

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 2017

SIMON JOHN JUDGE, Jr.,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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Question Presented

Should this Court review the conflict between the 9th Circuit's decision in Judge's case that the denial of a minor role reduction was harmless error even if the district court applied the wrong legal rule because the factors cited by the district court were sufficient to allow the denial of a role reduction under the newly amended minor role guideline with a Second Circuit decision holding that the district court's failure to apply the amended guideline required a resentencing. *See United States v. Soborski*, No. 16-3369, 2017 U.S. App. LEXIS 17459 (2d Cir. Sep. 11, 2017) (unpublished).

List of Parties

☒ All parties appear in the caption of the case on the cover page.

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A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED
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Petitioner, Simon John Judge, Jr., asks for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered February 27, 2017.

Opinion Below

The decision of the court of appeals, *United States v. Judge*, 678 F. App'x 591 (9th Cir. 2017)(unpublished), is attached as Appendix A.

Jurisdiction

The court of appeals issued its decision on February 27, 2017. Judge filed a

petition for panel and en banc rehearing which the court of appeals denied on October 19, 2017. *See* Appendix B. The Court has jurisdiction under 28 U.S.C. § 1254(1).

Involved Federal Law

§ 3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.¹

Statement of the Case

A. The charges and the guilty plea.

Judge was charged with importing heroin and cocaine into the United States. He pled guilty to the charge with a fast track plea agreement.

Judge filed sentencing papers with the district court explaining that how he got caught up in this border bust case. Judge is a 46-year-old father of five and in the months before his arrest, Judge had received a diagnosis of a terminal lung disease. Already in arrears on his child support, Judge got into contact with a prisoner that he had known from his prior drug conviction.

Judge got a car registered in his name and crossed it several times to create a crossing history. Judge believed that he was just going cross a small amount of

¹ The application notes to Section 3B1.2 are set out in Appendix D.

marijuana for \$2500.00. As part of the created crossing history, according to Judge, the organization put marijuana seeds into the vehicle in order to get it referred to secondary inspection and be found to be clean.

The day before his arrest, Judge was told that his car would be loaded with drugs and that he would drive them across the border and leave them at a Walmart parking lot.

Judge never made it to Walmart because he was apprehended at the border. He gave a detailed confession. Judge pled guilty to a fast track plea agreement.

B. Sentencing

Judge filed sentencing papers asking for a minor role reduction. The Presentence Report (PSR) analyzed Judge's role as being average and not minor because Judge registered the car in his name and created a crossing history, returned the vehicle to Mexico for the installation of a secret compartment, and that Judge has two drug possession convictions from 1991 and 2000.

The district court began the sentencing hearing by explaining that the new amendments to the minor role guideline had only codified his preexisting practices.

Mr. Stitt, I've read your arguments, and I'm familiar with the new commentary, the new criteria. I say "new." What's new about it is that they're just express. Those criteria I think have always applied, have always been taken into consideration by judges; I know I have.

. . . .

One of the things that strikes me about the new commentary is that if you look at the use notes that led the Sentencing Commission to adopt those -- somewhat expressly state the new criteria, they say that they relied principally on the cases from the Seventh and the Ninth Circuit in

reaching that, disagreeing with other circuits, agreeing with the standards by those two circuits. That, to me, means that they're affirming Ninth Circuit law on this issue of minor role. And of course I'm familiar with the most recent decision, *Hurtado*²; it says, you know, substantial planning activity, preparation activity, the fact that somebody's being paid a substantial amount, the amount of the narcotic, a great amount, any one of those factors of itself is sufficient for a Court to find that the defendant failed to establish that he had a minor role in the case. I'm not relying on any one factor; I understand the analysis here is totality of circumstances, but I just don't see it in this case.³

To counter this argument, Judge pointed out that the average sentences in the Southern District of California were closer to his recommended sentence than the 70 months recommended by the government. The district court was not moved:

THE COURT: The Southern District of California is so far out of the norm on median sentences across the United States that it's really -- that's not that meaningful to me.

MR. STITT: Well, it's meaningful --

THE COURT: I mean it's an idea of what -- I suppose of what others are doing, but, you know, you look at the national statistics and, you know, we're way at the bottom, and, you know, it's driven a lot of times by policies that I don't agree with -- not in play here; the government hasn't advocated a minor role -- but in so many cases, you've heard me say they come in and ask for a minor role and -- not just I, I'm not the only one, not just Judge Benitez, judges across the board reject the government's recommendation of minor role, they go up on appeal, and the judges are affirmed on that. So, again, sometimes they don't, Mr. Stitt, but that's what -- that's the phenomena of driving the median sentence down here is the overuse of minor role.⁴

In Judge's case, the district court noted Judge's drug priors which showed he was not a

² *United States v. Hurtado*, 760 F.3d 1068 (9th Cir. 2014).

³ Sentencing Hearing, December 15, 2015, at 4-6 (clerk's record 29).

⁴ *Id.* at 32.

novice at drug crimes and that Judge had participated in the offense by engaging in a number of preliminary acts such as registering the car and taking it over the border to create an innocent looking crossing history. Combining this with the large load of narcotics (though the district court would concede that the load was average sized for a border bust in the Southern District of California) and that Judge was to be paid made Judge, in the eyes of the district court, an average participant in the offense.

Without a role reduction, Judge's guideline range was 70-87 months in prison (with a role reduction, the range would be 46-57 months) and the district court imposed a sentence of 60 months.

C. The 9th Circuit's decision

The Ninth Circuit held that even if the district court applied the wrong version of the guideline, the factors it cited were close enough to the correct factors to make any error harmless: "Even if the Amendment and *Hurtado* are in conflict, the court properly applied the Amendment; it compared Judge to his co-participants in the offense, and considered the factors enumerated in the guideline and the totality of the circumstances, to determine whether Judge was 'substantially less culpable than the average participant.'" *United States v. Judge*, 678 F. App'x at 591-92. The Ninth Circuit then noted that the district court's finding was not clearly erroneous since Judge had crossed the border several times with marijuana seeds in his car. *Id.* at 592.

Reason for Granting the Petition

Supreme Court Rule 10(a) states that if a Court decides an important federal question in way that conflicts with decisions of other United States Courts of Appeals or with relevant decisions of this Court, that is grounds for certiorari review. In Judge's case, the Ninth Circuit's decision that the district court's application of an earlier version of the guidelines would be harmless error conflicts with an unpublished decision of the Second Circuit in *United States v. Soborski*, No. 16-3369, 2017 U.S. App. LEXIS 17459 (2d Cir. Sep. 11, 2017) (unpublished).⁵

A. The district court ignored the amended minor role guideline.

The issue of minor role for drug couriers in border-bust cases in the Southern District of California has been a heavily litigated issue over the past decade and District Judge Larry A. Burns has been at the center of it. Since his categorical rejection of the United States's plea bargaining practice of including a minor role reduction in *United States v. Rodriguez-Castro*, 641 F.3d 1189 (9th Cir. 2011), to accounting for a quarter of the minor appeals originating in the Southern District of California,⁶ the district court's view of the legal issue of minor role is quite simple: border-bust couriers with large quantities of drugs do not get role because it is too big of a break in the sentence. The

⁵ This Court considers unpublished decisions when considering whether the circuits are in conflict. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 583 n.5, 128 S. Ct. 1396, 1403 (2008) (noting that the Fourth Circuit was on one side of the circuit split because per an unpublished Fourth Circuit decision.)

⁶ A LEXIS search for "Larry A. Burns" and "minor role" retrieves 94 cases since 2006, whereas a search of "Southern District of California" and "minor role" gives 389.

district court's role denials are normally clothed in the standard, generic facts of the large quantity of drugs, the fact of payment, or having made ordinary preparations to cross the vehicle, but the truth is that this district court did not believe, and may still not believe, that border-bust couriers should usually get a role reduction. Here, Judge was denied role because Judge had engaged in substantial preparation, was being paid, it was a lot of cocaine and heroin (though district court itself noted the load was average importation case for the Southern District of California⁷) and Judge had a drug prior from the year 2000. All of these factors are commonplace in border-bust cases and the district court described Judge's case as being "very average."⁸

The approach of the district court in this case, by the district court's own admission, was the same standard as under *Hurtado* and that is exactly the analysis that the Sentencing Commission set out to change by the November 1, 2016, amendments to the minor role guideline. The Commission was specific that the problem it was addressing was the frequent denial of role reductions to couriers along the Southwest border:

The Commission conducted a review of cases involving low-level offenders, analyzed case law, and considered public comment and testimony. Overall, the study found that mitigating role is applied inconsistently and **more sparingly than the Commission intended**. In drug cases, the Commission's study confirmed that mitigating role is applied inconsistently to drug defendants who performed similar low-level functions (and that rates of application vary widely from district to district). For example,

⁷ Reporter's Transcript of Sentencing ("RT-Sent"), December 7, 2015, at pages 14 and 28 (noting that Judge was an average border bust); Clerk's Record ("CR") 14.

⁸ *Id.* at 28.

application of mitigating role varies **along the southwest border**, with a low of 14.3 percent of couriers and mules receiving the mitigating role adjustment in one district compared to a high of 97.2 percent in another.⁹

The express purpose of the guideline amendment is to get sentencing courts, like the district court in this case, to give minor role reductions more frequently than they currently do. That language cannot be squared with the district court's statement that the new guideline amendments did not really change anything about how minor role applies.

B. The 9th Circuit's decision conflicts with *Soborski*

In *Soborski*, the Second Circuit considered whether a trained sniper who contracted to provide security to people that he thought were Colombian drug traffickers but were in fact drug informants running a sting operation should get minor role. The district court held that Soborski knew what he was getting into and denied a role reduction. *United States v. Soborski*, No. 16-3369, 2017 U.S. App. LEXIS at *3. The *Soborski* court still vacated the sentence, though, finding that it was not clear that the district court understood that the amended minor role guideline had jettisoned the comparison of the defendant's guilt with the universe of similarly situated offenders in similar cases in favor of findings about the criminal activity directly before the Court. Because the record before the *Soborski* Court left a substantial doubt about whether the district court applied the amended guideline “. . . the proper course is to vacate the sentence and remand the case to the District Court for resentencing, to ensure that the

⁹ See Supplement to Appendix C, Amendment 794 (emphasis added).

District Court has had an opportunity to consider the proposed role reduction, and explain its decision, with the benefit of the full guidance provided by Amendment 794.” *Id* at *17.

Conclusion

This Court should grant certiorari review to correct the Ninth Circuit’s erroneous affirmance of the district court’s mistaken application of the minor role guideline and bring the unpublished decisions of the Second Circuit and the Ninth Circuit into harmony.

Dated: January 17, 2018



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