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WLF Asks *En Banc* Court to Reject Criminal Conviction Based on “Deliberate Indifference”

(*United States v. Clay*)

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WASHINGTON, DC—Yesterday evening, Washington Legal Foundation encouraged the U.S. Court of Appeals for the Eleventh Circuit to grant Appellant’s petition for rehearing *en banc* in the case of *U.S. v. Clay*. WLF’s brief asks the appeals court to vacate the panel’s opinion and to reject the panel’s holding that deliberate indifference is an adequate substitute for knowledge as the required level of *mens rea*. The National Association of Criminal Defense Lawyers led the brief, which the Cato Institute, the Reason Foundation and several law professors also joined.

The Eleventh Circuit panel decision misapplied a recent U.S. Supreme Court decision—*Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754—that said a knowledge requirement cannot be satisfied by proof of “deliberate indifference.” WLF’s brief argues the case warrants *en banc* consideration because the jury instruction below, which permitted a conviction upon a finding of “deliberate indifference” under a criminal statute requiring proof of knowledge, is a horrible precedent with the potential to affect prosecutions under numerous other criminal statutes.

Clay involves the indictment and conviction of C-suite executives at WellCare, a managed-care company that provides certain health care services under Florida’s Medicaid program. Seeing no contrary regulatory guidance, WellCare interpreted Florida’s so-called 80/20 statute such that it could lawfully set up a subsidiary to provide behavioral health care, a common practice for managed-care companies. The 80/20 statute governs what counts toward the 80 percent of funds companies must spend on “the provision of behavioral health care services.” In 2007, over 200 FBI and other law enforcement agents raided WellCare. Its executives were indicted on criminal charges, and a jury of lay people lacking experience with highly technical health care regulations convicted them of making false claims and committing health care fraud for counting payments to its subsidiary toward the 80 percent. A judge sentenced them to prison—departing from usual administrative or civil remedies—based on prosecutors’ interpretation of the 80/20 statute.

After the brief was filed, WLF issued this statement by General Counsel Mark Chenoweth: “Basic fairness and the rule of law demand putting people on notice that their conduct could be criminally sanctioned well before they are prosecuted. This case provides a troubling example of over-criminalization and the improper application of prosecutorial discretion.”

WLF is a national, public-interest law firm and policy center that regularly litigates in cases addressing the growing trend at the federal level to criminalize ordinary business activities.