No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

ANTONIO TORRES,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Issue Presented

1. Whether U.S.S.G. § 3B1.2 now contains a rebuttable presumption that a mitigating role reduction should be granted upon a showing by the defendant that he did not have a proprietary interest in the criminal activity and was simply being paid to perform certain tasks.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Antonio Torres ("Torres") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming Torres' conviction and sentence is styled: *United States v. Antonio Torres,* 716 F. App'x 379 (5th Cir. 2018).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the Petitioner's conviction and sentence was announced on March 29, 2018 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the date of the judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

U.S. Sentencing Guidelines

U.S.S.G. § 3B 1.2 (2015)

Based on the defendant's role in the offense, decrease the offense as follows:

(a) If a defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b)If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

U.S.S.G. § 3B 1.2 cmt. n. 3(C) (2015)

(C) Fact-Based Determination.—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.

In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:

(i) the degree to which the defendant understood the scope and structure of the criminal activity;

(ii) the degree to which the defendant participated in planning or organizing the criminal activity;

(iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;

(iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;

(v) the degree to which the defendant stood to benefit from the criminal activity.

For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.

The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.

Statement of the Case

Torres pled guilty without a plea agreement to an indictment charging him with possess with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(b)(1)(A). The district court sentenced him to 240 months in prison, five years of supervised release, and no fine. The jurisdiction of the federal district court was invoked pursuant to Title 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."). Torres was convicted of violating Title 21 U.S.C. § 841(b)(1)(A).

At the time Torres pled guilty, the Government proffered the following oral factual basis in support of the plea:

> The facts would show that on October 23rd, 2015, the Defendant Antonio Torres attempted to enter the United States through the Gateway Point of Entry in Brownsville, Cameron County, Texas. The Defendant was a driver and sole occupant of a gray-colored 2008 Nissan. During inspection of this vehicle, twenty-two packages were discovered in a false compartment located in the floor board underneath the driver's and front passenger seat. The packages field tested positive for methamphetamine. The Defendant claimed sole ownership of the vehicle and his crossing records established that the Defendant had used the same vehicle to cross into the

> United States on several occasions. The Defendant gave a statement admitting that he knew the narcotics were present and that he was going to be paid five thousand dollars for transporting it into the United States and driving the car with the drugs to Houston, Texas. The Defendant knowingly possessed the narcotics with the intent to distribute them to another person within the United States.

Torres' Presentence Investigation Report ("PSR") characterized his conduct thusly:

> After reviewing the facts in the case, it appears Antonio Torres was hired to smuggle methamphetamine into the United States. It appears that Torres is an average participant. There is no further information regarding this smuggling operation and the investigation is ongoing. The defendant's actions do not appear to warrant aggravating or mitigating role adjustment.

Torres complained that the PSR had not granted him a "minimal or minor role" adjustment, given that he had only been "transporting." The district judge adopted the PSR and chose not to grant the adjustment: "I do not believe Mr. Torres necessarily qualifies as a minor participant[.]"

Torres argued on appeal (among other things) that the district court clearly erred in denying him a mitigating role adjustment under U.S.S.G. § 3B1.2. More specifically, based on amendment 794 to the Sentencing Guidelines, he argued that the district court did not have

discretion (absent rebuttal) to refuse a § 3B1.2 downward adjustment under the following circumstance:

> [A] defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks *should be considered* for an adjustment under this guideline.

U.S.S.G. § 3B1.2, cmt. n. 3. The Fifth Circuit held that the district court was within its discretion to deny the adjustment because "[t]he record includes factors favoring granting the adjustment and some [factors] counseling against the adjustment."

Reason for Granting the Writ: The Fifth Circuit's holding is contrary to the Sentencing Commission's intent in promulgating amendment 794.

Although Amendment 794 did not change the text of § 3B1.2, it significantly amended the commentary thereto in the 2015 Guidelines. U.S.S.G. App. C, amend. 794; *United States v. Gomez–Valle,* 828 F.3d 324, 328 (5th Cir. 2016). The Sentencing Commission amended the guideline because the adjustment was being applied too infrequently, and

to provide guidance in the face of "circuit conflict and other case law that may be discouraging courts from applying the adjustment in otherwise appropriate circumstances." U.S.S.G. App. C, amend. 794. The amendment also made it clear that "average participant" is to be determined only by comparison to "those persons who actually participated in the criminal activity at issue in the defendant's case[.]" *Id.* The new guidance provided the following non-exhaustive list of factors to be considered in determining whether to apply the adjustment:

> (i) the degree to which the defendant understood the scope and structure of the criminal activity;
>
> (ii) the degree to which the defendant participated in planning or organizing the criminal activity;
>
> (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
>
> (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
>
> (v) the degree to which the defendant stood to benefit from the criminal activity.

U.S.S.G. App. C, amend. 794; U.S.S.G. § 3B1.2 cmt. n.3(C). The last sentence under the "Reason for Amendment" section provides as follows:

> The amendment further provides, as an example, that a defendant who does not have a proprietary interest in the criminal activity and who is simply paid to perform certain tasks *should* be considered for a mitigating role adjustment. (emphasis added)

U.S.S.G. App. C, amend. 794. Amendment 794 basically tells sentencing courts, "You're not granting mitigating role adjustments often enough; and if the defendant is simply being paid a flat fee to perform certain tasks, you *should* grant the adjustment."

The word "should" in a statute or rule creates a presumption. *See Lochridge v. Lindsey Mgmt. Co.,* 824 F.3d 780, 783 (8th Cir. 2016). The Sentencing Guidelines, including the commentary, "bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases." *Stinson v. United States,* 508 U.S. 36, 42 (1993). Therefore, when the Sentencing Commission includes the word "should" in an amendment to the guidelines, it likewise is to be treated as creating a rebuttable presumption. Amendment 756 is instructive in this regard.

In Amendment 756, the Sentencing Commission added the following provision to U.S.S.G. § 5D1.1 (Entitled "Imposition of a Term of Supervised Release"):

> (c) The court ordinarily *should not* impose a term of supervised release in case in which the supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.

U.S.S.G. App. C, amend. 756. The Third and Tenth Circuits have characterized this "should not" provision as creating a presumption. *See United States v. Azcona-Polanco,* 865 F.3d 148, 151 (3d Cir. 2017) ("Deportable immigrants are presumptively exempt from the discretionary imposition of supervised release per a 2011 amendment to the Sentencing Guidelines."); *United States v. Estrada-Barrios,* 555 F. App'x 753, 756 (10th Cir. 2014) (describing the "should not" phrase in § 5D1.1(c) as a presumption).

The Fifth Circuit has specifically held that the word "should" in amendment 794 does *not* create a presumption. *See e.g. United States v. Bello-Sanchez,* 872 F.3d 260, 264 (5th Cir. 2017) (holding that Amendment 794 "does not provide an affirmative right to a mitigating role reduction to every actor but the criminal mastermind."); *United States v. Chanes-Hernandez,* 671 F. App'x 266, 268-69 (5th Cir. 2016) (The commentary's statement that "a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid

to perform certain tasks should be considered for an adjustment" is not a requirement that the district court grant an adjustment). By not treating the "should" in Amendment 794 as creating a rebuttable presumption, the Fifth Circuit has essentially emasculated the amendment for defendants like Torres who are merely transporting drugs for a flat fee.

Conclusion

For the foregoing reason, Petitioner Torres respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing petition for writ of certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 27th day of June, 2018.

/s/ John A. Kuchera
John A. Kuchera, Attorney for
Petitioner Antonio Torres