NO._____

IN THE SUPREME COURT OF THE UNITED STATES

ALBERTO JAIR **PROA-DOMINGUEZ**, DALIA ALELI **LOPEZ**,
and NELLY BEATRIZ **CAZARES**,
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

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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, 570 U.S. 99 (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 each of 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 Alberto Jair Proa-Dominguez, Dalia Aleli Lopez, and Nelly Beatriz Cazares 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, B, and C. The district court did not issue written opinions in these cases.

JURISDICTION

In each petitioner's case, the United States Court of Appeals for the Fifth Circuit issued its opinion on the following date: (1) on October 10, 2018, for Mr. Proa-Dominguez; (2) on October 19, 2018, for Ms. Lopez; and (3) on October 25, 2018, for Ms. Cazares. See Appendices A-C. 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 statute of conviction in these cases, 21 U.S.C. § 841, is attached as Appendix D. Also attached, as Appendix E, is 21 U.S.C. § 960, which is discussed in this petition.

STATEMENT OF THE CASE

In separate district court proceedings in the Southern District of Texas, petitioners were convicted as follows: Mr. Proa-Dominguez pleaded guilty to possessing with intent to distribute 50 grams or more of methamphetamine or 500 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A), and conspiracy to commit that same offense, in violation of 21 U.S.C. § 846; Ms. Lopez pleaded guilty to importing 50 grams or more of methamphetamine or 500 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 952(a), 960(a)(1) and (b)(1)(H), and conspiracy to commit that same offense, in violation of 21 U.S.C. § 963; and Ms. Cazares pleaded guilty to possessing with intent to distribute more than 100 grams of marijuana, in violation 21 U.S.C. § 841(a)(1) and (b)(1)(B).

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 did not apply to the offense elements of drug type and quantity.[1] They argued, however, that this Court's

[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 offenses that must be charged in the indictment and proved to a jury beyond a reasonable doubt. See, e.g., United

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 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-C.

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).

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 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, 570 U.S. 99 (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-C (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,

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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. United States Gypsum Co., 438 U.S. 422, 437-38 (1978).

¶2. The Model Penal Code views with scepticism any form of strict liability – even 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

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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.

violation of § 841(a) or § 960(a) requires only an intent to distribute or respectively import 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, 570 U.S. 99 (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. 570 U.S. at 103 (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, 570 U.S. at 113. 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 109-10 (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 113.

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, 570 U.S. at 113, 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, 570 U.S. at 113, "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 or 100 kilograms of marijuana. 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 raise 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, Inc., 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, or possessing more than 100 kilograms of marijuana. The defendant is legally innocent of the "new, aggravated" offense created by § 841(b) or § 960(b), Alleyne, 570 U.S. at 113, if he only knew he was transporting or importing a controlled substance, but did not in fact know that the drug was methamphetamine (or marijuana) or that there was more than 500 grams of it (or 100 kilograms, in the case of marijuana).

C. If § 841(b)(1)(A), (B) 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) or (B) 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, for Petitioners Proa-Dominguez and Lopez, and five years to forty years in prison for Ms. Cazares.

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 five or ten years and a

maximum of forty years or 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 (B) and 960(b)(1) satisfy neither of these factors. The penalty under each statute is a mandatory-minimum of five or ten years of imprisonment, with a maximum of forty years or 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) or (B) 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, 570 U.S. 99 at 113). 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, 570 U.S. 99 at 113). 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

[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).

know that they are carrying ***some*** type of drugs, but plausibly claim that they do not know 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)], 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-

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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).

> 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 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 Alberto Jair Proa-Dominguez, Dalia Aleli Lopez, and Nelly Beatriz Cazares respectfully pray that this Court grant certiorari to review the judgments of the Fifth Circuit in these cases.

Date: November 13, 2018

Respectfully submitted,

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739 Fed.Appx. 309 (Mem)
This case was not selected for
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See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee
v.
Alberto Jair **PROA-DOMINGUEZ**,
Defendant-Appellant

No. 18-40324
|
Summary Calendar
|
Filed October 10, 2018

Appeal from the United States District Court for the Southern District of Texas, USDC No. 5:17-CR-609-1

Attorneys and Law Firms

Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX, for Plaintiff-Appellee

Marjorie A. Meyers, Federal Public Defender, Michael Lance Herman, Assistant Federal Public Defender, Federal Public Defender's Office, Southern District of Texas, Houston, TX, for Defendant-Appellant

Before KING, SOUTHWICK, and ENGELHARDT, Circuit Judges.

Opinion

PER CURIAM: *

Alberto Jair **Proa-Dominguez** appeals his guilty plea convictions and sentences for: (1) conspiracy to possess with intent to distribute 50 grams or more of methamphetamine or 500 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. § 846 and 21 U.S.C. § 841(a)(1), (b)(1)(A); and (2) possession with intent to distribute 50 grams or more of methamphetamine or 500 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A). **Proa-Dominguez** argues that the factual basis for his guilty plea was inadequate because it did not establish that he knew the type and quantity of the controlled substance involved in his offenses.

However, **Proa-Dominguez** has filed an unopposed motion for summary disposition correctly conceding that this issue is foreclosed by *United States v. Betancourt*, 586 F.3d 303 (5th Cir. 2009), and explaining that he has raised the issue only to preserve it for possible further review. Accordingly, because summary disposition is appropriate, *see Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), **Proa-Dominguez**'s motion is GRANTED. The district court's judgment is AFFIRMED.

All Citations

739 Fed.Appx. 309 (Mem)

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

End of Document

2018 WL 5259408
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee
v.
Dalia Aleli LOPEZ, Defendant-Appellant

No.
18
-
40132
|
Summary Calendar
|
Filed October 19, 2018

Appeal from the United States District Court for the Southern District of Texas, USDC No. 5:17-CR-567-1

Attorneys and Law Firms

Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX, for Plaintiff - Appellee

Marjorie A. Meyers, Federal Public Defender, Scott Andrew Martin, Assistant Federal Public Defender, John Moreno Parras, Federal Public Defender's Office, Southern District of Texas, Houston, TX, for Defendant - Appellant

Before DAVIS, HAYNES, and GRAVES, Circuit Judges.

Opinion

PER CURIAM: *

*1 Dalia Aleli Lopez pleaded guilty to (1) conspiracy to import 50 grams or more of methamphetamine and 500 grams or more of a mixture and substance containing methamphetamine and (2) importation of 50 grams or more of methamphetamine and 500 grams or more of a mixture and substance containing methamphetamine. Lopez argues that her convictions were not supported by an adequate factual basis because the Government failed to meet its obligation to prove that she had knowledge of the quality and quantity of methamphetamine involved in her offenses.

As Lopez concedes, her argument is foreclosed by *United States v. Betancourt*, 586 F.3d 303, 308-09 (5th Cir. 2009), which held that *Flores-Figueroa v. United States*, 556 U.S. 646, 129 S.Ct. 1886, 173 L.Ed.2d 853 (2009), did not overturn *United States v. Gamez-Gonzalez*, 319 F.3d 695 (5th Cir. 2003), and that the Government is not required to prove knowledge of the drug type and quantity as an element of a 21 U.S.C. § 841 drug trafficking offense. Likewise, knowledge of drug type and quantity is not an element that must be proven for an offense under the related drug importation statutes of 21 U.S.C. §§ 952(a) and 960(a). *United States v. Restrepo-Granda*, 575 F.2d 524, 527 (5th Cir. 1978); *see United States v. Valencia-Gonzales*, 172 F.3d 344, 345-46 (5th Cir. 1999). Thus, the Government was not required to prove that Lopez knew the quality and quantity of the methamphetamine involved in her offenses.

Accordingly, Lopez's motion for summary disposition is GRANTED, and the district court's judgment is AFFIRMED.

All Citations

--- Fed.Appx. ----, 2018 WL 5259408 (Mem)

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

End of Document

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publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee
v.
Nelly Beatriz CAZARES, Defendant-Appellant

No.
18
-
40296
|
Summary Calendar
|
Filed October 25, 2018

Appeal from the United States District Court for the Southern District of Texas, USDC No. 1:17-CR-563-1

Attorneys and Law Firms

Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX, for Plaintiff-Appellee

Marjorie A. Meyers, Federal Public Defender, John Moreno Parras, H. Michael Sokolow, Assistant Federal Public Defender, Federal Public Defender's Office, Southern District of Texas, Houston, TX, for Defendant-Appellant

Before HIGGINBOTHAM, ELROD, and DUNCAN, Circuit Judges.

Opinion

PER CURIAM: *

*1 Nelly Beatriz Cazares pleaded guilty to a single count of possession with intent to distribute more than 100 kilograms of marijuana. Cazares contends that her conviction was not supported by an adequate factual basis because the Government did not meet its obligation to prove that she had knowledge of the type and quantity of drugs involved in her offense.

As Cazares concedes, her sole appellate argument is foreclosed by *United States v. Betancourt*, 586 F.3d 303, 308-09 (5th Cir. 2009), which determined that *Flores-Figueroa v. United States*, 556 U.S. 646, 129 S.Ct. 1886, 173 L.Ed.2d 853 (2009), did not overturn *United States v. Gamez-Gonzalez*, 319 F.3d 695 (5th Cir. 2003), and that the Government is not required to prove knowledge of the drug type and quantity as an element of a 21 U.S.C. § 841 drug trafficking offense. The Government thus did not have to prove that Cazares was aware of the type and quantity of controlled substances involved in her offense.

Therefore, Cazares's motion for summary disposition is GRANTED, and the district court's judgment is AFFIRMED.

All Citations

--- Fed.Appx. ----, 2018 WL 5310665 (Mem)

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

End of Document

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of

N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 4,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 8,000,000 if the defendant is an individual or $ 20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section § 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 4,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No

person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 1,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

21 U.S.C. § 841.

§ 960. Prohibited acts A

(a) Unlawful acts

Any person who--

> **(1)** contrary to section § 952, 953 or 957 of this title, knowingly or intentionally imports or exports a controlled substance,
>
> . . .

shall be punished as provided in subsection (b) of this section.

(b) Penalties

(1) In the case of a violation of subsection (a) of this section involving--

> **(A)** 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
>
> **(B)** 5 kilograms or more of a mixture or substance containing a detectable amount of--
>
> > **(i)** coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
> >
> > **(ii)** cocaine, its salts, optical and geometric isomers, and salts or isomers;
> >
> > **(iii)** ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
> >
> > **(iv)** any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);
>
> **(C)** 50 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;
>
> **(D)** 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);
>
> **(E)** 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
>
> **(F)** 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(G) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana; or

(H) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers[;]

the person committing such violation shall be sentenced to a term of imprisonment of not less than 10 years and not more than life and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than 20 years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 4,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 8,000,000 if the defendant is an individual or $ 20,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

(2) In the case of a violation of subsection (a) of this section involving--

(A) 100 grams or more of a mixture or substance containing a detectable amount of heroin;
(B) 500 grams or more of a mixture or substance containing a detectable amount of--

(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(ii) cocaine, its salts, optical and geometric isomers, and salts or isomers;

(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii);

(C) 5 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

(D) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(E) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(F) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(G) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana; or

(H) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers[;]

the person committing such violation shall be sentenced to a term of imprisonment of not less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 4,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this paragraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

(3) In the case of a violation under subsection (a) of this section involving a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or flunitrazepam, the person committing such violation shall, except as provided in paragraphs (1), (2), and (4), be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years and not more than life, a fine not

to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 1,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding the prior sentence, and notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this paragraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(4) In the case of a violation under subsection (a) with respect to less than 50 kilograms of marihuana, except in the case of 10 or more marihuana plants regardless of weight, less than 10 kilograms of hashish, less than one kilogram of hashish oil, or any quantity of a controlled substance in schedule III, IV, or V[,] (except a violation involving flunitrazepam and except a violation involving gamma hydroxybutyric acid)[,] the person committing such violation shall be imprisoned not more than five years, or be fined not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an individual, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, notwithstanding section 3583 of title 18, in addition to such term of imprisonment, include (A) a term of supervised release of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

21 U.S.C. § 960.