NO._____

IN THE SUPREME COURT OF THE UNITED STATES

JULIO CESAR **VELASQUEZ**, and
OSCAR BOGAR **LAGUNA-GOMEZ**,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

SCOTT A. MARTIN
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana Street, Suite 1350
Houston, TX 77002-1056
Telephone: (713) 718-4600

QUESTIONS PRESENTED

I. In light of Flores-Figueroa v. United States, 556 U.S. 646 (2009), does the "knowingly or intentionally" mens rea contained in 21 U.S.C. §§ 841(a) and 960(a) apply to the offense elements of drug type and drug quantity found in 21 U.S.C. §§ 841(b) and 960(b)?

II. In light of the "aggravated offenses" created by the severe mandatory minimum prison sentences in 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1), do Alleyne v. United States, 133 S. Ct. 2151 (2013), and the Due Process Clause require the application of the mens rea contained in §§ 841(a) and 960(a) to the offense elements of drug type and drug quantity found in §§ 841(b) and 960(b)?

PARTIES TO THE PROCEEDINGS

Petitioners were convicted in separate proceedings before the district court, and the United States Court of Appeals for the Fifth Circuit entered separate judgments in their cases. Because petitioners seek review of these judgments on the basis of identical questions, they jointly file this petition with this Court. See Sup. Ct. R. 12.4.

All parties to petitioners' Fifth Circuit proceedings are named in the caption of the case before this Court.

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PRAYER

Petitioners Julio Cesar Velasquez and Oscar Bogar Laguna-Gomez respectfully pray that a writ of certiorari be granted to review the judgments entered by the United States Court of Appeals for the Fifth Circuit in their respective cases.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit in petitioners' cases are attached to this petition as Appendices A and B. The district court did not issue written opinions in these cases.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion in Mr. Velasquez's case on June 21, 2018, and issued its opinion in Mr. Laguna-Gomez's case on July 25, 2018. See Appendices A-B. This petition is filed within 90 days after entry of judgment in each case. See Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes of conviction in these cases, 21 U.S.C. §§ 841, 952, and 960, are attached as Appendices C, D, and E, respectively.

STATEMENT OF THE CASE

In separate district court proceedings in the Southern District of Texas, petitioners were convicted as follows: Mr. Velasquez was convicted of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1), and Mr. Laguna-Gomez was convicted of importing a controlled substance, in violation of 21 U.S.C. §§ 952(a) and 960(a)(1) and (b)(1).

Petitioners filed separate appeals to the United States Court of Appeals for the Fifth Circuit contending that the evidence was insufficient to support their convictions because the government was obliged to, but did not, prove that they knew the type and/or quantity of drugs involved in their offenses. They recognized that, in United States v. Gamez-Gonzalez, 319 F.3d 695, 700 (5th Cir. 2003), and subsequent cases, the Fifth Circuit had held that the "knowingly or intentionally" mens rea of 21 U.S.C. § 841 (and by analogy 21 U.S.C. § 960) did not apply to the offense elements of drug type and quantity.[1] They argued, however, that this Court's intervening decision in Flores-Figueroa v. United States, 556 U.S. 646 (2009), had overruled Gamez-Gonzalez and required reversal of their convictions. But, they acknowledged that the Fifth Circuit had already disagreed with this argument, holding that "Flores-Figueroa does not overturn Gamez-Gonzalez." United

[1] Under the rule of Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), drug type and drug quantity under 21 U.S.C. § 841(b) are clearly elements of aggravated § 841 and § 960 offenses that must be charged in the indictment and proved to a jury beyond a reasonable doubt. See, e.g., United States v. Keith, 230 F.3d 784, 786 (5th Cir. 2000) ("Apprendi overruled [the Fifth Circuit's] jurisprudence that treated drug quantity as a sentencing factor rather than as an element of the offense under § 841") (citation omitted).

States v. Betancourt, 586 F.3d 303, 308 (5th Cir. 2009); see also id. at 308-09.

On appeal, the Fifth Circuit noted that these arguments were foreclosed by Betancourt and affirmed. See Appendices A-B.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

These cases were originally brought as federal criminal prosecutions under 21 U.S.C. §§ 841, 952, and/or 960. The district court therefore had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to address the important issue whether, in light of Flores-Figueroa v. United States, 556 U.S. 646 (2009), and Alleyne v. United States, 133 S. Ct. 2151 (2013), the "knowingly or intentionally" mens rea contained in 21 U.S.C. §§ 841(a) and 960(a) applies to the offense elements of drug type and drug quantity found in 21 U.S.C. §§ 841(b) and 960(b).

A. *Flores-Figueroa* Casts Serious Doubt on How the Lower Courts Have Interpreted the *Mens Rea* Requirements of 21 U.S.C. §§ 841 and 960.

In United States v. Betancourt, 586 F.3d 303 (5th Cir. 2009), the Fifth Circuit – notwithstanding this Court's intervening decision in Flores-Figueroa v. United States, 556 U.S. 646 (2009) – adhered to its pre-Flores-Figueroa precedent[2] holding that the "knowingly or intentionally" mens rea found in 21 U.S.C. § 841(a) does not apply to the offense elements of drug type and drug quantity found in 21 U.S.C. § 841(b), which is a statute analogous to 21 U.S.C. § 960. See Betancourt, 586 F.3d at 308-09. In petitioners' cases, the Fifth Circuit followed Betancourt (and hence its pre-Flores-Figueroa precedent) to reach the same holding. See Appendices A-B (citing Betancourt). Every other circuit had, before Flores-Figueroa, agreed with this interpretation of 21 U.S.C. § 841 (and therefore by analogy 21 U.S.C. § 960). See, e.g., United States v. Branham, 515 F.3d 1268, 1275-76 & n.3 (D.C. Cir. 2008) (so holding and collecting cases so holding from the other 11 circuits). However, in other circuits that have considered this issue post-Flores-Figueroa and have adhered to their pre-Flores-Figueroa holdings, two circuit judges have voiced

[2] See United States v. Gamez-Gonzalez, 319 F.3d 695, 700 (5th Cir. 2003).

vigorous disagreement with those holdings and opined that the government must prove a defendant's mens rea with regard to the type and quantity of drugs. See United States v. Jefferson, 791 F.3d 1013, 1019-23 (9th Cir. 2015) (Fletcher, J., concurring); United States v. Dado, 759 F.3d 550, 571-73 (6th Cir. 2014) (Merritt, J., dissenting). For the reasons that follow, this Court should grant certiorari to decide the important question whether the "knowingly or intentionally" mens rea contained in 21 U.S.C. §§ 841(a) and 960(a) applies to the offense elements of drug type and drug quantity found in 21 U.S.C. §§ 841(b) and 960(b).

In Flores-Figueroa, the Court was tasked with deciding whether the "knowingly" mens rea of 18 U.S.C. § 1028A(a)(1) (the federal aggravated identity theft statute) applied to the statutory requirement that the means of identification unlawfully used was "of another person."[3] See Flores-Figueroa, 556 U.S. at 647-48. The Court concluded that it did. See id. at 647, 657. Significantly for present purposes, the Court explained that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." Id. at 652 (citing United States v. X-Citement Video, 513 U.S. 64, 79 (1994) (Stevens, J., concurring)).[4] Moreover,

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[3] As the Court explained in Flores-Figueroa, "[the] federal criminal statute forbidding '[a]ggravated identity theft' imposes a mandatory consecutive 2-year prison term upon individuals convicted of certain other crimes ***if*** during (or in relation to) the commission of those other crimes, the offender "'***knowingly*** transfers, possesses, or uses, without lawful authority, ***a means of identification of another person***.'" Flores-Figueroa, 556 U.S. at 647 (quoting 18 U.S.C. § 1028A(a)(1); emphasis added by Flores-Figueroa Court).

[4] In his concurring opinion in Flores-Figueroa, Justice Scalia read this statement, with its citation to Justice Stevens's concurring opinion in X-Citement Video, as representing a holding

the Court implicitly rejected the government's argument[5] that such a rule should be limited only to elements that mean the difference between innocent conduct and wrongful conduct. See United States v. Burwell, 690 F.3d 500, 529-30 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting) (noting that this Court has not cabined the presumption of mens rea so that it applies only when necessary to avoid criminalizing apparently innocent conduct and that the government's argument for such a limitation in Flores-Figueroa garnered zero votes). Indeed, had the Court accepted that argument, Flores-Figueroa could not have been decided as it was.

And Flores-Figueroa's presumption – that a statutory mens rea applies to all the offense elements that follow it – is consistent with the Model Penal Code.[6] The Model Penal Code provides that, generally, "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." Model Penal Code § 2.02(1) & Explanatory Note, ¶2. The Model Penal Code views with a jaundiced eye any form of strict liability – even

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about how courts should normally interpret "knowingly"-type statutes. See Flores-Figueroa, 556 U.S. at 657-58 (Scalia, J., concurring in part and concurring in the judgment); see also id. at 659-60 (Alito, J., concurring in part and concurring in the judgment) ("suspect[ing] that the Court's opinion will be cited for the proposition that the mens rea of a federal criminal statute nearly always applies to every element of the offense," but agreeing with a rebuttable "general presumption that the specified mens rea applies to all the elements of an offense") (underscoring in original).

[5] See Brief for the United States, Flores-Figueroa v. United States, No. 08-108 (O.T. 2008), at 5-8, 18, 33-36, 39-40, available at 2009 WL 191837.

[6] The Court has several times cited the Model Penal Code's culpability provisions in interpreting mens rea requirements. See, e.g., Safeco Ins. Co. of America v. Burr, 551 U.S. 47, 68 n.18 (2007); Holloway v. United States, 526 U.S. 1, 11 n.11 (1999); Liparota v. United States, 471 U.S. 419, 423 n.5 (1985); United States v. U.S. Gypsum Co., 438 U.S. 422, 437-38 (1978).

where that strict liability is only for part of a criminal offense (i.e., a "material element"). Indeed, the Model Penal Code countenances whole or partial strict liability for criminal statutes only where, in the statute defining the offense, "a legislative purpose to impose absolute liability for such offenses[,] or with respect to any material element thereof[,] plainly appears." Model Penal Code § 2.05(1)(b).

The rule that emerges from Flores-Figueroa and the Model Penal Code is that courts should presume that a statutory mens rea applies to every "material element" of the offense that follows it, unless a legislative purpose to impose strict liability with respect to that element "plainly appears." See Burwell, 690 F.3d at 537 (Kavanaugh, J., dissenting) (explaining that this Court's case law, including Flores-Figueroa, "demonstrates that the Court has applied the presumption of mens rea consistently, forcefully, and broadly . . . to statutes that are silent as to mens rea . . . and to statutes that contain an explicit mens rea requirement for one element but are silent or ambiguous about mens rea for other elements") (citations omitted and underscoring in original); see id. (concluding that this "Court has established and applied a rule of statutory interpretation for federal crimes: A requirement of mens rea applies to each element of the offense unless Congress has plainly indicated otherwise") (underscoring in original).

Nevertheless, the Fifth Circuit did not apply this rule to §§ 841 and 960, but rather distinguished Flores-Figueroa on the basis of the differing structure of the statutes at issue. See, e.g., Betancourt, 586 F.3d at 309 ("Unlike in § 1028A(a)(1), where it would be 'natural' to apply the word 'knowingly' to all 'subsequently listed elements,' in § 841 it

would not be natural to apply the word 'knowingly' used in subsection (b), especially because a period separates the two subsections") (citation omitted); see also United States v. Zuñiga-Martinez, 512 Fed. Appx. 428, 428-29 (5th Cir. 2013) (unpublished) (applying Betancourt to 21 U.S.C. § 960).

The Fifth Circuit's analysis of Flores-Figueroa and X-Citement Video is problematic for several reasons. First, the Fifth Circuit's assertion that – in contrast to the statutory language at issue here – "it would be natural to apply the modifier 'knowingly' to the language at issue in X-Citement Video," Betancourt, 586 F.3d at 309, is directly contrary to X-Citement Video itself. In X-Citement Video, the Court acknowledged that "[t]he most natural grammatical reading" would ***not*** extend the "knowingly" mens rea in 18 U.S.C. § 2252(a)(1) to the offense elements there in question, because the word "knowingly" and the offense elements in question "[were] set forth in independent clauses separated by interruptive punctuation." X-Citement Video, 513 U.S. at 68. But, notwithstanding that "most natural grammatical reading," id., the Court "d[id] not think this [was] the end of the matter," id., and, in fact, the Court went on to eschew that reading in favor of a reading that extended the "knowingly" mens rea to the offense elements in question. See id. at 78.

Taken together, Flores-Figueroa and X-Citement Video cast serious doubt upon the decisions in Gamez-Gonzalez, Betancourt, and petitioners' cases. Flores-Figueroa confirms that there is a presumption that a statutory mens rea will apply to all "material elements" that follow it. See Burwell, 690 F.3d at 537 (Kavanaugh, J., dissenting). And X-

Citement Video demonstrates that this presumption is not defeated by Congress's use of "independent clauses separated by interruptive punctuation." X-Citement Video, 513 U.S. at 68.[7] And, if any doubt remained, that interpretation is also compelled by the principle of constitutional doubt[8] and the rule of lenity.[9]

B. After *Alleyne v. United States*, §§ 841(b)(1)(A) and 960(b)(1) must be read to include a knowledge requirement as to the type and quantity of the drugs involved in an offense.

The Fifth Circuit's position that "knowingly" in §§ 841(a) and 960(a) does not apply to §§ 841(b) and 960(b) relies on the two-part structure of the statute and holds that a violation of § 841(a) or § 960(a) requires only an intent to distribute or respectively import

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[7] And, in fact, the Fifth Circuit itself has, relying in part on X-Citement Video, previously found that the "knowingly" mens rea found in 33 U.S.C. § 1319(c)(2)(A) of the Clean Water Act ("CWA") applied to offense elements found in other sections of the CWA. See United States v. Ahmad, 101 F.3d 386, 390 (5th Cir. 1996) (noting that "the phrase 'knowingly violates' appears in a different section of the CWA from the language defining the elements of the offenses") & id. at 391 (holding that "knowingly" mens rea applied to offense elements in question).

[8] "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter." United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909) (citation omitted). Thus, "'[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.'" United States v. LaFranca, 282 U.S. 568, 574 (1931) (citations omitted). Petitioners' proposed reading avoids the constitutional concerns raised by a strict-liability approach to drug type and drug quantity. See generally United States v. Cordoba-Hincapie, 825 F. Supp. 485 (E.D.N.Y. 1993) (discussing, in the context of drug type and drug quantity, some possible constitutional concerns about strict criminal liability).

[9] "Even if the [Court] does not consider the issue to be as clear as [petitioners] do, [the Court] must at least acknowledge . . . that it is eminently debatable – and that is enough, under the rule of lenity, to require finding for [petitioners]." Smith v. United States, 508 U.S. 223, 246 (1993) (Scalia, J., dissenting). "The rule of lenity requires ambiguous laws to be interpreted in favor of the defendants subjected to them." United States v. Santos, 553 U.S. 507, 514 (2008) (plurality op.) (citations omitted). Because petitioners' interpretation is more "defendant-friendly," to the extent there is any ambiguity, "the rule of lenity dictates that it should be adopted." Id.

a "controlled substance" and that § 841(b) and § 960(b) then create "strict liability punishment" based on the type and quantity of the drug "involved" in the offense. See Gamez-Gonzalez, 319 F.3d at 700 (citing United States v. Valencia-Gonzales, 172 F.3d 344, 346 (5th Cir. 1999)); see also Zuñiga-Martinez, 512 Fed. Appx. at 428-29 (applying Betancourt to 21 U.S.C. § 960).

This reading of §§ 841 and 960 cannot survive Alleyne v. United States, 133 S. Ct. 2151 (2013). In Alleyne, this Court held that any fact that imposes or increases an applicable mandatory minimum sentence must be found by a jury beyond a reasonable doubt. 133 S. Ct. at 2155 (overruling Harris v. United States, 536 U.S. 545 (2002)). The Court held that "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." Alleyne, 133 S. Ct. at 2161. The Court reasoned that "every fact which is in law essential to the punishment sought to be inflicted" is an inseparable "element" of the crime. Id. at 2159 (internal quotation marks and citation omitted). In other words, § 841(a) and (b) (as well as § 960(a) and (b)) "together" create a "new, aggravated" crime distinguishable from a violation of § 841(a) (and similarly § 960(a)) alone. See id. at 2161-62.

Once drug type and quantity are properly understood as elements of a "new, aggravated" offense under §§ 841(b)(1)(A) and 960(b)(1), Alleyne, 133 S. Ct. at 2161, ordinary principles of statutory construction, reinforced by logic and due-process considerations, require that the "knowingly or intentionally" language of §§ 841(a) and 960(a) be read as modifying those elements. See Jefferson, 791 F.3d at 1019-23 (Fletcher,

J., concurring); Dado, 759 F.3d at 571-73 (Merritt, J., dissenting). As previously discussed, this Court has recognized that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." Flores-Figueroa, 556 U.S. at 651-53 (citing X-Citement Video, 513 U.S. at 79 (Stevens, J., concurring)). Because drug type and quantity are now understood as elements of "a new, aggravated crime" created by § 841(b)(1)(A) and § 960(b)(1), Alleyne, 133 S. Ct. at 2161, "ordinary English usage" dictates that the government should have to prove not only that the defendant knew he possessed or was importing some controlled substance, but also that he knew he was possessing or importing over 500 grams of a mixture containing a detectable amount of methamphetamine. Flores-Figueroa, 556 U.S. at 651; see X-Citement Video, 513 U.S. at 79; Dado, 759 F.3d at 571-72 (Merritt, J., dissenting).

In light of Alleyne's recognition that the facts like drug type and quantity are elements of a separate, aggravated offense, failing to apply a mens rea requirement to these elements results in the creation of an entire class of "strict liability" offenses—a category of offense strongly disfavored in the law and which raises due-process concerns. See Jefferson, 791 F.3d at 1020-21 (Fletcher, J., concurring); Dado, 759 F.3d at 572 (Merritt, J., dissenting); see also, e.g., X-Citement Video, 513 U.S. at 78; United States v. Bailey, 444 U.S. 394, 404 n.4 (1980). Moreover, and counterintuitively, it would only be the "aggravated" offenses of § 841(b) and § 960(b) that require a mandatory-minimum sentence which would be stripped of the requirement of knowledge or intent. Yet,

"[h]istorically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea." Staples v. United States, 511 U.S. 600, 616 (reading mens rea requirement into statute providing for up to ten years of imprisonment); see also X-Citement Video, 513 U.S. at 72 (same); United States v. U.S. Gypsum Co., 438 U.S. 422, 442 n. 18 (1978) (reading mens rea requirement into statute providing for up to three years of imprisonment); Morissette v. United States, 342 U.S. 246, 260 (1952) (reading mens rea requirement into statute providing for up to one year of imprisonment). If the penalties in those cases were considered sufficiently "harsh" so as to implicate constitutional considerations, then the ten-year mandatory minimum of § 841(b)(1)(A) and § 960(b)(1) must be described as drastic, and cannot be imposed based on strict liability as to its key elements.

This Court has sometimes said that the default rule requiring a mens rea to be read into a statute applies only when it is necessary to distinguish guilty conduct from innocent conduct. See Elonis v. United States, 135 S. Ct. 2001, 2010 (2015). Yet this principle is not controlling, or Flores-Figueroa could not have been decided as it was. In Flores-Figueroa, this Court held that 18 U.S.C. § 1028A(a)(1) requires proof that the defendant "knew that the 'means of identification' he or she unlawfully transferred, possessed, or used, in fact, belonged to 'another person.'" Flores-Figueroa, 556 U.S. at 647. The defendant in Flores-Figueroa did not dispute that he knew the Social Security number he used during his immigration-document-fraud offense was false, but only disputed whether he knew it was actually a number assigned to another identifiable person. Id. at 649. And

the penalty provided for by the statute applied only if the defendant used the fraudulent means of identification during the commission of another offense. Thus, reading a mens rea into the identity-theft statute was not necessary to distinguish guilty conduct from wholly innocent conduct. Nonetheless, the Court applied the default rule and read a mens rea requirement into all the elements of the aggravated-identity-theft statute. Id. at 652-53.

But even if it is assumed arguendo that the rule extending a mens rea requirement throughout a statute applies only to distinguish innocent conduct from guilty conduct, after Alleyne, § 841(b) and § 960(b) must still be read to incorporate a knowledge requirement as to all key elements of the offense, including drug type and quantity. Under the Alleyne view of a § 841(b) or a § 960(b) offense as a new and separate crime with distinct elements from an § 841(a) or a § 960(a) offense, the mens rea as to type and quantity of drug makes the difference between the less culpable offense of transporting a controlled substance under § 841(a) or importing one under § 960(a), and the distinct, aggravated § 841(b) or § 960(b) crime of knowingly transporting or importing more than 500 grams of a mixture containing methamphetamine. The defendant is legally innocent of the "new, aggravated" offense created by § 841(b) or § 960(b), Alleyne, 133 S. Ct. at 2161, if he only knew he was transporting or importing a controlled substance, but did not in fact know that the drug was methamphetamine or that there was more than 500 grams of it.

C. If § 841(b)(1)(A) and § 960(b)(1) are not read to include a knowledge requirement as to the type and quantity of drugs involved in an offense, each statute creates a strict liability crime that violates the Due Process Clause.

Alternatively, if § 841(b)(1)(A) and § 960(b)(1) do not require proof of knowledge of drug type and quantity, then each violates the Due Process Clause by creating a strict liability offense punished by a mandatory minimum of ten years of imprisonment and the possibility of life in prison.

Due process principles create at least some constitutional limits on the penalties that can be imposed for strict liability crimes. At the very least, a lengthy term of imprisonment warrants a state of mind requirement. See United States v. Wulff, 758 F.2d 1121, 1123, 1125 (6th Cir. 1985) (holding that the felony provision of the Migratory Bird Treaty Act violated due process by allowing for a maximum of two years of imprisonment without a mens rea requirement); Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960) (explaining that elimination of mens rea requirement does not violate due process where, among other things, "the penalty is relatively small" and the "conviction does not gravely besmirch"); see also United States v. Heller, 579 F.2d 990, 994 (6th Cir. 1978) ("Certainly, if Congress attempted to define a *malum prohibitum* offense that placed an onerous stigma on an offender's reputation and that carried a severe penalty, the Constitution would be offended.").

Although this Court has upheld the constitutionality of some strict liability crimes, none have carried penalties as severe as a mandatory minimum of ten years and a maximum of life in prison. See, e.g., United States v. Freed, 401 U.S. 601 (1971) (possession of

unregistered firearm; fines up to $10,000 and/or imprisonment up to ten years); Williams v. North Carolina, 325 U.S. 226 (1945) (bigamous cohabitation; up to ten years' imprisonment); United States v. Dotterweich, 320 U.S. 277 (1943) (shipment of misbranded or adulterated drugs; fines up to $1,000 and/or imprisonment up to one year for first offense, $10,000 and/or three years for subsequent offense); United States v. Balint, 258 U.S. 250 (1922) (unlawful drug sale; imprisonment up to five years); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910) (cutting timber on state land; fines up to $1,000 and/or imprisonment up to two years).

"The elimination of the element of criminal intent does not violate the due process clause where (1) the penalty is relatively small, and (2) where conviction does not gravely besmirch." Wulff, 758 F.2d at 1125 (citing Holdridge, 282 F.2d at 310). Section 841(b)(1)(A) and 960(b)(1) satisfy neither of these factors. The penalty under each statute is a mandatory minimum ten years of imprisonment, with a maximum of life in prison, which cannot be classified as "relatively small" by any standard. Moreover, "a convicted felon loses his right to vote, his right to sit on a jury and his right to possess a gun, among other civil rights, for the rest of his life," and "a felony conviction irreparably damages one's reputation." Wulff, 758 F.2d at 1123, 1125. Thus, if § 841(b)(1)(A) and § 960(b)(1) are not read to include mens rea as to the type and quantity of drugs—the very elements that make them distinct offenses from a violation of § 841(a) or § 960(a) under Alleyne—then the imposition of strict liability for that separate, aggravated crime violates due process.

D. The Court Should Grant Certiorari.

As mentioned previously, two circuit judges have voiced vigorous disagreement with their circuits' adherence to pre-Flores-Figueroa precedent and have opined that the government must prove a defendant's mens rea with regard to the type and quantity of drugs. See Jefferson, 791 F.3d at 1019-23 (Fletcher, J., concurring); Dado, 759 F.3d at 571-73 (Merritt, J., dissenting). Concurring in Jefferson only due to prevailing circuit precedent, Judge Fletcher relied on: (1) the cardinal rule that the existence of mens rea is the rule rather than the exception in Anglo-American jurisprudence; (2) the fact that nothing in the Anti-Drug Abuse Act overcomes the presumption of mens rea; and (3) this Court's Sixth Amendment jurisprudence, which gives increasing attention to statutory sentencing schemes and emphasizes that any fact that increases the mandatory minimum sentence must be submitted to the jury. Jefferson, 791 F.3d at 1020-22. Judge Fletcher noted that she did not believe that Congress intended for "a defendant who reasonably believed that he is importing a relatively small quantity of marijuana into the country [to] be sentenced to the ten-year mandatory minimum prison term that applies to a defendant who knowingly imports the same quantity of methamphetamine." Id. at 1019.

In his dissent in Dado, Judge Merritt similarly emphasized that this Court's Sixth Amendment jurisprudence has "held that 'the core crime and the fact triggering the mandatory minimum sentence' – here, the drug quantity – 'together constitute a new, aggravated crime, each element of which must be submitted to the jury.'" Dado, 759 F.3d at 571 (quoting Alleyne, 133 S. Ct. at 2161). He noted that "[t]he key word is 'together' –

sections 841(a) and (b) 'together' create a 'separate, aggravated possession crime distinguishable from a violation of section 841(a) alone.'" Dado, 759 F.3d at 571 (quoting Alleyne, 133 S. Ct. at 2162). According to Judge Merritt, the majority's holding "runs against the strong presumption against strict liability crimes, . . . disregards the presumption that the more serious the penalty at issue, the more important intent is to guilt," and punishes a defendant with "two mandatory minimum sentences of 20 years triggered by a fact that he did not necessarily even know about." Dado, 759 F.3d at 572. Moreover, one commentator has urged this Court to address and reaffirm the clearly workable and practical mens rea interpretive principles of Flores-Figueroa and apply them to analogous federal statutes with traditional strict liability elements, because the lower courts were reluctant to do so. Leonid Traps, Note, "Knowingly" Ignorant: *Mens Rea* Distribution in Federal Criminal Law After *Flores-Figueroa*, 112 Colum. L. Rev. 628, 628-44 (Apr. 2012).

In addition to these persuasive opinions and commentary, the question of mens rea for drug type and drug quantity is an oft-recurring question in federal drug prosecutions, which are a large part of the federal criminal docket throughout the country.[10] Indeed, courts are confronted with some frequency with "blind mule" drug cases, in which persons know that they are carrying ***some*** type of drugs, but plausibly claim that they do not know

[10] According to the United States Sentencing Commission, in fiscal year 2016 there were 19,222 defendants sentenced for drug trafficking offenses nationwide out of the total of 67,742 defendants sentenced in federal courts, which constituted 23.94%. See United States Sentencing Commission, Quick Facts: Drug Trafficking Offenses (June 2017).

the type and/or quantity of drugs they are carrying. In fact, in these cases, petitioners received long prison sentences even though there was no proof that they had knowledge of the type or quantity of the drugs involved in their cases.

Finally, the importance of the issue presented here is underscored by the fact that drug type and drug quantity may elevate the statutory maximum for a drug trafficking offense under §§ 841 and 960 from one year in prison[11] all the way up to life imprisonment.[12] "Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to [the type and quantity gradations found in § 841(b) or § 960(b)], the distinction . . . between [those gradations] may be of greater importance than the difference between guilt or innocence for many lesser crimes." Mullaney v. Wilbur, 421 U.S. 684, 698 (1975). That being the case, the offense elements of drug type and drug quantity in §§ 841(b) and 960(b) are truly the tail wagging the dog of the "verb" elements found in § 841(a) (distributing, manufacturing, etc.) and § 960(a) (importing, exporting, etc.), and it is perverse to assign a mens rea to the latter but not to the former.

In sum, as one commentator has noted,

> [t]he Court's decision [in Flores-Figueroa] shows that lower courts should not automatically interpret any criminal statute in a broad manner, totally disregarding defendants' relative degrees of culpability. Thus, the Court's holding has the potential to bring punishment closer to the defendant's blameworthiness. Lower courts should follow the Court's lead in Flores-Figueroa and examine a statute's language to determine the type of behavior targeted by the statute at issue to ensure that harsh minimum sentences are

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[11] See 21 U.S.C. § 841(b)(4) (statutory maximum of one year for distribution of "a small amount of marihuana for no remuneration"); see also 21 U.S.C. § 960(b)(4).

[12] See 21 U.S.C. § 841(b)(1)(A); see also 21 U.S.C. § 960(b)(1).

not applied more broadly than conduct requires.

Mens Rea Requirement, 123 Harv. L. Rev. 312, 322 (2009). Because, however, the lower courts remain unclear about how to apply the teachings of Flores-Figueroa and Alleyne to the interpretation of other criminal statutes, this Court should grant certiorari in these cases to bring needed clarity to the field.

CONCLUSION

For the foregoing reasons, petitioners Julio Cesar Velasquez and Oscar Bogar Laguna-Gomez respectfully pray that this Court grant certiorari to review the judgments of the Fifth Circuit in these cases.

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Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

By Scott A. Martin
SCOTT A. MARTIN
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana Street, Suite 1350
Houston, TX 77002-1056
Telephone: (713) 718-4600