NO. 21-_____

IN THE SUPREME COURT OF THE UNITED STATES

AARON CHRISTOPHER PENA,

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

Eric M. Albritton
Counsel of Record
Christopher G. Granaghan
NELSON BUMGARDNER CONROY P.C.
3131 West 7th St., Suite 300
Fort Worth, Texas 76107
ema@nelbum.com
chris@nelbum.com
(817) 377-9111

COUNSEL FOR PETITIONER

QUESTION PRESENTED

Whether an offense level enhancement under the Sentencing Guidelines that applies when "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" permits enhancement when the defendant did not know that the amphetamine or methamphetamine at issue was imported.

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption of the case on the cover page.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases: **Page(s):**

Other Authorities:

PETITION FOR A WRIT OF CERTIORARI

Petitioner Aaron Christopher Pena seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is published at *United States v. Pena*, 853 F. App'x 958 (2021). It is reprinted in Appendix A to this Petition. The district court's amended judgment and sentence is attached as Appendix B.

JURISDICTION

The court of appeals issued its opinion and judgment on July 21, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

GUIDELINES PROVISION AT ISSUE

United States Sentencing Guidelines § 2D1.1(b)(5) states:

> If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine 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.

U.S.S.G. § 2D1.1(b)(5).

STATEMENT OF THE CASE

Petitioner Aaron Christopher Pena pleaded guilty to conspiracy to possess with intent to distribute a mixture and substance containing a detectable amount of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). As part of his guilty plea, Petitioner signed a factual resume in which he admitted that he and another person "agreed to possess with intent to distribute methamphetamine," but stated that the methamphetamine came "from a source whose identity was unknown to" Petitioner.

The probation officer prepared a Presentence Investigation Report ("PSR"), in which he calculated Pena's Guidelines range as 168-210 months in prison. Relevant here, the PSR applied a two-level enhancement to the base offense level (which leads to a higher recommended sentence) because "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." U.S. Sentencing Guidelines Manual § 2D1.1(b)(5). The PSR determined that this enhancement was justified because Petitioner "received methamphetamine from an individual

supplied by Quezada, who was in contact with, and was supplied methamphetamine from, a Mexico-based [source of supply]."

Petitioner objected to the PSR's enhancement of his base offense level based on importation because there was no evidence showing that he knew the methamphetamine at issue was imported. In his objection, Petitioner conceded that the objection was foreclosed by Fifth Circuit precedent, but stated that he was nevertheless making the objection to preserve the issue for review. The district court thus overruled the objection, found that Petitioner's Guidelines range was 168-210 months in prison, and imposed a sentence of 168 months.

On appeal, Petitioner argued that the district court erred by enhancing his base offense level by two without finding that Petitioner knew that the methamphetamine at issue was imported. Pena again conceded that the argument was foreclosed by Fifth Circuit precedent and stated that he was making the argument to preserve the issue for further review. The Fifth Circuit, in accordance with its precedent, affirmed Petitioner's sentence.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit alone holds that § 2D1.1(b)(5) imposes a strict-liability standard.

The Fifth Circuit uniquely holds that U.S.S.G. § 2D1.1(b)(5) imposes a strict-liability standard. In *United States v. Serfass*, 684 F.3d 548 (5th Cir. 2012), the Fifth Circuit held that "the § 2D1.1(b)(5) sentencing enhancement applies if 'the offense involved the importation of amphetamine or methamphetamine' regardless of whether the defendant had knowledge of that importation." 684 F.3d at 552. It concluded that this reading was compelled by "basic rules of English grammar." *Id.* at 551. The Fifth Circuit reasoned that the phrase "that the defendant knew were imported unlawfully" uses a plural verb—"were." *Id.* The only plural noun in § 2D1.1(b)(5) is "chemicals." Thus, the Fifth Circuit reasoned, the knowledge requirement applies only when the enhancement is based on "the manufacture of amphetamine or methamphetamine from listed chemicals." *Id.* It concluded that the "plural verb cannot apply to the sentence's disjunctive subject, 'amphetamine or methamphetamine,' because—according to the rules of grammar—'[i]f the subject consists of two or more *singular* words that

are connected by or . . . the subject is singular and requires a singular verb.'" *Id.* (quoting WILLIAM A. SABIN, GREGG REFERENCE MANUAL: A MANUAL OF STYLE, GRAMMAR, USAGE, AND FORMATTING 297 (11th ed. 2011) (emphasis and alterations in original)).

The Fifth Circuit also reasoned that construing § 2D1.1(b)(5) to require knowledge of importation "would render the language of § 2D1.1(b)(5) unnecessarily repetitive." *Id.* at 552. According to the Fifth Circuit, under that interpretation, "the guideline would apply to an offense involving 'the *importation* of amphetamine or methamphetamine . . . that the defendant knew [was] *imported* unlawfully[.]'" *Id.* (emphasis and alterations in original). The Fifth Circuit held that "[t]his redundant combination of 'importation' and 'imported' is not only awkward; it is almost certainly not what the Sentencing Commission intended." *Id.*

The Fifth Circuit's decision in *Serfass* misunderstands the rules of grammar and thus misinterprets § 2D1.1(b)(5). It is true that a disjunctive subject consisting of two or more singular words requires a singular verb. But, as the very style guide on which the Fifth Circuit relied on in *Serfass* explains, "[i]f the subject is made up of *both* singular

and plural words connected by *or*, *either . . . or*, *netiher . . . nor*, or *not only . . . but also*, the verb agrees with the nearer part of the subject." GREGG REFERENCE MANUAL at 297-98; *see also* BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 165 (2d ed. 2006) ("If the subject is a disjunctive compound (joined by *or* or *nor*), the verb should agree with the element of the compound closest to the verb . . . ."). That is the case here. The subject of the verb "were" is a disjunctive subject with three parts.[1] The first two parts are "amphetamine or methamphetamine," and, as the Fifth Circuit in *Serfass* recognized, are singular. The third part, and the one closest to the verb, is "chemicals." Because "chemicals" is plural, the verb should be plural even though it *also* applies to "amphetamine or methamphetamine." The Court in *Serfass* was therefore wrong to conclude that the phrase "'that the defendant knew were imported unlawfully[]' cannot apply to 'the importation of amphetamine or methamphetamine.'" *Serfass*, 684 F.3d at 551-52.

[1] The subject of "were" is technically the relative pronoun "that." However, "when the relative pronoun . . . *that* is itself the subject of the relative clause, the verb in the relative clause must agree with the antecedent of the relative pronoun." GREGG REFERENCE MANUAL at 336. Thus, "were" must agree with the antecedent of "that," which is "amphetamine or methamphetamine" and "chemicals."

The purposes behind § 2D1.1(b)(5)'s enhancement supports requiring that the defendant know that the drugs at issue were imported. When the Sentencing Commission added the importation enhancement, it stated that it did so "in response to evidence of a recent, substantial increase in the importation of methamphetamine and precursor chemicals used to manufacture methamphetamine." U.S. Sentencing Guidelines Manual Amendment 555 (1997). According to the Commission, the importation enhancement was "directed at such activity." *Id.* Enhancing a defendant's sentence when the defendant does not know that the methamphetamine was imported, however, does nothing to discourage importation—the enhancement in such a case is not "directed at" the importation activity.

Not only is the Fifth Circuit's interpretation of the importation enhancement inconsistent with its underlying purposes, it is inconsistent with the way in which the Guidelines determine relevant conduct as a whole. Under the Guidelines, courts are supposed to consider "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," and "in the case of a jointly undertaken criminal activity . . . , all acts and omissions of

others that were . . . (i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity." U.S. Sentencing Guidelines Manual § 1B1.3(a)(1), (2). The Fifth Circuit has held, however, that, not only is knowledge of importation not required for the importation enhancement to apply, an offense *involves* the importation of amphetamine or methamphetamine just because the drugs at issue were imported. *United States v. Foulks*, 747 F.3d 914, 915 (5th Cir. 2014) ("[D]istribution (or possession with intent to distribute) of imported methamphetamine, even without more, may subject a defendant to the § 2D1.1(b)(5) enhancement."). Thus, a defendant in the Fifth Circuit can receive the importation enhancement when he does not know of the importation, has no connection to anyone involved in the importation, and otherwise has no reason to even suspect that the methamphetamine was imported. Enhancing a sentence in these circumstances flies in the face of what the Guidelines themselves consider relevant conduct.

No other court of appeals has adopted the Fifth Circuit's reasoning. Indeed, in *United States v. Job*, the Ninth Circuit "decline[d] to adopt the

Fifth Circuit's interpretation." 851 F.3d 889, 908 (9th Cir. 2017). Before the district court, the government in *Job* argued that the importation enhancement should apply even though there was no evidence that the defendant was involved in the importation of methamphetamine "through relevant conduct related to jointly undertaken criminal activity under U.S.S.G. § 1B1.3(a)(1)(b)." *Id.* at 908. The district court applied the importation enhancement based in part on the finding that the defendant "was 'in the importing of methamphetamine,'" but made no finding regarding jointly undertaken criminal activity. *Id.* at 906, 908. The Ninth Circuit held that the finding that the defendant "was 'in the importing of methamphetamine'" was erroneous "because the government offered no evidence—at trial or at sentencing—that [the defendant] was personally involved in the importation of methamphetamine." *Id.* at 906-07. On appeal, the government argued that "§ 2D1.1(b)(5) can be imposed on a strict liability basis so long as the government proves that the drugs were imported by someone—and regardless of the defendant's intent, knowledge, or lack of knowledge that the drugs were imported." *Id.* at 908. The Ninth Circuit recognized that the Fifth Circuit had agreed with this argument in *Serfass*. But the Ninth Circuit "decline[d] to adopt the

Fifth Circuit's conclusion here—particularly where the government never advanced this argument in district court and sought to apply the increase only on the basis of jointly undertaken criminal activity under U.S.S.G. § 1B1.3, and the district court made no determinations about the scope of the jointly undertaken criminal activity as required by the Sentencing Guidelines." *Id.* at 908.

In light of these apparently conflicting decisions of the Fifth and Ninth Circuits, this Court should step in to resolve the disagreement. Indeed, one of the primary reasons that this Court grants certiorari is when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a); *see also Quarles v. United States*, 139 S. Ct. 1872, 1876 (2019) ("We granted certiorari in light of a Circuit split on how to assess state remaining-in burglary statutes for purposes of §924(e)." (citations omitted)).

Even if the Court believes that the Fifth and Ninth Circuit decisions are not in irreconcilable conflict, the Court should step in anyway to correct the Fifth Circuit's erroneous resolution of an important question of law. *See* Sup. Ct. R. 10(c) ("The following, although neither controlling

nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: . . . (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."). The Fifth Circuit's error is clear in light of the plain language of the Guidelines. And, as discussed below, the proper scope of § 2D1.1(b)(5) is an important question that can have drastic ramifications for defendants convicted of methamphetamine-related offenses. The Court should not allow the Fifth Circuit's erroneous interpretation to persist.

II. The proper scope of § 2D1.1(b)(5) is an important question worthy of this Court's review.

Whether § 2D1.1(b)(5) applies even when the defendant lacks knowledge that the drugs at issue were imported is an important question that affects a great number of defendants in the Fifth Circuit every year. While a two-point increase in a defendant's base offense level may seem small, it can often lead to years added to recommended sentencing ranges. For example, for a defendant with a criminal history category of V, an offense level of 30 leads to a recommended sentence of

imprisonment of 151-188 months, while an offense level of 32 leads to a recommended sentence of imprisonment of 188-235 months. *See* U.S.S.G. sentencing table. The tops of these ranges differ by almost four years.

The difference in Guidelines ranges can become even more pronounced in cases involving drug couriers, who make up a significant portion of federal drug offenders. *See* Kevin Lerman, *Couriers, Not Kingpins: Toward a More Just Federal Sentencing Regime for Defendants Who Deliver Drugs*, 7 U.C. IRVINE L. REV. 679, 684-86 (Dec. 2017) (note). Drug couriers are prime examples of defendants who may qualify for mitigating role-adjustments to their offense levels. *See id.* at 686-87. The mitigating role adjustment can have a significant effect on Guidelines ranges. For example, the mitigating role adjustment itself lowers a defendant's offense level. But it also makes the importation enhancement inapplicable, further lowering a defendants' offense level. *See* U.S.S.G. § 2D1.1(b)(5) (only applying the importation enhancement when "the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role)"). Thus, two identical drug couriers may receive vastly different Guidelines ranges based solely on whether the district court awards them a mitigating role adjustment. *See* Lerman at 686 tbl. 1 (illustrating

Guidelines calculations for two identical drug couriers, one of whom receives a mitigating role adjustment and one of whom does not, and reaching Guidelines ranges of 46-57 months and 103-135 months, respectively).

Whether § 2D1.1(b)(5) permits enhancement even when the defendant does not know whether the drugs at issue were imported is a particularly important issue now because more and more amphetamine and methamphetamine is being imported from Mexico. In 2020, the DEA reported that "Mexican [transnational criminal organizations] continue to be the primary producers and suppliers of low cost, high purity methamphetamine in the United States" and that "[c]landestine methamphetamine laboratory seizures continue to decrease across the United States." Drug Enforcement Administration, 2020 National Drug Threat Assessment at 21, 23 (March 2021), *available at* https://www.dea.gov/sites/default/files/2021-02/DIR-008-21%202020%20National%20Drug%20Threat%20Assessment_WEB.pdf. Indeed, the last several years have seen Mexican-made methamphetamine push into markets in which the drug was not readily available. *See* Jon Kamp, Methamphetamine Is Flooding Into U.S., Drug Officials Say, WALL ST. J.

(March 17, 2019) ("Mexican cartels have been aggressively pushing meth into the U.S. market, including places like the Northeast, where the stimulant was once relatively scarce, Drug Enforcement Administration agents said."), *available at* https://www.wsj.com/articles/methamphetamine-is-flooding-into-u-s-drug-officials-say-11552831201; *see also* Associated Press, Mexican cartels fill demand for meth in USA, USA TODAY (Oct. 11, 2012) ("Although Mexican meth is not new to the U.S. drug trade, it now accounts for as much as 80 percent of the meth sold here, according to the Drug Enforcement Administration."), *available at* https://www.usatoday.com/story/news/nation/2012/10/11/mexico-cartels-meth/1626383/. This issue is therefore deserving of the Court's attention.

III. This case is an ideal vehicle to address the proper scope of § 2D1.1(b)(5).

The Court should grant certiorari in this case because the proper scope of § 2D1.1(b)(5) is cleanly presented. Petitioner timely objected to the enhancement of his Guidelines range under § 2D1.1(b)(5), and the district court overruled that objection. The court of appeals affirmed based on its holding regarding the legal interpretation of § 2D1.1(b)(5).

And the court of appeals raised no harmless error issues that would hinder this Court's review. This case is therefore an ideal vehicle to address this important question of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

/s/Eric M. Albritton
Eric M. Albritton
NELSON BUMGARDNER CONROY P.C.
3131 W. 7th St., Suite 300
Fort Worth, Texas 76107
Telephone: 817-377-9111
Facsimile: 817-377-3485
ema@nelbum.com

COUNSEL FOR PETITIONER