No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WESLEY WAYNE WAKEFORD,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
NO. 19-11101

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QUESTION PRESENTED

This Court should grant this petition to interpret Sentencing Guidelines section 2D1.1(b)(5). What an "offense that involved the importation" of methamphetamine looks like has given rise to circuit splits on two issues, those issues approach the interpretation of the subsection differently, and contradictory caselaw exists within two circuits.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

DIRECTLY RELATED PROCEEDINGS

The following cases arose from the same Northern District of Texas case, No. 4:19-CR-112, and have been appealed to the United States Court of Appeals for the Fifth Circuit:

- *United States v. Royal Richards*, No. 19-11118 (pending)

The following cases arose from the same Northern District of Texas case, No. 4:19-CR-39, and were resolved in the district court without appeal:

- *United States v. Anthony Scott Smith*, No. 4:19-CR-112-1
- *United States v. Justin Paul Shaw*, No. 4:19-CR-112-3
- *United States v. Stephen Paul Graybill*, No. 4:19-CR-112-5
- *United States v. Ashley Gahagan*, No. 4:19-CR-112-6
- *United States v. Alicia Bouldin*, No. 4:19-CR-112-7
- *United States v. Holly Stapleton*, No. 4:19-CR-112-8
- *United States v. Jason Carter*, No. 4:19-CR-112-9

- *United States v. Kenneth Wayne Barber*, No. 4:19-CR-112-10
- *United States v. Tammy Smith*, No. 4:19-CR-112-11

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The petitioner, Wesley Wayne Wakeford, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit filed on August 14, 2020.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is *United States of America v. Wesley Wayne Wakeford* No. 19-11101 (unpublished). This opinion, which is not designated for publication, is reproduced in Appendix A. The judgment entered by the district court is reproduced in Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The Court of Appeals for the Fifth Circuit entered its opinion affirming on August 14, 2020 making this petition timely under Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Sentencing Guidelines Section 2D1.1(b)(5)

"If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels."

STATEMENT OF THE CASE

Proceedings Below

On February 8, 2019, the United States Attorney filed a complaint charging Wakeford and others with violations of the Controlled Substances Act. Wakeford was apprehended and appeared before a United States Magistrate judge for initial appearance on February 22, 2019. The government filed a motion for detention, and Wakeford was detained pending a preliminary and detention hearing. Additionally, Wakeford was found indigent and appointed counsel under the Criminal Justice Act. On February 27, 2019, the magistrate judge held a preliminary and detention hearing. The magistrate judge found probable cause and ordered Wakeford detained pending trial. Subsequently, Wakeford pleaded guilty to an information.

On April 16, 2019, the government filed an information charging Wakeford and others with violating section 846 and 841(a)(1) and (b)(1)(C) of Title 21. On April 19, 2019, the government filed a Second Superseding information charging Wakeford and others with violating section 846 and 841(a)(1) and (b)(1)(C) of Title 21. (The record does not contain a First Superseding information.) On April 24, 2019, Wakeford waived indictment and pleaded guilty to the single count of the Second Superseding information. The district court accepted Wakeford's waiv-

er of indictment and guilty plea and adjudged him guilty of the offense charged in the Second Superseding information.

The district court entered a scheduling order for sentencing. That order directed preparation of a presentence report. The PSR calculated Wakeford's sentencing guidelines as follows:

Base offense level (50–200 grams of methamphetamine)	24
Specific offense characteristic (2D1.1(b)(5)(A) involved the importation)	+2
Acceptance of responsibility	-3
Total offense level	23

The PSR determined that Wakeford had 5 criminal history points putting him in Criminal History Category III This made his sentencing guidelines range 57–71 months.

Wakeford lodged an objection to the application of the involved the importation enhancement under USSG 2D1.1(b)(5). Wakeford recognized that this objection was foreclosed by circuit precedent. At sentencing, the district court overruled Wakeford's objection and imposed a sentence at the top of the advisory guidelines range as calculated by the PSR: 71 months.

Wakeford timely gave notice of appeal.

Statement of Relevant Facts

Section 2D1.1(b)(5)(A) provides a 2-level enhancement when the offense "involved the importation" of methamphetamine: "If (A) the offense involved the importation of amphetamine or methamphetamine … ." USSG § 2D1.1(b)(5)(A).[1] The Presentence Report applied the enhancement to Wakeford because the methamphetamine in this case had been imported. "The methamphetamine the defendant received from Smith and later distributed was imported from Mexico." These two levels took Wakeford's Total Offense Level to 23. With his being in Criminal History Category III, his sentencing guidelines range was 57–71 months.

[1] This subsection also applies the 2-level enhancement if the offense involved the manufacture of amphetamine or methamphetamine from chemicals the defendant knew were imported unlawfully and conditions the application of the enhancement on the defendant's not being a minor or minimal participant. USSG § 2D1.1(b)(5). However, neither is applicable to this case.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition to interpret Sentencing Guidelines section 2D1.1(b)(5). What an "offense that involved the importation" of methamphetamine looks like has given rise to circuit splits on two issues, those issues approach the interpretation of the subsection differently, and contradictory caselaw exists within two circuits.

Introduction

Sentencing Guidelines section 2D1.1(b)(5) provides a 2-level increase when "the offense involved the importation" of methamphetamine. What an "offense that involved the importation" of methamphetamine looks like has been the subject of much jurisprudence by lower courts. This has focused on two primary questions. First, what is the scope of an offense that involved the importation of methamphetamine? In some circuits, this enhancement applies merely because the methamphetamine was imported. In at least one circuit, the enhancement only applies if the defendant was personally involved in the importation or the importation is relevant conduct to the defendant. Second, must the defendant know that the methamphetamine is imported? In some circuits—at least the ones applying the enhancement if the methamphetamine is imported—no. In others, maybe. At best, these two questions partially overlap. Where the application of the enhancement is based on the methamphetamine's having been imported, the defendant's knowledge of its importation is irrelevant.

Where more than merely imported methamphetamine is required, knowledge is suggested or imputed. And some circuits have sidestepped the issue. Compounding this further is contradictory caselaw within the Fifth and Ninth Circuits.

The circuits are split on the scope of the requirements of "involved the importation" in section 2D1.1(b)(5). In some circuits, it only requires the methamphetamine be imported. In one circuit, if the defendant was not personally involved with the importation, the importation must be relevant conduct for the defendant.

The circuits are split on the scope of the meaning of "involved the importation" in section 2D1.1(b)(5). In the Fourth, Fifth, and Tenth Circuits, this enhancement applies regardless of the defendant's participation or connection with the importation—if the methamphetamine is imported, this enhancement applies. In the Ninth Circuit, if the defendant was not involved in the importation of the methamphetamine, the act of importation must be at least relevant conduct for the defendant.

In the Fifth Circuit, "involved the importation" merely means that the methamphetamine was imported at some time by somebody. "Because the methamphetamine Foulks possessed was imported from Mexico, the enhancement was properly applied." *United States v. Foulks*, 747 F. 3d 914, 915 (5th Cir. 2014). The Tenth Circuit also ap-

plies this standard for the application of the section 2D1.1(b)(5) "involved the importation" enhancement where the methamphetamine has been imported. *United States v. Hohn*, No. 14-3030, at 16 (10th Cir. April 1, 2015); *United States v. Redifer*, No. 14-3031, at 27 (10th Cir. November 13, 2015). As does the Fourth Circuit. *See United States v. Crum*, No. 17-4634, at (4th Cir. July 3, 2018) (unpublished) ("We find that the court correctly determined that the Government demonstrated by a preponderance of the evidence that the methamphetamine Crum was distributing had been imported from Mexico.")

On the other hand, in the Ninth Circuit, "involved the importation" requires either that the defendant participated in the importation or that it be relevant conduct for the defendant. "If Job was not personally involved in the importation, the increase could apply only if the district court determined that the importation was 'within the scope of jointly undertaken criminal activity,' 'in furtherance of that criminal activity,' and 'reasonably foreseeable in connection with that criminal activity' under § 1B1.3(a)(1)(B)." *United States v. Job*, 871 F.3d 852, 871 (9th Cir. 2017).

The circuits are also split on whether section 2D1.1(b)(5)'s 2-level enhancement for an offense that "involved the importation" of methamphetamine requires the defendant know the methamphetamine was imported.

The circuits are also split on whether section 2D1.1(b)(5)'s 2-level enhancement for an offense that "involved the importation" of methamphetamine requires the defendant know the methamphetamine was imported. In the Fifth Circuit, the defendant need not know that the methamphetamine was imported for this enhancement to apply. On the other hand, in the Sixth and Eleventh Circuits, the defendant must know that the methamphetamine was imported for this enhancement to apply.

The Fifth Circuit appears to be the first to dispense with any knowledge requirement by the defendant. In *United States v. Serfass*, 684 F.3d 548 (5th Cir. 2012), after a lengthy analysis of the subsection and the appellant's argument, the court interpreted this enhancement and dispensed with any knowledge requirement by the defendant that the methamphetamine was imported. "We hold today that the two-level sentencing enhancement of U.S.S.G. § 2D1.1(b)(5) applies when 'the offense involved the importation of ... methamphetamine,' *even if the defendant did not know that the methamphetamine was imported*." *Id.* at 554 (alteration in original; emphasis added). In reaching this interpretation, the Fifth Circuit determined that the phrase "that the de-

fendant knew were imported unlawfully," applied only "to such contraband that was manufactured from one or more of the listed chemicals" and not "to 'the importation of amphetamine or methamphetamine,' ... ." *Id.* at 552.

On the other hand, the Sixth Circuit has held that the defendant must know that the methamphetamine was imported. In *United States v. Johnson*, Case No. 18-1043 (6th Cir. October 2, 2018) (not designated for publication), the Sixth Circuit interpreted section 2D1.1(b)(5) very differently than the Fifth. Contrary to the Fifth Circuit's interpretation of this section, the Sixth Circuit applied the "that the defendant knew were imported unlawfully" to the first part of the subsection as well as the later portion. "Under the United States Sentencing Guidelines, a defendant receives a two-point offense-level enhancement if the offense 'involved the importation' of methamphetamines 'that the defendant knew were imported unlawfully[.]'" *Id.* at 2 (citing USSG § 2D1.1(b)(5)). The Eleventh also requires knowledge of the imported nature of the methamphetamine. *United States v. Hernandez–Astudillo*, No. 18-12334, at 6 (11th Cir. June 13, 2019) (do not publish) ("Because the facts of this case support the district court's conclusion that it was more probable than not that the methamphetamine was imported from Mexico *and that Hernandez-Astudillo knew of the importation*, we affirm." (emphasis added)).

Other circuits dodge this question. The Eight Circuit has repeatedly avoided addressing this question finding that the evidence shows that the defendant knew the methamphetamine was imported. *See, e.g., United States v. Felix-Aguirre*, No. 19-2332, at 4 (8th Cir. August 21, 2020) (unpublished) ("Assuming that the Guidelines require proof that Felix-Aguirre knew that the methamphetamine was imported, the record sets forth facts sufficient to support such a finding."); *United States v. Rivera-Mendoza*, 885 F.3d 516 (8th Cir. 2018) ("Implicit in that finding is a finding that Rivera-Mendoza knew of the importation."). The Tenth Circuit has done the same. *Redifer*, No. 14-3031, at 28 ("We need not resolve this issue [of whether knowledge by the defendant is required], because regardless of the correct reading of the Guideline provision, we determine that the government proved by a preponderance of the evidence that Mr. Redifer knew the methamphetamine was imported."). Dicta from a district court in the Seventh Circuit on a section 2255 motion suggests a knowledge requirement. *See United States v. Martinez-Lopez*, Nos. 3:15-CR-076 JD, 3:17-CV-651 (N.D. Ind. May 2, 2018), Doc. #1, at 2 ("Martinez-Lopez did not object to this enhancement, but he did successfully oppose a separate two-level enhancement for knowingly distributing unlawfully imported methamphetamine under § 2D1.1(b)(5)."), *available at* https://scholar.-

google.com/scholar_case?case=16927044613109829166&hl=en&as_s-dt=6,44 (last visited November 11, 2020).

These disparate positions among the circuits persist though almost all methamphetamine in the United States today is imported.

According to DEA, most methamphetamine in this country comes from Mexico. "Most of the methamphetamine available in the United States is produced clandestinely in Mexico and smuggled across the S[outh]W[est]B[order]. Domestic production occurs at much lower levels than in Mexico and seizures of domestic methamphetamine laboratories have continued to decline." 2019 DEA National Drug Threat Assessment at 43 (December 2019), *available at* https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020_Low_Web-DIR-007-20_2019.pdf (last visited October 12, 2020). "Mexican T[ransnational]C[riminal]O[rganization]s continue to be the primary producers and suppliers of low cost, high purity, high potency methamphetamine in the United States. Mexican TCOs regularly produce large quantities of methamphetamine, which has led to a significant supply of methamphetamine in the U.S. market." *Id.* at 45. "Now, most of the methamphetamine available in the United States is produced in Mexico and smuggled across the S[outh]W[est]B[order]." *Id.* at 47. The number of domestic methamphetamine labs has fallen about 80% since

2010. *Methamphetamine Research Report, How is methamphetamine manufactured?*, National Institute on Drug Abuse (October 2019), available at https://www.drugabuse.gov/publications/research-reports/methamphetamine/how-methamphetamine-manufactured (last visited November 11, 2020). Domestic labs today typically produce less than two ounce quantities. *Id.*

Multiple cases have affirmed the application of this enhancement based on testimony that most methamphetamine in this country comes from Mexico—that is the methamphetamine was likely imported since the majority of methamphetamine in this country is imported. *E.g., Hohn*, No. 14-3030, at 17.

This also effectively results in a two-level structural boost to the methamphetamine guidelines in those circuits that apply the enhancement any time the methamphetamine has been imported. *See, e.g., United States v. Foulks*, 747 F.3d 914, 915 (5th Cir. 2014).

In addition to these two circuit splits, at least two circuits have struggled to decide what this enhancement requires leaving them with internally contradictory caselaw. Later decisions have walked back earlier decisions to reconcile them.

Two different circuits have walked back—in different directions—previous decisions to impose new standards for the application of the 2D1.1(b)(5) enhancement. The Fifth Circuit took a decision applying

this enhancement when the defendant had proximity, familiarity, and repeated business with the importer and replaced it with a strict liability approach applying the enhancement anytime the methamphetamine had been imported by claiming that the first decision had not actually held that the proximity, familiarity, and repeated business with the importer were required. The Ninth Circuit took a case holding that the enhancement applied anytime the methamphetamine was imported and replaced it with a decision requiring the defendant have knowledge that the methamphetamine was imported by claiming that the question at issue in the first case was narrower than the holding. These cases further muddy the waters of what an offense that involved the importation of methamphetamine looks like.

In the Fifth Circuit, *Foulks* announced what amounts to a strict liability standard—methamphetamine need only be imported for the 2-level 2D1.1(b)(5) enhancement for an offense that involved the importation of methamphetamine to apply. *United States v. Foulks*, 747 F. 3d at 915. But before Foulks, the Fifth Circuit had announced a standard based on the defendant's proximity, familiarity, and repeated business with the importers of the methamphetamine. In *United States v. Rodriguez*, 666 F.3d 944, (5th Cir. 2012) found that the defendant's

involvement to the importers justified the application of this enhancement.

> The scope of actions that "involve" the importation of drugs is larger than the scope of those that constitute the actual importation. If the Sentencing Commission had wanted [then] section 2D1.1(b)(4) to apply only to the importation of methamphetamine, "it would have used the language it used in the prior subsection, which applies a separate enhancement only '[i]f the defendant unlawfully imported or exported a controlled substance' under certain circumstances." Here, "involved" means "included in the process of." Just as building a house may involve importing building materials, possessing methamphetamine in Dallas may involve its importation to the Dallas area. *Rodriguez's proximity, familiarity, and repeated business with the importers justifies the enhancement.*

Id. at 946 (quoting *United States v. Perez-Oliveros*, 479 F.3d 779, 784 (11th Cir. 2007) (in turn quoting USSG § 2D1.1(b)(2))). *Foulks*, when confronted with this language from *Rodriguez* walked it back with the explanation that that wasn't actually a holding.

> [W]e explained that [t]he scope of actions that 'involve' the importation of drugs is larger than the scope of those that constitute the actual importation. We concluded that the defendant's proximity, familiarity, and repeated business with the importers justifie[d] the enhancement. Based on *Rodriguez*, Foulks argues that the enhancement applies only if a defendant has proximity, familiarity, and repeated business with the importers. *However,* Rodriguez *did not hold that these factors were required.*

Foulks, 747 F.3d at 914–15 (emphasis added). How it's not a holding is a mystery. The defendant's proximity, familiarity, and repeated business with the importers was why the application of the enhancement was affirmed.

> The methamphetamine was transported from Mexico to the Dallas area by the La Familia drug trafficking organization, then stored in the "stash house" of its local leader, Arnulfo Hernandez. Hernandez sold the methamphetamine to Rolando Vasquez, who sold it to Rodriguez on about six to ten instances over the course of approximately two to three months. Hernandez sometimes accompanied Vasquez to deliver the drugs to Rodriguez.

Rodriguez, 666 F.3d at 946.

Walking back a case the other direction is the Ninth Circuit. In *Biao Huang*, the Ninth Circuit announced what appeared to be a strict liability rule. A "defendant need not be personally involved in the importation of illegal drugs to receive an enhancement under § 2D1.1(b)(5); it is enough for the government to show that the drugs were imported." *United States v. Biao Huang*, 687 F.3d 1197, 1206 (9th Cir. 2012). *Job*, however, avoided this by characterizing the question in *Biao Huang* as whether the defendant defendant had to be personally involved in the importation. "In *Biao Huang*, relying on the plain language of the Guidelines, we rejected the argument that U.S.S.G. § 2D1.1(b)(5) requires the government to show that the defendant himself personally imported the drugs." *Job*, 871 F.3d at 871 (citing *Biao Huang*, 687 F.3d at 1205–06). The question in *Biao Huang* was whether the defendant had to be personally involved in the importation. *Biao Huang*, 687 F.3d at 1205 ("Huang argues that § 2D1.1(b)(5) requires the government to show that Huang himself imported the

methamphetamine."). But the holding went much, much further unequivocally stating that "it is enough for the government to show that the drugs were imported." *Id.* at 1206.

Finally, if this was not muddy enough, the Fifth Circuit in *Foulks* cited *Biao Huang* as support for its application of this enhancement anytime the methamphetamine was imported. *See Foulks*, 747 F.3d at 915 (citing *United States v. Biao Huang*, 687 F.3d 1197, 1206 (9th Cir. 2012)). Yet the Ninth Circuit has walked *Biao Huang* back if not abandoned it completely.

In short, not only are there two circuit splits, at least two circuits have had a hard time deciding what this enhancement actually requires and a now questionable decision from one of those circuits underpins the current law in another.

The two circuit splits—whether the defendant must be connected to the importation in some way and whether the defendant must have knowledge that the methamphetamine was imported—cannot be reconciled and potentially create multiple standards for the application of this enhancement.

The two circuit splits addressed above are partially contradictory and create multiple standards. If the enhancement applies anytime the methamphetamine has been imported, the defendant's knowledge is irrelevant—it's effectively a strict liability standard. Knowledge alone does not resolve the scope of what an offense that involved the impor-

tation of methamphetamine is. If knowledge of the methamphetamine's imported status is required but no participation in or connection to the importation is required, that portion of the enhancement effectively gets ignored. Even the contradictory caselaw within the Fifth and Ninth Circuits do not satisfactorily resolve this.

Under the Fourth, Fifth, and Tenth Circuits' application of the 2D1.1(b)(5) enhancement any time the methamphetamine was imported, the defendant's knowledge of the imported nature of the methamphetamine would be irrelevant. The simple fact that the methamphetamine had been imported supports the enhancement. This makes the defendant's knowledge of the imported status of the irrelevant meaning some circuits are answering a question that does not matter under this standard.

Conversely, a defendant's knowing that the methamphetamine was imported does not resolve the question about the scope of "involved the importation." A defendant could know that the methamphetamine was imported—perhaps simply by knowing that the majority of methamphetamine in this country comes from Mexico—and neither be involved in the actual importation nor be connected to the importation in any way.

What's more, even the Fifth Circuit's initial decision in *Rodriguez* and the Ninth Circuit's later decision in *Job* do not resolve this prob-

lem. *Rodriguez* held that the enhancement could be applied based on the defendant's proximity, familiarity, and repeated business with the importers. This implies the possibility of knowledge and perhaps could be construed to suggest that the defendant would know, but it's not clearly necessary. Under *Job*, the defendant necessarily would have known or should have known for the enhancement to apply since it only applies if the defendant was personally involved in the importation or the the importation was "within the scope of jointly undertaken criminal activity," "in furtherance of that criminal activity," and "reasonably foreseeable in connection with that criminal activity"—that is the importation qualified as relevant conduct under USSG § 1B1.3(a)(1)(B). This subsumes the knowledge question as the defendant would have or should have had knowledge of the importation.

Conclusion

Circuits have split over two aspects of this two-level enhancement for an offense that involved the importation of methamphetamine: what the scope of an offense that involved the importation of methamphetamine is and whether the defendant must have knowledge that the methamphetamine was imported. In some circuits, this enhancement applies merely because the methamphetamine; in one circuit, the defendant must have personally imported the methamphetamine or

the importation must be relevant conduct for that defendant; in the Fifth Circuit, the court first held that the enhancement applied when the defendant had proximity, familiarity, and repeated business with the importer and then replaced that with application of the enhancement merely when the methamphetamine in imported. In some circuits, the defendant must know that the methamphetamine is imported; in some circuits, no knowledge is required as the enhancement applies strictly based on the methamphetamine's being imported. A knowledge requirement does not address what the scope of an offense that involved the importation of methamphetamine is, and a knowledge requirement is subsumed by the requirement that some aspect of the defendant's conduct be connected to the importation in the circuits requiring that. Finally, the Fifth and Ninth Circuits have purportedly changed their standards for the application of this enhancement with the Fifth's having adopted a stricter standard based only on the methamphetamine's being deported while the Ninth adopted a much more expansive definition of involved the importation requiring that the importation at least be relevant conduct for the defendant. This Court should grant this petition and issue the writ ordering briefing on the merits.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Judicial Circuit.

Dated: November 12, 2020.

Respectfully submitted,

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