

No. _____

SUPREME COURT OF THE UNITED STATES

**DERRICK ANTHONY FELTON,
Petitioner,**

VERSUS

**UNITED STATES OF AMERICA,
Respondent**

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

PETITION FOR A WRIT OF CERTIORARI

**MOTION FOR LEAVE TO PROCEED
*IN FORMA PAUPERIS***

Pursuant to Supreme Court Rule 39, the Petitioner, DERRICK A. FELTON, by and through his court-appointed attorney, requests that the Court grant him leave to proceed *in forma pauperis*. In support of this Motion, the Petitioner avers that:

I.

Petitioner is unable to afford the cost of representation in this matter.

II.

Petitioner proceeded below in district court and on appeal with court-appointed counsel appointed pursuant to *18 U.S.C. §3006A*.

III.

Because of his continuing inability to afford counsel, and pursuant to *18 U.S.C. §3006A*, undersigned counsel represents the Petitioner in his petition before this Court.

WHEREFORE, the Petitioner, DERRICK A. FELTON, by and through undersigned counsel, respectfully requests that he be allowed to proceed *in forma pauperis* without payment of filing fees or service of notice fees, and for such other relief as the Court deems just and proper.

Respectfully submitted this 14th day of August, 2020.

Respectfully Submitted,

GREENWALD LAW FIRM, L.L.C.

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ATTORNEY FOR PETITIONER

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ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

- Did the Trial Court error in finding that Mr. Felton was an organizer, leader, manager, or supervisor of the criminal activity?

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

District Court:

Honorable Dee D. Drell
United States District Judge,
Western District of Louisiana
515 Murray Street, Suite 233
Alexandria, LA 71301

United States Fifth Circuit:

Honorable Jolly, Jones and Southwick
United States Court of Appeals, Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Defendant – Appellant:

Derrick Anthony Felton
FCI Beaumont Low
5560 Knauth Road
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TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
CERTIFICATE OF INTERESTED PERSONS.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI.....	1
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	2
A. Brief Overview of the Case.....	2
B. Procedural History.....	2
REASONS FOR GRANTING THE WRIT	4
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT.....	5
A. Mr. Felton was not an organizer, leader, manager or supervisor of the criminal activity and the evidence failed to support such a finding.....	5
B. The Pre-Sentence Report and Plea Agreement establish a drug conspiracy, but not a leadership role.....	7
C. §3B1.1 is impermissibly vague in its application.....	9
CONCLUSION.....	12
<u>Appendix A: Fifth Circuit Opinion of May 27, 2020.....</u>	Appx. 1-2

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
Stinson v. United States, 508 U.S. 36, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993).....	10
U.S. v. Fuller, 897 F.2d 1217 (1 st Cir. 1990).....	6
United States v. Garcia-Rodriguez, 415 F.3d 452, 455 (5th Cir.2005).....	10
United States v. Ho, 311 F.3d 589, 610 (5th Cir.2002).....	10
U.S. v. Lewis, 476 F.3d 369 (5 th Cir. 2007).....	7
United States v. Nava, 624 F.3d 226 (5 th Cir. 2010).....	5
United States v. Ochoa-Gomez, 777 F.3d 278 (5th Cir. 2015).....	10
U.S. v. Ramirez, 426 F.3d 1344 (11th Cir. 2005).....	11
U.S. v. Van Hynh, 884 F.3d 171 (3 rd Cir. 2018).....	6

FEDERAL STATUTES

28 U.S.C. § 1254(1).....	1
--------------------------	---

UNITED STATES SENTENCING GUIDELINES

U.S.S.G. §3B1.1.....	1, 2, 3, 5, 9, 10, 11
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**SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is set forth at *Appendix A*. The Opinion was not designated for publication.

JURISDICTION

On May 27, 2020, the United States Court of Appeals for the Fifth Circuit issued its Opinion affirming the District Court's Judgment. *Appx. A.*

No Petition for Rehearing was filed.

This Court has jurisdiction pursuant to *28 U.S.C. §1254(1)*.

The Petition for Writ of Certiorari is due by August 25, 2020.

**CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED**

This issue presented in this Writ involves federal sentencing guideline §3B1.1(c): Aggravating Role (organizer, leader, manager or supervisor).

STATEMENT OF THE CASE

A. Brief overview of the case:

Mr. Felton and three other defendants were indicted for conspiring to distribute methamphetamine, heroin and cocaine in and around Alexandria, Louisiana. The evidence established that Mr. Felton's role in the conspiracy was purchasing the drugs in California and facilitating their return to Louisiana. On the day the drugs arrived in Louisiana, law enforcement arrested Mr. Felton, so it is unknown how the drugs were to be distributed.

B. Procedural History:

The original Indictment charged Mr. Felton with Conspiracy to Possess with Intent to Distribute Methamphetamine, Possession of Methamphetamine with Intent to Distribute, Possession of Heroin with Intent to Distribute and Possession of Cocaine with Intent to Distribute.

On March 8, 2019, Mr. Felton entered a guilty plea to the Conspiracy charge. The Trial Court ordered a Pre-Sentence Report and scheduled sentencing for June 21, 2019.

The Pre-Sentence Report listed Mr. Felton's base level offense as 38, then added two points for his role in the offense. As stated in the Report:

Adjustment for Role in the Offense: The defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b); therefore, two levels are added, USSG §3B1.1(c). The investigative material and the stipulated factual basis described **D. Felton** as a supplier of illicit drugs to the other members

of the conspiracy. Furthermore, **D. Felton** traveled to California to purchase large quantities of methamphetamine and would arrange for the narcotics to be delivered to various locations within the Western District of Louisiana via the US Postal Service. **D. Felton** would then redistribute the narcotics to others, including, but not limited to, his co-defendant's. (PSR, ¶47).

After a reduction for acceptance of responsibility, Mr. Felton's total offense level was 37, and his criminal history category was III. His guideline range was 262–327 months.

Mr. Felton objected to the enhancement.

At sentencing, the Trial Court overruled the objection, adopted the findings of the Pre-Sentence Report, and sentenced Mr. Felton to 262 months.

Mr. Felton timely appealed. On May 27, 2020, the United States Court of Appeals for the Fifth Circuit affirmed the sentence, concluding that the district court did not clearly err in assigning Felton a two-level aggravating role enhancement under *U.S.S.G. §3B1.1(c)*.

The Appellate Court specifically found Felton to be a manager in the conspiracy, noting:

The uncontradicted presentence report (PSR) adopted by the district court recounted that investigative materials and the stipulated factual basis showed that Felton acquired all the co-conspirators' drugs by traveling to California to buy large quantities of methamphetamine, which he arranged to have delivered at various places in Louisiana so that he could distribute some to co-conspirators and keep some for his own sales. Also, the uncontradicted PSR addendum pointed out that substantial amounts of drugs and cash were found in Felton's residence, together with partially burned postal service boxes and vacuum sealed bags. Retrieved text messages showed that the drugs made it to

Louisiana because of Felton's coordination and negotiation. In gist, Felton managed how the co-conspirators' acquired the drugs that gave life to the conspiracy. Thus, as the enhancement was not clear error, we affirm.

Felton respectfully petitions this Court for a writ of certiorari to review the Judgment of the Fifth Circuit Court of Appeals and ultimately conclude that the aggravated enhancement does not apply.

REASONS FOR GRANTING THE WRIT

To provide clarity and guidance regarding relative responsibility in drug conspiracy cases. While the enhancement is fact driven, there does not appear to be any consistency amongst the circuits as to its application. Writ should be granted to establish a consistent approach to applying this enhancement.

SUMMARY OF THE ARGUMENT

Mr. Felton's argument is twofold: 1) that both lower courts erred in finding that he was an organizer, leader, manager or supervisor of the criminal activity; and 2) §3B1.1 is impermissibly broad in its application, requiring clarification and uniformity by this Honorable Court.

He prays the finding be reversed and the matter be remanded for re-sentencing without the two-level enhancement.

ARGUMENT

A. Mr. Felton was not an organizer, leader, manager or supervisor of the criminal activity and the evidence failed to support such a finding.

U.S.S.G. §3B1.1(c) provides for a two-level offense increase “[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b).” [Sections (a) and (b) require five or more participants.]

The guidelines do not define “manager” or “supervisor,” but the commentary does note that the defendant “must have been the ... manager, or supervisor of one or more other participants.” *§3B1.1 cmt. n.2. (2009)*. The application notes further provide that, in distinguishing a leadership and organizational role from one of mere management or supervision, the court should consider:

the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. *cmt. n.2. United States v. Nava*, 624 F.3d 226 (5th Cir., 2010).

In the present case, the evidence was insufficient to support a leadership enhancement. Mr. Felton participated in a conspiracy to distribute illegal drugs; however, he did not act as an organizer, leader, manager or supervisor of the conspiracy.

To qualify as an **organizer** or **leader**, a defendant must have exercised a

significant degree of control and decision-making authority over the criminal activity. *U.S. v. Van Hynh*, 884 F.3d 171 (3rd Cir. 2018). Evidence such as “recruiting members of the conspiracy”, “directing those members to distribute drugs”, “retaining a large portion of profits for himself” are needed to establish an organizer or leader role. Mr. Felton did none of this. The evidence established that he transported narcotics into the Alexandria area. There is no evidence that he exercised control or decision-making authority over the criminal activity, that he recruited members, directed those members to distribute drugs or retained a large portion of the profits. Proof of his involvement in the conspiracy does not equate to a leadership role.

To qualify as a **manager** or **supervisor**, a defendant need only “have exercised some degree of control over others involved in the commission of the offense or he must have been responsible for organizing others for the purpose of carrying out the crime.” *U.S. v. Fuller*, 897 F.2d 1217 (1st Cir. 1990). Again, there is no evidence that Mr. Felton exercised control over others or that he was responsible for organizing others for the purpose of carrying out the crime. Mr. Felton was arrested while transporting narcotics and pleaded guilty to participating in a drug conspiracy. However, there is no proof that Mr. Felton acted as a manager or supervisor over the co-conspirators.

The leadership enhancement focuses on the hierachal relationship of the

participants, whether one member exercises control or decision-making authority over some other participant. Mr. Felton submits the evidence fails to prove that he acted in such a way. He did not exercise control over any of the participants, he did not manage or recruit others, he did not direct or instruct others, he did not supervise others, nor was he responsible for others in the drug conspiracy.

Mr. Felton submits his case is analogous to the facts in *U.S. v. Lewis*, wherein the Court of Appeals found insufficient evidence to sustain leadership roles for two participants in a conspiracy. 476 F.3d 369 (5th Cir. 2007). The Court in *Lewis* examined the factors to be considered in identifying an organizer or leader, such as “the exercise of decision making authority, the nature of the participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense the nature and scope of the illegal activity, and the degree of control and authority exercised over others.” Applying these factors, Mr. Felton submits the evidence falls short.

B. The Pre-Sentence Report and Plea Agreement establish a drug conspiracy, but not a leadership role.

In response to Mr. Felton’s objection to the leadership enhancement, the Probation Officer submitted a lengthy response, which the Court ultimately agreed with, in support of the enhancement. The response outlines Mr. Felton’s role in the conspiracy, describing his trip to California to purchase the drugs and giving details

regarding each defendants' role in the conspiracy.

The following paragraph is contained in the factual basis and was used in support of the enhancement:

In or around 2017, the defendant, DERRICK ANTHONY FELTON, and other members of his Drug Trafficking Organization (DTO) were selling methamphetamine in the Western District of Louisiana. FELTON was the supplier of the other members of the Drug Trafficking Organization. FELTON would travel to California in order to purchase large quantities of methamphetamine. FELTON would then arrange for the narcotics to be delivered via the United States Postal Service to various locations in the Western District of Louisiana. Once the narcotics packages arrived in the Western District of Louisiana, FELTON redistributed the narcotics to others that included, but not limited to, Reginald Felton, Jr., Darian Napoleon, and George White, Jr. [Co-Defendants].

Mr. Felton submits the above-referenced paragraph describes a typical drug conspiracy, but provides no basis to support the enhancement. It describes how Mr. Felton and the other defendants sold drugs; it does not describe the hierachal relationship between the parties, give any examples of exercise, control, supervision, or any other factors needed to establish the enhancement.

The Probation Officer also relied upon a text exchange between Mr. Felton and George White (co-defendant), summarized below:

Felton asked: "*Mook said how many bottles do you want*" (referring to bottles of promethazine)

White responded: "*All of em*"

Felton sent: "*73 1 girl 1 boy*" (referring to 73 pds of meth, 1 pd of cocaine)

White responded: “*mane tell em make sho date badass lil boy and lil girl good*” (referring to the quality of drugs).

These exchanges clearly demonstrate that Mr. Felton was taking direction from George White and cannot be used as a basis for Mr. Felton’s leadership enhancement. [It should be noted that George White received a leadership enhancement for his role in the conspiracy.]

There were additional text messages between Derrick Felton and Reginald Felton presumably discussing the arrival of the drugs. Again, the exchange may shed light on the operation of the conspiracy, but does not support a leadership enhancement. Mr. Felton’s role as a supplier does not establish that he exercised control over the other participants.

Mr. Felton did not exercise control or decision-making authority over any participant in the drug conspiracy. He did not supervise, direct, manage, or recruit the other members. He may have conspired with them to sell drugs, but that does not equate to exercising a leadership role over them.

C. §3B1.1 is impermissibly vague in its application.

The Sentencing Guidelines instruct a district court to increase a defendant’s offense level if he played an aggravating role in the offense at issue. *U.S.S.G. § 3B1.1*. The guideline recommends three different adjustment levels depending on the scope of the criminal activity and the degree of control exercised by a defendant.

U.S.S.G. § 3B1.1(a)-(c). If the criminal activity involves fewer than five participants and is not otherwise extensive, then the district court should increase a defendant's sentence by two levels if he exercised any of the four aggravating roles listed—organizer, leader, manager, or supervisor. *U.S.S.G. § 3B1.1(c). United States v. Ochoa-Gomez*, 777 F.3d 278 (5th Cir. 2015).

The application notes accompanying a Guideline generally bind federal courts unless they are inconsistent with the text of the Guideline. *United States v. Garcia-Rodriguez*, 415 F.3d 452, 455 (5th Cir. 2005); *United States v. Ho*, 311 F.3d 589, 610 (5th Cir. 2002)(citing *Stinson v. United States*, 508 U.S. 36, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993)). To warrant an adjustment under any of the three subsections, the application notes for §3B1.1 state that the defendant “must” be an organizer, leader, manager, or supervisor “of one or more other participants.” *U.S.S.G. § 3B1.1, cmt. n.2.* Moreover, the notes advise that an upward departure may be warranted for a defendant who did not exercise control over another participant but “nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.” *U.S.S.G. § 3B1.1, cmt. n.2.*

The factors that a sentencing court considers to decide if §3B1.1 is applicable are: (1) exercise of decision-making authority, (2) nature of participation in the commission of the offense, (3) recruitment of accomplices, (4) claimed right to a larger share of the fruits of the crime, (5) degree of participation in planning or

organizing the offense, (6) nature and scope of the illegal activity, and (7) degree of control and authority exercised over others. *U.S. v. Ramirez*, 426 F.3d 1344 (11th Cir. 2005). In addition, the Application Notes to §3B1.1 allow for an upward departure even when the defendant did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization. *Note 2*.

The cumulative effect of §3B1.1 allows the trial court to increase a defendant's offense level for participating in a conspiracy. An "aggravating role" is so broadly defined that it encompassed all levels of activity and participation. The enhancement is not limited to exercising control over other participants, but includes management of property. Anyone who handled drugs or conspired with another is subject to it. In Mr. Felton's case, there is no evidence that he exercised control over anyone, only that he managed the illegal narcotics. That activity is the basis of the drug conspiracy and should not be considered again for sentencing enhancement. It is hard to envision a scenario where a defendant is involved in a drug conspiracy, but does not manage someone or something. Basically, everyone except the lowest level member or participant of a conspiracy qualifies for the enhancement. Because the enhancement is unduly broad, allowing the trial court to consider any evidence involved in a drug conspiracy, Writ should be granted to provide guidance in its application.

CONCLUSION

The evidence established that Mr. Felton was bringing illegal narcotics from California to Louisiana. There was no evidence that he exercised control over any other individual. The sole basis for the enhancement was his handling of the drugs. That reason alone is insufficient to support the enhancement and Mr. Felton prays that the Writ is granted in order to remedy the error.

For the above-enumerated reasons, Mr. Felton prays this Honorable Court grant the Petition for Writ of Certiorari, and ultimately find that the leadership enhancement does not apply. He further prays for any such relief as to which he may justly be entitled.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, Joseph W. Greenwald, Jr., the undersigned counsel, hereby certify that on this 14th day of August, 2020, one copy of the Petition for Writ of Certiorari and Motion for Leave To Proceed *In Forma Pauperis* in the above-entitled case was delivered to FedEx for next day delivery to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington D.C. 20530-0001 and was e-mailed to the Office of the Solicitor General

at SupremeCtBriefs@usdoj.gov and one copy was mailed to Assistant U.S. Attorney, Camille Ann Domingue, 800 Lafayette St., Ste. 2200, Lafayette, LA 70501-6865, and was e-mailed to Camille.Domingue@usdoj.gov.

I further certify that all parties required to be served have been served.

Respectfully Submitted,

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