

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JIMMY PIKE

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

PIA LEDERMAN
Counsel of Record
LEDERMAN LAW FIRM
721 W. Abram Street
Arlington, Texas 76013
(817) 860-8888
pia@ledermanlawfirm.com

Attorney for Petitioner

QUESTION PRESENTED

A district court's guidelines calculations are reviewed for clear error. Did the court of appeals err in holding that the district court's guidelines calculations did not constitute clear error where it denied a mitigating role adjustment to a conspirator who engaged in a limited number of transactions involving street-level quantities of methamphetamine?

PARTIES TO THE PROCEEDINGS

Jimmy Pike is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

TABLE OF CONTENTS

Question Presented.....	i
Parties to the Proceedings.....	ii
Table of Contents.....	iii
Index to the Appendices	iv
Table of Authorities.....	v
Petition for Writ of Certiorari.....	1
Opinion Below.....	1
Jurisdictional Statement	1
Statement of the Case.....	2
Reasons for Granting the Writ	5
Conclusion.....	12

INDEX TO THE APPENDICES

Appendix A	Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit
Appendix B	Judgment and Sentence of the United States District Court for the Northern District of Texas

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<i>United States v. Bello-Sanchez</i> , 872 F.3d 260 (5th Cir. 2017)	4
<i>United States v. Castro</i> , 843 F.3d 608 (5th Cir. 2016)	5
<i>United States v. Gomez-Valle</i> , 828 F.3d 324 (5th Cir. 2016)	5
<i>United States v. Ibarra-Luna</i> , 628 F.3d 712 (5th Cir. 2010)	9, 10
<i>United States v. Kiekow</i> , 872 F.3d 236 (5th Cir. 2017)	12
<i>United States v. Martinez-Romero</i> , 817 F.3d 917 (5th Cir. 2016)	10
<i>Molina-Martinez v. United States</i> , ___ U.S. ___, 136 S. Ct. 1338 (2016)	10
<i>United States v. Pike</i> , ___ F.3d ___, 2020 WL 6391221 (5th Cir. 2020)	1, 4
<i>United States v. Sanchez-Villarreal</i> , 857 F.3d 714 (5th Cir. 2017)	5
<i>United States v. Torres-Hernandez</i> , 843 F.3d 203 (5th Cir. 2016)	5, 7, 8

FEDERAL STATUTES

21 U.S.C. § 841(a) (1)	2
21 U.S.C. § 841(b) (1) (B)	2
21 U.S.C. § 846	2

SENTENCING GUIDELINES

USSG § 2D1.1(b) (5)	3
USSG § 3B1.2	3
USSG § 3B1.2, cmt. n.3(C)	5, 6, 8
USSG § 3B1.2, comment. (n.4)	7
USSG Chapter 5, Part A, Sentencing Table	3, 4

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Jimmy Pike, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The published opinion and judgment of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Pike*, _ _ _ F.3d _ _ _, 2020 WL 6391221 (5th Cir. 2020), and is provided in the Appendix to the Petition. [Appendix A]. The trial court's judgment of conviction and sentence was entered February 3, 2020, and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on November 2, 2020. [Appendix A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Proceedings Below

On October 17, 2019, Defendant-Appellant Jimmy Pike (“Mr. Pike” or “Appellant”) was charged by information with conspiracy to possess with intent to distribute a controlled substance. 21 U.S.C. § 846 (21 U.S.C. § 841(a)(1) and (b)(1)(C)). [ROA.15]; *see* 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(B).

On October 21, 2019, Mr. Pike entered his plea of guilty before the district court to the offense as set forth in the information.¹ [ROA.96]. On February 23, 2020, Mr. Pike was sentenced by the trial court to a term of imprisonment of 151 months. [ROA.71]. Mr. Pike filed notice of appeal on February 13, 2019. [ROA.72].

B. *Statement of the Facts*

Prior to assessing the sentence in this case, the district court accepted the findings in the Presentence Report (“PSR”) and found that Mr. Pike had an offense level of 31 and a criminal history category of IV, which yielded a guideline range of between 151 to

¹

Mr. Pike entered a *Waiver of Indictment* on October 17, 2019. [ROA.54].

188 months incarceration. [ROA.103]. Included in the court's calculations was the denial of Mr. Pike's request for a two, three or four-level reduction in offense level on the grounds that he was a minor or minimal participant. [ROA.102-03, 134]; *see* USSG § 3B1.2.

After determining that Mr. Pike's sentencing range was between 151 and 188 months, the district court assessed a sentence of 151 months, which was the very bottom of the advisory guideline range found by the district court. [ROA.107].

However, had the requested two, three or four-level reduction under § 3B1.2 been properly included in the calculation, the Mr. Pike's total offense level would have been either 25, 26 or 27, rather than 31, which, when indexed with his criminal history category of IV would have yielded a guideline range substantially lower.² *See* USSG Chapter 5, Part A, Sentencing Table.

Had the trial court thus used the guideline range which properly included one of the requested reductions as a minor or minimal participant, the bottom-of-the-guideline-range sentence

²

Had Mr. Pike been granted a mitigating role adjustment, he would not have received the two-level enhancement for importation of methamphetamine under USSG § 2D1.1(b)(5).

assessed would have been 84 months if granted a four-level reduction; 92 months if granted a three-level reduction; or 100 months if granted a two-level reduction, rather than the 151 months assessed by the trial court. *See id.*

C. The Appeal

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, contending inter alia that the district court had committed clear error in denying his requested downward variance predicated on the contention that he was a minimal or minor participant in the short-lived conspiracy. The court rejected this claim, holding that

[t]hough the lack of evidence regarding the degree to which Pike participated in planning or organizing the conspiracy weighs in favor of mitigation, we have found that when some factors support the reduction, but others do not, the district court does not clearly err in denying the reduction.

Pike, ___ F.3d ___, 2020 WL 6391221, at *1 (citing *United States v. Bello-Sanchez*, 872 F.3d 260, 264-65 (5th Cir. 2017)).

REASON FOR GRANTING THE PETITION

In November 2015, Amendment 794 became effective. *See United States v. Gomez-Valle*, 828 F.3d 324, 327 (5th Cir. 2016). It left the text of § 3B1.2 unchanged but made various revisions to the commentary. *See United States v. Castro*, 843 F.3d 608, 611–12 (5th Cir. 2016). Among other things, the amended commentary clarified that “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.”³

An “average participant” under § 3B1.2 “means only those persons who actually participated in the criminal activity at issue in the defendant’s case so that the defendant’s culpability is determined only by reference to his or her co-participants in the case at hand.” *United States v. Torres-Hernandez*, 843 F.3d 203, 208-09 (5th Cir. 2016) (footnote omitted). To address relative

3

U.S.S.G. § 3B1.2 cmt. n. 3(C); *see also United States v. Sanchez-Villarreal*, 857 F.3d 714, 722 (5th Cir. 2017) (explaining that, though a court may consider the fact that a defendant performed an essential task, it may not deny a mitigating-role adjustment solely on that basis).

culpability, a district court “should consider” the following non-exhaustive, five-factor list:

(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.

USSG § 3B1.2, cmt. n.3(C). Additionally, the revised commentary provides 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.*

Under the Guidelines commentary, Petitioner was eligible to receive a mitigating-role reduction. This fact becomes plainly evident when considered in light of the factors enumerated in Application Note 3(C) of the commentary to §3B1.2, the record evidence demonstrates that ’s participation was, at the very least, minor.

Understanding of the scope and structure. The record evidence demonstrates that Mr. Pike was at the bottom of the totem pole, the record shows that his role was limited to street-quantity drug sales which did little more than fund his own use of methamphetamine. [ROA.117].

As a result, Mr. Pike “lack[ed] knowledge or understanding of the scope and structure of the [criminal] enterprise and of the activities of others,” which “is indicative of a role as [a] minimal participant.” USSG § 3B1.2, comment. (n.4).

Participation in planning or organization. There is no evidence in the record that Mr. Pike played a role in planning or organizing the criminal activity. Thus, this factor weighs in Mr. Pike’s favor. *See Torres–Hernandez*, 843 F.3d at 209 (“There is no evidence as to his participation in planning or organizing the criminal activity This weighs in favor of an adjustment.”).

Exercise or influence on the exercise of decision-making authority. Nothing in the record suggests that Mr. Pike had authority to make decisions or had sway over those who did. Nor does any evidence indicate that he held supervisory authority over

any other offense participant. Once again, this factor thus weighs in favor of an adjustment. *See Torres–Hernandez*, 843 F.3d at 209 (“There is no evidence as to ... the degree to which he exercised decision-making authority or influenced the exercise of that authority. This weighs in favor of an adjustment.”)

Nature of participation and discretion. The extent of Mr. Pike’s participation reflected in the record is that for slightly over a year, he conducted street-level sales of methamphetamine to a limited circle of associates, often buying from and selling to the same individual. [ROA.117-118].

Degree of benefit. The record contains no evidence that Mr. Pike had any equity interest in the drugs or was entitled to any share of profits from their distribution. As the record shows, Mr. Pike’s activities in conducting street-level sales of methamphetamine did little more than allow Mr. Pike to consume methamphetamine. [ROA.117, 128]. The lack of a proprietary interest is another factor that weighs in favor of an adjustment. *See* USSG § 3B1.2, comment. (n.3(C) (“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

th[e] [G]uideline.”).

Mr. Pike was recruited to perform menial sales tasks. He often received the narcotics on consignment, as other participants owned the drugs, planned the activity, directed his actions, made decisions, and gave him instructions on what to do with respect to his single task of conducting street-level sales of methamphetamine.

Application of the factors enumerated in § 3B1.2, comment. (n.3(C)), to the record evidence thus make clear that Mr. Pike should have received a mitigating-role adjustment. The district court clearly erred by denying his request for an adjustment; an error that the court of appeals should have corrected.

D. *The government cannot meet its heavy burden of showing that the district court’s error was harmless*

For a preserved Guidelines-calculation error to be found harmless, the government has the “burden to convincingly demonstrate that the court would have imposed the very same sentence if it had not made an erroneous calculation.” *United States v. Ibarra-Luna*, 628 F.3d 712, 719 (5th Cir. 2010). And where, as here, “there is no record evidence that the district court

considered the lower, correctly calculated [G]uideline range,” the government “must compellingly prove that the district court would have imposed a sentence outside the properly calculated sentencing range for the same reasons it provided at the sentencing hearing” and then “must demonstrate that the ‘sentence the district court imposed was not influenced in any way by the erroneous Guidelines calculation.’” *United States v. Martinez-Romero*, 817 F.3d 917, 924 (5th Cir. 2016) (*citing and quoting Ibarra-Luna*, 628 F.3d 712, 718-19; *see also Molina-Martinez v. United States*, ___ U.S. ___, 136 S. Ct. 1338, 1346 (2016) (“In most cases a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome [at sentencing].”).

In this case, the government cannot meet its burden. Had the district court applied any reduction for a mitigating role, Mr. Pike would not have received the two-level enhancement for importation of methamphetamine under USSG § 2D1.1(b)(5). As a result, instead of a total offense level of 31, his offense level would have been 25, 26 or 27, if the court had granted a two, three or four-level adjustment for a minimal, minor role or a role between minor and

minimal. Combined with his criminal history category of IV, the resulting Guidelines imprisonment range would have been 84 to 105, 92 to 115, or 100 to 125 months, respectively.

Each of these ranges is considerably lower than the starting range of 151 to 188 months that the district court used. And the district court's sentence of 151 months is well above all of these ranges. With a four, three-, or two-level adjustment for mitigating role, the district court's sentence would have been, respectively, 46, 36 or 26 months above the top of the applicable Guidelines range. It cannot be argued that the district court would have departed upward so significantly when, at the original sentencing, the district court imposed a sentence at the very bottom of the range it used. The government accordingly cannot meet its heavy burden of demonstrating that the district court's Guidelines error was harmless.

In sum, the district court erred by denying a mitigating-role adjustment based on Mr. Pike's conduct at hand, using the factors set forth in the Guidelines commentary. The record evidence clearly demonstrates that Mr. Pike was entitled to a mitigating-role adjustment. The district court's error was not harmless because the

erroneous Guidelines range clearly influenced its selection of a sentence and the Guidelines range would have been much lower without the error.

Consequently, the court of appeals should have vacated Mr. Pike's sentence and remanded for resentencing with a mitigating-role adjustment. *See e.g., United States v. Kiekow*, 872 F.3d 236, 249 (5th Cir. 2017).

Because the district court failed to properly grant Petitioner his requested mitigating role adjustment, it committed clear error, which the Fifth Circuit failed to correct. This Court is respectfully requested to remedy the error of the court of appeals.

CONCLUSION

Petitioner respectfully prays that this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to which he may justly entitled.

Respectfully submitted this 3rd day of December, 2020.

/s/ PIA LEDERMAN
PIA LEDERMAN
Counsel of Record

LEDERMAN LAW FIRM
721 W. Abram Street
Arlington, Texas 76013
(817) 860-8888
pia@ledermanlawfirm.com

Attorney for Petitioner