Circuits Split as to Statutory Interpretation of the Mens Rea Requirement in 21 U.S.C. § 841(c)(2): The Tenth Circuit Provides the Correct Answer

Brian Walsh

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Law Commons

Recommended Citation
Available at: https://dsc.duq.edu/dlr/vol48/iss1/7

This Comment is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.
Circuits Split as to Statutory Interpretation of the Mens Rea Requirement in 21 U.S.C. § 841(c)(2): The Tenth Circuit Provides the Correct Answer

I. INTRODUCTION .................................................. 123

II. BRIEF HISTORY: INTERPRETATION OF MENS REA IN 21 U.S.C. § 841(C)(2) .............................................. 126
   A. The Rise of the Majority Interpretation:
      Either Subjective Intent or an Objective Cause to Believe ........................................... 126
   B. The Rise of the Minority Interpretation:
      Subjective Intent Only ........................................... 129

III. ANALYSIS ........................................................ 132
   A. The Majority Interpretation May Produce Unconstitutional Results ............................. 132
   B. The Minority Interpretation Reflects the Legislative Intent Behind § 841(c)(2) .................. 135
   C. The Majority Interpretation Undermines the Purpose of the Mens Rea Requirement ...... 138
   D. Response to Criticism ........................................... 139
   E. Governmental Due Diligence .................................. 140

IV. CONCLUSION .................................................................. 142

I. INTRODUCTION

The mens rea requirement has long been a crucial component to American criminal law for determining the guilt of an accused in criminal prosecutions. Along with establishing the accused’s actus reus, prosecutors generally have the burden of proving the requisite mens rea, or criminal intent, in order to secure a convic-

---

1. Mens rea, or “guilty mind,” refers to “[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime.” BLACK'S LAW DICTIONARY 1075 (9th ed. 2009).
3. Actus reus, or “guilty act,” refers to “[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea to establish criminal liability.” Id. at 41.
While this general principle of American jurisprudence has rarely, if ever, been disputed, interpretation of certain statutes’ particular mens rea requirements has spawned much debate within the legal community. Particularly at issue is whether certain statutes’ mens rea requirements mandate a showing of subjective intent on the part of the accused or a more lenient showing of an objective mindset that would be possessed by a reasonable person under like circumstances. In light of society’s growing drug problems, section 841(c)(2) of the Comprehensive Drug Abuse and Prevention and Control Act has been thrust to the forefront of the mens rea statutory interpretation debate among the various circuits.

Section 841(c)(2) makes it a crime for a person to knowingly or intentionally possess or distribute a listed chemical “knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance.” Given the stark rise in methamphetamine production and use in this country over the last decade, violations under section 841(c)(2) have most recently taken the form of individuals distributing unusually large amounts pseudoephedrine, a common decongestant and critical ingredient in the manufacturing and production of methamphetamine. As pseudoephedrine is a legally obtainable decongestant sold in many pharmacies nationwide, law enforcement has been faced with the difficult task of regulating the distribution of a legal substance in an effort to suppress the manufacturing of the illegal and highly dangerous methamphetamine. In response to this growing problem, several new regulations have been enacted to control the sale of common, readily obtainable methampheta-

---

4. Most statutory mens rea requirements demand a showing of subjective intent on the part of the accused in committing the alleged crime; however, a smaller number of statutes, namely those relating to strict liability crimes, merely require a showing of objective intent, based on the reasonable person standard. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.1(a) (2d ed. 2003).
8. Id. (emphasis added).
10. See, e.g., Khattub, 536 F.3d 765; United States v. Truong, 425 F.3d 1282 (10th Cir. 2005); United States v. Galvan, 407 F.3d 954 (8th Cir. 2005); United States v. Kaur, 382 F.3d 1155 (9th Cir. 2004); United States v. Prather, 205 F.3d 1265 (11th Cir. 2000).
mine ingredients, such as the pseudoephedrine. As a result, it has become increasingly difficult to purchase or distribute large amounts of pseudoephedrine, since federal law made it illegal to possess or distribute the legal substance with the knowledge, or with a reasonable cause to believe, that the distributed pseudoephedrine will be used to manufacture methamphetamine. In the midst of America’s war against methamphetamine, circuit courts are left with one lingering question: What is the correct interpretation of the “knowing, or having reasonable cause to believe” mens rea requirement found in section 841(c)(2)?

As it currently stands, there is a split in the circuits as to the interpretation of the mens rea requirement found in section 841(c)(2). With only four circuits weighing in on the issue, the minority has taken the stance that the statute requires a defendant’s subjective knowledge that the drugs he or she distributes will be used to manufacture a controlled substance, while the majority holds that the statute requires either subjective knowledge or an objective cause to believe to convict.

Recognizing the serious nature of a felony drug conviction, the minority holds that the “reasonable cause to believe” standard is akin to subjective, actual knowledge of the individual, thus ensuring that the defendant truly has the requisite criminal intent before subjecting the defendant to criminal conviction. The majority, on the other hand, takes the position that “reasonable cause to believe” equates to having knowledge of certain facts that, while not amounting to direct knowledge, would cause a reasonable person under similar circumstances and with knowledge of the same

13. 21 C.F.R. § 1310.02 (2009).
15. Id.
16. See, e.g., Khattub, 536 F.3d at 769; Truong, 425 F.3d at 1289; Galvan, 407 F.3d at 956; Kaur, 382 F.3d at 1157-58; Prather, 205 F.3d at 1269.
17. The United States Court of Appeals for the Seventh Circuit acknowledged the circuit split in Khattub, but declined to “weigh in” on the debate regarding the proper mens rea interpretation. Khattub, 536 F.3d at 769. The court held that there was sufficient evidence proving the defendant’s actual knowledge that the pseudoephedrine he purchased would be used to manufacture methamphetamine; thus, an interpretation of the statute’s mens rea requirement was not necessary. Id.
18. See United States v. Saffo, 227 F.3d 1260, 1269 (10th Cir. 2000); Truong, 425 F.3d at 1282.
19. See Galvan, 407 F.3d at 957; Kaur, 382 F.3d at 1157; Prather, 205 F.3d at 1270-72.
20. Saffo, 227 F.3d at 1269.
facts to conclude that the drug he or she distributes would likely be used to manufacture a controlled substance. This holding closely resembles a negligence state of mind as opposed to any sort of criminal intent. Such an approach serves to alleviate the prosecution’s burden of proof, while simultaneously placing an unnecessary risk of conviction on individuals who distribute legal drugs without any actual intent or knowledge that they will be used to manufacture illegal substances. As such, the majority’s interpretation of the section 841(c)(2)’s mens rea requirement is inappropriate as it undermines the very purpose of the mens rea requirement, which is to convict those individuals who are not only guilty of misconduct but who also intended to commit those very acts of misconduct.

This comment will concentrate on the serious flaws associated with the majority’s interpretation of the mens rea requirement found in section 841(c)(2), while exploring the appropriateness of the minority interpretation. The following section will discuss the major circuit court cases and the split, noting each circuit’s rationale for its respective interpretation of the mens rea requirement found in section 841(c)(2). Section III will provide a detailed analysis explaining the appropriateness of the minority interpretation, and point out the numerous legal, ethical, and constitutional flaws associated with the majority interpretation. It will also discredit the majority’s criticisms of the minority approach by evaluating the minority’s interpretation in conjunction with the very purpose behind a statutory mens rea requirement. Finally, Section IV will summarize both the main arguments in favor of the minority’s interpretation and the arguments detailing the absurdity of the majority’s interpretation. The comment will close with a recommendation that all other circuits that have yet to address this issue adopt the minority’s interpretation of section 841(c)(2)’s mens rea requirement.

II. BRIEF HISTORY: INTERPRETATION OF MENS REA IN 21 U.S.C. § 841(c)(2)

A. The Rise of the Majority Interpretation: Either Subjective Intent or an Objective Cause to Believe

As noted, the rise in methamphetamine manufacturing resulted in numerous regulations and other tactics to control the distribu-

tion of many legal drugs, such as pseudoephedrine, which are
common ingredients in methamphetamine.\footnote{22} As pseudoephedrine
can be legally purchased and sold in this country, law enforcement
and the courts alike are faced with a slippery slope when trying to
determine whether a distributor of the legal drug is in violation of
section 841(c)(2); namely, whether the distributor possesses the
requisite "knowledge, or reasonable cause to believe"\footnote{23} that the
legal drug will be used to manufacture methamphetamine. Be-
cause there is no presumption that a person who distributes large
quantities of pseudoephedrine has the knowledge that it will be
used to manufacture methamphetamine, prosecutors must bring
forth additional evidence to satisfy the knowledge requirement.\footnote{24}
As it currently stands, the circuit split is predicated on the degree
of evidence that prosecutors must set forth in order to prove the
accused had knowledge, or a reasonable cause to believe.\footnote{25}

The United States Court of Appeals for the Eleventh Circuit
was the first to address this statutory interpretation issue in the
context of pseudoephedrine and methamphetamine.\footnote{26} In United
States v. Prather, the Eleventh Circuit upheld the district court's
conviction of Vernon Prather, Jr., the operator of a mail-order
company that distributed large quantities of pseudoephedrine to
various wholesalers as well as individual purchasers.\footnote{27} Prather
appealed the district court's ruling, claiming that the court erred
in its instructions to the jury regarding the phrase "reasonable
cause to believe" as found in section 841(d)(2).\footnote{28} The jury was in-
structed that to determine whether one had a "reasonable cause to
believe," they should ask whether the facts presented in this case
"would cause a reasonable person knowing those facts to reasona-
ably conclude that the pseudoephedrine was being delivered to the
illegal manufacturer of a controlled substance."\footnote{29} Prather argued
that the instructions were faulty as they made no mention of any
bad faith requirement, and reduced the "reasonable cause to be-
lieve" standard to a mere negligence standard.\footnote{30} Unfortunately

\begin{itemize}
\item \footnote{22} Methamphetamine, supra note 9.
\item \footnote{23} 21 U.S.C. § 841(c)(2).
\item \footnote{24} Khattub, 536 F.3d at 769.
\item \footnote{25} Id.
\item \footnote{26} Prather, 205 F.3d 1265.
\item \footnote{27} Id. at 1272. The lower court found the defendant to be in violation of 21 U.S.C. § 841(d)(2), which is now 21 U.S.C. § 841(c)(2). Id. at 1268.
\item \footnote{28} Prather, 205 F.3d at 1271.
\item \footnote{29} Id.
\item \footnote{30} Id.
\end{itemize}
for Prather, he failed to object to the jury instructions at trial, forcing the Eleventh Circuit to review the issue based on a plain error standard. The Eleventh Circuit upheld the conviction, noting that there was a substantial amount of evidence proving that Prather had actual knowledge that the drugs he distributed would be used to manufacture a controlled substance. As such, the lower court's jury instructions as to "reasonable cause to believe" did not merit a reversal based on plain error.

Four years after the decision in Prather, the United States Court of Appeals for the Ninth Circuit applied the Eleventh Circuit's interpretation of "reasonable cause to believe" as found in section 841(c)(2) in the case of United States v. Kaur. On appeal to the Ninth Circuit, Kaur challenged the jury instructions given by the lower court regarding the "reasonable cause to believe" standard. Kaur took the position that "reasonable cause to believe" should be somewhat equated to actual knowledge, rather than a reasonable person standard akin to negligence. The Ninth Circuit readily rejected Kaur's position, claiming that the language of section 841(c)(2) contains both "knowledge" and "reasonable cause to believe," reflecting Congress's intent to utilize both a subjective and objective standard as two distinct alternatives. The court proclaimed that a standard which equated "reasonable cause to believe" to "actual knowledge" would be superfluous and redundant.

Furthermore, the Ninth Circuit defended its interpretation of the statute's mens rea requirement, claiming that its approach does not replace a subjective standard with an objective reason-

31. Id. In order to obtain a reversal based on plain error, the instruction at issue must be a plainly incorrect statement of the law and must have most likely attributed to an incorrect verdict, causing substantial injustice. Id.

32. Id. Evidence was presented at trial showing Prather's knowledge that many of his customers were being investigated for drug manufacturing, and also that Prather received an opinion letter notifying him that his conduct placed him at risk for violation of 21 U.S.C. § 841(d)(2). Id. at 1268.

33. Prather, 205 F.3d at 1271.

34. Kaur, 382 F.3d 1155. The defendant, a convenience store owner, was charged with distributing pseudoephedrine in violation of 21 U.S.C. § 841(c)(2) after selling large quantities of the drug to an undercover agent. Id. at 1156.

35. Id. at 1156. The district court's jury instructions stated that "reasonable cause to believe" means to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person knowing the same facts, to reasonably conclude that the pseudoephedrine would be used to manufacture a controlled substance." Id.

36. Id. at 1157.

37. Id.

38. Id.
able person standard akin to negligence. The court's only rationale for this defense was that its interpretation simply elaborates upon the statutory language of section 841(c)(2), incorporating both a subjective and objective standard.

The following year, the United States Court of Appeals for the Eighth Circuit was presented with the very same statutory interpretation issue in *United States v. Galvan*. On appeal to the Eighth Circuit, Galvan argued that the district court erred in failing to instruct the jury that the phrase "reasonable cause to believe," as found in section 841(c)(2), required "an inquiry into what this particular defendant had reason to believe' and is a standard 'akin to actual knowledge.' In rejecting Galvan's argument, the Eighth Circuit relied on the Ninth Circuit's interpretation of "reasonable cause to believe" in *Kaur*. The court reiterated the Ninth Circuit's rationale, claiming that by equating "reasonable cause to believe" with "actual knowledge," the mens rea requirement of section 841(c)(2) would be redundant. As such, the Eighth Circuit joined the Eleventh and Ninth Circuits in interpreting the "reasonable cause to believe" standard in section 841(c)(2) to require either a subjective intent on the part of the accused or an objective intent, rooted in the reasonable person standard.

B. The Rise of the Minority Interpretation: Subjective Intent Only

The same year the Eleventh Circuit introduced what is now the majority interpretation of section 841(c)(2)'s mens rea requirement, the United States Court of Appeals for the Tenth Circuit offered its own interpretation of the statute in *United States v. Saffo*. After being arrested for her part in a large-scale pseudoephedrine distribution operation that sold large quantities of the drug to various wholesale operations, Randa Saffo was con-

---

40. *Id*.
41. *Galvan*, 407 F.3d 954. Defendant was arrested after police officers, conducting surveillance, followed defendant while he traveled between numerous convenience stores, each time leaving with large quantities of pseudoephedrine. *Id.* at 957.
42. *Id.* at 957. The defendant argued that "such an instruction was necessary to avoid constitutional problems that would result from an objective mens rea requirement." *Id*.
43. *Id*.
44. *Id*.
victed of seven counts under section 841(d)(2). On appeal, the Tenth Circuit examined the constitutionality of the statute’s mens rea requirement, noting that “the standard involves a subjective inquiry that looks to whether the particular defendant accused of the crime knew or had reasonable cause to believe the listed chemical would be used to manufacture a controlled substance.” Furthermore, the court explained that such an interpretation “requires scienter to be evaluated through the lens of this particular defendant, rather than from the perspective of a hypothetical reasonable man.” The court eventually held that the “reasonable cause to believe standard” is one akin to actual knowledge, as guilt itself is a personal matter. To not base the mens rea requirement on the personal, subjective knowledge of the individual would undermine the very purpose of the mens rea.

In 2005, the Tenth Circuit solidified its position in United States v. Truong, holding once again that the “reasonable cause to believe” standard requires actual knowledge or something very close to it. In overruling the trial court’s conviction, the Tenth Circuit noted that it was simply not enough for the prosecutors to show that the defendant had knowledge that his customers were “up to no good.” According to the court, the mens rea requirement of section 841(c)(2) is unusually specific and explicitly requires a showing that the accused had actual knowledge, or something very similar, that the drugs he or she sold would be used to manufacture a controlled substance. As the court noted in Saffo, this narrow interpretation of the statute “imposes a constitutionally sufficient mens rea requirement.”

In Truong, the defendant was a convenience store owner who faced conviction under section 841(c)(2) for distributing large amounts of pseudoephedrine and ephedrine under circumstances that suggested he had knowledge that they were used for purposes

46. Id. at 1266-67. The district court found the defendant to be in violation of 21 U.S.C. § 841(d)(2), which was later changed to 21 U.S.C. § 841(c)(2). Id.
47. Id. at 1268.
48. Id. at 1268-69 (emphasis added).
49. Id. at 1269.
50. Saffo, 227 F.3d at 1269.
51. Truong, 425 F.3d 1282.
52. Id. at 1289.
53. Id. (quoting Principal Brief of Defendant/Appellant at 13, Truong, 425 F.3d 1282 (No. 04-5094)).
54. Id. at 1289-90.
55. Saffo, 227 F.3d at 1268.
unrelated to their stated medical uses. The court adamantly noted, however, that to obtain a conviction under section 841(c)(2):

It is not sufficient for the government to prove that the defendant knew, intended, or had reasonable cause to believe it that the substance would be abused or would be used illegally. Nor is it sufficient for the government to prove that the defendant was negligent or reckless with respect to the risk that the ephedrine or pseudoephedrine he sold would be used to manufacture methamphetamine.

The court asserted that the unusually specific mens rea requirement found in section 841(c)(2) required a greater showing from the prosecution, specifically a showing of definitive proof that the defendant had actual knowledge, or a reasonable cause to believe, that the substance would be used for the specific purpose of manufacturing methamphetamine.

Following the interpretive approach it had taken in Saffo, the Tenth Circuit again interpreted the mens rea requirement in section 841(c)(2) as a standard akin to actual knowledge. In so doing, the court strengthened its position by listing several means by which the government can meet its burden of proving the defendant had actual knowledge. Such means include setting forth evidence that the defendant received an official warning or notification about the drugs, using an undercover agent to converse with the defendant regarding the legal substance sold and its connection with methamphetamine production, and using the defendant's own actions and words that revealed his actual knowledge that the drugs sold will be used to manufacture methamphetame.

56. Truong, 425 F.3d at 1284. As the court stated, "the government presented an abundance of evidence from which a jury might reasonably infer that Mr. Truong knew that his customers 'were up to no good.'" Id. The evidence showed that Truong repeatedly sold unusually large amounts of pseudoephedrine to customers either after store hours or when no other customers were present in the store. Id. Those who purchased the large quantities from Truong did so in a secretive manner, arriving after store hours and concealing their purchases in styrofoam cups. Id. Truong sold the pseudoephedrine in cash transactions only, where the drugs were not rung up at the counter, and no records of the drug sales were maintained in the store books. Id. at 1290. Further evidence showed that Truong purchased the pseudoephedrine "outside of ordinary channels from an unknown person, and sold them without the usual packaging and labeling." Truong, 425 F.3d at 1290.

57. Id. at 1289 (citing United States v. Green, 779 F.2d 1313, 1318-19 (7th Cir.1985)).

58. Id.

59. 227 F.3d 1260.

60. Truong, 425 F.3d at 1289.
mine.\textsuperscript{61} The court concluded that the prosecution presented no such direct evidence in this case regarding the defendant's subjective, actual knowledge that the pseudoephedrine he sold would be used to manufacture methamphetamine.\textsuperscript{62} Although the government presented ample evidence that the defendant knew the drugs he sold would be used by his customers for some improper purpose, such knowledge is not punishable under section 841(c)(2).\textsuperscript{63}

III. ANALYSIS

A. The Majority Interpretation May Produce Unconstitutional Results

The majority interpretation of the mens rea requirement found in section 841(c)(2) dangerously straddles the line between constitutionality and unconstitutionality, as it has the potential of criminalizing a broad range of apparently innocent actions. As such, the majority interpretation carries with it a high probability of several constitutional challenges, as it can be argued that the majority's mens rea interpretation renders section 841(c)(2) unconstitutionally overbroad on its face.

Generally, statutes succumb to overbreadth challenges when it is proven that the statute, on its face, prohibits a substantial amount of protected activity.\textsuperscript{64} More significantly, statutes that contain a mens rea requirement, such as section 841(c)(2), may be deemed unconstitutionally overbroad if a presumption is attached to the mens rea, such as presumptions of knowledge or intent on behalf of the accused.\textsuperscript{65} Although no case law explicitly states that there is a presumption that a person who distributes large quanti-

\textsuperscript{61} Id. at 1289-90.
\textsuperscript{62} Id. at 1290.
\textsuperscript{63} Id. at 1291. The court supported its claim, stating: For all we know from the evidence presented to the jury in the government's case in chief, Mr. Truong may have thought that ephedrine and pseudoephedrine are themselves subject to abuse or that his purchasers were addicted to over-the-counter medications. He could have thought that he and his customers were evading taxes, or that the products were contraband for some reason beyond his ken. While such motives would hardly rebound to Mr. Truong's credit, they are not punishable by the statutes under which he was convicted.
\textsuperscript{65} See Virginia v. Black, 538 U.S. 343 (2003) (holding that the statute's mens rea required intent to threaten or harass with respect to cross-burning; and the built-in presumption that all cross-burning is done with intent to threaten or harass rendered the statute fatally overbroad).
ties of pseudoephedrine has the knowledge that it will be used to manufacture methamphetamine, the majority interpretation of section 841(c)(2) essentially creates such a presumption in instances where the prosecution cannot meet its burden of proving subjective knowledge of the accused beyond a reasonable doubt. The majority has utilized a two-step approach in accomplishing this. First, the majority has dispelled the long-standing notion that mens rea requirements are intended to focus on the personal, subjective guilty mind of the accused. Rather, the majority interpretation promotes conviction based on an objective, “reasonable person” mens rea interpretation that closely resembles a negligence standard.

Second, the majority, in conjunction with its use of an objective mens rea interpretation, creates the presumption that the “reasonable person” would know that bulk quantities of pseudoephedrine would be used by the purchaser of the drug in the manufacturing of methamphetamine. As prior case law suggests, such a presumption attached to the statute’s mens rea alone could render the majority’s approach susceptible to constitutional challenges.66 Moreover, the problem with the majority approach is compounded with a showing that the presumption described above is predicated on several other presumptions regarding the ordinary, reasonable man including, but not limited to, the following presumptions: the reasonable man knows what methamphetamine is, knows the intricate details of its production, knows that pseudoephedrine is a common ingredient used to produce methamphetamine, and knows that large quantities of pseudoephedrine are commonly purchased by individuals who seek to manufacture and distribute methamphetamine. As if one presumption attached to the mens rea interpretation does not open the door to constitutional challenges in and of itself, the fact that the ultimate presumption67 is prefaced on several other presumptions regarding knowledge of the objective, reasonable person surely compounds the constitutional problems associated with the majority interpretation.

Most, if not all, of the presumptions detailed above are unwarranted, as it is unreasonable to believe that the ordinary, reasonable person is highly familiar with the many facets associated

66. See Black, 538 U.S. at 363-64.
67. The objective, reasonable person who sells or distributes large quantities of pseudoephedrine does so with the knowledge that the legal drugs will be used to manufacture methamphetamine.
with the production of methamphetamine. This is especially true when considering that the stark rise in methamphetamine production is a relatively recent phenomenon within our society.  

We would likely be going far out on a limb to suggest that even the average adult American knows anything about the manufacturing of methamphetamine. The Tenth Circuit acknowledged this point in *Truong*, stating that the government would need to present some degree of evidence that knowledge of the connection between pseudoephedrine and methamphetamine production is sufficiently widespread among individuals under similar circumstances as the accused so that the defendant's knowledge can be inferred. In fact, Officer Deramus, the government's own witness in *Truong*, testified that the relationship between the two drugs is not common knowledge among everyone. Given this, any presumption that says the ordinary, reasonable man has sufficient knowledge of the detailed intricacies of methamphetamine production is simply ludicrous.

Furthermore, the majority interpretation, through the creation and application of its reasonable person presumption, potentially serves to criminalize a substantial amount of seemingly innocent conduct. Despite increased governmental regulation regarding its sale, pseudoephedrine remains a legally distributable and obtainable drug. At its core, pseudoephedrine is an effective decongestant and cold remedy that is still widely used for this legitimate purpose. As such, courts walk a fine line when determining the guilt of an accused under section 841(c)(2), as the distribution of pseudoephedrine may very well have been done with a completely innocent mind on the behalf of the accused.

The majority's interpretation of section 841(c)(2) ignores this possibility, applying a prosecution-friendly objective knowledge standard that encourages conviction of an accused based simply on what the hypothetical reasonable person should know, blatantly disregarding what each particular defendant actually does know. Thus, an accused within a majority jurisdiction can be sen-

68. Methamphetamine, supra note 9.
69. *Truong*, 425 F.3d at 1290. The government failed to present any such evidence. *Id.*
70. *Id.*
71. Pseudoephedrine, a common ingredient in the decongestant Sudafed, must be sold in “blister packs” rather than in loose form. Also, pseudoephedrine must now be sold “behind-the-counter” at retail stores and pharmacies, thus making it more difficult for purchasers to obtain large quantities of the drug. Purchases are limited to no more than nine grams per 30-day period, and purchasers must sign-in and provide identification before making purchases. Methamphetamine, supra note 8.
tenced to serve twenty years in prison\textsuperscript{72} for innocently or ignorantly selling a legal decongestant, simply by a court's opinion that a hypothetical person would have known that the legal drugs he sold would eventually be used illegally. Not only does this impose an unreasonable risk of liability on pharmacies and convenience stores alike, it runs afoul of the United States Constitution through the grossly unjust results it produces.

The minority's use of a subjective standard, on the other hand, ensures that no such injustice occurs. The minority only subjects an accused to the severe felony punishments under section 841(c)(2) if the prosecution has proved beyond a reasonable doubt that this particular defendant knew or, through the presentation of sufficient circumstantial evidence, had reason to know that the drugs he sold would be used by the purchaser to manufacture an illegal substance. This interpretation does not necessarily serve as a life preserver for any given defendant. Rather, it merely holds the prosecution to its constitutional burden of proof through the practice of due diligence,\textsuperscript{73} thus ensuring that justice is indeed served. As the Tenth Circuit has suggested, there is generally a significant amount of circumstantial evidence that the prosecution can bring forth in any given case to prove the subjective knowledge of the accused under section 841(c)(2).\textsuperscript{74}

B. The Minority Interpretation Reflects the Legislative Intent Behind § 841(c)(2)

Compared to other criminal statutes, interpretation of the mens rea requirement found in section 841(c)(2) is unusually significant and important, primarily because several of the chief ingredients that go into the production of methamphetamine may be sold, purchased, and possessed legally in this country.\textsuperscript{75} Thus, convict-

\textsuperscript{72} See 21 U.S.C. § 841(c).

\textsuperscript{73} See In re Winship, 397 U.S. 358, 364 (1970) (holding that the Due Process Clauses of the Fifth and Fourteenth Amendments "protect[] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

\textsuperscript{74} See Saffo, 227 F.3d at 1263-67 (stating that circumstantial evidence of the defendant's subjective knowledge included taking drastic steps to conceal her conduct, such as using fake names to rent storage units, requesting that her name remain off of all invoices, using fictitious company licenses, lying to the DEA about her pseudoephedrine customers and her first-hand knowledge regarding a DEA "Red Notice," engaging almost exclusively in cash transactions, and other evidence).

\textsuperscript{75} Common ingredients used in the manufacture of methamphetamine include pseudoephedrine, ephedrine, red phosphorus, rubbing alcohol, ether, paint thinner, iodine, chloroform, benzene, and drain cleaner, among other substances. Citizens Against Meth,
ing defendants under this statute represents a delicate situation, as a defendant's seemingly questionable conduct may have in fact been the product of an innocent state of mind, and vice versa. Understanding this, the Tenth Circuit appropriately recognized the unusually specific nature of section 841(c)(2)'s mens rea requirement as intended by Congress. By requiring the prosecution to prove a defendant's actual knowledge, or something close to it, the minority approach effectively ensures that innocent people are not placed at an unreasonable risk of criminal liability. The minority's interpretation therefore reflects the true purpose behind mens rea requirements: convict individuals only for crimes that they intended to commit with the requisite guilty state of mind.

Nevertheless, it is true that a given statute's particular mens rea requirement can take the form of either a subjective, personal guilt standard or an objective, reasonable person standard. However, a closer examination of these respective mens rea forms and their general applicability tends to illustrate the appropriateness of the Tenth Circuit's interpretation of section 841(c)(2).

A typical statute's mens rea requirement is generally reflected through the use of precise statutory language, such as knowingly, intentionally, willingly, negligently, carelessly, or recklessly. A mens rea that requires proof of subjective, personal guilt on the part of the accused may include one or more of the first three words, while a mens rea that requires only proof of objective guilt may include either or all of the latter three. In instances where a statutory mens rea contains words such as knowingly or intentionally, the Supreme Court has held that the government must always meet its burden of proof beyond a reasonable doubt that the defendant acted with the requisite subjective and personal guilty state of mind in order to secure a conviction.

---

76. See Truong, 425 F.3d at 1291.
78. LaFave, supra note 3, § 5.1(c).
79. Id.
80. Id. With crimes involving recklessness, however, there is a degree of subjective guilt involved, such that the defendant must realize in his own mind the risk which his conduct creates. Id.
81. Sandstrom v. Montana, 442 U.S. 510, 524 (1979) (holding that in cases involving subjective mens rea requirements the prosecution must prove defendant's personal guilty mind; presumptions that defendant intended the outcome of his or her actions does not meet this burden).
criminal statutes containing words of subjective intent, such as section 841(c)(2)’s use of “knowing,” bestow upon the prosecution the heavier burden of proving the accused’s subjective guilty mind beyond a reasonable doubt.

On the other hand, statutory mens rea requirements that permit a more lenient showing of objective fault on the part of the accused tend to lessen the prosecution’s ultimate burden, as the government in these cases need only prove that the defendant did not meet the reasonable person standards associated with negligence, recklessness, or carelessness. It is interesting to note, however, that many statutes containing these objective mens rea requirements serve to criminalize conduct that represent lesser offenses, which carry less severe criminal penalties, than similar crimes that require a showing of subjective intent.82 This general rule becomes evident when comparing the criminal sanctions associated with the offense of negligent homicide (i.e., involuntary manslaughter) with the criminal sanctions that are attached to the offense of intentional homicide (i.e., murder in the first degree).83 Those criminal offenses that require a mere showing of objective fault tend to carry lesser criminal sanctions than those offenses that require the prosecution to prove the subjective personal guilt of the accused.

Interestingly enough, this phenomenon can help prove the validity of the minority’s interpretation of the mens rea requirement found in section 841(c)(2). Under the statute, a defendant can be convicted upon the prosecution’s showing of either knowledge or a reasonable cause to believe.84 Regardless of whether the prosecution proves actual knowledge or a reasonable cause to believe on the part of the accused, the criminal sanctions for each are exactly the same: a prison term of up to twenty years.85 In light of the above analysis, it can be said that the statute’s inclusion of the word “knowing,” coupled with Congress’s failure to include lesser criminal sanctions for convictions based on a defendant’s “reasonable cause to believe,” indicates Congress’s intent to limit the reach of section 841(c)(2) to pseudoephedrine distributors who have the actual knowledge, or something akin to actual knowledge, that the drugs sold would be used to manufacture methamphetamine. As such, it can also be said that the Tenth Circuit’s

82. LaFave, supra note 3, at § 5.4(g).
83. Id.
84. 21 U.S.C. § 841(c)(2).
85. 21 U.S.C. § 841(c).
interpretation of section 841(c)(2)'s mens rea requirement correctly reflects congressional intent.

C. The Majority Interpretation Undermines the Purpose of the Mens Rea Requirement

As noted earlier, the historical purpose behind the mens rea requirement has traditionally been to criminalize certain acts of misconduct that the defendant committed with a subjective, guilty mind. The majority approach, on the other hand, carries the potential to do just the opposite, that is criminalize seemingly innocent acts of pseudoephedrine distribution regardless of the defendant's true personal knowledge regarding methamphetamine production. The mere potential for such unjust and absurd results demonstrates the serious ethical flaws associated with the majority's interpretation. Moreover, the very fact that majority's interpretation incorporates the thoughts of another "reasonable person" undermines the traditional purpose of the mens rea to punish acts of misconduct that an individual knowingly or intentionally committed on his or her own volition.

Furthermore, it is important to note once again that a defendant who is convicted under section 841(c)(2) is subjected to the same felony punishment regardless of whether the conviction is based on direct knowledge or a reasonable cause to believe. This proves to be a significant factor once again in comparing the appropriateness of the minority interpretation versus the majority interpretation. In Staples v. United States, the Supreme Court noted that the harshness of a penalty imposed by any given statute has traditionally been a significant consideration in determining Congress's true intent regarding that statute's mens rea requirement. The Court furthered its position, stating:

[W]here . . . dispensing with mens rea would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a mens rea requirement. In such a case, the usual presumption that a de-

---

86. See Gardner, supra note 2.
87. 21 U.S.C. § 841(c)(2).
89. Staples, 511 U.S. at 616.
fendant must know the facts that make his conduct illegal should apply.90

Although the majority’s interpretation of section 841(c)(2) does not dispense with the statute’s mens rea altogether, it does dispense of the general notion behind a mens rea, particularly that an individual should be punished only for his intentional, rather than accidental, acts of misconduct.91 In doing so, the majority has taken the mens rea requirement of section 841(c)(2) out of the traditional realm of “guilty mind” and inappropriately placed it in the tort realm of negligence. As a result, defendants in majority jurisdictions are required to have knowledge only of the traditionally lawful conduct of selling pseudoephedrine;92 thereafter, application of the reasonable person standard may render the defendants culpable under the statute, even though they may truly not possess the requisite knowledge of the hypothetical reasonable person as attributed by the court. With no other subjective knowledge required, such defendants are then subjected to the very same severe felony punishment93 as those defendants who were proven to have actual, subjective knowledge that the legal drugs they sold would be used to manufacture methamphetamine. Such an unjust outcome tends to suggest that Congress did not intend to dispense with the subjective notion of the mens rea, thereby alleviating the prosecutions burden of proof. Rather, given this analysis, it appears likely that the Supreme Court, as situated in Staples, would hold that the mens rea found in section 841(c)(2) requires the defendant to have actual knowledge, or something very close to it, that the drugs he sold would be used to manufacture an illegal substance such as methamphetamine.

D. Response to Criticism

The minority’s subjective interpretation of section 841(c)(2)’s mens rea requirement has been met by criticism from the majority circuits, specifically in the cases of United States v. Kaur94 and

90. Id. at 618-19 (emphasis added).
92. The sale and distribution of pseudoephedrine should be categorized as “traditionally lawful conduct.” Until recently, there have been no such federal regulations controlling the distribution of pseudoephedrine; rather, purchasers could freely purchase any quantity of the legal drug from pharmacies and convenience stores. See Methamphetamine, supra note 9.
93. Punishment may be up to twenty years imprisonment. 21 U.S.C. § 841(c).
94. Kaur, 382 F.3d at 1157
United States v. Galvan,95 respectively. The majority claims that because knowledge is specifically mentioned within the statute as an element of the statute’s mens rea requirement, an interpretation that equates the “reasonable cause to believe” standard found within section 841(c)(2) with one that is akin to “knowledge” would render the statute superfluous and repetitive.96 A closer inspection of the minority’s approach, however, reveals that such an interpretation does not render the statute either superfluous or repetitive.

The “knowing” standard of the statute’s mens rea addresses direct evidence that the prosecution may bring forth at trial to demonstrate the defendant’s actual knowledge that the pseudoephedrine sold would be used to manufacture methamphetamine. Such direct, actual knowledge can be proven through recorded statements made by the defendant that demonstrate his actual knowledge and guilt. Alternatively, the “reasonable cause to believe” standard welcomes circumstantial evidence tending to prove actual knowledge of the accused. In the absence of any explicit statement on behalf of the accused demonstrating his direct knowledge and guilty mind, the “reasonable cause to believe” standard ensures that the government can still prove actual knowledge through substantial circumstantial evidence which tends to prove something very close to the defendant’s actual knowledge. As such, the majority’s criticism of the minority interpretation is without merit, as each element of the mens rea requirement found in section 841(c)(2) serves a distinct function in the pursuit of justice.

E. Governmental Due Diligence

The arguments presented in this comment have not been made with the intent to favor any particular defendant or group of defendants. Nor are they motivated by any inherent sense of disdain towards prosecutors or the government. Rather, the arguments set forth are motivated simply by the pursuit of justice. Likewise, the minority’s subjective interpretation of the mens rea requirement found in section 841(c)(2) is not done with the intent to create additional hurdles for the prosecution to jump through in order to meet its burden of proof. It is, however, intended to ensure that the government is doing all that it can and should do to meet

95. Galvan, 407 F.3d at 957.
96. Kaur, 382 F.3d at 1157.
its constitutional burden of proof beyond a reasonable doubt, thus ensuring justice within the criminal legal system.

The minority's requirement that prosecutors must prove a defendant's actual knowledge, or something close to it, should not act as an impediment to the prosecution's rate of conviction under section 841(c)(2). Through various simple acts of governmental due diligence, prosecutors should not be faced with any substantial difficulties in proving the subjective, personal knowledge of any given defendant. As outlined by the Tenth Circuit in Truong, the government has at its disposal a number of methods by which it can prove a defendant's subjective knowledge. For instance, the government can help to satisfy its burden by issuing official warnings or notifications to any pharmacy, convenience store or individual which the government has reason to believe may be violating section 841(c)(2). These "Red Notices" act to inform its recipients about the numerous state and federal laws relating to pseudoephedrine distribution and its connection with methamphetamine production. Furthermore, these notices serve as prima facie evidence that any recipient of such a warning has the requisite knowledge regarding pseudoephedrine distribution, methamphetamine production, the connection between the two and the laws that are in place to suppress such illegal activity. Recipients of these "Red Notices" will not be able to plead ignorance at the time of trial.

The government can also employ undercover agents to engage in tape recorded conversations with a suspected felon regarding the distribution of pseudoephedrine and its relationship to the manufacturing of methamphetamine. The government has never been bashful about employing the use of undercover agents in the effort to stop crime. It is an extremely effective means of proving the actual guilty mind of the accused, as the defendant's own incriminating words, which are typically caught on tape, can be used at trial to prove actual knowledge and intent.

Additionally, the government can employ the use of police officers to follow suspected violators of section 841(c)(2) for extended periods of time, in an effort to catch them engaging in actions that tend to prove their actual knowledge of the connection between

97. 425 F.3d at 1289-90.
98. Id. at 1289.
99. Id. at 1290.
100. Id.
pseudoephedrine and methamphetamine production. This may involve following a suspect to and from various locations as the suspect sells or purchases large quantities of pseudoephedrine, or simply staking out a given location that is suspected of regularly distributing large quantities of the drug. Either way, such basic governmental tactics can provide a substantial amount of circumstantial evidence from which a jury may reasonably determine that the accused did indeed possess some degree of actual knowledge that the pseudoephedrine he or she sold would be used to manufacture methamphetamine in violation of section 841(c)(2).

The underlying point is the government can easily employ various means and methods to obtain proof of a defendant's actual knowledge of guilt pursuant to the minority's interpretation of the mens rea requirement found in section 841(c)(2). Even in majority jurisdictions that allow for proof of objective fault, the government should be utilizing any and all of these tactics to ensure that innocent individuals are not being subjected to the severe punishments under section 841(c)(2). The pursuit of justice requires such governmental due diligence.

IV. CONCLUSION

Despite the fact that the minority's interpretation of the mens rea requirement found in section 841(c)(2) is currently applied only by the Tenth Circuit, its requirement that prosecutors prove the subjective knowledge of each defendant represents a powerful tool for mitigating the risk of injustice associated with imposing criminal liability on innocent parties. When cases involving violations of section 841(c)(2) arise within the remaining circuits that have yet to address this issue, as they inevitably will, the circuit courts should not be deterred by the fact that the minority's interpretation is utilized in only one circuit.

As documented throughout, the minority's interpretation of the statute's mens rea correctly reflects both the legislative intent behind section 841(c)(2) and the historical purpose behind the imposition of mens rea requirements throughout American criminal jurisprudence. Furthermore, the minority approach is not susceptible to the constitutional challenges that will likely plague the majority interpretation in the years to come. As methamphetamine production continues to become more widespread throughout

101. Id.
our society, every circuit court will undoubtedly be faced with issues arising from violations of 21 U.S.C. section 841(c)(2) sooner than later. For all the reasons set forth in this comment, circuit courts that have yet to address this issue should follow the Tenth Circuit’s lead and adopt the subjective mens rea interpretation found within section 841(c)(2).

Brian Walsh