

IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 2020

LUIS BERNAL-VILLAREAL,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

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

GARY PAUL BURCHAM
BURCHAM & ZUGMAN
402 West Broadway, Suite 1130
San Diego, CA 92101
Telephone: (619) 699-5930
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether, in a drug importation offense, managers and supervisors of the offense should be considered “average participants” for purposes of a USSG § 3B1.2 minor role analysis.

TABLE OF CONTENTS

Authorities Cited	ii
Question Presented for Review	Prefix
Petition for Writ of Certiorari.....	1
Jurisdiction and Citation of Opinion Below	2
U.S. Sentencing Guideline Provision at Issue	2
Introduction	3
Statement of the Case	4
Argument	11
THE COURT SHOULD GRANT THIS PETITION TO CORRECT THE DISTRICT COURT’S IMPROPER USSG § 3B1.2 ANALYSIS AND PROVIDE GUIDANCE TO LOWER COURTS REGARDING HOW TO PROPERLY FORMULATE THE “AVERAGE PARTICIPANT” COMPARISON GROUP FOR A MINOR ROLE ANALYSIS	12
A. Managers/Supervisors are Average Participants for Purposes of a Minor Role Analysis in a Drug Importation Offense.....	12
B. Using a Proper Comparison Group, Petitioner was Entitled to a Minor Role Reduction.	16
Conclusion	19
Appendix: Ninth Circuit Court of Appeals Memorandum	

TABLE OF AUTHORITIES

CASES

<u>United States v. Diaz</u> , 884 F.3d 911 (9th Cir. 2018)	16
<u>United States v. Quintero-Leyva</u> , 823 F.3d 519 (9th Cir. 2016)	3

STATUTES

21 U.S.C. § 952	4
21 U.S.C. § 960	4
28 U.S.C. § 1254	2

U.S. SENTENCING GUIDELINES PROVISIONS AND MATERIALS

USSG § 3B1.2	2-4,12-14,16
USSG § 3B1.2 cmt. n.3(A)	12
USSG § 3B1.2 cmt. n.3(C)	2,6,18
USSG App. C. Amend. 794	3,17
U.S. Sentencing Comm’n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System at 165-67 & app. H (Oct. 2011)	13-17
U.S. Sentencing Comm’n, Report to the Congress: Cocaine and Federal Sentencing Policy at 17-18, app. C tbl. A-1 (May 2007)	13-15,17

No. _____

OCTOBER TERM, 2020

LUIS BERNAL-VILLAREAL,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent

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

Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 29, 2021.

JURISDICTION AND CITATION OF OPINION BELOW

On January 29, 2021, the Ninth Circuit affirmed Petitioner's conviction in an unpublished Memorandum opinion, attached in an appendix to this petition. This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

U.S. SENTENCING GUIDELINE PROVISION AT ISSUE

USSG §3B1.2 - MITIGATING ROLE

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.
...

Application Note 3(A):

Substantially Less Culpable than Average Participant.—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.

INTRODUCTION

Petitioner asks this Court to grant review in the instant case to decide an important issue regarding the application of USSG § 3B1.2, a Guidelines provision which has tremendous effects on federal drug sentences. Section 3B1.2 provides “a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.” USSG § 3B1.2 cmt. n. 3(A). While the Sentencing Commission recently has provided guidance to assist courts in making role determinations generally, see USSG App. C. Amend. 794; USSG § 3B1.2, cmt. n.3(C) (setting forth list of non-exhaustive factors to be considered in determining whether a defendant qualifies for a role reduction), and also clarified that the defendant is to be compared with the other participants “in the criminal activity” as opposed to hypothetical typical offenders, id.; United States v. Quintero-Leyva, 823 F.3d 519, 523 (9th Cir. 2016) (same), the Commission failed to provide guidance as to how the “average participant” comparative group within an offense should be formulated.

In the instant case, the district court ruled that the person who recruited Petitioner to participate in the drug importation offense, and who occupied the role of a local manager/supervisor of the smuggling endeavor, was not an average participant for the minor role analysis. This position is in direct conflict with the

Commission's findings where it determined that managers/supervisors of a drug offense landed in the middle of the hierarchy of participants in such an offense, thereby qualifying as "average participants." See U.S. Sentencing Comm'n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System at 165-67 & app. H (Oct. 2011). By formulating its comparison group in a way so as to exclude any participant who was above Petitioner in the offense hierarchy, including the manager/supervisor involved in this offense, the district court conducted a fundamentally flawed analysis which made it impossible for Petitioner to obtain a minor role adjustment. Petitioner asks the Court to grant this petition in order to correct the district court's improper minor role analysis in this case, and to provide lower courts guidance as to the proper formulation of a section 3B1.2 "average participant" comparison group in a drug case.

STATEMENT OF FACTS AND CASE

In July 2019, Petitioner was arrested after importing 45.16 kilograms of methamphetamine into the United States in a vehicle which he was driving. Petitioner pled guilty to a charge of importing methamphetamine, in violation of 21 U.S.C. §§ 952 and 960, pursuant to a written plea agreement. [ER 43-56]. Prior to sentencing and in connection with safety-valve relief, Petitioner submitted to the government a detailed proffer of what occurred in connection with the offense. He

then summarized the proffer in his sentencing memorandum:

Mr. Bernal-Villareal's involvement in this case began when he was talking with an old acquaintance from school he knew as Nacho While they were talking, Mr. Bernal-Villareal described his difficult financial situation which was due to severe difficulties he and his father were having getting their crops to market. Nacho offered Mr. Bernal-Villareal an opportunity to earn money smuggling a quantity of drugs. He did not tell Mr. Bernal-Villareal the type or quantity of drugs he would be bringing across. He offered Mr. Bernal-Villareal \$8000 if he would participate, and said they would use his vehicle to do so. Mr. Bernal-Villareal said he needed to think about it.

A few days later, Nacho called Mr. Bernal-Villareal to again extend the offer to him. After a discussion during which Nacho again tried to convince Mr. Bernal-Villareal to participate, he agreed. Another person picked up Mr. Bernal-Villareal's vehicle (three days prior to his arrest), and said he was going to take it to San Luis, Mexico, to be prepared. The day prior to his arrest, this same person called Mr. Bernal-Villareal and told him that his car was ready. He gave Mr. Bernal-Villareal the location where the vehicle was parked in San Luis, and instructed him to come pick it up and then drive it across the border.

Mr. Bernal-Villareal did as directed and got a ride to San Luis, Mexico. His vehicle was at the location, and he drove it to the San Luis port. The port had been closed due to what he heard was some sort of security threat, however, so he called to ask what to do. The man told Mr. Bernal-Villareal to bring his pick-up to a home near Los Algodones, Mexico, which he did. A man at that location told him they were going to keep his vehicle overnight at that location, and he should come back the next morning to drive it across. Mr. Bernal-Villareal called a family

member for a ride home (no knowledge of what was happening), and then obtained a ride back the next morning as instructed. Mr. Bernal-Villareal then drove to the Andrade POE and was arrested. Had Mr. Bernal-Villareal made it across, he was directed to park and wait after crossing the border to receive further instructions. This was the first time Mr. Bernal-Villareal had ever attempted to smuggle drugs.

[ER 34-35].¹

Because the government found that Petitioner had been truthful in his recitation of his involvement in the offense, and that he otherwise satisfied the safety-valve requirements under the First Step Act, it recommended a two-level reduction for safety-valve. The government did not, however, recommend a minor role reduction. Petitioner moved the district court for a minor role reduction, arguing that the USSG § 3B1.2, cmt. n.3(C) factors, applied to the undisputed facts of this case, strongly weighed in favor of a two-level minor role adjustment by showing that Petitioner was substantially less culpable than the average participant in the offense. [ER 33-39].

The district court denied a minor role adjustment:

THE COURT: SO THE COURT'S RECITED THE STANDARD. LET ME AT LEAST MENTION THE 3(B) FACTORS: THE DEGREE OF WHICH THE

¹ “ER” denotes the excerpts of record filed by Appellant in the Ninth Circuit Court of Appeals.

DEFENDANT UNDERSTOOD THE SCOPE AND STRUCTURE OF THE CRIMINAL ACTIVITY. MR. BURCHAM HAS CANDIDLY SAID THE DISCUSSION OF THIS CRIME BEGAN AT LEAST A WEEK, MORE LIKE TEN DAYS BEFORE. THE DEFENDANT CONSENTED TO IT. HE HAD A WEEK TO THINK ABOUT THIS AND CONSIDER THE RISKS. HE WENT FORWARD. DID HE KNOW THE SCOPE AND STRUCTURE OF THE CRIMINAL ACTIVITY? THE CRIMINAL ACTIVITY HERE IS IMPORTING NARCOTICS.

HERE IS WHAT HE KNEW: THAT A DRUG ORGANIZATION WAS COMMISSIONING HIM, PROMISING TO PAY HIM \$8,000, THAT HIS JOB WAS TO GET THE DRUGS ACROSS IN A VEHICLE, THAT THEY WOULD ALTER HIS VEHICLE AND PUT A COMPARTMENT IN SO THE DRUGS WOULDN'T BE READILY DETECTED, THAT ALL HE HAD TO DO WAS DRIVE ACROSS; THEY GIVE HIM A PHONE AND TOLD HIM HE WOULD GET FURTHER INSTRUCTIONS WHEN HE GETS ACROSS. THOSE ARE ALL THINGS THAT AN IMPORTER WOULD KNOW. THERE'S NOTHING ABOUT HIS KNOWLEDGE IN THIS CASE OR HIS UNDERSTANDING OF THE OPERATION THAT SUGGESTS THAT HE'S A MINOR PARTICIPANT, THAT HE DIDN'T FULLY UNDERSTAND THE SCOPE AND STRUCTURE OF THE CRIMINAL ACTIVITY FOR WHICH HE WAS COMMISSIONED.

THE DEGREE TO WHICH HE PARTICIPATED IN THE PLANNING: HE AGREED TO THE AMOUNT, HE AGREED TO TURN HIS CAR OVER, HE TURNED HIS TRUCK OVER, THEY FABRICATED I ASSUME BY WELDING A COMPARTMENT IN IT, INTO WHICH THE DRUGS WERE STUFFED, HE TOOK THE

PHONE, HE WAS WILLING TO GET FURTHER INSTRUCTIONS FROM THEM. DO I THINK THAT HE WAS THE DESIGNER OF THIS OFFENSE? NO, I DON'T. BUT HE FULLY PARTICIPATED IN THE PLANNING AND WAS WILLING TO TAKE STEPS THAT WOULD HELP TO ENSURE THAT THE PLAN WOULD SUCCEED.

THE THIRD FACTOR FAVORS HIM. HE DIDN'T HAVE ANY DECISION-MAKING AUTHORITY HERE OTHER THAN TO BE INVOLVED. I DON'T THINK THAT'S WHAT'S IMPLICATED HERE, BUT HE DIDN'T TRY TO INFLUENCE ANYBODY AND THE PLAN DIDN'T ORIGINATE WITH HIM. THAT DOES FAVOR THE MINOR ROLE APPLICATION.

THE FOURTH FACTOR, THE NATURE AND EXTENT OF HIS PARTICIPATION: THIS IS WHERE I THINK THE TIME PERIOD BETWEEN WHEN THE IDEA IS FIRST FLOATED AND ACCEPTED AND THEN THE CRIME TAKES PLACE COMES INTO PLAY. IT'S A CONCEPT OF PREMEDITATION AND DELIBERATION AND ABILITY TO THINK THINGS THROUGH IN AN ATMOSPHERE WHERE YOU'RE NOT BEING PRESSURED BY SOMEONE. HE CERTAINLY HAD THAT. HE HAD THE ABILITY TO REFLECT ON THIS AND TO UNDERSTAND WHAT THE RISK WAS, AND HE WENT FORWARD.

THIS IS AN ANALOGY, MR. BURCHAM, THAT I USED AND I FIND USEFUL HERE. IT HAS NOTHING TO DO WITH YOUR CLIENT, BUT THE ANALOGY IS A USEFUL ONE. THERE'S DEGREES OF HOMICIDE. SOMEONE GUILTY OF A FIRST DEGREE MURDER IS GUILTY OF THAT HIGH-DEGREE OF HOMICIDE BECAUSE THEY PREMEDITATE AND DELIBERATE AND SET UP AN AMBUSH; THEY WATCH A

PERSON AND KNOW WHERE THEY'RE GOING AND WAIT AND KILL THEM. THERE'S OTHER HOMICIDES. THE PERSON IS JUST AS DEAD. VOLUNTARY MANSLAUGHTER; I'M ANGRY AT A GUY AND I SLUG HIM AND HE HITS HIS HEAD ON A CURB AND DIES. THE DIFFERENCE BETWEEN THE TWO HOMICIDES -- AS I SAID, IN EACH CASE, THE PERSON IS JUST AS DEAD. BUT IN THE FORMER EXAMPLE, THE PERSON HAS A CHANCE TO THINK ABOUT IT AND PLAN AND CONSIDER AND RECONSIDER. AND THE LAW RECOGNIZES THAT THERE'S SOMETHING TOXIC ABOUT THAT, RIGHT? AND IT MAKES YOUR ROLE -- EVEN THOUGH THE END RESULT IS THE SAME, IT MAKES YOUR ROLE WORSE. IT MAKES YOUR ROLE MORE CULPABLE.

SO IT IS HERE. THE LONGER THE PERIOD OF TIME FOR CONTEMPLATION AND DISCUSSION AND LETTING PRELIMINARY ACTS OCCUR CERTAINLY NEEDS TO BE TAKEN INTO CONSIDERATION IN ASSESSING SOMEONE'S ROLE. AND FINALLY, IF IT'S TRUE, AND YOU SAY YOU DON'T THINK THEY WOULD HAVE PAID HIM THAT AMOUNT, THEY OFFERED HIM THAT AMOUNT, AND HE OBVIOUSLY THOUGHT HE WAS GOING TO GET \$8,000. THAT'S A LARGE AMOUNT OF MONEY. THESE ARE NON-EXCLUSIVE FACTORS. I'M SHOCKED AT THE AMOUNT OF METHAMPHETAMINE, ACTUAL METHAMPHETAMINE THEY'RE PUTTING INTO THE AUTOMOBILES THESE DAYS. YOU SAY IT WAS 38 KILOS HERE?

MR. BURCHAM [Defense Counsel]: I BELIEVE SO, YES.

THE COURT: AND YOU KNOW THE STATISTICS ON THIS. EACH KILO PRODUCES 10,000 INDIVIDUAL ADMINISTRATIONS OF THIS DRUG SO WE'RE TALKING ALMOST 400,000 TIMES THAT AN ADDICT WOULD BE ABLE TO SHOOT UP IF HE HAD SUCCEEDED WITH THIS LOAD. SO THE CONSEQUENCES FOR THE COMMUNITY -- I'M NOT GOING TO PROSELYTIZE OR GO OVER ALL THOSE AT THIS POINT -- BUT THE CONSEQUENCES FOR THE COMMUNITY ARE REALLY DIRE AND THOSE HAVE TO BE CONSIDERED TOO. I DON'T FIND BY A PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT CONVINCED ME THAT HE'S SUBSTANTIALLY LESS CULPABLE THAN THE AVERAGE PARTICIPANT.

THE PEOPLE THAT I COMPARED HIM TO IS, OF COURSE, NACHO WHO IS, OF COURSE, NOT AN AVERAGE PARTICIPANT. NACHO PROPOSES THIS, PRESUMABLY ORCHESTRATES GETTING THE DRUGS IN THE CAR, OFFERS HIM THE AMOUNT OF MONEY, GIVES HIM THE PHONE; THAT GUY IS AT A MINIMUM AN ORGANIZER, LEADER, SUPERVISOR. SO I CAN COMPARE HIM, BUT IT DOESN'T MOVE THE NEEDLE AT ALL BECAUSE HE'S NOT AN AVERAGE PARTICIPANT, AND THE POINT OF COMPARISON HERE IS OTHER AVERAGE PARTICIPANTS.

PEOPLE FABRICATED, PEOPLE FABRICATED, AND I DON'T THINK NACHO DID IT, PEOPLE FABRICATED THE COMPARTMENT IN THE TRUCK. I GET THEY'RE LIKELY PARTICIPANTS. I DON'T THINK HE'S SUBSTANTIALLY LESS CULPABLE THAN THEY ARE. THAT'S ESSENTIALLY A BLUE COLLAR FUNCTION THAT OCCURRED IN MEXICO. THEN FINALLY, SOMEONE IS SUPPOSED TO PICK

UP THE DRUGS ON THE OTHER SIDE. WHAT DO I KNOW ABOUT THEM? NOT MUCH. AS FAR AS I CAN TELL, THEY ARE NO MORE CULPABLE BUT NO LESS CULPABLE THAN THE DEFENDANT. THEY ARE OTHER LINKS IN THE CHAIN OF DISTRIBUTION.

SO I UNDERSTAND YOUR POSITION, AND I DON'T FAULT YOU FOR ASKING, BUT I DON'T FIND BY A PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT IS A MINOR PARTICIPANT. I'M HAPPY TO HEAR FROM YOU GENERALLY.

[ER 10-14].

The district court imposed a sentence of 78 months in custody, to be followed by five years of supervised release.

On direct appeal, Petitioner challenged the district court's denial of a minor role adjustment. Specifically, Petitioner claimed that the district court improperly formulated the comparison group by excluding the local manager/supervisor and other persons who were more culpable than Petitioner from the group, thereby resulting in an improperly skewed comparative analysis. Petitioner claimed that under this approach, all drug couriers would be precluded from receiving a minor role reduction because anyone higher in the organizational hierarchy would be excluded from comparison.

The Ninth Circuit rejected this argument, finding that the "district court

properly identified other likely participants in the scheme and assessed whether Bernal-Villareal was ‘substantially less culpable than the average participant in the criminal activity.’ [Ex. “A” at 2]. It further found that the record did not support the claim that the district court’s “approach to the minor-role analysis categorically precludes all drug couriers from receiving a minor role adjustment.” Id.

ARGUMENT

THE COURT SHOULD GRANT THIS PETITION TO CORRECT THE DISTRICT COURT’S IMPROPER USSG § 3B1.2 ANALYSIS AND PROVIDE GUIDANCE TO LOWER COURTS REGARDING HOW TO PROPERLY FORMULATE THE “AVERAGE PARTICIPANT” COMPARISON GROUP FOR A MINOR ROLE ANALYSIS

A. Managers/Supervisors are Average Participants for Purposes of a Minor Role Analysis in a Drug Importation Offense

Section 3B1.2(b) of the U.S. Sentencing Guidelines provides for a two-level reduction in a defendant’s sentence “[i]f the defendant was a minor participant in any criminal activity.” USSG § 3B1.2(b). In determining whether to grant a minor-role reduction, the correct inquiry is whether the defendant was “substantially less culpable than the average participant” in the charged criminal activity. USSG § 3B1.2 cmt. n.3(A).

When a district court conducts an assessment of whether a defendant should receive a role reduction because he was “substantially less culpable than the

average participant,” the court must compare the defendant only with the other participants “in the criminal activity.” Id. Thus, the relative culpability of the “average participant” is measured only in comparison to those persons who actually participated in the criminal activity, rather than against typical offenders who commit similar crimes.

In terms of identifying the “average participants” for purposes of a section 3B1.2 analysis, the Sentencing Commission ranked the roles of participants in drug trafficking organizations as part of reports to Congress in 2007 and 2011. In the Sentencing Commission’s 2011 report to Congress regarding mandatory minimum penalties, the Commission assigned each offender in a drug case to one of 21 separate function categories based on his or her most serious conduct as described in the pre-sentence report. See U.S. Sentencing Comm’n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System at 165-67 & app. H (Oct. 2011). These 21 categories were then combined into nine categories to facilitate analysis and presentation of the data, and the categories below represent a list of culpability, from most-culpable to least-culpable:

- High-Level Supplier/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.

Id.

The 2007 report found similarly with regard to the comparative role of a local manager or supervisor who “[t]akes instruction from higher-level individual

and manages a significant portion of drug business or supervises at least one other coparticipant but has limited authority.” See U.S. Sentencing Comm’n, Report to the Congress: Cocaine and Federal Sentencing Policy at 17-18, app. C tbl. A-1 (May 2007). There, the Commission found that a “manager/supervisor” was the fourth most culpable out of eight offender functions. Id. It found that an organizer/leader was the second most culpable. Id.

These findings by the Commission directly refute the district court’s conclusion that the person who recruited and directed Petitioner was not an average participant for purposes of a minor role analysis. The Commission clearly and substantially distinguished between a manager/supervisor and an organizer/leader, putting the former in the middle of the participant hierarchy, and the latter near the top. U.S. Sentencing Comm’n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System at 165-67 & app. H (Oct. 2011). The district court, however, conflated an organizer/leader with a manager/supervisor, [ER 13-14], which resulted in the creation of a flawed comparison group which excluded average participants such as managers or supervisors from the pool of comparative players. And by creating a comparison group in which participants who fell in the middle of the participant hierarchy were excluded from consideration, the district court applied section 3B1.2 in a manner which made it impossible for Petitioner, who as a drug

courier fell at the bottom of the culpability spectrum, to receive the minor role reduction to which he was entitled.

B. Using a Proper Comparison Group, Petitioner was Entitled to a Minor Role Reduction

“When measuring a defendant’s culpability relative to that of other participants, district courts must compare the defendant’s involvement to that of all likely participants in the criminal scheme.” United States v. Diaz, 884 F.3d 911, 917 (9th Cir. 2018). Had the district court formulated a proper comparison group for its minor role analysis, Petitioner would have been entitled to a section 3B1.2 reduction. When the correct average participants are included in the comparison group, including Petitioner’s recruiter and the local director of this offense (Nacho) and other local participants (such as the blue-collar participants) who were taking “instruction from higher-level individual[s]” or “supervis[ing] at least one other coparticipant but [with] limited authority,” U.S. Sentencing Comm’n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 165-67, Petitioner was substantially less culpable than these other participants.

The Commission reports also illustrate the unreasonableness of the district court’s approach in terms of concluding where Petitioner fell in terms of his role in this offense. The October 2011 report listed drug couriers like Petitioner as

eighth in a nine-level hierarchy, with only body-carrier mules below them at the bottom level. See U.S. Sentencing Comm’n, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System at 165-67 (Oct. 2011). The 2007 report listed couriers/mules as seventh out of eight types of offenders. See U.S. Sentencing Comm’n, Report to the Congress: Cocaine and Federal Sentencing Policy at 18 (May 2007). But as set forth above, the fact that typical drug couriers are at the bottom of the function spectrum cannot properly factor into a minor role analysis when every participant who is located above them is determined not to be average and is excluded from the analysis.

Applying the facts of this case to the Amendment 794 factors further supports a minor role application here. The Sentencing Commission promulgated these factors because “after conducting an independent review, it found that minor role reductions were being ‘applied inconsistently and more sparingly than the Commission intended.’” See USSG App. C. Amend. 794. This Amendment provides that “[i]n determining whether to apply subsection (a) or (b), or an intermediate adjustment, the court should consider the following non-exhaustive list of factors[::]”

- (i) the degree to which the defendant understood the scope and structure of the criminal activity;
- (ii) the degree to which the defendant participated in planning or organizing the criminal activity;

(iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;

(iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;

(v) the degree to which the defendant stood to benefit from the criminal activity.

For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.

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.

USSG § 3B1.2, cmt. n.3(C).

Each of these factors strongly supports a minor role adjustment in this case. Petitioner lacked any knowledge of the scope and structure of this activity beyond the basic tasks which he was asked to perform, he neither planned nor organized the smuggling event, and he had absolutely no decision-making authority or ability to influence decision-making. His actions in furtherance of the endeavor were limited and rudimentary, and he was going to be paid a set sum of money to

drive the vehicle across the border. Because the undisputed facts of this case firmly establish that Petitioner was substantially less culpable than the average participant in this offense, the Ninth Circuit's decision affirming the district court's denial of this adjustment should be denied.

CONCLUSION

For the above reasons, Petitioner respectfully requests that the Court grant the instant petition to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: June 15, 2021

/s/ Gary P. Burcham
GARY PAUL BURCHAM
BURCHAM & ZUGMAN
402 West Broadway, Suite 1130
San Diego, CA 92101
Telephone: (619) 699-5930
Attorney for Petitioner