

No. _____

In the Supreme Court of the United States

EFREN DERMA-DOMINGUEZ, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

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

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QUESTION PRESENTED FOR REVIEW

To qualify for an aggravating role adjustment, “the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants.” U.S.S.G. § 3B1.1 cmt. n.2. For a defendant who “exercised management responsibility over the property, assets, or activities of a criminal organization” but did not supervise a participant, an upward departure may instead be warranted. *Id.* Yet, the Fifth Circuit, unlike most courts of appeal, applies the aggravating role adjustment to defendants, like Petitioner, who supervised no one.

The question presented is:

Does an aggravating role adjustment under U.S. Sentencing Guideline § 3B1.1 apply, as Application Note 2 says, only if the defendant organized or supervised another participant in the criminal activity?

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Petitioner Efren Derma-Dominguez asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on December 29, 2023.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

All proceedings directly related to the case are as follows:

- *United States v. Derma-Dominguez*, No. 4:22-cr-00054-DC (W.D. Tex. Aug. 25, 2022) (judgment)

- *United States v. Derma-Dominguez*, No. 22-50787 (5th Cir. Dec. 29, 2023) (unpublished opinion)

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DECISION BELOW

A copy of the unpublished opinion of the court of appeals, *United States v. Derma-Dominguez*, No. 22-50787 (5th Cir. Dec. 29, 2023) (per curiam), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 29, 2023. Pet. App. A. This petition is filed within 90 days after entry of judgment or order sought to be reviewed. *See* Sup. Ct. R. 13.1, 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

SENTENCING GUIDELINE PROVISION INVOLVED

The aggravating role adjustment provides that “an organizer, leader, manager, or supervisor in any criminal activity” receives an increased offense level. U.S.S.G. § 3B1.1. Application Note 2 states:

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

U.S.S.G. § 3B1.1 cmt. n.2. Guideline § 3B1.1 is reproduced in full at Appendix B.

STATEMENT

After helping to unlawfully transport a cousin into the United States, Derma started working for a criminal organization, making extra money by driving noncitizens and drugs from the U.S.-Mexico border to Odessa, Texas. At first, a person named Saul gave him jobs transporting noncitizens for pay. After some successful trips, Saul asked Derma to start transporting drugs. Derma initially reported to a person named “Bolitas” who ran stash trailers in Odessa, but he eventually started reporting directly to Saul. He also stayed at the stash trailers.

Derma had been working for the organization for about five months before U.S. Border Patrol agents stopped his car and found over 200 kilograms of wrapped bundles of marijuana and about 154 grams of methamphetamine. Derma had picked up the marijuana near the border and then drove to Presidio, Texas, where he waited for instructions from Saul. Saul told Derma that a Border Patrol checkpoint on his route was closed, and Derma tried to drive past it but was eventually stopped and arrested.

3. Derma was indicted in one count for possessing with the intent to distribute 100 kilograms or more of marijuana and 50

grams or more of a mixture containing a detectable amount of methamphetamine. *See* 21 U.S.C. § 841(a)(1), (b)(1)(B). He pleaded guilty.

4. The presentence report assessed a base offense level of 32 based on the combined gross weight of the marijuana and methamphetamine found in the car. The report added a two-level “aggravating role” enhancement stating that Derma was an organizer, leader, manager, or supervisor in the criminal activity. *See* U.S.S.G. § 3B1.1(c). A three-level reduction for Derma’s acceptance of responsibility took the total offense level down to 31. Derma had zero criminal history points, placing him in criminal history category I. The resulting Guidelines range was 108 to 135 months’ imprisonment. *See* U.S.S.G. Ch.5, Pt.A (sentencing table).

Derma objected to the two-level aggravating role enhancement. He argued that he was not a leader or organizer of anything; he just transported drugs at others’ direction. And without an aggravating role enhancement, he could have qualified for two-level safety valve reduction. *See* U.S.S.G. § 2D1.1(b)(18). The probation officer responded that Derma played an aggravating role because he had management responsibility for the instant offense.

At sentencing, a Drug Enforcement Administration task force officer clarified that Derma did not recruit anyone or direct anyone. The prosecutor argued that Derma's promotion from transporting noncitizens to transporting drugs showed his role was aggravating.

The district court overruled Derma's aggravating role and safety-valve objections and imposed a sentence at the bottom of the Guidelines range: 108 months' imprisonment and three years' supervised release. Derma appealed.

4. On appeal, Derma argued that the district court erred by finding that Derma warranted an aggravating role adjustment.¹ According to the guideline, a defendant must supervise or manage other participants—not just assets or property—to receive the enhancement. § 3B1.1 cmt. n.2. Derma did not supervise another participant, so he should not have received the enhancement under the plain language of § 3B1.1(c) and Application Note 2. But

¹ Derma also argued that the district court applied the incorrect base offense level. The government conceded that resentencing was warranted based on that error. The court of appeals reversed and remanded for resentencing on that ground. Pet. App. A11–12. Derma was resentenced to 87 months' imprisonment, the bottom of the advisory Guidelines range with the correct base offense level. *See* Minute Entry, *United States v. Derma-Dominguez*, No. 4:22-cr-00054-DC (W.D. Tex. Mar. 25, 2024), ECF No. 56.

Derma recognized that the Fifth Circuit, in a binding en banc decision, held that the aggravating role nonetheless applies to mere property management. *United States v. Delgado*, 672 F.3d 320, 345 (5th Cir. 2012) (en banc). Derma also argued that he did not exercise *management* responsibility over the criminal organization's assets. The government conceded that Derma did not supervise other participants but argued that the aggravating role enhancement was nonetheless proper because of his trusted position in the organization.

The court of appeals affirmed. The majority opinion held that the district court's application of aggravating role was not clear error given the controlling precedent. Pet. App. A9. The majority relied on Derma's promotions within the organization, that he was entrusted with transporting a large load of marijuana and methamphetamine, and that he was staying in the stash trailers to support that Derma exercised management responsibility over the organization's assets. Pet. App. A10.

Judge Dennis dissented from the majority opinion's affirmance of aggravating role.² Pet. App. A14–18. He argued that the record

² Judge Dennis concurred in the majority opinion's remand for resentencing because the district court did not apply the correct base offense level. Pet. App. A14.

included no evidence of Derma's *management* responsibility over the property, assets, or activities of a criminal organization. Pet. App. A14. Rather, Derma "only transported marijuana at the order of others and exercised no managerial control over the drugs." Pet. App. A16. Judge Dennis criticized the majority's reasoning as coming dangerously close to concluding that every drug runner is a manager. Pet. App. A18.

REASONS FOR GRANTING THE WRIT

This case is an ideal vehicle to correct the Fifth Circuit’s outlier interpretation of the § 3B1.1 aggravating role adjustment.

The record is clear that Derma did not supervise any participant in the criminal activity. Under the plain text of Application Note 2 of guideline § 3B1.1, and the precedent of most circuit courts, the lack of participant supervision means Derma’s role was not aggravating and he should not have received the two-level increase. This Court should grant certiorari to correct the Fifth Court’s misinterpretation of the aggravating role adjustment.

A. Application Note 2 clearly restricts a § 3B1.1 aggravating role adjustment to defendants who supervise participants.

Guideline § 3B1.1 increases a defendant’s offense level based on the defendant’s role in the offense. For a defendant who is the “organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive,” the offense level is increased by four. U.S.S.G. § 3B1.1(a). If the defendant was a “manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive,” the increase is three levels. U.S.S.G. § 3B1.1(b). “If the defendant was an organizer, leader, manager, or supervisor in any

criminal activity other than described in (a) or (b),” the increase is two levels. § 3B1.1(c). Derma received the two-level increase.

In 1993, the Sentencing Commission added Application Note 2 to clarify the operation of guideline § 3B1.1 and to resolve a circuit split. U.S.S.G. App. C, amend. 500. Most circuits had held that § 3B1.1 applied only when the defendant had a degree of control over other participants. *See United States v. Fuentes*, 954 F.2d 151, 154 (3d Cir. 1992) (discussing cases). But some circuits had held it could apply even if the defendant did not supervise others. *See United States v. Chambers*, 985 F.2d 1263, 1265 (4th Cir. 1993); *United States v. Johnson*, 906 F.2d 1285, 1292–93 (8th Cir. 1990).

Application Note 2 clarified that, “To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants.” § 3B1.1 cmt. n.2. A defendant who did not supervise a participant but “exercised management responsibility over the property, assets, or activities of a criminal organization” could instead warrant an “upward departure.” § 3B1.1 cmt. n.2.

An upward departure is different than a § 3B1.1 adjustment. *United States v. Ramos-Paulino*, 488 F.3d 459, 464 (1st Cir. 2007) (“Although both may lead to similar outcomes, there is an important structural distinction between sentencing enhancements

and sentencing departures.”); *see* U.S.S.G. § 1B1.1 cmt. n.(F) (defining “departure”). Under the Guidelines, adjustments are part of the process to calculate the correct Guidelines range. *See* U.S.S.G. § 1B1.1(a)(3). A court considers whether to impose an upward departure after calculating the correct range. U.S.S.G. § 1B1.1(b).

The plain language of Application Note 2 means that a defendant who exercises management responsibility over a criminal organization’s assets—but does not organize or supervise anyone—is not eligible for an aggravating role adjustment.

B. The Fifth Circuit’s application of aggravating role to defendant who did not organize or supervise another participant conflicts with nearly every other court of appeals.

Since the addition of Application Note 2, the overwhelming majority of circuits have held that aggravating role does not apply to a defendant who exercises management control over property and assets but does not organize or supervise a participant. *See United States v. Ochoa-Gomez*, 777 F.3d 278, 285 n.6 (5th Cir. 2015) (Prado, J., joined by Elrod, J., concurring) (collecting cases). These circuits correctly interpret Application Note 2 as “preclud[ing] management responsibility over property, assets, or activities as the basis for an enhancement under § 3B1.1(c).” *United States v. Greenfield*, 44 F.3d 1141, 1146 (2d Cir. 1995); *see also Ramos-*

Paulino, 488 F.3d at 464 (“management of criminal activities, standing alone, does not constitute a basis for a role-in-the-offense enhancement under section 3B1.1”); *United States v. Cameron*, 573 F.3d 179, 185 (4th Cir. 2009) (same); *United States v. Christian*, 804 F.3d 819, 824 (6th Cir. 2015) (same); *United States v. Fones*, 51 F.3d 663, 668 (7th Cir. 1995) (“[T]his note now requires that a defendant have control over at least one participant of the criminal activity in order to be subject to a sentencing enhancement under § 3B1.1.”); *United States v. Hammerschmidt*, 881 F.3d 633, 637 (8th Cir. 2018) (same); *United States v. Whitney*, 673 F.3d 965, 975 n.6 (9th Cir. 2012) (“Control over the activities or assets of a criminal organization may therefore support an upward departure from the guidelines, but may not contribute to the calculation of the guideline sentence.”); *United States v. Glover*, 179 F.3d 1300, 1303 (11th Cir. 1999) (same); *United States v. Graham*, 162 F.3d 1180, 1185 n.6 (D.C. Cir. 1998) (same).

Even the Fifth Circuit initially interpreted guideline § 3B1.1 as applying the aggravating role adjustment only to a defendant who supervised another participant. *United States v. Jobe*, 101 F.3d 1046, 1068 (5th Cir. 1996) (reversing the aggravating role adjustment because the defendant did not manage or supervise any

other criminal participant and the district court did not order an upward departure).

But in a 2012 en banc decision, the Fifth Circuit inexplicably reversed course. In *United States v. Delgado*, the en banc Fifth Circuit held that the aggravating role adjustment applies to a defendant who was the organizer, leader, manager, or supervisor of one or more other participants *or* who exercised management responsibility over the property, assets, or activities of a criminal organization. 672 F.3d 320, 345 (5th Cir. 2012) (en banc). The court did not explain why it interpreted Application Note 2 as providing alternative bases for the adjustment. *See Ochoa-Gomez*, 777 F.3d at 284 (Prado, J., joined by Elrod, J., concurring) (“Importantly, there is little to indicate that we intended this interpretation of the Guidelines.”).

The Fifth Circuit’s interpretation appears to conflate an “adjustment” and an “upward departure” for purposes of Application Note 2. *Id.* But “[t]he distinction between an adjustment and a departure is not merely semantic[.]” *Id.* An “adjustment affects the defendant’s offense level and corresponding guideline range, while a departure involves the ‘imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence.” *Id.* (internal citations omitted).

Only the Tenth Circuit has followed the Fifth Circuit’s misstep. *See United States v. Parker*, 553 F.3d 1309, 1322 (10th Cir. 2009). Like the Fifth Circuit, the Tenth Circuit offered no explanation for interpreting the aggravating role adjustment as applying if the defendant supervised another participant “or” exercised management responsibility of assets. *Id.*; *but see United States v. Valdez-Arieta*, 127 F.3d 1267, 1271–72 (10th Cir. 1997) (clarifying that the two-level § 3B1.1(c) enhancement applies to a defendant who organized others even if he did not directly control or supervise them).

C. Under this Court’s precedent, courts are bound by Application Note 2.

The Fifth Circuit’s disregard for the plain language of Application Note 2 also conflicts with this Court’s precedent. In *Stinson v. United States*, this Court held that the “commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” 508 U.S. 36, 38 (1993). Application Note 2 interprets and explains guideline § 3B1.1, and it is consistent with that guideline, federal law, and the Constitution. Indeed, before the note was added to the commentary, most circuit courts restricted aggravating role adjustments to defendants who had supervised other participants. *See App. C*, amend. 500.

D. The Court should grant certiorari to correct the Fifth Circuit’s misinterpretation of the aggravating role adjustment.

“Despite Application Note 2’s clear instructions, [the Fifth Circuit has] upheld offense-level increases under § 3B1.1 based solely on management of property, assets or activities.” *United States v. Warren*, 986 F.3d 557, 569 (5th Cir. 2021). Many judges “believe those cases incorrectly applied the Guidelines,” but they “are bound by them under [the] court’s rule of orderliness.” *Id.*; *see also Ochoa-Gomez*, 777 F.3d at 284 (Prado, J., joined by Elrod, J., concurring).

Derma’s case cleanly presents this guideline interpretation issue that has split the circuits. The government conceded that he did not supervise a participant. The majority opinion affirms the aggravating role finding solely based on Derma’s use and possession of the criminal organization’s assets. As Judge Dennis warns, the majority opinion comes dangerously close to saying that any drug runner is a manager. That is clearly inconsistent with Application Note 2. It is also in tension with the § 3B1.2 mitigating role adjustment which specifically recognizes that someone who transports drugs can still be considered for a mitigating role reduction. *See* U.S.S.G. § 3B1.2 cmt. n.3(A). And, with the circuit split, it results in disparate sentences for similarly situated defendants. For

instance, in Derma's case, the lack of aggravating role translates to at least a year and a half difference between the guideline range he was sentenced under and the correct one.³

The Court should grant certiorari so that it can correct the Fifth Circuit's misinterpretation and misapplication of the aggravating role adjustment.

³ For Derma's resentencing, the district court calculated a range of 87 to 108 months in total offense level 29. Pet. App. A12. Without the two-level aggravating role adjustment, his total offense level would have been 27, producing a range of 70 to 87 months. U.S.S.G. Ch.5, Pt.A (sentencing table). Derma's range would be even lower if the court also applies a safety valve reduction on remand. *See* Pet. App. A5; § 2D1.1(b)(18).

CONCLUSION

FOR THESE REASONS, Derma asks that this Honorable Court grant a writ of certiorari.

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