
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

NO. _____

Bobby Dean Robey,

Petitioner,

-vs.-

United States of America,

Respondent.

Petition for Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit
(8th Cir. Case No. 21-3752)

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QUESTION S PRESENTED

- I. WHETHER THERE WAS INSUFFICIENT EVIDENCE THAT MR. ROBEY WAS INVOLVED IN THE “IMPORTATION” OF METHAMPHETAMINE?**

- II. WHETHER MR. ROBEY’S CRIMINAL HISTORY SHOULD BE INCREASED AS A CAREER OFFENDER WHEN HIS GUIDELINE RANGE WAS DETERMINED BY DRUG QUANTITY, NOT THE CAREER OFFENDER GUIDELINE?**

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
PETITION FOR WRIT OF CERTIORARI.....	1
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED....	2
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT.....	5
I. THERE WAS NO EVIDENCE THAT MR. ROBEY WAS INVOLVED IN THE IMPORTATION OF METHAMPHETAMINE. THERE WAS INSUFFICIENT EVIDENCE THAT THE CONSPIRACY AS A WHOLE WAS INVOLVED IN THE IMPORTATION OF METHAMPHETAMINE.....	5
II. MR. ROBEY SHOULD NOT HAVE BEEN PLACED IN CRIMINAL HISTORY CATEGORY VI AS A CAREER OFFENDER BECAUSE HE WAS NOT SENTENCED UNDER THE CAREER OFFENDER GUIDELINE.....	15
CONCLUSION.....	16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<i>United States v. Espinoza</i> , 885 F.3d 516 (8 th Cir. 2018).....	14
<i>United States v. Felix-Aguirre</i> , 824 Fed. Appx. 429 (8 th Cir. 2020).....	14
<i>United States v. Kroeger</i> , 229 F.3d 700 (8 th Cir. 2000).....	16
<i>United States v. Rivera-Mendoza</i> , 682 F.3d 730 (8 th Cir. 2012).....	14
<u>Statutes, Rules and Other</u>	<u>Pages</u>
21 U.S.C. § 841(a)(1)	3
21 U.S.C. § (b)(1)(A).....	3
28 U.S.C. § 1291.....	1
28 U.S.C. §1254(1).....	1
U.S. S.Ct. Rule 10(c).....	5
U.S.S.G. § 1B1.3.....	9
U.S.S.G. § 1B1.5(b)(2).....	15
U.S.S.G. § 2D1.1.....	15
U.S.S.G. § 2D1.1(b)(5).....	2, 3, 5, 8
U.S.S.G. § 4B1.1(b).....	2, 15
https://www.dictionary.com/browse/broker	12
https://www.merriam-webster.com/dictionary/broker	12

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Bobby Dean Robey, respectfully requests that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit in this matter.

OPINION BELOW

On March 14, 2023, the United States Court of Appeals for the Eighth Circuit entered its Opinion and Judgment, App. 1, 13, affirming the November 30, 2021, Judgment of the United States District Court for the Northern District of Iowa.

JURISDICTION

The Eighth Circuit's jurisdiction was based on 28 U.S.C. § 1291. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Eighth Circuit filed its Opinion and Judgment on March 14, 2023. A timely Petition for Rehearing and Rehearing *En Banc* was filed on March 28, 2023. The Eighth Circuit entered an Order denying the Petition for Rehearing and Rehearing *En Banc* on April 19, 2023. This Petition for Writ of Certiorari is timely filed within ninety (90) days of

the filing of the Eighth Circuit's Order denying Rehearing and Rehearing *En Banc*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

If (A) 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, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.

U.S.S.G. § 2D1.1(b)(5).

Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

U.S.S.G. § 4B1.1(b).

STATEMENT OF THE CASE

Bobby Dean Robey, along with several others, was indicted for Conspiracy to Distribute a Controlled Substance (Methamphetamine), in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). (R. Doc. 8 (original Indictment); R. Doc. 70 (Superseding Indictment)).¹ Mr. Robey pled guilty to Count 1 of the Superseding Indictment. (R. Doc. 387 - Report and Recommendation; R. Doc. 411 – Order).

The PSIR (R. Doc. 515) attributed 5,082.69 grams of methamphetamine (mixture) and 4,991.5 grams of “ice” methamphetamine to Mr. Robey. (PSIR at ¶ 22). That finding was unobjected to, resulting in a base offense level of 38. *Id.*

The PSIR then added two levels under U.S.S.G. § 2D1.1(b)(5) for importation of methamphetamine. (PSIR ¶ 23). That adjustment was objected to and is discussed in Section I below. The District Court overruled Mr. Robey's objection and imposed this adjustment. (Sent. Tr. 33-35).

Three levels were subtracted for acceptance of responsibility. (PSIR ¶¶ 29, 30; Sent. Tr. 7). Thus, the total offense level was 37.

¹“R. Doc.” refers to the District Court's docket in *United States v. Robey*, N.D. Iowa No. 20-CR-2034-004-CJW-MAR. “Sent. Tr.” refers to the transcript of Mr. Robey's sentencing, held November 29, 2021.

(PSIR ¶ 31; Sent. Tr. 36).

The PSIR found that Mr. Robey had six criminal history points, which would normally result in a criminal history category III. (PSIR ¶¶ 47, 48). However, the PSIR found that Mr. Robey is a Career Offender, which increases his criminal history category to VI. (PSIR ¶ 49). Mr. Robey objected. The District Court agreed with the PSIR and found that Mr. Robey should be sentenced using criminal history category VI. (Sent. Tr. 35-36). This issue is discussed in Section II below.

Ultimately, based on a total offense level of 37 and Criminal History Category VI, the District Court sentenced Mr. Robey to 270 months imprisonment, after additional sentencing reductions not at issue. (R. Doc. 611 - Judgment at 2; Sent. Tr. 36, 48).

Mr. Robey appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed Mr. Robey's conviction, rejecting his arguments regarding the two sentencing issues set forth above.

REASONS FOR GRANTING THE WRIT

Certiorari is properly granted as the Eighth Circuit's decision in this case decides an important question of federal law that has not been, but which should be decided by this Court. *See* Supreme Court Rule 10(c).

I. THERE WAS NO EVIDENCE THAT MR. ROBEY WAS INVOLVED IN THE IMPORTATION OF METHAMPHETAMINE. THERE WAS INSUFFICIENT EVIDENCE THAT THE CONSPIRACY AS A WHOLE WAS INVOLVED IN THE IMPORTATION OF METHAMPHETAMINE

Over Mr. Robey's objection, the District Court added two levels pursuant to U.S.S.G. § 2D1.1(b)(5) because "the offense involved the importation of amphetamine or methamphetamine." (Sent. Tr. 29-35; PSIR ¶ 23).

At sentencing, the Government presented testimony from Special Agent John Austin, its case agent. (Sent. Tr. 11, 12). Mario Hernandez was the main leader of the conspiracy, and was believed to reside in Mexico. (Sent. Tr. at 13). There had been intercepted phone calls between Mr. Hernandez and members of the conspiracy in which Mr. Hernandez used a Mexico-based telephone number. *Id.* at 13-14.

That included interception of phone calls between Mr. Hernandez and Mr. Robey in which delivery of methamphetamine to Mr. Robey was arranged. *Id.* at 15. In one call in particular, a delivery of methamphetamine from Houston, Texas, to Iowa was discussed. *Id.* at 29. Following that, a drug package intended for Mr. Robey coming from Texas driven by co-Defendants Jack Mazareigos-Galicia and Rogelio Lemus Hernandez was intercepted by law enforcement. *Id.* at 16.

SA Austin found no evidence that Mr. Robey was personally involved in importing methamphetamine from Mexico. (Sent. Tr. at 19-20). Mr. Robey was interviewed by authorities a couple of times. *Id.* at 20. He consistently stated that the methamphetamine was brought from Houston, Texas, to Iowa for distribution in Iowa. *Id.* Mr. Robey had no involvement in getting the methamphetamine to Houston. *Id.* at 22.

During the investigation, law enforcement seized both pure methamphetamine and methamphetamine mixture. (Sent. Tr. at 16). SA Austin testified that, based on his experience, pure methamphetamine comes from Mexico. *Id.* SA Austin has heard of super labs, in which pure methamphetamine is produced in large

quantities. *Id.* at 16-17. He has not run across a U.S. based super lab, although acknowledging the possibility that they exist, and believes the super labs are based in Mexico. *Id.* at 17. SA Austin testified, that during the course of the investigation of the Mario Hernandez organization, there was no indication that the methamphetamine was being manufactured in the United States. *Id.* However, there are conversion labs in the United States where methamphetamine manufactured in Mexico is produced in a liquid form that is more easily smuggled across the border and then converted in the United States to a crystal form. *Id.* at 17-18.

SA Austin was “inferring the fact that Mr. Hernandez was importing methamphetamine from Mexico to a person in Houston, Texas – a broker we’ll call it. That person was responsible for transporting the methamphetamine from Houston, Texas, to Iowa.” (Sent. Tr. 22). SA Austin acknowledged that it was possible that some other drug organization was importing the methamphetamine from Mexico and Mr. Hernandez bought it from that organization in Houston. *Id.* at 22-23. Although SA Austin had no indication that was happening, he also had no evidence of importation from Mexico other than “we had identified a person who we believed was responsible as –

we want to call him the broker in this investigation, as Pedrin Nunez. We believe that he was in Houston brokering these deals with Mario Hernandez.” *Id.* at 23. Mr. Nunez was not named as a defendant in the case. *Id.* Mr. Nunez was identified as the “broker in this case” and “could have been” “possibly transporting the drugs across the border.” *Id.* at 23-24.

There was no evidence that Mr. Robey was personally involved in the importation of methamphetamine from Mexico. (Sent. Tr. at 19-20). Mr. Robey was interviewed by authorities a couple of time. *Id.* at 20. He consistently stated that the methamphetamine was brought from Houston, Texas, to Iowa for distribution in Iowa. *Id.* Mr. Robey had no involvement in getting the methamphetamine to Houston. *Id.* at 22. Overall, while it is certainly possible that the methamphetamine had been originally imported from Mexico, there was no evidence that the conspiracy of which Mr. Robey was a part was involved in importing methamphetamine, as opposed to some other criminal group importing the methamphetamine and then selling it to members of the conspiracy involving Mr. Robey.

U.S.S.G. § 2D1.1(b)(5) provides for the two level adjustment “if the offense involved the importation of amphetamine or

methamphetamine.” “Offense” includes the offense of conviction and all relevant conduct under U.S.S.G. § 1B1.3. The offense of conviction as set forth in the Superseding Indictment is conspiracy to distribute methamphetamine. It is not conspiracy to import methamphetamine. The charged conspiracy, as set forth in the offense conduct section of the PSIR, involved the transportation of methamphetamine from Houston to Iowa and then distribution of the methamphetamine in Iowa. Mr. Robey's relevant conduct and role in the conspiracy was to accept shipments of methamphetamine from Houston brought by various couriers, such as co-Defendants Rogelio Lemus Hernandez and Jack Andrew Mazareigos-Galicia, and to then transfer the methamphetamine to dealers in Iowa, such as co-Defendants Jaime Becker and Travis Werkmeister. The Eighth Circuit's opinion affirming the District Court greatly expanded the scope of the conspiracy that Mr. Robey had agreed to participate in, *i.e.*, to transport methamphetamine from Texas to Iowa and distribute it in Iowa. There was no evidence that Mr. Robey ever agreed to be part of a conspiracy to import methamphetamine from Mexico. That expansion of the conspiracy beyond the scope of Mr. Robey's agreement is fundamentally unfair to Mr. Robey as he should be punished based only on what he

agreed to participate in and the criminal conduct that he knowingly participated in.

Even if the methamphetamine originated in Mexico, there was no evidence that members of the charged conspiracy, including Mr. Robey, were involved in importing the methamphetamine from Mexico to Houston. There is no concrete evidence as to whether individuals associated with Mario Hernandez imported the methamphetamine from Mexico, some other criminal organization imported the methamphetamine from Mexico and then sold it to Mr. Hernandez, or if the methamphetamine was manufactured in the United States, either by individuals associated with Mr. Hernandez or a different criminal organization, and then sold to Mr. Hernandez. Without direct evidence that the methamphetamine was imported from Mexico by members of the charged conspiracy and with Mr. Robey's knowledge and involvement, it is improper to assess the two-level adjustment for importation against Mr. Robey.

The importation adjustment should be reserved for those defendants who are actively involved in bringing methamphetamine across the border. Assessing this adjustment to individuals, such as Mr. Robey, who are not directly involved in importation impermissibly

broadens the scope of the adjustment beyond that intended. Under the logic of the panel opinion, every person in the United States involved in distribution of methamphetamine would be subject to this two-level adjustment on the theory that the methamphetamine ultimately originated in Mexico and was imported by someone into the United States. That cannot be what the Sentencing Commission intended with this adjustment.

There was absolutely no evidence that the Mario Hernandez drug trafficking conspiracy involving Mr. Robey included importation of methamphetamine from Mexico to Texas, as opposed to another criminal organization importing the methamphetamine and Mario Hernandez purchasing that methamphetamine in Texas. In fact, the evidence introduced by the Government at sentencing through SA Austin suggests the latter conclusion. In his testimony, SA Austin stated that the Government had developed evidence that a “broker” named Pedrin Nunes was the person in Houston, Texas responsible for providing the methamphetamine in Texas to the drivers who would bring it to Mr. Robey in Iowa. (Sent. Tr. 23) (“we had identified a person who we believed was responsible as – we want to call him the broker in this investigation, as Pedrin Nunes. We believe that he was

in Houston brokering these deals with Mario Hernandez.”). SA Austin referred to Mr. Nunes as a “broker” three times (Sent. Tr. 22, 23, 24). The District Court also referred to the “broker.” (Sent. Tr. 34) (“the investigation has identified a broker in Texas who was apparently in charge of or arranging for the transportation of methamphetamine across the border into Texas”). The panel’s opinion ignores this evidence and this point.

The term “broker” has a well-established meaning that is much more consistent with one group importing the methamphetamine and Mr. Nunes, as the “broker,” arranging for sale of the methamphetamine to Mario Hernandez for distribution in Iowa. Generally, a “broker” is a person who arranges a transaction between an independent seller and an independent buyer. *See* <https://www.dictionary.com/browse/broker> (“a person who functions as an intermediary between two or more parties in negotiating agreements, bargains, or the like”) (last visited April 3, 2022); <https://www.merriam-webster.com/dictionary/broker> (“one who acts as an intermediary: such as . . . b : an agent who negotiates contracts of purchase and sale (as of real estate, commodities, or securities)”) (last visited April 3, 2022). In other words, the use of the term “broker” to

describe Mr. Nunes denotes a person who acted as an intermediary between the person(s) importing the methamphetamine and Mario Hernandez and members of the Hernandez conspiracy who were then responsible for transporting it from Texas to Iowa for distribution in Iowa.

Also of great significance, the Government intercepted thousands of telephone calls, including interception of the phone of Mario Hernandez. (Sent. Tr. 19, 21). The Government also interviewed various persons involved in the conspiracy. *Id.* at 19. It was an extensive investigation. *Id.* Yet despite that extensive investigation, the Government did not introduce as evidence a single phone call or any statement by anyone involved referencing importation of methamphetamine from Mexico. It would be logical for the Government to have done so if any such evidence existed. It would also be logical that if Mario Hernandez was involved in importation of methamphetamine from Mexico to Houston, Texas, that there would have been some discussion of that in the numerous phone calls intercepted, particularly with respect to Mr. Hernandez' phone calls.

There is limited case law discussing the importation adjustment. First, the Eighth Circuit found that the adjustment applied in *United*

States v. Felix-Aguirre, 824 Fed. Appx. 429 (8th Cir. 2020). However, that case is distinguishable because there was evidence that Felix-Aguirre had been sent from Mexico by the drug cartel to manage its drug operation in the United States. Second, the Eighth Circuit approved application of the adjustment in *United States v. Rivera-Mendoza*, 682 F.3d 730, 733-4 (8th Cir. 2012). That case is also distinguishable because the evidence there was that the Rivera-Mendoza admitted that he received methamphetamine from a courier that he knew had brought it from Mexico. Third, *United States v. Espinoza*, 885 F.3d 516 (8th Cir. 2018), is distinguishable because there was evidence that the defendant (Tizoc) had traveled several times to Mexico, exchanged cars for drugs in Mexico, transported drug money to Mexico, and received shipments of drugs that had originated in Mexico.

Overall, there was insufficient evidence to find that the conspiracy involved importation of methamphetamine from Mexico or that Mr. Robey was involved in the importation of methamphetamine from Mexico. The District Court erred in imposing this adjustment and the Eighth Circuit erred in affirming. Mr. Robey's sentence must be reversed and this matter remanded for resentencing.

II. MR. ROBEY SHOULD NOT HAVE BEEN PLACED IN CRIMINAL HISTORY CATEGORY VI AS A CAREER OFFENDER BECAUSE HE WAS NOT SENTENCED UNDER THE CAREER OFFENDER GUIDELINE

With regard to Mr. Robey's criminal history, he has six criminal history points, which would normally place him in Criminal History Category III. (PSIR ¶ 48). The PSIR raised him to a Criminal History Category VI because he is a Career Offender. (PSIR ¶ 49). Mr. Robey objected to Paragraph 49. *Id.*

As noted in Paragraph 22 of the PSIR, the offense level applying U.S.S.G. § 2D1.1 is 38, which is greater than the Career Offender offense level of 37 from U.S.S.G. § 4B1.1(b). (PSIR ¶ 28).

U.S.S.G. § 4B1.1(b) provides that “if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.” (emphasis added). “Subsection” refers only to U.S.S.G. § 4B1.1(b). As that subsection is not being used to determine Mr. Robey's offense level, it cannot be used to determine his Criminal History Category. *Cf.* U.S.S.G. § 1B1.5(b)(2) (“An instruction to use a particular subsection or

table from another offense guideline refers only to the particular subsection or table referenced, and not to the entire offense guideline."); *United States v. Kroeger*, 229 F.3d 700, 702 (8th Cir. 2000). Because Mr. Robey's offense level is determined by § 2D1.1(a)(2), he is not being sentenced as a Career Offender under subsection 4B1.1(b). Thus, his Criminal History Category should remain at III, and not be increased to VI.

CONCLUSION

Petitioner Bobby Dean Robey respectfully requests this Court to grant certiorari in this matter. Petitioner Robey further requests this Court to reverse and remand this matter to Court of Appeals for the Eighth Circuit with directions to remand to the District Court for resentencing.

Respectfully Submitted,

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