

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

IVAN GUTIERREZ,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

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QUESTION PRESENTED

Did imposing a leadership enhancement on Petitioner, pursuant to USSG § 3B1.1(b) of the United States Sentencing Guidelines, but not on his codefendant who held a materially indistinguishable leadership position, violate Petitioner's right to equal protection?

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Petitioner, Ivan Gutierrez, respectfully asks that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit in Case No. 23-765.

OPINION BELOW

The March 21, 2025, Memorandum decision of the Ninth Circuit Court of Appeals, affirming Petitioner's sentence, is attached to the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The matter seeks redress from the Ninth Circuit Court of Appeals' March 21, 2025, Memorandum decision affirming Petitioner's conviction and sentence (Appendix at 2). Petitioner's petition for reconsideration was denied April 4, 2025 (Appendix at 6).

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

This case involves a violation Petitioner's right to the "due process of law" under the Fifth Amendment to the U.S. Constitution.

LIST OF PROCEEDINGS

Petitioner was indicted on February 22, 2019, in *United States v. Eric Gutierrez, et. al.*, Case No. 19-CR-00108-JAK, in United States District Court for the Central District of California, and charged with conspiracy to distribute and possession with intent to distribute cocaine, fentanyl, and methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), (b)(1)(B) and 846. Dkt. 1. Initially, there were four (4) defendants, including Petitioner and his brother, Eric Gutierrez. In May of 2022, Eric Gutierrez agreed to plead guilty. Dkt. 283. Petitioner proceeded to trial. However, two days into the trial, he pled guilty without a plea agreement. Dkt. 328.

On February 16, 2023, lead defendant Eric Gutierrez was sentenced to 60 months incarceration. Dkt. 351. On April 21, 2023, Petitioner was sentenced to 168 months incarceration. Dkt. 381.

Petitioner appealed to the United States Court of Appeal for the Ninth Circuit, Case No. 23-765. Judgment was affirmed on March 21, 2025 (Dkt. 62.1), and Petitioner's rehearing petition was denied on April 4, 2025. Dkt. 64.1. *See* Appx. at 6-7.

STATEMENT OF THE CASE

Petitioner and his brother Eric Gutierrez played equal roles in a drug distribution conspiracy that were indistinguishable for leadership-enhancement purposes, under the United States Sentencing Guidelines (the "Guidelines"). They were sentenced only 2 months apart. Petitioner was assessed 3 offense-levels for a leadership enhancement under USSG § 3B1.1(b), and Eric Gutierrez was not. The difference was that Eric Gutierrez entered an early plea agreement in which the government agreed not to seek the leadership enhancement, while Petitioner went to trial (before pleading guilty on day 2 of trial). The timeliness of a guilty plea may impact the application of the acceptance of responsibility offense-level reduction under USSG § 3E1.1, application of sentencing factors under 18 U.S.C. § 3553(a) factors, and/or the government's ultimate sentencing recommendation, but it is irrelevant to a correct application of the Guidelines. Applying the Guidelines differently to Petitioner than his materially indistinguishable brother, for no relevant reason, violated Petitioner's right to equal protection.

Due process under the Fifth Amendment includes the right to equal protection. Application of the Guidelines may be challenged on due process and equal protection grounds. *See United States v. Ruiz-Chairez*, 493 F.3d 1089, 1091

(9th Cir. 2007). To establish that the application of the Guidelines violated his right to due process and equal protection, Petitioner “must show that similarly situated persons are subject to disparate treatment, and that this disparate treatment has no rational basis.” *United States v. Roberts*, 915 F.2d 889, 891-92 (4th Cir. 1990) (citing *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 489 (1977) and *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974)).

The Government’s Answering Brief (GAB) admits they were both leaders of the drug conspiracy. GAB at 5-7 (Dkt. 39.1). The government argued, and the Panel concluded, that Petitioner and Eric Gutierrez were not similarly situated because Eric Gutierrez accepted an early plea agreement and Petitioner did not. By the time Petitioner pled guilty, “the government uncovered additional incriminating evidence about the brother’s managerial or supervisory roles.” Appx. at 5 (Dkt. 62.1 at 4).

However, at the time Eric Gutierrez entered his May 24, 2022, plea agreement, the government was aware of evidence that justified a managerial or supervisory role for Eric Gutierrez. First, the indictment showed his role. He was the lead defendant. The “Means” section of the indictment provides that “Defendants E. Gutierrez and I. Gutierrez would communicate with customers, including members of the South Carolina Drug Trafficking Organization, accepting orders for large quantities of drugs to be shipped from the Los Angeles, California, area to Charlotte, North Carolina, and the surrounding areas.” Dkt. 1 at 3. Of the 24 alleged Overt Acts, Eric Gutierrez is named in 15, and Petitioner is named in only 2.

Second, at his initial appearance in federal court, the government argued Eric Gutierrez was more involved in the conspiracy than Petitioner. Dkt. 26.5 at 20

(1-ER-184). Therefore, the government sought his pretrial detention. Dkt. 26.5 at 21 (1-ER-183).

Third, the government was aware of information from multiple cooperators that would justify the leadership enhancement for Eric Gutierrez. The government offered the declaration of a cooperating codefendant who explained “the Gutierrez brothers seemed to be running the business jointly, with neither in charge of the other. That is in contrast to their helpers, who were clearly subordinate to the Gutierrez’ brothers. . .” See Declaration Submitted in Connection with Sentencing of Ivan Gutierrez, Under Seal. That declaration was signed in April 2023. That cooperating codefendant pled guilty on March 31, 2022. Dkt. 282 (2-ER-162). At the cooperator’s change-of-plea hearing, the cooperating codefendant’s defense counsel stated, in response to a question from the Court, “I have been representing him *through before the proffer that was made with the government*, so probably now for about eight months.”¹ So, that cooperating codefendant made his proffer (stating Petitioner and his brother had equal leadership roles) to the government long before Eric Gutierrez’s May 24, 2022, plea agreement.

Defendant’s sentencing positions site to other cooperators who provided information to the government long before May 24, 2022. For example, a Confidential Witness stated that Eric Gutierrez coordinated a meeting re drugs, Eric was the main point of contact, and he was directing others what to do. Dkt. 375 at 2 (2-ER-80) and Dkt. 363 at 7-8 (2-ER-88-89).

Once it is acknowledged that Petitioner and Eric had similar roles, and the government was aware of evidence that would justify the leadership enhancement for both when they entered their respective pleas, the question is whether there is a

¹ Ninth Cir. Case No. 23-765, Dkt. 17.3 (2-ER-163-64) (emphasis added).

rational basis for their dissimilar treatment *under the Guidelines*. The starting point for any sentence is that the Guidelines must be calculated correctly, regardless of what mitigating or aggravating factors ultimately come into play in imposing the actual sentence. *Kimbrough v. United States*, 552 U.S. 85, 108 (2007). The Guidelines are either calculated correctly or they are not; whether they are calculated correctly does not depend on the position the government takes.

The Gutierrez brothers were sentenced only 2 months apart. At the time they were sentenced, it was clear they played equal roles in their joint crime. The fact that the government had agreed not to seek a leadership enhancement against Eric Gutierrez is not a rational basis for the district court to apply the guidelines differently to Petitioner.

At the end of the day, the district court applied a leadership enhancement to one defendant, but not to his codefendant, in the same case, where their leadership roles were materially indistinguishable. The only difference was the government recommended and provided evidence of a leadership role for one defendant, but not the other. That is not a “rational” distinction when it comes to the legal question of how leadership enhancements under the Guidelines are applied. There was no legally cognizable rational basis for the disparate treatment of the Gutierrez brothers on this legal issue. Accordingly, because of the government’s actions, the guidelines were applied by the district court in a manner inconsistent with Petitioner’s right to equal protection under the Fifth Amendment.

REASONS FOR GRANTING THE PETITION

The Guidelines are the starting point for every sentencing in the United States District Courts. The government’s approach to the Guidelines led to a sentence in violation of Petitioner’s right to equal protection under the Due Process

Clause of the Fifth Amendment. The Ninth Circuit's sanctioning of the equal protection violation was such a departure from constitutional requirements exercise of this Court's supervisory power is appropriate.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant the petition for writ of certiorari.

Dated: June 5, 2025

Respectfully submitted,

s/Kenneth M. Miller
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