IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

NO. _____

Jeremy Aswegan,

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. 22-2026)

WEBB L. WASSMER
Wassmer Law Office, PLC
5320 Winslow Road
Marion, IA 52302
Telephone: (319) 210-4288
e-mail: wassmerlaw@yahoo.com

ATTORNEY FOR PETITIONER
JEREMY ASWEGAN

QUESTION S PRESENTED

I. WHETHER PLAIN ERROR REVIEW APPLIES WHEN A DEFENDANT OPPOSES A GOVERNMENT' OBJECTION TO A SENTENCING ENHANCEMENT?

II. WHETHER THERE WAS INSUFFICIENT EVIDENCE THAT MR. ASWEGAN WAS INVOLVED IN THE "IMPORTATION" OF METHAMPHETAMINE?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Jeremy Aswegan, 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 May 23, 2023, the United States Court of Appeals for the Eighth Circuit entered its Opinion and Judgment, App. 1, 4, affirming the May 11, 2022, 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 May 23, 2023. A timely Petition for Rehearing and Rehearing *En Banc* was filed on June 5, 2023. The Eighth Circuit entered an Order denying the Petition for Rehearing and Rehearing *En Banc* on June 29, 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).

STATEMENT OF THE CASE

Defendant-Appellant Jeremy Aswegan was indicted on August 4, 2021, for one count of Conspiracy to Distribute a Controlled Substance (Methamphetamine), in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). (R. Doc. 3).

Mr. Aswegan pled guilty, without a plea agreement, to the charged offense on October 7, 2021. (R. Doc. 25 - Report and Recommendation; R. Doc. 27 - Order Regarding Report and Recommendation).

The Presentence Investigation Report found that Mr. Aswegan should be held responsible for 5,897.6 grams of ice methamphetamine, for a base offense level of 38. (R. Doc. 31 – PSIR at ¶ 22). The Government objected, arguing that Mr. Aswegan should be held responsible for 82,638.44 grams of ice methamphetamine. *Id.*[1] The District Court, at sentencing, resolved this issue in the Government's favor and found that Mr. Aswegan should be held responsible for approximately 80,000 grams of ice methamphetamine. (Sent. Tr. 70).

The Presentence Report added two levels for possession of a

1Mr. Aswegan also objected, asserting that he should be assessed a lesser quantity. Mr. Aswegan withdrew that objection prior to sentencing. (R. Doc. 35-1 – Defendant's Sentencing Memorandum).

firearm. (R. Doc. 31 – PSIR at ¶ 23). Although Mr. Aswegan initially objected, *id.*, Mr. Aswegan withdrew that objection prior to sentencing. (R. Doc. 35-1 – Defendant's Sentencing Memorandum).

At issue in this Petition, the Government also objected to the PSIR's failure to assess a two-level increase for importation of methamphetamine pursuant to U.S.S.G. § 2D1.1(b)(5). (R. Doc. 31 – PSIR at ¶ 27). At sentencing, the District Court resolved this issue in the Government's favor and imposed the adjustment. (Sent. Tr. 76). This was the issue raised on appeal and further facts are discussed below.

Three levels were subtracted for acceptance of responsibility by both the PSIR and the District Court. (R. Doc. 31 – PSIR at ¶¶ 29-30; Sent. Tr. 76).

The PSIR calculated a total offense level of 37. (R. Doc. 31 – PSIR at ¶ 31). With the addition of the two-level enhancement for importation, the District Court calculated the total offense level at 39. (Sent. Tr. 75-76).

Mr. Aswegan had one criminal history point for a Criminal History Category of I. (R. Doc. 31 – PSIR at ¶ 39).

The District Court ultimately calculated the advisory Sentencing Guidelines range at 262 to 327 months. (Sent. Tr. 77). Mr. Aswegan made a Motion for a Downward Variance. (R. Doc. 35 - Motion; R. Doc. 35-2 at 7 - Brief; Sent. Tr. 79-83). The District Court denied Mr. Aswegan's Motion for a Downward Variance. (Sent. Tr. 88). The District Court sentenced Mr. Aswegan to 262 months imprisonment. (Sent. Tr. 88-89).

Mr. Aswegan appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed Mr. Aswegan's conviction, rejecting his arguments regarding the sentencing issue set forth above. On appeal, the panel decision states "[b]ecause Aswegan did not object to the Sentencing Guidelines calculation below, we review for plain error." App. 2. As discussed below, the Eighth Circuit Court of Appeals applied an incorrect standard of review.

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). Specifically, when the Government objects to the PSIR's

failure to impose a sentencing enhancement, the defendant contests that objection, and the District Court sustains the Government's objection and imposes the enhancement, does the defendant preserve error?

I. THE EIGHT CIRCUIT INCORRECTLY APPLIED A PLAIN ERROR STANDARD OF REVIEW

As discussed above, the PSIR did not impose the importation adjustment. (R. Doc. 31 – PSIR at ¶ 27). The Government objected. *Id.* This issue was the primary issue litigated at sentencing. The Government presented evidence on the importation adjustment, through the testimony of case agent Michael Marcotte. (Sent. Tr. 11 et seq.). Counsel for Mr. Aswegan cross-examined Officer Marcotte. (Sent. Tr. 48 et seq.). The parties argued the issue the District Court. (Sent. Tr. 56 et seq.). The District Court expressly ruled on the issue. (Sent. Tr. 69 et seq.).

In the appeal briefing in this matter, Appellant Aswegan asserted that "[t]his issue was raised and decided at sentencing (Sent. Tr.). Error was preserved." (Appellant Brief at 5). While the Government did not make any statement in its Brief regarding error

preservation, the Government did correctly state the applicable standard of review that "[t]his Court reviews the district court's factual findings for clear error, while it reviews the district court's application of the guidelines to the facts de novo." (Gov't Brief at 19). The Government did not contest error preservation or make any argument that plain error review applies.

Counsel for Mr. Aswegan has not found any Eighth Circuit case (or cases from other Circuits) expressly addressing the standard of review when the District Court sustains the Government's objection to a Guideline adjustment and the Defendant appeals. Counsel has located *United States v. Callaway*, 762 F.3d 754 (8th Cir. 2014). In that case, the Government had objected to the PSIR's failure to apply the adjustment for a vulnerable victim, the District Court sustained the objection, and the defendant appealed. *Id.* at 757. The Eighth Circuit appears to have applied the standard of reviewing the District Court's interpretation and application of the Guidelines *de novo* and the District Court's factual findings for clear error with respect to that issue. *Id.* at 760. In contrast, the Eighth Circuit reviewed the issue of amount of loss, to which Defendant Callaway had not objected, for plain error. *Id.* at 759.

The panel opinion cites to *United States v. Harrell*, 982 F.3d 1137, 1140 (8th Cir. 2020). *Harrell* references only the general rule that plain error review applies when "no objection is made before the district court." *Id.* *Harrell* does not address the situation where the Government objects, Defendant contests the objection, extensive evidence is presented and extensive arguments are made, and the District Court squarely and expressly rules on the issue.

In any event, plain error Rule provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). Federal Rule of Criminal Procedure 51(a) provides that "[e]xceptions to rulings or orders of the court are unnecessary." Rule 51(b) provides that "[a] party may preserve a claim of error by informing the court – when the court ruling or order is made or sought – of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." The key distinction is whether the issue is brought to the ruling court's attention.

The issue of the importation adjustment was clearly brought to the District Court's attention and was heavily litigated. Error was preserved. The District Court was undisputedly informed by

Defendant that Defendant's position was that the importation adjustment should not be applied and the reasons therefor. Any further exception by Defendant after the District Court ruled was unnecessary. The Eighth Circuit's opinion is directly contrary to Rule 52(b).

The Eighth Circuit incorrectly applied the plain error standard of review. The Eighth Circuit's opinion should be summarily reversed and this matter remanded to the Eighth Circuit for consideration of Mr. Aswegan's appeal on the merits.

If this Court reaches the merits of the imposition of the importation enhancement, that issue is discussed in Section II below.

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

The Government objected to Paragraphs 27, 31, and 65 of the PSIR, on the basis that the PSIR did not assess Mr. Aswegan with a two-level enhancement for importation of methamphetamine pursuant to U.S.S.G. § 2D1.1(b)(5). (R. Doc. 31 – PSIR at ¶¶ 27, 31, and 65). The

Government argued that Mr. Aswegan was in communication with Daniel Manjarrez, who was organizing the supply of methamphetamine from Mexico. *Id.* The Probation Office rejected this argument. *See* R. Doc. 31 - PSIR at ¶ 27, Probation Office's Response to Objection No. 10. The PSIR contained the following information relevant to this issue.

Daniel Manjarrez is a "high-level drug trafficker." (R. Doc. 31 - PSIR at ¶ 4). Mr. Manjarrez instructed Ms. Deyerle to travel to California to pick up methamphetamine. (R. Doc. 31 - PSIR at ¶ 7). Mr. Manjarrez subsequently informed Ms. Deyerle that he would ship methamphetamine to her in Iowa via rail car. (R. Doc. 31 - PSIR at ¶ 9). However, the originating point of any methamphetamine shipped to Ms. Deyerle via rail car is not set forth in the PSIR. In Paragraph 15, it is noted that "The defendant further admitted to having direct communications with Manjarrez." (R. Doc. 31 - PSIR at ¶ 15). However, the frequency, substance or subject matter(s) of those communications is not discussed in the PSIR. Mr. Aswegan also admitted to going to Chicago to resupply methamphetamine and that the transaction was remotely coordinated by Mr. Manjarrez, which is possibly the subject matter of Mr. Aswegan's communications with Mr. Manjarrez. (R. Doc. 31 - PSIR at ¶ 15).

Michael Marcotte, a Cedar Falls, Iowa, police officer assigned to the Tri-County Drug Enforcement Task Force, testified for the Government at sentencing to provide further information to the Court. (Sent. Tr. 11-12). Investigator Marcotte was the case agent for the investigation as a whole. *Id.* at 12.

The investigation identified Sandra Deyerle as the Iowa head of the drug-trafficking organization. (Sent. Tr. 13). Ms. Deyerle redistributed to Dana Dana and Defendant Jeremy Aswegan. *Id*, at 13-14.[2] Ms. Deyerle's source was believed to be Daniel Manjarrez, believed to reside in Mexico. *Id.* at 14. Investigator Marcotte believed that Mr. Manjarrez lives in Mexico based on his use of Mexico-based phone numbers and IP addresses, and information from cooperators. *Id.*

Ms. Deyerle provided information to investigators. (Sent. Tr. 17). *See also* R. Doc. 37 - Gov't Ex. 1). Ms. Deyerle had made three trips to California to pick up methamphetamine. *Id.* *See also* (R. Doc. 31 - PSIR at ¶ 7). She mailed the methamphetamine to Mr. Aswegan's address in Iowa. *Id.* at 17-18. In June of 2020, Manjarrez began

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2Ms. Deyerle was separately charged and has been sentenced. (R. Doc. 31 - PSIR at page 1). Mr. Manjarrez was charged in the same Indictment with Mr. Aswegan and is a fugitive. *Id.* Dana Dana was charged on May 3, 2022, in ND Iowa 22-CR-2027-CJW-MAR and has been sentenced.

shipping methamphetamine to Ms. Deyerle by rail car. (R. Doc. 31 - PSIR at ¶ 9). Ms. Deyerle had no information as to where the methamphetamine she picked up in California or the methamphetamine she received by rail car had come from. (Sent. Tr. 50). She did not have any information about who had placed the methamphetamine in the rail cars. *Id.*

Investigator Marcotte also testified that Mr. Aswegan, as well as Dana Dana, made several money transfers to Mexico. (Sent. Tr. 29). Mr. Aswegan transferred about $6,000, in six or seven wire transfers. *Id.* at 56. There was a total of around $30,000 sent by wire transfer. *Id.* at 55-56. Ms. Deyerle delivered around $400,000 in cash to someone in Cicero, Illinois. *Id.* at 55-56.

Investigator Marcotte testified that it was his opinion that the methamphetamine Ms. Deyerle was obtaining from Mr. Manjarrez was coming from Culiacan, Sinaloa, Mexico. (Sent. Tr. 46).

On cross-examination, Investigator Marcotte admitted that there was no evidence that Mr. Aswegan was directly involved in bringing methamphetamine across the border from Mexico into the United States. (Sent. Tr. 48). There was no evidence that Mr. Aswegan ever traveled to Mexico to pick up methamphetamine and bring it back. *Id.*

Nor did Mr. Aswegan ever meet with someone known to have physically brought methamphetamine across the border. *Id.* Mr. Aswegan was interviewed for over an hour at the time of the execution of the search warrant at his residence. *Id.* at 49. He never made any statement that he had knowledge that methamphetamine was being imported from Mexico or that he knew that high purity methamphetamine was manufactured in super labs in Mexico. *Id.*

Investigator Marcotte also admitted that it was possible that someone other than Mr. Manjarrez or someone associated with him brought the methamphetamine across the border from Mexico. (Sent. Tr. 51-52).

The District Court sustained the Government's objection and assessed Mr. Aswegan with the two level increase for importation of methamphetamine. (Sent. Tr. 72-76). The Court first reasoned that U.S.S.G. § 2D1.1(b)(5) does not require the Government to prove that the defendant had knowledge of the importation of the methamphetamine. *Id.* at 72-73. The Court also found that, even if knowledge is required, Mr. Aswegan has the requisite knowledge. *Id.* at 75-76. The Court then reasoned that the methamphetamine was imported from Mexico because: (1) the purity was almost 100%, which

is consistent with manufacture in a super lab and there are no known super labs in the United States; (2) the vast quantity and delivery by rail car suggests a sophisticated, coordinated delivery system consistent with organized crime and origination in Mexico as opposed to the United States; (3) Mr. Manjarrez is located in Mexico; and (4) the wiring of money to Mexico; *Id.* at 74-75).

There was insufficient evidence that the conspiracy of which Mr. Aswegan was a member involved the importation of methamphetamine. The fundamental point is that Mr. Aswegan should only be held accountable for conduct that was part of the conspiracy that he agreed to join. That conspiracy involved the distribution of methamphetamine in Iowa. There was no evidence that the conspiracy that Mr. Aswegan agreed to join involved importation of methamphetamine from Mexico to Iowa. The focus under U.S.S.G. § 2D1.1(b)(5) is whether "the offense involved the importation of amphetamine or methamphetamine." (emphasis added). Mr. Aswegan's offense did not involve the importation of methamphetamine.

The Government introduced no evidence showing how the methamphetamine got from Mexico to the United States or who

brought it, assuming the methamphetamine was manufactured in Mexico. Ms. Deyerle had no information as to where the methamphetamine she picked up in California or the methamphetamine she received by rail car had come from. (Sent. Tr. 50). She did not have any information about who had placed the methamphetamine in the rail cars. *Id.* Similarly, Mr. Aswegan made no mention of importation when he was interviewed by Investigator Marcotte. (Sent. Tr. 48).

The District Court simply assumed that the methamphetamine was manufactured in Mexico and was brought to the United States by someone associated with the conspiracy. However, an examination of the factors considered by the District Court do not prove that, even if manufactured in Mexico, that the methamphetamine was brought to the United States by someone associated with the conspiracy of which Mr. Aswegan was a member.

The District Court gave four reasons for finding that the conspiracy involved importation of methamphetamine from Mexico. (Sent. Tr. at 74-75). Each is equally consistent with someone outside of the conspiracy at issue importing the methamphetamine. First, the purity was almost 100%, which is consistent with manufacture in a

super lab and there are no known super labs in the United States. All that could potentially prove is that the methamphetamine was manufactured in Mexico and imported by someone to the United States. It does not prove that Mr. Aswegan or someone associated with the conspiracy was the one transporting the methamphetamine from Mexico to the United States.

Second, the vast quantity and delivery by rail car suggests a sophisticated, coordinated delivery system consistent with organized crime and origination in Mexico as opposed to the United States. Again, that does not prove that someone associated with the conspiracy involving Mr. Aswegan was the person(s) importing the methamphetamine. Further, there are sophisticated organized criminal organizations in the United States as well.

Third and fourth, Mr. Manjarrez was located in Mexico; and the wiring of money to Mexico. With the wide availability of telephones and the internet, there is no reason that Mr. Manjarrez could not direct the conspiracy from anywhere in the world. With regard to the money, the vast majority of the drug proceeds, close to $400,000 was delivered by Ms. Deyerle to someone in Cicero, Illinois. (Sent. Tr. 55-56). That indicates that the conspiracy was based in the United States, otherwise

all of the money would have gone to Mexico. Only around $30,000 was wired to Mexico. *Id.* That amount most likely represents Mr. Manjarrez' cut for organizing and supervising the conspiracy. These factors also do not prove who imported the methamphetamine, assuming it was imported at all.

Overall, there was insufficient evidence that the conspiracy of which Mr. Aswegan was a part was responsible for importing the methamphetamine from Mexico. Mr. Aswegan's sentence should be reversed and this matter remanded for resentencing without the two level increase for importation.

The Government argued to the Eighth Circuit that importation of methamphetamine "is a continuous crime that is not complete until the controlled substance reaches its final destination point." *United States v. Rodriquez*, 666 F.3d 944, 946 (5th Cir. 2012) (citation omitted). *Rodriquez* is not on point. Although not entirely clear from *Rodriquez*, the importation from Mexico and eventual distribution to Rodriquez of the methamphetamine appears to all have involved members of the same conspiracy. There was no evidence in the present case of how the methamphetamine got to the United States from Mexico (or even specific evidence that it was manufactured in Mexico) or, more

importantly, whether anyone associated with the conspiracy of which Mr. Aswegan was a member was involved in importation of the methamphetamine.

The concept of "continuous crime" comes from *United States v. Perez-Oliveros*, 479 F.3d 779, 784 (11th Cir. 2007), wherein the Court rejected the argument that the "importation" was completed when the methamphetamine crossed the border. *Perez-Oliveros* is clearly not on point. That case involved a traffic stop during which methamphetamine was discovered. The truck that Perez-Oliveros was driving had been driven by someone else over the Mexican border, after which Perez-Oliveros started driving the truck to its intended destination in Alabama. Perez-Oliveros was clearly part of the conspiracy involving importation of the methamphetamine.

The *Perez-Oliveros* Court reasoned that, at the time of the traffic stop with Perez-Oliveros driving the same truck that had been used to bring the methamphetamine across the border, the methamphetamine had not reached its intended final destination in Alabama. *See Perez-Oliveros*, 479 F.3d at 784. Mr. Aswegan notes that the 11th Circuit "decline[d] to define the exact contours of what it means for an offense to 'involve[] the importation of . . . methamphetamine,'" but found that

"the requisite level of involvement is present here." *Id.* "Continuous crime" certainly makes sense under the facts of *Perez-Oliveros*, where the defendant took over driving the same truck used to transport the methamphetamine across the border to drive that truck to its intended destination in Alabama.[3] The point of *Rodriquez* and *Perez-Oliveros* is that, when the charged conspiracy itself involves the importation of methamphetamine, then each member of the conspiracy is subject to the importation adjustment, whether or not that particular member was the person who physically transported the methamphetamine across the border.[4]

3It also makes sense in the context of *United States v. Gray*, 626 F.2d 494, 498 (5th Cir. 1980). *Gray* involved a venue question. In that case, marijuana was imported into Mississippi by the defendants and then transported to Alabama by them, where they were arrested and charged. The Fifth Circuit described the offense as a "continuous crime" that was not complete until the controlled substance reached its final destination in rejecting the argument that venue for the importation charge was proper only in Mississippi, but rather was proper in any state along the way. *United States v. Netz*, 758 F.2d 1308, 1312 (8th Cir. 1985), involved the same venue question. In that case, a plane from Bolivia containing cocaine was intercepted at an airport in Miami. The cocaine was delivered by authorities to its intended destination to the defendant in Missouri. This Court held that venue was proper in Missouri for the importation offense as importation is a "continuous crime" from the foreign originating source to the intended final destination in the United States.

4In simple terms, if Defendant A in Mexico has Defendant B, a courier, take methamphetamine across the border and deliver it to Defendant C, then all three members of that conspiracy are subject to

The "continuous crime" concept cannot mean, as the Government argued, that every person distributing methamphetamine in the United States is subject to the importation adjustment if the methamphetamine, at any point in its existence, was transported from Mexico to the United States by someone. The Guideline is is tied to the "offense" which refers to the offense of conviction. Thus, it is only when the "offense" involves the importation of methamphetamine that the two level enhancement applies. Thus, the adjustment would apply to persons who physically transported the methamphetamine across the border and those in a conspiracy with such persons. It does not apply, based on the provision's plain language, to downstream purchasers not involved in the importation conspiracy after the importation is completed.

"Continuous crime" does not make sense in the context of Mr. Aswegan's case where there is no evidence that the conspiracy in which he was involved brought the methamphetamine across the border as opposed to someone else bringing the methamphetamine across the border, assuming it was imported at all.

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the importation enhancement, not just the courier, Defendant B. Mr. D, who purchases the methamphetamine from C but who is not part of the same conspiracy, is not subject to the importation enhancement.

The Government's argument, and the District Court's finding, was based entirely on evidence that one of the co-conspirators, Daniel Manjarrez, lived in Mexico. Even accepting that as true and as proof that Mr. Manjarrez provided some coordination of the conspiracy from Mexico (which through use of phone and internet he could have done from anywhere in the world), that does not prove that the methamphetamine was imported from Mexico by the conspiracy that Mr. Aswegan was a member of as opposed to someone else importing the methamphetamine and then selling it to members of the charged conspiracy.

Overall, there was insufficient proof that the conspiracy of which Mr. Aswegan was a member imported the methamphetamine from Mexico. The District Court's finding, as affirmed by the Eighth Circuit, would subject every person distributing high purity methamphetamine in the United States to the importation adjustment.

CONCLUSION

Petitioner Jeremy Aswegan respectfully requests this Court to grant certiorari in this matter. Petitioner Aswegan 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,

____/s/ Webb Wassmer_____
WEBB L. WASSMER
Wassmer Law Office, PLC
5320 Winslow Road
Marion, IA 52302
Telephone: (319) 210-4288
e-mail: wassmerlaw@yahoo.com

ATTORNEY FOR PETITIONER
JEREMY ASWEGAN