

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
\_\_\_\_\_  
ALFREDO MENDEZ,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

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

\_\_\_\_\_  
\_\_\_\_\_  
PETITION FOR A WRIT OF CERTIORARI

MICHAEL MARKS  
Federal Defenders of San Diego, Inc.  
225 Broadway, Suite 900  
San Diego, CA 92101  
Telephone: (619) 234-8467  
Facsimile: (619) 687-2666  
Email: Michael\_Marks@fd.org  
Attorneys for Petitioner

### **QUESTION PRESENTED FOR REVIEW**

Whether a federal district court is permitted boundless discretion at sentencing to weigh established factors at sentencing, as the Ninth Circuit has held, or whether, following the majority of circuits, appellate courts must instead determine whether the district court's weighing of sentencing factors was proper.

## TABLE OF CONTENTS

|   |        |
|---|--------|
| QUESTION PRESENTED FOR REVIEW .....   | prefix |
| TABLE OF AUTHORITIES .....  | ii     |
| JURISDICTION .....  | 1      |
| RELEVANT PROVISIONS .....   | 2      |
| STATEMENT OF THE CASE .....   | 2      |
| A.    The Offense .....   | 2      |
| B.    District Court Proceedings .....  | 3      |
| C.    Appeal to the Ninth Circuit .....   | 7      |
| REASONS FOR GRANTING THE PETITION .....   | 8      |
| A.    The Circuits Are Intractably Split on the Scope of Appellate<br>Review of a Federal District Court’s Weighing of Established<br>Sentencing Factors .....                                | 8      |
| B.    The Ninth Circuit Was Wrong to Affirm the District Court in<br>Petitioner’s Case When the District Court Failed to Consider and<br>Weigh Requisite Factors Under U.S.S.G. § 3B1.2 ..... | 12     |
| C.    This Case is a Good Vehicle for Resolving the Question Presented.....   | 14     |
| CONCLUSION .....  | 15     |
| APPENDIX A – <i>United States v. Mendez</i> , 746 F. App’x 620 (9th Cir. 2018)  |        |
| APPENDIX B – U.S.S.G. § 3B1.2   |        |

## TABLE OF AUTHORITIES

### CASES

|  |        |
|--|--------|
| <i>Anderson v. City of Bessemer City, N.C.</i> , 470 U.S. 564 (1985).....                      | 9      |
| <i>Colon–Cabrera v. Esso Standard Oil Co. (P.R.), Inc.</i> , 723 F.3d 82 (1st Cir. 2013) ..... | 9      |
| <i>Cooter &amp; Gell v. Hartmarx Corp.</i> , 496 U.S. 384 (1990).....                          | 8, 9   |
| <i>Molina-Martinez v. United States</i> , 136 S. Ct. 1338 (2016) .....                         | 14     |
| <i>United States v. Del Valle-Cruz</i> , 785 F.3d 48 (1st Cir. 2015).....                      | 9, 14  |
| <i>United States v. Diehl</i> , 775 F.3d 714 (5th Cir. 2015) .....                             | 9-10   |
| <i>United States v. Feemster</i> , 572 F.3d 455 (8th Cir. 2009) .....                          | 10     |
| <i>United States v. Gasca-Ruiz</i> , 852 F.3d 1167 (9th Cir. 2017) (en banc) .....             | 10     |
| <i>United States v. Hinkson</i> , 585 F.3d 1247 (9th Cir. 2009) (en banc).....                 | 10     |
| <i>United States v. Irej</i> , 612 F.3d 1160 (11th Cir. 2010) .....                            | 10     |
| <i>United States v. J.J.</i> , 704 F.3d 1219 (9th Cir. 2013) .....                             | 11     |
| <i>United States v. Jenkins</i> , 758 F.3d 1046 (8th Cir. 2014).....                           | 10     |
| <i>United States v. Mendez</i> , 746 F. App’x 620 (9th Cir. 2018).....                         | passim |
| <i>United States v. Quintero-Leyva</i> , 823 F.3d 519 (9th Cir. 2016) .....                    | 11     |
| <i>United States v. Wright</i> , 747 F.3d 399 (6th Cir. 2014) .....                            | 10     |

### STATUTES

|                           |      |
|---------------------------|------|
| 18 U.S.C. § 3553(a) ..... | 9    |
| 18 U.S.C. § 5032.....     | 11   |
| 21 U.S.C. § 952.....      | 1, 3 |
| 21 U.S.C. § 960.....      | 1, 3 |
| 28 U.S.C. § 1254.....     | 1    |

|                       |   |
|-----------------------|---|
| 28 U.S.C. § 1291..... | 1 |
|-----------------------|---|

## **SENTENCING GUIDELINES**

|   |        |
|---|--------|
| U.S.S.G. § 3B1.2.....                   | passim |
| U.S.S.G. app. C amend. 794 (2015) ..... | 12     |

IN THE SUPREME COURT OF THE UNITED STATES

---

---

ALFREDO MENDEZ,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

---

---

Petitioner Alfredo Mendez respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on December 17, 2018.

**JURISDICTION**

Petitioner pled guilty to importation of methamphetamine and cocaine, in violation of 21 U.S.C. §§ 952 and 960, in the United States District Court for the Southern District of California. The district court sentenced him to 78 months' imprisonment. Reviewing his sentence under 28 U.S.C. § 1291, the Ninth Circuit affirmed Petitioner's sentence in an unpublished disposition. *See United States v. Mendez*, 746 F. App'x 620 (9th Cir. 2018) (attached to this petition as Appendix A). This Court has jurisdiction to review the Ninth Circuit's decision under 28 U.S.C. § 1254(1).

## RELEVANT PROVISIONS

§ 3B1.2<sup>1</sup>

## STATEMENT OF THE CASE

### A. The Offense

Desperate for money and deeply lost in alcohol and drug abuse, Petitioner agreed to smuggle drugs into the United States. He dropped his car off with a drug-trafficking organization to construct a hidden compartment in the console of his car. The organization loaded drugs into the compartment, and Petitioner crossed the border successfully. He dropped off the drugs in the United States, and the organization paid him \$7,000.

A few weeks later, Petitioner agreed to another smuggling attempt. Again, he dropped the car off with the organization to load the drugs. This time, the organization used more than the secret compartment in the console; they packed drugs into the rear seats and spare tire of Petitioner's truck without telling him.

As he approached the border, a drug-sniffing dog alerted to the spare tire. A border agent inspected the interior of the truck and discovered several packages of drugs concealed behind the rear seats. Agents immediately placed Petitioner under arrest. A subsequent search revealed the drugs hidden in the spare tire and hidden compartment. The car held 24 kilograms of methamphetamine, 10 kilograms of cocaine, and one kilogram of heroin.

---

<sup>1</sup> The full text of this Guideline is attached at Appendix B.

## B. District Court Proceedings

The government charged Petitioner with one count of importation of methamphetamine and one count of importation of cocaine, each in violation of 21 U.S.C. §§ 952 and 960. Petitioner pled guilty to both counts.

Prior to sentencing, Petitioner requested a minor-role adjustment under § 3B1.2. He noted that § 3B1.2 cmt. n.3(C) contains a non-exhaustive list of factors pertinent to the application of the adjustment:

- (i) the degree to which the defendant understood the scope and structure of the criminal activity;
- (ii) the degree to which the defendant participated in planning or organizing the criminal activity;
- (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;
- (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;
- (v) the degree to which the defendant stood to benefit from the criminal activity.

He argued that each factor favored an adjustment.

Petitioner argued that his understanding of the “scope and structure of the criminal activity” was very limited. *See* U.S.S.G. § 3B1.2 cmt. n.3(C)(i). His role in the smuggling operation was discrete and his knowledge was limited to that role. He did not know to whom the drugs belonged, who manufactured the drugs, or the drugs’ final destination. Although he was the driver, registered owner, and sole occupant of the truck carrying drugs, none of those facts suggested he knew



anything about the scope of the larger smuggling operation for which he was working.

Petitioner also argued that the degree of benefit from his activity was small. *See* U.S.S.G. § 3B1.2 cmt. n.3(C)(v). Although he had earned \$7,000 and was due to earn the same amount if he had successfully crossed on the second occasion, that amount was only around two percent of the wholesale value of the drugs, which the government had estimated to be worth \$300,000 per load.

Last, Petitioner pointed out that he did not own the drugs and that he was only smuggling drugs at the behest of drug traffickers in exchange for money. He was thus the archetypal minor participant identified by the Sentencing Commission: “a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks.” *See* U.S.S.G. § 3B1.2 cmt. n. 3(C).

At sentencing, the district court began its minor-role analysis by citing the general standard from the application notes to § 3B1.2, that “[t]he court has to be convinced by a preponderance of the evidence that the defendant is substantially less culpable than the average participant in the offense.” The court also cited the “3B1.2 factors,” presumably referencing the enumerated factors listed in the application notes.

The court lamented that the information regarding the offense was “vague” but previewed, “[W]ith the exception of the decision-making authority, the defendant really doesn’t qualify [for a minor-role adjustment].” The court

summarized, “My judgment tells me that a guy who brings in 70 pounds of highly addictive drugs, 50 pounds of methamphetamine, 20 pounds of cocaine, who’s being paid \$7,000, who’s negotiated for that amount, who’s done it before, who’s working for the same organization, cannot in any sense be considered a minor participant.”

Assessing Petitioner’s degree of knowledge about the scope and operation of the drug-trafficking organization, the court concluded that Petitioner knew what all drug importers generally knew. The court explained, for example, that Petitioner knew the drug-trafficking organization brought drugs into the United States and imported them using hidden compartments in vehicles. Petitioner objected that those characteristics merely described the average drug courier, which the Sentencing Commission had identified as a typical minor participant in its application notes to § 3B1.2. But the court responded that the Commission did not properly take into account the difference between “couriers” (those who transport drugs within the United States) and “importers” (those who transport drugs across the international border). “So that’s my response to the Sentencing Commission’s statement about couriers,” the court declared.

Defense counsel agreed that the Commission hadn’t drawn a distinction between “couriers” and “importers.” But he argued that both lacked a “proprietary interest” in the drugs they transported, making them both minor participants in large drug-trafficking organizations. *See* U.S.S.G. § 3B1.2 cmt. n.3 (“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”). Again the court balked, proclaiming that the Commission’s definition did not “meet the reality here in the Southern District of California.”

The court noted that couriers prosecuted in the Southern District never own the drugs they carry. It continued:

So to say that that is what separates minor participants who are importing drugs from those who aren’t minor participants is just an abstraction. It really is. It doesn’t meet the reality here, and I think if the Sentencing Commission members came and sat in and listened to cases on a regular basis, they would understand that. I disagree with them to the extent that they think that—you’re saying they think that’s a defining factor on whether one gets a minor role.

Counsel put forward one final argument: that the \$7,000 Petitioner received was miniscule compared to the value of the drugs he transported. The court responded, “I reject that as a metric.” In support, the court offered only an odd comparison that drivers of armored cars are also paid small wages in comparison to the value of the money they carry.

Ultimately denying the minor-role adjustment, the court calculated the guideline range for the custodial sentence at 168 to 210 months. But “given defendant’s track record up to his unfortunate involvement in this,” the court varied down to a sentence of 78 months. The court’s sentence fell at the middle of the 70-to-87 month guideline range that would have applied had it granted the minor-role reduction. But the court never calculated the guideline range had the minor-role adjustment applied nor commented that it would impose the same sentence if that lower range applied. Mendez timely appealed his sentence to the Ninth Circuit.

### C. Appeal to the Ninth Circuit

On appeal, Petitioner argued that the district court had misinterpreted the Guideline factors. Specifically, he claimed that the court had inappropriately assigned no weight to his lack of knowledge about the drug-trafficking organization, his relatively low pay, and his lack of proprietary interest. Petitioner explained that the district court's disagreement with the Sentencing Commission's definition of a minor participant caused it to reject factors it was required to consider under § 3B1.2.

The Ninth Circuit disagreed and affirmed Petitioner's sentence in an unpublished memorandum disposition. *Mendez*, 746 F. App'x at 621. The panel began by noting that the district court had properly identified the relevant factors under § 3B1.2. *Id.* The panel then ruled that "[t]he record does not support [Petitioner's] contention that the district court failed to apply some of the factors because of a policy disagreement with the Sentencing Commission; rather, the court declined to give those factors the weight urged by [Petitioner]." *Id.* Without discussing whether the district court had given those factors appropriate weight, the panel then concluded that the district court "did not abuse its discretion by denying the minor role adjustment in light of the totality of the circumstances." *Id.* The panel cited different factors to support its conclusion "including Petitioner's prior successful drug crossing and the large amount of drugs Petitioner smuggled." *Id.*

## REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve a circuit split on the proper scope of appellate review of a federal district court’s application of a multi-factor legal test at sentencing. As the majority of the circuits have held, district courts must do more than merely identify relevant sentencing factors. District courts must go further to give proper weight to the individual factors and weigh them in a logical and reasonable manner. Accordingly, appellate courts must review whether a district court properly weighed legal factors at sentencing and must reverse when the district court abuses its discretion by giving improper weight to a particular factor.

Breaking from this reasoned rule, the Ninth Circuit has held that a district court imposing sentence need not weigh legal factors in a particular manner. Instead, the Ninth Circuit has held that mere identification and consideration of *some* relevant factors is sufficient to avoid any abuse of discretion. The Ninth Circuit’s rule is unworkable, and this Court should reverse and clarify that circuit courts must review the manner in which a district court weighs legal factors at sentencing under a multi-factor test.

### A. **The Circuits Are Intractably Split on the Scope of Appellate Review of a Federal District Court’s Weighing of Established Sentencing Factors**

This Court has held that “[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Cooter & Gell*, 496 U.S. at 405. While appellate courts review the district court’s legal determinations, “[t]he reviewing

court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.” *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). Yet “[t]he Court has long noted the difficulty of distinguishing between legal and factual issues,” *Cooter & Gell*, 496 U.S. at 401. That difficulty has resulted in a split of authority regarding the scope of appellate review of the application of multi-factor legal tests at sentencing.

The majority of circuits have ruled that the appellate court must review whether a district court properly weighed legal factors. Under this view, “[t]he abuse of discretion standard is not a rubber stamp, counseling affirmance of every discretionary decision made by a trial court.” *United States v. Del Valle-Cruz*, 785 F.3d 48, 58 (1st Cir. 2015) (internal quotation marks omitted). As the First Circuit puts it: “The [district] court exceeds its discretion when it fails to consider a significant factor in its decisional calculus, if it relies on an improper factor in computing that calculus, or if it considers all of the appropriate factors but makes a serious mistake in weighing such factors.” *Id.* (quoting *Colon-Cabrera v. Esso Standard Oil Co. (P.R.), Inc.*, 723 F.3d 82, 88 (1st Cir. 2013)).

Several other circuits apply some form of the same test. The Fifth Circuit has held that “[a] non-Guidelines sentence unreasonably fails to reflect the statutory sentencing factors set forth in § 3553(a) where it (1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors.” *United States v. Diehl*, 775 F.3d 714, 724 (5th

Cir. 2015). The Sixth Circuit similarly proclaims that a sentence is substantively unreasonable if the district court “gives an unreasonable amount of weight to any pertinent factor.” *United States v. Wright*, 747 F.3d 399, 413 (6th Cir. 2014) (internal quotation marks omitted). The Eighth Circuit has prescribed that “[a] district court abuses its discretion when it (1) ‘fails to consider a relevant factor that should have received significant weight’; (2) ‘gives significant weight to an improper or irrelevant factor’; or (3) ‘considers only the appropriate factors but in weighing those factors commits a clear error of judgment.’” *United States v. Jenkins*, 758 F.3d 1046, 1050 (8th Cir. 2014) (quoting *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009)). And the Eleventh Circuit holds that “a district court commits a clear error of judgment when it considers the proper factors but balances them unreasonably.” *United States v. Irej*, 612 F.3d 1160, 1189 (11th Cir. 2010).

The Ninth Circuit, however, has diverged from the majority rule, at least with regard to multi-factor legal tests. In *United States v. Hinkson*, the Ninth Circuit sitting en banc created a general, two-part abuse of discretion test. The Ninth Circuit explained that a trial court abuses its discretion if: 1) it fails to identify the correct legal rule, or 2) if its application of the correct legal standard was illogical, implausible, or without support in the record. 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). And a subsequent en banc panel confirmed appellate courts review the application of a sentencing guideline for abuse of discretion. *See United States v. Gasca-Ruiz*, 852 F.3d 1167, 1168 (9th Cir. 2017) (en banc). While

this general test lines up with other circuits, the application of the Ninth Circuit’s test to multi-factor legal rules does not.

The minor-role guideline at U.S.S.G. § 3B1.2 is an illustrative example. After the guideline was amended in 2015 to create a non-exhaustive list of legal factors, the Ninth Circuit quickly ruled—consistent with its general abuse-of-discretion test—that “a district court should consider all of the factors set forth in the Amendment.” *United States v. Quintero-Leyva*, 823 F.3d 519, 523 (9th Cir. 2016). But the Court also stated:

Once the court has considered all the factors, however, it may grant or deny a reduction even if some of the factors weigh toward the opposite result. A district court, therefore, may grant a minor role reduction even if some of the factors weigh against doing so, and it may deny a minor role reduction even if some of the factors weigh in favor of granting a reduction.

*Id.* In other words, once a district court *identifies* the proper factors, it is not required to *weigh* the factors in a particular manner. *See id.*; *Mendez*, 746 F. App’x at 621 (dismissing without reviewing Petitioner’s claim that the district court did not afford the proper weight to mandatory factors under § 3B1.2); *see also United States v. J.J.*, 704 F.3d 1219, 1222 (9th Cir. 2013) (holding that a district court has total discretion on how to weigh factors under 18 U.S.C. § 5032—the list of factors governing the transfer of a juvenile to adult court for prosecution—once it properly identifies the factors).

The Ninth Circuit’s rule therefore cannot be squared with the majority’s. While most circuits review a district court’s weighing of a multi-factor rule, the Ninth Circuit affords district courts unfettered discretion to weigh factors as they



see fit, provided they properly identify the relevant factors. This Court must resolve that split in authority.

**B. The Ninth Circuit Was Wrong to Affirm the District Court in Petitioner's Case When the District Court Failed to Consider and Weigh Requisite Factors Under U.S.S.G. § 3B1.2**

In sentencing Petitioner, the district court failed to weigh mandatory factors in the binding commentary to § 3B1.2. This was reversible error, but the Ninth Circuit abdicated its responsibility to review that improper weighing of legal factors. The Ninth Circuit ruled that the district court did not abuse its discretion without evaluating whether the district court's assignment of little or no weight to several of § 3B1.2's enumerated factors was error. The Ninth Circuit's decision in Petitioner's case is thus a glaring example of the Ninth Circuit's flawed rule.

The Sentencing Commission's most recent amendment to § 3B1.2 is instructive. On November 1, 2015, the Sentencing Commission amended § 3B1.2 of the Sentencing Guidelines, pertaining to minor-role adjustments. U.S.S.G. app. C amend. 794 (2015). As the Commission explained in its Reason for Amendment, the changes clarify the governing legal principles that a court must apply in deciding whether a minor-role adjustment is warranted in a particular case. *Id.* The heart of the amendment is a list of non-exhaustive factors in the commentary to the § 3B1.2 that a district court is required to consider in deciding the propriety of an adjustment. The Commission stated that the amended commentary was a specific response to the Commission's finding that the adjustment was being applied inconsistently and more sparingly than it had anticipated. *Id.*

Given the Commission's goal of encouraging more consistent application of the guideline, the Ninth Circuit's ruling in Petitioner's case makes little sense. A district court of course maintains discretion in its application of legal principles to varying factual scenarios. But the Commission made express its intent that the factors rein in overly-broad judicial discretion vis-à-vis minor role. The express intent of the Commission was to create a list of legal factors that would lead to an expected result in most cases.

In Petitioner's case, however, the district court dismissed arguments based on the guideline's enumerated factors, because the court "disagreed" with the Commission and "rejected" their application. Casting aside the Commission's commentary, the district court ruled that a minor-role adjustment was improper based on the presence of a few facts alone: 1) the amount of drugs; and 2) the fact that Petitioner had brought drugs across the border on more than one occasion. And it made this ruling despite the Commission's addition of express language stating that "a defendant who does not have 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." U.S.S.G. § 3B1.2, cmt. n.3 (emphasis added). The district court's ruling was thus wholly contrary to the guiding legal factors in the commentary to § 3B1.2, because the court failed to weigh the factors properly (or at all).

Under the majority rule requiring appellate courts to review the district court's weighing of legal factors, the Ninth Circuit should have reversed. Instead,

the Ninth Circuit turned its supposed review for abuse of discretion into a “rubber stamp.” *See Del Valle-Cruz*, 785 F.3d at 58 (explaining that review for abuse of discretion is not a “rubber stamp” on the district court’s ruling). The panel conceded that the district court “declined to give those factors the weight” Petitioner requested, but never evaluated whether the weight the district court *did* give to those factors was proper under § 3B1.2. *See Mendez*, 746 F. App’x at 621. Instead, the panel affirmed Petitioner’s sentence because of two facts—drug amount and a prior crossing—without any explanation of why those facts outweighed those Petitioner (and § 3B1.2) highlighted. *See id.* Providing essentially no review at all of the district court’s exercise of discretion was error.

**C. This Case is a Good Vehicle for Resolving the Question Presented**

Petitioner’s case is the perfect case to resolve the circuit split in authority. Here, the sole issue in the case is whether the district court abused its discretion in denying a minor-role adjustment. Review of the district court’s weighing of the factors is entirely dispositive of the case. If, contrary to the Ninth Circuit’s ruling, the appellate court must review the district court’s weighing of the factors under § 3B1.2, Petitioner will necessarily prevail. The district court did not just weigh the factors improperly, it completely failed to weigh them at all due to its disagreement with the Sentencing Commission. And this Court has ruled that an error in calculating the guideline range, absent unusual circumstances not present here, requires vacating and remanding for resentencing. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1347 (2016) (“[I]n the ordinary case a defendant will

satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder”). In other words, the case turns entirely on the proper standard of review.

#### CONCLUSION

For the foregoing reasons, this Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

Dated: March 14, 2019

*s/ Michael Marks*

MICHAEL MARKS

Federal Defenders of San Diego, Inc.

225 Broadway, Suite 900

San Diego, California 92101-5097

Telephone: (619) 234-8467

Attorneys for Defendant-Appellant