerment (Mont. Code Ann. §45-5-207) and criminal mischief (Mont. Code Ann. §45-6-101). The alleged conduct triggering the four-level enhancement concerned Petitioner having "shot a gun through a window and into a room where Clinton Porter was sleeping. . . . A witness stated the defendant told her

he threw the pistol into the river. Bullet fragments were found on the bed in the house.”

3. The district court summarized the issue before it as “whether or not the two unlawful possession offenses were part of the same course of conduct, common scheme, or plan. . . . And, if they were, then the handgun possession offense is relevant conduct to the shotgun possession offense. . . . And then the enhancement would apply.”

4. If the four-level enhancement did not apply, instead of Petitioner’s guideline ranging from 46 to 57 months, Petitioner’s guideline would be 30 to 37 months based on a total offense level 17 and criminal history category III.

(B) The district court’s ruling.

5. In ruling that the four-level enhancement applied, the district court indicated Petitioner was served an order of protection on January 4, 2014, at which time he moved firearms from his house to a friend’s in anticipation of receiving the restraining order. On January 13, 2016, the facts also showed that Petitioner went to the home of his ex-wife and fired a pistol into the residence and then threw the pistol into a river. On January 19, 2016, officers found a rifle in Petitioner’s vehicle.

6. Based on these facts, the district court found that Petitioner was a felon in possession on January 4, 2016, and then continued to be a felon in possession on January 13, 2016, which satisfied Application Note 14(b)(2) regarding course of conduct or common scheme or plan.

(C) The Ninth Circuit's disposition.

7. The Ninth Circuit affirmed the district court in a memorandum disposition holding that the four-level enhancement applied to Petitioner was proper since Petitioner's use of the pistol was part of the same course of conduct, common scheme, or plan to his possession of the rifle under USSG §2K2.1(b)(6)(B). *Wortley*, 705 Fed.Appx. at 650.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's opinion in Petitioner's case fails to account for the necessary reliability determination that both the Ninth Circuit and the Seventh Circuit Courts have indicated pertinent for determination of enhancements under USSG §2K2.1(b)(6)(B).

2. In particular, the Seventh Circuit reversed a district court's application of the four-level enhancement pursuant to USSG §2K2.1(b)(6)(B) where the district court failed to make findings supporting the conclusion that the offense of conviction that stemmed from the robbery was connected to the behavior underlying the

enhancement. *United States v. Seals*, 813 F.3d 1038 (7th Cir. 2016). The Seventh Circuit discussed how the application notes to USSG §2K2.1(b)(6)(B) made it clear that the firearm in question must be part of the same course of conduct as the offense of conviction. *Seals*, 813 F.3d at 1046.

3. The Ninth Circuit in *United States v. Valenzuela*, 495 F.3d 1127 (9th Cir. 2007), held that the defendant used “the shotgun to embolden his other felony offense of possession of stolen property.” *Valenzuela*, 495 F.3d at 1136. That followed where, in the course of transporting stolen items with the intent to sell them, the defendant placed one of the stolen firearms on the driver’s side floorboard of the car to make the firearm easily reachable. *Valenzuela*, 495 F.3d at 1129-1130.

4. Taken together, the Ninth and Seventh Circuits indicate that the government must establish a connection between Petitioner’s felon in possession of a rifle offense and his criminal endangerment and criminal mischief offenses. The government did not prove that the pistol used in the criminal endangerment and criminal mischief offenses emboldened Petitioner to commit the felon in possession of a rifle offense. Aside from pure speculation, no evidence suggested the rifle Petitioner pled to possessing was in Petitioner’s vehicle during the time of the pistol incident. Indeed, the criminal endangerment and criminal mischief charges were later dismissed.

5. That the Ninth Circuit affirmed application of the four-level enhancement in Petitioner's case without the necessary proof conflicts with the Ninth Circuit's own precedent in *Valenzuela*, the Seventh Circuit's precedent in *Seals*, and even this Court's recent precedent in *Nelson v. Colorado*, 137 S. Ct. 1249 (2017) (the presumption of innocence must be given weight, thereby suggesting that even as it concerns sentencing factors the government may not engage in an end-run around the United States Constitution by characterizing at sentencing acquitted, dismissed, or uncharged facts).

CONCLUSION

WHEREFORE, the Court should grant this petition and set the case down for full briefing and argument.

Respectfully submitted,



JOSLYN HUNT
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March 6, 2018