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NO. \_\_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**

**CARLOS MORA,**

PETITIONER,

vs.

**UNITED STATES OF AMERICA,**

RESPONDENT.

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

Section 2D1.1(b)(5), U.S.S.G., provides for a 2-level enhancement where the offense involves the importation of methamphetamine.

The questions presented are:

1. Where counsel raised an issue in written Objections to the Addendum to the Presentence Report filed with the district court, and never withdrew or waived the specific objection at the sentencing hearing, and continued to argue for an adjusted offense level, did the defendant fail to preserve his argument by not raising it expressly at the sentencing hearing, resulting in plain error review of the issue on appeal?
2. Does the application of the 2-level enhancement for possession of imported methamphetamine violate due process where the defendant courier had no knowledge of that importation and no *mens rea* or culpable mental state with respect to such possession?

**PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT**

Petitioner is Carlos Mora, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

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## **PETITION FOR A WRIT OF CERTIORARI**

The petitioner, Carlos Mora, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 8, 2021.

### **OPINION BELOW**

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit *United States v. Carlos Mora*, No. 20-10540 (5th Cir., April 8, 2021), is reproduced in the Appendix. (Pet. App. 1a - 4a).

### **JURISDICTION**

This Court has jurisdiction under Title 28, United States Code § 1254(1) to review the circuit court's decision on a writ of certiorari.

### **CONSTITUTIONAL PROVISION AND SENTENCING GUIDELINE INVOLVED**

1. This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States which provides that:

“[no] person shall be...deprived of life, liberty, or property without due process of law.”

2. This case also involves Sentencing Guideline § 2D1.1(b)(5) which provides:

"(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."



3. This case also involves Sentencing Guideline § 3B1.2 (b) which provides:

"Based on the defendant's role in the offense, decrease the offense level as follows:

. . .

- (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

## **STATEMENT OF THE CASE**

### **I. Course of Proceedings in the District Court and Relevant Facts**

Petitioner was charged on December 10, 2019 in a three-count Information with a violation of 21 U.S.C. § 846, conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. §§ 841 (a)(1) and (b)(1)(C), possession with intent to distribute a mixture and substance containing a detectable amount of methamphetamine.

Petitioner pleaded guilty to Count 2 of the three-count Information, without a written plea agreement, on January 8, 2020. A sentence of 180 months was imposed on petitioner on May 22, 2020.

#### Offense of Conviction.

The offense of conviction was conspiracy to possess with intent to distribute a mixture containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). The Information alleged that before March 9, 2019, in the Fort Worth Division of the Northern District of Texas, petitioner knowingly and intentionally conspired to possess with intent to distribute methamphetamine.

Guilty Plea.

A Factual Resume was signed by petitioner on December 4, 2019 and filed on January 8, 2020. On January 8, 2020, petitioner pleaded guilty without a written plea agreement to Count 2 of the three-count Information.

Presentence Investigation Report and Objections

The Presentence Investigation Report filed on March 9, 2020 ("PSR") found a total offense level of 39 and a Guideline Imprisonment Range of 292 to 365 months, after applying a 2-level enhancement for possession of a dangerous weapon, a 2-level increase for the offense involving the importation of methamphetamine and three-level adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1(a) and (b).

On April 13, 2020, Mora filed his written Objections to the PSR (the "PSR Objections"), including an objection to the enhancement for importation of methamphetamine and an objection to the drug quantity. Mora specifically objected that his offense of conviction did not "involve" importation of methamphetamine since importation was not part of his relevant conduct of his offense of conviction, and thus his offense did not "involve" the importation of methamphetamine by Mora and Mora did not know that the methamphetamine he transported was imported from Mexico.

On April 23, 2020, an Addendum to the PSR was filed stating that "the defendant need not know where the methamphetamine originated from, as long as the government can show, by a preponderance of the evidence, the drugs were imported unlawfully."

On May 4, 2020, petitioner filed his Objections to Addendum to the PSR ("PSR

Addendum Objections”), again objecting to the enhancement for importation of methamphetamine and a written objection to the lack of a mitigating role reduction. Mora specifically noted in his written objections that he qualified for a mitigating role adjustment if the factors under the § 3B1.2 Guideline were applied and that his sentence with such a reduction would be significantly lower because the enhancement for importation of methamphetamine would not apply in such a case. A motion for variance was filed on April 20, 2020 which stated, among other things, that petitioner was a "courier" and should have received a mitigating role reduction of 2 levels (which would have brought with it another 4-levels under § 2D1.1 (a)(5) and the absence of the imported methamphetamine enhancement). The variance motion stated that "the limited scope of Mora's involvement should be considered in sentencing and supports a lower sentence." Mora also noted that the U.S. Sentencing Commission research placed couriers at the bottom of the drug trafficking organization role culpability hierarchy and that the U.S. Sentencing Commission Chair cited couriers--without qualification--as an example of defendants who qualify for mitigating role adjustments.

#### Sentencing Hearing.

At the sentencing hearing held on May 22, 2020, the district court adopted as its fact findings and conclusions the findings and conclusions as stated in the PSR, as modified or supplemented by the Addendum to the PSR and any facts and conclusions the court found from the bench. At the sentencing hearing petitioner's counsel stated that he was still pursuing his objections to the PSR and Addendum and that he had concerns about the treatment of his role in the offense. The petitioner was sentenced to 180 months, after

the court granted a motion for variance by Mora.

## **II. The Fifth Circuit Opinion**

On April 8, 2021, the Court of Appeals for the Fifth Circuit affirmed the district court's sentence. The Fifth Circuit ruled that Mora failed to preserve his procedural argument challenging the miscalculation of his guideline range based upon the denial of a § 3B1.2 (b) minor-role reduction by not raising it in the district court and reviewed Mora's procedural argument for plain error only. The Fifth Circuit clearly erred in so ruling because Mora had, in fact, raised the argument in writing in his filed Objections to the Addendum to the Presentence Report ("PSR") and by so doing preserved the error. "[O]nce a party raises an objection in writing, if he subsequently fails to lodge an oral on-the-record objection, the error is nevertheless preserved for appeal." *United States v. Anicacio*, 325 F.3d 638, 642 (5th Cir. 2003).

The Fifth Circuit also acknowledged that petitioner conceded that the drug importation issue as to whether a defendant must know that the methamphetamine was imported in order to be enhanced pursuant to U.S.S.G. § 2D1.1 (b)(5) is foreclosed by Fifth Circuit precedent. The Fifth Circuit also stated that it reviewed for plain error "his contention raised for the first time on appeal, that the Government failed to proffer sufficient evidence showing that the methamphetamine at issue was imported." That was not petitioner's contention. Although petitioner argued that there was no evidence that any methamphetamine transported (i.e., "possessed") by petitioner was imported, petitioner's main issue in contention is not whether it *was* imported, but whether the petitioner *knew* it was imported, making him subject to the enhancement. That is a

different issue than whether it was, in fact, imported. Petitioner contends that if he had no knowledge that the methamphetamine was imported, he had no criminal intent and should not have been enhanced two levels.

### **III. The Appellate Review Preservation of Error Claim.**

The Fifth Circuit, in its opinion, stated that Mora "did not preserve the instant procedural argument challenging the miscalculation of his guidelines range based upon the denial of a § 3B1.2(b) minor-role reduction; accordingly, we review his procedural challenge for plain error only." Opinion at p.2. This was clear error. In fact, petitioner did preserve the procedural argument by a written objection stated in Mora's filed Objections to the PSR Addendum, stating

"Mora objects to the lack of a mitigating role adjustment where he clearly qualifies for such an adjustment if the factors under the Guidelines were applied."

Mora preserved the procedural argument and specifically explained in his PSR Addendum Objections that the failure to apply a minor role reduction resulted in a "particularly harsh sentence" because the mitigating role reduction would have resulted in "a swing of 8 levels lower" and "would result in a total offense level of 31 and a guideline range of 121 to 151 months, rather than 240 months." Opinion at p. 5.

Not only did Mora object to the miscalculation of his guidelines range on the basis of a failure to consider and apply a minor-role reduction, he explained in some detail the basis for the objection based on Mora's role as a "courier" and research of the U.S. Sentencing Commission and a 2014 article by the U.S. Sentencing Commission Chair in the American Criminal Law Review, placing couriers at the bottom of the drug-

trafficking organization role-culpability hierarchy. Mora also set out, in the written objection, the effect on his total offense level and guideline range of the lack of a mitigating role reduction compared to the granting of such a reduction.

As the Fifth Circuit stated in *United States v. Medina-Anicacio*

"Even if Medina's counsel had not renewed the objection at the sentencing hearing, once a party raises an objection in writing, if he subsequently fails to lodge an oral on-the-record objection, the error is nevertheless preserved for appeal."

*Medina-Anicacio*, 325 F.3d at 642.

The Fourth Circuit has also said that there is no requirement that, having objected in writing, a party must repeat its objection orally in order to preserve it. *United States v. Boyd*, No. 20-4054 (4th Cir., July 21, 2021)("To our knowledge, no court has imposed that kind of rigid 'reminder requirement' to avoid waiver. We won't be the first."). The error was preserved and the Fifth Circuit used the wrong standard in reviewing the procedural argument.

Petitioner preserved his procedural argument challenging the miscalculation of his Guidelines range based upon the denial of a § 3B1.2 (b) minor-role reduction by an express written objection to the Addendum to the Presentence Report, filed with the district court. Petitioner preserved the error both by "informing the court ... of [1] the action the party wishes the court to take" and "the party's objection to the court's action and the grounds for that objection." Fed. Rule Crim. Proc. 51(b). Petitioner did not "abandon" his contention, as stated in the Fifth Circuit's opinion. Opinion, p.2. The error was brought to the court's attention. See *Holguin-Hernandez v. United States*, \_\_ U.S. \_\_, 140 S.Ct. 762, 766 (2020). In fact, the district judge asked counsel at sentencing

whether he was still pursuing the objections to the presentence report on behalf of petitioner, to which counsel responded "Yes, we are, Your Honor."

Mora preserved the issue for appeal and it was clear error for the Circuit Court of Appeals to have reviewed the issue for plain error only. *United States v. Medina-Anicacio*, 325 F.3d 638, 642 (5th Cir. 2003).

#### **IV. The Methamphetamine Importation Enhancement Due Process Claim.**

The importation of methamphetamine issue in this case is clear cut. The district judge, in ruling on the objection to the application of the 2-level enhancement for importation of methamphetamine, on the basis that petitioner did not know that the methamphetamine he transported was imported, stated "that's not a relevant basis for an objection." The district judge, in ruling on the objection at sentencing, stated "[t]he two-level increase is properly applied whether the defendant knew that the drug came from Mexico or not." The Fifth Circuit has held that a defendant who possessed and distributed imported methamphetamine, even absent knowledge that he knew it was imported, is subject to the 2-level Sentencing Guidelines § 2D1.1(b)(5) importation enhancement. *United States v. Serfass*, 684 F.3d 548, 550-52 (5th Cir. 2012). The Tenth Circuit, in a recent case, noted that the Fifth Circuit was the only circuit to rule that the importation enhancement "dispense[s] with the requirement that the defendant actually kn[ew] the drugs were imported." and declined to adopt the Fifth Circuit's conclusion. See *United States v. Job*, 851 F.3d 889, 908-909 (10th Cir. 2017). The application of the enhancement for importation of methamphetamine under § 2D1.1 (b)(5)(A) was error where the Government failed to show that petitioner knew that the methamphetamine

was imported and violated his due process rights.

### **REASONS FOR GRANTING THE PETITION**

#### **A. The Decision Below Represents a Conflict Between Circuits on an Important and Recurring Question of National Interest.**

This case presents an important and recurring question on which the lower courts are in acknowledged conflict with respect to the application of the enhancement for importation of methamphetamine. There is a clear split in the circuits on this issue. Two of the largest regional circuits -- where many of the country's drug cases involving importation are decided -- have divided over the proper application of this Sentencing Guideline. The enhancement for imported methamphetamine is being applied with increasing frequency in these circuits. The enhancement is one of the most-used enhancements in federal drug conspiracy cases. Under the Fifth Circuit rule where a defendant's knowledge of importation does not matter, it can be applied to virtually every defendant in a conspiracy case, and yet it is not being applied in every case against all defendants, leading to the conclusion that it is being used, in part, as a plea bargaining tool. And in circuits that do not adhere to the Fifth Circuit "no knowledge of importation is necessary" rule, the resulting sentences for similar conduct will be less than those in the Fifth Circuit, resulting in sentencing disparities. Similar cases are being decided with different results, leading to different sentences under similar circumstances. This is a recurring issue of national importance and there is no reason to let the conflict continue. This is an ideal case for resolving an important issue that is arising with greater frequency. Resolution of the question will have a significant impact on petitioner and others in his situation.



**B. The Question Presented Significantly Impacts the Administration of Criminal Justice.**

**1. The § 2D1.1(b)(5) Enhancement Is Directed at Importation Activity but is Being Applied often where Defendants Had No Involvement with any such Activity.**

The Sentencing Commission has expressly stated that the enhancement for importation of methamphetamine was "directed" at importation activity. U.S.S.G. Appx. C, amend. 555 (Nov. 1, 1997). In addition, the enhancement is not applied to a defendant who is a minor or minimal participant in the criminal activity. *See* U.S.S.G.

§ 2D1.1(b)(5)(B). This suggests that a defendant whose role in the offense of conviction is minor and who merely possessed imported methamphetamine is not one whom the enhancement is "directed" towards. In other words, possession of imported methamphetamine, by itself, is not "enough" to apply the enhancement when the possessor is only slightly involved. Had the mere possession of imported methamphetamine been sufficient, the Sentencing Commission would have said so--and there would be no exception for lesser involved defendants.

If mere possession, without knowledge, of imported methamphetamine is enough, then every person charged with possession with intent to distribute methamphetamine is subject to a 2-level enhancement if an allegation is made in the PSR that the defendant is unable to "rebut" or if the defendant fails to object and the PSR is "adopted." In such a case, the accusation effectively becomes the proof. Such an enhancement becomes a strict liability provision, disfavored by our law.

If one of the § 3553(a) sentencing factors is designed to "deter" criminal conduct, punishing a defendant for importation about which he knows nothing, cannot have any deterrent effect, nor is he being punished for something that he knew he was doing, i.e., importing or being involved in importing, methamphetamine. A defendant has no way of making a conscious decision to be, or not to be, "involved" in importation of methamphetamine with its resulting greater punishment. Under the Fifth Circuit strict liability rule, he must be punished by a sentence two levels higher simply because he was, in fact in possession of imported methamphetamine.

**2. The Standards for Application of the Enhancement for Importation of Methamphetamine Are Not Settled in the Circuits and the Lack of Uniformity Will Lead to Sentencing Disparities.**

A number of circuits have decided cases involving § 2D1.1(b)(5)(A) based not on knowledge of importation being unnecessary, but simply based on finding that the defendant did know and therefore the court did not have to reach the question of knowledge of importation. See, e.g., *United States v. Biao Huang*, 687 F.3d 1197, 1206 (9th Cir. 2012). The sentencing guideline, as interpreted by the Fifth Circuit, reduces the quantum of proof necessary to make a case for its application. See, e.g., *United States v. Serfass*, 684 F.3d 548 (5th Cir. 2012). Such uneven application and lack of uniformity in the interpretation and application of the importation of methamphetamine enhancement guideline in § 2D1.1(b)(5)(A), in effect, creates different standards of proof and results in sentencing disparities that violate due process and denies defendants equal protection of the laws in circuits that dispense with the requirement to show knowledge of importation.

**C. The Fifth Circuit's Decision Contravenes This Court's Due Process Jurisprudence.**

**1. The Existence of a *Mens Rea* Is the Rule of, Rather Than the Exception to, the Principles of Anglo-American Criminal Jurisprudence.**

The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978). Our courts generally interpret criminal statutes to require the government to prove that "the defendant knew the facts that made his conduct illegal." *Staples v. United States*, 511 U.S. 600, 605 (1994). Absent this background rule, the terms of many federal statutes "would sweep out ..., except when expressly preserved, the ancient requirement of a culpable state of mind"--a result "inconsistent with our philosophy of criminal law." *Morissette v. United States*, 342 U.S. 246, 250 (1952). Subjecting a defendant to years more in prison based on a fact he did not know is inconsistent with "fundamental and far-reaching principles" of criminal liability. *Morissette*, 342 U.S. at 247.

The decision in *Alleyne v. United States*, 133 S.Ct. 2151 (2013) reflects a broader concern with the unfairness of sentencing schemes in which the facts that are "legally essential to the punishment to be inflicted" need not be found by the applicable standard of proof. *United States v. Jefferson*, 791 F.3d 1013, 1022 (9th Cir. 2015)(Wardlaw, J., concurring). Applying a *mens rea* of "knowingly" is consistent with the principle that any ambiguity in the reach of a criminal statute should be resolved in favor of lenity. *Staples v. United States*, 511 U.S. 600, 616 (1994). The same holds true with respect to the United States Sentencing Guidelines.

## **2. Abolishing the Requirement to Prove a Culpable State of Mind and Knowledge Violates a Defendant's Right to Due Process.**

Under the enhancement in § 2D1.1(b)(5), the finding must be based on two key elements: (1) the offense of conviction "involved" the importation of methamphetamine and (2) the enhancement is proved by at least a preponderance of the evidence. The courts that have considered this enhancement have, in some cases, stated that 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). But it is also clear that most of these courts have not determined that simply showing that the methamphetamine was imported is "enough," without more, to apply the enhancement. In *Biao Huang* the Ninth Circuit stated that "[w]hether § 2D1.1(b)(5) requires such knowledge [that the defendant had to know that the methamphetamine he sold was imported] is an open question." 687 F.3d at 1206. The court found, by a preponderance of the evidence, that Huang knew he was selling imported methamphetamine. *Id.* To permit the government, in some circuits, to merely show that the methamphetamine was imported while in others it must be shown that the defendant had knowledge of the fact that he was selling imported methamphetamine results in a markedly different standard. Such lack of uniformity in sentencing under a guideline denies due process of law to those subject to a standard that allows enhancement without knowledge of importation.

**D. The Fifth Circuit Has Decided an Important Question of Federal Law that Has Not Been, but Should Be, Settled by this Court.**

The Fifth Circuit has ruled that petitioner did not preserve his procedural argument challenging the miscalculation of petitioner's Guidelines range based upon the denial of a § 3B1.2 (b) minor-role reduction "by raising it in the district court," with the result that plain error review applies. The petitioner, in fact, raised the issue with the court, in his Objections to the Addendum to the Presentence Report. The issue is whether there must be an oral on-the-record objection in court in order to preserve the issue for appeal. There is Fifth Circuit precedent that such an oral on-the-record objection at the sentencing hearing is not necessary to preserve it for appeal. *See United States v. Medina-Anicacio*, 325 F.3d 638, 642 (5th Cir. 2003). There is also authority from other circuits that if a party has objected in writing, there is no requirement that the party must repeat his objection orally in order to preserve it. *See, e.g., United States v. Boyd*, No. 20-4054 (4th Cir., July 21, 2021). There is a lack of clarity on this issue and this Court should settle this important question of federal law as to whether an objection in writing that is not repeated orally at sentencing is sufficient to protect a criminal defendant's right to an appeal and, if not, what are the requirements in order to protect this right.

**CONCLUSION**

For the foregoing reasons, Petitioner respectfully submits that the petition for writ of certiorari should be granted.

DATED: August 30, 2021

Respectfully submitted,

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