

No. \_\_\_\_\_

IN THE  
**SUPREME COURT OF THE UNITED STATES**

*OCTOBER TERM, 2017*

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**JOHN DOE**  
*Petitioner*

v.

**UNITED STATES OF AMERICA**  
*Respondent*

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**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Third Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

I. Whether the Court of Appeals erred by affirming the judgment of the District Court, which incorrectly applied the Sentencing Guidelines when it imposed a two-level sentencing enhancement under U.S.S.G. §3C1.2 (“Reckless Endangerment During Flight”), finding a nexus between the obstructive act and the federal offense of conviction is not required and that a sound basis existed for relevant conduct and connected conduct anyway.

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

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Petitioner, John Doe, by his attorney Gerard E. Grealish, Esquire, appellate counsel appointed by the United States Court of Appeals for the Third Circuit under the Criminal Justice Act, 18 U.S.C. §3006A(d)(6), respectfully petitions for a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Third Circuit.

## **OPINIONS AND ORDERS BELOW**

The Judgment Order and Opinion of the United States Court of Appeals for the Third Circuit affirming the Judgment of the United States District Court for the Middle District of Pennsylvania is docketed at No. 17-3200 (3d Cir. May 22, 2018) and is unreported. The Entry of Judgment within the United States Court of Appeals for the Third Circuit is docketed at No. 17-3200 (3d Cir. May 25, 2018). The Judgment of the United States District Court for the Middle District of Pennsylvania was docketed at 3:13-CR-106 (Mariani, J.) on September 19, 2017. These documents are included in the Appendix.

## **JURISDICTION**

On May 25, 2018, the Court of Appeals entered Judgment in this case. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

## **CONSTITUTIONAL PROVISIONS INVOLVED**

I. The Fifth Amendment to the United States Constitution states:

No person shall be ... deprived of life, liberty, or property, without due process of law ...

U.S. Const. amend. V.

- II. The Equal Protection Clause, part of the Fourteenth Amendment to the United States Constitution, provides that “no state shall...deny to any person within its jurisdiction the equal protection of the laws.”

U.S. Const. amends. V and XIV (the Equal Protection Clause is encompassed by the Fifth Amendment Due Process Clause).

- III. The Eighth Amendment to the United States Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

U.S. Const. amend. VIII.

## STATEMENT OF THE CASE

### A. Procedural Background

On September 26, 2013, John Doe was arrested and detained on related state charges by law enforcement authorities from Montgomery County, Pennsylvania and charged with Manufacture, Delivery or Possession with Intent to Manufacture or Deliver Controlled Substances and Conspiracy to Manufacture, Deliver, or Possess with Intent Controlled Substances. He was arrested and detained on the instant federal offense on April 8, 2014.

On March 25, 2014, an eight-count Superseding Indictment was returned in the Middle District of Pennsylvania against Ramon Baez, Jose Hernandez-Tirado, Juan Mendez-Lazaro, Pedro Hernandez, Romualdo Hermosillo-Avendano, Gilberto Bautista-Ocampo, Maria Pina, and Richard Carvajal. John Doe was charged in Count I with conspiracy to distribute and possess with intent to distribute fentanyl, oxycontin (oxycodone), in excess of 280 grams of cocaine base (“crack”), in excess of 5 kilograms of cocaine, in excess of 50 grams of methamphetamine, Schedule II controlled substances, in excess of 1 kilogram of heroin, in violation of 21 U.S.C. §841(a)(1).

Pursuant to a sealed written plea agreement, the appellant pled guilty to Count I of the Indictment.

On September 15, 2017, John Doe was sentenced by the district court to a term of 156 months of imprisonment to run concurrent with the sentence of the



Court of Common Pleas of Montgomery County, a related case, where the appellant was sentenced to a term of 7 to 14 years.

On September 29, 2017, John Doe filed a timely notice of appeal.

On May 22, 2018, after briefs were filed by John Doe and the government, judgment was announced by the United States Court of Appeals for the Third Circuit, affirming the judgment of the United States District Court for the Middle District of Pennsylvania.

On May 25, 2018, Entry of Judgment was filed in the United States Court of Appeals for the Third Circuit.

## **B. Facts Supporting John Doe's Due Process, Eighth Amendment, and Equal Protection Claims**

On September 15, 2017, John Doe was sentenced in the United States District Court for the Middle District of Pennsylvania on one count of Conspiracy to Distribute and Possess with Intent to Distribute Fentanyl, Oxycontin (oxycodone), in Excess of 280 Grams of Cocaine Base ("crack"), in Excess of 5 Kilograms of Cocaine, in Excess of 50 Grams of Methamphetamine, and in Excess of 1 Kilogram of Heroin. The sentencing court, based on the Presentence Report, determined that the appellant's total offense level is **35** and his criminal history category **3**, yielding an imprisonment range of **210** to **262** months. Upon the government's request for a four-level downward departure based upon his cooperation and the district court's granting of it the imprisonment range became

**135 to 168** months. Ultimately the sentencing court granted the government's recommendation of 156 months, which fell within the range.

Prior to the sentencing hearing, the appellant had filed a Sentencing Memorandum in which he argued that he should not receive the two-level enhancement the Presentence Report found applicable under U.S.S.G. §3C1.2 (Reckless Endangerment During Flight). In the Sentencing Memorandum and at sentencing John Doe argued that the state incident and case embodying the obstructive act in question was not related to the federal offense of conviction and, therefore, the sentencing enhancement could not be imposed. The incident that triggered the PSR application of a two-level enhancement under U.S.S.G. §3C1.2 (Reckless Endangerment During Flight) occurred when members of the Fort Lee police in Bergen County, New Jersey were checking license plates of vehicles "as part of routine patrol" and discovered that a car driven by the appellant did not match the license plate that was on it. When approached by the police in this matter, the appellant jumped into a police cruiser and recklessly drove away in it. There is nothing to indicate that the Fort Lee police were acting as part of the investigation into the drug trafficking activities of John Doe that federal authorities were concerned with. While there was a vague reference to documents found in the vehicle that may have been drug related **or** related to a money laundering scheme, it is clear that the police did not really know what the significance of the documents were. In the end, the only charges lodged against the appellant in Bergen County had to do with attempting to cause death to police officers, causing bodily injury to police officers, attempting to cause bodily injury to police officers,

theft of a motor vehicle, attempting to flee and elude police, and providing false information to law enforcement. None of the charges filed against the appellant were drug-related, which was the central concern of the federal investigation that led to the federal offense of conviction.

The district court, however, questioned whether such a nexus was required based on the language of §3C1.2 and indicated that, even if it were, it found a sound basis for there being sufficient relevant conduct and connected conduct to establish a nexus.

Ultimately, the sentencing court imposed the two-level enhancement. Without it, the appellant would have been sentenced, at offense level **29**, to an advisory imprisonment range of **108** to **135** months.

For the reasons set forth below, petitioner John Doe disagrees with the lower appellate panel, finding its opinion and judgment at odds with the nexus requirement of U.S.S.G. §1B1.3 (the relevant conduct provision) and the evidence insufficient to support the nexus requirement.

## **REASON FOR GRANTING THE WRIT**

**The application of the two-level sentencing enhancement embodied in U.S.S.G. §3C1.2 (“Reckless Endangerment During Flight”) to John Doe’s case amounts to a violation of the Due Process Clause of the Fifth Amendment, the Eighth Amendment prohibition against “cruel and unusual punishment,” and the Equal Protection Clause of the Fourteenth Amendment.**

Incorrectly applying the two-level sentencing enhancement embodied in U.S.S.G. §3C1.2 (“Reckless Endangerment During Flight”) to John Doe’s sentence, the district court erred by finding that no nexus between the obstructive act in question and the underlying federal offense of conviction was required. Such a nexus requirement is implicitly called for by the very title of Part C of the federal sentencing guidelines (i.e., “Obstruction and Related Adjustments”). Accordingly, the guideline for U.S.S.G. §3C1.1 and its Application Note 1, both of which explicitly require such a nexus, should apply to §3C1.2.

The general principles stated in the Guidelines have to be considered when determining if an enhancement, such as §3C1.2, apply. Thus, the relevant-conduct provision, U.S.S.G. §1B1.3, is particularly important, providing as it does that all acts and omissions caused by the defendant occur during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. In holding that such a nexus is required when applying §3C1.2 to a sentence, the Fifth, Sixth, and Seventh

Circuits have relied heavily on §1B1.3. United States v Dial, 524 F.3d 783, 786 (6<sup>th</sup> Cir. 2008) and United States v Southerland, 405 F.3d 263 (5<sup>th</sup> Cir. 2005), United States v Seals, 813 F.3d 1038, 1045 (7<sup>th</sup> Cir. 2016).

While there is a split between the Circuit Courts as far as explicitly requiring the foregoing nexus, it is to be noted that a number of them, without declaring a nexus requirement, have proceeded in their analysis by “assuming” that such a nexus is required. The district court in the appellant’s case took this latter approach. See United States v Gray, 512 Fed Appx 803, 807 (10<sup>th</sup> Cir. 2013); see United States v Searcy, 108 F.3d 1374 (4<sup>th</sup> Cir. 1997); see also United States v Seals, 813 F.3d 1038, 1045 (7<sup>th</sup> Cir. 2016).

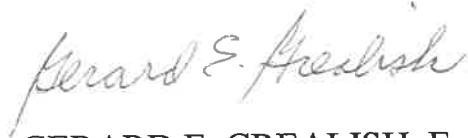
It is submitted that the district court erred, for the foregoing reasons, in its denial of a nexus requirement. Given the lack of evidence (the police search that led to “documents reflecting drug trafficking *and/or* money laundering activity,” (emphasis added) which the lower appellate panel cited as a nexus seems too uncertain and insufficient to meet any nexus requirement and were not even discovery in the case) pointing to such a nexus as well as the lack of temporal and geographic proximity between the flight in question and the drug conspiracy at the heart of the federal offense of conviction, the district court’s provisional consideration of a nexus and finding of a “sound basis” for “relevant conduct” and “connected conduct” fails as well. Thus, the §3C1.2 sentencing enhancement should not have been applied in the appellant’s case.

The split between the Circuit Courts on requiring or not requiring a nexus should be resolved by this Honorable Court in favor of requiring a nexus so there might be consistency and fairness in sentencing.

### **CONCLUSION**

Wherefore, Petitioner John Doe respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Gerard E. Grealish".

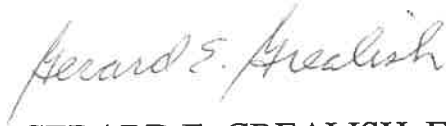
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Date: August 23, 2018

**CERTIFICATE OF APPOINTMENT  
UNDER THE CRIMINAL JUSTICE ACT**

While not a member of the Bar of this Court, I, Gerard E. Grealish, Esquire, certify that, pursuant to Rule 9, I have been appointed under the Criminal Justice Act, 18 U.S.C. §3006A(d)(6) to serve as appellate counsel for the petitioner.

Respectfully submitted,

A handwritten signature in dark ink, reading "Gerard E. Grealish". The signature is written in a cursive, slightly slanted style.

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