
No. _____

TRAVIS WERKMEISTER,

Petitioner-Appellant,

v.

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*

ROCKNE O. COLE
Cole Law Firm, PC
200 S. West Street
P.O. Box 68
Ossian, IA 52161
(319) 519-2540 Office
(319) 359-4009 Fax
rockncole@gmail.com
ATTORNEY FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

1. Whether this Court should grant the Writ to resolve a circuit split as to whether the two level enhancement under U.S.S.G. § 2D1.1 (b) (5) contains a scienter requirement relating to whether the Government must establish that a Defendant knew that the methamphetamine was unlawfully imported?

PARTIES

Travis Werkmeister is the Petitioner; he was the Defendant-Appellant below before the 8th Circuit. The United States of America is the respondent; it was the Plaintiff-Appellee below.

Additionally, Mr. Werkmeister's appeal was consolidated along with his co-defendants which are set forth here. All opinions were decided and rejected on March 14, 2023, the same day as Mr. Werkmeister's appeal was rejected.

United States v. Rogelio Hernandez 21-3709

United States v. Bobby Robey 21-3752

United States v. Breanna Garcia 21-3753

United States v. Jack Mazariegos-Galicia 21-3924

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CITATIONS TO OFFICIAL AND UNOFFICIAL OPINIONS BELOW

8th Circuit Court of Appeals – *United States v. Travis Werkmeister* – 21-2690

A – Mandate (Apr. 4, 2023)

B – Judgment (Mar. 14, 2023)

C – Opinion Affirming Judgment (Mar. 2023)

D – Order Appointing Criminal Justice Act Counsel (July 8, 2021)

District Court in the Northern District of Iowa – *United States v. Travis Werkmeister*, No. 6:20-CR-2034-CJW-MAR-5

E – Notice of Appeal (July 27, 2021)

F – Judgment (July 21, 2021)

JURISDICTION

This is an appeal from a combined federal criminal judgment arising in the Northern District of Iowa. On July 21, 2021, Mr. Werkmeister received a 346 month sentence. Judgment, App. F. On July 27, 2021, Defendant filed a timely notice of appeal. Notice of Appeal, App. E. See Fed. R. App. Proc. 4 (b) (1) (A) (i) (appeals must be filed within 14 days of final judgment).

The District Court The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

The 8th Circuit has jurisdiction over all federal criminal judgments and sentences. See 28 U.S.C. § 1291.

The jurisdiction of this Court is invoked under § 28 U.S.C. §1254(1).

TIMELINESS

The 8th Circuit affirmed the conviction on March 14, 2023. Judgment and Panel Decision; Appx. B and C. This Petition is filed within 90 days of that date. See US Supreme Court Rule 13 (1) (“A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.”). The 90th day falls on June 12, 2023.

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 June 12, 2023, and post marked for delivery on that date. Thus, it is timely filed since it was sent and postmarked on June 12, 2023.

GUIDELINE PROVISIONS INVOLVED

U.S.S.G. § 2D1.1 (b) (5) set forth verbatim in Appendix G.

STATEMENT OF THE CASE

Relevant Procedural History before the District Court

On July 22, 2020, the Grand Jury returned an Indictment against Werkmeister, and others for Conspiracy to Distribute a 500 grams or more of methamphetamine mixture and 50 grams or more of pure methamphetamine, in violation of 21 U.S.C. Section 841 (a) (1) and (b) (1) (A). Indictment; R. Doc. 8. Docket 2. On October 21, 2021, a Grand Jury returned a superceding indictment against Mr. Werkmeister, adding a forfeiture allegation and additional Defendant. Superceding Indictment; R. Doc. 70. The underlying charge remained the same, to wit: Conspiracy to Distribute a 500 grams or more of methamphetamine mixture and 50 grams or more of pure methamphetamine, in violation of 21 U.S.C. Section 841 (a) (1) and (b) (1) (A). *Id.*

On February 23, 2021, the District Court accepted the Report and Recommendation accepting Mr. Werkmeister's guilty plea to Count 1 of superceding indictment. Order, R. Doc. 265.

Following a July 19, 2021 sentencing, the Honorable Judge C.J. Williams entered judgment for 346 months. Judgment; App. F.

Appeals Proceedings before 8th Circuit of Appeals

On July 27, 2021, Mr. Werkmeister filed a timely notice of appeal. Appx. E. On March 14, 2023, the 8th Circuit affirmed the district court, denying all three claims made by Mr. Werkmeister and judgment issued on the same day. Appx. B and C. On April 4, 2023, the Court issued its mandate sending the case back down the District Court. Appx. A.

Facts Relevant to Petition

This case raises an issue relating to an unlawful importation enhancement, but nearly all of the conspiracy was centered in Waterloo and Marshalltown Iowa. The Petitioner's operations were entirely based out of Waterloo, Iowa from start to finish. The conspiracy was hatched in an Iowa prison. Mario Hernandez, Duane Baker, Cash Burch, and Anthony Howard Amundson had been in prison together. PSI (Presentence Investigation Report") ¶ 5, R. Doc. 377. Prior to his deportation, Mr. Hernandez worked as a drug supplier residing in Marshalltown and Des Moines, Iowa. PSI ¶ 5, n. 1. Baker identified Mr. Werkmeister as a customer of Mr. Hernandez.

The PSI then described, among other things, Mr. Werkmeister's Waterloo based drug dealing activities in which Werkmeister made the sales, took the calls, and did the transactions, primarily out of his house. Waterloo based transactions involving Werkmeister directly.

On June 22, 2018, a CS working with law enforcement contacted

Werkmeister to purchase methamphetamine. The CS went to Werkmeister's residence in Waterloo, Iowa, where he/she bought 27.51 grams of methamphetamine (per laboratory testing). PSI ¶ 6.

Paragraphs 7 and 8 describe similar transactions with Mr. Werkmeister at his residence, occurring on November 28, 2018, and December 1, 2018. In February of 2019, the PSI describes a telephone call with Jason Evans to transact methamphetamine. PSI ¶ 12.

From January 2019 through December 2019, the PSI describes the wire intercepts between Hernandez and Mr. Werkmeister. Based on those phone calls, it "was determined "Pedrin Nunez," Gomez, Aguilar Lemus, Jorge Luis Martinez Garcia, Jorge Calderon Orozco, Lemus Hernandez, and Robey transported methamphetamine to Waterloo, Iowa, area, drug customers, who were identified as Werkmeister, Amundson, and Becker. PSI ¶ 9.

It then describes his customers and associates as his mom, Lisa Werkmeister, and his associate, Jason Evans. His girlfriend, Breanna Garcia helped him with drug distribution tasks. Mr. Werkmeister had some telephone related contacts with Mr. Hernandez.

Other drug related activity also centered on Mr. Werkmeister's Waterloo residence, which are described in Paragraphs 17, 18, 19, and 20.

The PSI described Mr. Robey, an Iowa based supplier, as the "most likely

current methamphetamine supplier for Werkmeister and Becker.” PSI ¶ 23. The transactions ceased with Mr. Werkmeister’s arrest on this case when he was arrested for via a search warrant. PSI 24. They also searched his mother’s residence, which law enforcement suspected as a stash house for Mr. Werkmeister. PSI ¶ 25.

His girlfriend, Breanna Garcia, was his primary associate. PSI ¶ 30. And the PSI shows that many of the transactions occurred at their home, when Mr. Werkmeister was not present. PSI ¶ 30 and 31.

Relating to the international part of this conspiracy, the PSI shows multiple phone calls between Mr. Hernandez and Mr. Werkmeister, but none of those calls were transcribed or contained incriminating statements from Mr. Werkmeister. PSI ¶¶ 9, 10, 11, and 19.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A CIRCUIT SPLIT AS TO WHETHER U.S.S.G. § 2D1.1 (b) (5) CONTAINS A SCIENTER REQUIREMENT RELATING TO THE DEFENDANT’S KNOWLEDGE THAT THE OFFENSE INVOLVED UNLAWFUL IMPORTATION OF METHAMPHETAMINE.

A. Rule 10 (a)

The Writ should be granted to resolve a circuit split as to whether this guideline contains a scienter requirement. See Supreme Court Rule 10 (a) (Writ may be granted if there is circuit split on important federal questions). There is

currently a circuit split between 8th and 5th Circuits and the 9th and 11th Circuits relation to the knowledge requirement.

B. The Guideline and the 8th Circuit's Resolution of the Guideline.

This case illustrates that, even in cases involving “plain English,” two Parties can reach diametrically opposed interpretations, including federal courts of appeals. The Guideline seems clear enough. A two level increase applies if “the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully.” USSG § 2D1.1(b)(5) (emphasis added)

To Mr. Werkmeister, this appears to provide for a straightforward application. For the enhancement to apply, the Government must establish at sentencing that Mr. Werkmeister knew: (1) that the substance that he distributed was methamphetamine and that it was unlawfully imported, or (2) the methamphetamine itself was manufactured using “listed chemicals” that were also imported unlawfully. This was the same argument raised by three other Defendants. Appx. C, p. 6. Mr. Mazriegos-Galacia raised an argument relating to knowledge of importation. This was the same argument that Mr. Werkmeister and others raised before the district court. *Id.*

The 8th Circuit, in effect, chided Mr. Werkmeister’s counsel and other counsels’ knowledge of basic grammar.

Applying basic rules of grammar, however, we conclude that the qualifying phrase—“that the defendant knew were imported unlawfully”—applies only to the importation of “listed chemicals” that are used to manufacture drugs. The word “were” is plural, and the drug types in the first clause are stated in the singular. Grammar does not allow an interpretation that says the offense involved the importation of methamphetamine that the defendant knew were imported.

Panel Opinion p. 6 (citing *United States v. Serfass*, 684 F.3d 548, 551 (5th Cir. 2012), Appx. C-6. It also concluded that the “word ‘unlawfully’ also would be redundant and unnecessary if it referred to the importation of methamphetamine, but it acquires meaning when applied to the importation of listed chemicals, some of which may be imported lawfully in certain circumstances.” *Id.* citing See 21 U.S.C. § 952(d). Thus, since it found it unnecessary to address Mr. Werkmeister’s challenge to the knowledge enhancement because the “increase applies *whether or not a defendant knew the offense involved* importation of methamphetamine.” Appx. C-6 (emphasis supplied).

C. The 8th Circuit Adopted the 5th Circuit’s Approach Relating to the Lack of a Scienter Requirement in Serfass.

Like the 8th Circuit, the 5th Circuit viewed this as a basic grammar issue, i.e. that the knowledge requirement applies to the listed chemicals instead of knowledge that the methamphetamine was imported. The Fifth Circuit reached its

decision by applying English grammar rules to the Guidelines, and based its holding on the fact that the Guidelines use the plural verb “were,” which matches the plural noun, “chemicals.” *Serfass*, 684 F.3d at 551.

In *Serfass*, the defendant pleaded guilty to a violation of 21 U.S.C. § 841(a)(1), possessing methamphetamine with intent to distribute.” The defendant then received a two-level sentencing enhancement, under United States Sentencing Guidelines § 2D1.1(b)(5), after it was proven by a preponderance of the evidence that the defendant possessed methamphetamine and imported it into the United States. Unless the sentence imposed is above the statutory maximum, these factual findings must only be determined by the court by a preponderance of the evidence. Although the court found that the defendant had no knowledge that the methamphetamine was imported, the Fifth Circuit held that the sentencing enhancement for importation of amphetamine or methamphetamine does not have a scienter requirement, and that the importation enhancement “applies irrespective of whether the defendant knew that the possessed methamphetamine had been unlawfully imported.”

D. In Contrast to 5th and 8th Circuits, the 9th and 11th Circuits Required Knowledge that the Defendant knew the Methamphetamine was Imported Unlawfully.

Other circuits have been hesitant to follow *United States v. Serfass*. For example, the 9th Circuit has expressly recognized that its approach conflicts with

Serfass. In *United States v. Job*, the defendant was convicted of conspiracy to distribute methamphetamine and possession of methamphetamine with intent to distribute. The Ninth Circuit reinstated the holding of Biao Huang, which held that United States Sentencing Guidelines § 2D1.1(b)(5) does not require the government to show that the defendant themselves personally imported the drugs. Although the Guidelines do not require that the defendant is the one who actually imported the finished-product methamphetamine, the Ninth Circuit refused to accept the idea that the two-level enhancement would apply if it was not shown by a preponderance of the evidence that the defendant had knowledge that the methamphetamine was imported. *United States v. Job*, 871 F.3d 852, 857 (9th Cir. 2017). Specifically, the Ninth Circuit stated: “We decline to adopt the Fifth Circuit’s conclusion here” In *United States v. Job*, it was shown by a preponderance of the evidence that the defendant had knowledge that the methamphetamine was imported, but the Ninth Circuit held that this requirement was necessary and required in order for the two-level enhancement to apply.

Most recently, in *United States v. Hernandez-Astudillo*, the Eleventh Circuit held that in order to receive the two-level enhancement for importation, there must be sufficient evidence to support the conclusion that the defendant knew of the importation. *United States v. Hernandez-Astudillo*, 777 F. App’x 374, 377

(11th Cir. 2019). Specifically, the Eleventh Circuit found that the defendant’s statement that a cousin mentioned that methamphetamine powder was imported from Mexico was sufficient to “‘indicate[] that the Defendant was aware’ of the importation.” There, the prosecution also had additional sufficient information about the defendant to support the conclusion that it was “more probable than not that the methamphetamine was imported from Mexico and that [the defendant] knew of the importation.” For the Eleventh Circuit, the knowledge of importation was crucial for the application of the United States Sentencing Guidelines.

E. This Court should grant the Writ to avoid random, arbitrary and capricious applications of the guidelines.

Thus, as it stands now, in the 5th and 8th Circuits, it does not matter whether the Defendant knew whether the methamphetamine was imported unlawfully. The problem with this enhancement is that does not function as an enhancement. It would seem to apply in virtually every case involving pure methamphetamine. Indeed, in the 5th Circuit, an FBI agent advised probation that a sufficient quantity and purity of methamphetamine would support a finding that the methamphetamine came from Mexico. *United States. v. Cadena*, 642 F. App'x 306, 307 (5th Cir. 2016) (“Given this quantity and purity, an FBI agent advised the probation officer that the methamphetamine was more likely than not imported from Mexico.”).

Where’s the outer limit of this enhancement? In the 8th and 5th Circuits,

there does not appear to be any limit as long as the person does not also have a mitigating role. § 2D1.1 (b) (5) (exempting enhancement for mitigating role). Unless there is evidence that the methamphetamine was domestically manufactured, or of lower purity, it would appear to apply in nearly every single case involving high purity methamphetamine no matter how many steps from the actual importation since knowledge does not matter.

Finally, the potential for arbitrary and capricious application of this Guideline was realized in this case. It *did not* apply to Jorge Martinez, a co-defendant involved in direct importation of methamphetamine from Mexico to Texas while it *did* apply to Travis Werkmeister, a Waterloo Iowa based dealer who the record clearly showed was never involved in any drug activity outside of Iowa.

Mr. Martinez' involvement in unlawful importation appeared to be as much or perhaps more so than Mr. Werkmeister. In the Government's Memo in Martinez-Garcia's sentencing, it noted that, in April 2019, investigators learned that defendant was in Houston, Texas waiting for a load of methamphetamine. Sent. Memo at p. 2; Docket 428 (citing Martinez PSI ¶ 12). While in Texas, defendant Martinez-Garcia communicated via text message with CS. (Id.). Defendant told CS that if CS wired defendant \$5,000 that defendant could give CS three (3) pounds of methamphetamine. *Id.* Ultimately, CS wired \$986 to a male identified by defendant. *Id.* The wire transfer was a partial payment

for a shipment of methamphetamine to go from Houston, Texas to Iowa. *Id.* Also in April 2019, investigators monitored GPS information on a telephone utilized by Martinez-Garcia. Gov. Memo at p. 2 (citing (PSI ¶ 14). Investigators tracked the telephone from Texas to Knoxville, Iowa, where a traffic stop was conducted of the vehicle believed to contain the telephone. *Id.* Mr. Martinez was driving the vehicle and Juan Mendoza was the passenger. *Id.* During the stop, officers seized ten packages of methamphetamine from the gas tank of the vehicle. *Id.* In total, over 4 kilograms of methamphetamine was located in the trunk. *Id.*

Thus, Mr. Martinez, a person involved in direct importation of high grade and large quantity of methamphetamine from Mexico via Houston, Texas, **did not** receive while Mr. Werkmeister, a Waterloo based dealer dealing primarily with his girlfriend, **did receive** the enhancement.

The desire to avoid arbitrary and capricious punishments is essence of the rule of law. That is precisely what happened here and it happened because of the 8th Circuit's broad interpretation of this guideline virtually guarantees that it will apply in virtually every case involving high purity methamphetamine.

Such an interpretation is not consistent with the Rule of Lenity. In a fantastic student note, author Quincy Ferrill explains why the rule of lenity should apply. Quincy Ferrill, "*Enhancement Without a Cause: United States v. Serfass and Its Erasure of the Scienter Requirement*", 53 Texas Tech Law Review 311

(2021). The rule of lenity is a canon of statutory construction that instructs that courts should strictly construe criminal statutes to criminalize or punish the least amount of conduct. *Bifulco v. United States*, 447 U.S. 381, 387 (1980). The rule of lenity “means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.” *Id.* (quoting *Ladner v. United States*, 358 U.S. 169, 179 (1958)).

This rule only applies “if, after considering text, structure, history, and purpose, there remains a ‘grievous ambiguity or uncertainty in a statute’ in imposing a criminal penalty or enhancement.

United States Sentencing Guidelines § 2D1.1(b)(5) was added in 1997 as part of multipart Amendment 555 in response to the Comprehensive Methamphetamine Control Act of 1996. Amendment 555 briefly discusses the purpose behind the addition of United States Sentencing Guidelines § 2D1.1(b)(5). See, *supra*, Ferrill Note. This amendment states: “In response to evidence of a recent, substantial increase in the importation of methamphetamine and precursor chemicals used to manufacture methamphetamine, the amendment provides an enhancement of two levels directed at such activity.”

The text of the amendment clearly demonstrates that the two-level enhancement was added with a desire to punish the importation of

methamphetamine and chemicals used to make methamphetamine. This intent is evidenced by the fact that the amendment is “directed at such activity”—importation of methamphetamine. As Ferrill confirms, this “implies that the chemicals and the finished-product methamphetamine should be treated in the same manner because the enhancement and amendment are directed at the activity of importation.” See, *supra*, *Ferrill* at 331.

Most importantly, the Amendment makes no reference to distinguishing between importation of chemicals used to make methamphetamine or finished product. It entirely focused on importation itself as the aggravating factor. Thus, it makes no sense whatsoever to require knowledge of importation of listed chemicals used to make methamphetamine while requiring strict liability, without scienter, to importation of methamphetamine itself.

Further, without any knowledge requirement to unlawful importation, there is seemingly no limit to imposition of the two level enhancement in cases involving pure methamphetamine. Enhancements should be applied in such a way so that they do not apply in nearly every case. This enhancement is clearly designed to punish only the most culpable defenders directly involved in importation or closely facilitating significant importation. Mr. Werkmeister was a frontline Waterloo based dealer dealing from his house. Such enhancements were not designed for lower level dealers like Mr. Werkmeister.

CONCLUSION AND REQUESTED RELIEF

The Court should grant the Writ and order briefing on this important guideline issues of national scope.

RESPECTFULLY SUBMITTED,



Rockne O. Cole
ROCKNE O. COLE
AT:00001675
200 S. West Street
P.O. Box 68
Ossian, IA 52161
(319) 519-2540 Office
(319) 359-4009 Fax
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I, Rockne Cole, counsel for Petitioner, hereby certify that, on June 12, 2023, 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:

Ashley L Corkery
United States Attorney's Office
111 7th Avenue SE Box 1
Cedar Rapids, IA 52401

Rockne Cole

CERTIFICATE OF WORD COUNT

I, Rockne Cole, certify that the above Petition includes 3432 words and was prepared in 14 Point New Times Roman and therefore, complies with US Supreme Court Rule 33.1, and it also complies with Rule 33.2 as it contains less than 40 pages.

Rockne Cole

Rockne Cole