

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALDO SALAZAR-MARTINEZ,
RICARDO ROOSBEL MORALES-GALLEGOS, and
VICTOR MANUEL ROBLEDO-CUEVAS,
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

QUESTION PRESENTED

Whether, in light of *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), *Rehaif v. United States*, 139 S. Ct. 2191 (2019), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013), and the Due Process Clause, the “knowingly or intentionally” mens rea contained in 21 U.S.C. § 960(a) applies to the offense elements of drug type and drug quantity found in 21 U.S.C. § 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.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF CITATIONS	v
PRAYER	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT	5
REASONS FOR GRANTING THE WRIT	6
The Court should grant certiorari to address the important issue whether, in light of <i>Flores-Figueroa v. United States</i> , 556 U.S. 646 (2009), <i>Rehaif v. United States</i> , 139 S. Ct. 2191 (2019), and <i>Alleyne v. United States</i> , 133 S. Ct. 2151 (2013), and the Due Process Clause, the “knowingly or intentionally” mens rea contained in 21 U.S.C. § 960(a) applies to the offense elements of drug type and drug quantity found in 21 U.S.C. § 960(b).	
A. <i>Flores-Figueroa</i> and <i>Rehaif</i> cast serious doubt on how the lower courts have interpreted the mens rea requirement of 21 U.S.C. § 960.....	6
B. After <i>Alleyne</i> and <i>Rehaif</i> , § 960(b) must be read to include a knowledge requirement as to the type and quantity of the drugs involved in an offense.	12

TABLE OF CONTENTS – (Cont'd)

	Page
C. If § 960(b) is not read to include a knowledge requirement as to the type and quantity of drugs involved in an offense, then the statute creates a strict liability crime that violates the Due Process Clause.	16
D. The Court should grant certiorari.	18
CONCLUSION	22
APPENDIX A: Opinion of the Court of Appeals in <i>United States v. Salazar-Martinez</i> , No. 19-40079, slip op. (5th Cir. July 26, 2019) (unpublished)	23
APPENDIX B: Opinion of the Court of Appeals in <i>United States v. Morales-Gallegos</i> , No. 19-40054, slip op. (5th Cir. July 26, 2019) (unpublished)	25
APPENDIX C: Opinion of the Court of Appeals in <i>United States v. Robledo-Cuevas</i> , No. 19-40171, slip op. (5th Cir. Aug. 16, 2019) (unpublished)	27
APPENDIX D: 21 U.S.C. § 960	29
APPENDIX E: 21 U.S.C. § 841	35

TABLE OF CITATIONS

	Page
CASES	
<i>Alleyne v. United States</i> , 133 S. Ct. 2151 (2013)	<i>passim</i>
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000)	3
<i>Elonis v. United States</i> , 135 S. Ct. 2001 (2015)	15
<i>Flores-Figueroa v. United States</i> , 556 U.S. 646 (2009)	<i>passim</i>
<i>Harris v. United States</i> , 536 U.S. 545 (2002)	13
<i>Holdridge v. United States</i> , 282 F.2d 302 (8th Cir. 1960)	17-18
<i>Holloway v. United States</i> , 526 U.S. 1 (1999)	9
<i>Liparota v. United States</i> , 471 U.S. 419 (1985)	9
<i>Morissette v. United States</i> , 342 U.S. 246 (1952)	14
<i>Mullaney v. Wilbur</i> , 421 U.S. 684 (1975)	21
<i>Rehaif v. United States</i> , 139 S. Ct. 2191 (2019).....	<i>passim</i>
<i>Safeco Ins. Co. of America v. Burr</i> , 551 U.S. 47 (2007)	9
<i>Shevlin-Carpenter Co. v. Minnesota</i> , 218 U.S. 57 (1910)	17-18
<i>Smith v. United States</i> , 508 U.S. 223 (1993)	12
<i>Staples v. United States</i> , 511 U.S. 600 (1994).....	14
<i>United States ex rel. Attorney General v. Delaware & Hudson Co.</i> , 213 U.S. 366 (1909)	12
<i>United States v. Ahmad</i> , 101 F.3d 386 (5th Cir. 1996)	12

TABLE OF CITATIONS – (Cont'd)

	Page
CASES – (Cont'd)	
<i>United States v. Bailey</i> , 444 U.S. 394 (1980)	14
<i>United States v. Balint</i> , 258 U.S. 250 (1922)	17
<i>United States v. Betancourt</i> , 586 F.3d 303 (5th Cir. 2009)	<i>passim</i>
<i>United States v. Branham</i> , 515 F.3d 1268 (D.C. Cir. 2008)	6
<i>United States v. Burwell</i> , 690 F.3d 500 (D.C. Cir. 2012) (<i>en banc</i>)	8, 10-11
<i>United States v. Cordoba-Hincapie</i> , 825 F. Supp. 485 (E.D.N.Y. 1993)	12
<i>United States v. Dado</i> , 759 F.3d 550 (6th Cir. 2014)	<i>passim</i>
<i>United States v. Dotterweich</i> , 320 U.S. 277 (1943)	17
<i>United States v. Freed</i> , 401 U.S. 601 (1971)	17
<i>United States v. Gamez-Gonzalez</i> , 319 F.3d 695 (5th Cir. 2003)	<i>passim</i>
<i>United States v. Heller</i> , 579 F.2d 990 (6th Cir. 1978)	17
<i>United States v. Jefferson</i> , 791 F.3d 1013 (9th Cir. 2015)	7, 13-14, 19
<i>United States v. Keith</i> , 230 F.3d 784 (5th Cir. 2000)	3
<i>United States v. LaFranca</i> , 282 U.S. 568 (1931)	12
<i>United States v. Santos</i> , 553 U.S. 507 (2008)	12

TABLE OF CITATIONS – (Cont'd)

	Page
CASES – (Cont'd)	
<i>United States v. United States Gypsum Co.</i> , 438 U.S. 422 (1978)	9, 14
<i>United States v. Valencia-Gonzales</i> , 172 F.3d 344 (5th Cir. 1999)	13
<i>United States v. Wulff</i> , 758 F.2d 1121 (6th Cir. 1985)	17-18
<i>United States v. X-Citement Video</i> , 513 U.S. 64 (1994)	7, 10-14
<i>United States v. Zuñiga-Martinez</i> , 512 Fed. Appx. 428 (5th Cir. 2013) (unpublished).....	10, 13
<i>Williams v. North Carolina</i> , 325 U.S. 226 (1945)	17

STATUTES AND RULES

18 U.S.C. § 2	3
18 U.S.C. § 1028A(a)(1)	7, 15
18 U.S.C. § 2252(a)(1)	11
18 U.S.C. § 3231	5
21 U.S.C. § 841	<i>passim</i>
21 U.S.C. § 841(a)	<i>passim</i>
21 U.S.C. § 841(b)	<i>passim</i>
21 U.S.C. § 922(g)	8, 15-16

TABLE OF CITATIONS – (Cont'd)

	Page
STATUTES AND RULES – (Cont'd)	
21 U.S.C. § 924(a)(2)	8, 15
21 U.S.C. § 952(a)	3, 5
21 U.S.C. § 960	<i>passim</i>
21 U.S.C. § 960(a).....	<i>passim</i>
21 U.S.C. § 960(a)(1)	3
21 U.S.C. § 960(b)	<i>passim</i>
21 U.S.C. § 960(b)(1)	<i>passim</i>
21 U.S.C. § 960(b)(2)	<i>passim</i>
21 U.S.C. § 963	3, 5
28 U.S.C. § 1254(1)	1
33 U.S.C. § 1319(c)(2)(A)	12
Sup. Ct. R. 12.4	ii
Sup. Ct. R. 13.1	1

MISCELLANEOUS

Brief for the United States, <i>Flores-Figueroa v. United States</i> , No. 08-108 (O.T. 2008), available at 2009 WL 191837	8
Leonid Traps, Note, “ <i>Knowingly</i> ” <i>Ignorant: Mens Rea Distribution in</i> <i>Federal Criminal Law After Flores-Figueroa</i> , 112 Colum. L. Rev. 628 (Apr. 2012)	20

TABLE OF CITATIONS – (Cont'd)

	Page
MISCELLANEOUS – (Cont'd)	
<i>Mens Rea Requirement,</i> 123 Harv. L. Rev. 312 (2009)	21
Model Penal Code § 2.02 Explanatory Note ¶2	9
Model Penal Code § 2.02(1)	9
Model Penal Code § 2.05(1)(b)	9
United States Sentencing Commission, <i>Quick Facts: Drug Trafficking Offenses</i> (June 2017)	20

PRAYER

Petitioners Aldo Salazar-Martinez, Ricardo Roosbel Morales-Gallegos, and Victor Manuel Robledo-Cuevas 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 through C. The district court did not issue written opinions in these cases.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinions on the following dates: on July 26, 2019 for Mr. Salazar-Martinez and Mr. Morales-Gallegos, and on August 16, 2019, for Mr. Robledo-Cuevas. *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 statutory provisions involved, 21 U.S.C. §§ 960 and 841, are attached as Appendices D and E.

STATEMENT OF THE CASE

In separate district court proceedings in the Southern District of Texas, petitioners were convicted as follows: (1) Mr. Salazar-Martinez pleaded guilty to importing 500 grams or more, that is, approximately 3 kilograms, of cocaine, in violation of 21 U.S.C. §§ 952(a), 960(a)(1) and (b)(2), and 18 U.S.C. § 2; (2) Mr. Morales-Gallegos pleaded guilty to importing 18.69 kilograms of methamphetamine, in violation of 21 U.S.C. §§ 952(a), 960(a)(1) and (b)(1), and 18 U.S.C. § 2; and (3) Mr. Robledo Cuevas pleaded guilty to conspiracy to import, and importing, five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 963, 952(a), 960(a)(1) and (b)(1), and 18 U.S.C. § 2.

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 the related drug-importation statutes of 21 U.S.C. §§ 952(a) and 960(a), did not apply to the offense elements of drug type and quantity.¹ They argued, however, that this Court’s intervening

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) and 960(b) are clearly elements of aggravated § 841 offenses 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).

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.*

**BASIS OF FEDERAL JURISDICTION IN THE
UNITED STATES DISTRICT COURT**

These cases were originally brought as federal criminal prosecutions under 21 U.S.C. §§ 952(a), 960(a) and (b), and 963. 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), *Rehaif v. United States*, 139 S. Ct. 2191 (2019), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013), and the Due Process Clause, the “knowingly or intentionally” mens rea contained in 21 U.S.C. § 960(a) applies to the offense elements of drug type and drug quantity found in 21 U.S.C. § 960(b).

A. *Flores-Figueroa* and *Rehaif* cast serious doubt on how the lower courts have interpreted the mens rea requirement of 21 U.S.C. § 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* precedent² holding that the “knowingly or intentionally” mens rea found in 21 U.S.C. § 841(a), which is a statutory provision that is analogous to 21 U.S.C. § 960(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 statutory provision that is analogous to 21 U.S.C. § 960(b). *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

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

voiced 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. § 960(a) applies to the offense elements of drug type and drug quantity found in 21 U.S.C. § 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,

³ As the Court explained in *Flores-Figueroa*, "[the] federal criminal statute forbidding '[a]ggrevated 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 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

the Court implicitly rejected the government’s argument⁵ 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.

This Court recently applied *Flores-Figueroa*’s presumption — that a statutory mens rea applies to all the offense elements that follow it — in *Rehaif v. United States*, 139 S. Ct. 2191 (2019). In that case, the Court applied *Flores-Figueroa*’s presumption to hold that, in a prosecution under 21 U.S.C. §§ 922(g) and 924(a)(2), the government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing the firearm. *See* 139 S. Ct. at 2195-2200. The Court reasoned that “[a]pplying the word ‘knowingly’ to the defendant’s status in § 922(g) *helps advance* the purpose of scienter, for it helps to separate wrongful from innocent acts,” *id.* at 2197 (emphasis added), but did *not* state that that *Flores-Figueroa*’s presumption should be limited only to elements that mean the difference between innocent

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”).

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.

conduct and wrongful conduct. The Court did note, however, that there is an exception to the presumption in favor of scienter “in cases involving statutory provisions that form part of a ‘regulatory’ or ‘public welfare’ program and carry only minor penalties.” *Rehaif*, 139 S. Ct. at 2197.

Flores-Figueroa’s presumption 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 is skeptical of 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*, *Rehaif*, 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 the statutory provision forms part of a “regulatory” or “public welfare” program carrying only minor penalties, *see Rehaif*, 139 S. Ct. at 2197, or

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).

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”).

Nevertheless, the Fifth Circuit has not applied this rule to 21 U.S.C. §§ 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. Its 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*, *Rehaif*, and *X-Citement Video* cast serious doubt upon the decisions in *Gamez-Gonzalez*, *Betancourt*, and petitioners’ cases. *Flores-Figueroa* and *Rehaif* confirm that there is a presumption that a statutory mens rea will apply to all material elements that follow it, except in cases involving statutory provisions that form part of a “regulatory” or “public welfare” program and carry only minor penalties. *See Rehaif*, 139 S. Ct. at 2195-96; *see also Burwell*, 690 F.3d at 537 (Kavanaugh, J., dissenting). Also, *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 doubt⁸ and the rule of lenity.⁹

B. After *Alleyne v. United States*, § 960(b) 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 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*

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.*

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 § 960(b)(1) and (2), *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 § 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)).

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, 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 § 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 (1994) (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 and five-year

mandatory minimums of § 960(b)(1) and (2) 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); *see also Rehaif*, 139 S. Ct. 2196 (“The cases in which we have emphasized scienter’s importance in separating wrongful from innocent acts are legion.”). 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.

In *Rehaif*, this Court applied that default rule to hold that, in a prosecution under 21 U.S.C. §§ 922(g) and 924(a)(2), the government must prove both that the defendant knew

he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing the firearm. *See* 139 S. Ct. at 2195-2200. Although the Court noted that “[a]pplying the word ‘knowingly] to the defendant’s status in § 922(g) *helps advance* the purpose of scienter, for it helps to separate wrongful from innocent acts,” *id.* at 2197 (emphasis added), it did not state that that *Flores-Figueroa*’s default rule should be limited only to elements that mean the difference between innocent conduct and wrongful conduct.

But even assuming *arguendo* that the rule extending a mens rea requirement throughout a statute applies only to distinguish innocent conduct from guilty conduct, after *Alleyne*, § 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 § 960(b) offense as a new and separate crime with distinct elements from a § 960(a) offense, the mens rea as to type and quantity of drugs makes the difference between the less culpable offense under § 960(a), and the distinct, aggravated offense under § 960(b). The defendant is legally innocent of the “new, aggravated” offense created by § 960(b), *Alleyne*, 133 S. Ct. at 2161, if he did not in fact know the type and quantity of drugs involved in the offense.

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

Alternatively, if § 960(b) does not require proof of knowledge of drug type and quantity, then the statute violates the Due Process Clause by creating a strict liability offense punished by a mandatory minimum of ten (or five) years of imprisonment and the possibility of life (or 40 years) 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 (or five) years and a maximum of life (or 40 years) 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); *cf. Rehaif*, 139 S. Ct. at 2197 (“[W]e have typically declined to apply the presumption in favor of scienter in cases involving statutory provisions that form part of a ‘regulatory’ or ‘public welfare’ program and carry only minor penalties.”). Sections 960(b)(1) and (2) satisfy neither of these factors. The penalty under each statute is a mandatory minimum of ten years or five years of imprisonment, with a maximum of life or 40 years 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 § 960(b) is not read to include mens rea as to the type and quantity of drugs — the very elements that make distinct from a violation of § 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 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

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).

offense under § 960 all the way up to life imprisonment. *See* 21 U.S.C. § 960(b)(1). “Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to [the type and quantity gradations found in § 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 § 960(b) are truly the tail wagging the dog of the “verb” elements found in § 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 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* (and now *Rehaif*) 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 Aldo Salazar-Martinez, Ricardo Roosbel Morales-Gallegos, and Victor Manuel Robledo-Cuevas respectfully pray that this Court grant certiorari to review the judgments of the Fifth Circuit in these cases.

Date: October 15, 2019

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

July 26, 2019

Lyle W. Cayce
Clerk

No. 19-40079
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ALDO SALAZAR-MARTINEZ,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:17-CR-909-1

Before JOLLY, JONES, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Aldo Salazar-Martinez pleaded guilty to importing 500 grams or more of cocaine. He contends, for the first time on appeal, that his conviction was not supported by an adequate factual basis because the Government failed to prove that he knew the type and quantity of drugs involved in his offense.

As Salazar-Martinez concedes, his claim is foreclosed by *United States v. Betancourt*, 586 F.3d 303, 308-09 (5th Cir. 2009), which concluded that *Flores-*

* 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.

Figueroa v. United States, 556 U.S. 646 (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 an offense arising under 21 U.S.C. § 841. The Government therefore did not have to establish that Salazar-Martinez was aware of the type and quantity of controlled substances involved in his offense under the analogous statute of 21 U.S.C. § 960(a)(1), (b)(2).

Thus, Salazar-Martinez's motion for summary disposition is GRANTED, and the district court's judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

July 26, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RICARDO ROOSBEL MORALES-GALLEGOS,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:18-CR-579-1

Before REAVLEY, JONES, and HO, Circuit Judges.

PER CURIAM:*

Ricardo Roosbel Morales-Gallegos was convicted of one charge of importing 18.69 kilograms of methamphetamine and was sentenced to serve 168 months in prison. Now, he argues that the factual basis is insufficient to support his conviction because it does not establish that he knew the type and quantity of drugs involved with his offense. He concedes that this argument is foreclosed by *United States v. Betancourt*, 586 F.3d 303, 308-09 (5th Cir. 2009),

* 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.

and he has filed an unopposed motion for summary disposition based on *Betancourt*.

As Morales-Gallegos acknowledges, *Betancourt* reiterated that a defendant's knowledge of the type and quantity of drugs is not an element of a federal drug offense. 586 F.3d at 308-09. This case thus forecloses his argument concerning the necessity of the factual basis establishing his knowledge of the type and quantity of drugs involved with his offense. *See id.* His motion for summary disposition is GRANTED, and the judgment of the district court is AFFIRMED.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

August 16, 2019

Lyle W. Cayce
Clerk

No. 19-40171
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

VICTOR MANUEL ROBLEDO-CUEVAS,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:18-CR-400-1

Before CLEMENT, ELROD, and OLDHAM, Circuit Judges.

PER CURIAM:*

Victor Manuel Robledo-Cuevas was convicted of conspiracy to import 5 kilograms and more of a mixture and substance containing a detectable amount of cocaine and of importation of 5 kilograms and more of a mixture and substance containing a detectable amount of cocaine, and he was sentenced within the guidelines range to concurrent 57-month terms of imprisonment and to concurrent three-year periods of supervised release. In this appeal, he

* 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.

No. 19-40171

argues that the factual basis is insufficient to support his conviction because it does not establish that he knew the type and quantity of drugs involved with his offense. He concedes that this argument is foreclosed by *United States v. Betancourt*, 586 F.3d 303, 308-09 (5th Cir. 2009), and he has filed an unopposed motion for summary disposition based on *Betancourt*.

As Robledo-Cuevas acknowledges, *Betancourt* reiterated that a defendant's knowledge of the type and quantity of drugs is not an element of a federal drug offense. *Id.* This case thus forecloses his argument concerning the necessity of the factual basis establishing his knowledge of the type and quantity of drugs involved with his offense. *See id.* His motion for summary disposition is GRANTED, and the judgment of the district court is AFFIRMED.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated

Title 21. Food and Drugs (Refs & Annos)

Chapter 13. Drug Abuse Prevention and Control (Refs & Annos)

Subchapter II. Import and Export (Refs & Annos)

21 U.S.C.A. § 960

§ 960. Prohibited acts A

Effective: December 21, 2018

Currentness

(a) Unlawful acts

Any person who--

(1) contrary to section 825, 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures, possesses with intent to distribute, or distributes a controlled substance, shall be punished as provided in subsection (b).

(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) 280 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.¹

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 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 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 or \$20,000,000 if the defendant is an individual or \$75,000,000 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) 28 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.¹

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 or \$5,000,000 if the defendant is an individual or \$25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony 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 or \$8,000,000 if the defendant is an individual or \$50,000,000 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 Hillary 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 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 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.

(4) In the case of a violation under subsection (a) with respect to less than 50 kilograms of marihuana, except in the case of 100 or more marihuana plants regardless of weight, less than 10 kilograms of hashish, or less than one kilogram of hashish oil, the person committing such violation shall be sentenced in accordance with section 841(b)(1)(D) of this title.

(5) In the case of a violation of subsection (a) involving a controlled substance in schedule III, such person shall be sentenced in accordance with section 841(b)(1) of this title.

(6) In the case of a violation of subsection (a) involving a controlled substance in schedule IV, such person shall be sentenced in accordance with section 841(b)(2) of this title.

(7) In the case of a violation of subsection (a) involving a controlled substance in schedule V, such person shall be sentenced in accordance with section 841(b)(3) of this title.

(c) Repealed. Pub.L. 98-473, Title II, § 225, formerly § 225(a), Oct. 12, 1984, 98 Stat. 2030, as amended by Pub.L. 99-570, Title I, § 1005(c), Oct. 27, 1986, 100 Stat. 3207-6

(d) Penalty for importation or exportation

A person who knowingly or intentionally--

(1) imports or exports a listed chemical with intent to manufacture a controlled substance in violation of this subchapter or subchapter I;

(2) exports a listed chemical in violation of the laws of the country to which the chemical is exported or serves as a broker or trader for an international transaction involving a listed chemical, if the transaction is in violation of the laws of the country to which the chemical is exported;

(3) imports or exports a listed chemical knowing, or having reasonable cause to believe, that the chemical will be used to manufacture a controlled substance in violation of this subchapter or subchapter I;

(4) exports a listed chemical, or serves as a broker or trader for an international transaction involving a listed chemical, knowing, or having reasonable cause to believe, that the chemical will be used to manufacture a controlled substance in violation of the laws of the country to which the chemical is exported;

(5) imports or exports a listed chemical, with the intent to evade the reporting or recordkeeping requirements of section 971 of this title applicable to such importation or exportation by falsely representing to the Attorney General that the importation or exportation qualifies for a waiver of the 15-day notification requirement granted pursuant to paragraph (2) or (3) of section 971(f) of this title by misrepresenting the actual country of final destination of the listed chemical or the actual listed chemical being imported or exported;

(6) imports a listed chemical in violation of section 952 of this title, imports or exports such a chemical in violation of section 957 or 971 of this title, or transfers such a chemical in violation of section 971(d) of this title; or

(7) manufactures, possesses with intent to distribute, or distributes a listed chemical in violation of section 959 of this title.²

shall be fined in accordance with Title 18, imprisoned not more than 20 years in the case of a violation of paragraph (1) or (3) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (3) involving a list I chemical, or both.

CREDIT(S)

(Pub.L. 91-513, Title III, § 1010, Oct. 27, 1970, 84 Stat. 1290; Pub.L. 98-473, Title II, §§ 225, formerly 225(a), 504, Oct. 12, 1984, 98 Stat. 2030, 2070; renumbered § 225 and amended Pub.L. 99-570, Title I, §§ 1004(a), 1005(c), 1302, 1866(e), Oct. 27, 1986, 100 Stat. 3207-6, 3207-15, 3207-55; Pub.L. 100-690, Title VI, §§ 6053(c), 6475, Nov. 18, 1988, 102 Stat. 4315, 4380; Pub.L. 101-647, Title XII, § 1204, Title XXXV, § 3599J, Nov. 29, 1990, 104 Stat. 4830, 4932; Pub.L. 103-200, §§ 4(b), 5(b), Dec. 17, 1993, 107 Stat. 2338, 2339; Pub.L. 103-322, Title IX, § 90105(a), Title XXXIII, § 330024(d)(2), Sept. 13, 1994, 108 Stat. 1987, 2151; Pub.L. 104-237, Title I, § 102(c), Title III, § 302(b), Oct. 3, 1996, 110 Stat. 3100, 3105; Pub.L. 104-305, § 2(b)(2)(B), (C), Oct. 13, 1996, 110 Stat. 3807; Pub.L. 105-277, Div. E, § 2(b), Oct. 21, 1998, 112 Stat. 2681-759; Pub.L. 106-172, § 3(b)(2), Feb. 18, 2000, 114 Stat. 9; Pub.L. 107-273, Div. B, Title III, § 3005(b), Nov. 2, 2002, 116 Stat. 1806; Pub.L. 109-177, Title VII, §§ 716(b)(1)(A), 717, Mar. 9, 2006, 120 Stat. 267; Pub.L. 110-425, § 3(i), Oct. 15, 2008, 122 Stat. 4832; Pub.L. 111-220, §§ 2(b), 4(b), Aug. 3, 2010, 124 Stat. 2372; Pub.L. 113-260, § 3(b), Dec. 18, 2014, 128 Stat. 2931; Pub.L. 115-391, Title IV, § 401(b), Dec. 21, 2018, 132 Stat. 5221.)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. The period probably should be a comma.

21 U.S.C.A. § 960, 21 USCA § 960

Current through P.L. 116-58. Some statute sections may be more current, see credits for details.

End of Document

© 2019 Thomson Reuters. No claim to original U.S. Government Works.

 KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version Held Unconstitutional by U.S. v. Grant, C.D.Cal., Nov. 30, 2007

 KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated

Title 21. Food and Drugs (Refs & Annos)

Chapter 13. Drug Abuse Prevention and Control (Refs & Annos)

Subchapter I. Control and Enforcement

Part D. Offenses and Penalties

21 U.S.C.A. § 841

§ 841. Prohibited acts A

Effective: December 21, 2018

Currentness

(a) Unlawful acts

Except as authorized by this subchapter, 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 849, 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) 280 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 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 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 or \$20,000,000 if the defendant is an individual or \$75,000,000 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 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years 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) 28 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 or \$5,000,000 if the defendant is an individual or \$25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony 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 or \$8,000,000 if the defendant is an individual or \$50,000,000 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 Hillary 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 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 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, 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 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 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 term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 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 more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$500,000 if the defendant is an individual or \$2,500,000 if the defendant is other than an individual, or both.

(ii) 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 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 more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph 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 term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall 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 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 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. 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 one year 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 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or \$100,000 if the defendant is an individual or \$250,000 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 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or \$200,000 if the defendant is an individual or \$500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) \$500,000 if the defendant is an individual; or

(D) \$1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with Title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution

(A) In general

Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definition

For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; “boobytrap” defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under Title 18, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under Title 18, or both.

(3) For the purposes of this subsection, the term “boobytrap” means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18 or imprisoned not more than one year, or both.

(g) Internet sales of date rape drugs

(1) Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that--

(A) the drug would be used in the commission of criminal sexual conduct; or

(B) the person is not an authorized purchaser;

shall be fined under this subchapter or imprisoned not more than 20 years, or both.

(2) As used in this subsection:

(A) The term “date rape drug” means--

(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol;

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of Title 5, to be used in committing rape or sexual assault.

The Attorney General is authorized to remove any substance from the list of date rape drugs pursuant to the same rulemaking authority.

(B) The term “authorized purchaser” means any of the following persons, provided such person has acquired the controlled substance in accordance with this chapter:

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by the Attorney General. A “qualifying medical relationship” means a medical relationship that exists when the practitioner has conducted at least 1 medical evaluation with the authorized purchaser in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other health¹ professionals. The preceding sentence shall not be construed to imply that 1 medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(ii) Any practitioner or other registrant who is otherwise authorized by their registration to dispense, procure, purchase, manufacture, transfer, distribute, import, or export the substance under this chapter.

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate purpose for using any “date rape drug” for which a prescription is not required.

(3) The Attorney General is authorized to promulgate regulations for record-keeping and reporting by persons handling 1,4-butanediol in order to implement and enforce the provisions of this section. Any record or report required by such regulations shall be considered a record or report required under this chapter.

(h) Offenses involving dispensing of controlled substances by means of the Internet

(1) In general

It shall be unlawful for any person to knowingly or intentionally--

(A) deliver, distribute, or dispense a controlled substance by means of the Internet, except as authorized by this subchapter; or

(B) aid or abet (as such terms are used in section 2 of Title 18) any activity described in subparagraph (A) that is not authorized by this subchapter.

(2) Examples

Examples of activities that violate paragraph (1) include, but are not limited to, knowingly or intentionally--

(A) delivering, distributing, or dispensing a controlled substance by means of the Internet by an online pharmacy that is not validly registered with a modification authorizing such activity as required by section 823(f) of this title (unless exempt from such registration);

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or dispensation by means of the Internet in violation of section 829(e) of this title;

(C) serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance in a manner not authorized by sections² 823(f) or 829(e) of this title;

(D) offering to fill a prescription for a controlled substance based solely on a consumer's completion of an online medical questionnaire; and

(E) making a material false, fictitious, or fraudulent statement or representation in a notification or declaration under subsection (d) or (e), respectively, of section 831 of this title.

(3) Inapplicability

(A) This subsection does not apply to--

(i) the delivery, distribution, or dispensation of controlled substances by nonpractitioners to the extent authorized by their registration under this subchapter;

(ii) the placement on the Internet of material that merely advocates the use of a controlled substance or includes pricing information without attempting to propose or facilitate an actual transaction involving a controlled substance; or

(iii) except as provided in subparagraph (B), any activity that is limited to--

(I) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of Title 47); or

(II) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of Title 47 shall not constitute such selection or alteration of the content of the communication.

(B) The exceptions under subclauses (I) and (II) of subparagraph (A)(iii) shall not apply to a person acting in concert with a person who violates paragraph (1).

(4) Knowing or intentional violation

Any person who knowingly or intentionally violates this subsection shall be sentenced in accordance with subsection (b).

CREDIT(S)

(Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194; Pub.L. 98-473, Title II, §§ 224(a), 502, 503(b)(1), (2), Oct. 12, 1984, 98 Stat. 2030, 2068, 2070; Pub.L. 99-570, Title I, §§ 1002, 1003(a), 1004(a), 1005(a), 1103, Title XV, § 15005, Oct. 27, 1986, 100 Stat. 3207-2, 3207-5, 3207-6, 3207-11, 3207-192; Pub.L. 100-690, Title VI, §§ 6055, 6254(h), 6452(a), 6470(g), (h), 6479, Nov. 18, 1988, 102 Stat. 4318, 4367, 4371, 4378, 4381; Pub.L. 101-647, Title X, § 1002(e), Title XII, § 1202, Title XXXV, § 3599K, Nov. 29, 1990, 104 Stat. 4828, 4830, 4932; Pub.L. 103-322, Title IX, § 90105(a), (c), Title XVIII, § 180201(b)(2) (A), Sept. 13, 1994, 108 Stat. 1987, 1988, 2047; Pub.L. 104-237, Title II, § 206(a), Title III, § 302(a), Oct. 3, 1996, 110 Stat. 3103, 3105; Pub.L. 104-305, § 2(a), (b)(1), Oct. 13, 1996, 110 Stat. 3807; Pub.L. 105-277, Div. E, § 2(a), Oct. 21, 1998, 112 Stat. 2681-759; Pub.L. 106-172, §§ 3(b)(1), 5(b), 9, Feb. 18, 2000, 114 Stat. 9, 10, 13; Pub.L. 107-273, Div. B, Title III, § 3005(a), Title IV, § 4002(d)(2)(A), Nov. 2, 2002, 116 Stat. 1805, 1809; Pub.L. 109-177, Title VII, §§ 711(f)(1)(B), 732, Mar. 9, 2006, 120 Stat. 262, 270; Pub.L. 109-248, Title II, § 201, July 27, 2006, 120 Stat. 611; Pub.L. 110-425, § 3(e), (f), Oct. 15, 2008, 122 Stat. 4828, 4829; Pub.L. 111-220, §§ 2(a), 4(a), Aug. 3, 2010, 124 Stat. 2372; Pub.L. 115-391, Title IV, § 401(a) (2), Dec. 21, 2018, 132 Stat. 5220.)

Notes of Decisions (8020)

Footnotes

1 So in original. Probably should be "health".

2 So in original. Probably should be "section".

21 U.S.C.A. § 841, 21 USCA § 841

Current through P.L. 116-58. Some statute sections may be more current, see credits for details.