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

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IN THE SUPREME COURT OF THE UNITED STATES

JENNIFER MARIE MORRISON,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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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. Does the application of the 2-level enhancement for possession of imported methamphetamine violate due process where there has been no showing that the defendant had knowledge of that importation and no *mens rea* or culpable mental state with respect to such possession?
2. Where a defendant specifically objects to a bare allegation in a presentence report that she possessed imported methamphetamine, does the application of a 2-level enhancement based only on the court's "implicit" finding by adopting the PSR which has been challenged by the defendant shift the burden of proof and violate due process of law?

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IN THE SUPREME COURT OF THE UNITED STATES

JENNIFER MARIE MORRISON,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

The petitioner, Jennifer Marie Morrison, 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 October 25, 2017.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit *United States v. Jennifer Marie Morrison*, No. 16-11657 (5th Cir., October 25, 2017), is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."

STATEMENT OF THE CASE

Petitioner was charged on May 17, 2016 in a one-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 the one-count Information, without a written plea agreement, on June 1, 2016. A sentence of 90 months was imposed on petitioner on November 4, 2016.

Offense of Conviction.

The offense of conviction was possession 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 in or around January 2015, 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 April 29, 2016 and filed on June 1, 2016. On June 1, 2016, petitioner pleaded guilty without a written plea agreement to the one-count Information.

Presentence Investigation Report and Objections

The Presentence Investigation Report filed on September 13, 2016 ("PSR") found a total offense level of 29 and a Guideline Imprisonment Range of 121 to 151 months, after applying 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), and stated that petitioner was accountable for 2,156.97 grams of marijuana.

On September 22, 2016, Morrison filed her Clarifications and Objections to the PSR (the "PSR Objections"), including an objection to the enhancement for importation of methamphetamine and an objection to no downward adjustment for her role in the offense.

On October 18, 2016, an Addendum to the PSR was filed stating that "the mere fact that the methamphetamine obtained by Snelson during the defendant's participation in the drug-trafficking activity, was imported from Mexico is sufficient to support the increase and the defendant need not personally be involved in the importation" and further that "the defendant need not have knowledge that the methamphetamine was imported " and

stating that petitioner was not eligible for a reduction for a mitigating role because she was "an average participant in the conspiracy."

On October 24, 2016, petitioner filed her Objections to Addendum to the PSR ("Addendum Objections"), again objecting to the importation enhancement and the lack of a mitigating role reduction.

#### Sentencing Hearing.

At the sentencing hearing held on November 4, 2016, the district court adopted as its fact findings the findings stated in the PSR as modified or supplemented by the Addendum to the PSR. The petitioner was sentenced to 90 months, after the court granted a Government motion for downward departure.

A Notice of Appeal to the Fifth Circuit was filed.

#### **C. The Court of Appeals' Decision.**

On October 25, 2017, the Court of Appeals for the Fifth Circuit affirmed the district court's sentence. The Fifth Circuit ruled that the district court did not commit clear error by determining that petitioner "failed to meet her burden to demonstrate the facts in the presentence investigation report (PSR) were 'inaccurate or materially untrue'." The Fifth Circuit stated that "[b]ecause [petitioner] did not introduce sufficient rebuttal evidence, the court was entitled to rely on the PSR and adopt its factual findings, including the finding the methamphetamine was imported." The Fifth Circuit held that the court's precedent foreclosed petitioner's challenge to the importation enhancement because of its holdings (1) that possession of imported methamphetamine was sufficient for application of the enhancement and that (2) possession of imported methamphetamine "involved" the

importation of methamphetamine for sentencing purposes. The Fifth Circuit rejected petitioner's due-process challenge to the imposition of the enhancement without the defendant's knowledge of importation of the methamphetamine distributed by petitioner.

### REASONS FOR GRANTING THE PETITION

#### **I. 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. 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).

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. 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 her situation.

A. There Was No Evidence, Other Than the Bare Assertion in the PSR, that any Methamphetamine Possessed or Distributed by Petitioner Was Imported.

Convicted defendants have a due process right to be sentenced on the basis of accurate and reliable information. *United States v. Corona-Gonzalez*, 628 F.3d 336, 343 (7th Cir. 2010); see also, *United States v. Tucker*, 404 U.S. 443, 447 (1972). The Government must prove the facts underlying a sentencing enhancement by a preponderance of the evidence. *United States v. Serfass*, 684 F.3d 548, 553 (5th Cir. 2012). When the defendant objects to the enhancement and challenges the Government's evidence, the Government has the burden of proof--and should not be able to satisfy that burden by simply adopting mere allegations in the PSR and shifting the burden to the defendant. The Government should have to prove that petitioner, in fact, possessed imported methamphetamine, and possessed it "knowingly." The district court can only rely on an "unchallenged" PSR in order to meet its burden of proof in proving sentencing enhancement factors by a preponderance of the evidence. See *United States v. Romero-Rendon*, 220 F.3d 1159, 1160-61 (9th Cir. 2000). In this case, petitioner challenged the 2-level enhancement under § 2D1.1(b)(5)(A) and the PSR allegations concerning the possession of imported methamphetamine both in objections to the PSR and the PSR Addendum and at sentencing.

At sentencing, the testimony by a government agent about importation of methamphetamine from Mexico was based on the inference that high purity indicated a Mexican source. To speculate that some methamphetamine may have come from Mexico simply because it was "high purity" is unreliable and inaccurate as it has been established

for several years that methamphetamine "super labs," like those in Mexico, exist in the United States. See *United States v. Rivera-Mendoza*, 682 F.3d 730, 733-34 (8th Cir. 2012). Petitioner was not allowed to offer rebuttal evidence to bare allegations from the PSR Addendum other than to challenge generally the reliance on the inference that high purity showed that she possessed any imported methamphetamine. Where the enhancement is applied based on bare assertions unsupported by any factual testimony or definitive evidence, the petitioner had no means to refute or contest the assertions (other than counter-assertions) and defend herself and her due process rights are violated. Since petitioner challenged the allegations in the PSR and PSR Addendum, the district court could not rely on the PSR in order to meet the burden of proving, by a preponderance of the evidence, the importation of methamphetamine or petitioner's possession of any imported methamphetamine. There was no testimony that petitioner ever possessed imported methamphetamine or that she obtained all, or any part, of her methamphetamine from a supplier who received methamphetamine only from Mexico. The district court's "implicit" finding from the "adoption" of the PSR was ineffective to meet the burden of proof and as there was no direct evidence of importation at sentencing but only an inference raised by the high purity (which was also challenged by petitioner), the enhancement was not proven. There was never any showing that any specific methamphetamine possessed by petitioner was imported.

"Speculation" that petitioner might have come in contact with imported methamphetamine from Mexico and unknowingly possessed or distributed it is not sufficient to support a 2-level enhancement when the defendant has objected to that

enhancement. See *United States v. Conner*, 537 F.3d 480, 491-92 (5th Cir. 2008). See also, *United States v. Showalter*, 569 F.3d 1150, 1160 (9th Cir. 2009) (When a defendant raises objections to the PSR "the court may not simply rely on the factual statements in the PSR.").

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

### **A. The § 2D1.1(b)(5) Enhancement Was Directed at Importation Activity and Petitioner 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 is minor in the offense of conviction 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 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

becomes the proof. Such an enhancement becomes a strict liability provision, disfavored by our law. Petitioner's activities were in no way "directed" at, or focused on, importation activity.

If one of the § 3553(a) sentencing factors is designed to "deter" criminal conduct, punishing a defendant for importation about which she knows nothing, cannot have any deterrent effect, nor is she being punished for something that she knew she 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, she must be punished by a sentence two levels higher simply because she was, in fact in possession of imported methamphetamine. In this case, there was no factual evidence of possession of imported methamphetamine, only an inference based on purity which was challenged by petitioner. Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime. See *Jones v. United States*, 135 S. Ct. 8, 9 (2014) (Scalia, J., dissenting from denial of certiorari). Here, the determination by the district court that the offense involved the importation of methamphetamine, over petitioner's objection and without a specific finding, by a preponderance of the evidence standard, increased the penalty to which petitioner was exposed and violated her constitutional rights.

B. 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.

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

#### **A. 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 two years more in prison based on a fact she did not know is

inconsistent with "fundamental and far-reaching principles" of criminal liability.

*Morrisette*, 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.

B. Abolishing the Requirement to Prove a Culpable State of Mind and Knowledge of Importation Violated Petitioner'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 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. Here, petitioner disputed the application of the guideline for the imported methamphetamine enhancement to the facts of her case, in writing, with specific arguments and facts. The district court erred in enhancing her sentence based on adoption of the PSR and PSR Addendum when the allegation and application of the enhancement was specifically challenged by petitioner. The district court's reliance on the "adoption" of the challenged PSR and Addendum violated petitioner's due process and denied petitioner equal protection of the law.

CONCLUSION

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

DATED: January 20, 2018

Respectfully submitted,

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