No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MIGUEL MENDOZA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

JOHN CHARLES ELLIS, JR.
Law Offices of John C. Ellis, Jr.
180 Broadway, Suite 1800
San Diego, California 92101
Telephone: (619) 501-5522
Counsel for Mr. Mendoza

QUESTIONS PRESENTED

1. Whether 21 U.S.C. § 960, which carries a ten-year mandatory-minimum sentence for "knowingly" importing a controlled substance if that substance is 1 kilogram or more of heroin, or 50 grams or more of methamphetamine, requires the defendant to know the type and quantity of the drug involved in the offense?

2. Whether and to what extent a defendant's due process right to a fair sentencing proceeding is violated when he is sentenced based on information only the government and the district court can access?

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Petitioner, Miguel Mendoza, respectfully prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

On October 14, 2020, the Ninth Circuit issued a memorandum opinion, affirming in part Petitioner's sentence, and dismissing in part his appeal, finding that in his plea agreement he had waived his right to challenge the length of his sentence. *See* App. A. Petitioner filed a Petition for Rehearing, which the Ninth Circuit denied on December 22, 2020. *See* App. B.

JURISDICTION

Petitioner was convicted of violating of 21 U.S.C. §§ 952 and 960 in the United States District Court for the Southern District of California. The United States Court of Appeals for the Ninth Circuit reviewed his sentence under 28 U.S.C. § 1291, and affirmed on October 14, 2020. It denied a Petition for Rehearing on December 22, 2020. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause provides that "no person shall be … deprived of life, liberty, or property, without due process of law."

U.S. CONST. amend. V.

21 U.S.C. § 960 provides:

(a) Unlawful Acts

Any person who —

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

(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; …

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

> the person committing such violation shall be sentenced to a term of imprisonment of not less than 10 years and not more than life …

STATEMENT OF THE CASE

I. Petitioner is arrested for drug smuggling and charged with a mandatory-minimum offense for smuggling heroin and methamphetamine.

Petitioner was charged with two counts of importing a controlled substance after heroin and methamphetamine were found in his car as he tried to cross the border from Mexico into the United States. Because of the type and quantity of the drugs found in his car, each charge carried a mandatory-minimum sentence of ten years. *See* 21 U.S.C. § 960(b)(1).

II. Petitioner meets with the government to disclose details of his involvement in the offense to obtain relief from the mandatory-minimum sentence.

Petitioner met with government agents for over two hours to explain his involvement in the drug smuggling. He hoped to avoid a mandatory-minimum sentence and qualify for "safety-valve relief." *See* 18 U.S.C. § 3553(f)(5) (court shall impose Guidelines sentence, without regard to mandatory minimum sentence if court finds, among other factors, that "not later than the time of sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct").

Petitioner explained that he had smuggled drugs about ten times, and detailed the process of having someone load drugs into his truck before crossing the border, turning the drugs over to someone in the United States, and then ultimately receiving payment. The government also asked Petitioner questions about his finances. He

explained that, at the time of the offense, other than his salary working at a tire store he had no other large sources of income. The government questioned Petitioner about some of his information, such as whether he had helped other individuals fix up cars and then sell them at auction. Satisfied with his responses, the government told defense counsel a few days after the meeting that, assuming the government did not "learn any facts that conflict with [Petitioner's] statement, [the government] will recommend that [Petitioner] is Safety Valve eligible."

III. Petitioner pleads guilty to importing a federally controlled substance that he believed was marijuana.

After his safety-valve debrief meetings with the government, and in reliance upon the government's representations that it would recommend at sentencing that he qualified for safety-valve relief from the mandatory-minimum sentencing, Petitioner decided to plead guilty to the two importation charges. At his change of plea hearing, the court asked Petitioner if he knew "that there was both heroin and methamphetamine in [his] vehicle." Petitioner said he did not; he "thought there was marijuana." But he agreed that he "knowingly, intentionally, and voluntarily brought an illegal drug into the United States," thinking it was marijuana. He agreed that the government could prove that the drugs in his car were approximately 45 kilograms of methamphetamine and 8.9 kilograms of heroin. The court found this factual basis sufficient, and Petitioner then pleaded guilty.

IV. The government, relying on secret records that it does not disclose to Petitioner, claims Petitioner is not entitled to safety-valve relief because he has been untruthful.

Later, at sentencing, the government backed out on its promise to recommend safety-valve relief. It claimed that Petitioner had not truthfully disclosed all the information he had about the offense and relevant conduct. The government subpoenaed information about Petitioner's bank accounts that showed transactions that the government claimed proved Petitioner had been untruthful with the United States about his drug smuggling, so safety-valve was not warranted. But these bank records were obtained with subpoenas that the government refused to turn over so Petitioner argued that the government was not acting in good faith in not recommending safety-valve. He could not see the information the government was relying on to challenge his safety-valve debrief, and he could not explain or contest the information.

The district court held an *ex parte* hearing with the government and denied Petitioner's motion. It found that "the bank records were obtained through lawful means and that the source of the records is protected from disclosure under governing law." After this, the government relied on Petitioner's bank record and claimed that Petitioner lied about his bank transactions during his debrief and did not disclose the details of acts he undertook as part of the same course of conduct as his smuggling. The government argued that he was not entitled to safety-valve relief from the mandatory-minimum sentence.

V. The district court sentences Petitioner to ten years in custody, noting that its hands are tied and it cannot impose a lower sentence because of the type and quantity of drugs involved.

At sentencing, the court addressed Petitioner's discovery motion for the bank records. It noted that its ruling put Petitioner "obviously, behind an eight ball" when arguing in favor of safety-valve relief because he was not aware of all of the information the district court considered. Nevertheless, the court did not disclose the bank records, or the subpoena the government relied upon to obtain the records, to Petitioner. It found that, based on the records it had considered, Petitioner had not been truthful with the government, and it would not grant safety-valve relief from the mandatory-minimum sentence under § 3553(f).

Having denied safety-valve relief, the court noted that "the law ties my hands" and it could not impose a sentence below the ten-year mandatory-minimum sentence. It then imposed a 120-month sentence.

VI. The Ninth Circuit affirms in part Petitioner's sentence.

On appeal, Petitioner argued that imposing the mandatory-minimum sentence violated his Sixth Amendment right to a jury trial, since he had never admitted the type or quantity of the drugs that set the required ten-year sentence. He also argued that determining his sentence based in part on consideration of bank records that he could not see or challenge, and that he was unaware of how the government obtained, violated his due process right to a fair sentencing procedure.

The Ninth Circuit first held that Petitioner had waived his right to challenge the length of his sentence, by validly waiving his appellate rights in his plea agreement. It dismissed in part his appeal from his sentence. Next, assuming that the appellate waiver did not bar his argument that he was denied due process by the district court's consideration in camera of unknown bank records, the court held that there was no due process violation. Petitioner did not show that "he needed to know how his bank records were obtained to assess their accuracy." *See* App. A. And, reviewing an *ex parte* appellate submission, the Ninth Circuit concluded that the government "demonstrated that preventing the disclosure of its sources was necessary to keep sensitive information from the opposing party." *See id.* (citation omitted). The court then affirmed Petitioner's sentence.

REASONS FOR GRANTING THE PETITION

I. Imposing a mandatory ten-year minimum sentence, even though Petitioner did not admit to knowing the type or amount of drugs that he was importing, runs afoul of this Court's caselaw requiring a *mens rea* for every element of the offense.

A. A defendant must know the quantity and drug type he is responsible for importing—and that triggers the mandatory minimum sentence—for a § 960 offense.

As the Court is well aware, there is a common-law presumption of *mens rea* for criminal statutes. *See*, *e.g.*, *Rehaif v. United States*, 139 S. Ct. 2191 (2019) (explaining the "longstanding presumption, traceable to the common law" "in favor of 'scienter'"); *Staples v. United States*, 511 U.S. 600, 605-06 (1994). As Justice Kavanaugh explained, writing as a circuit judge in *United States v. Burwell*, the

"presumption of *mens rea* embodies deeply rooted principles of law and justice that [this Court] has emphasized time and again. The presumption of *mens rea* is no mere technicality, but rather implicates 'fundamental and far-reaching' issues." 690 F.3d 500, 527-28 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (citation omitted).

Those deeply rooted principles of justice are at play here. Even though Petitioner did not know the type or quantity of the drugs he imported, these two facts entirely determined Petitioner's mandatory ten-year sentence. It violates basic notions of fairness, and the fundamental concerns underlying our criminal laws, to impose a harsh, mandatory punishment for conduct someone did not realize would trigger that punishment. Indeed, doing so raises the question of whether any deterrence is even achieved under these circumstances. Rather, as Justice Kavanaugh observed in *Burwell*, imposing criminal responsibility and punishment without *mens rea* generally provokes the instinctive reaction familiar from childhood, where a child logically defends himself by claiming, "But I didn't mean to!" *See Burwell*, 690 F.3d at 532-33 (Kavanaugh, J., dissenting) (citation omitted).

To understand why Petitioner received a harsh, mandatory sentence of a decade in prison even though he did not know what type or quantity of drugs he was importing, it is necessary to understand the structure of the statute. Petitioner's statute of conviction, 21 U.S.C. § 960, states that anyone who "knowingly or intentionally imports or exports a controlled substance" "shall be punished as provided in subsection (b)." 21 U.S.C. 960(a)(1). Subsection (b), in turn, specifies mandatory minimum and maximum sentences for importing or exporting a controlled

substance, and the penalties depend on the type and quantity of drug involved. For example, importing a kilogram or more of heroin or 500 grams or more of a mixture of methamphetamine requires a court to impose "a term of imprisonment of not less than 10 years and not more than life." 18 U.S.C. § 960(b)(1)(A), (H). In other words, drug type and quantity are the facts that trigger the mandatory minimum sentence for a § 960 offense.

That is important to Petitioner's *mens rea* argument because, under this Court's holding in *Alleyne v. United States*, any facts triggering a mandatory minimum sentence are elements of "a separate aggravated offense that must be found by the jury." 570 U.S. 99, 115 (2013). Accordingly, drug type and quantity are elements of a § 960 offense. *See id.* And, as the presumption of *mens rea* generally applies to every element of an offense, *see*, *e.g.*, *Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016), the "knowingly" *mens rea* should extend to the elements of drug type and quantity. This is especially true when "Congress includes a general scienter provision in the statute itself—then the scienter provision should apply to all elements of the offense. *See*, *e.g.*, *Rehaif*, 139 S. Ct. at 2195. Because § 960 requires someone to "knowingly" import a controlled substance, the knowingly *mens rea* should extent to drug type and quantity so that someone could not be guilty of a § 960 offense without knowing the type and quantity of the drugs involved.

This is the approach the Court has taken in similar cases where the Court had to decide how far to extend the presumption of *mens rea* in criminal statutes when the statute already contained a "knowingly" *mens rea* in one part of the statute. In

Rehaif, the Court found that a statute imposing up to a ten-year sentence on someone who "knowingly" violated 18 U.S.C. § 922(g), which made it illegal for certain prohibited persons to possess a firearm, required the person to know not only that he possessed a firearm but also that he was prohibited from doing so. 139 S. Ct. at 2195-96. In other words, the Court applied the "knowingly" *mens rea* to all elements of the crime. *Id.*

Similarly, in *United States v. X-Citement Video, Inc.*, the Court determined that the statutory *mens rea* of "knowingly" applied to the transportation of a pornographic video or photo as well as the fact that a minor child appeared in the video or photo. 513 U.S. 64, 68 (1994). Even though this interpretation was not consistent with the most natural grammatical reading of the statute, the Court still rejected the plain-text reading because it was inconsistent with the presumption of *mens rea*. *Id.* at 70, 78. And in *Flores-Figueroa v. United States*, a statute prohibited someone from committing a crime while also "knowingly" using the identification of another person. 556 U.S. 646 (2009). The question was whether "knowingly" meant just that the defendant had to know he possessed an identification card, or also that the identification card belonged to "another person." *Id.* The Court, relying partly on the presumption of *mens rea* in criminal statutes, applied the "knowingly" *mens rea* that was in part of the statute to each element of the offense and held that the defendant had to know that the identification card belonged to someone else.

The same reasoning applies to § 960. Applying the "knowingly" *mens rea* from the elements of importing or exporting a controlled substance to the *Alleyne* elements

of drug quantity and type furthers the principles animating the *mens rea* presumption. Congress chose to impose escalating penalties, depending on the type and quantity of the drugs involved in the importation offense. The severity of the penalty increases in proportion to the perceived dangerousness of the type and quantity of drug involved—a large amount of heroin carries a longer mandatory sentence than a small amount of marijuana. *See* 21 U.S.C. § 960(b). It follows, then, that imposing a severe penalty on someone who unknowingly imports a large amount of a drug considered dangerous, when he believed he possessed a less dangerous drug, does not proportionally punish defendants according to their actual culpability. Without applying the presumption of *mens rea* to drug type and quantity, defendants may be punished not only disproportionately according to their culpability, but also based on factors beyond their control, which is not in line with common views of culpability or deterrence.

The facts of Petitioner's own case underscore this. He explained when he pleaded guilty that he believed he was smuggling marijuana (though he admitted that the government could prove he was smuggling heroin and methamphetamine, even if unknowingly). Under section 960, the highest mandatory-minimum sentence Petitioner could have received, depending on the amount of marijuana he imported, would have been five years. *See* 21 U.S.C. § 960(b)(2)(G) (100 kilograms or more of marijuana carries minimum sentence of five years). Instead, because he was sentenced based on the actual drugs he was importing, even though there was no *mens rea* requirement of drug type, he received a mandatory-minimum ten-year

sentence. Applying the presumption of *mens rea* to drug quantity and type would have avoided this result and ensured that Petitioner, and other defendants in his similar circumstances, are subjected to punishment based only on their actual culpability.

While this Court has previously been concerned with the principle that the presumption of *mens rea* is important because it can separate wrongful acts from innocent ones, *see*, *e.g.*, *Rehaif*, 139 S. Ct. at 2196 (noting principle and collecting cases), the presumption is also important in separating culpable conduct from more harmful conduct. As Justice Kavanaugh noted in *Burwell*, again writing as a Circuit Judge, this Court has "never limited the presumption of mens rea" to "only when necessary to avoid criminalizing apparently innocent conduct." 690 F.3d at 529 (Kavanaugh, J., dissenting). Instead, the presumption also applies when "necessary to avoid convicting the defendant of a more serious offense for apparently less serious criminal conduct (that is, when the defendant would receive a less serious criminal sanction if the facts were as the defendant believed)." *Id.* Here, applying the *mens rea* presumption to the drug type and quantity elements is necessary to avoid convicting someone of a more serious offense—a ten-year mandatory-minimum offense for Petitioner—when he was involved in less serious criminal conduct that would receive a lower sentence if the facts were as he believed them.

Moreover, the "potentially harsh" mandatory penalty—ten years in custody—favors applying the presumption of a *mens rea*. *Staples*, 511 U.S. at 617. This Court applied the presumption in *Staples*, where a statute was silent about *mens rea* and

carried a maximum ten-year sentence; the Court held that the government had to prove that the defendant knew that his unregistered gun was automatic. *Id.* Here, the punishment is even harsher as it is a mandatory minimum, not maximum, sentence of ten years. The concerns about punishment are therefore even more at play.

In sum, § 960 carries a severe mandatory ten-year punishment. It imposes this sanction for conduct that Congress considers more culpable—*i.e.* importing a greater quantity of more dangerous drugs—than other conduct. Congress already required a defendant to "knowingly" import a controlled substance, and the fundamental, longstanding presumption of *mens rea* should extend here to the *Alleyne* elements of drug type and quantity, so that, for a § 960 offense, a defendant must know the drug type and quantity of drug involved before he is sentenced to a mandatory-minimum sentence.

B. The lower courts have failed to impose this *mens rea* requirement for section 960, including in Petitioner's case.

The presumption of *mens rea* "stands on a bedrock of historical foundation." *See Burwell*, 690 F.3d at 531-32 (Kavanaugh, J., dissenting). Yet despite the fact that the American legal tradition, and the English common-law tradition before it, both "required proof of the defendant's mens rea as a pre-condition for imposing criminal liability," *id.*, the lower courts have consistently refused to require proof of knowledge of drug type and quantity when finding section § 960 liability.

For instance, in the Second Circuit, there is no requirement that a defendant know the "quantity and type of drugs underlying his conviction" for the analogous drug statute 21 U.S.C. § 841(a)(1), which makes it a crime to "knowingly" "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance," and imposes punishment based on the type and quantity of drug involved. *See*, *e.g.*, *United States v. King*, 345 F.3d 149, 151 (2d Cir. 2003) (addressing *mens rea* requirement of similarly-structured drug statute). The same is true in the Third Circuit, where the court recently held that, though drug type and quantity are elements of an aggravated *Alleyne* crime, the "defendant need not consciously cognize the amount he is distributing in order to violate the law." *United States v. Williams*, 974 F.3d 320, 363 (3d Cir. 2020) (analyzing statutorily analogous crimes of 21 U.S.C. §§ 841 and 846); *see also United States v. Dado*, 759 F.3d 550, 570-71 (6th Cir. 2014) (*Alleyne* does not require government to prove knowledge of drug type and quantity for analogous § 841 offense).

The Ninth Circuit recently addressed this issue, reasoning that although drug quantity and type are elements of an aggravated *Alleyne* drug offense, *Alleyne* did not rewrite § 841 to add a new *mens rea* requirement. *United States v. Collazo*, 984 F.3d 1308, 1322 (9th Cir. 2021) (en banc) (quoting *Dado*, 759 F.3d at 570). Instead, the court concluded, the government only needs to prove that "the defendant knew he was importing some amount of controlled substance." 984 F.3d at 1328 (citation and quotation omitted). The Eleventh Circuit agrees. In addressing the *mens rea*

required for an § 841 offense, it held that the "specific type of drug involved is not an element of § 841(a) but is instead 'relevant only for sentencing purposes.'" *United States v. Achey*, 943 F.3d 909, 913-14 (11th Cir.) (citation omitted). "[A] finding of mens rea with respect to the specific type of drug is ordinarily not required." *Id.*

The lower courts unanimously agree that the presumption of *mens rea* does not apply to drug statutes carrying severe mandatory-minimum penalties, even though Congress chose to include a "knowingly" *mens rea* in the statute already, and even where drug type and quantity are elements of the *Alleyne* offense. The circuits are ignoring the longstanding and fundamental presumption of *mens rea* that ensures defendants are punished only in proportion to their respective level of culpability, which encourages deterrence and respect for the law. Given that the lower courts are not applying the presumption of *mens rea* in such a widespread area of criminal law, the Court should grant the petition to address and underscore the importance of this longstanding principle of criminal law. *See* Sup. Ct. R. 10(c).

II. The district court's reliance on information that was not disclosed to Petitioner in order to determine his sentence violated the due process right to a fair sentencing proceeding.

This Court has held that a defendant retains a due process right "in a sentencing proceeding that is fundamentally fair." *Betterman v. Montana*, 136 S. Ct. 1609, 1617-18 (2016). While due process means many things in different contexts, the "fundamental requisite of due process is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

Here, the district court conducted Petitioner's sentencing proceeding without allowing Petitioner to access the means the government used to receive the bank records the district court considered in denying Petitioner safety-valve relief. Petitioner did not see the subpoena or warrants that the government used to obtain the records. After an *ex parte* hearing, the district court simply ruled that the government had lawfully obtained the records without giving Petitioner any information about them, nor giving him an opportunity to be heard on the issue.

As the district court itself recognized, this put Petitioner at a disadvantage—it placed him "behind an eight ball"—because he had no ability to counter the information the court relied upon to determine sentence. In essence, the court's reliance on secret information that it considered *in camera* denied Petitioner the opportunity to be heard at his own sentencing proceeding. He could not argue that the government had illegally obtained the documents the court relied upon.

He was left in the dark, with the district court and the government discussing his sentence without him during an *ex parte* proceeding. The unfairness was only compounded when the government submitted the records to the Ninth Circuit and the court relied on the documents—again without revealing them to Petitioner—to affirm Petitioner's sentence on appeal.

This does not comport with this Court's formulation of fundamental fairness, as guaranteed by the Due Process clause. Though a defendant's right to due process may be diminished slightly at sentencing, he retains a right to a fundamentally fair proceeding. *See Betterman*, 136 S. Ct. at 1617-18. It cannot satisfy the Constitution

to allow a defendant to be sentenced based on information he is not allowed to know about, and to have his sentence affirmed even though he cannot obtain that information and refute it or explain it.

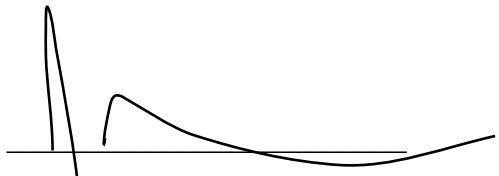
The Court should grant the petition to address whether it is fundamentally fair to allow a defendant to be sentenced based on information the other parties can obtain and discuss, but he cannot, and whether this affords him a sufficient opportunity to be heard so that it comports with due process. *See* Sup. Ct. R. 10(c).

CONCLUSION

This Court should grant the writ to clarify that the presumption of *mens rea* extends to § 960 offenses so that the "knowingly" *mens rea* covers the drug type and quantity elements, and also to address whether and to what extent defendants have a due process right at sentencing to challenge the information used to determine the sentence imposed.

Date: April 1, 2021

Respectfully submitted,



JOHN CHARLES ELLIS, JR.
Law Offices of John C. Ellis, Jr.
180 Broadway, Suite 1800
San Diego, CA 92101
Telephone: (619) 501-5522
Counsel for Mr. Mendoza