

No. _____

In the Supreme Court of the United States
October Term, 2019

Marcus Derby, Petitioner

v.

United States of America, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit

Petition for Writ of Certiorari



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QUESTION PRESENTED

In 2015, the United States Sentencing Guidelines were amended to clarify that defendants are entitled to the “minor role” reduction, even if they are essential to the conspiracy. Some circuits, but not all, have given effect to the amendment.

Does being a supplier to a drug trafficking organization categorically bar a defendant from receiving the “minor participant” reduction under the Sentencing Guidelines, where he is one of five suppliers but is uninvolved in the management or day-to-day operation of the conspiracy?

LIST OF PARTIES

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

RELATED CASES

None.

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OPINION BELOW

The unpublished opinion of the United States court of appeals for the Eighth Circuit appears at Appendix B. Though not designated for publishing, the opinion is available at United States v. Derby, 783 Fed. App's 638 (8th Cir. 2019) and was issued on November 4, 2019. The opinion of the United States district court appears at Appendix A to the petition and is unpublished.

JURISDICTIONAL STATEMENT

The Eighth Circuit Court of Appeals denied Mr. Derby's petition for rehearing on December 11, 2019. This Court has jurisdiction to review this Petition under 28 USC § 1254(1).

RELEVANT PROVISIONS

This petition involves the application of USSG § 3B1.2(b), which provides in pertinent part:

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

...

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

A "minor participant" is one who is "less culpable than most other participants in the criminal activity but whose role could not be described as minimal." *Id.*, cmt. c.

In determining whether to apply subsection (a) [the minimal role] or (b) [the minor role], 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.

Id. at cmt. 3(C).

STATEMENT OF THE CASE

Statement of facts

Beginning late-2016 through early 2018, the FBI investigated a Northwest Arkansas drug trafficking organization headed by the Nicholsons. In September of 2017, the FBI conducted surveillance of the then-head of the organization, Ms. Nicholson. Through that surveillance, the FBI identified Mr. Derby as an associate of Ms. Nicholson's.

Intercepted text messages between Ms. Nicholson and Mr. Derby indicated that Ms. Nicholson was purchasing narcotics from Mr. Derby. These messages also suggested Mr. Derby was aware that Ms. Nicholson was purchasing the narcotics for the purpose of redistributing them throughout the Western District of Arkansas.

The course of conduct between Ms. Nicholson and Mr. Derby was that Ms. Nicholson always traveled to Dallas, Texas to obtain the narcotics from Mr. Derby. Mr. Derby did not solicit Ms. Nicholson, nor did he transport the narcotics himself. Mr. Derby had no contact with anyone else in the conspiracy, was otherwise uninvolved in the conspiracy, and was one of five suppliers involved with the organization.

Procedural history

On March 5, 2018, Mr. Derby was indicted on a single count for conspiracy to traffic cocaine. Mr. Derby entered a guilty plea about three months later, on June 7. The PSR did not provide a downward adjustment for Mr. Derby's role in the

conspiracy. Mr. Derby objected, arguing that he should be entitled to a two-level downward adjustment because he was a “minor participant” within the meaning of USSG § 3B1.2.

The district court denied Mr. Derby the mitigation. Instead, the district court found Mr. Derby had knowledge, by virtue of his role as a supplier, of the scope and purpose of the conspiracy. The district court further found that Mr. Derby served as “an essential part of the overall operation.”

Although the district court ultimately found that Mr. Derby was “less culpable” than the Nicholsons, it emphasized that the operative question is whether Mr. Derby was substantially less culpable than the average participant, not the ringleaders.

The district court determined that this organization had approximately a dozen participants and distinguished Mr. Derby from street dealers, individuals who were purchasing and marketing small quantities of the drugs, by emphasizing that Mr. Derby was one of the organization’s suppliers. As a result, the district court found that Mr. Derby was not substantially less culpable than the average participant.

Mr. Derby was sentenced to 96 months of imprisonment, followed by three years of supervised release, and a \$3500 fine. This was within his applicable 84- to 105-month range as his Guidelines calculations then stood. Had Mr. Derby been granted the minor-role adjustment, his term of imprisonment range would have been 70 – 87 months.

REASONS FOR GRANTING CERTIORARI

This Court should grant certiorari to address the issue of whether being a supplier in a drug conspiracy categorically bars a defendant from receiving the “minor participant” reduction provided by USSG § 3B1.2(b). This Court has yet to address any issues surrounding the interpretation and application of the adjustment, leaving federal circuits to maintain a definition of “minor participant” in conflict with the Sentencing Guidelines as they read today.

Lack of direction from this Court likely contributed to the Sentencing Commission’s announcement in 2015 that the “minor participant” reduction was being applied “inconsistently and more sparingly than the Commission intended.” United States v. Carbajal, 717 Fed. App’x 234, 240 (4th Cir. 2018) (citing USSG Manual, app. C, amend. 794, at 117 (U.S. Sentencing Comm’n Supp. Nov. 1, 2015)).

Accordingly, the Commission amended the Guidelines commentary to clarify that whether “a defendant performs an essential or indispensable role in the criminal activity is not determinative.” USSG § 3B1.2, cmt. 3(C). Following the clarification, a finding that a defendant is not a minor participant because he is “essential” to the conspiracy is in direct conflict with the intended application of the minor role adjustment.

In Carbajal, the Fourth Circuit notes that the clarification was published after a survey discovered that the “mitigating role is applied consistently and more sparingly

than the Commission intended.” Id. (citing U.S. Sentencing Guidelines Manual, app. C, amend. 794, at 117).

Following the amendment, the Carbajal Court explains, the decision is based on examination of five factors, along with other factors the court might consider relevant. Id. 717 Fed. Appx. at 241. Broadly, the factors inquire into the degree to which the defendant actively participates in the conspiracy, i.e. by planning, managing, and executing the purposes of the conspiracy. See USSG § 3B1.2, cmt. 3(C) .

But this amendment has not been given effect in all of the circuits and was not given effect for Mr. Derby. Even after the amendment, some circuits still consider whether a defendant’s role was “essential” to the conspiracy as a dispositive factor in determining whether the reduction is warranted. See, e.g., United States v. Griffith, 663 Fed. App’x 446, 454 (6th Cir. 2016) (“A defendant whose role has importance in the overall scheme . . . is not a minor participant.”) (internal citations omitted); United States v. Aguilera, 655 Fed. App’x 213, 216 (5th Cir. 2016) (affirming denial of the adjustment because defendant’s role was “essential to [the drug offense’s] success”).

Inconsistent interpretation of the minor role adjustment continues to result in disparate sentences among similarly situated defendants. For example, the Second Circuit upheld the denial of a “minor participant” reduction in United States v. Gomez-Rodriguez, 775 Fed. App’x 709 (2nd Cir. 2019), stating the defendant’s criminal activity went “beyond that of a minor participant” where he facilitated the

distribution of heroin and served as a trusted associate of the supplier. 775 Fed. App'x at 712.

By contrast, the defendant in United States v. Carrasco-Deleon, 781 Fed. App'x 94 (3rd Cir. 2019), was granted a three-level reduction for having something between the minor role and the minimal role, even though he “played a key role in procuring the heroin” and acted as a lookout for drug transactions involving a high quantity of drugs. 781 Fed. App'x at 96.

The district court's findings amount to a categorical bar from this minor role reduction where a defendant is found to be “essential” to a drug trafficking conspiracy. Rather than tie specific evidence presented to each of the factors listed the application note, the district court made a general presumption that a supplier meets all criteria set forth therein.

This Court should issue a writ of certiorari because it was the Commission's express purpose to dispense with the notion that a defendant is ineligible for the reduction simply because he was essential to the conspiracy. The dispositive question is supposed to be whether his individual participation is less culpable than the average participant involved in this specific conspiracy. See USSG Manual, app. C, amend. 794, at 117 (U.S. Sentencing Comm'n Supp. Nov. 1, 2015); see, e.g., United States v. Garcia, 182 F.3d 1165 (10th Cir. 1999) (upholding a finding that defendant was not less culpable than his suppliers where he was the person actively contacting suppliers to arrange deals and sold the drugs himself).

The only other participants mentioned by the district court were the leaders of this conspiracy (Mr. and Ms. Nicholson). Text messages between Ms. Nicholson and Mr. Derby indicated that Mr. Derby was one (of several) of Ms. Nicholson's suppliers. Texts also suggested Mr. Derby was aware Ms. Nicholson was purchasing narcotics from him with the intent to redistribute them elsewhere. Ms. Nicholson traveled to Dallas, Texas to obtain narcotics from Mr. Derby, which she then brought back to Northwest Arkansas. Mr. Derby was not involved in the day-to-day activities or management of the organization.

Even though Mr. Derby's involvement was entirely limited to the above-described conduct, the district court rejected Mr. Derby's argument that he should receive a two-level downward adjustment for his role as a "minor participant." Rather, the district court found Mr. Derby's role as a "supplier" categorically barred his request for mitigation under USSG § 3B1.2. This despite the district court's separate finding that Mr. Derby was, indeed, less culpable than the only member of the conspiracy with whom he had any contact (Ms. Nicholson).

In this case, the panel affirmed the district court's refusal to apply the minor-role adjustment, stating Mr. Derby cannot qualify for a minor-role adjustment "given the facts of this case." Of the district court's factual findings, the only facts mentioned by the panel were: 1) Mr. Derby was a supplier in the conspiracy, 2) Mr. Derby was less culpable than the two leaders of the organization, and 3) Mr. Derby was not

substantially less culpable than the average participants, many of whom were street-level dealers.

But the district court pointed to no evidence other than the fact Mr. Derby was one supplier (amongst several) in this conspiracy to suggest he was more culpable than the average participant. This categorical approach, where a sentencing judge presumes every supplier meets the factors requiring consideration under § 3B1.2 without other supporting evidence, undermines the Commission's stated intentions surrounding the "minor participant" adjustment. Accordingly, this case presents a question of exceptional importance that merits certiorari, namely the interpretation and application of USSG § 3B1.2. See SCR 10(a).

ARGUMENT

The district court clearly erred in finding that Mr. Derby was not a “minor participant” in a drug trafficking organization where he was uninvolved in its day-to-day activities, had no management authority, and was only one of many suppliers. Below, the district court found that Mr. Derby was not a “minor participant” because he was one of the organization’s suppliers. The district court reasoned that, because Mr. Derby knew the organization’s ringleaders and supplied a substantial portion of the narcotics they then redistributed, his role as a supplier prevented him from receiving the minor-role adjustment.

This was clear error because the district court did not address all facts pertinent to the determination of whether Mr. Derby was a “minor participant” under USSG § 3B1.2. Relying only on those facts which the district court addressed, the panel affirmed the district court’s refusal to apply the minor-role adjustment. But USSG § 3B1.2 calls for an examination of more than one factor; thus, Mr. Derby’s role as a supplier cannot categorically bar him from receiving a minor-role adjustment.

Legal framework

Whether a defendant qualifies for a role reduction is a question of fact. United States v. Speller, 356 F.3d 904, 907 (8th Cir. 2004). A defendant is entitled to this adjustment if he is “substantially less culpable than the average participant in the criminal activity.” USSG § 3B1.2, Application Note 3(A). The Guidelines provide a list of non-exhaustive factors for courts to analyze when determining whether a

defendant is entitled to a mitigating role adjustment. See USSG § 3B1.2, Application Note 3(C).

The Eighth Circuit has previously clarified that when a defendant was essential to the commission of a crime, they cannot be a “minor participant.” United States v. Johnson, 358 F.3d 1016, 1018-19 (8th Cir. 2004). In Johnson, the defendant contended that he was a minor participant where he supplied the crack cocaine, which was sold by two others in two separate transactions. Id. The Eighth Circuit found that he was not entitled to the mitigation because he “was essential to the commission of the controlled buys.” Id.

The problem with Johnson is that the Sentencing Guidelines specifically precludes this analytical framework. The “minor participant” role is not determined by whether the defendant was “essential” but by whether they are “substantially less culpable than the average participant.” USSG § 3B1.2, Application Note 3.

The Eighth Circuit has also previously clarified that a role reduction is not warranted when the defendant was not sentenced upon the entire conspiracy but only upon his own actions. Speller, 356 F.3d at 907. In Speller, the defendant was not entitled to a role reduction because she was not “held accountable for the drugs other conspirators had distributed.” Id.

The Speller rule is founded on the reasoning that the relatively minor role in the conspiracy is already reflected in the lower base offense level. Id. (to give a role

reduction on these circumstances “would result in a double reduction to her base offense level and would be contrary to the Sentencing Guidelines.”)

The problem with the Speller framework is that it, too, is conflicts with the Guidelines’s intentions regarding role adjustments. The Guidelines specifically provide that a defendant may receive an adjustment, even when he is only held accountable for the conduct in which he was personally involved. USSG § 3B1.2, Application Note 3(A).

In contrast to the foregoing, the Eighth Circuit has affirmed a finding of “minor participant” where the defendants were substantially more involved with the overall conspiracy than Mr. Derby was involved with the conspiracy at issue. See United States v. Boksan, 293 F.3d 1056 (8th Cir. 2002). Although the Boksan defendants were neither ringleaders nor suppliers, they engaged in activities greatly indicative of the “organizer” role: the defendants recruited an accomplice, supervised that accomplice, and “played the central role” of connecting the supplier with the courier. Id., 293 F.3d at 1058. Yet their minor-role adjustments were upheld.

Analysis

Consideration of the factors provided by USSG § 3B1.2, Application Note 3(C) reveals that it was clearly erroneous for the district court to deny Mr. Derby mitigation as a “minor participant” on these facts. Applying these factors leads to only one reasonable conclusion: Mr. Derby was a “minor participant” in this conspiracy and should be resentenced.

1.1: Mr. Derby's understanding of the scope and structure of the criminal activity was limited

The first factor asks the degree Mr. Derby understood the scope and structure of the criminal activity. From the PSR, it is clear Mr. Derby knew the ringleaders. Beyond that, the PSR is silent as to Mr. Derby's understanding of the organization's scope. The district court had no evidence before it to prove Mr. Derby knew any of the other co-conspirators, what they were selling, how much they were selling, or what other activities the organization was involved in.

Mr. Derby's role was limited to transacting the cocaine he was held responsible for. Whereas the street-level dealers and the ringleaders doubtlessly had a strong understanding of the nature and scope of their activities, the PSR clearly indicates that Mr. Derby's role was limited to being one of several suppliers. The first factor lends a finding that Mr. Derby was substantially less culpable than the average participant.

1.2: Mr. Derby had no role in the planning or organization of the criminal activities

Likewise, Mr. Derby had no role in planning or organizing the criminal activities of this organization. The PSR shows Ms. Nicholson reached out to Mr. Derby for the inventory she was seeking. Critically, the undisputed facts show that this was a one-way street: Mr. Derby did not market his illicit wares to Ms. Nicholson. He did not instruct her on how to further distribute the wares, how to launder the unlawful receipts, how to recruit accomplices, or on how to otherwise further her nefarious

plots. The PSR is clear: Mr. Derby had no role in the planning or organization of the criminal activities of this organization. The second factor lends a finding that Mr. Derby was substantially less culpable than the average participant.

1.3: Mr. Derby exercised no decision-making authority nor influenced the exercise of decision-making authority

The third factor is determining the degree to which Mr. Derby exercised decision-making authority or influenced the exercise of decision-making authority. Like the second factor, the PSR unambiguously shows that Mr. Derby exercised neither authority nor influence over this organization. The PSR does not show that Mr. Derby was setting the organization's prices, directing its activities, or otherwise having any meaningful managerial role in it.

The district court seemingly intuited this factor in finding that Mr. Derby was less culpable than the Nicholsons. But this puts Mr. Derby in the same position as the low-level street dealers that the district court found were substantially less culpable than average. Undeniably, this factor lends a finding that Mr. Derby was substantially less culpable than the average participant.

1.4: Mr. Derby's nature and extent of participation in the commission of the criminal activity was minor; the acts he performed and the responsibility and discretion the defendant had in performing those acts preclude him from the "minimal" role

The fourth factor is an inquiry into the nature and extent of Mr. Derby's participation in the commission of the criminal activity, including the acts he

performed and the responsibility and discretion he had in performing those acts. Mr. Derby's role in the organization's activities was extremely limited.

The PSR is clear that Mr. Derby was one of many suppliers, was located approximately 350 miles away, was not performing any of the organization's managerial or day-to-day activities, and overall had no hand in any of the organization's dealings other than his communications with Ms. Nicholson.

It is the acts that he performed, his responsibility therefore, and the discretion he had that makes his role "minor" and not "minimal." Candidly, he supplied the instrumentality of the organization. He does not lack criminal responsibility. His conduct was not minimal.

But Mr. Derby's role, despite being more than "minimal," does not entirely preclude him from mitigation. It simply limits the mitigation he is entitled to receive to the "minor"-role adjustment. This factor lends toward a finding that Mr. Derby is substantially less culpable than the average participant.

1.5: Due to the bulk discounting, Mr. Derby stood to benefit from the criminal activity less than the average participant

Likewise, the amount Mr. Derby stood to benefit from the criminal activity lends toward a finding of "minor" and not "minimal." As the district court correctly found, Mr. Derby stood to profit off each of the organization's transactions. This does not constitute minimal involvement, but it does not preclude a finding of "minor participant." Unlike the Nicholsons, Mr. Derby did not realize a profit share in the

overall organization. The PSR is silent as to whether the street dealers held a profit share in the overall organization.

But fundamental business principles indicate that Mr. Derby stood to profit less from each transaction than the street dealers and the ringleader. Necessarily, each successive transaction “downstream” must result in greater sales proceeds, relative to quantity sold. If each participant fails to earn a profit to pay themselves and the preceding participant, then the venture is not self-perpetuating, and the system will collapse. The fact that this organization was in existence from at least late-2016 to early 2018 is proof that it was self-sustaining.

In construing culpability, the district court focused on the amount of contraband in each transaction. This was clearly erroneous because this factor instructs courts to look at the “amount gained,” revenues, and not the “quantity sold.” If each “downstream” transaction must involve progressively greater unit prices, then each “upstream” transaction must involve progressively lower unit prices. So logically, Mr. Derby profited less than those distributors who were “downstream.” This factor requires a finding that Mr. Derby was less culpable than the average participant.

Conclusion

Each of the factors lends toward a finding of “minor participant.” Three of these factors instruct courts to look at the defendant’s level of participation in the criminal activity. Here, the PSR makes abundantly clear that Mr. Derby’s level of participation was essentially non-existent in the activities of this organization. The

remaining factors look to Mr. Derby's understanding of the organization's scope and activities and how much Mr. Derby stood to gain from its activities. The PSR provides no evidence that Mr. Derby had any understanding of the organization's scope or activities; it only indicates that Mr. Derby provided Ms. Nicholson narcotics.

As in Johnson, Mr. Derby supplied the instrumentality of the conspiracy. And under Johnson, Mr. Derby appears to be barred from mitigation as a "minor participant" because he was essential to the conspiracy to distribute cocaine, as indicated by the district court. But to the extent Johnson appears to be dispositive on Mr. Derby's case, it should be overruled for being inconsistent with the Guidelines. The Johnson analysis, like the district court's analysis here, begins and ends with the defendant's role as supplier. This is cautioned against by the Guidelines, which specifically provide that the question is not determined by whether the defendant was "essential." USSG § 3B1.2, Application Note 3(C).

The fact that Mr. Derby was one of many suppliers, rather than the sole supplier, further minimizes his role in this organization. The Government may rely on Speller and argue that the mitigation is already factored in at the base-line level. But, again, the Speller approach conflicts with the Guidelines, which specifically contemplate a defendant who is held accountable only for those drugs he personally transported or stored. USSG § 3B1.2, Application Note 3(A). The Guidelines are not ambiguous: the defendant is still entitled to the adjustment. *Id.*

Mr. Derby is entitled to the adjustment. His only involvement in the conspiracy was his communication and interaction with Ms. Nicholson, who initiated the transactions between them and drove to his out-of-state location to purchase narcotics. He did not transport the narcotics to the Western District of Arkansas himself. He did not enlist persons to help broaden the organization's reach. He did not even communicate with anyone involved in the organization other than Ms. Nicholson. Recall that the Boksan defendants, by contrast, recruited an accomplice, managed the accomplice, and served as the connector between the supplier and the courier. Mr. Derby's involvement here does not come close to resembling the activities attributed to the defendants in Boksan. If the Boksan defendants were "minor participants," then Mr. Derby must surely be a "minor participant" as well.

CONCLUSION

The Sentencing Guidelines were amended to clarify that even "essential" participants to a conspiracy can benefit from the minor role adjustment. The district court did not apply the amendment for Mr. Derby. The panel's affirmed the refusal. Had the adjustment been granted, Mr. Derby's sentence would fall outside the range.

There is a circuit split on this issue, with some courts continuing to refuse defendants an adjustment provided by the Guidelines. This results in disparate sentencing depending only on a prosecutor's choice of venue. Accordingly, the panel opinion should be vacated, and Mr. Derby's petition for writ of certiorari should be granted.

Respectfully submitted on February 24, 2020,
on behalf of Mr. Marcus Derby

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