

IN THE UNITED STATES SUPREME COURT

No. _____

HENRY EILDERS,

Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE 8TH CIRCUIT

PETITION FOR *CERTIORARI*

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QUESTION PRESENTED FOR REVIEW

1. Whether Petitioner's prior methamphetamine related convictions occurring within two years of the conspiracy for distributing methamphetamine should have been classified as relevant conduct and therefore not counted as criminal history points?

LIST OF PARTIES

1. Mr. Eilders and United States appear in the caption.
2. His Co-Defendant below was Defendant George Ashby and his case number is: 1:20-CR-27-1 and was not included in Mr. Eilders' appeal proceeding.

TABLE OF CONTENTS

Questions Presented.....	i
List of Parties.....	ii
Table of Contents.....	iii
Table of Authorities.....	iii
Citation to Official and Unofficial Opinions Below.....	1
Jurisdiction.....	1
Constitutional Provisions and Statutes Involved.....	2
Statement of the Case.....	2
Reason for Granting Writ.....	4
Conclusion.....	8
Certificate of Service.....	9
Certificate of Word	
Count.....	9
Appendices	

TABLE OF AUTHORITIES

Cases

<i>United States v. Campbell-Martin</i> , 17 F.4th 807 (8th Cir. 2021).....	6
<i>United States v. Pinkin</i> , 675 F.3d 1088, 1091 (8th Cir. 2012).....	8
<i>United States v. Weiland</i> , 284 F.3d 878, 881 (8th Cir.2002).....	8

Statutes

21 U.S.C. §§ 841 (a) (1), 841 (b) (1) (A).....	1, 3
21 U.S.C. § 846.....	1, 3
28 U.S.C. §1254.....	1
28 U.S.C. § 1331.....	1
Rules and Guideline Provisions	
Supreme Court Rule 10.....	8
Supreme Court Rule 13.....	1
Supreme Court Rule 29.2.....	2
Supreme Court Rule 33.1.....	9
U.S.S.G. § 4A1.1.....	2
U.S.S.G. § 4A1.2.....	2, 7

CITATIONS TO OFFICIAL AND UNOFFICIAL OPINIONS BELOW

8th Circuit

- A. *United States v. Henry Eilders*, Judgment, No. 21-2352 (8th Cir. May 19, 2022)
- B. *United States v. Henry Eilders*, *Per Curium* Opinion, No. 21-2352 (8th Cir. May 19, 2022)

Northern District of Iowa

- C. *United States v. Henry Eilders*, Judgment, No. 1:20-CR-0027-CJW-2

JURISDICTION

Mr. Eilders is a federal prisoner serving a 230 month sentence for conspiracy to distribute a controlled substance and possession with intent to distribute a controlled substance in violation of 21 U.S.C. §§ 841 (a) (1), 841 (b) (1) (A) respectively. Federal question jurisdiction exists under 28 U.S.C. § 1331. Mr. Eilders filed a timely notice of appeal on June 18, 2021 after final judgment entered on June 7, 2001 Appx. D and E. The 8th Circuit Court of Appeals issued a per curium opinion and final judgment on May 19, 2022. Appx. B and A. The jurisdiction of this Court is invoked under § 28 U.S.C. §1254(1).

TIMELINESS

The 8th Circuit affirmed Mr. Eilders' appeal in a per curium opinion on May 19, 2022 and judgment issued on the same date. Appx. A and B. This Petition is filed within 90 days of that date. See US Supreme Court Rule 13 (1) ("Unless

otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.”) That deadline falls on August 17, 2022. A document is considered timely filed if it were delivered on “if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing, or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days.” Supreme Court Rule 29.2. This document was mailed via United States Postal Service on August 17, 2022, and post marked for delivery on that date. Thus, it is timely filed.

GUIDELINE PROVISIONS INVOLVED

(Set forth *verbatim* in Appendix F)

1. U.S.S.G. §§ 4A1.1 and 4A1.2.

STATEMENT OF THE CASE

Nature of the Case:

This is a federal criminal appeal from the Northern District of Iowa.

The Petitioner, Henry Eilders, pleaded guilty to a two federal methamphetamine offenses and seeks certiorari review from an 8th Circuit decision. Appx. B.

Relevant Procedural and Factual History

A. The Conviction

Pursuant to a plea agreement with the Government, Mr. Eilders pleaded guilty to:

- A. Count 1 charged Conspiracy to Distribute a Controlled Substance, in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A), and 21 U.S.C. § 846; and
- B. Count 4 charged Possession with Intent to Distribute a Controlled Substance, in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(A). Docket 84 and Appx. B.

On October 21, 2020, United States District Court Judge C.J Williams formally accepted the defendant's plea. Docket 92. Pursuant to Government Motion, Defendant received 5K departure, resulting in a 10% reduction from 262 months to 230 months. Appx. E. Following formal entry of judgment on June 7, 2021, Mr. Eilders filed a timely a notice of appeal on June 18, 2021. Appx. D.

B. Direct Appeal

On plain error review, Mr. Eilders raised only one issue, two possession of methamphetamine convictions, Paragraphs 100 and 102 should have not have been counted as criminal history because they were relevant conduct. On May 19, 2022, the 8th Circuit Court of Appeals the argument and affirmed the conviction. Judgment and Opinion, Appx. A and B.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY AN IMPORTANT, BUT UNRESOLVED AREA OF THE LAW, TO WIT: WHETHER PRIOR CRIMINAL HISTORY SHOULD BE CLASSIFIED AS RELEVANT CONDUCT.

A. Overview

Admittedly, this case does not necessarily meet the classic grounds for granting a petition because it does not involve a conflict of circuits or even a significant constitutional issue. Instead, it involves only an application of the guidelines to the presentence investigation report. Nevertheless, this particular issue, double counting criminal history that should be properly classified as relevant conduct is a very common issue affecting potentially thousands of cases each year and yet, this Court has not ever applied a run of the mill issue like this, depriving lower courts of clear authority.

Mr. Eilders will briefly review the issue and the 8th Circuit's resolution of

this issue before discussing reasons to grant the writ.

B. The Argument Below and the 8th Circuit's Analysis

The conspiracy in this case occurred from the Summer of 2018 through March 10, 2020, primarily in Linn County and Des Moines County, Iowa. Appx. B pp. 1-2. On appeal, Mr. Eilders' objected to two paragraphs, 100 and 102 both involving possession of small amounts of methamphetamine. Appx. B, pp. 1-4. Since the conduct involved similar allegations to the instant offense and occurred in close temporal proximity to the Counts 1 and 4, Mr. Eilders argued that the prior convictions should not be counted because they were relevant conduct.

Both Paragraph 100 and 102 relate to methamphetamine. Paragraph 100 involved Possession of a Controlled Substance, Methamphetamine, 2nd Offense.

The PSI stated:

The Complaint and Affidavit reflects that law enforcement conducted a traffic stop on a motor vehicle that was being operated by the defendant for speeding and noted an odor of alcohol emanating from the vehicle, in which the defendant was the sole occupant, and that the defendant had bloodshot and watery eyes. The defendant denied drinking, noted that he was a diabetic, and stated that other individuals had been drinking in the vehicle earlier that evening. Law enforcement then observed a glass pipe that contained residue on the driver's side of the vehicle and placed the defendant under arrest. During a search of the defendant's person incident to arrest, law enforcement located a small tin that contained a plastic baggie that held approximately one gram of methamphetamine.

Paragraph 100 PSI. That conduct occurred on September 23, 2016. Docket 100. He

was sentenced on March 10, 2017.

For Paragraph 102, Mr. Eilders also received one point for a methamphetamine related offense. PSI Paragraph 102. The conduct occurred September 6, 2017 and Defendant was sentenced on January 22, 2018. PSI 102.

The PSI alleged the following:

The Complaint and Affidavit reflects that law enforcement conducted a traffic stop on a motor vehicle that was being operated by the defendant for traffic violations and then determined that the defendant's driver's license was revoked due to a drug-related offense. Law enforcement placed the defendant under arrest and conducted an inventory of the vehicle, locating drug paraphernalia and a small baggie of methamphetamine. A Report of Violation alleges that the defendant violated the terms of his probation by failing to report for intake processing and scheduled appointments with his supervising officer, failing to report for drug testing (multiple violations), and via his commission of and arrest for the conduct constituting the instant offense.

Paragraph 102. He then received an additional two criminal history points since he committed the instant offense while under the criminal justice sentence outlined in Paragraph 102.

In its decision, the 8th Circuit rejected Mr. Eilder's argument:

Eilders's state offenses were severable and distinct from his federal offenses because they occurred well before the charged conspiracy, they involved only small quantities of methamphetamine, they did not involve distribution, they were not used to prove the federal offenses, they occurred in different Iowa counties, and there were no common victims. See *United States v. Campbell-Martin*, 17 F.4th 807, 818-19 (8th Cir. 2021) (district court did not clearly err in determining defendant's prior offense was not relevant conduct because there was a four-month gap between the offenses, there was no common scheme or purpose, the prior offense involved different controlled

substance, the offenses occurred in two different Iowa counties, and there were no common victims), petition for cert. filed, 90 U.S.L.W. 3326 (U.S. Apr. 11, 2022) (No. 21-1344).

Appx. B pp. 2-3.

C. This Case Presents Substantial and Unresolved Question Relating to the Relevant Conduct and Prior Criminal History Guidelines

Ordinarily, this Court does not grant certiorari on run of the mill guideline issues; however, this case should provide the exception to the rule since it involves an issue affecting countless cases throughout the United States. Many drug dealers use and distribute to support their habit. Where does the line occur between prior drug use resulting in a conviction and the relevant conduct related to the instant offense? This Court draw that line right here.

Mr. Eilders presented a fairly strong argument on appeal. The convictions in Paragraphs 100 and 102 involved methamphetamine possession occurring within two and one years of the conspiracy to distribute methamphetamine. Mr. Eilders argued persuasively that the conduct should have been classified as relevant conduct.

But he was limited only to the 8th Circuit case law and left with no guidance from this Court about this important statutory issue. Here the issue is whether, pursuant USSG § 4A1.2(a)(1), prior convictions should not be counted because they were imposed for relevant conduct. To answer that question, the 8th Circuit

assess whether “[c]onduct underlying a prior conviction is not relevant to the instant offense if the former conviction was a ‘severable, distinct offense’ from the latter.” *United States v. Weiland*, 284 F.3d 878, 881 (8th Cir.2002) (citation omitted). Factors the 8th Circuit has consistently applied in reviewing this determination include “temporal and geographical proximity, common victims, common scheme, charge in the indictment, and whether the prior conviction is used to prove the instant offense.” *United States v. Pinkin*, 675 F.3d 1088, 1091 (8th Cir. 2012).

In its analysis, the 8th Circuit cited no Supreme Court case law. This particular issue has been percolating in the lower courts for nearly 45 years without clear guidance from this Court about the intersection between relevant conduct and criminal history. It’s now time to resolve that issue and grant the Writ under the standard of Supreme Court Rule 10 (c), an important, but unresolved question of federal law.

CONCLUSION AND REQUESTED RELIEF

For the above reasons, Mr. Eilders requests a writ of certiorari.

RESPECTFULLY SUBMITTED,



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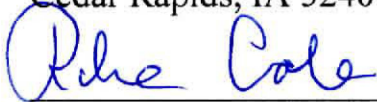
CERTIFICATE OF SERVICE

I, Rockne Cole, counsel for Petitioner, hereby certify that, on August 17, I mailed an original and 10 copies to the Supreme Court via United States Postal Service Express Mail to:

United States Supreme Court
Clerk's Office
1 First Street, N.E.,
Washington, D.C. 20543

and one copy to:

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CERTIFICATE OF WORD COUNT

I, Rockne Cole, certify that the above Petition includes 1863 words, was prepared in 14 Point New Times Roman, Microsoft Word, and therefore, complies with US Supreme Court Rule 33.1.



Rockne Cole