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**POLICING THOUGHT: *UNITED STATES V. KHATTAB* AND THE *MENS REA* REQUIREMENT OF 21 U.S.C. § 841**

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INTRODUCTION

*Actus non facit reum nisi mens sit rea*, that “an act does not make one guilty unless the mind is guilty,” is an important principle of American criminal jurisprudence.<sup>1</sup> Crimes are said to consist of two parts: a physical act or omission called the *actus reus* and a mental component called the *mens rea*.<sup>2</sup> The *mens rea*, however, need not always be entirely about the defendant’s guilty mind.<sup>3</sup> Certain *mens rea* may require that the prosecution show objective fault based on the mindset of an objective reasonable person rather than subjective fault based solely on the defendant’s bad mind.<sup>4</sup> Either way, proving *mens*

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<sup>1</sup> Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 905 (1939).

<sup>2</sup> *U.S. v. Apfelbaum*, 445 U.S. 115, 131 (1980). *Mens rea* means “guilty mind” and is sometimes also called *scienter* or criminal intent. WAYNE R. LAFAVE, CRIMINAL LAW § 5.1 (4th ed. 2003).

<sup>3</sup> LAFAVE, *supra* note 2.

<sup>4</sup> *Id.* § 5.1(a). There are also a small number of crimes, strict liability crimes, that impose liability without fault or *mens rea*. *Id.* § 5.1 n.1.

*rea* demands some discussion of the defendant's thoughts in committing the crime.<sup>5</sup>

Often, *mens rea* is overlooked in criminal law and deemed unimportant compared to the act itself.<sup>6</sup> However, for both state and federal modern statutory crimes, a legislature has the power to place it in a position of utmost importance.<sup>7</sup> In *United States v. Khattab*,<sup>8</sup> the defendant was convicted of one such crime—attempting to possess pseudoephedrine under 28 U.S.C. § 841(c)(2) (the “Statute”).<sup>9</sup> The Statute makes it illegal for a defendant to knowingly or intentionally possess or distribute a listed chemical “*knowing or having reasonable cause to believe*” that the chemical will be used to manufacture illegal drugs.<sup>10</sup> Many of the listed chemicals would otherwise be legal to sell or possess or would carry lesser penalties for their black market sale; without the knowledge or reasonable belief that the chemical will be used to manufacture illegal drugs. Indeed, the sale or possession of the chemicals may not be at all illegal or even immoral.<sup>11</sup> Thus, the *mens*

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<sup>5</sup> See *id.* § 5.1(a).

<sup>6</sup> See Perkins, *supra* note 1, at 905 (noting facetiously that perhaps the Latin phrase should be shortened to *actus facit reum*, an act makes one guilty).

<sup>7</sup> See LAFAVE, *supra* note 2, § 5.1(a). Where the legislature does not consider *mens rea* important for a crime and fails to include a *mens rea* in its language, one is inferred. See *Staples v. U.S.*, 511 U.S. 600, 605 (1994).

<sup>8</sup> 536 F.3d 765 (7th Cir. 2008).

<sup>9</sup> *Id.* at 766.

<sup>10</sup> Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401(c), 28 U.S.C. § 841(c)(2) (emphasis added). For precise text, see *infra* note 31. Listed chemicals include precursor chemicals to methamphetamine such as ephedrine, pseudoephedrine, iodine, red phosphorous, ethers such as toluene and ethyl ether, and hydrochloric acid. 21 C.F.R. § 1310.02 (2008).

<sup>11</sup> For example, red phosphorous is a component of the strike pads of matches. CHARLES SALOCKS & KARLYN BLACK KALEY, CAL. EPA OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, TECHNICAL SUPPORT DOCUMENT: TOXICOLOGY CLANDESTINE DRUG LABS/ METHAMPHETAMINE, RED PHOSPHOROUS 2 (2003). While matchbooks may be legally sold or even given away, under 21 C.F.R. § 1310.02 and 28 U.S.C. § 841(c)(2), it would be illegal to sell matchbooks to anyone with the knowledge that they would be used to manufacture methamphetamine.

*rea* component of the Statute is unusually important, and conviction under the Statute will depend heavily on proving that *mens rea*.<sup>12</sup>

In *Khattab*, the Seventh Circuit identified a split among the circuits as to the interpretation of the *mens rea* required for prosecution under the Statute.<sup>13</sup> The Tenth Circuit found that “knowing or having reasonable cause to believe” requires that the government show a defendant had subjective, actual knowledge that the listed chemical would be used to manufacture methamphetamine.<sup>14</sup> On the other hand, the Eighth, Ninth, and Eleventh Circuits all found that an objective, reasonable cause to believe was sufficient for conviction.<sup>15</sup> The Seventh Circuit declined to take a side in the split, affirming *Khattab*’s conviction on other grounds and leaving the question entirely open in the Seventh Circuit.<sup>16</sup>

Part I of this comment discusses the importance of the Statute in the context of the methamphetamine problem in the United States and pseudoephedrine’s role in the manufacture of methamphetamine. It also briefly reviews the *mens rea* requirement. Part II examines the background of the Statute’s *mens rea* requirement as applied in the other circuits. Part III details the facts and arguments in *United States v. Khattab*.<sup>17</sup> Finally, Part IV recommends that in the future, the Seventh Circuit, and the Supreme Court if applicable, join the Tenth Circuit and apply the “knowingly” *mens rea* narrowly, finding defendants guilty only where the government can prove that the defendant actually knew, not should have known, that the chemical would be used to manufacture an illegal narcotic. This conclusion will discuss the circuit split not only in the context of pseudoephedrine sales and possession but also within a more general question about

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<sup>12</sup> 28 U.S.C. § 841(c)(2).

<sup>13</sup> 536 F.3d 765, 769 (7th Cir. 2008).

<sup>14</sup> See *U.S. v. Truong*, 425 F.3d 1282, 1289 (10th Cir. 2005); *U.S. v. Saffo*, 227 F.3d 1260, 1268-69 (10th Cir. 2000).

<sup>15</sup> See *U.S. v. Galvan*, 407 F.3d 954, 957 (8th Cir. 2005); *U.S. v. Kaur*, 382 F.3d 1155, 1157-58 (9th Cir. 2004); *U.S. v. Prather*, 205 F.3d 1265, 1267 (11th Cir. 2000).

<sup>16</sup> *Khattab*, 546 F.3d at 769.

<sup>17</sup> *Id.*

*mens rea* and whether the sale of otherwise legal materials should, as a matter of policy, be illegal where a dealer simply should know that the materials will be used to manufacture an illegal substance.

## I. BACKGROUND

### A. Pseudoephedrine and Methamphetamine Manufacture

The unusual importance of *mens rea* in the Statute has arisen out of a unique societal problem. In the last ten years, methamphetamine use and manufacture have dramatically changed rural America.<sup>18</sup> Methamphetamine is an extraordinarily powerful—as well as addictive and dangerous—illegal stimulant.<sup>19</sup> Methamphetamine users snort powdered methamphetamine, smoke a mixture of the powder, or inject the drug intravenously.<sup>20</sup> Apart from the quick and powerful high methamphetamine users experience, the drug can also cause irritability, nervousness, insomnia, nausea, depression, and brain damage.<sup>21</sup> However, unlike other powerful illegal drugs such as cocaine and heroin, which generally are imported, anyone who can read a recipe off the Internet can manufacture methamphetamine in their own home using several legally available ingredients, including the common decongestant pseudoephedrine.<sup>22</sup> The manufacturing

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<sup>18</sup> In rural areas, where methamphetamine laboratories are easily concealed and thus prevalent, production and use have proliferated, resulting in a spike in accompanying crimes like theft and child abuse. Timothy Egan, *Meth Building Its Hell's Kitchen in Rural America*, N.Y. TIMES, Feb. 6, 2002, at A14. Additionally, methamphetamine manufacture produces extremely toxic byproducts, putting rural environments at risk. Jennifer Wieman, *Meth Labs: "Cooking" Up Environmental Disaster*, 15 MO. ENVTL. L. & POL'Y REV. 127, 128 (2007).

<sup>19</sup> U.S. Drug Enforcement Admin., *Methamphetamine*, <http://www.usdoj.gov/dea/concern/meth.html> (last visited Nov. 11, 2008).

<sup>20</sup> U.S. Drug Enforcement Admin., *Methamphetamine Facts*, <http://www.usdoj.gov/dea/pubs/pressrel/methfact01.html> (last visited Nov. 11, 2008).

<sup>21</sup> *Id.*

<sup>22</sup> Simple Ways to Make Methamphetamine, [www.simple-ways-to-make-methamphetamine.com](http://www.simple-ways-to-make-methamphetamine.com) (last visited Oct. 13, 2008).

process for methamphetamine is also extraordinarily dangerous, resulting in powerful fumes, toxic waste, and occasional explosions.<sup>23</sup>

Because methamphetamine labs are both mobile and easy to construct, state and federal authorities have determined that restricting the sale of the legal ingredients used to make methamphetamine, including pseudoephedrine, is the most effective means of curbing methamphetamine production and use.<sup>24</sup> Beginning with the Comprehensive Methamphetamine Control Act of 1996,<sup>25</sup> the federal government instituted additional regulations to control sale of methamphetamine's ingredients.<sup>26</sup> In its legal use, pseudoephedrine is an over-the-counter drug that relieves respiratory congestion.<sup>27</sup> It was once available at retail in bottles containing loose pills, but now the drug is available only in "blister packs."<sup>28</sup> Packets of pseudoephedrine must be stored "behind-the-counter."<sup>29</sup> Federal law now criminalizes

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<sup>23</sup> U.S. Drug Enforcement Admin., *supra* note 19.

<sup>24</sup> *See*, 21 U.S.C. § 841, which criminalizes the sale of precursor chemicals, listed in 21 C.F.R. § 1310.02.

<sup>25</sup> Comprehensive Methamphetamine Control Act of 1996, Pub. L. No. 104-237, 110 Stat. 3099 (1996).

<sup>26</sup> U.S. Drug Enforcement Admin., *supra* note 19.

<sup>27</sup> U.S. Food & Drug Admin., *Legal Requirements for the Sale and Purchase of Drug Products Containing Pseudoephedrine, Ephedrine, and Phenylpropanolamine*, <http://www.fda.gov/cder/news/methamphetamine.htm> (last visited Nov. 13, 2008).

<sup>28</sup> *United States v. Khattab*, 536 F.3d 765, 666 (7th Cir. 2008). A blister pack is "[a] package that consists of molded plastic or laminate that has indentations (viewed as 'blisters' when flipped) into which a dosage form, is placed. A covering, usually of laminated material, is then sealed to the molded part." U.S. Food & Drug Admin., *Package Type*, in DATA STANDARDS MANUAL C-DRG-00907 (2006), available at <http://www.fda.gov/cder/dsm/drg/Dr00907.htm>.

<sup>29</sup> Behind-the-counter means either behind the pharmacist's counter in a place inaccessible to the public or in a locked case. U.S. Food & Drug Admin., *supra* note 27. As recently as a few years ago, a person could walk into a drugstore, pick up a box of pseudoephedrine, commonly known as Sudafed, from the shelves, and purchase it at the cash register—no questions asked. Now, at least 37 states require the congested to wait in line at the pharmacy counter, show identification, and sign a logbook to purchase decongestants, and only in limited quantities. *Id.*; Terry Everett, *Reversing Rural America's Methamphetamine Epidemic*, U.S. FED. NEWS, Jan. 30, 2006, available at 2006 WLNR 21183912. Tennessee has reported that such

possession or distribution of pseudoephedrine or several other precursor chemicals<sup>30</sup> with the knowledge or reasonable cause to believe that it would be used to manufacture methamphetamine.<sup>31</sup>

At wholesale, pseudoephedrine is still sold in cases of bottles of loose pills, 144 bottles of 60 pills or 8,640 pills per case.<sup>32</sup> Wholesalers need a license from the Drug Enforcement Agency (DEA) to import, export, or distribute cases in this format.<sup>33</sup> A significant black market has therefore arisen to sell bulk quantities of pseudoephedrine to methamphetamine producers.<sup>34</sup> Many recipes for methamphetamine call for the 60-milligram pseudoephedrine tablets.<sup>35</sup> Loose pills are generally preferred over the blister packs, because they are easier to process.<sup>36</sup> Because there are 8,640 pills in a case of bottles of loose methamphetamine pills, methamphetamine

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regulations alone reduced the number of small methamphetamine lab seizures from more than 1,500 in 2004 to 955 in 2005. U.S. Drug. Enforcement Admin., *supra* note 19, n. 24.

<sup>30</sup> See 21 C.F.R. § 1310.02. Pseudoephedrine regulations were strengthened by the Combat Methamphetamine Act of 2005, Pub. L. No. 109-177, 120 Stat. 192, 256-77 (2006).

<sup>31</sup> 21 U.S.C. § 841(c)(2) says in relevant part,  
Any person who knowingly or intentionally-

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(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter;...

shall be fined in accordance with Title 18 or imprisoned not more than 20 years...

<sup>32</sup> U.S. v. Khattab, 536 F.3d 765, 766 (7th Cir. 2008).

<sup>33</sup> *Id.*

<sup>34</sup> See *Id.* at 766.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

manufacturers use the number 8,640 as a code to indicate bulk quantities.<sup>37</sup>

There are no recorded uses of bulk quantities of pseudoephedrine sold outside of DEA licensing restrictions.<sup>38</sup> The DEA is unaware of any black market use for bulk quantities of pseudoephedrine other than for manufacture of methamphetamine.<sup>39</sup>

Thus, because of the nationwide problem with methamphetamine use, sales of pseudoephedrine and other precursor chemicals to methamphetamine have been criminalized and resulted in a black market.<sup>40</sup> However, black market sellers can only be prosecuted under the Statute if they possess the requisite *mens rea* by knowing or having reasonable cause to believe that the chemicals they possess or distribute will be used to make an illegal drug.<sup>41</sup>

### B. *Mens Rea*

In the American legal system, crimes are said to consist of two parts: the physical act (or omission) and a mental component called the *mens rea*.<sup>42</sup> The justification for the existence of *mens rea* may be based on an idea that one should only be punished for intentional, not accidental acts.<sup>43</sup> Alternatively, others justify the *mens rea* requirement on utilitarian grounds, arguing that only intentional crimes can be deterred.<sup>44</sup>

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<sup>37</sup> *Id.* at 766-67.

<sup>38</sup> *Id.* at 767.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 766.

<sup>41</sup> 21 U.S.C. § 841(c)(2).

<sup>42</sup> LAFAVE, *supra* note 2, at §5.1.

<sup>43</sup> This argument is instinctual, the Supreme Court noted, as an extension of “the child’s familiar exculpatory ‘But I didn’t mean to[.]’” U.S. v. Morissette, 342 U.S. 246, 250-51 (1952).

<sup>44</sup> See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.03[A] (3d ed. 2001). Dressler also identifies an argument that there is some value in prosecuting certain accidental crimes as a warning to others to be more careful. *Id.*

Legal scholars have often criticized the term as “ambiguous” and having different meanings in different situations.<sup>45</sup> Sometimes the meaning is broad and encompasses the defendant’s culpability or fault, while other times it refers to a defendant’s particular mental state required for prosecution of a crime.<sup>46</sup> Further, the *mens rea* can be subjective and based on the thoughts and motives of the defendant himself.<sup>47</sup> Alternatively, the *mens rea* may create an objective fault standard based on the mindset of a reasonable person in the defendant’s situation.<sup>48</sup> Narrow, subjective fault is the usual requirement, while objective fault is sufficient for crimes where a stricter standard of criminal liability is appropriate.<sup>49</sup>

For statutory crimes, the language typically includes carefully chosen words to express the *mens rea* requirement, like intentionally, purposely, willingly, fraudulently, recklessly, or negligently.<sup>50</sup> Naturally, there is significant case law discussing the applications of these words to real world fact scenarios,<sup>51</sup> and the Model Penal Code has attempted to codify the common law definitions of the words.<sup>52</sup>

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<sup>45</sup> *Id.* at § 10.02[A] (quoting George Fletcher, Oliver Wendell Holmes, Francis Bowes Sayre, and Sanford H. Kadish).

<sup>46</sup> *Id.* at § 10.02[B]-[C].

<sup>47</sup> LAFAVE, *supra* note 2, at § 5.1.

<sup>48</sup> *Id.*

<sup>49</sup> The *mens rea* for such crimes is typically negligence or carelessness, and the crimes themselves are often lesser offenses of crimes involving true intent, i.e. negligent homicide as opposed to intentional homicide. Thus, it is appropriate in such instances to hold the defendant to a higher standard of blameworthiness because the offenses charged are less than those requiring a more subjective intent. *Id.* at §5.1(a).

<sup>50</sup> *Id.*

<sup>51</sup> *See* Bryan v. U.S., 524 U.S. 184 (1998).

<sup>52</sup> MODEL PENAL CODE § 2.02(2)(b) (2001). Relevantly, the word knowingly is defined as “A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.” *Id.*

It is an oft-repeated presumption in criminal law that when one commits an act, they intend for the “natural and probable consequences” to unfold.<sup>53</sup> However, where the statutory *mens rea* requirement is purposely or knowingly, it is not enough to presume that the defendant intended the ordinary consequences of his or her actions.<sup>54</sup> In fact, as the Supreme Court noted in *Sandstrom v. Montana*, in a criminal trial the prosecution always has the burden of proving beyond a reasonable doubt that the accused had the requisite *mens rea*.<sup>55</sup> Thus, for a knowingly *mens rea*, the prosecution is charged with proving the defendant’s subjective fault—his personally guilty mind.<sup>56</sup>

In at least some circuits, “knowingly” does not necessarily require that the defendant knew with absolute certainty what would happen; he merely need be aware that there was a high probability that the illegal result would occur.<sup>57</sup> Thus, a defendant may not willfully turn a blind eye to the situation around him and then say he did not know what was happening.<sup>58</sup> When a defendant “shuts his eyes,” he then

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<sup>53</sup> See *Ford v. Maryland*, 625 A.2d 984, 994 (Md. 1993) (quoting *Davis v. Maryland*, 102 A.2d 816, 819-209 (Md. 1954)).

<sup>54</sup> *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (holding that the trial court incorrectly instructed the jury that a person is held to intend the reasonable consequences of his actions and overturning their conviction of defendant).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976), *cert. denied* 426 U.S. 951 (1976) (holding that a man who was paid \$100 to drive a stranger’s car from Tijuana to an address in the United States did not examine the situation around him if he did not know the car was full of marijuana).

<sup>58</sup> See, e.g. *United States v. Flores*, 454 F.3d 149, 155 (3d Cir. 2006) (finding that defendant knew he was involved in money laundering because he used false social security numbers, opened bank accounts with large quantities of money, and received notice from the bank about structured transactions); *United States v. Stewart*, 185 F.3d 112, 126 (3d Cir.1999). See also *United States v. Antzoulatos*, 962 F. 2d 720, 724-25 (1992) (holding that the defendant who sold cars in cash to a group of men and left the cars under title of the dealership knew that those men were drug dealers purchasing the cars to hide the proceeds of their drug dealing).

acts at his own peril and is treated as though he has knowledge.<sup>59</sup> A determination of a “knowing” *mens rea* based on a willful blindness standard must nonetheless be subjective in nature; the finder of fact should look to the defendant’s state of mind to determine whether he knew and was simply closing his eyes to the circumstances.<sup>60</sup>

For a *mens rea* like having reasonable cause to believe, on the other hand, whether the fault is objective or subjective is significantly less clear.<sup>61</sup>

## II. PREVIOUS CASE LAW WITH RESPECT TO 21 U.S.C. § 841(C)(2)

As with other elements of a crime, the government has the burden of proving that the defendant had or should have had the requisite *mens rea* for the Statute.<sup>62</sup> The government must therefore show that the defendant knew or should have known that the chemical the defendant possessed or distributed would be used to make an illegal narcotic.<sup>63</sup> Despite the fact that there are no other known uses for bulk quantities of pseudoephedrine, no presumption exists that simply because the defendant was selling bulk quantities of pseudoephedrine, he or she knew that it would be used to produce methamphetamine.<sup>64</sup> The government must show additional facts to reach that conclusion, and the circuits have split as to exactly what the government must show.<sup>65</sup>

The Eleventh Circuit was one of the first to examine the issue in 2000, *United States v. Prather*, where the defendant operated a mail-order company that sold miscellaneous items wholesale, including

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<sup>59</sup> Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 920 (1939).

<sup>60</sup> *United States v. Wasserson*, 418 F.3d 225, 237 (2005) (holding that a jury instruction must be clear on the subjectivity of the standard).

<sup>61</sup> *See supra* Section II.

<sup>62</sup> *Sandstrom*, 442 U.S. at 524.

<sup>63</sup> 21 U.S.C. § 841(c)(2).

<sup>64</sup> *United States v. Khattab*, 536 F.3d 765, 769 (7th Cir. 2008).

<sup>65</sup> *Id.*

pseudoephedrine in cases of 75 1,000 tablet bottles.<sup>66</sup> His customers included both individuals and “head shops.”<sup>67</sup> During 1994 and 1995, Prather learned that several of his customers were being investigated by authorities, and in 1995 he received an opinion letter from a law firm stating that his business activities put him at risk for prosecution.<sup>68</sup> Additionally, he told one potential customer that an arrangement where he sent 100 cases per week of pseudoephedrine to his home address was not “a good idea” because the “cops would be hot on” them.<sup>69</sup> He persisted with his business.<sup>70</sup> Eventually, he was charged with and convicted of ten counts of violating the Statute by distributing pseudoephedrine and knowing or having reasonable cause to believe that it would be used to manufacture methamphetamine.<sup>71</sup>

The Eleventh Circuit upheld the conviction over Prather’s argument that the government had not proved that the pseudoephedrine had actually been used to manufacture methamphetamine, holding that the government has no such obligation.<sup>72</sup> Further, the Eleventh Circuit affirmed the jury instructions regarding “reasonable cause to believe.” The jury instructions asked the jurors “[W]hat would a reasonable person reasonably have believed based on the evidence known to the defendant[?]” The jurors requested clarification. The judge responded, “Here the focus is not on what it is proven that he actually knew. Here the standard is[,] based on what he did know, would a reasonable

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<sup>66</sup> 205 F.3d 1265, 1268 (11th Cir. 2000).

<sup>67</sup> *Id.* A “head shop” is a shop specializing in articles of interest to drug users. Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/head%20shop> (last visited Dec. 10, 2008).

<sup>68</sup> *Prather*, 205 F.3d at 1268.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* Actually, Prather was charged and convicted under 21 U.S.C. § 841(d)(2), which was re-designated 21 U.S.C. § 841(c)(2) with the passage of the Hillory J. Farias And Samantha Reid Date-Rape Drug Prohibition Act Of 2000, Pub. L. 106-172 § 9, 114 Stat. 13 (2000).

<sup>72</sup> *Id.* at 1269.

person . . . have cause to believe that the pseudoephedrine in the count would be diverted.”<sup>73</sup>

Because the defendant failed to object to the jury instructions at trial, the Eleventh Circuit reviewed the question based on a plain error standard, which requires only that the instruction was not a plainly incorrect statement of the law, and found that the jury instruction was not plainly erroneous.<sup>74</sup>

In 2004, the Ninth Circuit examined another conviction under the Statute in *United States v. Kaur*.<sup>75</sup> Defendant Manjit Kaur was charged when a confidential DEA source purchased large quantities of pseudoephedrine from her at the convenience store she owned.<sup>76</sup> The district court instructed the jury 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.”<sup>77</sup> Kaur argued on appeal that the jury instruction abused the discretion of the district court where it failed to equate knowledge with reasonable cause to believe and imposed a reasonable person standard rather than a subjective standard.<sup>78</sup> The Ninth Circuit rejected the idea that reasonable cause to believe should be equated with actual knowledge, finding that such an interpretation would render the second term superfluous.<sup>79</sup> Furthermore, the court held that the reasonable person standard was appropriate in that it incorporated “both subjective and objective considerations.”<sup>80</sup>

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<sup>73</sup> *Id.* at 1271.

<sup>74</sup> *Id.*

<sup>75</sup> 382 F.3d 1155 (9th Cir. 2004).

<sup>76</sup> *Id.* at 1156.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1157.

<sup>79</sup> *Id.* (citing *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992) (“[C]ourts should disfavor interpretations of statutes that render language superfluous.”)).

<sup>80</sup> *Id.*

Similarly, in 2005, the Eight Circuit upheld a defendant's conviction in *United States v. Galvan*.<sup>81</sup> Galvan was caught by police officers conducting surveillance of a Wal-Mart after purchasing his maximum allotted three boxes of pseudoephedrine pills.<sup>82</sup> The police officers then followed Galvan to six other stores, arrested him, and found many boxes of pseudoephedrine pills in his car.<sup>83</sup> The Eighth Circuit held that the district court was correct in rejecting Galvan's proposed jury instructions, which stated that "'reasonable cause to believe' . . . requires an inquiry into what this particular defendant had reason to believe" and is a standard "akin to actual knowledge."<sup>84</sup> The court quoted and agreed with *Kaur* that the instruction would render "reasonable cause to believe" extraneous next to actual knowledge.<sup>85</sup>

The Tenth Circuit, on the other hand, has held that "reasonable cause to believe" is mainly subjective and based on the knowledge of the defendant. In *United States v. Saffo*, defendant Randa Saffo was part of a large-scale operation selling pseudoephedrine wholesale to other wholesale distributors in different states.<sup>86</sup> She was arrested, charged with, and convicted of seven counts of violating the Statute.<sup>87</sup> In this case, the Tenth Circuit's first examination of the Statute's *mens rea* requirement, the court examined the requirement's constitutionality.<sup>88</sup> In this discussion, the court held that "the reasonable cause to believe" standard is "akin to actual knowledge."<sup>89</sup> If it were not, it would mean that *mens rea* was not "personal," but instead based on societal ideals and mindsets.<sup>90</sup> In other words, if "reasonable cause to believe" was not based on the defendant's

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<sup>81</sup> 407 F.3d 954, 957 (8th Cir. 2005).

<sup>82</sup> *Id.* at 956.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 957.

<sup>85</sup> *Id.*

<sup>86</sup> 227 F.3d 1260, 1264 (10th Cir. 2000).

<sup>87</sup> *Id.* at 1267.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1269 (citing *State v. Smith*, 123 A.2d 369, 372 (N.J. 1956)).

<sup>90</sup> *Id.*

subjective knowledge, it would not be a *mens rea* requirement at all but instead a barometer of society's knowledge.<sup>91</sup> Such a result would be unconstitutional, so the Tenth Circuit interpreted the "reasonable cause to believe" standard as based on defendant's subjective knowledge and held that the Statute was constitutional.<sup>92</sup>

In *United States v. Truong*, the defendant sold large quantities of pseudoephedrine to various people while working at a Texaco gas station.<sup>93</sup> While the gas station stocked boxes of six sixty-milligram pseudoephedrine tablets, it also kept thousand-count bottles of 50 milligram tablets under the counter that sold for approximately \$300 each.<sup>94</sup> Truong willingly told police that he received the large bottles from a man who then accepted payment after Truong sold them.<sup>95</sup> He also told police he did not know the purpose of the pills.<sup>96</sup> One of Truong's former purchasers-turned-government-witness testified in response to the prosecutor's question, "And he was speaking English?" "He was trying to, yeah . . ." <sup>97</sup> These facts contributed to the idea that Truong may not have known the purpose of the pills.<sup>98</sup> However, Truong also acted as if he knew his actions were illegal; he accepted cash only for the bottles, kept no records of the transactions, did not ring up the sales in the cash register, conducted the sales after hours, and hid the bottles in Styrofoam cups when he sold them.<sup>99</sup> At the end of the government's case, Truong moved for judgment of acquittal, arguing that the prosecution had failed to prove that he knew or had reasonable cause to believe that the pseudoephedrine would be

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* While the examination was useful precedent, the point was rather moot. Because Saffo had actual knowledge that the pseudoephedrine she sold would be used to manufacture methamphetamine, the court sustained her conviction. *Id.*

<sup>93</sup> 425 F.3d 1282, 1284-85 (10th Cir. 2005).

<sup>94</sup> *Id.* at 1285.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 1287.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1285-86.

used to manufacture methamphetamine; the motion was denied, and the jury found Truong guilty.<sup>100</sup>

The Tenth Circuit noted on appeal that the Statute has an unusual *mens rea* requirement in that the government cannot simply prove that the defendant knew, intended, or had reasonable cause to believe that the chemical would be abused or used illegally; they must actually show that he knew or had reason to believe the substance would be *used to manufacture methamphetamine*.<sup>101</sup> The court also noted that the Statute could be interpreted, as other circuits have,<sup>102</sup> to contain both a subjective and objective *mens rea* requirement; a defendant could be convicted based on his actual knowledge or with a showing that a reasonable person under the circumstances would have known.<sup>103</sup> However, the court retained its *Saffo* interpretation and held that the government had the burden of proving that Truong had actual knowledge or something close to it that the pseudoephedrine he sold would be used to manufacture methamphetamine.<sup>104</sup> Because the government did not present evidence that Truong had received official government notice, as other defendants had in similar cases,<sup>105</sup> that large quantities of pseudoephedrine are generally used to manufacture

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<sup>100</sup> *Id.* at 1287-88.

<sup>101</sup> *Id.* at 1289 (emphasis added).

<sup>102</sup> See *United States v. Galvan*, 407 F.3d 954, 957 (8th Cir. 2005); *United States v. Kaur*, 382 F.3d 1155, 1157-58 (9th Cir. 2004); *United States v. Prather*, 205 F.3d 1265, 1271 (11th Cir. 2000).

<sup>103</sup> *Truong*, 425 F.3d at 1289.

<sup>104</sup> *Id.*

<sup>105</sup> Other cases contained evidence that defendants had received actual notice pills would be used to produce methamphetamine. See *United States v. Nguyen*, 413 F.3d 1170, 1175 (10th Cir. 2005) (DEA issued red notices to area stores warning that pseudoephedrine may be used to make methamphetamine and informed employees of the state and federal laws regarding pseudoephedrine sales.); *United States v. Saffo*, 227 F.3d 1260, 1265 (10th Cir. 2000) (Defendant received a DEA “red notice” with information about pseudoephedrine and the law); *United States v. Buonocore*, 416 F.3d 1124, 1126 (10th Cir. 2005) (A recording revealed the purchaser saying, “the meth cooks have been cookin [sic] like crazy . . . I must have had a run, there’s a bunch of meth cooks in town, that’s what their [sic] using them for.”).

methamphetamine, the court reversed Truong's conviction as unsupported by sufficient evidence.<sup>106</sup> Though the government presented more than sufficient evidence that Truong knew his customers "were up to no good", they did not prove the "unusually specific *mens rea* requirement" of the Statute.<sup>107</sup>

Thus, the Tenth Circuit's interpretation of the Statute disagrees directly with that of the Eighth, Ninth, and Eleventh Circuits about whether the "having reasonable cause to believe" *mens rea* is based on the defendant's knowledge or what a reasonable person would think in the defendant's position.<sup>108</sup>

### III. *United States v. Khattab*

In 2005, Muhammad Khattab negotiated with Khalid Hassan, a confidential informant for the Drug Enforcement Agency, to purchase a large quantity of pseudoephedrine.<sup>109</sup> Hassan recorded his conversations with Khattab both through a recording device on his telephone and by wearing a wire while meeting with Khattab in person.<sup>110</sup> During this time, Hassan told Khattab he had a contact willing to sell him 100 boxes of pseudoephedrine.<sup>111</sup>

At a meeting April 22, 2005, between Khattab, Hassan, and another man at an auto parts store, Hassan wore a recording device monitored and recorded by DEA agents.<sup>112</sup> During this conversation, at least one of the men present referenced extracting something from the pseudoephedrine to make a different substance.<sup>113</sup> The men also

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<sup>106</sup> *Truong*, 425 F.3d at 1291.

<sup>107</sup> *Id.* at 1290-91.

<sup>108</sup> *See United States v. Khattab*, 536 F.3d 765, 769 (7th Cir. 2008).

<sup>109</sup> *Id.* at 765-66.

<sup>110</sup> *Id.* at 766.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* The conversation was conducted in Arabic. The government introduced transcripts verified as accurate translations into English by a linguist, Bassam Abbasi. *Id.* at 767.

<sup>113</sup> *Id.* The Seventh Circuit is unclear as to whether it is known who made the various statements. Several possibly incriminating statements were made by Khattab

referred to the substance created from the extracted pseudoephedrine as “the narcotic substance.”<sup>114</sup> When one of the men asked Khattab, “[d]o they sniff it or inject it?” Khattab answered, “No, they sniff it... They’ll mix it with the baking soda... [o]r with cocaine.”<sup>115</sup>

On May 31, 2005, Hassan and Khattab decided to meet with a DEA agent posing as a deliveryman for said pseudoephedrine supplier.<sup>116</sup> After Khattab became spooked by the potential of law enforcement presence one day, the men rescheduled and met in an alley behind a gas station on the South Side of Chicago later that day.<sup>117</sup> The undercover DEA agent showed Khattab 100 boxes of pseudoephedrine in the back of his van. Khattab then paid the agent \$3,000 for the drugs.<sup>118</sup> That amounted to double what the agent paid from a wholesale supplier.<sup>119</sup> As Khattab began moving the drugs to his own van, DEA agents who had been conducting surveillance on the scene identified themselves.<sup>120</sup> Khattab gave chase but was quickly apprehended.<sup>121</sup>

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or in his presence on April 22: “they extract those substances”; “[d]o they extract the same amount from this substance, as from the other substance that they bring from . . . Canada?”; “they’ll mix it with the baking soda.” *Id.* Only one statement, “[they] dissolve the medicine, and they extract the substance from it, and they mix it up,” was attributed by the Seventh Circuit to Khattab. *Id.*

<sup>114</sup> *Id.* They said: “the narcotic substances”; “it’s a narcotic”; “half and half with the . . . narcotic, uh, substance.” *Id.* The transcript also contained a conversation indicating that Khattab knew the pseudoephedrine was more valuable in loose bottle form: “[Khattab:] The Canadian stuff . . . First, it comes loose and ready. [Hassan:] Yeah, this one you have to make it loose by yourself. [Khattab:] No, I can give it to them the way it is, but with a lesser price. It’s a cheaper price.” *Id.* The men also mention the number 8,640, and Khattab said “the most important thing” was to obtain 60-milligram pills. *Id.*; *see also supra* text accompanying notes 32-37.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 766.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

Khattab was thus indicted on one count of attempting to knowingly or intentionally possess or distribute pseudoephedrine with knowledge, or a reasonable cause to believe, that it would be used to manufacture a substance containing methamphetamine.<sup>122</sup> Khattab waived his right to a jury and was tried in a bench trial in January 2007.<sup>123</sup> At trial, after the government presented its case, Khattab moved for a judgment of acquittal, arguing that the government had failed to produce testimony linking Khattab to methamphetamine and thus failed to prove that he knew or should have known that the pseudoephedrine he purchased would be used to manufacture methamphetamine.<sup>124</sup> The district court denied the motion, ruling that it had not fully reviewed the recordings and transcripts, and that as the finder of fact, it would do so and make a determination at the end of the trial.<sup>125</sup> Khattab waived his right to testify. After closing arguments, the district court declared that the evidence was “just barely” sufficient to connect Khattab to production of methamphetamine.<sup>126</sup> The court identified Khattab’s recorded statement, “They sniff it,” as the most damning piece of evidence, and further held that Khattab clearly knew his behavior to be illegal in some way, else he would not have insisted on secrecy in the meetings.<sup>127</sup> Thus, Khattab was convicted.<sup>128</sup> He was sentenced below sentencing guidelines to 144 months’ imprisonment.<sup>129</sup>

Khattab appealed his conviction on the basis that the government failed to prove that he met the second element of the crime in the statute.<sup>130</sup> He conceded that he “knowingly or intentionally . . . possess[ed] . . . a listed chemical,” but denied that he did so “knowing,

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<sup>122</sup> This indictment came under 21 U.S.C. § 846 and 21 U.S.C. § 841(c)(2)(2).

<sup>123</sup> *Khattab*, 536 F.3d at 766.

<sup>124</sup> *Id.* at 767.

<sup>125</sup> *Id.* at 767-68.

<sup>126</sup> *Id.* at 768.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 4.

or having reasonable cause to believe that the listed chemical w[ould] be used to manufacture a controlled substance.”<sup>131</sup> In fact, Khattab argued on appeal that the government had failed to prove the *mens rea* requirement that he knew the pseudoephedrine he had purchased would be used to make methamphetamine.<sup>132</sup>

The Seventh Circuit then identified the split between the courts as discussed above in Part II, but declined to “weigh in on the circuit split regarding the proper *mens rea* standard.”<sup>133</sup> The court held that even viewing the evidence in the light most favorable to Khattab, he actually knew that the pseudoephedrine would be used to make methamphetamine.<sup>134</sup> The court saw his understanding that the pseudoephedrine would be “extracted” and that “they sniff it,” as adequate proof of his knowledge. Thus, the Seventh Circuit affirmed the district court’s decision.<sup>135</sup>

#### IV. THE SEVENTH CIRCUIT AND SUPREME COURT SHOULD ADOPT THE POSITION OF THE TENTH CIRCUIT WITH RESPECT TO *MENS REA* REQUIRED BY 21 U.S.C. § 841.

The Tenth Circuit’s opinion in *United States v. Saffo*<sup>136</sup> is the only interpretation of reasonable cause to believe that makes sense in light of the meaning and history of *mens rea*. The *mens rea* requirement may not always focus exclusively on the defendant’s guilty state of mind, and it may sometimes force the defendant to have examined the world around him,<sup>137</sup> but it ought generally to be subjective, to remain personal. A *mens rea* requiring knowledge or reasonable cause to believe cannot sensibly incorporate aspects of some other reasonable person’s mind. To blend the two states of mind is to completely

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<sup>131</sup> *Id.*; 21 U.S.C. § 841(c)(2)(2).

<sup>132</sup> *Khattab*, 536 F.3d at 768.

<sup>133</sup> *Id.* at 769.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 771.

<sup>136</sup> 227 F.3d 1260 (10th Cir. 2000).

<sup>137</sup> *See supra* text accompanying notes 57-60.

eradicate the purpose of the *mens rea* requirement, which is generally to hold defendants responsible only for crimes they intended to commit.<sup>138</sup>

The other circuits' holdings with respect to "reasonable cause to believe" consider only that knowledge is already a possible *mens rea* listed in the Statute and express concerns that interpreting "reasonable cause to believe" as akin to knowledge would be duplicative.<sup>139</sup> On the contrary, it is not at all duplicative. The "reasonable cause to believe" standard merely allows the government, in cases where the defendant had clear notice that the chemical would be used to make methamphetamine, to convict where they do not have an affirmative statement by the defendant that he or she knew the chemical would be used to make methamphetamine.<sup>140</sup> Thus, it allows the government to meet its burden of proof where knowledge is all but explicit. However, it does not allow the government to make inferences based on the knowledge of people in general about methamphetamine or based on evidence that the defendant knew *something* generally illegal was going on.<sup>141</sup> Thus, the standard as interpreted by the Tenth Circuit is not duplicative as alleged by the other circuits.<sup>142</sup>

In general, it would be ludicrous to hold sellers responsible for the damage their otherwise innocent products may cause. A fertilizer retailer should not be convicted of murder because he sold the fertilizer that would later be used to make a bomb. A gas station attendant must not be held responsible for selling the gas an arsonist uses to burn a building. A pawnshop owner cannot be held responsible for legally selling a gun later used to kill someone. Likewise, it would be crazy to hold someone liable for selling the pseudoephedrine, iodine, red phosphorous, ether, hydrochloric acid, or methanol that

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<sup>138</sup> See Rollin M. Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 905 (1939). This, of course, excepts strict liability and negligence crimes. See *supra* Section I.B.

<sup>139</sup> See *United States v. Kaur*, 382 F.3d 1155, 1157 (9th Cir. 2004).

<sup>140</sup> See *United States v. Saffo*, 227 F.3d 1260, 1269 (10th Cir. 2000).

<sup>141</sup> See *United States v. Truong*, 425 F.3d 1282, 1291 (10th Cir. 2005).

<sup>142</sup> *Kaur*, 382 F.3d at 1157.

someone later uses to manufacture methamphetamine when the seller had no way of knowing the destination of their product. Thus, the Statute includes a *mens rea* requirement “knowing or having reasonable cause to believe[.]” to ensure that innocent people are not prosecuted for the crimes of others.<sup>143</sup>

While it is clear that a seller who knows ought to be prosecuted and a seller who does not know should not be, there exists a grey area wherein the government may not be able to prove what exactly the defendant knew or thought.<sup>144</sup> In such a circumstance, it is unfair and contrary to the purpose of *mens rea* to hold a defendant liable for what he might have thought or what another man in his shoes might have thought. This is, of course, not true in the case of a defendant who willfully turns a blind eye to the circumstances around him.<sup>145</sup> In fact, it would be possible to argue that at this juncture, anyone who sells bulk quantities of pseudoephedrine must either know the pseudoephedrine will eventually be used to make methamphetamine or has turned a blind eye to reality, especially where the DEA has gone out of their way to inform people.<sup>146</sup> However, the government must nonetheless maintain the burden of proof; the government cannot convict people under the Statute without showing that they knew or had something reasonably akin to knowledge that the chemical they possess or distribute will be used to make methamphetamine.<sup>147</sup> Especially with respect to the other precursor chemicals such as iodine

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<sup>143</sup> 21 U.S.C. § 841(c)(2).

<sup>144</sup> See *United States v. Truong*, 425 F.3d 1282, 1291 (10th Cir. 2005).

<sup>145</sup> *United States v. Antzoulatos*, 962 F.2d 720, 725 (7th Cir. 1992).

<sup>146</sup> See, e.g. *United States v. Nguyen*, 413 F.3d 1170, 1175 (10th Cir. 2005) (DEA issued red notices to area stores warning that pseudoephedrine may be used to make methamphetamine and informed employees of the state and federal laws regarding pseudoephedrine sales.); *United States v. Saffo*, 227 F.3d 1260, 1265 (10th Cir. 2000) (Defendant received a DEA “red notice” with information about pseudoephedrine and the law); *United States v. Buonocore*, 416 F.3d 1124, 1126 (10th Cir. 2005) (A recording revealed the purchaser saying, “the meth cooks have been cookin [sic] like crazy . . . I must have had a run, there’s a bunch of meth cooks in town, that’s what their [sic] using them for.”).

<sup>147</sup> See *United States v. Saffo*, 227 F.3d 1260, 1264 (10th Cir. 2000).

and red phosphorous that can be purchased legally for a variety of legal purposes, to apply a reasonable person standard would be grossly unfair and create an absurd result.

Therefore, the *mens rea* requirement in the Statute should be applied narrowly to avoid requiring people, in the context of selling otherwise legal goods, to think precisely like the reasonable man.

#### CONCLUSION

Because the Tenth Circuit's holding in *United States v. Saffo* that "reasonable cause to believe" is a standard akin to knowledge is the only just and fair way to interpret 21 U.S.C. § 841(c)(2), the Seventh Circuit and the United States Supreme Court should adopt that standard if the issue arises.