# No. _____

# In the
# Supreme Court of the United States

OCTOBER TERM, 2020

PEDRO RAUL GONZALEZ-MENDOZA,
*Petitioner,*

v.

UNITED STATES OF AMERICA
*Respondent.*

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

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

DID THE DISTRICT COURT ERR BY FINDING THAT MR. GONZALEZ-MENDOZA WAS NOT ELIGIBLE FOR A MITIGATING ROLE ADJUSTMENT PURSUANT TO U.S.S.G. §3B1.2?

DID THE DISTRICT COURT ERR BY CONSIDERING EXTRANEOUS FACTORS IN DENYING AN ADJUSTMENT FOR MITIGATING ROLE ?

DID THE DISTRICT COURT ERR BY COMPARING MR. GONZALEZ-MENDOZA TO DEFENDANTS IN OTHER, UNRELATED CASES ?

DID THE DISTRICT COURT ERR BY DENYING MR. GONZALEZ-MENDOZA A MITIGATING ROLE ADJUSTMENT WITHOUT PROPERLY CONSIDERING THE FACTORS SET FORTH IN THE 2015 AMENDMENT TO § 3B1.2?

DID THE DISTRICT COURT ERR BY DENYING MR. GONZALEZ-MENDOZA A REDUCTION FOR HIS ROLE IN THE OFFENSE UNDER U.S.S.G. §3B1.2 WHEN THERE WAS SUFFICIENT AND SUBSTANTIAL EVIDENCE TO WARRANT THIS REDUCTION?

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The decision of the Court of Appeals for the Fifth Circuit is reported as *United States v. Gonzalez-Mendoza*, No.19-41051 (5th Cir. November 9, 2020)(not published). It is attached to this Petition in the Appendix.

## JURISDICTION

The decision by the United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment of conviction and sentence in the Southern District of Texas.

Consequently, Mr. Gonzalez-Mendoza files the instant Application for a Writ of Certiorari under the authority of Title 28, U.S.C., § 1254(1).

## BASIS OF FEDERAL JURISDICTION

## IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in the United States District Court for the Southern District of Texas because Mr. Gonzalez-Mendoza was indicted for violations of Federal law by the United States Grand Jury for the Southern District of Texas.

## CONSTITUTIONAL PROVISIONS

### U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

### U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

# STATEMENT OF THE CASE

## 1. Procedural History.

On January 30, 2019, a Superseding Indictment was filed in the Southern District of Texas, McAllen Division, charging Appellant Pedro Raul Gonzalez-Mendoza in Counts 1 and 3 through 6, Brenda Acuna in Counts 1 and 2, Manuel Perez-Gonzalez-Mendoza (hereinafter referred to as Manuel Perez) in Counts 1, 2, and 7, and David Jesus Zavala (hereinafter referred to as David Zavala) in Counts 1, 3, and 4 as follows:

Count 1: Conspiracy to possess with intent to distribute 500 grams or more of methamphetamine and 5 kilograms or more of cocaine, in violation of 21 U.S.C. § 846, 841(a)(1), and 841(b)(1)(A).

Count 2: Possess with intent to distribute 500 grams or more, that is, approximately 20.40 kilograms of methamphetamine, in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(A), and 18 U.S.C. § 2.

Count 3: Possess with intent to distribute 500 grams or more, that is, approximately 27.80 kilograms of methamphetamine, in violation of 21 U.SC. § 841(a)(1), 841(b)(1)(A), and 18 U.S.C. § 2.

Count 4: Possess with intent to distribute 5 kilograms or more, that is, approximately 20 kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(A), and 18 U.S.C. § 2.

Count 5: Possess with intent to distribute 500 grams or more, that is, approximately 19.50 kilograms of methamphetamine, in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(A), and 18 U.S.C. § 2.

Count 6: Possess with intent to distribute 5 kilograms or more, that is, approximately 5.50 kilograms of cocaine, in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(A), and 18 U.S.C. § 2.

Count 7: Possess with intent to distribute 500 grams or more, that is, approximately 15.65 kilograms of methamphetamine, in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(A), and 18 U.S.C. § 2.

ROA. 37-40.[1]

On October 4, 2019, Mr. Gonzalez-Mendoza , Brenda Acuna, and David Zavala, each accompanied by respective legal counsel, appeared before the Honorable Randy Crane, U.S. District Judge, McAllen, Texas, and entered a plea of guilty to Count 1 of the seven-count Superseding Indictment. ROA.117.

[1]In the references to the Record on Appeal, references are made according to the pagination assigned by the Clerk of the Court.

The pleas were entered pursuant to identical written Rule 11(c)(1)(A) and (B) plea agreements stipulating that in exchange for the defendants' pleas of guilty to Count 1 of the seven-count Superseding Indictment, the government will recommend the offense level decrease by two levels, pursuant to U.S.S.G. § 3E1.1(a), if the defendants clearly demonstrate acceptance of responsibility for the instant offense. The plea agreements also stipulated that the Indictment and the remaining counts of the Superseding Indictment, as they pertain to each defendant, be dismissed at the time of the sentencing hearings. ROA. 168-169.

Mr. Gonzalez-Mendoza was sentenced on December 17, 2019. The District Court sentenced Mr. Gonzalez-Mendoza to a 168-month term of imprisonment. ROA. 165. The District Court also ordered a special assessment of $100. The District Court did not impose a term of supervised release since Mr. Gonzalez-Mendoza is a deportable alien. ROA.165. A notice of appeal was then timely filed.

On November 9, 2020, a panel of the Fifth Circuit affirmed the Petitioner's conviction in an unpublished decision.

**2. Statement of Facts.**

Pedro Raul Gonzalez-Mendoza is a 31-year old man who is a citizen of Mexico. He is a father to two young children. Virtually all of his family members

reside in Mexico. Mr. Gonzalez-Mendoza has no prior convictions and no criminal history points. He was classified with a criminal history category "I".

The factual basis provided:

> Beginning sometime in January of 2018 and continuing to on or about December of [2018], the Defendants, Pedro Raul Gonzalez-Mendoza, Brenda Acuna, and Davis Jesus Zavala, and others known and unknown entered into an agreement to possess with intent to distribute narcotics. In furtherance of this agreement, Brenda Acuna would receive speaker boxes that she knew contained an illegally[*sic*] substance from Manuel Perez-Espinoza that she would transport in her van to Dallas and Houston. In Dallas and Houston, Brenda Acuna would arrange to deliver the speaker boxes to the individuals Manuel Perez-Espinoza designated. On April 18th, 2018, Guadalupe Gutierrez and Brenda Acuna were stopped at the Falfurrias Checkpoint in Brenda Acuna's van with two speaker boxes containing eight packages of methamphetamine weighing approximately 20 kilograms that they had received from Manuel Perez-Espinoza. In furtherance of this agreement, on August 22nd, 2018, Pedro Raul Gonzalez-Mendoza delivered several speaker boxes containing approximately 27.8 kilograms of methamphetamine and 20 kilograms of cocaine to Davis Jesus Zavala who was then going to deliver them to someone else. The speaker boxes were then seized by law enforcement. ROA.144-45. Mr. Gonzalez-Mendoza said these facts were all true. ROA.145.

This criminal case arose from the following factual context. At approximately 8:32 a.m. on April 18, 2018, Customs and Border Protection (CBP) agents conducted a search of a blue 2007 Chrysler Town and Country van driven by co-conspirator Guadalupe Gutierrez at the Border Patrol checkpoint near Falfurrias, Texas. Brenda Acuna and her three-year-old daughter were passengers in the van. Law enforcement

officers discovered a total of about 20.40 kilograms (gross weight) of methamphetamine hidden within two audio speaker boxes inside the van. Guadalupe Gutierrez and Brenda Acuna were arrested in reference to the narcotics seizure, but they did not discuss the offense with authorities immediately following their arrests.

The methamphetamine and van were both seized in reference to the offense. A laboratory test indicated that the controlled substance was d-methamphetamine with a net weight of 19.85 kilograms and a purity level of 92 percent,which means it is considered "Ice" based on a purity level of at least 80 percent. When questioned on May 31, 2018, and August 15, 2018, subsequent to his arrest regarding the related case in U.S. District Court, Southern District of Texas, Corpus Christi Division, Docket Number 2:18CR00383-001, Guadalupe Gutierrez informed law enforcement officials that he met Manuel Perez in 2016, and Mr. Perez offered Guadalupe Gutierrez opportunities to earn money in return for transporting audio speaker boxes loaded with unknown contraband, which Mr. Gutierrez believed to be narcotics. According to Guadalupe Gutierrez, he and Brenda Acuna made three deliveries on unspecified dates on behalf of Manuel Perez, and Mr. Perez paid Guadalupe Gutierrez approximately $1,500 to $1,800 per trip. The first two deliveries were made by Mr. Gutierrez and Brenda Acuna to Dallas, Texas, while the third delivery was made to Houston, Texas. As indicated above, Guadalupe Gutierrez and Brenda Acuna were

arrested during their fourth trip on April 18, 2018, at the Border Patrol checkpoint near Falfurrias, Texas. During continued questioning with authorities, Mr. Gutierrez informed agents that Brenda Acuna maintained consistent telephonic contact with Manuel Perez during each of the deliveries that Mr. Gutierrez and Ms. Acuna made together. Further, Guadalupe Gutierrez revealed that Manuel Perez provided him with different vans to use for the previous deliveries.

Additionally, according to Mr. Gutierrez, Manuel Perez met him and Brenda Acuna prior to each trip/load, and Mr. Perez would load speaker boxes containing narcotics into whatever vehicle was used on that occasion. Lastly, Guadalupe Gutierrez stated that the blue Town and Country van seized on April 18, 2018, belonged to Brenda Acuna, and Mr. Gutierrez and Ms. Acuna were accompanied by her young daughter and/or son on each of the four trips they made together.

On July 17, 2018, DEA agents received information from an unknown source concerning a planned delivery of narcotics from the Rio Grande Valley of Texas to Atlanta, Georgia. Later that same day, authorities observed David Zavala assist in transporting and loading approximately 60 kilograms of methamphetamine, at least some of which was concealed in audio speaker boxes, into a tractor-trailer outside a Motel 6 along West Nolana Avenue in McAllen, Texas. Mr. Zavala arrived at the location in a gray Cadillac CTS and met with unnamed co-conspirators on that

occasion. The methamphetamine was subsequently transported from south Texas to Atlanta as part of a controlled delivery on July 24, 2018, but David Zavala was not arrested at that time. A laboratory report concerning the 60 kilograms (gross weight) of methamphetamine from the controlled delivery to Atlanta has been requested, but it has not been received.

Nonetheless, a DEA case agent confirmed that the controlled substance in question was d-methamphetamine ("Ice") with a purity level of at least 80 percent. After identifying Mr. Gonzalez-Mendoza as a member of the instant conspiracy, DEA agents conducted surveillance of Mr. Gonzalez-Mendoza on August 2, 2018. At approximately 8:27 p.m. on that day in Pharr, Texas, agents observed Mr. Gonzalez-Mendoza deliver four audio speaker boxes in a 2000 Freightliner tractor-trailer to David Zavala, who was driving a gray 2006 Cadillac CTS. Shortly thereafter, an officer of the Pharr Police Department conducted a traffic stop of David Zavala for a traffic violation. After a canine alerted to the presence of narcotics in Mr. Zavala's automobile, a search of the trunk of the Cadillac resulted in the discovery of a total of approximately 52.82 kilograms (gross weight) of methamphetamine and/or cocaine within the aforementioned four speaker boxes. The narcotics, Cadillac CTS, and David Zavala's mobile telephone were seized in reference to the instant offense. David Zavala was subsequently questioned, but he did not have any information to

provide authorities at that time. Mr. Gonzalez-Mendoza was not arrested or questioned on that date. Laboratory tests indicated that the narcotics consisted of 20.10 kilograms of cocaine (net weight), as well as 27.90 kilograms (net weight) of dmethamphetamine with a purity level of 98 percent, which means the methamphetamine is considered "Ice."

At approximately 1:35 p.m. on November 19, 2018, immigration officers at the Pharr, Texas, Port of Entry searched a tractor-trailer driven by Mr. Gonzalez-Mendoza bearing Mexican license plates. A search of the vehicle resulted in an apparent anomaly in a vehicular tool compartment. An audio speaker box was found within the tool compartment, and a closer inspection of the speaker box resulted in the discovery of narcotics wrapped in plastic and tape. Another such speaker box was found in the tractor cab, and that box also contained narcotics wrapped in plastic and tape. The narcotics in the speaker boxes were determined to be approximately 19.45 kilograms (gross weight) of methamphetamine and about 5.65 kilograms (gross weight) of cocaine.

Mr. Gonzalez-Mendoza was arrested in reference to the narcotics, and a pat search of Mr. Gonzalez-Mendoza resulted in the discovery of a small plastic bag containing approximately 3 grams of additional cocaine. Mr. Gonzalez-Mendoza was arrested, and the narcotics, tractor-trailer, and Mr. Gonzalez-Mendoza's mobile

telephone were seized in reference to the instant conspiracy. Laboratory results reflect the net weight of the seized cocaine was 5.00 kilograms, while the d-methamphetamine had a purity level of 99 percent ("Ice") and a net weight of 18.75 kilograms.

During post-arrest questioning on November 19, 2018, Mr. Gonzalez-Mendoza informed DEA agents that he transported produce on regular basis from Tamaulipas, Mexico, to Pharr, Texas. According to Mr. Gonzalez-Mendoza, he met an individual known only as "Serrano" in 2017 at a truck stop in Reynosa, Tamaulipas, Mexico. Through continued contact with "Serrano," Mr. Gonzalez-Mendoza learned that "Serrano" was an illegal narcotics distributor based in Rio Bravo, Tamaulipas, Mexico, who worked for an individual known only as "La Rana."

Mr. Gonzalez-Mendoza admitted to DEA agents that in June 2018, he transported an audio speaker box in his tractor-trailer from Reynosa to Pharr to an individual referred to as Ivan Chino in exchange for $1,500 from "La Rana." Moreover, Mr. Gonzalez-Mendoza admitted to agents that in July 2018, he successfully transported two speaker boxes in his tractor-trailer from Reynosa to Pharr to an individual known as "Don Macas" in exchange for $3,000 from "La Rana." Further, according to Mr. Gonzalez-Mendoza, in September 2018 he delivered

one speaker box in his tractor-trailer from Reynosa to Pharr to an unidentified person in return for a $1,500 payment from "La Rana."

Additionally, Mr. Gonzalez-Mendoza informed agents that on November 19, 2018, "Serrano" provided him with two audio speaker boxes to be transported in Mr. Gonzalez' tractor-trailer from Reynosa to Pharr in exchange for a payment of $3,000. Lastly, according to Pedro Gonzalez, "La Rana" was employed by an individual known only as "El Mencho," who was one of the individuals reportedly in charge of the Jalisco New Generation Cartel in Mexico.This the criminal conduct that comprised the charges to which Mr. Gonzalez-Mendoza entered a plea of "guilty". ROA. 117.

The PSR assigned Mr. Gonzalez-Mendoza a base offense level of 38 for Count One, based on the amount of methamphetamine for which he was responsible.[2] Pursuant to USSG §2D1.1(b)(5), the PSR assigned a two-level increase based on its finding that the offense involved the importation of amphetamine or methamphetamine. The PSR found that the investigation revealed that the methamphetamine involved in this conspiracy was obtained from Mexico and that a two-level increase was warranted. No adjustment for role was assigned.

[2]"PSR" refers to the Presentence Investigation Report filed by the United States Probation Department (under seal).

Mr. Gonzalez-Mendoza filed objections to the PSR. Mr. Gonzalez-Mendoza objected because he was not assigned a mitigating role adjustment. The District Court overruled the objection to the PSR. ROA. 164.

The District Court explained its ruling as follows:

> "The Court adopts the factual findings contained within the presentence report. It is correctly scored at a Base Offense Level of 38. He for two points for being involved in the importation of meth, but I do grant two points off because he's Safety Valve qualified and I grant all three acceptance points off. That reduces the Defendant to a level of 35. He has no Criminal History and therefore, he's in a range of 168 to 210 months." ROA. 164.

The District Court subsequently sentenced Mr. Gonzalez-Mendoza to a total of 168 months' imprisonment. ROA. 164. The notice of appeal was then timely filed. On November 9, 2020, the Fifth Circuit affirmed Mr. Gonzalez-Mendoza's conviction and sentence in an unpublished, per curiam decision. *See United States v. Gonzalez-Mendoza*, No.19-41051 (5th Cir. 2020).

## REASONS WHY CERTIORARI SHOULD BE GRANTED

In this case, the District Court erroneously denied Mr. Gonzalez-Mendoza a reduction for his role in the offense under U.S.S.G. §3B1.2 although there was substantial evidence to substantiate this reduction. United States Sentencing Guideline U.S.S.G. § 3B1.2 decreases a defendant's offense level based on his comparatively mitigating role in an offense. A defendant is eligible for a downward adjustment of at least two levels if he is substantially less culpable than other offense participants.

Section 3B1.2 and its associated Application Notes list several factors that must be considered in determining the applicability of the mitigating-role adjustment. Section 3B1.2 of the Sentencing Guidelines instructs the district court to reduce a defendant's offense level if he occupied a comparatively less culpable role than other offense participants. *See United States v. Gomez-Valle*, 828 F.3d 324, 328 (5th Cir. 2016). The Fifth Circuit erred by affirming the District Court's determination because the District Court relied on legally unrelated and improper factors in denying this adjustment.

The Guideline provides: 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. USSG § 3B1.2.

"The commentary to § 3B1.2 provides that a mitigating role adjustment is available to any defendant 'who plays a part in committing the offense that makes him substantially less culpable than the average participant.'" *Gomez-Valle*, 828 F.3d at 328; *see* also USSG § 3B1.2, comment. [n.3(A)]. As to the degree of adjustment warranted, the commentary explains that a defendant's "lack of knowledge or understanding of the scope and structure of the [criminal] enterprise and of the activities of others is indicative of a role as [a] minimal participant." *Id*. § 3B1.2, comment. (n.4).

A minor participant, in contrast, is a person who "is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal." *Id*. § 3B1.2, comment. (n.5). The applicability of the adjustment 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, comment. [n.3( c )].

Effective November 1, 2015, the United States Sentencing Commission amended § 3B1.2 based on its determination that courts had been applying mitigating-role adjustments "inconsistently and more sparingly than the Commission intended." USSG App. C, amend 794, at 117 (Supp. Nov. 1, 2015); *see Gomez-Valle*, 828 F.3d at 329. As relevant to this appeal, the amendment made two changes to the Guideline's commentary intended to clarify its proper application and remedy its underuse.

First, the amendment revised Application Note 3(A) to specify that, when determining whether to apply a mitigating-role adjustment, the defendant is to be compared with the other participants "in the criminal activity." USSG § 3B1.2, comment. (n.3[A]). The Commission intended this revision to clarify that the "average participant" encompasses "only those persons who actually participated in the criminal activity at issue in the defendant's case, so that the defendant's relative culpability is determined only by reference to his or her co-participants in the case at hand." USSG App. C, amend 794, at 117 (citing cases applying this analysis); *see Gomez-Valle*, 828 F.3d at 329.

The Guideline commentary defines "participant" as one who is one criminally responsible for the offense whether or not he has been convicted of it. *See* USSG § 3B1.2, comment. (n.1) (incorporating definition in § 3B1.1); see id. § 3B1.1,

comment. (n.1) ("A 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted.").

Second, the amendment directed the sentencing court to consider a "nonexhaustive list of factors" in order to "give the courts a common framework" for determining whether to apply a mitigating-role adjustment and, if so, to what degree. U.S.S.G. App. C, amend. 794 , at 118. The commentary now provides that the court should consider:

(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; [and]

(v) the degree to which the defendant stood to benefit from the criminal activity. USSG § 3B1.2, comment. (n.3 [c]).

Section 3B1.2's relative-culpability inquiry is based on the defendant's role in the relevant conduct for which he or she is held accountable at sentencing. *See United States v. Garcia*, 242 F.3d 593, 598 (5th Cir. 2001) ("The determination is to be made in light of all relevant conduct ('all conduct within the scope of § 1B1.3 (Relevant Conduct)'), 'not solely on the basis of elements and acts cited in the count of conviction.'". "In other words, the district court must assess whether the defendant is a minor or minimal participant in relation to the relevant conduct attributed to the defendant in calculating [his or] her base offense level." *United States v. Rodriguez De Varon*, 175 F.3d 930, 940 (11th Cir. 1999) (en banc).

The following colloquy occurred during the sentencing hearing regarding the mitigating role adjustment:

> **MR. BARREIRO:** Judge, we did ask for a mitigating role of minus two in this case because it was a transporter and I believe the Guidelines even states that a transporter is a mitigating reduction as far as to be considered.
>
> **THE COURT:** Yeah, the Guidelines don't say that, but sometimes, you know, drug mules are minor. It depends on the duration of their involvement, how frequently they were delivering, there's a lot of factors that go into it.
>
> **MR. BARREIRO:** There's factors like was he participating in the profits of the conspiracy, what was his role in the conspiracy, was he entitled to a greater amount of money because of his participation, did he have people under him that were working under him. So, there's a series in the Guidelines of questions that are --

**THE COURT:** Sure. Right. Just not sure about him.

**MR. BARREIRO:** I think he -- and also they set him at the bottom of the people that were involved. He was the last one in the PSR.

**THE COURT:** So, he was –- Ms. Profit, you can correct me if I'm wrong, but so he was bringing in these audio speakers loaded with narcotics and then they would hand them off and other people were caught with him also --

**MS. PROFIT:** Other people were caught with him. He was involved in helping cross them into the United States. He was involved in coordinating the pickup of them. I don't believe that it is fair -– I do not think that he is eligible for a role adjustment because I think his role was far more extensive in terms of the number of people he met, the number of times he went back and went through these POE crossings, and the number of the times that we went back and look at his crossings through the Checkpoint. So, I don't think that it's fair to say that he's like a transporter who happened to be caught just on this one occasion or transferred it on this one occasion. He was far more heavily involved than that.

**MR. BARREIRO:** Judge, there were three others. One was David Zavala, the other one was Manuel Perez, and there was Brenda Acuna. And in the PSR, he's listed as the one with the least responsibility, and they state so that he was transporting. At one point on time, he transported and they allowed him to transport because they knew that he was possibly carrying something so he came across the bridge and he left the box right in Hidalgo, the city of Hidalgo, and then he was arrested after that. But the other ones that are basically ones that were transporting up north or attempting to transport, and they had, obviously, more responsibility so far as contact with buyers and so forth.

**MS. PROFIT:** I don't think that that's a fair assessment of his role. Just because he as primarily involved here does not mean that he was not responsible and an active participant in more than a minimal involvement.

**THE COURT:** Right. I mean, here, they mention at least four times. I suspect maybe more, but --

**MR. BARREIRO:** I think because the other ones he's in the process of qualifying for the Safety Valve or possibilities of (indiscernible), he admitted to them that he had done it about three times or four times, Judge. He had to tell the truth or he --

**THE COURT:** They caught him twice.

**MS. PROFIT:** The Government was already aware of his extensive involvement at the time that he met with them and that created part of the problem because they felt we had to go back in and demonstrate to him that we had already had pictures of him meeting with Zavala, that we already knew about his intensive involvement. It's not something that he was a happenstance person who just happened to have crossed at the Checkpoint.

**MR. BARREIRO:** We're not saying that it was happenstance.

**THE COURT:** I look at him as he was at least some kind of an average participant. He wasn't just a mule. He was doing more than that. And don't know if it's related. I have a lot of these drugs in audio speaker cases, it seems like. I don't know if it's the new way of concealing weapons or it's just one particular organization's modus operandi.

**MR. BARREIRO:** I think it was conspiracy, Judge, that four, and obviously the way rate them on the PSR

**THE COURT:** Well, there's Serano, Lorana, I mean, there's other people involved here as well.

**MR. BARREIRO:** Brenda Acuna was there, I think at the Checkpoint. He also had a limited visa, Judge. He could only cross a certain distance into this area and then had to return back. He was not allowed to proceed to the north.

**THE COURT:** I thought there were some records that he went through Fal?

**MS. PROFIT:** Your Honor, he had met up with the individuals who went through Fal.

**THE COURT:** Okay. Well, we knew that because that's where one of them was seized. All right. I'll consider that, but again, I wasn't inclined when I took the bench to limit his role given his multiple trips. It seems to be his connection to the hierarchy in Mexico, his coordination of deliveries of these drugs.

**MR. BARREIRO:** What we found out, Judge, was that they have a line of truckers that are coming to the U.S. and the people that are supplying, providing the drugs actually go and talk to these drivers, if anybody's interested in taking, for money, you know, bundles of whatever they had. So, the ones that say yes, they put the bundles either in the front of the tractor that they're driving, other bundles are found in the trailer, so that would mean that they would have to probably load them up in the warehouses. But I think, in his case, I don't recall, but I think they were in the front of the tractor-trailer, so that means that they just take them in and once they pay them, then they take off with the –

**THE COURT:** But he's a lot more connected than that. He doesn't just happen to be just some innocent truck driver waiting to cross the bridge and get approached. I mean, he's obviously connected to these people and delivering on their instructs, the narcotics to --

**MS. PROFIT:** Other individuals.

**THE COURT:** -- other individuals –- the guy in the Cadillac, for example.

**MR. BARREIRO:** There's a lot of them that are being offered. They entice them with money.

> **THE COURT:** I know. Everybody does this for money for the most part and I do see a lot of similar cases in this court. Over the last six months, it seems like I see a lot of these audio speaker cases where they're loaded with narcotics. All right. So, let's –- I'm not going to grant a role adjustment. I'm not inclined at this time.

Couriers generally are less culpable than other participants in drug offenses. The facts show that Mr. Gonzalez-Mendoza was at most a courier. The evidence presented demonstrated that Mr. Gonzalez-Mendozawas a transporter in this conspiracy. He never managed, organized or directed other conspirators to deliver any of the drugs to the final destinations north. He knew nothing about buyers of the drugs he was transporting. He never was in charge of any coconspirators. In fact, he did not know the kind of narcotics that he was transporting.

Mr. Gonzalez-Mendoza received the drugs, which were already packaged, and delivered them to where he was told to go. The other co-defendants were much more involved than he was because he had a very restricted Visa permit. Mr. Gonzalez-Mendoza was not involved in the planning or negotiations for the narcotics. He did not know what were the financial arrangements for the sale or delivery of the narcotics engaged in by his co-defendants.

Mr. Gonzalez-Mendoza was substantially less culpable than other participants. A defendant "who is less culpable than most other participants, but whose role could

not be described as minimal," is considered to be a minor participant under the sentencing guidelines. U.S.S.G. § 3B1.2, comment. (n.5).

Mr. Gonzalez-Mendoza received a reduction under the "safety valve" provision's pursuant to U.S.S.G. §5C1.2(a)(5). By granting a safety valve reduction the court implicitly makes a determination that the defendant was truthful in dealings with government. Indeed that is a necessary element to uphold a grant of a safety valve reduction. The District Court granted the 2-level "safety valve" reduction, a reduction that required Mr. Gonzalez-Mendoza to "truthfully provide" information concerning his offense. *See* U.S.S.G. § 5C1.2(a)(5); *United States v. Rodriguez*, 342 F.3d 296, 301 (3d Cir. 2003) (to grant safety-valve reduction district court "must have believed that the defendant was truthful" in dealings with government).

It is undisputed that Mr. Gonzalez-Mendoza was unarmed and that he no prior criminal history. This is a classic minor or minimal role scenario. As a general matter, drug couriers are substantially less culpable than other participants in a drug offense. *See Rodriguez*, 342 F.3d at 300 ("drug couriers are often small players in the overall drug importation scheme"); *United States v. Valdez-Gonzalez*, 957 F.2d 643, 649-50 (9th Cir. 1992) ("mules" less culpable participants in drug conspiracies), limited on other grounds, *United States v. Webster*, 996 F.2d 209, 211 (9th Cir. 1993); Tracy Ruling, Women Drug Couriers, 9 criminal justice 14, 58 (Winter 1995) (consensus

in New York criminal justice system that "drug mules play only marginal roles in the drug trade"); cf. 28 C.F.R. § 2.20, Chapter 13, Subchapter B (14) (2003) (under parole commission guidelines, "peripheral role" in drug offense refers to simple courier, chauffeur, deckhand, or drug-loader).

The District Court ruling that Mr. Gonzalez-Mendoza's role reduction request was not warranted was clearly erroneous given the evidence in this case. The District Court further erred, and misapplied the guidelines, by apparently relying on factors that were not relevant to the determination of a minor-role adjustment.

Role determinations under U.S.S.G. § 3B1.2 are of course, heavily dependent upon the facts of the particular case. U.S.S.G. § 3B1.2, comment. [n.3©]. In deciding whether a defendant merits a role adjustment, the sentencing court must consider the broad context of the defendant's offense. *United States v. Brown*, 54 F.3d 234, 241 (5th Cir. 1995); *United States v. Melton*, 930 F.2d 1096, 1099 (5th Cir. 1991). Nonetheless, the role adjustment determination may not be based on "factors that simply do not define appellant's role in the offense." *United States v. Westerman*, 973 F.2d 1422, 1427 (8th Cir. 1992).

The factors identified by the Court which were the basis for denying the minor role or minimal participant role were irrelevant to whether Mr. Gonzalez-Mendoza was a minor or minimal participant. They did not address Mr. Gonzalez-Mendoza's

relative function in the conspiracy. *See* U.S.S.G. § 3B1.2, comment. (n.3(A)) (adjustment depends on defendant's relative "function" in "concerted criminal activity").

The District Court, however, appeared to consider other, extraneous factors in denying an adjustment for mitigating role. The District Court's comments at sentencing, at least some of the Court's comments, indicate that the court was not comparing Mr. Gonzalez-Mendoza to other defendants within Mr. Gonzalez-Mendoza's discreet offense, but other defendants in other, unrelated cases. This is an incorrect legal standard.

For instance, the District Court stated at one point that "I look at him as he was at least some kind of an average participant. He wasn't just a mule. He was doing more than that. And don't know if it's related. I have a lot of these drugs in audio speaker cases, it seems like. I don't know if it's the new way of concealing weapons or it's just one particular organization's modus operandi". ROA. 162 . The District Court also stated, "Everybody does this for money for the most part and I do see a lot of similar cases in this court. Over the last six months, it seems like I see a lot of these audio speaker cases where they're loaded with narcotics. All right. So, let's –- I'm not going to grant a role adjustment. I'm not inclined at this time". ROA. 164.

In *United States v. Aguilar Diaz*, 884 F.3d 911 (9th Cir. 2018), the Ninth Circuit confronted Amendment 794 to the Sentencing Guidelines, which amended USSG §3B1.2 (Mitigating Role) and became effective on November 1, 2015. The Ninth Circuit noted that, in stating its purpose for the Amendment, the Sentencing Commission explained that minor role adjustments had been "applied inconsistently and more sparingly than the Commission intended" and that the Commission intended to address caselaw which might discourage applying a minor role adjustment.

Further, the Ninth Circuit noted that the Amendment resolved a circuit split which had developed concerning the interpretation of the average participant – some circuits allowed defendants to compare their culpability to other hypothetical typical offenders. The Amendment provided that the appropriate comparison for determining the average participant was between the defendant and other participants in the same criminal scheme. The Ninth Circuit remanded the case to the district court because, based on the record, the district court's decision to deny the adjustment rested on incorrect interpretations of §3B1.2, as amended by Amendment 794.

The Sixth Circuit remanded a case on the minor role issue in *United States v. Ednie*, 707 F. App'x 366, 371-72 (6th Cir. 2017). The Sixth Circuit found legal error requiring resentencing when a district court declined to apply the minor-role reduction because the defendant played a "vital" role in the conspiracy. *Id*. at 371.

That reasoning employed "precisely the analysis the Commission sought to end with [the] Amendment." *Id*. The panel focused on the absence of evidence that the court reviewed the non-exhaustive list of factors under Application Note 3 ( c ).

Relying in part on *Aguilar Diaz*, the Sixth Circuit also reversed a case on the minor role issue in *United States v. Penny*, 777 F. App'x 142, 151 (6th Cir. 2019). The Sixth Circuit in *Penny* found that the the district court failed to review amendments to § 3B1.2's Application Notes and therefore employed an erroneous legal standard. In *United States v. Valdez*, No. 19-14778 (11th Cir. Jul. 28, 2020)(not published), the Eleventh Circuit remanded Mr. Valdez's sentence because the District Court refused to assign a reduction based on an incorrect legal standard. The Eleventh Circuit noted that the sentencing guidelines provide that a drug-courier defendant who is held accountable for only his own relevant conduct may still receive a role reduction. *See* U.S.S.G. § 3B1.2, cmt. n.3(A), (C). That court further stated that an evaluation of the defendant's role in the relevant conduct for which he is held accountable at sentencing "is only one of many relevant factors".The Eleventh Circuit determined that "the wisest course of action is to vacate the district court's decision and remand for resentencing. On remand, the court should base its role-reduction decision on "the relevant factors and the totality of circumstances." *Valdez*, *supra*.

The amendment to § 3B1.2's notes clarify that "a finding that the defendant was essential to the offense does not alter the requirement, expressed in Note 3(A), that the court must assess the defendant's culpability relative to the average participant in the offense." U.S. Sentencing Guidelines Manual, suppl. to App. C, amend. 794 at 114-17 (2015). Application Note 3(C) confirms that "perform[ing] an essential or indispensable role in the criminal activity is not determinative" and that "[s]uch a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant." *Id*.

While it is true that a reviewing court "assume[s] the district judge knew the law and understood his or her obligation to consider all of the sentencing factors," it is also imperative that "the assessment of a defendant's eligibility for a minor-role adjustment must include consideration of the factors identified by the Amendment." *United States v. Diaz*, 884 F.3d 911, 916 (9th Cir. 2018). Here, the record does not indicate that the district court considered the requisite factors. *Cf. id*. (finding it clear that the district court "was well aware of the factors" because they "were thoroughly enumerated in the defendant's sentencing memorandum" and were discussed at the sentencing hearing).

These cases, although only persuasive authority, illustrate the District Court's error in this case. The District Court, instead of comparing Mr. Gonzalez-Mendoza's

conduct to the other conspirators, singularly focused on his conduct. For instance, the District Court stated: " I wasn't inclined when I took the bench to limit his role given his multiple trips. It seems to be his connection to the hierarchy in Mexico, his coordination of deliveries of these drugs". ROA. 162-163. The District Court also stated, "But he's a lot more connected than that. He doesn't just happen to be just some innocent truck driver waiting to cross the bridge and get approached. I mean, he's obviously connected to these people and delivering on their instructs, the narcotics to –". ROA. 163.

The District Court did not consider the proper factors in determining whether a mitigating role adjustment was appropriate. The District Court did not address Mr. Gonzalez-Mendoza's relative function in the conspiracy. *See* U.S.S.G. § 3B1.2, comment. (n.3[A]) (adjustment depends on defendant's relative "function" in "concerted criminal activity").The factors identified by the Court--- which were the basis for denying the mitigating role adjustment for this case--- were, in fact, not relevant to whether Mr. Gonzalez-Mendoza was a minor participant.

This case presents a classic minor role scenario. Mr. Gonzalez-Mendoza was a transporter. It is undisputed that Mr. Gonzalez-Mendoza was unarmed and that he had no prior criminal history. The relevant evidence establishes his mitigating role in the offense, including his limited ability to transport drugs given the restrictive

nature of his visa. Further, there is no evidence that Mr. Gonzalez-Mendoza planned or organized the drug smuggling operation, had any authority to make decisions, had any influence over other participants, or had a significant financial interest in the enterprise.

The evidence is thus sufficient to satisfy Mr. Gonzalez-Mendoza's burden to show that he had was substantially less culpable than other participants in the offense, and was entitled to at least a 2-level reduction in his offense level for his mitigating role. The District Court's ruling that Mr. Gonzalez-Mendoza's role reduction request was not warranted. Further, the ruling was clearly erroneous given the evidence in this case and the incorrect legal standard employed by the District Court.

The relevant evidence indicated that Mr. Gonzalez-Mendoza was substantially less culpable than the other participants. The District Court clearly erred in denying him a mitigating-role adjustment, and it misapplied the guidelines by relying on factors that did not define Mr. Gonzalez-Mendoza' s role in the offense. The District Court's error requires remand because it cannot be said that the court would have imposed the same sentence absent the error in calculating the guideline sentence range. *See United States v. Huskey*, 137 F.3d 283, 289 (5th Cir. 1998). Because the court's error was not harmless, remand is required.

# CONCLUSION

This Petition for Writ of Certiorari should be granted and the decision of the Fifth Circuit should be vacated, and the case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ Amy R. Blalock
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# RELIEF REQUESTED

FOR THESE REASONS, the Petitioner moves this Court to grant a Writ of Certiorari in order to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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# CERTIFICATE OF SERVICE

I certify that on the 8th day of February 2021, I served one (1) copy of the foregoing Petition for Writ of Certiorari on the following individuals by mail (certified mail return receipt requested) by depositing same, enclosed in post paid, properly addressed wrapper, in a Post Office or official depository, under the care and custody of the United States Postal Service, or by other recognized means pursuant to the Rules of the Supreme Court of The United States of America, Rule 29:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Carmen Castillo Mitchell
US Attorney's Office
Southern District of Texas
Houston, Texas

PEDRO RAUL GONZALEZ-MENDOZA
USM #71960-479
GREAT PLAINS
CORRECTIONAL INSTITUTION
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HINTON, OK 73047

/s/ Amy R. Blalock
**AMY R. BLALOCK**

# No. _____

# In the

# Supreme Court of the United States

OCTOBER TERM, 2020

PEDRO RAUL GONZALEZ-MENDOZA,

*Petitioner,*

V.

UNITED STATES OF AMERICA

*Respondent.*

## APPENDIX

OPINION OF THE UNITED STATES COURT

OF APPEALS FOR THE FIFTH CIRCUIT

# United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
**FILED**
November 9, 2020
Lyle W. Cayce
Clerk

No. 19-41051
Summary Calendar

UNITED STATES OF AMERICA,

*Plaintiff—Appellee*,

*versus*

PEDRO RAUL GONZALEZ-MENDOZA,

*Defendant—Appellant*.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:18-CR-2048-1

Before HAYNES, WILLETT, and HO, *Circuit Judges*.

PER CURIAM:*

Pedro Raul Gonzalez-Mendoza pleaded guilty to conspiring to possess with the intent to distribute 500 grams or more of a substance containing methamphetamine and five kilograms or more of a substance containing cocaine, and he was sentenced at the bottom of the applicable guidelines

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

range to 168 months of imprisonment. He filed a timely notice of appeal and now challenges the district court's denial of his request for a two-level minor-role adjustment under U.S.S.G § 3B1.2(b).

A "minor participant" is any participant "who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal." § 3B1.2, comment. (n.5). Upon a de novo review of the record, *see United States v. Torres-Hernandez*, 843 F.3d 203, 207 (5th Cir. 2016), we reject Gonzalez-Mendoza's argument that the district court misinterpreted the Guideline by comparing his conduct to that of defendants involved in conspiracies other than the instant one.[1]

We review for clear error the factual determination whether a defendant played a minor role in the offense. *Torres-Hernandez*, 843 F.3d at 207. In the face of Gonzalez-Mendoza's argument that he was a mere mule or drug courier, the district court found that he was at least an average participant and was not entitled to a minor-role adjustment. Considering the totality of the circumstances presented here, *see United States v. Kearby*, 943 F.3d 969, 977 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2584 (2020), we are not left "with the definite and firm conviction that a mistake has been committed" in this regard. Accordingly, there is no clear error, *United States v. Serfass*, 684 F.3d 548, 550 (5th Cir. 2012) (internal quotation marks and citation omitted).

The judgment of the district court is AFFIRMED.

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[1] The details of this argument were provided for the first time in the Reply Brief, so we need not consider them. Even if we did, Gonzalez-Mendoza's citation to the district court's mention of other cases it had heard does not support the argument that the district court was comparing his culpability to defendants in those cases. Thus, nothing supports the argument that the district court misinterpreted the Guideline in this manner.

# *United States Court of Appeals*

**FIFTH CIRCUIT**
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November 09, 2020

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 19-41051 USA v. Pedro Gonzalez-Mendoza
USDC No. 7:18-CR-2048-1

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5TH Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5TH Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

By:_____
Whitney M. Jett, Deputy Clerk

Enclosure(s)

Mrs. Amy Howell Alaniz
Ms. Amy R. Blalock
Ms. Carmen Castillo Mitchell