

No. 2020 - ____

In The
SUPREME COURT OF THE UNITED STATES
October Term 2019

VICTOR RIVERA MUNOZ,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

**Petition For a Writ of Certiorari
To The Ninth Circuit Court of Appeals**

Wendy Holton
211 5th Avenue
Helena, Montana 59601
Ph. (406) 443-4829
wholton@mt.net

Counsel for
Petitioner Rivera Munoz

QUESTION PRESENTED

1. In the absence of a definition of the terms, can a defendant receive a manager, or supervisor enhancement under U.S.S.G. § 3B1.1 when the evidence establishes that his alleged subordinates felt free to ignore his requests and no sanctions were imposed when they did so?

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**Petition for a Writ of Certiorari
to the Ninth Circuit Court of Appeals**

Petitioner, Victor Rivera Munoz, respectfully prays that a writ of certiorari issue to review the Memorandum Opinion of the Ninth Circuit Court of Appeals entered in this proceeding on January 3, 2020 (Appendix A).

Opinions below

The Memorandum of the Ninth Circuit Court of Appeals was not published. It is reported as *United States v. Rivera-Munoz*, 789 Fed. Appx. 74 (9th Cir. 2020) and is reproduced as Appendix A.

Jurisdiction

The final decision of the Ninth Circuit Court of Appeals was entered on January 3, 2020. This petition for certiorari is filed within ninety days of that decision. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254.

Guideline provision involved

United States Sentencing Guideline § 3B1.1 – Aggravating Role:

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

- (a) If the defendant was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
- (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

Statement of the case

A. Procedural Summary and Basis for Jurisdiction in the Federal Courts.

On June 22, 2017, Victor Rivera Munoz was charged in a two-count Indictment. Count I alleged Conspiracy to Distribute Methamphetamine in violation of 21 U.S.C. § 846, and Count II alleged Possession of a Firearm in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. § 924(c)(1)(A)(I). The district court's jurisdiction was premised on 18 U.S.C. § 3231.

On March 13, 2018, Victor pled guilty to both counts of the Indictment. There was no plea agreement so as to preserve his appellate rights. A presentence report was prepared and objections made. A sentencing memorandum was filed which presented legal arguments regarding the unresolved objections. (CD 43) At the sentencing hearing, held on August 10, 2018, testimony was heard and arguments made. Victor was sentenced to an aggregate term of 207 months. (CD 51) The written Judgment was filed on August 13, 2018. (CD 52)

A timely Notice of Appeal was filed on August 15, 2018. (CD 55) The jurisdiction of the Ninth Circuit Court of Appeals was invoked pursuant to the provisions of 28 U.S.C. § 1291.

The final decision of the Ninth Circuit Court of Appeals was entered on January 3, 2020. This petition for certiorari is filed within ninety days of that

decision. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254.

B. Facts.

Three points were added to Victor's Offense Level based on U.S.S.G. § 3B1.1(b) and the conclusion that he was a manager or supervisor in criminal activity that involved five or more participants or was otherwise extensive. The justification for the enhancement was that there were 12 individuals charged in the conspiracy and "Rivera used the Schacht's to rent vehicles for him and brought an unindicted co-conspirator to Montana with him to collect drug debts. Jail phone calls reflect he was attempting to get those he used to distribute methamphetamine for him to make contact with others in the conspiracy who could continue to distribute methamphetamine for him." In its sentencing memo and again at the sentencing hearing, the defense objected to the addition these points. (CD 43)

At the sentencing hearing the State called three witnesses: Jeanette Schacht, Raymond "Ed" Schacht, and Billings Police Department Detective Michael Robinson.

Jeanette testified that she was serving a sentence of two weeks – time served – plus five years of supervised release for conspiracy to possess and distribute methamphetamine. (Sent. Tr. p.p. 7:16-8:6, 20:23) Ed testified that he got a sentence of supervised release for conspiracy to "deliver meth." (Sent. Tr. p.p. 29:15-21, 41:10-11)

Jeanette and Ed began using methamphetamine in 2013 and, eventually, each had a gram-a-day habit. Prior to meeting Victor, they had a number of suppliers: Paul Myers and Taylor Wyman, someone named Danny, Tomi Gray (who they let move into their home so they would know where to find her), Shaun Lambrecht, Francis Reimers, someone named Blue, and Mercedes Bennick. (Sent. Tr. p.p.21:14-23:3).

Jeanette met Victor in the first part of November of 2015, when Tomi Gray invited Victor, Luis and Kevin to live at the Schacht's home.¹ Jeanette's understanding was that Victor's purpose for being in Montana and living in her home in Laurel was to sell methamphetamine. (Sent. Tr. p.p. 10:24-11:3, 44:16-20). Victor lived in the basement of the Schacht's house from early November 2015 until mid-February 2016. (Sent. Tr. p.p. 10:7-8).

Just before Jeanette was arrested in January of 2016, she confronted Victor about the price (\$1,500.00 an ounce) she and Ed were paying for their methamphetamine because he was living at their house rent-free. (Sent. Tr. p.p. 11:12-24, 13:16-21). She wanted to negotiate a different price and get some for free. During this conversation they created an Excel worksheet. (Sent. Tr. p.p. 13:1-25). The worksheet had the number 36 on it which stood for 36 ounces of methamphetamine, and 2.4 which stood for 2.2 pounds or approximately a kilogram of methamphetamine (the 36 ounces converted into pounds) because "that is what

¹At the time of the hearing Tomi Gray, Kevin, and Luis were all serving federal sentences for similar drug charges. (Sent. Tr. p.p. 8:24-9:25)

Victor said he was buying.” (Sent. Tr. p.p. 14:1-22). She broke it down into price per ounce, and determined that Victor was paying \$222.00 per ounce compared to the \$ 1,500.00 per ounce that she was paying. (Sent. Tr. p.p. 15:1-12).

Victor provide Jeanette and Ed four ounces of methamphetamine a month. If they rented a car for him they got an ounce free. Four ounces is the most he gave them at one time. Jeanette never saw him sell or provide methamphetamine to anyone else. There was only one occasion when Jeanette and Ed saw him with quite a lot of methamphetamine – a Pampered Chef pie plate full of methamphetamine that she estimated to be a couple of pounds. (Sent. Tr. p.p.17:7-13, 24:13-14, 24:22-25:4, 43:9-17).

Jeanette testified that her understanding was that Victor purchased the methamphetamine in California and that he went to California four times. One time he had his own vehicle and the other three (in December 2015, and January and February of 2016) she and Ed rented a vehicle for him. Ed testified that they rented vehicles for Victor on two occasions. (Sent. Tr. p.p. 16:3-23, 25:23-25). The first time Victor went to California he told Jeanette that he was going to see his mother – he didn’t have a car when he came back. After that trip he gave her some money. (Sent. Tr. p.p. 23:20-24, 24:3-4) Regarding the January trip he went with another person who had a court appearance in California. He came back by himself. Jeanette did not see any methamphetamine when he came back, although he gave her four ounces that could have been left over from the amount on the pie plate. (Sent. Tr. p.p. 24:1-18, 26:6-13).

The Presentence Report writer asserted at Paragraph 22 that Victor was involved in “distributing large quantities of methamphetamine” and that the “lab analysis’ conducted in this case conspiracy reflect the methamphetamine was 99 % pure.” It refers specifically to methamphetamine seized from Sadey Kust Meyers and purchases made by a confidential source from Tomi Gray. However, there were no controlled buys involving Victor and no methamphetamine was seized from his residence, vehicle, or person. When he was arrested on February 18, 2016, he was accompanied by Sadey Kust Meyers who had a purse that contained about 2 ounces of meth. She told investigators that the purse belonged to her.

There is no indication where the methamphetamine that Tomi Gray distributed came from, however, as counsel noted at the sentencing hearing, Ms. Gray was involved in more than one methamphetamine conspiracy in the Billings area. Prior to Victor, she had been one of the Schachts suppliers. (Sent. Tr. p.p. 72:9-12, 22:7-17).

The “Offense Conduct” section of the PSR also contains a number of references by confidential informants discussing amounts of meth that they had received from Victor. The only definite amounts are: In paragraph 9 Christine Kamran-Kohnjani stated she received a total of about 7 ounces of meth from Victor. Paragraph 12 describes Marissa Lymann’s account of obtaining 4 ounces of methamphetamine from Victor. Paragraph 15 states that Jason Nelson recalled seeing “Mexicans” at Josh Hagen’s residence breaking up ½ pound of methamphetamine. Paragraph 16 says he said he saw “large quantities” of meth at the Schacht’s residence.

Paragraph 17 says that on one occasion Jeanette Schacht saw 3 pounds of methamphetamine. There is no indication whether these amounts are separate or one conglomerate amount of meth. None of these amounts were tested, or seized and are otherwise uncorroborated.

At the sentencing hearing Jeanette Schacht testified, without detail, that “He [Victor] was the top dog, I guess. . . . [O]nce he moved in with us he was the only one that did the traveling and handed it out.” Likewise, Ed testified that “he was one of the top, key players” because:

[T]he people that came to the house, he never really kept a lot at the house that I knew of, but he was – he was in, like, charge of distributing it. I don’t know how to explain it. Because there was people that owed him money, and Luis and all those guys, they were all there for a short time, Luis and Kevin, but they pretty much were underneath Victor, my understanding.

(Sent. Tr. p.p. 40:11-24).

Jeanette and Ed rented cars for Victor on three occasions – but he paid for the vehicles and, each time, gave them a free ounce of methamphetamine in exchange.

(Sent. Tr. p.p.43:18-23). When he was in jail he asked them “to have one of the persons on that list pay what they owed on his account.” He also asked them to put money on his account when he was arrested. They wrote a letter for one of Victor’s brothers. (Sent. Tr. p.p. 18:1-20, 19:8-9, 20-24). Ed testified that Victor asked Richard Schiedel “Blue” to collect money and a vehicle that he had purchased, however, Schiedel was not successful. (Sent. Tr. p.p.36:8-25, 42:4-8).

After Victor was arrested three Hispanic men, including the Luis who had

lived with them, showed up at the Schacht's house and asked Ed if he needed anything – which he interpreted to mean drugs. Someone said something to the effect of “the word went out to me to see if you guys needed anything.” (Sent. Tr. p.p.39:1-25). He assumed that this was referring to Victor. (Sent. Tr. p.p.40:1-2). However, Jeanette and Ed were well connected in the methamphetamine world and Victor's arrest was in the paper, so people would know that their supplier was no longer available. (Sent. Tr. p.p.42:17-43:8).

As noted above, Jeanette had no qualms about dickering with Victor regarding the price she paid for methamphetamine. (Sent. Tr. p.p. 27:9-11). Further, although Victor asked Ed to buy him a gun at a gun show Ed refused to do it. Like her, Ed did not have any problem saying “no” to him. (Sent. Tr. p.p. 27:17-24, 28:1-2; 35:21-24). Similarly, Ed testified that Victor asked him to set him up with some people in Wyoming – which he didn't do. (Sent. Tr. p.p. 35:11-17). He never saw Victor threaten anybody. (Sent. Tr. p.p. 44:21-24).

Reason for granting the writ

- I. The circuit courts have not developed a consistent or coherent method for interpreting and applying U.S.S.G § 3B1.1 – at least one noting “the murk surrounding review of § 3B1.1 adjustments”– after more than 25 years, the Sentencing Commission has done nothing to assure clear, consistent, and equitable application.**

A district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. Indeed, in considering whether a district court abused its discretion in imposing a sentence – whether inside or outside of the guidelines – a reviewing court must first ensure that the district court

committed no significant procedural error, such as failing to calculate, or improperly calculating, the Guidelines range. *Gall v. United States*, 552 U.S. 38, 51 (2007)

In *Braxton v. United States*, 500 U.S. 344, 345 (1991) this Court considered the application of U.S.S.G. § 1B1.2(a) noting:

A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of the provisions of federal law. See this Court's Rule 10.1. With respect to federal law apart from the Constitution, we are not the sole body that could eliminate such conflicts, at least as far as their continuation in the future is concerned. Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute and agencies can do the same with respect to regulations. Ordinarily, however, we regard the task as initially and primarily ours. Events that have transpired since our grant of certiorari in the present case have focused our attention on the fact that this may not be Congress' intent with respect to the Sentencing Guidelines.

While Congress may intend to exercise control over circuit conflicts regarding the application of the guidelines, neither it, nor the Sentencing Commission, have done so regarding the application U.S.S.G. § 3B1.1. Under these circumstances, this Court should use its authority to resolve the conflicts and ensure consistent and equitable application.

The Guidelines provide enhancements in the base offense level for defendants who play an "Aggravating Role" in their offenses. U.S.S.G. § 3B1.1 provides :

(a) If the defendant was an organizer or leader of criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or

was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

Application Note 2 to the section provides:

To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets or activities of a criminal organization.

Section 3B1.1 was "included primarily because of concerns about relative responsibility" and provides "a range of adjustments to increase the offense level based upon the size of the criminal organization (i.e., the number of participants) and the degree to which the defendant was responsible for committing the offense." . . . The Guidelines do not define the terms 'leader,' 'organizer,' 'manager,' or 'supervisor,' but the commentary to § 3B1.1 suggests that the [seven factors listed in Application Note 4] are to be considered in deciding whether to enhance a defendant's offense level." *United States v. Brown*, 944 F.2d 1377, 1380 (7th Cir. 1994).

Application Note 4 to § 3B1.1, however, does not apply to the decision whether to enhance a sentence. Rather, it offers guidance in distinguishing *between* organizers/leaders and managers/supervisors:

In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as 'kingpin' or 'boss' are not controlling. Factors the court should consider include the exercise of

decision making authority, the nature of participation in the commission of the offense, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

As suggested by *Brown*, however, most courts use the seven factors set forth in Application Note 4, not only to distinguish between and organizer/leader or manager/supervisor role but also to determine whether an enhancement should be given in the first place. E.g., *United States v. Figueroa*, 682 F.3d 694, 697 (7th Cir. 2012)

“Without additional guidance, courts have used these same factors to determine whether a 3B1.1 enhancement applies in the first place. “If a judge, a probation officer, a lawyer, even a defendant, doesn't know what a ‘manager’ or ‘supervisor’ is, Application Note 4 isn't going to help him especially since it's about organizers and leaders and not middle managers and low-level supervisors, as the cases, hungry for text to hang a decision on, are reluctant to acknowledge.

The best that can be said for applying the seven factors to supervisors is that section 3B1.1(c) provides the same sentencing bonus whether the defendant was an organizer, leader, manager, or supervisor, if the criminal activity in which he occupied one of those four roles had fewer than five participants and was not "otherwise extensive." *Id.* at 695.

Courts have noted that application of U.S.S.G. §3B1.1 is a murky question. *United States v. Mustread*, 42 F.3d 1097, 1104, n. 3 (7th Cir 1994). “As with most multi factor tests, the application note’s seven-factor test is not too clear. No weighing of factors is indicated (so really the ‘multifactor test should be called a list

of factors’). And a majority of the factors are vague and redundant.” “Slavish adherence [to the multifactor test] found in many opinions dealing with 3B1.1 produces meandering inconclusive results.” *United States v. Rosales*, 716 F.3d 996, 997-998 (7th Cir. 2013).

There is also disagreement regarding whether the application of the enhancement is mandatory if any of the factors exists. E.g., *United States v. Williams*, 755 Fed Appx. 926, 934 (11th Cir. 2018) “We need not decide whether our precedent permits a district court to impose the supervisory role enhancement based solely on the fact that the defendant recruited others to join the scheme. The appeal presents a different question: whether the district court erred when it concluded that our precedent *required* it to impose the enhancement.” The *Williams* Court held that the enhancement was not mandatory but should be applied on a case by case basis in light of various factual considerations. Similarly, the Second Circuit in *United States v. McGregor*, 11 F.3d 1133, 1138-39 (2nd Cir. 2017) held that where the defendant, on one occasion, asked his wife to hand two packages of drugs to two men the case was “atypical” and, thus, did not support a leadership enhancement. Two years later it held the opposite in *United States v. Pristell*, 941 F.3d 44, 49 (2nd Cir. 2019): “Once it’s factual predicates have been established, the managerial role enhancement under § 3B1.1 is mandatory.” See also *United States v. Washington*, 580 Fed. Appx. 578 (9th Cir. 2014).

The courts are in agreement that the government has the burden of proving

by a preponderance of the evidence the existence of an aggravating role. *United States v. Mares-Molina*, 913 F.3d 770, 773 (9th Cir. 1990). Less clear, however, is the implementation of Application Note 2 requiring the defendant to have been an “organizer, leader, manager, or supervisor of one or more other participants.” Is unequal bargaining power and/or evidence of actual control required? That is the issue presented by this petition.

When a defendant contests facts alleged in a PSR, the government must produce evidence to convince the sentencing court that its position is correct. *United States v. Hammer*, 3 F.3d 266, 268 (8th Cir. 1993). Here, the only evidence presented regarding Victor’s role in the offense was the testimony of Jeanette and Ed Schacht.

The District Court justified the manager or supervisor enhancement on the basis that: there were there were 12 individuals charged in the conspiracy and Jeanette and Ed “understood” that Victor was the top guy in Billings; Jeanette said he was the only one that traveled to California, the only one who handed out methamphetamine and that he personally provided methamphetamine to her; the Schacht’s rented vehicles for him three times; he asked Richard Schiedel to collect a drug debt; asked Ed buy guns and introduce him to people in Wyoming who he could sell to; and “he was trying to recruit some people to step in since he couldn’t complete his responsibilities to the conspiracy.” (Sent. Tr. p.p. 61-63).

The circuit courts consistently hold, as a general rule, that a buyer/seller

relationship, in and of itself, is not sufficient to support an aggravated role enhancement. E.g., *United States v. Glinton*, 154 F. 3d 1245, 1260 (11th Cir. 1998); *United States v. Cameron*, 573 F.2d 179, 184 (4th Cir. 2009). The question remains though as to what actually constitutes being an organizer, leader, manager, or supervisor.

Victor did travel to California more than once, but that hardly establishes supervision or management of anyone else. Likewise, it was not disputed that he provided four ounce quantities of drugs to others with the understanding that they would resell at least a portion of those drugs. He set the price at which his buyers purchased methamphetamine – but all sellers do that and Jeanette felt free to dicker with him over that price. There is no evidence that he directed, in any fashion, how the people who obtained drugs from him were to handle further sales or the price at which they were to sell.

Victor asked the Schachts to rent vehicles for him, which they did on three occasions, but not without exacting a price – reimbursement for the cost of the rental and an ounce of methamphetamine each time. He asked Ed to buy guns for him and to introduce him to people in Wyoming, both of which Ed declined to do. He asked Richard Scheidel to collect a debt for him. Scheidel was unsuccessful and there is no evidence that there were any repercussions. Similarly, there is no evidence that anyone did anything in response to jailhouse calls asking that money be collected. In sum, while Victor may have asked others to assist him in specific tasks the fact of the matter is that others routinely ignored his requests, refused to

do what he asked, and felt free to bargain with him. There were no consequences for disobedience or failure to perform. If they complied they were handsomely compensated. These are hardly the hallmarks of a successful manager or supervisor.

Jeanette and Ed's opinion that Victor was the "top dog" or "one of the top, key players," are simply conclusory statements. At least the District of Columbia Circuit has held that "conclusory labels are inadequate with assessing culpability under § 3B1.1." See *United States v. Graham*, 162 F.3d 1180,1182 (D.C. Cir. 1998):

"Nothing in Woodfork's testimony explains how often Terrell acted as a lieutenant, what actions Terrell performed when purportedly acting as a lieutenant, whether all lieutenants acted alike, or – more importantly – why he believed that Terrell was a lieutenant, as opposed to some other cog in the Newton Street machine. Woodfork's testimony is therefore a vivid illustration of why conclusory labels are inadequate when assessing culpability under § 3B1.1."

Although counsel has not found a case similar to this where other participants felt free to ignore or challenge an alleged manager or supervisor, the Seventh Circuit in *United States v. Weaver*, 716 F.3d 439, 443-444 (7th Cir. 2013) indicated that a defendant should not receive a § 3B1.1 enhancement absent some evidence of *actual* authority:

For purposes of § 3B1.1 then, a defendant exercises control and authority over another when he 'tells people what to do and determines whether they've done it. . . . This exercise of control and authority will usually allow the defendant to impose some sanction, reward, or punishment for the underling's execution of the directed task. Thus, the ability to coerce underlings is a key indicator of control or authority suggestive of managerial or supervisory responsibility in the criminal enterprise. See *Bennett*, 708 F.3d at 892 ('Although most supervisors do not terrorize their subordinates (at least not physically), administering

sanctions for poor work quality is a quintessential supervisory task.’). Moreover, the importance of coercion suggests that an underling’s independence from the defendant can undermine the government’s suggestion of control. . . . Finally, the enhancement requires ongoing supervision, not a one-off request from one equal to another during the course of the criminal activity. *Figueroa*, 682 F.3d at 697-98 (‘Because to be a ‘manager’ or ‘supervisor’ is to occupy a role – to have a status – cases distinguish between ongoing supervision and merely asking a coconspirator on one occasion to do something.’ (citations omitted).)

By contrast, in *United States v. Flores*, 149 F.3d 1272, 1279 (10th Cir. 1998) cert. denied, 525 U.S. 1092 (1999), the Tenth Circuit approved a § 3B1.1 enhancement without citing any evidence of direct control. Instead, it noted that the defendant set the price he charged for the drugs he sold, and on at least one occasion acted as a mediator. It quoted with approval the district court’s finding that “[w]ithout [the defendant] and his group Maass had no supply, and without customers he had no organization.” It did not make clear how the fact that the defendant set the price for the drugs he sold, or that without a source of drugs a lower-level distributor could not stay in business, distinguishes this case from any other arms-length buyer-seller relationship.

For at least the past 25 years the circuit courts have referenced the lack of guidance provided by both the text and Application Notes of U.S.S.G. § 3B1.1. This has resulted in disparate application of the enhancement as illustrated by its imposition in this case where those ostensibly managed or supervised had little or no respect for Victor. Certainly that he was no threat, and did not control any of them. This case presents the Court with an opportunity to clarify the operation of § 3B1.1 and ensure more equitable application of it.

Conclusion

For the reasons discussed above, a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 2nd day of April, 2020.

/s/ Wendy Holton

Wendy Holton
Counsel for Petitioner
Victor Rivera-Munoz, and a Member of
the Bar of this Court

Appendix A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 3 2020

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

No. 18-30180

Plaintiff-Appellee,

D.C. No.

v.

1:17-cr-00073-SPW-1

VICTOR MIGUEL RIVERA-MUNOZ,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Montana
Susan P. Watters, District Judge, Presiding

Argued and Submitted November 6, 2019
Portland, Oregon

Before: PAEZ and RAWLINSON, Circuit Judges, and WU,** District Judge.

Victor Rivera-Munoz appeals his sentence for conspiracy to distribute methamphetamine. He argues the district court erred in three ways: (1) he asserts the district court overestimated the quantity of drugs attributable to him; (2) he contends the district court erred when it deemed him a “manager” or “supervisor”

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

** The Honorable George H. Wu, United States District Judge for the Central District of California, sitting by designation.

for the purposes of a Sentencing Guidelines' enhancement; and (3) he argues that he should have received a downward departure for time he served on a sentence he completed on a prior related case. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. *Drug Quantity Approximation.* We disagree that the district court clearly erred in finding Rivera-Munoz responsible for at least three kilograms of methamphetamine. *See United States v. Culps*, 300 F.3d 1069, 1076 (9th Cir. 2002). Testimony by Rivera-Munoz's coconspirators at sentencing, given under oath and subject to cross-examination, contained enough indicia of reliability and met the preponderance standard. The coconspirators established that Rivera-Munoz drove to California four times to purchase one kilogram of methamphetamine on each trip so that he could distribute it in Montana. The district court erred on the side of caution by finding that Rivera-Munoz only purchased methamphetamine on three trips he took to California, rather than four, based on the number of times he asked his coconspirators to obtain a rental car for him. Thus, the district court's finding of the approximate drug weight attributable to Rivera-Munoz was not clearly erroneous.

2. *Manager / Supervisor Enhancement.* The district court did not abuse its discretion when it applied a three-level enhancement to Rivera-Munoz's offense level for being a "manager" or "supervisor" under U.S.S.G. § 3B1.1(b). *See*

United States v. Garcia, 497 F.3d 964, 970 (9th Cir. 2007). Testimony by Rivera-Munoz's coconspirators at sentencing established that he asked his coconspirators to rent cars for him so that he could make trips to California to purchase methamphetamine. Furthermore, Rivera-Munoz recruited an unindicted coconspirator to collect a debt while he was in jail. The district court thus did not clearly err in concluding that Rivera-Munoz exercised sufficient control over at least one other participant to warrant the enhancement under § 3B1.1(b).

3. *Downward Departure for Time Served on Discharged Sentence.* Lastly, we disagree that the district court erred by not reducing Rivera-Munoz's sentence to account for a term of imprisonment he served on a prior related case. Although a court must apply a downward departure for an undischarged sentence on a prior related case, *see* U.S.S.G. § 5G1.3(b), a court may decline to do so when that sentence has been completed, *see* U.S.S.G. § 5K2.23. Because Rivera-Munoz's sentence was completed by the time he was sentenced, the district court was not required to provide a downward departure under § 5G1.3(b). *See United States v. Turnipseed*, 159 F.3d 383, 386–87 (9th Cir. 1998).

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT

District of Montana

UNITED STATES OF AMERICA

v.

VICTOR MIGUEL RIVERA-MUNOZ

JUDGMENT IN A CRIMINAL CASE

Case Number: CR 17-73-BLG-SPW-01

USM Number: 16328-046

Wendy Holton (Appointed)

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 & 2 of Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:846; 21:841a1A	Conspiracy to Dist. & to Possess w/ intent to Dist. Meth.	2/18/2016	1
18:924c1Ai	Poss. of a Firearm in Furtherance of a Drug Traff. Crime	2/18/2016	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

8/10/2018

Date of Imposition of Judgment

Susan P. Watters
Signature of Judge

FILED

AUG 13 2018

Clerk, U S District Court
District Of Montana
Billings

Susan P. Watters, District Judge

Name and Title of Judge

8/10/2018

Date

DEFENDANT: VICTOR MIGUEL RIVERA-MUNOZ

CASE NUMBER: CR 17-73-BLG-SPW-01

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Count 1: 147 months and count 2: 60 months, to run consecutive to one another. This sentence should run concurrent with CR 16-66.

☒ The court makes the following recommendations to the Bureau of Prisons:

that the defendant participate in the RDAP program. Also that the defendant receive vocational training. Also that the defendant be placed in California for proximity to family.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: VICTOR MIGUEL RIVERA-MUNOZ

CASE NUMBER: CR 17-73-BLG-SPW-01

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

5 years on each count to run concurrent

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: VICTOR MIGUEL RIVERA-MUNOZ

CASE NUMBER: CR 17-73-BLG-SPW-01

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: VICTOR MIGUEL RIVERA-MUNOZ
CASE NUMBER: CR 17-73-BLG-SPW-01

SPECIAL CONDITIONS OF SUPERVISION

1. If you are ordered deported from the United States, you must remain outside the United States, unless legally authorized to re-enter. If you re-enter the United States, you must report to the nearest probation office within 72 hours after you return.
2. The defendant shall submit their person, residence, place of employment, vehicles, and papers, to a search, with or without a warrant by any probation officer based on reasonable suspicion of contraband or evidence in violation of a condition of release. Failure to submit to search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. The defendant shall allow seizure of suspected contraband for further examination.

DEFENDANT: VICTOR MIGUEL RIVERA-MUNOZ

CASE NUMBER: CR 17-73-BLG-SPW-01

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00	\$	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS	\$	<u>0.00</u>	\$	<u>0.00</u>
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: VICTOR MIGUEL RIVERA-MUNOZ
CASE NUMBER: CR 17-73-BLG-SPW-01

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 200.00 due immediately, balance due
- ☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
- Criminal monetary penalty payments are due during imprisonment at the rate of not less than \$25.00 per quarter, and payment shall be through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk, United States District Court, James F. Battin U.S. Courthouse, 2601 2nd Ave North, Ste 1200, Billings, MT 59101.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT A assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.