

ENHANCEMENT WITHOUT A CAUSE: *UNITED STATES V. SERFASS* AND ITS ERASURE OF THE SCIENTER REQUIREMENT

Comment

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I. INTRODUCTION

John Doe is arrested for possession of methamphetamine that the local police find in his car. The police recover fifty grams. Following booking at the local jail, John Doe later admits to an investigator that he intended to sell this methamphetamine to a friend. He is charged with possession of methamphetamine under 21 U.S.C. § 841(a)(1), which makes it a crime “to manufacture, distribute, . . . or possess with intent to manufacture, distribute, or dispense, a controlled substance.”¹ During an interrogation, John also tells the investigator that he obtained the methamphetamine from Josh Roe. The police already have knowledge that Roe gets his methamphetamine from an individual who imports the methamphetamine from Mexico. John is convicted, and during the sentencing phase he receives a two-level increase to the base level offense category under United States Sentencing Guidelines § 2D1.1(b)(5). This enhancement applies when it is proven by a preponderance of the evidence that “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.”² Depending on his criminal history, the amount of methamphetamine he possessed, and numerous other factors, this enhancement could result in a range of additional months added to his sentence.³

In comparison, consider Jim, who commits the exact same crime but in the jurisdiction of the Eleventh or Ninth Circuit. Jim will face a maximum of about twenty-four years in prison and will likely return to society again one day.⁴ This large sentencing disparity should not exist within the federal system with two people convicted of the exact same crime, possessing the exact same amount of methamphetamine, and having the exact same criminal

1. 21 U.S.C. § 841(a)(1).

2. U.S. SENT’G GUIDELINES MANUAL § 2D1.1(b)(5) (U.S. SENT’G COMM’N 2018).

3. *Id.* at 458.

4. *See* United States v. Hernandez-Astudillo, 777 F. App’x 374 (11th Cir. 2019); *see also* United States v. Biao Huang, 687 F.3d 1197 (9th Cir. 2012).

history category. Yet, these are the possible problems resulting from the Fifth Circuit's decision in *United States v. Serfass*.⁵

An enhancement is defined as “[a]n upward adjustment to a defendant’s offense level under applicable sentencing guidelines.”⁶ Possession of fifty grams of methamphetamine with intent to distribute begins with a base offense level of twenty-four.⁷ The base offense level of a crime is the “starting point for determining the seriousness of a particular offense.”⁸ There are forty-three levels.⁹ Additionally, criminal history category is the other factor considered in determining the appropriate sentencing range.¹⁰ The criminal history category ranges from one to six and is “based upon the extent of an offender’s past misconduct.”¹¹ If John has a typical criminal history category of three, the application of this enhancement results in a possible extra thirty-four months to his sentence.¹² If John has a more extensive criminal history category of five or six, this enhancement could potentially add an additional forty-five or fifty years to his sentence, respectively.¹³ Now, suppose John is in possession of a larger amount of methamphetamine. If John is in possession of more than forty-five kilograms of methamphetamine, more than 4.5 kilograms of methamphetamine (actual), or more than 4.5 kilograms of “[i]ce,” John will start with a base offense level of thirty-eight.¹⁴ If he has an average criminal history category of three, the United States Sentencing Guidelines § 2D1.1(b)(5) enhancement would be the difference between a sentence of 292 months—about twenty-four years—or a life sentence.¹⁵

Thus, receiving this enhancement for importation could be the difference between John being able to walk out of prison with a significant portion of his life in front of him, or John never seeing the outside of the federal penitentiary. It is important to note that John had no knowledge that the methamphetamine was imported from Mexico and he was not charged with a conspiracy offense, which could result in him being criminally responsible for the actions of others if the actions of others involved in the conspiracy were in furtherance of the conspiracy and reasonably foreseeable.

5. See *United States v. Serfass*, 684 F.3d 548 (5th Cir. 2012).

6. *Enhancement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

7. U.S. SENT'G COMM'N, *Drug Quantity Table*, U.S. SENT'G GUIDELINES MANUAL § 2D1.1(c) tbl. (2018) [hereinafter *Drug Quantity Table*].

8. *An Overview of the Federal Sentencing Guidelines*, U.S. SENT'G COMM'N, at 1, https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf (last visited Dec. 14, 2020).

9. *Id.*

10. *Id.*

11. *Id.* at 2.

12. See *infra* p. 6 (illustrating the sentencing table).

13. See *intra* p. 6 (illustrating the sentencing table).

14. *Drug Quantity Table*, *supra* note 7.

15. *Id.*

And yet, he is faced with an enhanced sentence based on the acts of others that he had no knowledge of and were not reasonably foreseeable to him.

This Comment attempts to resolve the issues underpinning and resulting from the Fifth Circuit's decision in *United States v. Serfass* by proposing an amendment to United States Sentencing Guidelines § 2D1.1(b)(5) that would clarify the scienter requirement, and lead to uniform sentencings and application of this subsection across all federal circuits. Part II explains the background and important developments of the Sentencing Guidelines since enactment in 1987, as well as the concept of relevant conduct and its general personal involvement requirement under the Guidelines.¹⁶ Part III addresses the general personal involvement requirement as applied to United States Sentencing Guidelines § 2D1.1(b)(5), as well as a statutory interpretation analysis of United States Sentencing Guidelines § 2D1.1(b)(5).¹⁷ Part III also suggests a proposed amendment to clarify the scienter requirement of United States Sentencing Guidelines § 2D1.1(b)(5), and supports the proposed amendment with policy arguments surrounding this suggested change.¹⁸

II. BACKGROUND

This background section will first broadly explore the development and creation of the United States Sentencing Guidelines as a whole, including the important developments the Guidelines have undergone through relevant caselaw. Next, the background section will analyze the general concept of relevant conduct under the Guidelines and the role that relevant conduct plays in sentencing criminal defendants, as well as the base requirements for conduct to be classified as relevant conduct for sentencing purposes. Subsequently, this Section will discuss the relevant caselaw in the Fifth Circuit surrounding § 2D1.1(b)(5) of the United States Sentencing Guidelines. Lastly, it will compare the relevant cases from courts in other circuits to the Fifth Circuit case decisions.

A. Historical Development and Function of the Sentencing Guidelines

The United States Sentencing Guidelines were created as part of the Sentencing Reform Act of 1984.¹⁹ This Act “provide[d] for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.”²⁰ The United States Sentencing Guidelines were created to provide consistency and

16. See *infra* Part II (discussing the development and implementation of the Sentencing Guidelines).

17. See *infra* Part III (addressing the general personal involvement requirement).

18. See *infra* Part III (proposing an amendment to clarify the scienter requirement).

19. 28 U.S.C. § 994.

20. U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A.1.2, The Statutory Mission (U.S. SENT'G COMM'N 2018).

predictability to the federal sentencing system.²¹ Before the enactment of the United States Sentencing Guidelines in 1987, federal district judges across the nation were largely left to their own discretion when determining criminal defendants' sentences.²² During this time period, Congress would set the statutory maximum (and sometimes a mandatory minimum) for each federal crime, and district judges were allowed to impose a sentence anywhere within that range.²³ This approach to federal sentencing led to similarly-situated offenders being sentenced differently for similar crimes.²⁴

This wide range of sentencings for similar defendants made many uneasy.²⁵ In response to the concerns surrounding this form of sentencing, Congress decided to create the United States Sentencing Commission, a bipartisan agency located within the Judicial Branch.²⁶ The purpose of the United States Sentencing Commission was to encourage honesty and reasonable uniformity in sentencing.²⁷ To achieve this goal, under the United States Sentencing Guidelines, the district judge determines the appropriate Sentencing Guidelines range by: "(1) [F]inding the applicable offense level and offender category and then (2) consulting a table that lists proportionate sentencing ranges . . . at the intersections of rows (marking offense levels) and columns (marking offender categories)."²⁸ The intersection that the judge arrives at after consulting the Sentencing Guidelines table determines the appropriate sentencing range for the offender.²⁹ In theory, this methodology should provide sentencing uniformity across the federal courts and circuits.³⁰ The Sentencing Guidelines as a whole have achieved the goal of providing for more uniform and predictable criminal sentencings; however, circuits sometimes disagree about when enhancements or downward departures should apply, which again results in sentencing disparities in certain cases.³¹

21. See Brandon E. Beck, *The Orwell Court: How the Supreme Court Recast History and Minimized the Role of the U.S. Sentencing Guidelines to Justify Limiting the Impact of Johnson v. United States*, 66 BUFF. L. REV. 1013, 1038 (2018).

22. *Federal Sentencing: The Basics*, U.S. SENT'G COMM'N, at 1, (Nov. 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201811_fed-sentencing-basics.pdf.

23. Beck, *supra* note 21, at 1038.

24. *Federal Sentencing: The Basics*, *supra* note 22.

25. *Id.*

26. *Id.*

27. U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A.1.3, The Basic Approach (Policy Statement) (U.S. SENT'G COMM'N 2011).

28. *Dorsey v. United States*, 567 U.S. 260, 265 (2012).

29. *Id.*

30. *See id.*

31. *See infra* Parts II.D–E (discussing caselaw in which application of enhancements or downward departures from the Sentencing Guidelines has not been uniform).

SENTENCING TABLE
(in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

B. Important, Impactful Developments to the Guidelines Since 1987

In the time since its enactment, the Sentencing Guidelines have undergone many important developments and changes.³² Although the Guidelines are not technically a statute, courts have historically applied the ordinary rules of statutory construction and interpretation to them.³³ “[F]or purposes of construction and interpretation,” courts view the Guidelines “as if they were statutes or court rules.”³⁴ In *Apprendi v. New Jersey*, the Supreme Court explored this statutory construction and interpretation to the Guidelines.³⁵ There, the defendant pled guilty to two counts of “possession of a firearm for an unlawful purpose,” which were each punishable by up to ten years imprisonment.³⁶ Before sentencing, the judge held a hearing to discover the defendant’s motivation for the crime.³⁷ During that hearing, the court found, by a preponderance of the evidence, that the defendant was motivated by a racial bias, which increased the maximum penalty to twenty years on the firearms count.³⁸ On appeal, the Supreme Court ultimately found that before a sentence can be enhanced beyond the statutory maximum, the facts required to enhance that sentence must be decided by a jury beyond a reasonable doubt.³⁹

Another important development surrounding the Sentencing Guidelines occurred in 2005 in the Supreme Court case of *United States v. Booker*.⁴⁰ There, the Supreme Court held that the United States Sentencing Guidelines are not mandatory, only advisory.⁴¹ In *United States v. Booker*, the defendant was charged with possession of fifty grams or more of crack cocaine, which had a corresponding minimum sentence of ten years imprisonment.⁴² A jury convicted the defendant, Booker, after considering evidence that he possessed 92.5 grams of crack cocaine in his duffel bag, which resulted in a Sentencing Guideline range of 210 to 262 months imprisonment.⁴³ At Booker’s sentencing hearing, it was concluded by a preponderance of the evidence that the defendant possessed an additional 566 grams of crack cocaine and that he also obstructed justice, resulting in a mandated sentence

32. See generally Beck, *supra* note 21 (demonstrating changes in the Sentencing Guidelines over time).

33. *United States v. Rabanal*, 508 F.3d 741, 743 (5th Cir. 2007).

34. *United States v. Vickers*, 891 F.2d 86, 88 (5th Cir. 1989).

35. *Apprendi v. New Jersey*, 530 U.S. 466, 466 (2000).

36. *Id.*

37. *Id.* at 470.

38. *Id.* at 466.

39. *Id.*

40. See *United States v. Booker*, 543 U.S. 220 (2005).

41. *Id.* at 222.

42. *Id.* at 235.

43. *Id.* at 221.

of 360 months to life imprisonment.⁴⁴ Booker was sentenced to 360 months imprisonment.⁴⁵

Booker's co-defendant, Fanfan, was also involved in the criminal activity and charged with conspiracy to distribute and possession with intent to distribute 500 grams or more of cocaine, which resulted in a range of 5–40 years imprisonment.⁴⁶ At Fanfan's sentencing hearing, however, the district court judge concluded by a preponderance of the evidence that Fanfan possessed 2.5 kilograms of cocaine, 261.6 grams of crack, and had been an organizer-leader of the conspiracy, which resulted in a new range of 188 to 235 months imprisonment.⁴⁷ The jury never heard this evidence.⁴⁸ On appeal, the Supreme Court acknowledged that the way the Sentencing Guidelines were being applied was an issue.⁴⁹ Specifically, the Court held that the mandatory nature of the Sentencing Guidelines violated the defendant's Sixth Amendment right to a jury trial.⁵⁰ To fix this problem, the Court removed 18 U.S.C. § 3553(b)(1) from the Sentencing Reform Act of 1984, which previously made the United States Sentencing Guidelines mandatory, but continued to allow judicial fact-finding post-trial.⁵¹

Post-*Booker*, district court judges determine the advisory sentencing range under the Guidelines, consider applicability of any departure provisions, and consider the statutory sentencing factors codified in 18 U.S.C. § 3553(a), which include the nature and circumstance of the offense and the history and characteristics of the defendant.⁵² Despite the fact that the Guidelines are now technically advisory, they are still very heavily relied on in federal sentencing, and a departure from the Guidelines requires adequate reasoning and fact-finding to determine if a departure should apply.⁵³ A judge must consider the facts of each specific case, and “[i]f he decides on an outside-the-Guidelines sentence, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of variation.”⁵⁴

In *Beckles v. United States*, the Supreme Court decided another important issue surrounding the application of the United States Sentencing Guidelines—the fact that they are not subject to constitutional challenges for vagueness or due process violations.⁵⁵ There, the defendant was convicted of

44. *Id.* at 227.

45. *Id.*

46. *Id.* at 228 (citing 21 U.S.C. § 841(b)(1)(B)(ii)).

47. *Id.* at 228.

48. *Id.*

49. *Id.* at 222.

50. *Id.* at 267.

51. Beck, *supra* note 21, at 1043.

52. *Id.* at 1053.

53. *Id.* at 1059.

54. Gall v. United States, 552 U.S. 38, 39 (2007); see Beck, *supra* note 21, at 1059 (describing that if a judge departs from the Sentencing Guidelines, he must utilize competent reasoning and fact-finding).

55. Beckles v. United States, 137 S. Ct. 886, 888 (2017).

being a convicted felon in possession of a firearm and sentenced as a career offender under the Sentencing Guidelines.⁵⁶ The United States Sentencing Guidelines Commission defines a career offender as “someone who commits a crime of violence or a controlled substance offense after two prior felony convictions for those crimes.”⁵⁷ Career offenders receive criminal history categories of VI and “offense levels at or near the statutory maximum penalty of the offense of conviction.”⁵⁸ Therefore, they are given the longest sentences.⁵⁹ The defendant appealed his sentence and the Eleventh Circuit affirmed.⁶⁰ The defendant then petitioned for certiorari, and the Supreme Court remanded the case for further consideration in light of the decision in *Johnson v. United States*, which struck a portion of the Armed Career Criminal Act as void for unconstitutional vagueness.⁶¹ The Supreme Court ultimately held that the Sentencing Guidelines are not subject to a void for vagueness challenge under the Fifth Amendment Due Process Clause because they are not mandatory, only advisory.⁶² Therefore, they are not subject to constitutional challenges because of their advisory nature post-*Booker*.⁶³

C. Concept of Relevant Conduct

The United States Sentencing Guidelines allow for a defendant’s offense level, for purposes of sentencing, to be determined based on the specific crime charged as well as “relevant conduct” surrounding the crime.⁶⁴ Relevant conduct includes “certain actions and omissions that took place on occasions beyond the charged offense” and must be proven by a preponderance of the evidence.⁶⁵ In other words, during the sentencing phase, offenders can be held responsible for conduct that was not directly charged in their conviction if that conduct was reasonably related to their offense.⁶⁶

Specifically, United States Sentencing Guidelines § 1B1.3(a)(1) describes the concept of relevant conduct and the applicability of adjustments

56. *Id.*

57. *Quick Facts, Career Offenders*, U.S. SENT’G COMM’N (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Career_Offender_FY18.pdf.

58. *Id.*

59. *Id.*

60. *Beckles*, 137 S. Ct. at 888.

61. *Id.*; see *Johnson v. United States*, 135 S. Ct. 2551, 2557–58 (2015) (finding that the residual clause of the Armed Career Criminal Act violates due process, and is vague for both failing to provide a method for estimating a risk created by a crime and the amount of risk necessary to be considered a violent felony).

62. *Beckles*, 137 S. Ct. at 888.

63. *Id.* at 888–89.

64. Office of Gen. Couns. U.S. Sent’g Comm’n, *Primer: Relevant Conduct*, U.S. SENT’G COMM’N (Mar. 2018), https://www.ussc.gov/sites/default/files/pdf/training/primers/2018_Primer_Relevant_Conduct.pdf.

65. *Id.*

66. *Id.*

under the Guidelines.⁶⁷ United States Sentencing Guidelines § 1B1.3(a)(1) states that, unless otherwise specified, criminal acts can give rise to a sentencing enhancement in two circumstances: (1) when the defendant personally “committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused” those acts; or (2) “in the case of a jointly undertaken criminal activity,”⁶⁸ when another person committed a reasonably foreseeable act “in furtherance of the jointly undertaken criminal activity.”⁶⁹ Under United States Sentencing Guidelines § 1B1.3(a)(1), an offender convicted of possession under 21 U.S.C. § 841(a)(1) should not be held responsible for acts the offender did not personally “commit[], aid[], abet[], counsel[], command[], induce[], procure[], or willfully cause[].”⁷⁰ This section requires that, outside of a criminal conspiracy, the defendant must be in some way personally involved in the relevant conduct that gives rise to the sentencing enhancement.⁷¹

D. Relevant United States Sentencing Guidelines § 2D1.1(b)(5) Cases

United States v. Serfass was an important case in the Fifth Circuit because of its interpretation of a specific guideline enhancement for possession of imported methamphetamine.⁷² The Fifth Circuit’s *Serfass* decision expanded upon the circuit’s *Rodriguez* decision where the Fifth Circuit held that the importation enhancement applies regardless of the fact that the defendant did not have possession of the methamphetamine until after importation.⁷³ In other words, the defendant in *Rodriguez* received an enhanced sentence although the defendant was not directly involved in the importation of the methamphetamine.⁷⁴ The court reasoned that “[t]he scope of actions that ‘involve’ the importation of drugs is larger than the scope of those that constitute the *actual* importation.”⁷⁵ In *Rodriguez*, unlike *Serfass*, it was found there was sufficient evidence to support the conclusion that the defendant in fact had knowledge that the methamphetamine was imported from Mexico although she was not directly involved.⁷⁶

In *United States v. Serfass*, the Fifth Circuit went a step further in expanding the scope of relevant conduct in regard to importation of

67. U.S. SENT’G GUIDELINES MANUAL § 1B1.3(a)(1) (U.S. SENT’G COMM’N 2018).

68. *Id.*

69. *Id.* at cmt. n.3(A).

70. U.S. SENT’G GUIDELINES MANUAL § 1B1.3(a)(1)(A) (U.S. SENT’G COMM’N 2018).

71. *Id.*

72. *United States v. Serfass*, 684 F.3d 548, 551 (5th Cir. 2012); Off. of Gen. Couns. U.S. Sent’g Comm’n, *Selected Post-Booker and Guideline Application Decisions for the Fifth Circuit*, U.S. SENT’G COMM’N (July 2015), <https://www.ussc.gov/sites/default/files/pdf/training/case-law-documents/circuit-5th.pdf>.

73. *United States v. Rodriguez*, 666 F.3d 944, 946 (5th Cir. 2012).

74. *Id.*

75. *Id.* (emphasis added).

76. *Id.* at 947; *Serfass*, 684 F.3d at 550.

methamphetamine and the degree of involvement required for § 2D1.1(b)(5) to apply.⁷⁷ In *Serfass*, the defendant pleaded guilty to a violation of 21 U.S.C. § 841(a)(1), possessing methamphetamine with intent to distribute.⁷⁸ The defendant then received a two-level sentencing enhancement, under United States Sentencing Guidelines § 2D1.1(b)(5), after it was proven by a preponderance of the evidence that the defendant possessed methamphetamine and imported it into the United States.⁷⁹ Unless the sentence imposed is above the statutory maximum, these factual findings must only be determined by the court by a preponderance of the evidence.⁸⁰ Although the court found that the defendant had no knowledge that the methamphetamine was imported, the Fifth Circuit held that the sentencing enhancement for importation of amphetamine or methamphetamine does not have a scienter requirement, and that the importation enhancement “applies irrespective of whether the defendant knew that the possessed methamphetamine had been unlawfully imported.”⁸¹

Black’s Law Dictionary defines “scienter” as “[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act’s having been done knowingly, esp. as a ground for civil damages or criminal punishment.”⁸² In other words, scienter is a higher knowledge requirement that subjects one to criminal responsibility or responsibility for civil damages.⁸³ The Fifth Circuit reasoned that the enhancement for an offense involving the importation of the finished product of a controlled substance does not have a scienter requirement because the scienter requirement only applies if the ingredients used to make the methamphetamine were imported.⁸⁴

The Fifth Circuit reached its decision by applying English grammar rules to the Guidelines, and based its holding on the fact that the Guidelines use the plural verb “were,” which matches the plural noun, “chemicals.”⁸⁵ The court failed to consider the possibility that the United States Sentencing Commission chose the plural verb “were” to agree with the compound single and plural subject “methamphetamine . . . or . . . listed chemicals.”⁸⁶ The court also did not mention that courts generally apply a personal involvement requirement to all enhancements under the Guidelines, unless otherwise explicitly stated.⁸⁷ As mentioned previously, United States Sentencing

77. *Serfass*, 684 F.3d at 550–51.

78. *Id.* at 549.

79. *Id.*

80. *See* *Apprendi v. New Jersey*, 530 U.S. 466, 495 (2000).

81. *Serfass*, 684 F.3d at 550.

82. *Scienter*, BLACK’S LAW DICTIONARY (11th ed. 2019).

83. *See id.*

84. *Serfass*, 684 F.3d at 551.

85. *Id.*

86. *Id.*; U.S. SENT’G GUIDELINES MANUAL § 2D1.1(b)(5)(A) (U.S. SENT’G COMM’N 2018).

87. U.S. SENT’G GUIDELINES MANUAL § 1B1.3(a)(1) (U.S. SENT’G COMM’N 2018).

Guidelines § 1B1.3(a)(1) is the Guideline section that imposes the personal involvement requirement, which applies to United States Sentencing Guidelines § 2D1.1(b)(5), and should control the interpretation and application of the Guideline.⁸⁸ The Fifth Circuit did not mention United States Sentencing Guidelines § 1B1.3(a)(1), the purpose behind United States Sentencing Guidelines § 2D1.1(b)(5), or Amendment 555 because it quickly moved away from the rule of lenity by simply making a conclusory statement that the Guideline is unambiguous, yet somehow subject to debate.⁸⁹

In summary, a quick six months after the Fifth Circuit in *Rodriguez* held that a criminal defendant can receive the importation enhancement even if they receive the methamphetamine after it was imported, the Fifth Circuit held that the sentencing enhancement for importation of amphetamine or methamphetamine does not have a scienter requirement.⁹⁰ In practice, over time, the *Serfass* decision has effectively erased the knowledge requirement entirely.

E. Other Circuits Have Failed to Adopt the Same Reasoning and Conclusion that the Fifth Circuit Reached in United States v. Serfass

Other circuits have been hesitant to follow *United States v. Serfass*. For example, in *United States v. Biao Huang*, the defendant was convicted for conspiracy and possession with intent to distribute more than 900 grams of methamphetamine and was sentenced to 135 months imprisonment.⁹¹ There, the Ninth Circuit acknowledged that the issue concerning whether § 2D1.1(b)(5) requires the defendant's knowledge that the methamphetamine was or has been imported is an "open question."⁹² However, the Ninth Circuit did not expand on this issue because the defendant in that case knew the source of the methamphetamine.⁹³ Moreover, in *United States v. Job*, the defendant was convicted of conspiracy to distribute methamphetamine and possession of methamphetamine with intent to distribute.⁹⁴ The Ninth Circuit reinstated the holding of *Biao Huang*, which held that United States Sentencing Guidelines § 2D1.1(b)(5) does not require the government to show that the defendant *themselves personally imported* the drugs.⁹⁵ Although the Guidelines do not require that the defendant is the one who actually imported the finished-product methamphetamine, the Ninth Circuit refused to accept the idea that the two-level enhancement would apply if it

88. *Id.*; U.S. SENT'G GUIDELINES MANUAL § 2D1.1(b)(5) (U.S. SENT'G COMM'N 2018).

89. *Serfass*, 684 F.3d at 553.

90. *Id.* at 551; *United States v. Rodriguez*, 666 F.3d 944, 946 (5th Cir. 2012); Office of Gen. Couns. U.S. Sent'g Comm'n, *supra* note 64.

91. *United States v. Biao Huang*, 687 F.3d 1197, 1200 (9th Cir. 2012).

92. *Id.* at 1206.

93. *Id.*

94. *United States v. Job*, 871 F.3d 852, 857 (9th Cir. 2017).

95. *Id.* at 871.

was not shown by a preponderance of the evidence that the defendant had knowledge that the methamphetamine was imported.⁹⁶ Specifically, the Ninth Circuit stated: “We decline to adopt the Fifth Circuit’s conclusion here”⁹⁷ In *United States v. Job*, it was shown by a preponderance of the evidence that the defendant had knowledge that the methamphetamine was imported, but the Ninth Circuit held that this requirement was necessary and required in order for the two-level enhancement to apply.⁹⁸

Most recently, in *United States v. Hernandez-Astudillo*, the Eleventh Circuit held that in order to receive the two-level enhancement for importation, there must be sufficient evidence to support the conclusion that the defendant knew of the importation.⁹⁹ Specifically, the Eleventh Circuit found that the defendant’s statement that a cousin mentioned that methamphetamine powder was imported from Mexico was sufficient to “‘indicate[] that the Defendant was aware’ of the importation.”¹⁰⁰ There, the prosecution also had additional sufficient information about the defendant to support the conclusion that it was “more probable than not that the methamphetamine was imported from Mexico and that [the defendant] knew of the importation.”¹⁰¹ For the Eleventh Circuit, the knowledge of importation was crucial for the application of the United States Sentencing Guidelines § 2D1.1(b)(5).¹⁰²

To date, the Fifth Circuit is the only Circuit that has held that the scienter requirement does not apply to the importation of finished-product methamphetamine under the United States Sentencing Guidelines § 2D1.1(b)(5) two-level enhancement.

III. ANALYSIS

This Analysis section will first discuss the beginning fact that the general personal involvement requirement of relevant conduct should automatically apply to United States Sentencing Guidelines § 2D1.1(b)(5), as it applies to all Guidelines unless otherwise stated.¹⁰³ Then, this section will analyze United States Sentencing Guidelines § 2D1.1(b)(5) through the applicable statutory interpretation canons to provide a correct reading of United States Sentencing Guidelines § 2D1.1(b)(5), which includes a scienter requirement for importation of finished-product methamphetamine. Lastly, this section will propose an amendment to the United States Sentencing

96. *Id.* at 871–72.

97. *Id.* at 871.

98. *Id.* at 872.

99. *United States v. Hernandez-Astudillo*, 777 F. App’x 374, 377 (11th Cir. 2019).

100. *Id.* at 376 (quoting the district court).

101. *Id.* at 376–77.

102. *Id.*

103. U.S. SENT’G GUIDELINES MANUAL § 1B1.3(a)(1) (U.S. SENT’G COMM’N 2018).

Guidelines in order to remedy current issues and address the multiple surrounding policy concerns that also support this conclusion.

*A. The General United States Sentencing Guidelines § 1B1.3(a)(1)
Personal Involvement Requirement Automatically Applies to United States
Sentencing Guidelines § 2D1.1(b)(5)*

There is a general personal involvement requirement for sentencing enhancements which should apply to United States Sentencing Guidelines § 2D1.1(b)(5) by default.¹⁰⁴ In general, the United States Sentencing Guidelines follow the general principles of criminal law in that they require a knowledge or scienter requirement to most enhancements, unless otherwise stated.¹⁰⁵ In the case of § 2D1.1(b)(5), the sentencing committee has not added a note to clarify that the personal knowledge requirement should not apply, which implies that the personal knowledge requirement should automatically apply, just as it does to the other enhancements and departures.¹⁰⁶

In *United States v. Evbuomwan*, the Fifth Circuit held that, in order for a defendant to be held accountable for the actions of another, the prosecutor must show that the defendant “agreed to jointly undertake criminal activities with [a] third person, and that the particular crime was within the scope of that agreement.”¹⁰⁷ The jointly undertaken criminal activity that the *Evbuomwan* court was referring to are conspiracy charges, which are ordinarily the only charges that hold a defendant responsible for the acts of another.¹⁰⁸ The focus of this Comment is limited to those who are convicted of possession of methamphetamine with intent to distribute and does not extend to those convicted of a conspiracy drug offense. Under the principles underpinning the *Evbuomwan* holding, defendants convicted of possession of methamphetamine under 21 U.S.C. § 841(a)(1) should not receive sentencing enhancements for the acts of another—for example, someone else importing methamphetamine.¹⁰⁹

As mentioned above, United States Sentencing Guidelines § 1B1.3(a)(1) requires that, generally, a defendant should only receive enhancements and departures for conduct that the defendant personally “commit[s], aid[s], abet[s], counsel[s], command[s], induce[s], procure[s], or willfully cause[s].”¹¹⁰ This general knowledge or personal involvement requirement applies, “[u]nless otherwise specified,” to: “(i) [T]he base

104. *Id.*

105. *Id.*

106. *Id.*

107. *United States v. Evbuomwan*, 992 F.2d 70, 74 (5th Cir. 1993).

108. *See id.*

109. *See id.*; *United States v. Serfass*, 684 F.3d 548 (5th Cir. 2012).

110. U.S. SENT’G GUIDELINES MANUAL § 1B1.3(a)(1) (U.S. SENT’G COMM’N 2018).

offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three.”¹¹¹ In some cases, the Guidelines Committee has “otherwise specified” and disposed of the personal involvement requirement for specific sentencing enhancements by clarifying in the Commentary to Guidelines that the knowledge requirement does not apply to a specific enhancement.¹¹²

An example of the Guidelines Committee exercising this power to dispose of the general personal involvement requirement lies in United States Sentencing Guidelines § 2K2.1(b)(4), which allows for a two- or four-level increase if any firearm was stolen or “had an . . . obliterated serial number.”¹¹³ With this enhancement, the Committee added a section in the application notes to address the knowledge requirement.¹¹⁴ The note states: “Subsection (b)(4) applies *regardless* of whether the defendant *knew or had reason* to believe that the firearm was stolen or had an altered or obliterated serial number.”¹¹⁵ In contrast, the Sentencing Committee has added no such note to § 2D1.1(b)(5).¹¹⁶ Since the Committee has not added a section in the application notes to clarify that the personal involvement requirement of United States Sentencing Guidelines § 1B1.3(a)(1) does not apply to the importation enhancement, the presumption is that this general personal involvement requirement applies automatically.¹¹⁷

B. A Correct Reading of United States Sentencing Guidelines § 2D1.1(b)(5) Includes a Scienter Requirement

Under a correct statutory interpretation analysis, United States Sentencing Guidelines § 2D1.1(b)(5) includes a scienter requirement for the importation of finished-product methamphetamine. United States Sentencing Guidelines § 2D1.1(b)(5) allows for a two-level enhancement to the base level offense used to determine sentencing if “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.”¹¹⁸ In *United States v. Serfass*, the Fifth Circuit held that United States Sentencing Guidelines § 2D1.1(b)(5) was not ambiguous and applied the “basic rules of English grammar” to interpret the sentencing guideline.¹¹⁹ Because the Guidelines are treated as a statute,

111. *Id.* § 1B1.3(a).

112. *Id.*; U.S. SENT’G GUIDELINES MANUAL § 2K2.1(b)(4).

113. *Id.*

114. *Id.*

115. *Id.* § 2K2.1(b)(4) cmt. 8.B (emphasis added).

116. *Id.* § 2D1.1(b)(5).

117. *Id.*; *Id.* § 1B1.3(a)(1).

118. *Id.* § 2D1.1(b)(5).

119. *United States v. Serfass*, 684 F.3d 548, 551 (5th Cir. 2012).

statutory analysis is helpful to resolve the ambiguity present in § 2D1.1(b)(5) and demonstrates that this Guideline includes a scienter requirement for importation of finished-product methamphetamine.

1. Plain Meaning Rule

Statutory interpretation principles first require a look into the “plain meaning” of a statute.¹²⁰ If the plain meaning of a statute is ambiguous from the language of the statute alone, then the additional textual and substantive canons of statutory interpretation are employed to attempt to understand the meaning of the statute.¹²¹ In *Caminetti v. United States*, the Supreme Court established that “the meaning of a statute must, in the first instance, be sought in the language in which the act is framed.”¹²² The Court went on to say that if the language of a statute “is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.”¹²³ Therefore, the interpretation of a statute begins at the text of the statute itself.¹²⁴

The plain language of United States Sentencing Guidelines § 2D1.1(b)(5) is unambiguous with respect to its knowledge requirement because the drafters did not split the sections of the Guideline by inserting a comma or semicolon to distinguish them from one another.¹²⁵ Clearly, a knowledge requirement exists within the Guideline itself: “[T]he 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*.”¹²⁶ In *United States v. Serfass*, the Fifth Circuit held that the Guideline is unambiguous and the knowledge requirement only applies “to such contraband that was *manufactured* from one or more of the listed *chemicals*.”¹²⁷ This decision was based solely on the use of the verb “were” in the importation enhancement guideline.¹²⁸ This logic is improper and unsound. The Fifth Circuit was correct to say that the importation enhancement is unambiguous; however, the importation enhancement is unambiguous because it contains a scienter requirement that applies to the entirety of the Guideline. Thus, a plain language reading of § 2D1.1(b)(5) supports the conclusion that the scienter requirement applies to both sections of the Guideline because the parts are not split by a comma or a semicolon to distinguish them and the phrase “the defendant knew were

120. *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

121. *Id.* at 485–86.

122. *Id.* at 485.

123. *Id.*

124. *Id.*

125. U.S. SENT’G GUIDELINES MANUAL § 2D1.1(b)(5) (U.S. SENT’G COMM’N 2018).

126. *Id.* (emphasis added).

127. *United States v. Serfass*, 684 F.3d 548, 551 (5th Cir. 2012) (emphasis added).

128. *Id.*

imported” applies to “amphetamine or methamphetamine . . . or . . . listed chemicals” would require a plural verb.¹²⁹

However, under the current interpretation of United States Sentencing Guidelines § 2D1.1(b)(5) in the Fifth Circuit, the knowledge requirement apparent in this Guideline has been effectively erased because “importation” of methamphetamine can be proven by a preponderance of the evidence from the purity of the methamphetamine alone.¹³⁰ In practice, defendants in the Fifth Circuit are found and arrested with finished-product methamphetamine and the courts do not inquire into whether the methamphetamine was produced outside of the United States and then imported, or whether the methamphetamine was manufactured inside of the United States from imported chemicals.¹³¹ There is no mechanism to test if the chemicals used to make the methamphetamine were imported or if the finished-product methamphetamine itself was imported.¹³² Practically speaking, when a defendant is caught with methamphetamine, the methamphetamine is tested for purity, and then importation can be implied if an FBI agent determines that the quantity and purity of the methamphetamine alone suggest that the methamphetamine “more likely than not” was imported from Mexico.¹³³ The Fifth Circuit has held that the inquiry stops there.¹³⁴ Given this procedure, the knowledge requirement for the importation enhancement has been effectively erased in the Fifth Circuit.

Moreover, even if the plain language of the importation enhancement guideline were ambiguous, the canons of statutory construction also support the conclusion that there is a scienter requirement which applies to both the importation of finished-product methamphetamine and the importation of chemicals or ingredients used to make methamphetamine.

2. *Applicable Canons of Construction*

Within the rules of statutory interpretation, semantic canons of construction should be utilized after the plain language of the statute is analyzed and determined to be ambiguous.¹³⁵ Under the rules of statutory interpretation, the rules of grammar govern the interpretation of a statute “unless they contradict legislative intent or purpose.”¹³⁶ This legislative

129. See Brief of Appellant, *United States v. Serfass*, 684 F.3d 548 (5th Cir. 2012) (No. 11-10719); GREGG REFERENCE MANUAL: A MANUAL OF STYLE, GRAMMAR, USAGE, AND FORMATTING 297 (William A. Sabin ed. 11th ed., 2011).

130. *United States v. Cadena*, 642 F. App’x 306, 307 (5th Cir. 2016).

131. See *id.*

132. *Id.*; *Serfass*, 684 F.3d at 553–54.

133. *Cadena*, 642 F. App’x at 307.

134. *Id.*

135. *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

136. ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 140 (2012).

purpose or intent should be clear and included in the text of the enactment.¹³⁷ Arguably, in the aforementioned United States Sentencing Guidelines § 1B1.3(a), the United States Sentencing Commission made it clear that, with exception to conspiracy convictions, the sentencing enhancements in general only apply to relevant conduct that the offender was personally involved in or had knowledge of.¹³⁸ Even if it is conceded that the grammatical structure of United States Sentencing Guidelines § 2D1.1(b)(5) suggests that the knowledge requirement only applies if chemicals used to make the methamphetamine were imported, this interpretation would directly contradict the legislative intent and purpose behind sentencing enhancements explicitly stated in United States Sentencing Guidelines § 1B1.3(a), which provides a personal knowledge requirement for everything except conspiracy offenses.¹³⁹

United States Sentencing Guidelines § 2D1.1(b)(5) aims to target both the importation of methamphetamine and the importation of ingredients used to manufacture methamphetamine.¹⁴⁰ Given the structure of § 2D1.1(b)(5), it is likely that the Sentencing Committee placed the verb “were” in its place in the Guidelines to “agree with ‘amphetamine or methamphetamine . . . or . . . listed chemicals,’ taken as a whole” and not just the “chemicals” portion of the sentence.¹⁴¹ The basic rules of English grammar support this reading of the Guideline: “If the subject is made up of both singular and plural words connected by or, either . . . or, neither . . . nor, or not only . . . but also, the verb agrees with the nearer part of the subject.”¹⁴² In the case of United States Sentencing Guidelines § 2D1.1(b)(5), the subject is made up of singular and plural words that are connected by “or,” so the use of the verb “were” is grammatically correct to apply to both “amphetamine or methamphetamine . . . or . . . listed chemicals.”¹⁴³ The structure of the Guideline itself suggests that the Sentencing Commission intended that the scienter requirement apply to both the importation of chemicals used to make methamphetamine as well as the importation of finished-product methamphetamine.¹⁴⁴ If the Sentencing Commission intended to require different knowledge requirements for the two subparts of United States Sentencing Guidelines § 2D1.1(b)(5), then they could have separated the finished-product methamphetamine into its own guideline or utilized a

137. *Id.*

138. U.S. SENT’G GUIDELINES MANUAL § 1B1.3(a)(1) (U.S. SENT’G COMM’N 2018).

139. *Id.*; *Id.* § 2D1.1(b)(5).

140. *Id.* § 2D1.1(b)(5).

141. Initial Brief of Appellant Criminal Appeal at 17, *United States v. Rico*, 864 F.3d 381 (5th Cir. 2017) (No. 16-10235, 2016 WL5787370 at *17).

142. *Id.* at *18 (citing GREGG REFERENCE MANUAL, *supra* note 129, at 297–98).

143. U.S. SENT’G GUIDELINES MANUAL § 2D1.1(b)(5) (U.S. SENT’G COMM’N 2018); *see* Initial Brief of Appellant, *supra* note 138, at *17–18.

144. *See* Brief of Appellant, *United States v. Serfass*, 684 F.3d 548 (5th Cir. 2012) (No. 11-10719).

comma or semicolon to split the subparts of the Guideline into two separate parts with different scienter requirements.¹⁴⁵

a. The Rule of the Last Antecedent and Its Exceptions

The rule that the Fifth Circuit should have referenced to support their conclusion is the rule of last antecedent. The rule of last antecedent should have been addressed in *United States v. Serfass* because the issue the court was trying to decide was whether the qualifier—“that the defendant knew were imported”—applied to both of the subjects or only the last antecedent of the sentence.¹⁴⁶ While the Fifth Circuit was correct that courts presume the ordinary rules of grammar and punctuation govern a statute, the court was incorrect that the inquiry stops there.¹⁴⁷ The rule of last antecedent stands for the principle that “referential and qualifying words refer only to the last antecedent, unless contrary to the statute’s punctuation or policy.”¹⁴⁸

In regards to punctuation, there is no such separation of the two items contained in United States Sentencing Guidelines § 2D1.1(b)(5)—“the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully.”¹⁴⁹ Through the grammatical canon of the rule of last antecedent, this lack of separation—with a semicolon or otherwise—between the two subjects results in an ambiguity within United States Sentencing Guidelines § 2D1.1(b)(5) because there is more than one way for the guideline to be interpreted.¹⁵⁰

For example, in *Commonwealth v. Kelly*, the Supreme Court of Massachusetts confronted a similar issue as the one contained in United States Sentencing Guidelines § 2D1.1(b)(5).¹⁵¹ There, the statute was one that contained a qualification, separated by a comma, at the end of the statute.¹⁵² Specifically, the statute in that case provided for a condition on alcohol licenses:

[T]hat no sale of spirituous or intoxicating liquor shall be made between the hours of twelve at night and six in the morning; nor during the Lord’s day, except that if the licensee is also licensed as

145. *See id.*

146. *United States v. Serfass*, 684 F.3d 548, 550 (5th Cir. 2012).

147. *Id.*; see WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 266 (2d ed. 2006).

148. ESKRIDGE, *supra* note 144.

149. U.S. SENT’G GUIDELINES MANUAL § 2D1.1(b)(5) (U.S. SENT’G COMM’N 2018).

150. ESKRIDGE, *supra* note 147.

151. *See Commonwealth v. Kelly*, 58 N.E. 691 (1900).

152. *Id.* at 691–92.

an innholder, he may supply such liquor to guests who have resorted to his house for food or lodgings.¹⁵³

The court held the rule of the last antecedent supported the conclusion that the proviso (“except that if the licensee is also licensed as an innholder, he may supply such liquor to guests who have resorted to his house for food or lodgings”) only modifies the latter part of the statute (“nor during the Lord’s day”).¹⁵⁴ The *Kelly* court reached this decision by noting that the semicolon separating the two items was evidence that the proviso set off by the comma only applied to the last antecedent.¹⁵⁵

Ultimately, the majority of courts will consider the role of punctuation in a statute “for what it is worth” but will abandon the rule of the last antecedent if strictly following the rule “would yield an absurd result or undercut the statutory goal.”¹⁵⁶ As a result, one must then look to the applicable substantive canons in an attempt to resolve the ambiguity behind the statute and its knowledge requirement by finding the statutory goal of the Guideline.¹⁵⁷ The statutory goal of the Guideline should then be compared to the current state of application of the Guideline, and one should determine if that application is undercutting the goal and leading to results that undercut the statutory goal of the Guideline. As addressed in the following sections, the current application of United States Sentencing Guidelines § 2D1.1(b)(5) in the Fifth Circuit is clearly undercutting the original statutory goal of the Guideline.¹⁵⁸

b. The Rule of Lenity and the History of United States Sentencing Guidelines § 2D1.1(b)(5)

Additionally, the rule of lenity is a canon of statutory construction that instructs that courts should strictly construe criminal statutes to criminalize or punish the least amount of conduct.¹⁵⁹ The rule of lenity “means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.”¹⁶⁰ This rule only applies “if, after considering text, structure, history, and purpose, there remains a ‘grievous ambiguity or uncertainty in a statute’ [imposing a criminal

153. *Id.* at 691.

154. *Id.*; ESKRIDGE, *supra* note 147.

155. *Kelly*, 58 N.E. at 691.

156. ESKRIDGE, *supra* note 147 (first citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242–43 (1989); then citing Raymond Marcin, *Punctuation and the Interpretation of Statutes*, 9 CONN. L. REV. 227 (1997)).

157. *Id.*

158. *See United States v. Serfass*, 684 F.3d 548, 551 (5th Cir. 2012).

159. *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

160. *Id.* (quoting *Ladner v. United States*, 358 U.S. 169, 179 (1958)).

penalty], such that the [C]ourt must simply ‘guess as to what Congress intended.’”¹⁶¹ As such, a court must first look to the intent behind the enactment of United States Sentencing Guidelines § 2D1.1(b)(5) to analyze the history and purpose of the enhancement.¹⁶²

United States Sentencing Guidelines § 2D1.1(b)(5) was added in 1997 as part of multipart Amendment 555 in response to the Comprehensive Methamphetamine Control Act of 1996.¹⁶³ Amendment 555 briefly discusses the purpose behind the addition of United States Sentencing Guidelines § 2D1.1(b)(5).¹⁶⁴ This amendment states: “In response to evidence of a recent, substantial increase in the importation of methamphetamine and precursor chemicals used to manufacture methamphetamine, the amendment provides an enhancement of two levels directed *at such activity*.”¹⁶⁵ Unfortunately, the text of this amendment does not provide any specific guidance regarding the scienter or knowledge requirement of importation.¹⁶⁶

However, it is clear from the text of the amendment that the two-level enhancement was added with a desire to punish the *importation* of methamphetamine *and* chemicals used to make methamphetamine.¹⁶⁷ This intent is evidenced by the fact that the amendment is “directed at such activity”—importation of methamphetamine.¹⁶⁸ This implies that the chemicals and the finished-product methamphetamine should be treated in the same manner because the enhancement and amendment are directed at the activity of importation.¹⁶⁹ The amendment mentions no specific concern between importing chemicals used to make methamphetamine or the finished-product methamphetamine.¹⁷⁰

Further, the amendment states that the two-level enhancement is “directed at such *activity*.”¹⁷¹ The current application of this enhancement in the Fifth Circuit is not aimed at the *activity* of importation because it is applied to offenders who have no knowledge that the finished-product methamphetamine they possess was imported.¹⁷² With this in mind, the two-level enhancement cannot be said to deter defendants from the importation of finished-product methamphetamine, which Amendment 555

161. Barber v. Thomas, 560 U.S. 474, 488 (2010) (internal citations omitted).

162. See *id.*

163. Kevin Lerman, *Couriers, Not Kingpins: Toward a More Just Federal Sentencing Regime for Defendants Who Deliver Drugs*, 7 U.C. IRVINE L. REV. 679, 714 (2017).

164. U.S. SENT’G GUIDELINES MANUAL app. C, vol. I, amend. 555 (U.S. SENT’G COMM’N 2018).

165. *Id.* (emphasis added).

166. *Id.*

167. See *id.* (emphasis added).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. United States v. Serfass, 684 F.3d 548, 554 (5th Cir. 2012).

states as its purpose, because someone cannot be deterred from participating in or performing an *activity* that they lack knowledge of.¹⁷³

As mentioned, United States Sentencing Guidelines § 2D1.1(b)(5) was added to the Sentencing Guidelines as part of Amendment 555, which was the product of the Comprehensive Methamphetamine Control Act of 1996.¹⁷⁴ Under the rule of lenity, a glance into the purposes behind the Comprehensive Methamphetamine Control Act sheds light on the purpose and goals behind Amendment 555 and United States Sentencing Guidelines § 2D1.1(b)(5).¹⁷⁵ The Comprehensive Methamphetamine Control Act of 1996 ordered the United States Sentencing Commission to:

Review and amend its guidelines and its policy statements to provide for increased penalties for unlawful manufacturing, *importing*, exporting, and trafficking of methamphetamine, and other similar offenses, *including unlawful possession with intent to commit any of those offenses*, and attempt and conspiracy to commit any of those offenses.¹⁷⁶

This language suggests that the Comprehensive Methamphetamine Control Act of 1996, as well as Amendment 555, was aimed at punishing the act of importation of methamphetamine or intent to commit importation of methamphetamine.¹⁷⁷ With this aim in mind, it is illogical to punish those who were not involved in or aware of the importation of the methamphetamine that they possess.¹⁷⁸

C. The Most Effective Way to Address This Issue Is a Proposed Amendment to Clarify the Correct Reading of United States Sentencing Guidelines § 2D1.1(b)(5)

Because the United States Supreme Court will not grant certiorari to cases challenging the Guidelines for unconstitutional vagueness or due process violations, the most effective way to ensure uniformity and limit ambiguity is to amend the Sentencing Guidelines themselves.¹⁷⁹ According to the United States Sentencing Commission's website, "the Commission reviews and refines the guidelines in light of congressional action, decisions from courts of appeals, sentencing-related research, and input from the criminal justice community. There have been over 800 amendments since the

173. See U.S. SENT'G GUIDELINES MANUAL app. C, vol. I, amend. 555 (U.S. SENT'G COMM'N 2018).

174. Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237, 110 Stat. 3099.

175. See SCALIA, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 140 (Thomson/West 2012).

176. Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237, § 301(a), 110 Stat. 3099 (emphasis added).

177. See *id.*

178. See Pub. L. No. 104-237, 110 Stat. 3099.

179. See *Beckles v. United States*, 137 S. Ct. 886, 897 (2017).

guidelines went into effect in 1987.”¹⁸⁰ This number suggests that the Guidelines are amended with regularity when a specific issue with the application of the Guidelines presents itself to the Commission or the Commission *sua sponte* notices an issue within the Guidelines.¹⁸¹ The amendment process requires the “affirmative vote in a public meeting of a majority (and not less than three) of the voting members then serving. Any such amendment shall be adopted only after notice and reasonable opportunity for public comment.”¹⁸²

1. Amendment Language

There are two possible methods to effectively amend the existing Guideline language. The most effective way for the amendment to be structured would be to add language to the commentary section following United States Sentencing Guidelines § 2D1.1(b)(5) to avoid confusion and ensure that the section is only applied if the defendant knew, or had reason to know, that the offense involved methamphetamine that was imported into the United States. Although the personal involvement requirement applies to all enhancements, unless otherwise stated, this addition of a knowledge requirement to the commentary following the enhancement would provide an additional layer of protection for defendants in the Fifth Circuit.¹⁸³ As all amendments to the United States Sentencing Guidelines, the amendment will also include a section entitled “reason for amendment.”¹⁸⁴ This reason for amendment section will explain the circuit split between the Fifth, Ninth, and Eleventh Circuits surrounding United States Sentencing Guidelines § 2D1.1(b)(5), and the need to resolve the potential ambiguities within the Guideline in its current state.

The second alternative solution to amend the Guideline would be to add an amendment separating the two sections (methamphetamine and imported ingredients used in the manufacture of methamphetamine) and specify that the scienter requirement applies to both subjects. However, this is not the most effective method because, as previously mentioned, a personal involvement requirement applies to all enhancements generally.¹⁸⁵ Additionally, the separation of the subjects and repeating the knowledge

180. *Polycymaking*, U.S. SENT’G COMM’N, <https://www.uscc.gov/polycymaking> (last visited Dec. 14, 2020).

181. *See id.*

182. *Rules of Practice and Procedure*, U.S. SENT’G COMM’N, <https://www.uscc.gov/about/rules-practice-and-procedure> (last visited Dec. 14, 2020).

183. *See* U.S. SENT’G GUIDELINES MANUAL § 1B1.3(a)(1) (U.S. SENT’G COMM’N 2018).

184. *See Amendments to the Sentencing Guidelines*, U.S. SENT’G COMM’N (Apr. 30, 2018), https://www.uscc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20180430_RF.pdf.

185. *See* U.S. SENT’G GUIDELINES MANUAL § 1B1.3(a)(1).

requirement for both subjects would be repetitive and cumulative,¹⁸⁶ therefore, the previously mentioned amendment is the best option in this case.

The proposed amendment would also add a definition for importation. Currently, United States Sentencing Guidelines § 2D1.1(b)(5) does not contain a definition of importation.¹⁸⁷ What exactly does importation mean? It is not defined in this specific guideline or anywhere in the United States Sentencing Guidelines. Is importation limited to importation into specific countries or does it include importation from any country outside of the United States? The amendment would draw this definition from the Comprehensive Methamphetamine Control Act of 1996, which was directed at the “movement of methamphetamine and methamphetamine precursors into the United States.”¹⁸⁸ As such, the definition of importation would be limited to the importation from outside of the United States into the United States to further clarify the reach of the importation guideline and prevent future ambiguities.

The proposed amendment would also include guidance on how importation should be proven by a preponderance of the evidence. For example, currently, methamphetamine is tested and importation can be implied from purity alone.¹⁸⁹ There is concern that this is not enough to imply importation from outside of the United States.¹⁹⁰ The thought behind this rationale is that the more pure the methamphetamine is, the more likely a defendant imported it into the United States; however, the *Cadena* opinion provides no additional information supporting this conclusion, except the agent’s “training and experience.”¹⁹¹ The Fifth Circuit has held that a defendant’s comment that he was dealing with the “cartel” was not enough to find importation by a preponderance of the evidence.¹⁹² Ideally, this proposed amendment would note that the defendant’s knowledge of importation should be evidenced by conversation or testimony from the defendant himself or the defendant’s involvement in the importation. High-purity methamphetamine is produced in the United States, as well as outside of the United States, and prosecutors should not be able to prove the act of importation by a preponderance of the evidence based on the purity level of the methamphetamine.¹⁹³ To provide uniformity across the circuits, it would be helpful for the Sentencing Commission to provide specific

186. *See id.*

187. *Id.* § 2D1.1(b)(5).

188. Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237, § 101, 110 Stat. 3099.

189. *United States v. Cadena*, 642 F. App’x 306, 307 (5th Cir. 2016).

190. *See United States v. Rivera-Mendoza*, 682 F.3d 730, 733–34 (8th Cir. 2012) (finding that the purity of the defendant’s methamphetamine in addition to phone calls out of the country established importation).

191. *Cadena*, 642 F. App’x at 307.

192. *United States v. Nimerfroh*, 716 F. App’x 311, 316 (5th Cir. 2018).

193. *See Cadena*, 642 F. App’x at 307.

information about the scienter requirement of the enhancement, as well as give specifics as to how the importation can be shown by a preponderance of the evidence. Testing the purity level of the methamphetamine should not be enough to show by a preponderance of the evidence that the methamphetamine was imported into the United States in the first place. To sufficiently show importation by a preponderance of the evidence, the prosecution should be required to do more than simply test the purity level of the methamphetamine. For example, the prosecution would have to employ other methods to sufficiently prove this fact, such as testimony from witnesses supporting the finding that the defendant knew the methamphetamine was coming from outside the United States, drug symbols on the methamphetamine to prove that the defendant knew the methamphetamine was coming from outside the United States, or the defendant's close personal involvement in the importation process to show that the defendant knew, by a preponderance of the evidence, that the methamphetamine was brought into the United States.

*D. There Are Also Multiple Policy Concerns that Support the Reading of a
Scienter Requirement into United States Sentencing Guidelines
§ 2D1.1(b)(5)*

Numerous policy concerns support the finding that the § 2D1.1(b)(5) importation enhancement should include a scienter requirement. First, the original purpose of the Sentencing Guidelines was to promote uniformity and predictability in sentencing. The current application of the § 2D1.1(b)(5) enhancement is creating disproportionate sentence lengths between criminal defendants within the Fifth Circuit and criminal defendants outside of the Fifth Circuit. Next, the issue of overcrowding and scarce resources in federal prisons has been an increasing concern in recent years. To combat this issue, the recent trend for lesser sentencing of nonviolent drug offenders supports the conclusion that nonviolent drug offenders should not be receiving longer sentences for importation that they had no knowledge of.¹⁹⁴ Lastly, this issue of imposing longer sentences for imported methamphetamine versus domestic methamphetamine can be paralleled to the long-existing issue of imposing longer sentences for crack cocaine versus powder cocaine. When the Fair Sentencing Act of 2010 and First Step Act of 2018 were adopted to address this problem with respect to cocaine, neither of these important bills addressed the issue with regards to methamphetamine. The time has come to realize the arbitrariness of imposing longer sentences on criminal defendants who possessed methamphetamine that was “imported,” especially those who

194. *Drug Sentencing Trends*, NAT'L CONF. OF STATE LEGISLATURES (July 30, 2016), <https://www.ncsl.org/research/civil-and-criminal-justice/drug-sentencing-trends.aspx>.

had no knowledge of the alleged importation, versus criminal defendants who possessed domestic methamphetamine.

1. The Original Purpose Underpinning the Creation of the Sentencing Guidelines Supports the Inclusion of a Scierter Requirement

The United States Sentencing Committee should add an amendment to United States Sentencing Guidelines § 2D1.1(b)(5) because the current application of the Sentencing Guidelines contradicts and impedes the purpose and goal of the United States Sentencing Guidelines. The federal Sentencing Guidelines were originally created to provide consistency and predictability to the federal sentencing system.¹⁹⁵ The commission created to draft these Guidelines was formed with the goals of “increas[ing] transparency, uniformity, and proportionality in sentencing.”¹⁹⁶ The underlying purpose of the Guidelines is for defendants to not be blindsided by the sentences and enhancements they receive.¹⁹⁷ An additional purpose of the Guidelines was to reduce the prior sentencing disparities across the nation.¹⁹⁸ Under the Fifth Circuit’s current application of the importation enhancement, the sentences of defendants outside of the Fifth Circuit are shorter on average than sentences that offenders receive within the Circuit for the same crime.¹⁹⁹ The sentencing disparities in the Fifth Circuit under the current application of United States Sentencing Guidelines § 2D1.1(b)(5) are directly contrary to the underlying reasons the Sentencing Guidelines were originally created. For this reason, United States Sentencing Guidelines § 2D1.1(b)(5) should be amended to reduce ambiguity and encourage uniformity in sentencing of drug offenders across the federal criminal system.

2. The Issue of Overcrowding in Federal Prisons Supports the Inclusion of a Scierter Requirement

The issues surrounding the application of United States Sentencing Guidelines § 2D1.1(b)(5) are part of a larger, national issue surrounding the sentences of drug offenders in the United States. During the Reagan administration in the 1980s, the War on Drugs resulted in an array of criminal reform bills that increased the length of sentencings for drug offenders.²⁰⁰ Although it was enacted a few years later, this era heavily influenced the

195. U.S. SENT’G GUIDELINES MANUAL § 1A1.3 (U.S. SENT’G COMM’N 2011).

196. *Dorsey v. United States*, 567 U.S. 260, 265 (2012).

197. See U.S. SENT’G GUIDELINES MANUAL § 1A1.3.

198. *Federal Sentencing: The Basics*, U.S. SENT’G COMM’N (Nov. 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201811_fed-sentencing-basics.pdf.

199. See *supra* text accompanying notes 2–5 (explaining the problems created by the current sentencing guidelines).

200. Beck, *supra* note 21, at 1018–19.

United States Sentencing Guidelines § 2D1.1(b)(5) bill. As previously noted, the Sentencing Commission enacted United States Sentencing Guidelines § 2D1.1(b)(5) in response to the Comprehensive Methamphetamine Control Act of 1996.²⁰¹ Over the past decade, however, there has been a recent trend towards decreasing lengths of sentences, especially for drug offenders, based on the large burden and scarce resources of the federal criminal justice system and facilities.²⁰² Specifically, “for the past several years, the Department of Justice . . . has identified prison overcrowding as a significant management issue.”²⁰³

There have been various forms of action taken to try to reduce the problem of lack of resources by reducing the lengths of criminal sentences, particularly for drug offenses.²⁰⁴ When prisons become overcrowded, the Bureau of Prisons struggles to safely operate and maintain federal prisons.²⁰⁵ In particular, the Legislature has passed several bills to allow for drug offenders to receive shorter sentences.²⁰⁶ With the recent trend of Congress decreasing the lengths of sentences for federal drug offenders, the United States Sentencing Commission should consider amending United States Sentencing Guidelines § 2D1.1(b)(5) to ensure that, across federal circuits, criminal offenders are not receiving longer sentences than necessary for the importation of methamphetamine—an act which they did not perform and had no knowledge of. In fact, the Congressional Research Service report from 2014 suggested that “policy makers might also consider whether they want to revise some of the policy changes that have been made over the past three decades that have contributed to the steadily increasing number of offenders being incarcerated.”²⁰⁷ The current application of the United States Sentencing Guidelines § 2D1.1(b)(5) enhancement is leading to an increased and unnecessary period of incarceration, and should be amended to reduce prison time for these nonviolent drug offenders. This amendment would not result in these offenders walking free. The offenders would still be required to serve a considerable amount of time in prison, depending on the amount of methamphetamine they possessed, their criminal history category, and the other factors that the Sentencing Guidelines consider when determining enhancements and departures. Of course, criminal defendants would still be

201. Kevin Lerman, *Couriers, Not Kingpins: Toward a More Just Federal Sentencing Regime for Defendants Who Deliver Drugs*, 7 U.C. IRVINE L. REV. 679, 714 n.178 (2017).

202. John Fitzgerald & Stephen E. Vance, *How Today's Prison Crisis Is Shaping Tomorrow's Federal Criminal Justice System*, FED. PROBATION (Sept. 2015), https://www.uscourts.gov/sites/default/files/79_2_6_0.pdf.

203. *Id.* at 24.

204. *Id.*

205. Nathan James, *The Federal Prison Population Buildup: Options for Congress*, CONG. RSCH. SERV. (May 20, 2016), <https://fas.org/sgp/crs/misc/R42937.pdf>.

206. These bills include the Smarter Sentencing Act of 2015, Fair Sentencing Act of 2010, and the Justice Safety Valve Act of 2015. Fitzgerald & Vance, *supra* note 202.

207. Nathan James, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options*, CONG. RSCH. SERV. (Apr. 15, 2014), <https://www.hsdl.org/?abstract&did=753072>.

required to serve time for their crimes. However, this amendment would result in them receiving sentences no longer than necessary for their criminal actions.

3. *Crack Cocaine v. Powder Cocaine; Domestic Methamphetamine v. Imported Methamphetamine*

The sentencing disparities between powder cocaine and crack cocaine, as well as the resulting racial and economic impacts, have been a topic of discussion for many years. In 2010, the Fair Sentencing Act of 2010 was signed into law by President Barack Obama, which made significant progress in reducing the disparities between “the amount of crack that will trigger these mandatory minimums and the amount of powder cocaine that will produce the same results.”²⁰⁸ This Act did not originally apply retroactively, however.²⁰⁹ Fortunately for cocaine drug offenders, this issue was addressed by the First Step Act, signed into law by President Trump in December of 2018, which made the provisions of the Fair Sentencing Act apply retroactively.²¹⁰ But, neither the Fair Sentencing Act of 2010 nor the First Step Act of 2018 address the sentencing disparities with respect to methamphetamine.²¹¹

A similar disparity exists between the guideline ranges for methamphetamine, methamphetamine (actual), and “ice.”²¹² Ice is defined as “a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.”²¹³ In short, methamphetamine with a higher purity level results in a higher sentencing range than the same quantity of methamphetamine with a lower purity does.²¹⁴

Coupled with the current application of United States Sentencing Guidelines § 2D1.1(b)(5) in the Fifth Circuit, the Fifth Circuit is effectively punishing possession of methamphetamine of a high purity level twice. The Fifth Circuit has held that the purity level of methamphetamine can prove, by

208. Kyle Graham, *Sorry Seems to be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765, 765 (2011).

209. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372; The Editorial Board, *At Long Last, A Measure of Justice for Some Drug Offenders*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/opinion/first-step-act-drug-offenders.html>.

210. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194; see *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/fsa/overview.jsp#sentencing_reforms (last visited Dec. 14, 2020).

211. See Fair Sentencing Act of 2010; First Step Act of 2018.

212. Graham, *supra* note 208, at 786.

213. U.S. SENT’G GUIDELINES MANUAL app. C, amend. 370 (U.S. SENT’G COMM’N 1991); U.S. SENT’G GUIDELINES MANUAL § 2D1.1(c) N.C. (U.S. SENT’G COMM’N 2010).

214. See Graham, *supra* note 208 (discussing past and current differences in sentencing ranges based on the purity level of the methamphetamine).

a preponderance of the evidence, that methamphetamine was imported.²¹⁵ Without a knowledge requirement, this enhancement imposes strict liability upon defendants and applies to high-purity methamphetamine.

To partially combat this arbitrary sentencing distinction between imported methamphetamine and domestic methamphetamine, the Sentencing Guidelines committee should add an amendment to § 2D1.1(b)(5) to clarify that the importation enhancement only applies to defendants who at least had knowledge of the importation of the methamphetamine. This amendment would also solve the additional policy concerns mentioned previously, such as the current sentencing disparities between the Fifth Circuit and the rest of the nation, and the problem of imposing longer-than-necessary sentences on nonviolent drug offenders who are needlessly spending additional time in prison for the actions of others that they were unaware of. The proposed amendment will additionally ensure that the application of the importation enhancement is targeted at the group of people who the authors of the amendment in 1997 sought to target—those individuals who are involved in the activity of importing methamphetamine into the United States.

IV. CONCLUSION

The Fifth Circuit's *United States v. Serfass* decision effectively eliminated the scienter requirement clearly present in United States Sentencing Guidelines § 2D1.1(b)(5). The issues resulting from this Fifth Circuit decision are complex and have serious, real-world consequences for many offenders under the jurisdiction of the Fifth Circuit. The current application of United States Sentencing Guidelines § 2D1.1(b)(5) in the Fifth Circuit has resulted in sentencing disparities across the nation and should be addressed and remedied. A correct reading of United States Sentencing Guidelines § 2D1.1(b)(5) restricts the application of the section to those defendants who were personally involved in the importation of the amphetamine or methamphetamine and those defendants who were aware that the methamphetamine they possessed was imported into the United States from an outside source. The rules of statutory interpretation, as well as the original purpose of United States Sentencing Guidelines § 2D1.1(b)(5), support this conclusion, which was reached by the Ninth and Eleventh Circuits. This proffered reading of United States Sentencing Guidelines § 2D1.1(b)(5) is further supported by the original purpose of the Sentencing Guidelines themselves, the issue of overcrowding in prisons, and the recent trend towards fair sentencing with regards to drug offenses. The answer to the issues surrounding the application of United States Sentencing Guidelines

215. *United States v. Cadena*, 642 F. App'x 306, 307 (5th Cir. 2016) (discussing how application of United States Sentencing Guidelines § 2D1.1(b)(5) was proven by a preponderance of evidence because an FBI agent, based on "his training and experience and [] conversations with the DEA," informed the probation officer "that the methamphetamine was more likely than not imported from Mexico").

§ 2D1.1(b)(5), created in the Fifth Circuit by *United States v. Serfass*, is relatively simple and achievable: The United States Sentencing Commission should respond and remedy this issue by amending United States Sentencing Guidelines § 2D1.1(b)(5), clarifying the scienter requirement of this section, and ensures that the scienter requirement applies in the Fifth Circuit and across the federal courts.

V. APPENDIX

Proposed Amendment to United States Sentencing Guidelines § 2D1.1(b)(5) (*the words in italics are author's additions*)

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.

Commentary:

12. **Application of Subsection(b)(5).**—If the offense involved importation of amphetamine or methamphetamine, and an adjustment from subsection (b)(3) applies, do not apply subsection (b)(5).

Additionally, this subsection should not apply based on purity alone.

“Importation,” for purposes of subsection (b)(5) and this note, refers to the importation of methamphetamine or precursor chemicals into the United States from outside of the United States. Knowledge of this importation should be proven by a preponderance of evidence from the defendant’s own statements or evidence of personal involvement or close physical or temporal proximity to the act of importation.

The qualification “That the defendant knew were imported unlawfully,” for purposes of subsection (b)(5) and this note, applies to both the importation of amphetamine or methamphetamine and the manufacture of amphetamine or methamphetamine from listed chemicals. This subsection is not a strict liability enhancement and applies only if the defendant knew or should have known that the methamphetamine the defendant possessed was imported into the United States.

Reason for Amendment: *This amendment is in response to the circuit split between the Fifth Circuit and the Eleventh and Ninth Circuits surrounding the application of this subsection. Since 2012, this circuit split has resulted in sentencing disparities across the federal circuits. This amendment is included to resolve any potential ambiguities within the guideline in its previous state.*

This subsection was originally added in response to the Comprehensive Methamphetamine Control Act of 1996, which was aimed at the activity of importation of methamphetamine into the United States. In alignment with this purpose, this subsection, across all federal circuits, should apply only if it is proven by a preponderance of the evidence that the defendant knew or had reason to know that the methamphetamine the defendant possessed was imported into the United States. This subsection is not a strict liability enhancement.