

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

IN THE SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_  
\_\_\_\_\_  
CUAUHTEMOC JUAREZ-AQUINO,

Petitioner.

-v-

UNITED STATES OF AMERICA,

Respondent.  
\_\_\_\_\_  
\_\_\_\_\_

**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED FOR REVIEW**

Whether a federal district court is permitted boundless discretion 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.

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IN THE SUPREME COURT OF THE UNITED STATES

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CUAUHTEMOC JUAREZ-AQUINO,

Petitioner.

-v-

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI

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Petitioner Cuauhtemoc Juarez-Aquino 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 August 20, 2018.

**JURISDICTION**

Petitioner pled guilty to importation of methamphetamine, in violation of 21 U.S.C. § 952, 960, in the United States District Court for the Southern District of California. The district court sentenced him to 80 months' imprisonment. Reviewing his sentence under 28 U.S.C. § 1291, the Ninth Circuit affirmed Petitioner's sentence in an unpublished memorandum decision. *See United States v. Juarez-Aquino*, No. 17-

50218 (Aug. 20, 2018) (attached to this petition as Appendix A). The Ninth Circuit denied Petitioner’s petition for rehearing or rehearing en banc on January 3, 2019. *See* Appendix B. This Court has jurisdiction to review the Ninth Circuit’s decision under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S.S.G. § 3B1.2<sup>1</sup>

## INTRODUCTION

The scope of appellate review is essential to ensuring fairness and uniformity in federal sentencing. Where a decision will be governed by consideration of particular factors, the Court has held that “a district court must carefully consider those factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review.” *United States v. Taylor*, 487 U.S. 326, 336 (1988). However, despite the Court’s instructions to “carefully consider” all factors of a legal standard and “clearly articulate their effect,” circuit courts are irreconcilably divided about the outcome when a lower court does not properly weigh all factors within the legal standard.

Many circuits agree that appellate courts must review not only whether a district identified the correct sentencing factors, but also whether a district court properly weighed legal factors at sentencing. *See, e.g., United States v. Kramer*, 827 F.2d

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

1174, 1179 (8th Cir. 1987) (an “abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered”). If the district court abuses its discretion by giving improper weight to a particular factor, the appellate court must reverse. *See id.* The Ninth Circuit, however, does not review the manner in which a district court weighs factors before imposing a sentence. Instead, the Ninth Circuit has held mere identification and consideration of relevant factors satisfies a district court’s obligations at sentencing. This split must be resolved because the outcome of an appellate decision should not depend upon which circuit the case happens to arise in. Moreover, the Ninth Circuit’s refusal to find any abuse of discretion where a district court identifies relevant factors, but fails to correctly interpret and weigh those factors, ignores the Court’s instructions.

In this case, the district court weighed two factors—compensation and scope of knowledge—against minor role when, under binding commentary from the United States Sentencing Commission and Ninth Circuit precedent, the factors should have been weighed *in favor* of minor role. The Ninth Circuit affirmed the district court’s denial of a minor role reduction, finding that the court “denied the minor role adjustment after considering each of the factors listed in the commentary to the Guideline.” *See App. A at 2.* However, in affirming the lower court’s ruling, the Ninth Circuit ignored the district court’s blatant failure to properly interpret and weigh the minor role factors in accordance with the U.S. Sentencing Commission’s binding commentary.



This case presents a good vehicle to resolve the issue of what happens when a district court identifies the relevant sentencing factors, but fails to correctly interpret and weigh those factors. The Ninth Circuit's denial of Petitioner's appeal, despite the district court's clear failure to correctly interpret and weigh the minor role factors, exemplifies the incongruous consequences of the Ninth Circuit's standard for appellate review of the interpretation and application of multi-factor legal tests on federal sentencing.

### **STATEMENT OF THE CASE**

Petitioner was arrested after U.S. Customs and Border Protection officers discovered 12.77 kilograms of methamphetamine in his car at the San Ysidro Port of Entry. Notably, Petitioner's role was limited to the discrete task of transporting the drugs across the United States-Mexico border. On two prior occasions, he had driven a car containing drugs across the border. He was paid a fixed fee of \$2,000 to transport the drugs and had no proprietary interest in the drugs hidden inside the car.

Petitioner only knew of four people involved in the criminal scheme: the man who recruited him, Arturo, Arturo's brother Saul, and two men who off-loaded the drugs in the United States. He had no idea what quantity or type of drugs were hidden inside the car he was driving.

The central issue in the district court and on appeal was whether Petitioner played a minor role in the criminal activity, as defined by the United States Sentencing Guidelines. Under U.S.S.G. § 3B1.2, a sentencing court must consider five, non-

exhaustive factors in determining whether a defendant's role in a criminal offense was minor. Those factors include:

- (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.

U.S.S.G. § 3B1.2, App. n. 3(C). Section 3B1.2 provides commentary to guide sentencing courts' interpretation of these factors. With regard to factor (v), the commentary specifies that "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.* The commentary also clarifies that "[t]he fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative." *Id.* Recent Ninth Circuit precedent, *Aguilar-Diaz*, 884 F.3d 911 (9th Cir. 2018), further clarified that a defendant's limited knowledge regarding other participants should be weighed *in favor* of a minor role reduction, not against it.

At the sentencing hearing, Petitioner argued that each of the five factors favored a downward adjustment for his minor role in the offense. Petitioner argued

that the degree he stood to benefit from the criminal activity was minimal because his fixed fee—\$2,000 per trip—was a mere fraction of the total value of the drugs hidden in the car—approximately \$100,000. Further, he argued, because he had no proprietary interest in the drugs smuggled, the compensation factor should weigh in favor of a minor role reduction.

Petitioner also argued that his knowledge about the criminal activity was limited solely to knowledge of his own role—he had no knowledge regarding the production or distribution of the drugs transported. Additionally, he knew of only four participants in the criminal scheme: his recruiter, Arturo, Arturo’s brother Saul, and two off-loaders who picked up his car after he crossed into the United States. Petitioner argued that his scope of knowledge was narrowly drawn because he was not a trusted member of the smuggling organization, as evidenced by the GPS device hidden in the car he was driving.

The district court began its analysis of Petitioner’s role by citing the general standard from the application notes to § 3B1.2, that “the threshold decision for the Court is to determine whether the defendant is substantially less culpable than the average participant.” The district court then cited the five factors listed under § 3B1.2. First, despite the fact that Petitioner’s knowledge regarding the criminal scheme was limited to the contours of his own role and four participants (two of whom were unnamed), the district court weighed the scope of knowledge factor against minor role. In support of this decision, the district court noted that Petitioner “knew he was

working for a drug organization that imported drugs to a particular place,” had crossed twice with drugs, and knew who the recruiter was. The district court also weighed the compensation factor against a minor role reduction, ignoring Petitioner’s arguments that his modest, fixed fee and lack of proprietary interest weighed in favor of minor role. Instead, the court weighed the factor against him, concluding that Petitioner “benefitted handsomely,” based on his fixed fee of \$2,000 per trip.

On appeal, Petitioner argued that the district court erred by misinterpreting the minor role Guideline, in light of the Ninth Circuit’s analysis in *Aguilar-Diaz*. The Ninth Circuit affirmed Petitioner’s sentence in a memorandum decision. Citing *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017), the Ninth Circuit stated “[w]e review the district court’s interpretation of the Guidelines de novo and its application of the of the Guidelines to the facts for abuse of discretion.” *See* App. A at 2. The Ninth Circuit determined that the district court “denied the minor role adjustment after considering each of the factors listed in the commentary to the Guideline.” *Id.* Accordingly, Ninth Circuit held “[t]he district court’s decision to deny the minor role reduction in light of Juarez-Aquino’s preparatory conduct, prior successful drug crossings, and the large amount of methamphetamine, and to accord little weigh to Juarez-Aquino’s lack of propriety [sic] interest in the drugs and limited knowledge about the drug organization, was not an abuse of discretion.” *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 discretion when the court identifies the relevant factors, but fails to properly weigh those factors. As the majority of the circuits have held, district courts must do more than merely identify relevant sentencing factors. District courts must also 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 grant the writ and clarify that circuit courts must review the manner in which a district court weighs legal factors at sentencing under a multi-factor test.

### **I. 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 v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). 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 that 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.*; *United States v. Mendez*, 746 F. App’x 620, 621 (9th Cir. 2018) (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.

## **II. The Ninth Circuit Was Wrong to Affirm the District Court in Petitioner’s Case When the District Court Failed to Correctly Interpret and Weigh Requisite Factors Under U.S.S.G. § 3B1.2**

In sentencing Petitioner, the district court failed to correctly interpret and 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 interpretation of the factors or assignment of 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. When the Sentencing Commission amended § 3B1.2 of the Sentencing Guidelines on November 1, 2015, it explained in its Reason for Amendment that the changes clarify the governing legal principles a sentencing court must apply in

deciding whether a minor-role adjustment is warranted in a particular case. U.S.S.G. app. C amend. 794 (2015). 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 expressly weighed every factor but one—decision-making authority—against minor role. Of note, the district court weighed the compensation factor *against* minor role, even though Petitioner received a modest fixed fee and lacked proprietary interest in the drugs transported—facts that weigh in favor of minor role. In fact, the court’s decision to weigh the compensation factor against minor role contravenes the U.S. Sentencing Commission’s express directive 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). Additionally, the district court weighed the scope of knowledge factor *against* minor role, despite the fact that Petitioner’s understanding of the criminal scheme was limited to his own, narrow role and the existence of four other participants, including two unnamed off-loaders. 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.

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 found the district court “consider[ed] each of the factors listed in the commentary to the Guideline,” but never evaluated whether the district court properly interpreted those factors nor whether the weight it assigned to those factors was proper under § 3B1.2. *See* App. A at 2. Instead, the panel affirmed Petitioner’s sentence because of three facts—preparatory conduct, prior successful drug crossings, and the large quantity of drugs—without any explanation of why those facts outweighed the facts highlighted by Petitioner. *See id.* Providing essentially no review at all of the district court’s exercise of discretion was error.

### III. This Case is a Good Vehicle for Resolving the Question Presented

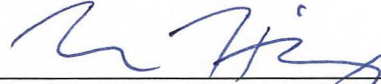
Petitioner's case presents a good vehicle to resolve the circuit split in authority. Here, the sole issue in the case is whether the district court abused its discretion in denying a minor-role adjustment. Review of the district court's weighing of the factors is entirely dispositive of the case. If, 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. 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.

#### IV. CONCLUSION

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

Respectfully submitted,

Dated: April 3, 2019



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# APPENDIX A



**NOT FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS

AUG 20 2018

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 17-50218

Plaintiff-Appellee,

D.C. No. 3:16-cr-02815-LAB

v.

MEMORANDUM\*

CUAUHTEMOC JUAREZ-AQUINO,

Defendant-Appellant.

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

Submitted August 15, 2018\*\*

Before: FARRIS, BYBEE, and N.R. SMITH, Circuit Judges.

Cuauhtemoc Juarez-Aquino appeals from the district court's judgment and challenges the 80-month sentence and 3-year term of supervised release imposed following his guilty-plea conviction for importation of methamphetamine, in violation of 21 U.S.C. §§ 952 and 960. We have jurisdiction under 28 U.S.C.

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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).

§ 1291, and we affirm in part and vacate and remand for resentencing in part.

Juarez-Aquino contends that the district court erred by denying his request for a minor role adjustment under U.S.S.G. § 3B1.2. He argues that the district court improperly compared him to a hypothetical “average participant,” rather than his co-participants in the offense, and misapplied the factors contained in the commentary to § 3B1.2. We review the district court’s interpretation of the Guidelines de novo and its application of the Guidelines to the facts for abuse of discretion. *See United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc).

The record shows that the district court properly compared Juarez-Aquino to his co-participants in the offense, both named and unnamed, *see United States v. Diaz*, 884 F.3d 911, 916-17 (9th Cir. 2018), and denied the minor role adjustment after considering each of the factors listed in the commentary to the Guideline, *see* U.S.S.G. § 3B1.2 cmt. n.3(C). The district court’s decision to deny the minor role reduction in light of Juarez-Aquino’s preparatory conduct, prior successful drug crossings, and the large amount of methamphetamine, and to accord little weight to Juarez-Aquino’s lack of propriety interest in the drugs and limited knowledge about the drug organization, was not an abuse of discretion. *See United States v. Quintero-Leyva*, 823 F.3d 519, 523 (9th Cir. 2016).

Juarez-Aquino also contends, and the government concedes, that the district



court erred in determining that Juarez-Aquino was subject to three-year mandatory minimum term of supervised release. Because the district court concluded that Juarez-Aquino was entitled to safety valve relief under 18 U.S.C. § 3553(f), the three-year mandatory minimum term of supervised release under 21 U.S.C. § 960(b)(3) did not apply. *See* U.S.S.G. § 5C1.2 cmt. n.9. Accordingly, we vacate the three-year term of supervised release and remand for the district court to reconsider the length of the supervised release term.

**AFFIRMED in part; VACATED and REMANDED in part.**

# APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

JAN 3 2019

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CUAUHTEMOC JUAREZ-AQUINO,

Defendant-Appellant.

No. 17-50218

D.C. No. 3:16-cr-02815-LAB  
Southern District of California,  
San Diego

ORDER

Before: FARRIS, BYBEE, and N.R. SMITH, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Juarez-Aquino's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 32) are denied.



# APPENDIX C

United States Code Annotated  
Federal Sentencing Guidelines (Refs & Annos)  
Chapter Three. Adjustments (Refs & Annos)  
Part B. Role in the Offense (Refs & Annos)

USSG, § 3B1.2, 18 U.S.C.A.

§ 3B1.2. Mitigating Role

Currentness

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.

#### CREDIT(S)

(Effective November 1, 1987; amended effective November 1, 1992; November 1, 2001; November 1, 2002; November 1, 2009; November 1, 2011; November 1, 2014; November 1, 2015.)

#### COMMENTARY

##### <Application Notes:>

<1. **Definition.**--For purposes of this guideline, "participant" has the meaning given that term in Application Note 1 of § 3B1.1 (Aggravating Role).>

<2. **Requirement of Multiple Participants.**--This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.>

##### <3. **Applicability of Adjustment.**-->

<(A) **Substantially Less Culpable than Average Participant.**--This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.>

<A defendant who is accountable under § 1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in the criminal activity may receive an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense,

whose participation in that offense was limited to transporting or storing drugs and who is accountable under § 1B1.3 only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under this guideline.>

<Likewise, a defendant who is accountable under § 1B1.3 for a loss amount under § 2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense or who had limited knowledge of the scope of the scheme may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, may receive an adjustment under this guideline.>

**<(B) Conviction of Significantly Less Serious Offense.--**If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 12 under § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under § 2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.>

**<(C) Fact-Based Determination.--**The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.>

<In determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors:>

<(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.>

<For example, 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.>

<The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.>

**<4. Minimal Participant.**--Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in the criminal activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.>

**<5. Minor Participant.**--Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal.>

**<6. Application of Role Adjustment in Certain Drug Cases.**--In a case in which the court applied § 2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in § 2D1.1(a)(5), the court also shall apply the appropriate adjustment under this guideline.>

Notes of Decisions (624)

Federal Sentencing Guidelines, § 3B1.2, 18 U.S.C.A., FSG § 3B1.2  
As amended to 3-1-19.

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