No. _____

In The

Supreme Court of the United States

October Term, 2020

ADAN TORRES-NIEVES,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the 9th Circuit significantly depart from its own precedent when it failed to resolve ambiguity in favor of the defendant in its determination of whether the government breached an admittedly ambiguous plea agreement?

PARTIES TO THE PROCEEDING

Petitioner Adan Torres-Nieves was the sole defendant in the district and appellate court proceedings. Respondent United States of America was the plaintiff in the district court proceedings and appellee in the court of appeals proceedings on direct appeal.

RELATED CASES

- *USA v. Torres-Nieves,* 2020 U.S. App. LEXIS 34514 (9st Cir. Or., Nov. 2, 2020)
- *USA v. Torres-Nieves*, 367 F. Supp. 3d 1235 (9th Cir. 2019).
- *USA v. Torres-Nieves,* USDC Oregon No. 3:17CR386-SI

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Adan Torres-Nieves (Mr. Torres), respectfully prays this Court issue a *Writ of Certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on November 2, 2020.

OPINION BELOW

On November 2, 2020, the Court of Appeals for the Ninth Circuit issued its *Memorandum Opinion* affirming the district court's ruling on the issue relevant here - Torres's motion to declare breach of the plea agreement by the Government. *Memorandum Opinion*, November 2, 2020, attached as App. 1.

Explicitly noting that it relied on its own precedent - *United States v. Clark*, 218 F.3d 1092, 1095-96 (9th Cir. 2000) and *United States v. De La Fuente*, 8 F.3d 1333, 1338-40 (9th Cir. 1993) - the Ninth Circuit noted "the district court did not err in considering extrinsic evidence and concluding that the communication between the parties during plea negotiations, showed that the parties reasonably understood that once the plea agreement was accepted, the government could argue for ... the application of the firearm enhancement." *Id*. at p. 3. But there is a noticeable absence in the lower court's ruling – any mention at all of the required standard applicable to an ambiguous plea agreement where government breach has been raised. The appellate court simply ignored its own precedent. In doing so, the 9th circuit is departing far from the usual judicial norm and into a wrong standard of review by not resolving the ambiguity in the defendant's favor.

On November 30, 2020, the Ninth Circuit issued its formal mandate.

JURISDICTION

On November 2, 2020, the Ninth Circuit entered its *Memorandum Opinion* affirming the district court's sentence and ruling on Torres's motion to declare breach of the plea agreement by the government. On November 30, 2020, the Ninth Circuit issued its formal mandate. Jurisdiction of this Court is invoked under Title 28 U.S.C. §§ 1651(a) and 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Fifth Amendment:

"No person shall ... be deprived of liberty … without due process of law…."

STATEMENT OF THE CASE

The relevant facts of this case are simple and undisputed.

On October 17, 2017, the U.S. Attorney in the Oregon District Court, Portland Division, filed a five-count Indictment charging Mr. Torres with several counts of possession for distribution of heroin, methamphetamine, and cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). The government also added an unlawful possession of firearm by felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); this count was later dropped. The government also charged Torres in Count 5 with possession of firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i), making him ineligible for safety valve if convicted and subject to the mandatory minimum ten-year penalty. [CR 1]

Mr. Torres was arrested on October 18, 2017 and was released on bail a few days later. He would remain free on bail for two years without incident until his self-surrender to FCI Sheridan Oregon on October 31, 2019.

1. ***Facts Related to the Government's Breach of the Plea Agreement.***

On the eve of trial, May 6, 2019, the government offered a conditional guilty plea to Count 1 – possession for distribution of more than one kilogram of heroin. The plea agreement, *inter* alia, preserved for Torres the appellate right to appeal the denial of his suppression motion. [CR 59] App. 7.

The government offered Torres the written plea agreement only after vigorous, eve of trial discussions with defense counsel. The plea negotiations covered several issues, including whether a mandatory minimum sentence was disproportionate, given Torres's many equities. App. 5. The parties agreed that Torres had a criminal history category of I and could qualify for safety valve, if the gun enhancement was not applied by the court. The specific terms of the final plea agreement were unilaterally written by the government and Mr. Torres accepted and signed it on May 6, 2019. He would enter his conditional guilty plea the very same day. [CR 58] App. 10.

For sentencing, Torres would ask that the firearm enhancement not be applied, thereby qualifying for safety valve and less than the ten-year mandatory minimum. The government, in the pre-plea negotiations wanted to be free to argue for the firearm +2 upward adjustment; but there were also discussions about why that would be a disproportionate sentence. The parties then awaited for the government to finalize the specific final terms of the plea agreement.

The finalized plea agreement, unilaterally authored by the government, was missing a *specific* section *explicitly* allowing the government to seek the +2 firearm enhancement, discussed during the negotiations. Instead, the final agreement included a key paragraph – paragraph 14 – specifically forbidding the Government from seeking any upward adjustments and enhancements.

The final agreement provided two paragraphs that, at sentencing, the district court would come to interpret as creating an ambiguity. The two operative paragraphs provided:

> 11. **Firearm Enhancement:** The parties have *no agreement* as to whether the adjustment for possession of a firearm applies pursuant to U.S.S.G. § 2D 1.1 (b)(1).
>
> 14. **Additional Departures, Adjustments, or Variances:** The USAO agrees *not to seek any upward* departures, *adjustments*, or variances to the advisory sentencing guideline range, or to seek a sentence in excess of that range, except ***as specified*** in this agreement.

Government Plea Agreement Letter, April 29, 2019, emphasis in original and added. App. 4. Unambiguously, the plea agreement ***did not include a passage that "specified"*** that the Government was free to seek at least one upward adjustment– the +2 firearm upward adjustment. Of course, explicitly, the "adjustment for possession of a firearm ... pursuant to U.S.S.G. § 2D 1.1 (b)(1)" would uncontestably be an "upward adjustment". Which the government explicitly agreed at paragraph 14 not to seek.

Despite the explicit contractual prohibition in paragraph 14, the government went on at sentencing vigorously advocating for exactly what it had agreed not to advocate. In its Sentencing Memorandum the government argued as follows:

> The government submits ***that the firearm enhancement is appropriate*** and the safety valve adjustment is not appropriate because of the proximity of the firearm to the drugs and other drug trafficking materials, the fact that only defendant had access to the Pathfinder, and the absence of any explanation for why a stolen firearm would be located with tens of thousands of dollars of drugs.

> Defendant essentially maintained a safe to keep the items necessary to engage in drug trafficking and hid the safe in plain sight by using the locked Pathfinder in his garage.

Government's Sentencing Memorandum, emphasis added. App 34. [CR 64] The Government vigorously advocated for application of an upward "adjustment" for the firearm enhancement.

Mr. Torres timely objected, noting in his *Defendant's Objection to Government's Sentencing Recommendation*:

> The binding Plea Agreement between the parties specifically and explicitly precludes the Government from seeking what it has just asked this Court to do – to apply the gun … upward enhancement[]. This is a breach of the Agreement. See, Puckett v. United States, 556 U.S. 129, 136 (2009). For the reasons outlined here, Defendant, Adan Torres-Nieves, objects to the Government's recommendations for a gun … enhancement, because the Plea Agreement that the Government drafted and accepted provides as follows at paragraph 14, page 3:

App 38-39. [CR 67]. In his objection, Torres quoted paragraph 14 of the plea agreement:

> 14. **Additional Departures, Adjustments, or Variances**: The USAO agrees *not to seek* *any upward* departures, *adjustments*, or variances to the advisory sentencing guideline range, or to seek a sentence in excess of that range, except as specified in this agreement.

Id. Emphasis in original and added.

The best outlook for the Government at sentencing, then faced by the district court, was the obviously disputed issue of an internal tension or ambiguity in the

plea agreement, created entirely by the Government's own failure to specify that it was free to seek the upward firearm adjustment. And so, trying to dislodge itself from its obviously unforeseen predicament, the Government provided the court email correspondence between the parties that led up to the plea agreement, noting:

> On April 28, 2019, defense counsel stated, "All we need is a decent shot at the +2 for the gun. The client will plead with John and I have some shot ***at showing that the enhancement should not be applied***. ***You two argue that it does.*** Not much to ask to get the plea." *See* Exhibit 5. In response, the government revised the plea agreement to leave open the issue of the firearm enhancement, changing the language from "parties agree to recommend a two-level upward adjustment for possession of a firearm" to the "parties have no agreement as to whether the adjustment for possession of a firearm applies."

Government's Supplemental Sentencing Memorandum, emphasis added. App 44.

But the revised plea agreement did not explicitly have a part that "specified" that the Government nevertheless maintained the right to argue for the +2 upward adjustment. In fact, the plea agreement unambiguously contained the opposite – paragraph 14 – explicitly prohibiting the Government from seeking *any* upward adjustments or enhancements.

In his *Objection to Government's Sentencing Recommendation,* App. 40, Torres argued of the plea agreement and of paragraph 14:

> Thus, the binding Plea Agreement specifically precludes the Government from seeking "***any upward departures, adjustments, or variances to the advisory sentencing guideline range, or to seek a sentence in excess of that range, except as specified in this agreement***."

Emphasis in original. Significantly, Torres did not argue that there was an ambiguity in the plea agreement; he specifically noted that the plea agreement *explicitly and unambiguously* prevented the Government from arguing as it did.

2. ***Sentencing Court's Interpretation of Plea Agreement.***

Addressing Torres's breach objection, the district court made the following observations at sentencing:

> [....] I do believe that the express statements in the plea agreement letter at paragraphs 11 through 13 make it clear ***that those are exceptions*** to the comment in section 14 that the U.S. Attorney's Office does not seek any upward departures, adjustments, or variances to the advisory sentencing guideline range or to seek a sentence in excess of that range, except as specified in this agreement.
>
> ***I see that language or that text in paragraph 14***, but I do think that the statements in paragraphs 11, 12, and 13 that expressly discuss the firearm enhancement, the obstruction enhancement, and the safety valve issue, where it says that the parties have no agreement on those issues, is sufficient to constitute the exception identified in paragraph 14, that that is not governed by any agreement and that both parties are free to assert their positions.
>
> I think that is the most reasonable interpretation on an objective standard of the plea agreement letter, and so I am rejecting the defendant's argument that the government is in breach of the plea agreement.

App. 45, *Sentencing Transcript*. The trial court noted that the parties "had no agreement" on the contested adjustments and went on to address paragraphs 11-13, contrasted with 14. But the court never even addressed the obvious ambiguity it had identified. Erroneously, the court instead resolved the disputed paragraphs in favor

of the Government. But never acknowledged that the court ignored that the Government created internal friction between paragraphs 11 and 14, giving rise to an ambiguity. The court then failed to follow binding precedent mandating that the ambiguity be resolved in Torres's favor. *Id.*

At sentencing, the Government failed to meaningfully explain why it had not *expressly* reserved the right to argue for upward adjustments. Saying that there is "no agreement," in light of the explicit prohibition in paragraph 14, begged the question, necessarily highlighting an ambiguous phrase which does not equate to reservation of the right to affirmatively argue for specific upward adjustments.

Predictably, the court went on to deny safety valve because of the firearm enhancement and then sentenced Torres to the mandatory minimum 10-year custody required by statute. The court then engaged Government counsel in this colloquy:

> THE COURT: I think you do agree that a sentence of ten years is a substantial sentence.
>
> MR. NARUS: Yes, Your Honor.

Id. at App. 46, lines 8-10.

Curiously, the court noted that Torres could appeal the suppression issues preserved in his conditional guilty plea agreement. And then noted of the new explicit breach issue:

> THE COURT: And so you certainly may appeal that [suppression issues]. I'm also of the opinion, but I don't think that will bind the Ninth Circuit -- but I'm also of the opinion that ***the defendant should be allowed to appeal***, if he wishes, his argument that there's been a breach of the plea agreement. I don't think there has been, for the reasons I've stated on the record. But if there has been, ***then that would relieve him of his waiver, in my opinion***.

> ***And, therefore, I think he should be allowed to appeal that if he wants to***. But then again, that's for the government to decide whether or not it wishes to oppose and ultimately for the Ninth Circuit to decide if they wish to hear it or not.

Id., emphasis added. App. 47.

The appellate court never addressed the binding precedent requiring the trial court to resolve the obvious ambiguity in Torres's favor. The court also failed to hold the Government to produce unambiguous extrinsic evidence that eliminated the ambiguity at hand.

Left unresolved by the district and appellate courts was the reality that paragraphs 11-13 of the plea agreement did not *explicitly specify* that the Government could seek an upward adjustment under U.S.S.G. § 2D1.1 (b)(l). It simply, passively noted that "there was no agreement" between the parties that § 2D1.1 (b)(l) did in fact apply nor that the Government was specifically authorized to pursue the contested upward adjustment.

The email correspondence between the parties submitted by the Government under seal, regarding whether Torres in fact agreed that the Government reserved the right to argue for at least two upward adjustments – 1) obstruction; and, the U.S.S.G. § 2D1.1 (b)(l) enhancement –, served only to inject more of the same ambiguity between Sections 11 and 14 of the final plea agreement.

The record shows that the appellate court did not in fact follow its own precedent. In *United States v. Morales-Heredia,* 768 F.3d 1220, 1230 (9th Cir. 2014), this Court held of plea agreements:

> "[C]riminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper, 132 S. Ct.*

> *1376, 1388, 182 L. Ed. 2d 398 (2012)*. In the vast majority of criminal cases, a prosecutor's promise of ***less harsh treatment induces the defendant to waive his constitutional rights and admit guilt***. Plea bargaining is desirable because it conserves resources, encourages prompt ***and final*** resolution of criminal cases, helps avoid the "corrosive impact" of prolonged pretrial detention, and abates the risk to public safety caused by lengthy pretrial release. *Santobello v. New York, 404 U.S. 257, 260-61, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)*. "However, all of these considerations presuppose fairness" in the plea bargaining process. *Id. at 261*. Accordingly, when the prosecutor makes a promise to the defendant, that "promise must be fulfilled." *Id. at 262*. ***The integrity of the criminal justice system depends upon the government's strict compliance with the terms of the plea agreements*** **[**21]** into which it freely enters. *See Whitney, 673 F.3d at 974 [United States v. Whitney, 673 F.3d 965, 970 (9th Cir. 2012)]*.

Emphasis added. The district court was also compelled by precedent - *United States v. De La Fuente*, 8 F.3d 1333, 1338 (9th Cir.1993) – to, at best for the Government, to do as the court did – to find internal tension and ambiguity in the plea agreement. But then the court was required by unambiguous precedent to resolve the matter on behalf of Torres. In *DeLaFuente*, this Court explicitly warned:

> As with other contracts, provisions of plea agreements are occasionally ambiguous; the government "ordinarily must bear responsibility for any lack of clarity." *Id.*; *cf. United States v. Read, 778 F.2d 1437, 1441 (9th Cir. 1985)* ("***responsible public servant who recognizes the desirability of clarity in agreements would avoid . . . use" of vague language in plea agreements***), *cert. denied, 479 U.S. 835, 93 L. Ed. 2d 75, 107 S. Ct. 131 (1986)*. Construing ambiguities in favor of the defendant makes

> sense in light of the parties' respective bargaining power and expertise.

Emphasis added.

The Government, the party with superior bargaining power, failed to include in either paragraphs 11-13 or 14 its *explicit, unambiguous* freedom to advocate for the +2-gun enhancement, here at issue. Therefore, the district court's rejection of Torres's timely objection to the explicit breach by the Government was prejudicial error in that it ignored well-established precedent and made him ineligible for safety valve and subjected him to the mandatory 10-year minimum.

REASON FOR ALLOWANCE OF THE WRIT

This Court Must Allow Torres' *Writ* To Cure The Lower Court's Significant Departure From Its Own Precedent When It Failed To Resolve Ambiguity In Favor Of The Defendant In Its Determination Of Whether The Government Breached An Ambiguous Plea Agreement.

The appellate and lower courts were bound by *De La Fuente*, well-established Ninth Circuit precedent, to resolve the ambiguity in favor of Mr. Torres. In the Ninth Circuit, the question of whether there has been a violation of a plea agreements is to be reviewed *de novo*. *United States v. Gonzalez-Aguilar*, 718 F.3d 1185, 1187 (9th Cir. 2013); *United States v. Whitney*, 673 F.3d 965, 970 (9th Cir. 2012); and *United States v. Camarillo-Tello*, 236 F.3d 1024, 1026 (9th Cir. 2001). And the question of whether the government violated the terms of the plea agreement is also reviewed *de novo*. *United States v. Clark*, 218 F.3d 1092, 1095 (9th Cir. 2000).

Critically here, a court's interpretation of an alleged government breach of an *ambiguous plea agreement* requires a trial and appellate court to resolve all ambiguity in the defendant's favor; and the appellate court here was also required to apply *de novo* review. *United States v. Clark,* 218 F.3d 1092, 1095 (9th Cir. 2000).

In *Clark*, the Ninth Circuit explicitly noted:

> In our precedents, we have made clear that several well-established rules of interpretation govern our consideration of the plea agreement in dispute. ***If the terms of the plea agreement on their face have a clear and unambiguous meaning, then this court will not look to extrinsic evidence to determine their meaning***. *See United States v. Ajugwo*, 82 F.3d 925, 928 (9th Cir. 1996).

Emphasis added. Here, Torres expressly first noted at sentencing that the terms of the plea agreement were indeed "clear and unambiguous." That paragraph 14 precluded the Government from seeking *any* enhancements or upward adjustments. It was then the trial court who proceeded to consider extrinsic evidence to determine what the terms of the pela agreement meant. Of this, the court in *Clark* noted:

> If, however, a term of a plea agreement ***is not clear on its face***, we look to the facts of the case to determine what the parties reasonably understood to be the terms of the agreement. *See United States v. Gerace*, 997 F.2d 1293, 1294 (9th Cir. 1993). ***If, after we have examined the extrinsic evidence, we still find ambiguity*** regarding what the parties reasonably understood to be the terms of the agreement, ***then the government "ordinarily must bear responsibility for any lack of clarity***." *De La Fuente*, 8 F.3d at 1337 (quoting *United States v. Packwood*, 848 F.2d 1009, 1011 (9th Cir. 1988)) [*United States v. DeLaFuente*]. "***Construing ambiguities in favor of the***

> ***defendant makes sense in light of the parties respective bargaining power and expertise***." *Id*.

Id., 1095-96, emphasis added.

Here, the record explicitly demonstrates that paragraph 14, authored by the Government, absolutely provided:

> 14. **Additional Departures, Adjustments, or Variances:** The USAO agrees *not to seek any upward* departures, *adjustments*, or variances to the advisory sentencing guideline range, or to seek a sentence in excess of that range, except ***as specified*** in this agreement.

Emphasis added. Paragraphs 11, on the other hand, ambiguously states:

> 11. **Firearm Enhancement:** The parties have *no agreement* as to whether the adjustment for possession of a firearm applies pursuant to U.S.S.G. § 2D1.1(b)(1).

Emphasis added. The Government's failure to add a *specific passage* to the plea agreement that provided "Notwithstanding paragraph 14, the Government hereby reserves the right to advocate for the gun enhancement," would have eliminated the obvious ambiguity in what the parties expected. But the Government failed to clarify. Therefore, binding precedent in the Ninth Circuit provided: "***If, after we have examined the extrinsic evidence, we still find ambiguity*** regarding what the parties reasonably understood to be the terms of the agreement, ***then the government "ordinarily must bear responsibility for any lack of clarity***." *United States v. DeLaFuente*, 8 F.3d 1333, 1337 (9th Cir. 1993), emphasis added. The lower court ignored this precedent and resolved the ambiguity in favor of the Government.

In its *Memorandum Opinion*, the Ninth Circuit specifically wrote of the trial court's findings:

> [T]he district court did not err ***in considering extrinsic evidence*** and concluding that ***the communication between the parties during plea negotiations***, showed that the parties ***reasonably understood*** that once the plea agreement was accepted, the government could argue for ... the application of the firearm enhancement.

Id. at App. 2-3, emphasis added.

The appellate court also disregarded the trial court's erroneous observations at sentencing:

> [....] I do believe that the express statements in the plea agreement letter at paragraphs 11 through 13 ***make it clear*** that those are exceptions to the comment in section 14 that the U.S. Attorney's Office does not seek any upward departures, adjustments, or variances to the advisory sentencing guideline range or to seek a sentence in excess of that range, except ***as specified*** in this agreement.
>
> I see that language or that text in paragraph 14, but I do think that the statements in paragraphs 11, 12, and 13 that expressly discuss the firearm enhancement, the obstruction enhancement, and the safety valve issue, where it says that the parties have no agreement on those issues, is sufficient to constitute the exception identified in paragraph 14, that that is not governed by any agreement and that both parties are free to assert their positions.
>
> I think that is the most reasonable interpretation on an objective standard of the plea agreement letter, and so I am rejecting the defendant's argument that the government is in breach of the plea agreement.

Sentencing Transcript, App. 45, emphasis added. But the trial court's noting that "paragraphs 11 through 13 make it clear" made nothing clear but instead injected ambiguity as it expressly contradicted paragraph 14.

The district court never explicitly addressed whether paragraphs 11-13, contrasted with 14, created internal friction giving rise to an ambiguity. Nor did it explore why the Government had not expressly reserved the right to argue for upward adjustments. Saying that there is no agreement, in light of the explicit prohibition in paragraph 14, is, at best for the Government, an ambiguous phrase which does not equate to a "specified" reservation of the right to affirmatively argue for specific upward adjustments.

After the district court determined that it did not have the discretion to grant safety valve because of the gun enhancement, the court then sentenced Torres to the mandatory minimum 120 months required by statute. The district court specifically rejected the Government's clamoring for 135 months. However, in doing so, the court engaged Government counsel in this revealing colloquy:

> THE COURT: I think you do agree that a sentence of ten years is a substantial sentence.
>
> MR. NARUS: ***Yes, Your Honor***.

Id. at App. 46, emphasis added. Government counsel did not at all say that it really believed in its recommendation of 135 months; the Government agreed that 10 years was a "substantial sentence."

For these reasons, this Court must grant review.

CONCLUSION

For the foregoing reasons, Mr. Torres respectfully requests this Court issue a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: January 21, 2021

Respectfully Submitted,

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No. 20-_____

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Certificate of Service

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO)

I, EZEKIEL E. CORTEZ, state under oath that: I am a member of the Bar of the Supreme Court of the United States; that on January 21, 2021, pursuant to this Court's Order 589 issued April 15, 2020, an electronic copy of the Petition for *Writ of Certiorari* in the above-entitled case was e-filed with the Clerk of the Supreme Court of the United States; that I also deposited a paper copy in a United States post office mail box in San Diego, California, with priority postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States, the same day of e-filing said Petition for *Writ of Certiorari*, and with an additional copy of the

Petition for *Writ of Certiorari* and Affidavit of mailing served on counsel for Respondent: Solicitor General of the United States, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001. Dated at San Diego, this January 21, 2021.

s/ *Ezekiel E. Cortez*
EZEKIEL E. CORTEZ, Affiant