No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARITZA BURGUENO-GONZALEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

KRISTI A. HUGHES
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467
Counsel for Ms. Burgueno-Gonzalez

QUESTION PRESENTED

1. Whether the district court violated 18 U.S.C. § 3553(a)'s rule that a district court must consider unwarranted sentencing disparities when it refused to consider the sentences of other defendants who participated in the same smuggling scheme as Petitioner?

TABLE OF AUTHORITIES

PRAYER FOR RELIEF

Petitioner, Maritza Burgueno-Gonzalez, respectfully prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JURISDICTION

Petitioner was convicted of violating of 21 U.S.C. §§ 952 and 960, for importing methamphetamine, in the United States District Court for the Southern District of California. The United States Court of Appeals for the Ninth Circuit reviewed her sentence under 28 U.S.C. § 1291, and affirmed. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

OPINION BELOW

The Ninth Circuit's unpublished memorandum opinion, filed on December 19 2018, is reproduced in the appendix. *See* Appendix, *United States v. Burgueno-Gonzalez*, 745 F. App'x 737 (9th Cir. Dec. 19, 2018) (unpublished). In it, the Ninth Circuit affirmed Petitioner's sentence, finding that the district court did not fail to consider unwarranted disparities with similarly situated individuals, did not err in denying her a minor-role Guidelines reduction under U.S.S.G. § 3B1.2, and did not base the sentence on clearly erroneous facts. *Id.*

STATEMENT OF THE CASE

1. Petitioner was involved in a drug smuggling organization and was convicted of drug smuggling.

After Petitioner's fiancée was arrested at the United States-Mexico border and told the arresting agents the name of the man she worked for, Petitioner started receiving threatening phone calls at her house. The male caller made clear that he was watching her, and would threaten to sexually assault her and murder her family members.

He eventually identified himself, after a number of phone calls, as the man who hired her fiancée to smuggle drugs across the border. He told Petitioner that she needed to pay off the debt her fiancée incurred when she was arrested and the agents seized the load of drugs she was smuggling. Petitioner gave in to the man's demands after he told her that he knew people in jail who could harm her fiancée and described where Petitioner's family lived and worked.

Petitioner began illegally crossing money from the United States into Mexico. After doing this three times, during which the man assured Petitioner that she was smuggling cash and not drugs, she picked up a car again at the man's request and tried to drive it across the border. This time, the car had methamphetamine hidden inside, and Petitioner was arrested. She was charged with importation of methamphetamine and convicted at trial.

2. **Before sentencing, Probation filed a PSR which noted that Petitioner was part of a drug smuggling organization.**

In the Pre-Sentence Report (PSR), Probation noted that Petitioner was "a courier in the instant offense and the government was able to find people in the drug trafficking organization that were more involved than the defendant and are currently under investigation." Additionally, the PSR recounted the prosecutor's view that Petitioner's fiancée, who was involved in previous drug smuggling events and smuggled multiple loads of drugs, was "more involved in the DTO than the defendant." Petitioner submitted to the district court an 11-page investigative report from the Department of Homeland Security that detailed how the larger smuggling organization operated and identified a number of known participants in the drug smuggling scheme. Petitioner argued that, based on this ongoing investigation detailing numerous criminal acts the organization undertook as part of its overall importation scheme, there were at least "five individuals in this particular case who were substantially more culpable" than Petitioner. These included the man who directed Petitioner to import the drugs and cross the cash, three individuals who worked for him, and Petitioner's fiancée, whom the government acknowledged was more involved than Petitioner.

Petitioner also noted to the district court that imposing a harsh sentence would result in unwarranted disparities in sentencing between her and the other people involved in the drug smuggling organization. She requested a 30-month sentence, and noted that other couriers in the same smuggling organization,

including her fiancée, had received federal sentences of 37 months, 36 months, and 24 months, and the man who recruited Petitioner received a 36-month suspended state sentence. She argued that imposing a sentence close to the 240-month Guideline range would result in an unwarranted sentencing disparity.

The district court, however, refused to consider these other individuals' sentences—even though they were sentenced in federal court, and even though Petitioner furnished the district court with information about each defendant. Comparing Petitioner to other participants in the same smuggling scheme in order to impose a comparable sentence was a "fool's errand," in the district court's view. Because it did not sentence the other defendants, it believed that it was too difficult to compare the other cases to Petitioner's, even though they were all involved in similar activity for the same organization.

Petitioner objected that the district court was refusing to consider unwarranted disparities with similarly situated individuals, in violation of 18 U.S.C. § 3553(a), but the district court only responded, "You can object all you want. I didn't sentence those people."

Ultimately, the district court varied down from the 240-month Guideline range and imposed an 84-month sentence, with five years of supervised release to follow.

3. The Ninth Circuit affirmed Petitioner's sentence.

Petitioner argued on appeal that, among other things, the district court had procedurally erred when it refused to consider the co-participants' sentences in fashioning her sentence. The court's refusal ran afoul of 18 U.S.C. § 3553(a), which required district courts to consider unwarranted sentencing disparities when imposing sentence.

The Ninth Circuit affirmed Petitioner's sentence, holding that the "district court did not err because it did consider those other individuals and found that they were not similarly situated to [Petitioner]." *See* App. A. at 2.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit affirmed the district court's flouting of the clear rule in 18 U.S.C. § 3553(a) to consider unwarranted sentencing disparities, and this case presents a good vehicle to provide guidance to the lower courts on factors they must consider at sentencing.

The Court should grant the Petition to ensure that federal courts are following federal law when it comes to sentencing and to ensure uniformity at sentencing.

First, the district court here violated 18 U.S.C. § 3553(a)'s command that sentencing courts must consider unwarranted disparities among similarly situated defendants. Congress mandated that a district court "shall" consider at sentencing "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). And this Court has held that the § 3553(a) analysis requires a broad comparison of similar defendants and is not limited to other defendants the district court sentenced for the

same crime. *See, e.g., Kimbrough v. United States,* 552 U.S. 85, 108 (2007) (stating that "district courts must take account of sentencing practices in other courts," and examining disparity on a national level) (emphasis added).

Yet the district court refused to do so, saying it would be a "fool's errand," and claiming that it would not consider any disparity with defendants it did not personally sentence. This was despite the fact that the district court had sufficient information about the other defendants so it could determine whether they were similarly situated. It knew the amount of drugs each defendant smuggled and whether each was granted any Guidelines adjustments, and the PSR recognized that these other individuals were involved in the same organization as Petitioner and were more culpable than she was. Accordingly, the district court could gauge whether the defendants had "similar records" and had "been found guilty of similar conduct," 18 U.S.C. § 3553(a)(6), so that it could take their sentences into account when determining Petitioner's sentence.

It could have accounted for any minor factual differences in the ultimate analysis of the appropriate sentence length, but the differences did not justify entirely refusing to consider the disparities between the sentences. Instead of engaging in the required disparity analysis, *see id.*, and trying to find a parsimonious sentence for Petitioner that accounted for all unwarranted disparities, the district court threw up its hands and refused to even try. There will always be some differences among similarly situated defendants—no two cases or defendants are ever exactly the same. And yet § 3553(a) still requires courts to account for "the need to avoid unwarranted

sentence disparities," 18 U.S.C. § 3553(a)(6), which means that Congress does not regard this as a "fool's errand" and believes that factual differences do not preclude this analysis. Here, the basis of all of the defendants' conduct was the same—driving a carload of drugs across the border at the same leader's direction—and they had therefore all "been found guilty of similar conduct." *Id.* Instead of focusing only on the inevitable factual differences between Petitioner and the other defendants, the district court should have tried to impose a sentence that accounted for this similar conduct. *See* 18 U.S.C. § 3553(a)(1) (first requirement is that sentence must account for "the nature and circumstances of the offense" and the "history and characteristics of the defendant"). Its failure to acknowledge, and account for, the similarities between Petitioner and the other identified defendants was procedural error and clearly violated § 3553(a).

Second, this case provides an ideal vehicle to make sure that all sentencing courts are following federal law and continuing to ensure that unwarranted disparities in sentences are not occurring. § 3553(a) applies in each federal sentencing hearing in every courtroom in the country, and only if courts are following its dictate will true uniformity in sentencing be achieved. The Court should grant the Petition as a decision in this case will provide much-needed guidance to the lower courts across the country on the important issue of disparities in sentencing. The issue was preserved in the district court, addressed by the Ninth Circuit, and is squarely presented in this Petition. And a favorable result for Petitioner will show sentencing courts that disparity in federal sentences is an

important issue, and likely result in a shorter sentence for Petitioner, who received a sentence four times as long as her co-participants' average sentence. The Court should therefore grant the writ.

CONCLUSION

This Court should grant the writ to address this important issue in federal sentencing law and ensure that 18 U.S.C. § 3553(a) is uniformly applied.

Date: February 27, 2019

Respectfully submitted,

KRISTI A. HUGHES
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101-5008
Telephone: (619) 234-8467
Attorneys for Ms. Burgueno

APPENDIX

NOT FOR PUBLICATION

FILED

DEC 19 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARITZA BURGUENO-GONZALEZ, Defendant-Appellant.	No. 17-50356 D.C. No. 3:17-cr-00245-LAB MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Submitted December 17, 2018**

Before: WALLACE, SILVERMAN, and McKEOWN, Circuit Judges.

Maritza Burgueno-Gonzalez appeals from the district court's judgment and challenges the 84-month sentence imposed following her jury-trial conviction for importation of methamphetamine, in violation of 21 U.S.C. §§ 952, 960. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Burgueno-Gonzalez first contends that the district court failed to consider the need to avoid unwarranted sentencing disparities when it refused to compare Burgueno-Gonzalez's sentence to the sentences previously imposed on other individuals who were involved in the overall drug trafficking organization. The district court did not err because it did consider those other individuals and found that they were not similarly situated to Burgueno-Gonzalez. *See United States v. Carter*, 560 F.3d 1107, 1121 (9th Cir. 2009) (no unwarranted sentencing disparity if defendants are not similarly situated).

Burgueno-Gonzalez also contends that the district court erroneously denied her a minor-role reduction under U.S.S.G. § 3B1.2. We review the district court's interpretation of the Guidelines de novo, and its factual findings for clear error. *See United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc). Contrary to Burgueno-Gonzalez's argument, the district court properly concluded that importers who had worked for the same drug organization in the past were not "co-participants" in Burgueno-Gonzalez's offense for purposes of assessing her relative culpability. *See* U.S.S.G. § 3B1.1 cmt. n.1 (defining "participant" under the minor role Guideline as "a person who is criminally responsible for the commission of the offense"); *United States v. Rojas-Millan*, 234 F.3d 464, 473 (9th Cir. 2000) ("the relevant comparison is between the defendant's conduct and that of the other participants in the same offense" (internal quotations and alteration

omitted)). The court also did not clearly err in assuming that Burgueno-Gonzalez, despite facing some coercion, was also paid for the importation activity. *See United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). In any event, the record reflects that the court's presumption about payment did not affect its decision to deny a minor role reduction or the sentence selected. *See United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc).

AFFIRMED.