

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BOBBY FRIE, JR. - PETITIONER

VS.

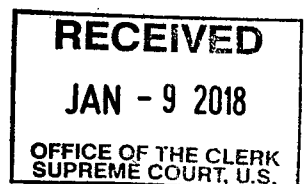
UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Pro Se Petitioner



QUESTION PRESENTED

United States Sentencing Guideline Section 2D1.1(b)(5) states the following, in pertinent part:

[If] the offense involved the importation of amphetamine or methamphetamine or the manufacturing of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully ... increase by 2 levels.

The Fifth Circuit holds that, under this language, the defendant does not have to know the methamphetamine was imported. Other courts hold the exact opposite.

Upon that introductory statement, Mr. Frie presents the following question:

Does the language in USSG § 2D1.1(b)(5) require that a defendant know the methamphetamine was imported to incur the importation penalty under the guideline, and does it offend Due Process to impose such a penalty without requiring the defendant knew about the importation or the government to prove he knew for the penalty to apply?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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United States of America v. Bobby Frie,
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(July 29, 2016)

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BOBBY FRIE, JR. - PETITIONER

VS.

UNITED STATES OF AMERICA - RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Bobby Frie respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix A to the Petition and is reported at United States of America v. Bobby Frie, 2017 U.S. App. LEXIS 19006 (5th Cir. Oct. 2, 2017).

The judgment of the United States District Court for the Northern District of Texas appears at Appendix B and is not reported, but is docketed as entry 506 under case number 4:16-CR-00021-13.

JURISDICTION

Petitioner Bobby Frie seeks review of an October 2, 2017, Order issued by the United States Court of Appeals for the Fifth Circuit. No petition for rehearing was filed in this case.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provision is stated in its entirety:

U.S.S.G. § 2D1.1(b)(5)

If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacturing 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.

The following provisions are too lengthy to post in their entirety:

21 U.S.C. § 841

21 U.S.C. § 846

28 U.S.C. § 944

21 U.S.C. § 952

21 U.S.C. § 959

21 U.S.C. § 960

Public Law No. 104-237

U.S.S.G. Amendment 555

STATEMENT OF THE CASE

Bobby Frie was charged by indictment with a single count of conspiring with five others to possess with intent to distribute a controlled substance (methamphetamine), in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B). He pleaded guilty without a plea agreement on March 29, 2016.

A presentence report (PSR) was completed prior to sentencing, which relied on the information by a codefendant, which determined that Mr. Frie was responsible for 22.8 kilograms of methamphetamine. 21.85 kilograms of this amount was based on the statement of a codefendant alone. A polygraph, however, proved Mr. Frie had received a total of less than 24 ounces during the offense. The polygraph was admitted for sentencing by the court. Mr. Frie's objection to the drug amount was overruled and the higher amount was used to calculate a sentence. Further, the fact that the methamphetamine was only 74-percent pure was not addressed by the court.

The court used the higher drug amount to determine Mr. Frie's sentence under § 841(b)(1)(B), instead of the lower penalty under § 841(b)(1)(C), had the purity level been considered.

After the Government filed a motion for reduction under U.S.S.G. § 5K1.1, the court imposed a sentence of 340 months, or 28 years and 4 months, in prison -- 80 months below the 420 months under the adjusted Guideline range.

When Mr. Frie's counsel objected to the two-level penalty under U.S.S.G. § 2D1.1(b)(5) for the importation of the

methamphetamine, the following discussion took place at the sentencing hearing:

THE COURT: ... Okay. Your next objection is to paragraph 48 of the Presentence Report. Let me find that. * * * I think possibly the probation officer misread the guideline because she said in paragraph 48 that the defendant had to -- knew (sic) that the drugs were imported unlawfully.

I don't think the guideline says that. I think it says that if we're dealing with listed chemicals, that one of the requirements is that the defendant knew that they were imported unlawfully.

Is that the way you read the guideline?

[PROSECUTOR]: Yes, Your Honor, and I believe there was a response to the objection in this case that cited a Fifth Circuit case that there is no requirement that it be proved that the defendant knew the methamphetamine was imported.

[DEFENSE COUNSEL]: And Judge, I agree with that, but what we were proceeding on is the evidence that I had of where they were scoring that it was imported because, again, Mr. Overstreet's [a codefendant] statement of saying that just because, where he got it from, the guy was Hispanic, therefore, he assumed it was from Mexico. There was no evidence it was from Mexico. He just assumed because the guy was Hispanic.

THE COURT: Well, I think these people that are dealing in these drugs know where they come from, so I'll overrule that objection. I'm satisfied that the drugs were imported from Mexico, and that he didn't need to know they were imported from Mexico to be subject to the two-level increase, and I find that they were imported and that the two-level increase was proper.

Okay. That takes care of the objection to paragraph 48.

Sent. Tr., at 14-15.

On direct appeal, Mr. Frie's counsel did raise this issue, but acknowledged that the argument was foreclosed by Fifth Circuit caselaw. Mr. Frie also raised that the drug quantity calculations based on one codefendant's unsubstantiated statement was wrong, and that his sentence was unreasonable. The Fifth Circuit affirmed his conviction and sentence. See United States

v. Frie, No. 16-11223, reported at 2017 U.S. App. LEXIS 19006
(11th Cir. Oct. 2, 2017).

Mr. Frie did not appeal to the Supreme Court, and has not
filed any motions attacking his sentence or conviction.

REASONS FOR GRANTING THE WRIT

There is a circuit split on whether a defendant must know that the methamphetamine he possessed was imported in order to qualify for the importation penalty under the Sentencing Guidelines. Whether a defendant gets that penalty depends entirely on which circuit he is in when sentenced.

It is important for this Court to resolve this circuit split, because the point of the Guidelines is to promote fairness across the sentencing courts. This circuit split contradicts that point. Further, the Guideline enhancement at issue here was the result of a Congressional directive to the Sentencing Commission, which increases the importance that all of the sentencing courts are on the same page.

The Court should grant Mr. Frie's petition to correct this important matter.

A. There is a Circuit Split on This "Important Matter"

The Ninth Circuit requires that the government must prove a defendant knew the methamphetamine he possessed was imported for the sentencing enhancement under USSG § 2D1.1(b)(5) to apply. United States v. Job, 851 F.3d 889, 908 (9th Cir. 2017).

The Fifth Circuit holds the exact opposite. United States v. Serfass, 684 F.3d 548, 553 (5th Cir. 2012).

The Job Court pointed out why the Fifth Circuit's position is wrong: "Only one circuit has applied the government's proffered reading of U.S.S.G. § 2D1.1(b)(5) that would dispose with the requirement that the defendant actually know the drugs

were imported. In United States v. Serfass, the Fifth Circuit stated that the plain language of § 2D1.1(b)(5) supports the conclusion that the increase applies to a defendant who possesses methamphetamine that had itself been unlawfully imported regardless of whether he or she had actual knowledge of the importation. 684 F.3d 548, 553 (5th Cir. 2012). We decline to adopt the Fifth Circuit's conclusion here[.]” Job, 851 F.3d, at 908.

Other courts are at odds as well with the Fifth Circuit's holding in Serfass. See United States v. Rivera-Mendoza, 682 F.3d 730 (8th Cir. 2012) (importation enhancement applicable because defendant admitted methamphetamine came from Mexico); United State v. Redifer, 631 Fed. Appx. 548, 565 (10th Cir. 2015) (“government proved by a preponderance of the evidence that Mr. Redifer knew the methamphetamine was imported”); and United States v. Frake, 2016 U.S. Dist. LEXIS 137806 (SDFL Aug. 3, 2016) (“Section 2D1.1(b)(5) applies, which provides for a two-level increase where the defendant knows methamphetamine was illegally imported”), R&R adopted at 2016 U.S. Dist. LEXIS 137624 (Sept. 28, 2016).

No other court has held that § 2D1.1(b)(5)'s importation penalty applies regardless of whether the defendant knew the drugs were imported, except the Fifth Circuit in Serfass.

B. The Language of § 2D1.1(b)(5) is Ambiguous

Section 2D1.1(b)(5) at the time of Mr. Frie's offense in 2014 provided in its entirety as follows (on the next page):

If (A) the offense involved importation of amphetamine or methamphetamine or the manufacturing 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) (2014).

Counsel did not ask for a mitigating role under § 3B1.2; therefore, § 2D1.1(b)(5) could be applied to Mr. Frie.

Does the phrase "that the defendant knew were imported unlawfully" apply to both the importation of the methamphetamine and the chemicals used to make it, or to just the chemicals?

It would not make sense to require only that the defendant knew the chemicals used to make methamphetamine were imported, and not also the methamphetamine that was imported.

First, the scienter requirement should apply to importation of both the methamphetamine and the chemicals, under a common-sense reading of the Guideline. This would comport with the legislative intent behind the Guideline penalty.

Congress enacted the Comprehensive Methamphetamine Control Act of 1996 finding that "methamphetamine is a very dangerous and harmful drug." Pub. L. No. 104-237, § 2. Under the Act, Congress, pursuant to 28 U.S.C. § 944, enacted a directive to the Sentencing Commission:

The United States Sentencing Commission shall review and amend its guidelines and its policy statements to provide for increased penalties for unlawful ... importing ... of methamphetamine."

Id., at § 301(a) (emphasis added).

Pursuant to the Congressional directive above, the Commission created Amendment 555 (1997) to add a two-level penalty if the offense involved the importation of methamphetamine.

The Commission provided the following "reason" for the amendment:

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.

Amend. 555, Reason for Amendment.

The clear objective of the two-level penalty, according to the Commission, was to provide a penalty to both the importation of methamphetamine and the chemicals used to make it.

Because the language of § 2D1.1(b)(5) has been construed differently by the courts, with each court taking a different view of the language, looking at the legislative history and reasons for the language shows that the scienter requirement applies to importation of the drug and the chemicals used to make methamphetamine. It is what Congress wanted, and what the Commission intended by the penalty.

Further, the drug statutes dealing with importation under Title 21 require knowledge of the importation for importation of both methamphetamine and the chemicals. See 21 U.S.C. §§ 952, 960(a) (requiring "knowingly or intentionally imports" methamphetamine); and 21 U.S.C. § 959(b) (requiring "intending or knowing" the chemical will be used to make methamphetamine).

"Sentencing Guidelines must be interpreted as if they were a statute or a court rule." United States v. Goldbaum, 879 F.2d 811, 814 (10th Cir. 1989) (relying on Mistretta v. United States, 488 U.S. 361, 391-92 (1989)). Treating § 2D1.1(b)(5) as a statute, interpreting the language "in favor of the

defendant[]," the government should have to prove that Mr. Frie knew the methamphetamine that was attributed to him was imported in order for the penalty to apply.

The Fifth Circuit's holding in Serfass would mean that anyone at all who possessed methamphetamine should get the two-level penalty under § 2D1.1(b)(5), and the government would never have to prove it was imported for the importation penalty to apply. To say the least, this lacks due process for the defendant subjected to the penalty.

Here in Mr. Frie's case, the government did not even have to attempt to prove Mr. Frie knew the methamphetamine was imported. In fact, the sentencing judge stated when Mr. Frie's counsel tried to challenge that Mr. Frie did not know the methamphetamine was imported:

THE COURT: Well, I think these people that are dealing in these drugs know where they come from, so I'll overrule that objection. I'm satisfied that the drugs were imported from Mexico, and that he didn't need to know they were imported from Mexico to be subject to the two-level increase, and I find that they were imported and that the two-level increase was proper.

Okay. That takes care of the objection to paragraph 48. Sent. Tr., at 15.

The judge's reasoning here entirely contradicts that the "burden of proof is the government's" on whether § 2D1.1(b)(5) applies. United States v. Rivera-Medoza, 682 F.3d 730, 733 (8th Cir. 2012) (regarding application of importation penalty under § 2D1.1(b)).

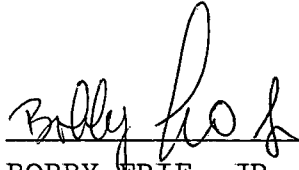
The language of § 2D1.1(b)(5) is ambiguous as far as to which provision the scienter applies. But legislative intent shows knowledge of importation is needed for both provisions.

CONCLUSION

Mr. Frie's petition should be granted because there is a circuit split on the question he brings before this Court. Only the Fifth Circuit has held that a defendant does not have to know the drug was imported for the importation penalty under the Guidelines. The rest of the courts have held otherwise, even pointing out why the Fifth Circuit's position is wrong. This Court should answer Mr. Frie's question to resolve this divide between the courts.

Respectfully submitted,

Dated: 12-29-17



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