

No. _____

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

OCTOBER TERM 2020

SAMUEL EARL SMITH

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

LAW OFFICE OF STAN SCHWIEGER

600 Austin Avenue, Suite 12

Waco, Texas 76701

(254) 752-5678

(254) 752-7792 — Facsimile

State Bar No. 17880500

E-mail: wacocrimatty@yahoo.com

ATTORNEY OF RECORD AND ATTORNEY FOR PETITIONER

May 25, 2021

QUESTION PRESENTED

The Fifth Circuit's holding in finding that Mr. Smith was a leader or organizer under the United States Sentencing Guidelines evidences a circuit split.

LIST OF PARTIES

Pursuant to Rule 14.1(b) of the Rules of this Court, Petitioner would show that all parties to the proceeding of which the judgment is sought to be revised appear in the caption of this case.

TABLE OF CONTENTS

Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Basis of Jurisdiction	vi
Statutes Involved	vii
Statement of the Case	vii
Argument for Granting the Writ	1
A. Grounds for Granting the Writ.	1
B. Reasons for Granting the Writ.	1
Prayer	9
Appendix	
Opinion and Judgment of the Fifth Circuit Court of Appeals	A-2
Judgment of the United States-- District Court for the Western District of Texas, Waco Division	A-4
Statutes Involved.	A-10

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Gall v. United States</i> , 552 U.S. 38 (2007)	8
<i>Kaley v. United States</i> , 517 U.S. 320 (2014)	7
<i>United States v. Bass</i> , 54 F.3d 125 (3d Cir. 1995)	3
<i>United States v. Billingsley</i> , 115 F.3d 458 (7th Cir. 1997)	3
<i>United States v. Bjorkman</i> , 270 F.3d 482 (7th Cir. 2001)	5
<i>United States v. Collins</i> , 877 F.3d 362 (7th Cir. 2017)	1
<i>United States v. Mankiewicz</i> , 122 F.3d 399 (7th Cir. 1997)	3, 6
<i>United States v. Mays</i> , 902 F.2d 1501 (10th Cir. 1990)	7
<i>United States v. McGregor</i> , 11 F.3d 1133 (2d Cir. 1993)	6
<i>United States v. Mir</i> , 919 F.2d 940 (5th Cir. 1990)	5
<i>United States v. Mitchell</i> , 85 F.3d 800 (1st Cir. 1996)	6
<i>United States v. Ornelas-Yanez</i> , 77 F. Supp. 3d 1083 (D.N.M. 2014)	5
<i>United States v. Schultz</i> , 14 F.3d 1093 (6th Cir. 1994)	7

<i>United States v. Smith</i> , 840 F. App'x 782, 784 (5th Cir. 2021)	x,1, 6, 8
<i>United States v. Tagore</i> , 158 F.3d 1124 (10th Cir. 1998)	4
<i>United States v. Talladino</i> , 38 F.3d 1255 (1st Cir.1994)	5
<i>United States v. Weidner</i> , 703 F. Supp. 1350 (N.D. Ind. 1988), <i>aff'd</i> , 885 F.2d 873 (7th Cir. 1989)	7

FEDERAL RULES

Sup. Ct. R. 10(a)	1
-----------------------------	---

UNITED STATES SENTENCING GUIDELINES

USSG § 3B1.1 cmt. (n.2)	3, 5
-----------------------------------	------

MISCELLANEOUS

Joseph L. Barloon, An Economic Analysis of Group Crime and the Federal Sentencing Guidelines, 84 Geo. L.J. 2261, 2276 (1996)	6
--	---

**IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021**

SAMUEL EARL SMITH Petitioner v. UNITED STATES OF AMERICA Respondent

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

Petitioner, Samuel Earl Smith, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on February 26, 2021.

BASIS OF JURISDICTION

The Fifth Circuit Court of Appeals entered their judgment on February 26, 2021.¹ The jurisdiction of this Court is invoked pursuant to the United States Code.²

¹ (App., p. A-1).

² 28 U.S.C. § 1254(1) (2020) (“Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods . . . [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.”).

STATUTES INVOLVED

This material has been included in the Appendix.

STATEMENT OF THE CASE

A federal grand jury named Appellant Samuel Earl Smith in a three-count indictment alleging:

Count	Offense	Statute
1	Conspiracy to Possess with Intent to Distribute and to Distribute Methamphetamine, a Schedule Two Controlled Substance.	21 U.S.C. § 846. [21 U.S.C. §841(a)(1)(b)(1)(A)(viii)]. ³
2	Conspiracy to Possess With Intent to Distribute and to Distribute Cocaine, a Schedule II Narcotic Drug Controlled Substance.	21 U.S.C. § 846. (21 U.S.C. § 841(a)(1), 841(b)(1)(B)(ii) (II)). ⁴
3	Conspiracy to Possess with Intent to Distribute and to Distribute “Crack” Cocaine, a Schedule II Narcotic Drug Controlled Substance	21 U.S.C. § 846. [21 U.S.C. § 841(a)(1), 841(b)(1)(A)(iii); 21 U.S.C. § 841(a)(1), 841(b)(1)(B)(iii)]. ⁵

On November 20, 2018, the Government filed a superseding information alleging and requesting:

³ ROA.20-50187.18–19.

⁴ ROA.20-50187.19–20.

⁵ ROA.20-50187.20–21.

Count	Offense	Statute
1	Conspiracy to Possess with Intent to Distribute and to Distribute Methamphetamine, a Schedule Two Controlled Substance.	21 U.S.C. § 846. [21 U.S.C. §841(a)(1)(b)(1)(A)(viii)]. ⁶
2	Conspiracy to Possess With Intent to Distribute and to Distribute Cocaine, a Schedule II Narcotic Drug Controlled Substance.	21 U.S.C. § 846. [21 U.S.C. § 841(a)(1), 841(b)(1)(B)(ii)(II)]. ⁷
3	Conspiracy to Possess with Intent to Distribute and to Distribute “Crack” Cocaine, a Schedule II Narcotic Drug Controlled Substance	21 U.S.C. § 846. [21 U.S.C. 841(a)(1), 841(b)(1)(A)(iii); 21 U.S.C. § 841(a)(1), 841(b)(1)(B)(iii)]. ⁸
	Notice of Governments Demand for Forfeiture	21 U.S.C. § 853(a). ⁹

The Government then filed a Sentencing Enhancement Information on May 13, 2019.¹⁰ Within the document, the Government alleged that Appellant had been convicted of a “serious violent felony.”¹¹ Further, Appellant had served a term of imprisonment more than 12 months for the alleged felony, and his release was within 15 years of commencement of the instant offense.¹² As a result of a conviction, the Government averred that Appellant was subject to an increase

⁶ ROA.20-50187.59–60.

⁷ ROA.20-50187.60–61.

⁸ ROA.20-50187.61–62.

⁹ ROA.20-50187.61–62.

¹⁰ ROA.20-50187.95.

¹¹ ROA.20-50187.95. The Government alleged that Appellant had been convicted of Aggravated Robbery in cause number 9409841, in the 232nd District Court of Harris County, Texas.

¹² ROA.20-50187.95.

punishment to a mandatory term of at least 15 years of imprisonment, maximum life imprisonment, a fine not to exceed \$20 million and at least 10 years of supervised release.¹³

On November 20, 2018, the Government filed its second superseding information in this cause, alleging and requesting:

Count	Offense	Statute
1	Conspiracy to Possess with Intent to Distribute and to Distribute Methamphetamine, a Schedule Two Controlled Substance. Sentence Enhancement.	21 U.S.C. § 846. [21 U.S.C. § 841(a)(1)(b)(1)(A)(viii)]. ¹⁴ 21 U.S.C. § 851. ¹⁵
2	Conspiracy to Possess With Intent to Distribute and to Distribute Cocaine, a Schedule II Narcotic Drug Controlled Substance and to Distribute at Least 500 Grams of Cocaine, a Schedule II Narcotic Drug Controlled Substance.	21 U.S.C. § 846. [21 U.S.C. § 841(a)(1), 841(b)(1)(B)(ii)(II)]. ¹⁶
3	Conspiracy to Possess With Intent to Distribute and to Distribute at Least 280 Grams of “Crack” Cocaine, a Schedule II Narcotic Drug Controlled Substance. Sentence Enhancement.	21 U.S.C. § 846. [21 U.S.C. 841(a)(1), 841(b)(1)(A)(iii)]. ¹⁷ 21 U.S.C. § 851. ¹⁸
	Notice of Governments Demand for Forfeiture	21 U.S.C. § 853(a). ¹⁹

¹³ ROA.20-50187.95.

¹⁴ ROA.20-50187.97–98.

¹⁵ ROA.20-50187.98.

¹⁶ ROA.20-50187.97–98.

¹⁷ ROA.20-50187.98–99.

¹⁸ ROA.20-50187.99.

¹⁹ ROA.20-50187.99–100.

On July 1, 2019, the Government moved to dismiss “the Sentencing Enhancement Information, and Superseding Information in this cause,” without prejudice.²⁰ Then, on May 2, 2020, Appellant entered a plea of guilty to the three counts in the second superceding information.²¹

The District Court held Appellant’s sentencing hearing on March 4, 2020. Punishment was assessed at 300 months as to each of the three counts to be served concurrently.²² Upon release from imprisonment, Mr. Smith must serve five years supervised release, which again is to be served concurrently.²³ A fine of \$750.00 (\$250.00 for each count) and special assessments totaling of \$300.00 were also assessed.²⁴ Judgment was entered on March 5, 2020.²⁵ Petitioner’s issues were overruled in the Fifth Circuit Court of Appeals.²⁶

²⁰ ROA.20-50187.99–100.

²¹ ROA.20-50187.223–24. Mr. Smith also waived indictment in this matter. ROA.20-50187.127–28.

²² ROA.20-50187.155.

²³ ROA.20-50187.155.

²⁴ ROA.20-50187.159.

²⁵ ROA.20-50187.154.

²⁶ *United States v. Smith*, 840 Fed. Appx. 782 (5th Cir. 2021).

ARGUMENT FOR GRANTING THE WRIT

Did the Fifth Circuit err in holding that the concept of corpus delicti should not
apply in the punishment phase?

A. *Ground for Granting the Writ.*

Problems concerning section “3B1.1 arise with seemingly infinite shadings. The text of the guideline and its application notes provide limited guidance . . .”²⁷

This Court is called upon to more clearly define the parameters of being an “organizer or leader” or “manager or supervisor (but not an organizer or leader).” In the instant case, the Fifth Circuit cited three factors, two of which conflict with applicable decision of other Circuits.²⁸ As such, Petitioner argues that the Fifth Circuit’s has entered a decision requires review.²⁹

B. *Reasons for Granting the Writ.*

Below, the Fifth Circuit upheld a four-point level increase for an “aggravating role” in a criminal offense.³⁰ The panel found three factors in support of Mr. Smith’s “leadership role”: (1) the evidence of Mr. Smith’s role in receiving complaints or soliciting feedback about the quality of the cocaine provided; (2) his direction of at least one co-defendant during a part of the conspiracy; and (3) the “suggestion” of the PSR that Mr. Smith was the sole source of supply for his co-defendants.³¹

²⁷ *Cf. United States v. Collins*, 877 F.3d 362, 366 (7th Cir. 2017).

²⁸ *United States v. Smith*, 840 F. App’x 782, 784 (5th Cir. 2021).

²⁹ Sup. Ct. R. 10(a).

³⁰ *Alexander*, 840 Fed. Appx. at 784.

³¹ *Id.*

Section 3B1.1 of the Sentencing Guidelines provides for a level increase for an “aggravating role” in a criminal offense:

Based on the defendant’s role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
- (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
- (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

However, the Guidelines do not clearly define the term “leader” and the courts must make this determination. To assist, the Guidelines provides that a sentencing court should consider several factors when determining whether a defendant was a leader: “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.” The Guidelines further provide that “[t]o qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants.”

In general, the circuits agree that the cited commentary to the Guidelines purports only to suggest various factors the court should consider. Evidence of every factor is not a prerequisite to a finding that the defendant is a leader or organizer under section 3B1.1, nor is evidence that the defendant is the sole or predominate leader required.³² Further, the circuits are in agreement that where a defendant is leader or organizer of criminal activity that involved five or more participants or was otherwise extensive, and the record establishes that the putative leader gave directions to at least one of the participants, the enhancement is proper.³³

The opposite conclusion demonstrates another area of agreement: a single factor does not automatically justify the imposition of this enhancement.³⁴ Rather, the factors must be weighed by the district court in light of the intent of the Guidelines section to differentiate among relative degrees of responsibility.³⁵

³² *United States v. Bass*, 54 F.3d 125, 128 (3d Cir. 1995).

³³ USSG § 3B1.1 cmt. (n.2).

³⁴ *See United States v. Billingsley*, 115 F.3d 458, 465 (7th Cir. 1997).

³⁵ *United States v. Mankiewicz*, 122 F.3d 399, 406 (7th Cir. 1997).

1. Supervisory role.

“When I use a word, it means just what I choose it to mean—neither more, nor less.”³⁶

The failure of the Sentencing Commission to fully define the factors under section 3B1.1 created a circuit split. In this case, the Fifth Circuit found that even a one time exercise of supervision supports an aggravating role Guideline level increase. This is contrary to several Seventh Circuit holdings.

As cited above, the Fifth Circuit found that Mr. Smith directed “at least one co-defendant during a part of the conspiracy.” However, the record demonstrates only ***one instance*** of “control,” where Appellant brokered a drug swap using a codefendant as an intermediary in a one-off deal.³⁷ Mr. Smith believes that this broad construction of the supervision aspect requires review, as this holding fails to account for reading the Guideline as a whole.

The gravamen of this enhancement is either the exercise of control over other participants or the organization of others to carry out the crime.³⁸ The Sentencing Commission included this adjustment primarily because of concerns about relative

³⁶ LEWIS CARROLL, *THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE* 52 (1871).

³⁷ ROA.20-50187.275.

³⁸ *United States v. Tagore*, 158 F.3d 1124, 1131 (10th Cir. 1998).

responsibility.³⁹ As such, this adjustment increases with both the size of the organization and *the degree of the defendant's responsibility*.⁴⁰

The aggravating role adjustment is properly viewed as having a temporal, as well as scope test, when the allegations are an ongoing conspiracy.⁴¹ Both the Fifth and Seventh Circuits have spoken to the temporal requirement, and have authorized the adjustment only in cases where it is “anchored to the transaction It is not the contours of the offense charged that defines the outer limit of the transaction; rather it is the contours of the *underlying scheme* itself. All participation firmly based in that underlying transaction is ripe for consideration in adjudging leadership role.”⁴²

The narrow focus in the instant case – granting an adjustment based a single transaction – hardly seems to comprise a broad view of the entire “underlying scheme.” To be a “manager” or “supervisor” is to occupy a role – to have a status. A defendant who “makes the critical strategic and operational decisions” in a group

³⁹ USSG § 3B1.1(a) (comment.) (backg’d) (emphasis added).

⁴⁰ *Id.*

⁴¹ *See United States v. Ornelas-Yanez*, 77 F. Supp. 3d 1083, 1113 (D.N.M. 2014). There, the district court found that section 3B1.1 enhancement is proper within one time crimes “because [section] 3B1.1 contains no requirement that the underlying offense occur over an extended period of time.” However, that case merely reiterates the 3B1.1 factors must be weighed in light of the intent of the Guidelines section to differentiate among relative degrees of responsibility. Obviously, the degrees of responsibility shift when a crime is committed over a longer time.

⁴² *United States v. Mir*, 919 F.2d 940, 944 (5th Cir. 1990) (emphasis added); *accord United States v. Bjorkman*, 270 F.3d 482, 497 (7th Cir. 2001).

enterprise can be deemed an organizer or leader.⁴³ Essentially, leaders must be able to exercise some element of control or organization over other people.⁴⁴ Viewed in this manner, a leader is a personnel specialist.⁴⁵ The correct focus in this sentencing enhancement should distinguish between ongoing supervision and merely asking a coconspirator, on one occasion, to do something.⁴⁶ The former provides grounds for the enhancement; the latter does not. The Fifth Circuit’s holding concerning this factor stands in stark contrast to the finding by the Seventh Circuit, and requires review.

2. *Smith was the sole source of supply for his co-defendants.*

In the opinion, the *Smith* panel found that the evidence “suggested Smith was the sole source of supply for his co-defendants”⁴⁷ supported the supervisory enhancement. This stands in contrast to several other circuits that have held a

⁴³ *United States v. Talladino*, 38 F.3d 1255, 1261 (1st Cir.1994).

⁴⁴ Joseph L. Barloon, *An Economic Analysis of Group Crime and the Federal Sentencing Guidelines*, 84 GEO. L.J. 2261, 2276 (1996).

⁴⁵ *Id.*

⁴⁶ *United States v. Mankiewicz*, 122 F.3d 399, 405–06 and n. 4 (7th Cir. 1997); *United States v. Mitchell*, 85 F.3d 800, 813–14 (1st Cir. 1996); *United States v. McGregor*, 11 F.3d 1133, 1138–39 (2d Cir. 1993) (“One isolated instance of a drug dealer husband asking his wife to assist him in a drug transaction is not the type of situation that section 3B1.1 was designed to reach.”).

⁴⁷ *Smith*, 840 F. App’x at 784.

mere buy/sell relationship does not qualify for an aggravating role in the offense enhancement.⁴⁸ This demonstrates a further circuit split and requires review.⁴⁹

⁴⁸ *United States v. Schultz*, 14 F.3d 1093, 1099 (6th Cir. 1994); *United States v. Mays*, 902 F.2d 1501, 1503 (10th Cir. 1990); *United States v. Weidner*, 703 F. Supp. 1350, 1354 (N.D. Ind. 1988), *aff'd*, 885 F.2d 873 (7th Cir. 1989).

⁴⁹ *Kaley v. United States*, 517 U.S. 320, 326 (2014).

3. *Quality control.*

The Fifth Circuit, noted without passing on whether the “quality control” of the product contributed to Mr. Smith’s leadership role.⁵⁰ The presentence investigation report (PSR) detailed intercepted telephone calls in which Smith either received complaints or solicited feedback about the quality of the cocaine he provided.⁵¹ In summary, the discussions can be summarized Mr. Smith’s codefendant’s stated that: (1) cocaine of sufficient quality to “cook” was needed; (2) the yield from powder to crack cocaine was of concern, and finally, that Mr. Smith received either statements or complaints about the quality of the contraband. Since the Fifth Circuit did not pass on this issue, and because the Guidelines are now advisory, this appears to be a question that must be remanded to the Fifth Circuit.⁵²

C. *Conclusion*

Because the failure of the Fifth Circuit failed to grant Petitioner a sentence free of error, this Honorable Court should grant Petitioner’s Writ.

⁵⁰ *Smith*, 840 Fed. Appx. at 784 (stating that neither party supplied “controlling authority” from the Fifth Circuit “addressing whether the receipt of complaints about the quality of drugs provided support for an ‘organizer or leader enhancement.’”)

⁵¹ *Id.*

⁵² *See Gall v. United States*, 552 U.S. 38, 46 (2007) (holding the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are “reasonable.”).

PRAYER

Petitioner requests that this Honorable Court grant his Writ of Certiorari, and reverse the holdings of the District Court and the Fifth Circuit, and for any other relief that he may be so entitled.

Respectfully submitted,

LAW OFFICE OF STAN SCHWIEGER

/s/ Stan Schwieger

Stan Schwieger
600 Austin Avenue, Suite 12
Waco, Texas 76701
(254) 752-5678
(254) 752-7792—Facsimile
State Bar No. 17880500
ATTORNEY FOR PETITIONER