

No. _____

In the Supreme Court of the United States

ADOLFO DE-LA-CRUZ-GUTIERREZ, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a trial court can sentence a “safety-valve”-eligible defendant to the applicable mandatory minimum sentence, in contravention to the U.S. Sentencing Guidelines.

Whether a trial court may deny a defendant a role-in-the-offense reduction to his advisory U.S. Sentencing Guidelines range based solely on the factor of drug quantity.

TABLE OF CONTENTS

Questions Presented	I
Table of Authorities	III
Opinion Below	1
Jurisdiction	1
Federal Sentencing Provision	2
Statement of the Case	3
Discussion	3
Reasons for Granting Review	7
1. The First Circuit’s Judgment Conflicts with Federal Sentencing Law Regarding Imposition of Mandatory Minimum Sentences	7
2. The First Circuit’s Ruling Renders the Guidelines’ Mitigating Role Provision Meaningless and Unavailable to Any Defendant in a Drug Offense Involving Large Quantities	11
Conclusion	15

APPENDIX

Judgment of the United States Court of Appeals for the First Circuit, <i>United States v. Adolfo De-La-Cruz-Gutierrez</i> , App. 16-2350 (1st Cir. 2018)	1a
Opinion of the United States Court of Appeals for the First Circuit, <i>United States v. Adolfo De-La-Cruz-Gutierrez</i> , App. 16-2350 (1st Cir. 2018)	2a

TABLE OF AUTHORITIES

Cases

<i>Alleyne v. United States</i> , 133 S.Ct. 2151 (2013)	10
<i>Dorsey v. United States</i> , 132 S.Ct. 2321 (2012)	8
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	9, 14
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007)	12
<i>Nelson v. United States</i> , 555 U.S. 350 (2009)	9
<i>Pepper v. United States</i> , 131 S.Ct. 1229 (2011)	12
<i>Rita v. United States</i> , 551 U.S. 338 (2007)	14
<i>United States v. Arrington</i> , 73 F.3d 144 (7th Cir. 1996)	8
<i>United States v. Cabrera</i> , 567 F. Sup. 2d 271 (D. Mass. 2008)	12
<i>United States v. Cintrón-Echautegui</i> , 604 F.3d 1 (1st Cir. 2010)	9
<i>United States v. Cortés-Medina</i> , 819 F. 3d 566 (1st Cir. 2016)	14
<i>United States v. Dilorio</i> , 948 F.2d 1 (1st Cir. 1991)	13, 14
<i>United States v. Flores-Machicote</i> , 706 F.3d 16 (1st Cir. 2013)	9
<i>United States v. Ortiz-Santiago</i> , 211 F. 3d 146 (1st Cir. 2000)	13
<i>United States v. Sanchez-Villarreal</i> , 857 F. 3d 714 (5th Cir. 2017)	13
<i>United States v. Santos</i> , 357 F.3d 136 (1st Cir. 2004)	13
<i>United States v. Torres-Rivera</i> , 661 Fed.Appx 727 (1st Cir. 2016)	10
<i>United States v. Vargas</i> , 560 F.3d 45 (1st Cir. 2009)	11, 13
<i>Wasman v. United States</i> , 468 U.S. 559 (1984)	9

Statutes

18 U.S.C. § 3553, <i>et seq.</i>	8, 9
21 U.S.C. § 841, <i>et seq.</i>	3
21 U.S.C. § 952(a)	3
21 U.S.C. § 960, <i>et seq.</i>	3
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2101(c)	1

Rules and Guidelines

U.S.S.G. § 2D1.1, <i>et seq.</i>	4, 7, 8
U.S.S.G. § 3B1.2 <i>et seq.</i>	5, 11, 12
U.S.S.G. § 3E1.1, <i>et seq.</i>	5, 7
U.S.S.G. § 5C1.2, <i>et seq.</i>	2, 5, 7, 8

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Petitioner herein respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The United States Court of Appeals for the First Circuit entered judgment in this case. The opinion (Appendix, 2a) has been reported at 881 F.3d 221 (1st Cir. 2018).

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on January 31, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Pursuant to Supreme Court Rules 13.1 and 13.3 and 28 U.S.C. § 2101(c), this petition is timely filed if deposited in the United States mail, with first-class postage prepaid, on or before May 1, 2018.

FEDERAL SENTENCING PROVISION

The federal sentencing provision at issue is U.S.S.G. § 5C1.2, which provides:

- (a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553 (f)(1)-(5) set forth below:
 - (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of § 4A1.3 (Departures Based on Inadequacy of Criminal History Category);
 - (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
 - (3) the offense did not result in death or serious bodily injury to any person;
 - (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
 - (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

STATEMENT OF THE CASE

The U.S. District Court for the District of Puerto Rico (hereinafter “trial court”) imposed a mandatory minimum sentence upon Petitioner that disregarded the federal “safety valve” provision, designed to protect defendants from mandatory minimums when they meet the provision’s requirements. The sentence also punished Petitioner, a minor player with no prior criminal record, as much as the known drug traffickers who the government suspected were also involved in this case. The First Circuit Court of Appeals affirmed the sentence.

This petition seeks relief because the First Circuit decision conflicts with decisions of this Court and misapplies the clear directive of federal law.

DISCUSSION

Petitioner, a non-citizen who resided in the Dominican Republic, pleaded guilty to one count of possessing with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A); and one count of importing five kilograms or more of cocaine into the United States, in violation of 21 U.S.C. § 952(a) and § 960(a)(1) and (b)(1)(B).

On January 7, 2016, police in Isabela, Puerto Rico, contacted the U.S. Border Patrol to report a possible drug smuggling offense at a local beach. Eventually, agents from the U.S. Department of Homeland Security Investigations (“HSI”) were also contacted. Border Patrol agents found a 22-foot fiberglass boat with a single, 60-horsepower outboard motor at the scene. Petitioner, who was seen near the boat carrying a backpack, was detained. The agents conducted a warrantless search of

the backpack, which revealed, *inter alia*, a global positioning system (“GPS”) device, two cellular phones, and a square, taped packaged containing cocaine. No drugs were found on the boat, but a search of the area turned up five bales of cocaine, weighing 153.78 kilos.

HSI agents interviewed Petitioner the next day.¹ Petitioner told them he had been on the boat with two other individuals, one of whom he knew as “Tin,” or Domingo Antonio Bonilla-Castillo, who had hired him in the Dominican Republic to take Tin and another individual in a boat to Puerto Rico, in exchange for \$20,000. Petitioner, who was unemployed at the time, accepted the offer.² He claimed he did not know about the drugs until the day of the trip.

The government admitted that Tin was known to them as a boat captain. However, Petitioner was the only participant indicted, as Tin and the other individual were not found or charged. In compiling the Presentence Report (“PSR”), the U.S. Probation Office initially calculated Petitioner’s base offense level under the U.S. Sentencing Guidelines at 33 for an offense involving between 150 and 450 kilos of cocaine. The November 2015 guidelines, which were in effect at the time of the offense, listed the base level at 36. U.S.S.G. § 2D1.1(2). The government did not object.

Initially, the PSR enhanced Petitioner’s total offense level (“TOL”) by two, pursuant to § 2D1.1(b)(3)(C), alleging that he was the “captain” of the boat. The

¹ This was the first of two times Petitioner spoke to the government regarding the offense.

² The PSR stated Petitioner and his wife earned about \$300 a month to support themselves and their three children.

PSR also applied a two-level reduction for acceptance of responsibility, pursuant to § 3E1.1(a). Petitioner filed an objection to the enhancement, while also requesting that the PSR include a number of specific mitigating provisions under the Guidelines. Significant among these was a request for a reduction based on Petitioner's minor role in the offense. The probation officer agreed and, in the amended PSR, subtracted two levels for Petitioner's minor role, pursuant to § 3B1.2(b).

In response to Petitioner's other requests, the final PSR also awarded him a two-level reduction for meeting the criteria for the so-called "safety valve" provision under § 5C1.2 and further reduced the TOL by one level, pursuant to § 3E1.1(b), for notifying the government in a timely manner of his intent to plead guilty. However, the PSR kept the two-level enhancement for Petitioner's alleged role as captain of the boat.

After these revisions were made, Petitioner's TOL in the final PSR was 28. As Petitioner had no prior criminal record and, therefore, no criminal history points, he was placed in Criminal History Category I, giving him a guideline sentencing range ("GSR") of 78 to 97 months.

Prior to sentencing, the trial court accepted Petitioner's first objection, finding no evidence that he was the boat's captain. However, it overruled the second objection – and the PSR's conclusion – regarding Petitioner's entitlement to a reduction for playing a minor role in the offense, stating:

[T]here is no factual basis to justify classifying defendant as a minor participant versus the participation of the

other two persons who he claims accompanied him in the smuggling venture...By the sheer quantity of drugs, this was a multimillion dollar smuggling venture. The persons onboard the vessel with the multikilos [sic] of cocaine were not ordinary mules but, rather, persons of trust within the organization.

Petitioner renewed his objection at sentencing, noting that the participation of Tin, an individual whom the government knew was a captain in other drug smuggling operations, made it more likely that Petitioner played a lesser role. The trial court countered that the government knew of an individual named Tin but never confirmed he was involved.

To demonstrate that Petitioner would not have been trusted to transport millions of dollars of cocaine by himself, and that he was accompanied by at least one other individual in a position of authority, he spoke to the fact that he had no prior criminal record and had a consistent work history throughout his adult life until 2015, when he became unemployed.³ The trial court affirmed its denial of the role adjustment, calling Petitioner's theory – that more culpable individuals must have been on board because Petitioner had no knowledge or experience in the drug trafficking business – “a long shot.”

After renewing his objection Petitioner then asked the court for a variance between 78 to 97 months, in light of, *inter alia*, his first-time offender status, his prior employment record and, despite living in impoverished conditions, his financial obligations to his spouse and three young children. The government opposed the variance, repeating the trial court's speculation that everyone on board

³ The PSR stated that Petitioner had worked for a number of years at bakeries and a supermarket.

the boat “was trusted, at least trusted within the organization to smuggle or travel with a multimillion dollar amount of cocaine.” There was no evidence in this case that Petitioner was ever a member of any organized cocaine trafficking operation.

The trial court recalculated Petitioner’s GSR by setting his base level at 36 for an offense involving between 150 and 450 kilograms of cocaine, pursuant to U.S.S.G. § 2D1.1(c)(2). It then subtracted two levels for the safety valve, under § 5C1.2(a)(1), and three levels for acceptance of responsibility, pursuant to § 3E1.1(a) and (b). However, after finding “no other applicable guideline adjustments,” the trial court set Petitioner’s TOL at 31, which under his criminal history yielded a GSR of 108 to 135 months. The trial court then erred by sentencing him to 120 months, the same term as the applicable mandatory minimum sentence, despite the clear directive under § 5C1.2(a) to impose a term “without regard to any statutory minimum sentence.” *Id.*

REASONS FOR GRANTING REVIEW

1. The First Circuit’s Judgment Conflicts with Federal Sentencing Law Regarding Imposition of Mandatory Minimum Sentences.

This Court should grant certiorari in this case because it presents an important issue regarding federal sentencing law. Here, after the trial court adjusted Petitioner’s TOL to prompt an excessively high GSR, it sentenced him to the exact mandatory minimum sentence that the Guidelines prohibits when a defendant meets all the requirements of U.S.S.G. § 5C1.2, the so-called “safety valve” provision. *See id.* (stating that when a defendant meets the criteria, the trial

court “**shall** impose a sentence in accordance with the applicable guidelines **without regard** to any statutory minimum sentence.” (emphasis added).

As this Court is aware, Congress enacted 18 U.S.C. § 3553(f), from which the safety valve arose, in part as a mechanism for relieving non-violent drug offenders with little or no criminal history from being subjected to mandatory minimum sentences. *Dorsey v. United States*, 132 S.Ct. 2321, 2337 (2012). In addition to removing the mandatory minimum from the sentencing calculation, the safety valve also provides relief by granting a two-level decrease to a defendant’s TOL. *See* U.S.S.G. § 2D1.1(b)(17).

There was no dispute Petitioner met the § 5C1.2 criteria. He had no criminal history points; there was no violence or firearms involved in the case; there were no deaths or serious injuries; he played no leadership role in the offense, and; Petitioner spoke to law enforcement at length about the offense in at least two interviews, in which he identified Tin as the source of the drugs. Compare *United States v. Arrington*, 73 F.3d 144,148 (7th Cir. 1996) (denying safety valve relief to defendant who failed to provide complete information, including drug source). Further, the trial court reduced his TOL by two levels pursuant to § 2D1.1(b)(17), an explicit acknowledgment that Petitioner was safety-valve eligible. The government made no objection to that reduction.

The First Circuit assumed that the trial court understood it was not constrained by either the statutory mandatory minimum or the Guidelines, finding that 120 months was reasonable as it fell within the trial court’s newly calculated

GSR. However, the trial court's arrival at the exact term as the applicable mandatory minimum belies this. Further, as this Court realizes sentences within the GSR are not presumptively reasonable. *See Nelson v. United States*, 555 U.S. 350, 352 (2009). A sentencing court "may not presume that the Guidelines range is reasonable." *Gall v. United States*, 552 U.S. 38, 51 (2007). Even the First Circuit acknowledged in previous cases that a "sentencing court may not mechanically assume that the GSR frames the boundaries of a reasonable sentence in every case." *United States v. Flores-Machicote*, 706 F.3d 16, 20-21 (1st Cir. 2013).

Under 18 U.S.C. § 3553(a)(1), "the nature and circumstances of the offense and the history and characteristics of the defendant," are factors a court "shall consider" in determining an appropriate sentence. *Id.* This Court has noted that trial courts should consider a wide range of information at sentencing, as it "ensures that the punishment will suit not merely the offense but the individual defendant." *Wasman v. United States*, 468 U.S. 559, 564 (1984). While the trial court name-checked some of the factors listed under § 3553(a)(1), the main factor and, arguably, the only factor it relied upon in imposing ten years was drug quantity, an issue which came up multiple times during the hearing. As the First Circuit has admitted, drug case sentences are "largely driven" by drug quantities. *United States v. Cintrón-Echautegui*, 604 F.3d 1, 5 (1st Cir. 2010).

Although the First Circuit inferred from the trial court's comments that it understood its obligation to consider "the kind of sentences available," as directed by the sentencing statute 18 U.S.C. § 3553(a)(3), Petitioner notes that the trial court

did not mention the term “mandatory minimum” once during the sentencing hearing. That is significant because without some discussion of the applicable term there was no indication the court was sentencing without regard to it, as required by the Guidelines. In this respect, the First Circuit’s affirmation here conflicts with its previous decision in *United States v. Torres-Rivera*, 661 Fed.Appx 727 (1st Cir. 2016), in which it also upheld a 120-month sentence – the same term as the applicable mandatory minimum – even though the defendant qualified for safety valve relief. According to the opinion the sentencing court discussed the mandatory minimum issue extensively, unlike the court in Petitioner’s case, and explained on the record specifically why it was imposing the same number of months as a variance and not as a mandatory term.⁴

At the time of this Court’s decision in *Alleyne v. United States*, 133 S.Ct. 2151 (2013), a case which cast a critical eye on certain mandatory minimum sentences for drug offenses, then-U.S. Attorney General Eric Holder called on federal prosecutors to avoid seeking mandatory minimum sentences in cases exactly like this one, in which there was no violence or weapons, and the defendant was not actually a leader or organizer with ties to drug trafficking organizations or cartels, and had a minimal criminal record. The First Circuit’s affirmation of a mandatory minimum sentence here seems to signal a substantial policy disagreement with Mr. Holder’s expressed concerns, but that may be a sign of the radically altered political climate in America since *Alleyne*. However, the Guidelines provision remains

⁴ The defendant was shown to have served in a managerial role in the drug offense, warranting – in the sentencing court’s view – a variance above the applicable GSR. *See id.*

unchanged, and the trial court's action in arbitrarily applying a mandatory minimum-length 120-month sentence contravenes the clear directive of federal sentencing law.

2. The First Circuit's Ruling Renders the Guidelines' Mitigating Role Provision Meaningless and Unavailable to Any Defendant in a Drug Offense Involving Large Quantities.

Under U.S.S.G. § 3B1.2, a defendant is eligible for a two-level minor role adjustment if he "is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal." *Id.* cmt. n. 5. Further, "a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline." *Id.* cmt. n. 3(C). There was no evidence offered that Petitioner had "a proprietary interest" in the conspiracy. In fact, the government offered no evidence to counter Petitioner's claim that he had been hired to help drive the boat, (potentially) help unload the shipment,⁵ and help bring the boat back to the Dominican Republic.

The trial court's opinion, which the First Circuit has affirmed, is that the drug amount contained in a shipment is the most reliable indicator of whether a defendant qualifies for a mitigating role reduction. The First Circuit, while not going that far, has determined that drug quantity is a legitimate factor to consider where role is at issue. *United States v. Vargas*, 560 F.3d 45, 51 (1st Cir. 2009) ("large quantity of drugs hauled by the appellant...was a relevant datum in

⁵ Even the latter task is somewhat in doubt as he did not help load the boat.

assessing [his] role in the conspiracy”). However, at least one trial court within the First Circuit has challenged the fact-free assumption that quantity will indicate or verify a defendant’s true role. *See United States v. Cabrera*, 567 F. Sup. 2d 271, 277 (D. Mass. 2008) (noting drug shipment size is beyond the control of most “mules” and is, therefore, a wildly uneven determinate for culpability).

Further, the U.S. Sentencing Commission, which enumerated a “non-exhaustive list of factors” to help courts make a “fact-based determination” regarding role in the offense, declined to list drug quantity as one of those factors for consideration. *See* § 3B1.2 cmt. n.3(C). Therefore, under the provision as drafted by the Commission those who help deliver drug shipments, the so-called “mules,” are still eligible to receive a Guidelines reduction, no matter how many drugs are involved. As this Court has noted, the Commission “has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.” *Pepper v. United States*, 131 S.Ct. 1229, 1247 (2011) (quoting *Kimbrough v. United States*, 552 U.S. 85, 109 (2007)) (internal quotation marks omitted).

The trial court’s assumption, affirmed by the First Circuit, is that a large drug shipment automatically means every participant is a “trusted member of the organization,” regardless of all the other circumstances. However, determining a role reduction by use of a single factor, drug weight, is inapposite to the Commission’s clearly stated guidance, which directs sentencing courts to weigh “the totality of the circumstances.” § 3B1.2 cmt. n.3(C). In addition to its incompatibility

with the Commission, the First Circuit's ruling also conflicts with the Fifth Circuit's decisions on role determinations. Compare, *e.g.*, *United States v. Sanchez-Villarreal*, 857 F. 3d 714, 722 (5th Cir. 2017) (remanding where sentencing court denied role adjustment based "solely" on its view that defendant's role was critical to the offense).

The First Circuit's decision creates an enormous ambiguity regarding the criteria trial courts may use to determine role, because it contradicts a number of the appellate court's own previous decisions. The government's evidence showed that Petitioner took a turn (or turns) steering the boat. Compare *United States v. Santos*, 357 F.3d 136, 143 (1st Cir. 2004) (record indicated appellant was more than a courier, as "he inspected the cocaine for quality and assisted in repackaging it for transportation."). Petitioner neither loaded or unloaded the drugs, and there was no indication he had ever been involved in drug smuggling before. Compare *Vargas*, 560 F. 3d at 47-48 (minor role reduction denied where appellant owned the truck used to transport drugs, helped load the drugs into truck's hidden compartment, admitted to hauling at least one prior drug shipment and had discussed future deliveries with drug's distributor); *United States v. Ortiz-Santiago*, 211 F. 3d 146, 149 (1st Cir. 2000) (mitigating role reduction denied for appellant who unloaded large drug shipment and then "conducted surveillance as a member of the conspiracy," which "warrant[ed] categorizing him as a player rather than as a dabbler."). Finally, there is no evidence anywhere that Petitioner was to play any enhanced role in the offense once the drugs reached Puerto Rico. Compare *United*

States v. Dilorio, 948 F.2d 1, 5-6 (1st Cir. 1991) (role reduction denied for defendant who acted as “loyal lieutenant” to drug dealer, clearly demonstrating intent to play that part in future transactions and distributions).

Petitioner identified a man named “Tin,” a person known to the government, as the captain and leader, *i.e.*, the actual associate of the drug organization that owned the shipment. The trial court called that “a long shot” and refused to include that information in its deliberation, as that would have contradicted the court’s own inflation of Petitioner’s role in the offense. The court’s statement that Petitioner was a “person[s] of trust within the organization,” was an assertion that had no basis in the record, and ultimately resulted in a sentence that unjustly left Petitioner solely responsible for the contraband.

This Court reminds sentencing courts to “not presume that the Guidelines range is reasonable.” *Gall*, 552 U.S. at 49-50. Although appellate courts may presume a sentence imposed within the applicable GSR is reasonable, the “presumption is not binding.” *Rita v. United States*, 551 U.S. 338, 347 (2007). And as the First Circuit has noted, the presumption only applies when “the sentence falls within a properly calculated GSR.” *United States v. Cortés-Medina*, 819 F. 3d 566, 572 (1st Cir. 2016). The trial court miscalculated Petitioner’s GSR by erroneously denying the minor role reduction. The First Circuit’s opinion affirming the trial court’s action renders the Guidelines provision meaningless and all but unavailable to defendants within its jurisdiction. Certiorari must be granted in order to reverse that unjust consequence.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 30, 2018