No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL PALOMINO

Petitioner.

-v-

UNITED STATES OF AMERICA,

Respondent.

On Petitioner For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Michael Marks
Federal Defenders of San Diego
225 Broadway, #900
San Diego, California 92101
(619) 234-8467
Michael_Marks@fd.org

Counsel for Petitioner

QUESTION PRESENTED

Whether a district court abuses its discretion in misapplying a sentencing guideline when it refuses to consider a factor expressly provided for in the guideline's commentary.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL PALOMINO,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

OPINION BELOW

After Petitioner appealed his sentence based on the district court's denial of a minor-role adjustment, the United States Court of Appeals for the Ninth Circuit affirmed Petitioner's sentence in an unpublished memorandum disposition. *United States v. Palomino*, 730 F. App'x 485 (9th Cir. 2018).[1]

JURISDICTION

The court of appeals entered final judgment on July 11, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

[1] A copy of the Ninth Circuit's memorandum is attached to this brief at Appendix A under S. Ct. R. 14(i)(i).

STATUTORY PROVISIONS

U.S.S.G. § 3B1.2[2]

STATEMENT OF THE CASE

A. The Offense

Addicted to methamphetamine, Petitioner needed quick money to feed his habit and repay money he had borrowed from his mother. He had met a man nicknamed "El Muchacho" in Tijuana, who told him that he could make money smuggling marijuana into the United States. El Muchacho would give Petitioner a car to use as his own, and he would pay $2000 each time Petitioner crossed drugs. Petitioner agreed.

He crossed drugs successfully six times. Each time, El Muchacho contacted him prior to the crossing. Someone would pick up the car and load it with drugs. When the car was ready, Petitioner would travel to the loaded car by Uber. He would then drive the car across the border to a gas station, park it, and wait for someone to return it after unloading the drugs. Petitioner would then drive back to Mexico, where El Muchacho paid him.

But on April 6, 2017, the plan failed. A drug-sniffing dog alerted to the car at the border and agents eventually discovered just over 15 kilograms of methamphetamine concealed in the gas tank. The agents arrested Petitioner, who immediately confessed his involvement in the smuggling as described above.

[2] A copy of this guideline is included at App'x B.

In a later interview with Probation, Petitioner confirmed that he did not own the drugs and was not even aware of what type or quantity of drugs he was carrying. In fact, the smuggling organization did not tell him about his final destination in the United States until after he had successfully crossed the border. Petitioner also stated that El Muchacho had shorted him $200 or $300 each time he crossed.

He quickly pled guilty under the government's Fast Track program to one count of importation of methamphetamine, in violation of 21 U.S.C. §§ 952, 960.

B. Sentencing

Petitioner requested that the court apply a downward adjustment for his minor role in the offense under U.S.S.G. § 3B1.2. He noted that he precisely fit the profile of § 3B1.2's explanatory example of a minor participant: he was "a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks." He also explained that he had no discretion in the tasks he performed and had no direct knowledge of any participants in the importation scheme beyond El Muchacho. Petitioner argued that the adjustment was warranted because he "was taking direction each step of the way and had no discretion or decision-making authority or proprietary interest in the drugs."

The district court responded, "Average participants never do, in my experience." It continued:

> I have seen thousands of these cases in the time I have been here. The only cases where anybody had a proprietary interest is where they find a small amount on the person. Really, that's it. And anybody who has worked in this district knows that. The people who bring the drugs

> across never have a proprietary interest in them. *I can't see that is a relative factor on role*. It is so typical of average participants to be importers of drugs they don't own.

The court acknowledged that the applicability of the minor-role adjustment was "significant." The adjustment, in conjunction with a role cap, would result in an eight-level downward adjustment. The court remarked that "I understand why the defense is advocating for it."

The court then ran through the other factors listed in § 3B1.2 and ultimately denied a minor-role adjustment. Without the adjustment, the court calculated the guidelines at 188 to 235 months. But based on the substantial equities in the case, the district court varied down to a sentence of 100 months.

After the district court imposed sentence, defense counsel took exception to the court's minor-role ruling. Specifically, counsel stated, "I do think the Court misapplied the guidelines, for example, whether or not the proprietary interest was—is an important factor in assessing minor role. . . ." The court responded, "As I said, if somebody wants to substitute their experience for mine and say that proprietary interest in the drugs is a really important factor in minor role, then they haven't been in the Southern District of California for 30 years. . . ." "It is kind of a universal view, shared by everyone, apparently, [defense counsel], [other] than you." Petitioner timely appealed.

C. Appeal

Petitioner appealed his sentence to the Ninth Circuit, arguing that the district court had erred in denying the minor-role adjustment. Among other arguments, he

contended that the district court had erroneously failed to apply the binding guideline commentary for defendants who lack proprietary interest in the offense. *See* U.S.S.G. § 3B1.2 cmt. n.3(c).

A screening panel of the Ninth Circuit affirmed in a memorandum disposition. *See* Appendix A. The panel ruled, "the court's decision . . . to accord little weight to [Petitioner's] lack of proprietary interest in the drugs . . . was not an abuse of discretion." App'x A.

REASONS FOR GRANTING THE PETITION

This is the rare case where this Court should grant review for purposes of error correction. *See* S. Ct. R. 10. Here, the Ninth Circuit affirmed Petitioner's sentence despite the district court's abuse of discretion in applying § 3B1.2. The Ninth Circuit erred in concluding that the district court gave "little weight" to the proprietary-interest factor when in fact the district court expressly refused to apply the factor at all. Even if a district court has the authority under *Kimbrough* to vary from a guideline based on a policy disagreement, the court may not ignore binding guideline commentary based on its anecdotal experience sentencing other defendants. The district court erred in calculating the guidelines, and this Court should grant review and reverse the Ninth Circuit's erroneous ruling.

A. The District Court Erred by Refusing to Apply Binding Guideline Commentary.

Commentary in the Guideline Manual that interprets or explains a guideline is binding on sentencing courts. *Stinson v. United States*, 508 U.S. 36, 37-38 (1993). While the district court is free to vary from the final guidelines recommendation

based on a policy disagreement, *see Kimbrough v. United States*, 552 U.S. 85, 109 (2007), the court must still begin by calculating the guidelines correctly, *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc). Here, the district court discarded commentary to the minor-role guideline because it believed its own experience conflicted with, and was superior to, the Sentencing Commission's guidance regarding a defendant's lack of proprietary interest in the offense. The district court's bold rejection of binding commentary was procedurally erroneous.

The district court's error arises from its discussion of language the Sentencing Commission added in a 2015 amendment to § 3B1.2. Specifically, "[n]ewly amended § 3B1.2 now states 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 the reduction.' " *United States v. Quintero-Leyva*, 823 F.3d 519, 523 (9th Cir. 2016) (quoting U.S.S.G. app. C amend. 794). The Commission amended the guideline to change language " 'that may have had the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances.' " *Id.*

Defense counsel expressly invoked that language at sentencing, arguing that Petitioner had a minor role in the offense in part because he had "no discretion or decision-making authority or *proprietary interest* in the drugs." (emphasis added). The court responded, "Average participants never do, in my experience. . . ." It continued, "I have seen thousands of these cases in the time I have been here . . . The people who bring the drugs across never have a proprietary interest in them."

The district court therefore ruled, "I can't see that is a relative factor on role. It is so typical of average participants to be importers of drugs they don't own."

Defense counsel took exception to the court's ruling, but the court stood defiant. It proclaimed, "if somebody wants to substitute their experience for mine and say that proprietary interest in the drugs is a really important fact in minor role, then they haven't been in the Southern District of California for 30 years. . . ."

Of course, the Sentencing Commission *had* used its own experience to draft the minor-role guideline, and that is exactly what it is supposed to do. As this Court has explained, "the Commission fills an important institutional role: It has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." *Kimbrough*, 552 U.S. at 109 (quotation marks omitted). In line with that role, the Commission carefully amended the minor-role guideline only after it "conducted a review of cases involving low-level offenders, analyzed case law, and considered public comment and testimony." U.S.S.G. app. C amend. 794 reason for amendment. Accordingly, the amendment to § 3B1.2 arose from data that far surpassed the anecdotal experience of one district judge in one district. The district court therefore had no authority to apply § 3B1.2 in a manner inconsistent with its binding commentary.

In one sense, the district court and the Commission agree: low-level drug couriers typically have no proprietary interest in the drugs they carry. But the Commission decided that this typical characteristic weighs *in favor* of a minor-role

adjustment. Indeed, the Commission chose the example of "a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks" as the archetypal minimal participant. *See* U.S.S.G. § 3B1.2 cmt. n.3(C). That example builds on other commentary to § 3B1.2 that states "a defendant who is convicted of a drug trafficking offense, whose participation in that offense was limited to transporting or storing drugs . . . may receive an adjustment under this guideline." U.S.S.G. § 3B1.2 cmt. n.3(A). So whatever the district court's opinion on the matter, the guideline plainly favors a minor-role adjustment for drug couriers who have no proprietary interest in the drugs they transport. At the very least, the guideline expressly requires district courts to *consider* proprietary interest in their analysis.

This is not to say that drug couriers are per se entitled to a minor-role adjustment. But the district court's conclusion here that lack of proprietary interest is not a "relative factor on role" at all is flatly inconsistent with the commentary. Proprietary interest may weigh more or less heavily in a particular case, but the district court erred in discounting the factor altogether as a generalized rule. And because the district court failed to weigh that factor as required by § 3B1.2, its role analysis was procedurally erroneous.

B. This court should grant review and correct the error in Petitioner's case.

Despite the district court's error, the Ninth Circuit screening panel affirmed the sentence. The panel's decision was erroneous, because it completely ignored material portions of the record and misunderstood the requisite analysis.

The Ninth Circuit ruled that the district court's decision "to accord little weight" to the proprietary-interest factor was not an abuse of discretion. App'x A. But the premise underlying that conclusion is flatly inconsistent with the record. The district court did not say it gave the factor little weight; the court said, "I can't see that is a relative factor on role." So the district court went farther than giving the factor little weight, it failed to weigh the factor at all.

The Ninth Circuit panel failed to confront that problem. It did not even address the district court's policy disagreement with the guideline. Instead, the panel misread the record, treating the district court's misapplication of the guideline as a discretionary, factual decision rather than a legal error. The Ninth Circuit was wrong, and this Court must correct the error.

Moreover, reversing the Ninth Circuit's decision on this point will be dispositive. The district court's procedural error in misapplying § 3B1.2 led to a drastic increase in the guidelines. "[I]n the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1347 (2016) (holding that a guideline error, without more, will generally show prejudice even under the deferential plain-error standard of review). Here, the district court's error clearly prejudiced Petitioner, so reversal and remand for resentencing is warranted.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the Ninth Circuit's erroneous ruling.

Respectfully submitted,

Dated: October 9, 2018

s/ Michael Marks

MICHAEL MARKS
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101
Telephone: (619) 234-8467
Facsimile: (619) 687-2666
Michael_Marks@fd.org

Attorneys for Petitioner