NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JESSIE HARRIS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2D1.1(b)(5) of the United States Sentencing Guidelines provides that "[i]f (A) the offense involved the importation of ... methamphetamine or the manufacture of ... methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment [for a mitigating role], increase by 2 levels." Although the text of the guideline provision clearly requires scienter on the part of the defendant, the Fifth Circuit case law is an outlier which holds that such an increase applies even where the defendant has no scienter regarding the source of the methamphetamine. Should this Court resolve this circuit split and clarify whether scienter is required before the two-level increase may be applied?

PARTIES TO THE PROCEEDINGS

Jessie Harris is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jessie Harris, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Jessie Harris*, –Fed. Appx.– (5th Cir. 2019) (unpublished), and is provided in the Appendix to the Petition. [Appendix A]. The judgment of conviction and sentence was entered February 3, 2020 and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on November 9, 2020. [Appendix A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Proceedings Below

On October 17, 2019, Defendant-Appellant Jesse Harris ("Mr. Harris" or "Appellant") was charged by information with conspiracy to possess a with intent to distribute a controlled substance. [ROA.42];[1] *see* 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(C).

On October 21, 2019, Mr. Harris entered his plea of guilty before the district court to the sole count as set forth in the information. [ROA.87]. On February 3, 2020, Mr. Harris was sentenced by the district court a term of incarceration for 151 months, with three years of supervise release. [ROA.96]. Mr. Harris filed timely notice of appeal on February 18, 2020.[2] [ROA.63].

B. Statement of the Facts

On October 17, 2019, Appellant was charged by information with conspiracy to possess with intent to distribute a controlled substance.

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[1]On October 4, 2018, Mr. Harris agreed to waive indictment. [ROA.44].

[2]Note that Monday, February 17, 2020, was a federal holiday.

On October 21, 2019, Mr. Harris entered his plea of guilty before the district court to the sole count as set forth in the information. [ROA.87]. On February 3, 2020, Mr. Harris was sentenced by the district court a term of incarceration for 151 months, with three years of supervise release. [ROA.96]. Mr. Harris filed timely notice of appeal on February 18, 2020. [ROA.63].

At that sentencing hearing, the district court adopted the offense computations set forth in the PSR and Addenda. [ROA.94]. Those computations resulted in a base offense level of 31, with a criminal history category of III. [ROA.94].

There were also two guideline enhancements. Two levels were added due to the district court's determination that Mr. Harris had possessed dangerous weapons in connection with methamphetamine distribution. [ROA.109]; *See* U.S.S.G. §2D1.1(b)(1). Two level were added because the offense involved methamphetamine which was imported from Mexico. [ROA.110]; *See* U.S.S.G. §2D1.1(b)(5). Three levels were then subtracted based

on Mr. Harris's acceptance of responsibility for the offense. [ROA.121, 110]; *See* U.S.S.G. §§ 3E1.1(a), (b). His total offense level was calculated to be 31.[3] [ROA.94].

Mr. Harris's filed written objections to the PSR's two asserted enhancements regarding the possession of a dangerous weapon and that the methamphetamine at issue had been imported from Mexico on the grounds that the alleged possession of the dangerous weapons was not connected to the methamphetamine distribution, [ROA.123], and that the alleged importation of methamphetamine from Mexico did not require scienter of Mr. Harris's part in enhancing his sentencing range. [ROA.124]. Mr. Harris reurged those objections at the sentencing hearing.[4] [ROA.93].

After the sentence was pronounced as set forth above, Mr. Harris objected to said sentence on the grounds that it was

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[3]Although in the district court Mr. Harris contested the calculations pertaining to his criminal history score and category on the grounds that a Texas deferred adjudication is not a "conviction," he did not challenge those calculations on appeal. [ROA.125].

[4] Mr. Harris does not challenge the dangerous weapon finding in this Petition.

unreasonable. [ROA.97]. That objection was overruled by the district court. [ROA.97].

C. The Appeal

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, contending that the two-level importation increase under § 2D1.1(b)(5) required scienter regarding the importation of the methamphetamine on the part of the defendant. The court summarily rejected this claim as foreclosed by Fifth Circuit precedent. *See* [Appendix A] (citing *United States v. Serfass*, 684 F.3d 548, 552 (5th Cir. 2012).

REASON FOR GRANTING THE PETITION

The opinion of the Fifth Circuit demonstrates the circuit split regarding the two-level importation increase under § 2D1.1(b)(5), as other courts of appeal do hold that scienter is required regarding the importation of the methamphetamine on the part of the defendant.

In rejecting the theory that the enhancement at issue here has no scienter requirement, one circuit court of appeals has noted the Fifth Circuit's solitary stance on the issue,

> Only one circuit has approved the government's

> proffered reading of U.S.S.G. § 2D1.1(b)(5) that would dispense with the requirement that the defendant actually know the drugs were imported. In *United States v. Serfass*, the Fifth Circuit stated that the plain language of § 2D1.1(b)(5) supports the conclusion that the increase applies to "a defendant who possesses methamphetamine that had itself been unlawfully imported" regardless of whether he or she had actual knowledge of the importation. 684 F.3d 548, 553 (5th Cir. 2012). We decline to adopt the Fifth Circuit's conclusion here ....

United States v. Job, 871 F.3d 852, 871 (9th Cir. 2017).

The Tenth Circuit has likewise noted the Fifth Circuit's position regarding scienter, although in doing so the Tenth Circuit found that the defendant before it knew that the methamphetamine had been imported. *See United States v. Redifer*, 631 Fed.Appx. 548, 565 (10th Cir. 2015) (unpublished) (citations omitted); *see also United States v. Valdez*, 723 Fed.Appx. 624, 627 (10 Cir. 2018) (unpublished) (same).

The history and language of the 2D1.1(b)(5)(A) and (B) enhancement clearly suggests a *mens rea* element is included and that knowledge of importation is required. Section 2D1.1(b)(5)(A) and (B) does not apply the 2-level increase for an offense that "involved" the importation of methamphetamine if the defendant is subject to an adjustment under Section 3B1.2

(Mitigating Role).

The mitigating role provision of the guidelines provides a range of downward adjustments "for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant." U.S.S.G. §3B1.2, Application Note 3(A). If the § 2D1.1(b)(5) enhancement is truly a "strict liability" provision, it isn't logical to not apply the enhancement simply because a defendant was less involved than others. This exemption from the application of the enhancement for those less culpable clearly suggests that the enhancement has a *mens rea* element–those less involved are less likely to have actual knowledge of where the methamphetamine came from and are not "involved" in importation.

The enhancement should not be applied to Mr. Harris without proof of knowledge of importation. The U.S. Sentencing Commission has expressly stated that the importation enhancement was "directed" at importation activity. *See* U.S.S.G. Appendix C, Amend. 555 (November, 1997). To enhance Mr. Harris's sentence by two levels in no way serves the purpose of a provision "directed" at importation activity where he had no knowledge of importation.

This exemption for those less involved suggests that there is a *mens rea* element.

Moreover, where the sentencing enhancement provision is ambiguous, as §2D1.1(b)(5) is, the doctrine of lenity should be applied. It is settled that the rule of lenity applies not only to the substantive scope of criminal prohibitions, but also to questions about the severity of sentencing. *Bifulco v. United States*, 447 U.S. 381, 387, 100 S.Ct. 2247 (1980); *see generally* Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 513 (Spring 2002) (nearly half of all recent cases in which the Supreme Court has invoked the rule of lenity have been sentencing cases); *accord Leocal v. Ashcroft*, 543 U.S. 1, 11 n. 8, 125 S.Ct. 377 (2004) (the rule of lenity applies where a statute has both criminal and noncriminal applications); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n. 10, 112 S.Ct. 2102 (1992) (same).

Second, this Court's recent holding in *Elonis v. United States*, 575 U.S. 723, 135 S.Ct. 2001 (2015), tends to support the argument that § 2D1.1(b)(5) requires that the defendant had to know the methamphetamine was imported. That case involved

Anthony Elonis, who posted rap lyrics on his Facebook page that contained graphically violent language and imagery concerning his estranged wife, co-workers, elementary-school students, and state and local law enforcement. *See id.* at 2004–07. Concluding that a reasonable person would foresee that Elonis's posts would be interpreted as a threat, a jury convicted Elonis of violating 18 U.S.C. § 875(c), which makes it a federal crime to transmit in interstate commerce "any communication containing any threat ... to injure the person of another." *Id.* at 2007 (citation omitted) (internal quotation marks omitted). The United States Court of Appeals for the Third Circuit affirmed Elonis's conviction. *See id.*

This Court reversed. *See id.* In an opinion that the Honorable John G. Roberts, Chief Justice of the United States, authored, this Court began its analysis by noting that the dictionary definitions of threat do not set forth an intent requirement. *See id.* at 2008 ("These definitions ... speak to what the statement conveys[,] not to the mental state of the author"). The Chief Justice explained, however, that the "'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with'" such a requirement. *Id.* at 2009 (quoting *Morissette v. United*

States, 342 U.S. 246, 250, 72 S.Ct. 240 (1952)). Instead, the Chief Justice noted, courts must read a *mens rea* requirement into such statutes to "separate wrongful conduct from otherwise innocent conduct." *Id*. at 2010 (internal quotation marks omitted). Chief Justice Roberts said that this rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal" and that a defendant must be "blameworthy in mind" before he can be found guilty. *Id*. at 2009 (internal quotation marks omitted). Chief Justice Roberts said that the trial judge erred in using a reasonable person standard, because that standard did not require proof that Elonis was aware of his wrongdoing. *See id.* at 2009–12. Not specifying the intent that § 875(c) requires, the Chief Justice said only that "negligence is not sufficient." *Id*. at 2013.

The same argument fits neatly to the facts here. Neither the PSI nor the Addendum even suggest that Mr. Harris had any knowledge of the methamphetamine's origin that the PSI claimed he acquired from O'Meara. [ROA.110, 149]. As Chief Justice Roberts stated, "wrongdoing must be conscious to be criminal" and that a defendant must be "blameworthy in mind" before he may be

punished for his actions. *See Elonis* at 2009.

This Court is therefore respectfully requested to grant *certiorari* to address the circuit split identified above and to clarify the law surrounding this frequently-occurring sentencing enhancement.

CONCLUSION

Petitioner respectfully prays that this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to which he may be justly entitled.

Respectfully submitted this 25th day of November, 2020.

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