

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

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In the  
Supreme Court of the United States

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SALVADOR DELRIO,  
Petitioner,  
v.

UNITED STATES OF AMERICA,  
Respondent.

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On Petition for a Writ of Certiorari  
To the United States Court of Appeals  
For the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. What weight should a court give to a defendant's essential role as a mere courier when determining a mitigating-role adjustment?
2. Does a district court violate U.S.S.G. § 3B1.2 and a defendant's due process right to be sentenced on accurate information when it denies a mitigating-role adjustment based on speculative inferences?

## PARTIES TO THE PROCEEDINGS

The parties are petitioner, Salvador Delrio, and respondent, United States of America. All parties appear in the caption of the case on the cover page.

## TABLE OF CONTENTS

QUESTIONS PRESENTED .....	i
PARTIES TO THE PROCEEDINGS .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	v
PETITION FOR WRIT OF CERTIORARI .....	1
OPINIONS BELOW .....	1
STATEMENT OF JURISDICTION .....	1
CONSTITUTIONAL PROVISION INVOLVED .....	2
STATEMENT OF THE CASE .....	3
A.    Mr. Delrio's Background .....	3
B.    The Facts Giving Rise to Mr. Delrio's Conviction, the Indictment, and Arrest .....	5
C.    The District Court's Preclusion of the Necessity Defense .....	8

D. The Plea Agreement and Change of Plea.....	9
E. The Presentence Report and the Parties' Sentencing Positions.....	11
1. The Office of Probation's Presentence Report .....	11
2. The Government's Sentencing Position .....	13
3. Mr. Delrio's Sentencing Position.....	13
F. Sentencing and the Notice of Appeal .....	14
G. The Appeal .....	15
REASONS FOR GRANTING THE WRIT .....	16
I. THE DECISION IN THIS MATTER MAGNIFIES THE CONFLICT AMONG THE CIRCUITS REGARDING THE WEIGHT A COURT CAN GIVE A DEFENDANT'S STATUS AS A COURIER WHEN DETERMINING A MITIGATING-ROLE ADJUSTMENT. .....	16
II. THE DISTRICT COURT VIOLATED U.S.S.G. § 3B1.2 AND MR. DEL RIO'S DUE PROCESS RIGHT TO BE SENTENCED ON ACCURATE INFORMATION WHEN IT DENIED HIM A MITIGATING ROLE ADJUSTMENT BASED SIMPLY ON SPECULATIVE INFERENCES. .....	23
CONCLUSION .....	28

## APPENDICES

### Appendix A

November 2, 2020, Memorandum of the Ninth Circuit Court of Appeals ..... 2a

Appendix B  
September 24, 2018, Judgment of U.S. District Court, Central  
District of California ..... 8a

## TABLE OF AUTHORITIES

### CASES:

<i>Townsend v. Burke,</i> 334 U.S. 736 (1948) .....	16, 17, 19
<i>United States v. Alvarado-Martinez,</i> 556 F.3d 732 (9 <sup>th</sup> Cir. 2009) .....	26
<i>United States v. Berry,</i> 258 F.3d 971 (9 <sup>th</sup> Cir. 2001) .....	26
<i>United States v. Cruickshank,</i> 837 F.3d 1182 (11 <sup>th</sup> Cir. 2016) .....	25
<i>United States v. Escobar,</i> 866 F.3d 333 (5 <sup>th</sup> Cir. 2017) .....	21
<i>United States v. Gómez-Encarnación,</i> 885 F.3d 52 (1 <sup>st</sup> Cir. 2018) .....	24
<i>United States v. Gonzalez,</i> 534 F.3d 613 (7 <sup>th</sup> Cir. 2008) .....	24
<i>United States v. Ibarra,</i> 737 F.2d 825 (9 <sup>th</sup> Cir. 1984) .....	27
<i>United States v. Kluball,</i> 843 F.3d 716 (7 <sup>th</sup> Cir. 2016) .....	26
<i>United States v. Littlesun,</i> 444 F.3d 1196 (9 <sup>th</sup> Cir. 2006) .....	25

<i>United States v. McGowan,</i> 668 F.3d 601 (9 <sup>th</sup> Cir. 2012) .....	27
<i>United States v. Sanchez-Villarreal,</i> 857 F.3d 714 (5 <sup>th</sup> Cir. 2017) .....	21
<i>United States v. Sand,</i> 541 F.2d 1370 (9 <sup>th</sup> Cir. 1976).....	26
<i>United States v. Torres-Hernandez,</i> 843 F.3d 203 (5 <sup>th</sup> Cir. 2016).....	21
<i>United States v. Tucker,</i> 404 U.S. 443 (1972) .....	26
<i>United States v. Vanderwerfhorst,</i> 576 F.3d 929 (9 <sup>th</sup> Cir. 2009) .....	27
<i>United States v. Watts,</i> 519 U.S. 148 (1997) .....	26
<i>United States v. Wilson,</i> 900 F.2d 1350 (9 <sup>th</sup> Cir. 1990) .....	25

CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND  
SENTENCING GUIDELINES:

UNITED STATES CONSTITUTION

United States Constitution, Amendment V .....	2
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FEDERAL STATUTES

28 U.S.C. § 455.....	23
28 U.S.C. § 1254(1).....	1
18 U.S.C. § 3661.....	19
18 USC § 3553(a)(2).....	19-20

U.S. SENTENCING GUIDELINES

U.S.S.G. § 3B1.2 .....	16, 17, 19, 25
U.S.S.G. § 6A1.3(a) .....	26

## PETITION FOR WRIT OF CERTIORARI

Petitioner, Salvador Delrio, respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals, entered in the instant proceeding on November 2, 2020, Ninth Circuit Court of Appeal № 19-50230.

## OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit issued an unpublished memorandum decision in this matter. App. 2a. See United States v. Delrio, No. 19-50230, 2020 WL 6408751 (9<sup>th</sup> Cir. Nov. 2, 2020)(unpublished). The district court order from which Mr. Delrio appealed is also unpublished. App. 8a. See United States v. Delrio, U.S. District Court, Central District of California № 2:18-cr-00686-PA-1.

## STATEMENT OF JURISDICTION

The date on which the Ninth Circuit Court of Appeals filed its Memorandum in the instant matter was November 2, 2020. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

## STATEMENT OF THE CASE

### A. Mr. Delrio's Background

Mr. Delrio was born in 1973. His parents were United States citizens living in Mexico at the time of his birth. Thus, he is a naturalized American citizen.

Mr. Delrio was raised in San Diego County in a positive family environment and enjoyed a middle-class upbringing. He played sports in high school and was on the varsity football and wrestling teams. PSRs<sup>1</sup> 16. He completed the 11th grade and later received his GED, eventually completing five college courses. PSRs 19.

At the age of 17, Mr. Delrio began helping his father with various construction projects. He subsequently became a licensed forklift driver and worked in scaffolding, carpentry, and HazMat abatement, working for a number of construction companies. PSRs 16, 18. Over the years, he

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<sup>1</sup>“PSRs” refers to the volume of Presentence Reports Filed by Mr. Delrio with this Court.

obtained numerous construction licenses and became a member of a carpenter's and flooring union. PSRs 16, 18.

Through his construction and carpentry work, Mr. Delrio suffered a variety of injuries that has caused him tremendous pain in both of his wrists and in his shoulders for the last 20 years. In 2017, he was in a car accident that led him to experience continuing back pain. Because of his various injuries, Mr. Delrio became unemployed and was without income, beginning in late 2017. PSRs 18. In April 2017, Mr. Delrio was diagnosed with PTSD as a result of his years-long stay at Pelican Bay State Prison. PSRs 17. In early 2018, he began smoking marijuana to aid him with his various body pains.

Mr. Delrio has been married twice but has no children. Following his last divorce in 2018, Mr. Delrio began living with his sister and occasionally with a friend in Mexico. PSRs 16-17.

Mr. Delrio's parents remain married and live in San Diego. Both parents are retired. His father was a bus driver and also ran a construction

business. PSRs 16. In addition, Mr. Delrio has several siblings who are gainfully employed and with whom he maintains contact. PSRs 16.

**B. The Facts Giving Rise to Mr. Delrio's Conviction, the Indictment, and Arrest**

In August and September 2018, agents from the Drug Enforcement Administration (DEA) used a confidential source (CS) to try to buy drugs from a supplier located in Tijuana, Mexico, known as "Primo." On August 22, 2018, Primo and the CS spoke by telephone. During the call, Primo offered to sell the CS thirty kilograms of methamphetamine and three kilograms of fentanyl. Primo said he would send someone to Los Angeles, California to complete the deal. ER 276. Mr. Delrio was completely uninvolved with Primo or this transaction. ER 208-210.

In September 2018 and as a result of his divorce, Mr. Delrio was living in Tijuana, Baja California, Mexico with a friend by the name of Roy Hernandez. Roy and Mr. Delrio were childhood friends.

Roy had a brother named Rudy Hernandez who Mr. Delrio had also known since childhood. In the past, Rudy had helped Mr. Delrio when he had been in difficult situations. For example, Rudy loaned Mr. Delrio the \$3,500 he needed to hire a divorce attorney. ER 208.

On September 4, 2018, Mr. Delrio traveled to Tijuana to meet with Roy and pay him his share of the monthly rent. Shortly thereafter, Roy's brother, Rudy, arrived and asked Mr. Delrio if he could help him with a sensitive situation. Rudy explained that a friend of his was supposed to deliver some drugs to a customer in Los Angeles, California but that the people who owned the drugs did not trust this friend and were holding him against his will. ER 208-209.

Rudy asked Mr. Delrio if he could do him the favor of delivering the drugs. Mr. Delrio decided that although he did not want to get involved in the situation, he would do this as a favor for Rudy. In this regard, Mr. Delrio felt that Rudy's friend's life was in danger, and he was also indebted to Rudy. ER 209.

That same night, Mr. Delrio crossed the border and met with a woman at a predetermined location near Imperial Beach, California. This woman gave Mr. Delrio two suitcases. Mr. Delrio then drove to the Los Angeles, California area, staying in communication with Rudy. The next morning, Mr. Delrio did as he was told to do and delivered the two suitcases of drugs to the supposed buyer. ER 209, 276-277.

Mr. Delrio had never met the buyer before. Although he knew he was transporting drugs, he did not know the exact nature and type of drugs being delivering. Mr. Delrio only became involved in this offense in order to save the life of Rudy's friend. ER 209.

Upon his arrival at the location where the drugs were to be delivered, Mr. Delrio was arrested for carrying a rolling suit case and duffel bag, containing approximately 26.84 kilograms of methamphetamine and 3.957 kilograms of fentanyl. ER 160, 277-278. At the time, authorities also found that Mr. Delrio was carrying a loaded pistol and that both the pistol and the ammunition had been transported from another state. ER 160, 277. Mr.

Delrio had a record that included felony convictions. ER 161, 278.

As a result of his September 5, 2019 arrest, Mr. Delrio was arraigned, pleading not guilty. ER 293, 297. Based on the government's requests, the district court detained Mr. Delrio without bail. ER 296-297, 300, 303-304, 316, 321-323, 326. He thus remained incarcerated throughout the proceeding. PSRs 4.

Sometime after Mr. Delrio was arrested in this matter, he had a three-way telephone conversation with Roy Hernandez. During the telephone conversation, Mr. Hernandez stated that the individual who had set up the drug deal in Mexico had been killed. Correspondingly, Mr. Delrio had not heard from Rudy since his arrest. ER 209. In the Spring of 2019, Mr. Delrio learned that his friend, Roy, had been killed in Tijuana, Mexico. ER 210. See also ER 216-217, 220-228.

### **C. The District Court's Preclusion of the Necessity Defense**

On April 1, 2019, Mr. Delrio filed a written offer of proof in support

of the necessity defense he sought to raise at trial. ER 202. Mr. Delrio explained that the only reason he became involved in the offense was to prevent Rudy Hernandez's friend from being harmed or killed. ER 203, 206, 208-209. Mr. Delrio explained that the fear someone could be killed if he did not deliver the drugs was objectively reasonable because at least two people involved were in fact killed following his arrest in the instant matter. ER 206.

The government filed a written opposition to Mr. Delrio's offer of proof. ER 195. At an April 22, 2019 hearing, the district court concluded, ". .for the reasons stated by the Government in its opposition to the proffer, I don't believe the defense has made a *prima facie* showing of the defense of necessity and; therefore, I'm going to preclude the assertion of that defense at trial." ER 178. See also, ER 172.

#### **D. The Plea Agreement and Change of Plea**

On April 24, 2019, Mr. Delrio and the government entered into a plea

agreement. ER 152, 169. Mr. Delrio agreed, *inter alia*, to plead guilty to Count One of the Indictment, Possession with Intent to Distribute Methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii); Count Three, Possession of a Firearm in Furtherance Of a Drug Trafficking Crime in violation of 18 U.S.C. § 924(c)(1)(A)(i); and Count 4, Felon in Possession of a Firearm and Ammunition in violation of 18 U.S.C. § 922(g). ER 153, 154.

Mr. Delrio and the government agreed that the entry of guilty pleas would be conditional, in that Mr. Delrio reserved the right, on appeal from the judgment, to seek review of the adverse determination of his offer of proof regarding necessity. Thus, if Mr. Delrio prevails on appeal, he will be allowed to withdraw his guilty pleas. ER 154, 155.

The government agreed to recommend a two-level reduction in the applicable Sentencing Guidelines offense level, pursuant to U.S.S.G. § 3E1.1, and recommend, and if necessary, move for an additional one-level reduction if available under that section, provided that Mr. Delrio

demonstrated an acceptance of responsibility for the offense. It further agreed to move to dismiss the remaining count against Mr. Delrio. ER 155.

In the plea agreement, Mr. Delrio waived the right to appeal his conviction, except for, *inter alia*, an appeal based on a claim that the guilty plea was involuntary or on a ground regarding the offer of proof. ER 163. The waiver of the right to attack the conviction included a waiver of his right to a collateral attack. ER 163. Mr. Delrio also agreed to a limited waiver of appeal of the sentence as long as the total term of imprisonment did not exceed 235 months. ER 164.

At the change of plea hearing, Mr. Delrio pleaded guilty to Counts One, Three, and Four of the Indictment. ER 106, 141-142. The district court accepted the pleas. ER 106, 143.

## **E. The Presentence Report and the Parties' Sentencing Positions.**

### **1. The Office of Probation's Presentence Report**

In advising the district court as to Mr. Delrio's appropriate sentence,

Probation filed a Pre Plea Report, a Presentence Report, and an addendum. ER 288, 292; PSRs 2, 3, 23. Ultimately, the Office of Probation recommended a 248-month term of incarceration and 5 years of supervised release. ER 99. This recommendation was based on following calculations:

Base Offense Level:	38
Guideline: § 2d1.1	
Adjusted Offense Level	38
Acceptance of Responsibility	-3
Total Offense Level	35
Criminal History Category	II

Sentencing Options:

Guideline Sentence 188 to 235 Months (plus mandatory 60 months pursuant to 21 U.S.C. § 924(c))

Supervised Release    5 Years [Count 1]  
                          2 to 5 Years [Count 3]  
                          1 to 3 Years [Count 4]

PSRs 6.

Mr. Delrio's Criminal History Category was based on a record that

included a 1992 misdemeanor conviction for receiving stolen goods, 1992 convictions for various weapons' charges and the sale of methamphetamine, a 1993 misdemeanor conviction for assault on a custodial officer, a 1995 conviction for the sale/transportation of a controlled substance, a 1996 conviction for taking a vehicle without consent, and a 2003 conviction for car jacking. PSRs 14.

## **2. The Government's Sentencing Position**

In taking a sentencing position, the government did not object to Probation's calculations of Mr. Delrio's offense level or criminal history category. ER 99. Consequently, the government recommended that Mr. Delrio be sentenced to a total of 248 months of imprisonment, to be followed by five years of supervised release. ER 99. The government further argued that Mr. Delrio should not be allowed a minor role adjustment. ER 102.

## **3. Mr. Delrio's Sentencing Position**

Mr. Delrio filed a sentencing position requesting a sentence of 15

years. ER 25. In making this request, Mr. Delrio discussed the individual who in fact had arranged the drug sale for which Mr. Delrio was charged in the instant matter – Primo, a.k.a. Ricardo Rodriguez-Perez, as well as other involved individuals, Maricela Arreola and Ernesto Beltran-Araujo. ER 29, 47-49, 60, 67, 75, 83. These individuals were prosecuted in Florida. ER 47. The documents filed in Florida showed Mr. Delrio's minimal involvement with the drug transaction as a mere courier. ER 51-52. On that basis, Mr. Delrio requested a minor-role adjustment. ER 54-57.

#### **F. Sentencing and the Notice of Appeal**

Mr. Delrio's sentencing hearing took place on July 8, 2019. ER 29. The government continued to oppose Mr. Delrio's request for a minor-role reduction. ER 33.

The district court denied Mr. Delrio's request for a minor-role reduction. ER 36-37. The court adopted the factual findings and the guideline application as calculated by Probation. ER 38. It then imposed

a 180-month term of incarceration on Count One to run concurrently with the 120-month term imposed on Count Four, and 60 months of incarceration on Court Three to be served consecutively with the terms for Count One and Four. ER 42. Thus, the district court imposed a total term of incarceration of 240 months. ER 1, 42. The district court imposed 5 years of supervised release on Counts One and Three and 3 years on Count 4, all of which were to run concurrently. ER 1, 41-43.

On the government's motion, the district court dismissed the remaining count against Mr. Delrio. ER 44.

## **G. The Appeal**

On July 12, 2019, Mr. Delrio filed a timely notice of appeal. ER 26. On November 2, 2020, the Ninth Circuit Court of Appeals issued a memorandum affirming Mr. Delrio's conviction and judgement.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION IN THIS MATTER MAGNIFIES THE CONFLICT AMONG THE CIRCUITS REGARDING THE WEIGHT A COURT CAN GIVE A DEFENDANT'S STATUS AS A COURIER WHEN DETERMINING A MITIGATING-ROLE ADJUSTMENT.

The Court of Appeals affirmed the denial of Mr. Delrio's request for a decrease in his offense level under the United States Sentence Guidelines.

The relevant guideline states:

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.

U.S.S.G. § 3B1.2.

The commentary to U.S.S.G. § 3B1.2 instructs that the determination whether to apply a mitigating-role reduction is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case. U.S.S.G. § 3B1.2, comm. n. 3(C). However, in reports to Congress, the Sentencing Commission identifies the likely participants in drug trafficking organizations and in so doing ranks them in terms of culpability. See *U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, Ch. 8 pp. 166-167 (Oct. 2011); *U.S. Sentencing Comm'n, Report to the Congress: Cocaine and Federal Sentencing Policy*, Ch 2, pp. 17-18 (May 2007).

In its 2011 report to congress, the Commission ranked the roles of drug trafficking participants in order of decreasing culpability as follows:

- High-Level Suppler/Importer: Imports or supplies large quantities of drugs (one kilogram or more); is near the top of the distribution chain; has ownership interest in the drugs; usually supplies drugs to other drug distributors and generally

does not deal in retail amounts.

- Organizer/Leader: Organizes or leads a drug distribution organization; has the largest share of the profits; possesses the most decision-making authority.
- Grower/Manufacturer: Cultivates or manufactures a controlled substance and is the principal owner of the drugs.
- Wholesaler: Sells more than retail/user-level quantities (more than one ounce) in a single transaction, purchases two or more ounces in a single transaction, or possesses two ounces or more on a single occasion, or sells any amount to another dealer for resale.
- Manager/Supervisor: Takes instruction from higher-level individual and manages a significant portion of drug business or supervises at least one other coparticipant but has limited authority.
- Street-Level Dealer: Distributes retail quantities (less than one

ounce) directly to users.

- Broker/Steerer: Arranges for drug sales by directing potential buyers to potential sellers.
- Courier: Transports or carries drugs using a vehicle or other equipment.
- Mule: Transports or carries drugs internally or on his or her person.

*U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, Ch. 8, pp. 165-167 (Oct. 2011),*  
emphasis added.

This ranking lists couriers as the second to the last in terms of culpability. A comment to U.S.S.G. § 3B1.2 further underscores the limited culpability of a drug trafficking courier:

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.

U.S.S.G. 3B1.2, comment. n. 3(C).

Although the Sentencing Commission has opined that a drug couriers is one of the very least culpable roles in a drug trafficking operation, some circuits adhere more closely the Sentencing Commission's commentary and rankings than do others.

The Ninth Circuit Court of Appeals' decision in the instant matter is a clear example of a decision that sorely tests the directives of the Sentencing Commission. The district court in the instant matter based its denial of the mitigating-role request on the indispensable nature of Mr. Delrio's actions as a courier, and, as found by the Ninth Circuit, justified that heavy reliance based on the manner in which Mr. Delrio performed his duties as a courier. ER 16, 54, 159-161; App 2a. Thus, the Court of Appeals in this matter determined that a courier's indispensability to a drug trafficking organization makes the courier highly culpable in terms of a mitigating-role adjustment.

Other Circuits have made similar determinations in which the mere fact that a defendant acted as a courier was heavily weighted in the calculation of a mitigating-role adjustment. *United States v. Bello-Sanchez*, 872 F.3d 260, 262, 264 (5<sup>th</sup> Cir. 2017) citing *United States v. Escobar*, 866 F.3d 333, 335-37 (5<sup>th</sup> Cir. 2017) for the holding that “...error lies only where the defendant's 'integral role' is treated as a *per se* bar to a mitigating-role adjustment and not where it is treated as a factor, even a heavily weighted one, in a broader calculus.” *United States v. Torres-Hernandez*, 843 F.3d 203, 209 (5<sup>th</sup> Cir. 2016). To similar effect see, *United States v. Sanchez-Villarreal*, 857 F.3d 714, 722 (5<sup>th</sup> Cir. 2017).

In great contrast to the decision in this matter and the decisions of the Fifth Circuit, the Third Circuit does not heavily weigh the indispensability of a drug couriers in a determining mitigating-role adjustment. *United States v. Rodriguez*, 342 F.3d 296, 300 (3d Cir. 2003) Thus, the Third Circuit adheres more closely to the commentary of the relevant sentencing guideline.

The split among the circuits on the issue of a mitigating-role adjustment is an important one. For certain courts to weight the mere fact that a defendant is a courier heavily in its determination of a mitigating-role adjustment while others do not, is a split this Court should address by granting the instant petition.

**II. THE DISTRICT COURT VIOLATED U.S.S.G. § 3B1.2 AND  
MR. DEL RIO'S DUE PROCESS RIGHT TO BE SENTENCED  
ON ACCURATE INFORMATION WHEN IT DENIED HIM  
A MITIGATING ROLE ADJUSTMENT BASED SIMPLY ON  
SPECULATIVE INFERENCES.**

Mr. Delrio acted as a courier in the single transaction for which he was incarcerated. The sum total of his involvement was little more than twenty-four hours. Despite the discrete and limited nature of Mr. Delrio's actions, the district court concluded that the very fact he had been entrusted to deliver the drugs elevated his culpability sufficiently to support a denial of a mitigating-role adjustment.

The Ninth Circuit Court of Appeals decided that the district court, ". . . reasonably concluded that 'defendant occupied a sufficiently high position of trust within the organization to bear sole responsibility for delivering multiple kilograms of methamphetamine and fentanyl,' and, therefore, had some understanding of the scope or structure of the

scheme.” App. 4a. On this basis the Court of Appeals affirmed Mr. Delrio’s conviction.

A drug courier is by definition a person who has been entrusted to deliver drugs. To say that a person is more than a mere courier and thus does not warrant a mitigating role adjustment because s/he has been entrusted to deliver drugs relies on little more than circular reasoning to achieve a predetermined result. In the instant matter, this circular reasoning was then used to speculate that, because Mr. Delrio was “trusted” he “had some understanding of the scope or structure of the scheme.”

Courts in other circuits have relied on this “trust reasoning” to speculate that the courier-defendant had greater participation than the record actually supported. See *United States v. Gómez-Encarnación*, 885 F.3d 52, 57 (1<sup>st</sup> Cir. 2018); *United States v. Gonzalez*, 534 F.3d 613, 617 (7<sup>th</sup> Cir. 2008) By contrast, other circuits, have rejected this type of speculation. See *United States v. Delgado-Lopez*, 974 F.3d 1188, 1193-1194 (10<sup>th</sup> Cir. 2020)

wherein the reviewing court determined that the district court had impermissibly speculated about the courier's culpability based on the financial wisdom of becoming a drug courier.; *United States v. Cruickshank*, 837 F.3d 1182, 1194 (11<sup>th</sup> Cir. 2016) remanding the matter where the court based its denial of a mitigating-role adjustment through speculation based on the drug quantity at issue.

There is clear a split among the circuits as to the use of speculative inferences in determining a mitigating-role adjustment. This alone is a basis for the grant of the instant petition. An additional basis, however, is that the use of speculative inferences in this context is a violation of due process.

Despite the wide ranging nature of information allowed at sentencing, due process provides some limitation in that it requires a defendant be sentenced on the basis of accurate information. *United States v. Wilson*, 900 F.2d 1350, 1353 (9<sup>th</sup> Cir. 1990) citing *Townsend v. Burke*, 334 U.S. 736, 741 (1948). This accuracy requirement connotes information that is reliable. *United States v. Littlesun*, 444 F.3d 1196, 1199 (9<sup>th</sup> Cir. 2006);

*United States v. Berry*, 258 F.3d 971, 976 (9<sup>th</sup> Cir. 2001). To similar effect, see U.S.S.G. § 6A1.3(a) which requires that information used in sentencing have "sufficient indicia of reliability to support its probable accuracy."

A defendant cannot be deprived of liberty based upon mere speculation. *United States v. Berry*, 553 F.3d 273, 284 (3d Cir. 2009); *United States v. Kluball*, 843 F.3d 716, 719 (7<sup>th</sup> Cir. 2016) holding that information is not reliable where it is based on speculation or unfounded allegations. To satisfy due process, facts that are considered at sentencing, as a general matter, must be proved by a preponderance of the evidence. *Berry*, 553 F.3d 273, 284 citing *United States v. Watts*, 519 U.S. 148, 156 (1997). See also *United States v. Alvarado-Martinez*, 556 F.3d 732, 734-35 (9<sup>th</sup> Cir. 2009).

The district court violates a defendant's due process rights when it relies on materially false or unreliable information at sentencing. See *United States v. Tucker*, 404 U.S. 443, 446 (1972); *United States v. Sand*, 541 F.2d 1370, 1378 (9<sup>th</sup> Cir. 1976). To establish the violation of his due process right to be sentenced based on accurate information, a defendant must show that the

asserted allegations were (1) false or unreliable, and (2) demonstrably made the basis for the sentence. *United States v. McGowan*, 668 F.3d 601, 606 (9<sup>th</sup> Cir. 2012) citing *United States v. Vanderwerfhorst*, 576 F.3d 929, 935-936 (9<sup>th</sup> Cir. 2009) and *United States v. Ibarra*, 737 F.2d 825, 827 (9<sup>th</sup> Cir. 1984).

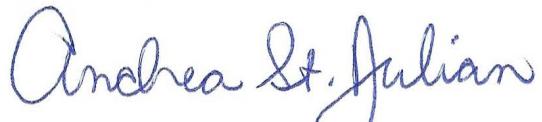
The inference on which the district court denied Mr. Delrio a mitigating-role adjustment was based, not on facts, but on the district court's speculative assertion. The Ninth Circuit's decision thus violates due process and this violation warrants the grant of the instant petition for a writ of certiorari.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: January 27, 2021

Respectfully submitted,



Andrea Renee St. Julian  
Counsel of Record for Petitioner,  
SALVADOR DELRIO

# APPENDICES

# APPENDIX A

**NOT FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
v.  
SALVADOR DELRIO,  
Defendants-Appellants.

No. 19-50230  
D.C. No.  
2:18-cr-00686-PA-1

**MEMORANDUM\***

Appeal from the United States District Court  
for the Central District of California  
Percy Anderson., District Judge, Presiding

Argued and Submitted October 14, 2020  
Pasadena, California

Before: GOULD and LEE, Circuit Judges, and KORMAN, \*\* District Judge.

Salvador Delrio appeals from the district court's preclusion of a necessity defense at trial and the sentence resulting from his conditional guilty plea. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We affirm.

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

\*\* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

1. Necessity defense: We review de novo a district judge’s preclusion of a necessity defense. *See United States v. Barnes*, 895 F.3d 1194, 1195 (9th Cir. 2018). To present a necessity defense, a defendant must first establish that a reasonable jury could conclude: “(1) that he or she was faced with a choice of evils and chose the lesser; (2) that he or she acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law.” *United States v. Arellano-Rivera*, 244 F.3d 119, 1125-26 (9th Cir. 2001) (citing *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989)). But when a “defendant’s offer of proof is deficient with regard to *any* of the four elements, the district judge *must* grant the motion to preclude evidence of necessity.” *Id.* at 1125-26 (emphasis added).

The district did not err in barring Delrio’s necessity defense because he never faced a choice of evils. Instead, a friend invited him to participate in a drug trafficking scheme in exchange for money. He accepted, and only later decided that his actions could “possibly” save an unidentified third-party’s life. Indeed, nobody told Delrio that his actions could spare that individual’s life. Moreover, Delrio could not establish imminence of harm or a causal connection between his acts and the avoidance of a greater evil.

2. Minor role adjustment: The district court did not err in denying Delrio’s request for a minor-role adjustment. In evaluating a request for a minor-role

adjustment, a court must consider the non-exhaustive factors outlined in U.S.S.G. § 3B1.2 cmt. n.3(C). We, however, do not require the district judge to “tick off each of the factors to show that it has considered them.” *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008). Rather, absent evidence to the contrary, we “assume the district judge knew the law and understood his or her obligation to consider all of the sentencing factors.” *United States v. Diaz*, 884 F.3d 911, 916 (9th Cir. 2018).

The district court cited and applied the correct Guidelines factors. For example, it discussed Delrio’s limited negotiating power in juxtaposition with his substantial autonomy. It reasonably concluded that “defendant occupied a sufficiently high position of trust within the organization to bear sole responsibility for delivering multiple kilograms of methamphetamine and fentanyl,” and, therefore, had some understanding of the scope or structure of the scheme.

In refusing to grant minor role adjustment, the district court did not rely solely on Delrio’s essential role. Instead, it gave significant weight to the level of autonomy that Delrio exercised, the high quantity of drugs he trafficked, and his possession of a firearm. According to Delrio, the suppliers detained a previous courier because they did not trust him with this shipment. The district court thus did not err in considering the suppliers’ apparent trust in Delrio. Moreover, the district court could have considered these factors as inconsistent with a minor role adjustment. *See United States v. Davis*, 36 F.3d 1424, 1436 (9th Cir. 1994) (a district

court appropriately “denied downward adjustments to defendants who were couriers where some *additional* factors [like the amount of drugs] showed that they were not a minor or minimal [participant]”); *United States v. Rodriguez-Castro*, 641 F.3d 1189 (9th Cir. 2011) (a district court did not abuse its discretion when “justifiably skeptical that [the] amount of drugs [in question] would not be entrusted to a minor player”).

3. Quantity of drugs: The district court did not err in determining that Delrio knew the quantity of drugs in his possession. Under his plea bargain, Delrio admitted that “he knew that the suitcase and duffel bag contained methamphetamine.”

4. Procedurally and substantively unreasonable sentence: A district court must consider the Section 3553 factors in sentencing a defendant. 18 U.S.C. § 3553(a). Delrio argues that the district court failed to adequately consider the nature and circumstances of the offense, the need to protect the public from further crimes, and the need to avoid unwarranted sentencing disparities.

But a district court need not “tick off” each of the factors in its explanation. *See Carty*, 520 F.3d at 992. Absent contrary evidence, we accept a district court’s statement that it reviewed and considered the submissions. *See id.* at 996. The district court acknowledged having “received, read, and considered” the sentencing memoranda and the Presentence Report.

We conclude that the district court did not err by imposing a sentence on the lower end of the Guidelines-recommended range: 240-months imprisonment. We review a district court's decision for an abuse of discretion in light of the totality of the circumstances. *See United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055 (9th Cir. 2009). Contrary to Delrio's claims, the district court did consider the nature of Delrio's offense, his culpability, available defenses, criminal history, and the need to avoid sentencing disparities.

**AFFIRMED.**

# APPENDIX B

United States District Court  
Central District of California

UNITED STATES OF AMERICA vs.

Defendant Salvador DelrioTrue Name: Salvador Hernandez Del Rio; Also  
Known As: Salvador Delrio Hernandez; Also  
Known As: Salvador Del Rio Hernandez;  
akas: Moniker: SpankyDocket No. CR 18-686 PASocial Security No. 9 3 2 2

(Last 4 digits)

## JUDGMENT AND PROBATION/COMMITMENT ORDER

MONTH	DAY	YEAR
July	08	2019

In the presence of the attorney for the government, the defendant appeared in person on this date.

**COUNSEL**

Angel Navarro, CJA

(Name of Counsel)

**PLEA** **GUILTY**, and the court being satisfied that there is a factual basis for the plea.  **NOLO**  
**CONTENDERE**  **NOT**  
**GUILTY****FINDING**There being a finding/verdict of **GUILTY**, defendant has been convicted as charged of the offense(s) of:

Possession with Intent to Distribute Methamphetamine in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 841(b)(1)(A)(viii) as charged in Count 1 of the 4-Count Indictment

Possession of a Firearm in Furtherance of a Drug Trafficking Crime in violation of 18 U.S.C. § 924(c)(1)(A)(i) as charged in Count 3 of the 4-Count Indictment

Prohibited Person in Possession of a Firearm and Ammunition in violation of 18 U.S.C. § 922(g), 18 U.S.C. § 924(a)(2) as charged in Count 4 of the 4-Count Indictment

**JUDGMENT  
AND PROB/  
COMM  
ORDER**

The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Salvador Delrio, is hereby committed on Counts 1, 3, and 4 of the Indictment to the custody of the Bureau of Prisons for a term of 240 months. This term consists of 180 months on Count 1 and 120 months on Count 4 of the Indictment, to be served concurrently with each other, and 60 months on Count 3, to be served consecutively to Counts 1 and 4.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 5 years. This term consists of 5 years on each of Counts 1 and 3 and 3 years on Count 4 of the Indictment, all such terms to run concurrently under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation & Pretrial Services Office and General Order 18-10.
2. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from custody and at least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer.
3. During the period of community supervision, the defendant shall pay the special assessment in accordance with this judgment's orders pertaining to such payment.

USA vs. SALVADOR DELRIODocket No.: CR 18-686 PA

4. When not employed or excused by the Probation Officer for schooling, training, or other acceptable reasons, the defendant shall perform 20 hours of community service per week as directed by the Probation & Pretrial Services Office.
5. The defendant shall cooperate in the collection of a DNA sample from the defendant.
6. The defendant shall submit his person, property, house, residence, vehicle, papers, computers [as defined in 18 U.S.C. § 1030(e)(1)], cell phones, other electronic communications or data storage devices or media, office, or other areas under the defendant's control, to a search conducted by a United States Probation Officer or law enforcement officer. Failure to submit to a 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. Any search pursuant to this condition will be conducted at a reasonable time and in a reasonable manner upon reasonable suspicion that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation.

It is ordered that the defendant shall pay to the United States a special assessment of \$300, which is due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than \$25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

Pursuant to Guideline § 5E1.2(a), all fines are waived as the Court finds that the defendant has established that he is unable to pay and is not likely to become able to pay any fine.

The Court recommends that the defendant be incarcerated in a Southern California facility.

The Court further recommends that the Bureau of Prisons consider the defendant for placement in its 500-hour Residential Drug Abuse Program.

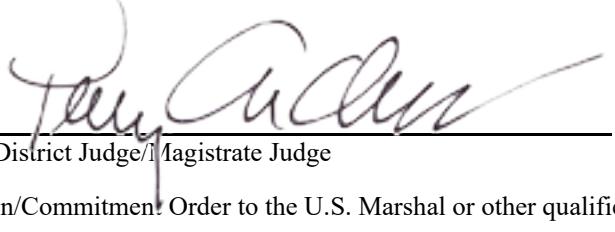
On Government's motion, all remaining counts are ORDERED dismissed.

Defendant advised of his right to appeal.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

July 08, 2019

Date

  
U. S. District Judge/Magistrate Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

July 08, 2019

By /s/ Kamilla Sali-Suleyman

USA vs. SALVADOR DELRIODocket No.: CR 18-686 PA

Filed Date

Deputy Clerk

The defendant must comply with the standard conditions that have been adopted by this court (set forth below).

### **STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE**

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant must work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;
9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;
10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;
13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;
14. As directed by the probation officer, the defendant must notify specific persons and organizations of specific risks posed by the defendant to those persons and organizations and must permit the probation officer to confirm the defendant's compliance with such requirement and to make such notifications;
15. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

The defendant must also comply with the following special conditions (set forth below).

#### **STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS**

The defendant must pay interest on a fine or restitution of more than \$2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(1)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1. Special assessments under 18 U.S.C. § 3013;
2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid):
  - Non-federal victims (individual and corporate),
  - Providers of compensation to non-federal victims,
  - The United States as victim;
3. Fine;
4. Community restitution, under 18 U.S.C. § 3663(c); and
5. Other penalties and costs.

#### **CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS**

As directed by the Probation Officer, the defendant must provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

The defendant must maintain one personal checking account. All of defendant's income, "monetary gains," or other pecuniary proceeds must be deposited into this account, which must be used for payment of all personal expenses. Records of all other bank accounts, including any business accounts, must be disclosed to the Probation Officer upon request.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of \$500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

USA vs. SALVADOR DELRIO

Docket No.: CR 18-686 PA

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**RETURN**

I have executed the within Judgment and Commitment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

Defendant noted on appeal on \_\_\_\_\_ to \_\_\_\_\_

Defendant released on \_\_\_\_\_ to \_\_\_\_\_

Mandate issued on \_\_\_\_\_ to \_\_\_\_\_

Defendant's appeal determined on \_\_\_\_\_ to \_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

at \_\_\_\_\_  
the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

By \_\_\_\_\_

Deputy Marshal

\_\_\_\_\_  
Date

**CERTIFICATE**

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

By \_\_\_\_\_

Deputy Clerk

\_\_\_\_\_  
Filed Date

**FOR U.S. PROBATION OFFICE USE ONLY**

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) \_\_\_\_\_ Date \_\_\_\_\_  
Defendant

\_\_\_\_\_  
U. S. Probation Officer/Designated Witness Date