

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALBERTO PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

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QUESTION PRESENTED

Does the district court's blind reliance upon United States Sentencing Guideline § 2D1.1(c)(1)'s draconian base offense level of 38 for distribution of "pure" methamphetamine, without considering arguments adopted by numerous district courts that the guideline is baseless and unduly harsh, result in an arbitrary sentence and violate a criminal defendant's right to due process?

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Petitioner, Alberto Perez, respectfully asks that a writ of certiorari issue to review the judgment and decision of the Ninth Circuit Court of Appeals in Case No. 22-50178.

OPINION BELOW

The unpublished December 13, 2023, Memorandum decision of the Ninth Circuit Court of Appeals is attached as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The matter seeks redress from the Ninth Circuit Court of Appeals' December 13, 2023, Memorandum (Appendix A). Petitioner's petition for rehearing and rehearing en banc was denied January 18, 2024 (Appendix B).

CONSTITUTIONAL PROVISION AND GUIDELINES INVOLVED

This case turns on the Fifth Amendment to the U.S. Constitution, and United States Sentencing Guideline § 2D1.1(c)(1).

LIST OF PROCEEDINGS

Petitioner was indicted on March 9, 2021, in United States District Court for the Central District of California, in *United States v. Perez*, Cr. 21-00112-FLA.¹ Petitioner was charged with possession of methamphetamine with intent to distribute, possession of a firearm in furtherance of a drug crime, and forfeiture allegations. Dkt. 1.

A plea agreement was filed on September 16, 2021, and a Change-of-Plea Hearing was held on October 8, 2021. Dkt. No. 43. Probation recommended a 120-month sentence. Dkt. 48. However, on August 5, 2022, Petitioner was sentenced to 210 months in prison and remanded to custody. Dkt. 71.

¹ All citations to "Dkt." refer to numbered entries in the district court's docket.

Petitioner appealed his sentence to the United States Court of Appeals for the Ninth Circuit in Case No. 22-50178. The appeal was denied on December 13, 2023 [9th Cir. Dkt. 41-1], and his Petition for Rehearing was denied on January 26, 2024. 9th Cir. Dkt. 43.

STATEMENT OF THE CASE²

Application of the U.S. Sentencing Guidelines to an individual defendant may be challenged on due process grounds. *United States v. Brittman*, 872 F.2d 827, 828 (8th Cir. 1989)). Due process is satisfied if the statute or regulation in question bears a “reasonable relation to a proper legislative purpose” and is “neither arbitrary nor discriminatory.” *United States v. Bishop*, 894 F.2d 981, 986 (8th Cir. 1990) (quoting *Nebbia v. New York*, 291 U.S. 502, 537 (1934)). Thus, where a statute or rule is arbitrary or discriminatory, due process is violated.

USSG § 2D1.1(c)(1) assigns an offense level of 38 to the possession of more than 4.5 kilograms of “actual” methamphetamine. The Guideline Range for possession of that much actual methamphetamine ranges from 235 months to life imprisonment, depending upon a defendant’s criminal history. That is the same offense level assigned to:

- 90 KG or more of Heroin;
- 450 KG or more of Cocaine;
- 25.2 KG or more of Cocaine Base;
- 36 KG of Fentanyl; or,
- 450 KGs of a mixture containing Methamphetamine.

Section 2D1.1(c)(1)’s severe treatment of relatively small amounts of actual methamphetamine has generated much criticism among district courts. Conversely,

² The district court had jurisdiction under 18 U.S.C. § 3231, and the appellate court had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

this district court placed great weight on the Sentencing Commission's harsh treatment of pure methamphetamine.

The parties agree that pursuant to guideline Section 2D1.1 and the drug quantity table, that the base offense level is 38, because the offense involved 5.18 kilograms of actual methamphetamine. *And I do note that this is the highest level and [sic] the drug quantity table.*

The district court followed this observation by emphasizing that this Guideline has been in existence *for 30 years*, which presumably demonstrated the Guideline's bona fides.

[W]hen we look at the guidelines that have been in effect now for more than 30 years, this is the top level of the drug quantity table so that the amount that he had in his possession, the 5-plus kilograms of meth is the equivalent under level 38 of 90 kilograms or more of heroin, 450 kilograms or more of cocaine, 25 kilograms or more of crack cocaine, 90 kilograms or more of PCP.

Toward the end of the hearing, the district court noted *for a third time* that the amount of methamphetamine Petitioner possessed placed him "at the top of the drug quantity table in the Sentencing Guidelines."

Contrary to the great weight the district court ascribed to this 30-year-old Guideline provision, the Sentencing Commission's rationale for its draconian treatment of actual methamphetamine is no longer valid, and has been shown to be unfairly harsh in comparison with the Guideline's treatment of other illegal drugs.

First, purity no longer corresponds to culpability. The offense level for 5-15 kilograms of mere methamphetamine (that is, a mixture containing methamphetamine, as opposed to the weight of "actual" methamphetamine) is only 34. USSG § 2D1.1(c)(3). In Petitioner's case, that would result in a Guideline range of 121-151 months. The Commission justified this disparity because traffickers of "actual" methamphetamine likely play "a [more] prominent role in

the criminal enterprise and [have greater] proximity to the source of the drugs.” U.S.S.G. § 2D1.1, cmt. n.27(c)). But for the past decade, virtually all street methamphetamine is close to 100% pure, leaving the premise of greater culpability “divorced from reality.” *United States v. Ibarra-Sandoval*, 265 F. Supp.3d 1249, 1255-56 (D.N.M. 2017). *See also United States v. Ferguson*, No. CR 17-204 (JRT/BRT), 2018 WL 3682509, at *4 (D. Minn. Aug. 2, 2018) (“purity is no longer a proxy for, and thus not probative of, the defendant's role or position in the chain of distribution”); *United States v. Hartle*, No. 4:16-CV-00233-BLW, 2017 WL 2608221, at *3 (D. Idaho June 15, 2017) (“Today, most methamphetamine seized at all distribution levels is remarkably pure, which means that higher purity is not a good indicator of a defendant's place in the chain of distribution”).

Second, the disparity also over-criminalizes methamphetamine trafficking when compared to the distribution of other controlled substances, such as cocaine or heroin, which are equally addictive and dangerous.³ Had Petitioner been caught with 5.18 kilograms of cocaine, his starting offense level would have been 30 and his starting Guideline Range would have been 108-135. USSG § 2D1.1(c)(5). A similar amount of heroin results in an initial offense level of 32 and an initial Guideline Range of 135-168. USSG § 2D1.1(c)(4). Not surprisingly, year after year, the average sentence for methamphetamine distribution is a third longer than what federal courts mete out to heroin, cocaine and even fentanyl traffickers. *See* U.S. Sent. Comm., Quarterly Data Report at 35, Fig. 12 (Mar. 2022).

³ L. Coleman, Crack 2.0: Federal Methamphetamine Sentencing Policy, The Crack/Meth Sentencing Disparity, And The Meth/Meth-Mixture Ratio, 34 Fed. Sent. R. 29 (Oct. 2021) *citing* Goodman & Gilman's The Pharmacological Basis of Therapeutics (12th ed. 2011), at 663.

For these reasons, a growing chorus of district courts has rejected the “actual versus mixture” distinction for sentencing purposes and, absent cogent reasons, decline to give effect to the “actual” methamphetamine Guideline. *See, e.g., United States v. Carrillo*, 440 F. Supp.3d 1148, 1153-1156 (E.D. Calif. 2020); *United States v. Rodriguez*, 382 F. Supp.3d 892 (D. Alaska 2019); *United States v. Bean*, 371 F.3d 46 (D. N.H. 2019); *United States v. Pereda*, No. 18-cr-00228-CMA, 2019 WL 463027, at *1-6 (D. Colo. Feb. 6, 2019); *United States v. Dunn*, No. 1:18-CR-00062-BLW-1, 2018 WL 5809944, at *4 (D. Idaho, Nov. 6, 2018); *United States v. Nawanna*, 321 F. Supp.3d 943, 945 (N.D. Iowa 2018); *United States v. Harry*, 313 F. Supp.3d 969, 973-75 (N.D. Iowa 2018); *Ibarra-Sandoval*, 265 F. Supp.3d at 1252-54; *United States v. Hayes*, 948 F. Supp.2d 1009 (N.D. Iowa 2013); *Hartle*, 2017 WL 2608221, at *1.⁴

⁴ While some courts like *Hayes* have remedied the “actual” versus “mixture” disparity by reducing all sentences resulting from the “actual” Guideline by one-third, *see* 948 F. Supp.2d at 1032, most have simply refused to apply the “actual” methamphetamine guideline at all. Instead, they treat **all** methamphetamine offenses as falling under the **mixture** guideline regardless of purity. *See Rodriguez*, 382 F. Supp.3d at 898 (“will routinely grant downward variances from the Guidelines range for methamphetamine offenses where the base offense level is enhanced due to the tested purity”); *Bean*, 371 F. Supp. at 55-56 (same); *Harry*, 313 F. Supp.3d at 974 (“I will no longer apply [the actual and ice Guidelines]. Instead, by way of variance, I will calculate an alternative Guidelines range, starting with a base offense level determined by reference to the methamphetamine mixture Guidelines”); *Ferguson*, 2018 WL 3682509 (following *Harry*); *United States v. Saldana*, No. 1:17-cr-271-1, 2018 U.S. Dist. LEXIS 110790 (W.D. Mich. 2018) (“This Court’s methodology for sentencing in methamphetamine cases will be to treat all methamphetamine quantities as mixtures”); *Ibarra-Sandoval*, 265 F. Supp.3d at 1256 (imposing a term that “would have fallen within the Guidelines range had [the defendant] been sentenced under the methamphetamine-mixture calculation”); *cf. United States v. Hoover*, No. 4:17-CR-327-BLW, 2018 WL 5924500 (D. Idaho Nov. 13, 2018) (“typically, [imposing] a sentence much closer

This confluence of factors renders the methamphetamine Guidelines unconstitutional as applied to Petitioner. The factual basis for the draconian sentences for actual methamphetamine is no longer valid. And a straight-up comparison with the Guidelines for other serious drugs demonstrates that the punishment it proscribes are irrationally severe. While that may not be a problem where a district court is aware of the issue and can choose if and how to remedy the problem (like the district courts cited above), it's a real problem where (as here) the district court is not even aware of the issue and instead venerates a Guideline because of its longevity.⁵ Because the district court's determination of Petitioner's guideline range was central to the 210-month sentence it imposed, application of USSG § 2D1.1(c)(1) to Petitioner resulted in a sentencing determination that was arbitrary, unfair, and therefore unconstitutional.

REASONS FOR GRANTING THE PETITION

Many district courts have debunked the Guideline's rationale for recommending draconian sentences for actual methamphetamine compared to a mixture of methamphetamine and/or other serious drugs. These courts have refused to follow this Guideline and instead imposed significantly reduced sentences. The district court was obviously unaware that the central pillar supporting Petitioner's lengthy sentence was cracked and could not support such a lengthy sentence, at least without further explanation from the district court. The

to the guideline range applicable [to meth mixtures]"') and *United States v. Moreno*, 583 F.Supp.3d 739, 745 (W.D. Va. 2019) (same).

⁵ Petitioner asserted defense counsel was ineffective for failing to bring this issue to the district court's attention. The Ninth Circuit declined to reach that issue on direct appeal. Appx. at A4.

district court's blind reliance on this guideline provision resulted in an arbitrary application of the guidelines in violation of Petitioner's right to due process.

CONLUSION

For the foregoing reasons, Petitioner requests that this Court grant the petition for writ of certiorari.

Dated: March 18, 2024

Respectfully submitted,

s/Kenneth M. Miller

Kenneth M. Miller
Counsel for Petitioner

APPENDIX

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEC 13 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALBERTO PEREZ, AKA Rhino,

Defendant-Appellant.

No. 22-50178

D.C. No.
2:21-cr-00112-FLA-1

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Fernando L. Aenlle-Rocha, District Judge, Presiding

Submitted December 11, 2023**
Pasadena, California

Before: GRABER, CHRISTEN, and OWENS, Circuit Judges.

Defendant Alberto Perez appeals the sentence imposed by the district court after he pleaded guilty to possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A)(viii). We dismiss the appeal in part and affirm in part.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

1. Defendant expressly waived the right to appeal most of the issues raised here because the court imposed a prison term “within or below the range corresponding to an offense level of 37 and the criminal history category calculated by the Court, or 120 months, whichever is higher[.]” (Emphases added). The court found a criminal history of II and sentenced Defendant to 210 months, which is “within . . . the range corresponding to an offense level of 37” using that criminal history score.

We review de novo whether a defendant waived the right to appeal. United States v. Dailey, 941 F.3d 1183, 1188 (9th Cir. 2019). Defendant’s waiver was made knowingly and voluntarily. See United States v. Medina-Carrasco, 815 F.3d 457, 461 (9th Cir. 2016) (stating the standard for enforcing a waiver). Defendant argues that the waiver was not made knowingly and voluntarily because he was sentenced to more than 120 months and a reasonable person in his position would not have known that he was waiving the appeal of a sentence greater than 120 months. But the clear wording of the waiver in the plea agreement is to the contrary. The fact that the Guideline range corresponding to offense level 37 is not spelled out in the plea agreement does not render the waiver uncertain or otherwise invalid. Nor does the waiver suggest that the Guideline range of a sentence for offense level 37 could be less than 120 months; the waiver specifies that the court could sentence Defendant “within or below” that range. (Emphasis added). Had

the court chosen to sentence “below” the range, in theory the resulting sentence could have been less than 120 months. Accordingly, Defendant’s waiver is valid, so his arguments that his sentence is unreasonable and that the district court abused its discretion in denying a mitigating role reduction are waived.

2. Defendant argues that the district court’s application of U.S. Sentencing Guidelines § 2D1.1(c)(1) violated his right to due process. See United States v. Pollard, 850 F.3d 1038, 1041 (9th Cir. 2017) (noting that a valid appellate waiver does not prevent courts from reviewing a sentence that violates the Constitution). Defendant’s argument is, in essence, a policy argument, not a constitutional one. For example, he asserts that the Guideline is “draconian,” that it lacks “any empirical basis,” and that it is “much maligned.” Accordingly, and also because Defendant expressly agreed to the application of this Guideline, Defendant’s due process argument fails.

3. Finally, Defendant argues that his trial counsel was ineffective for failing to argue that the sentencing court should not have followed U.S.S.G. § 2D1.1(c)(1) and for failing to call to the court’s attention that other judges have declined to apply this Guideline. We follow our usual rule and decline to review this claim on direct appeal. See United States v. Singh, 979 F.3d 697, 731 (9th Cir. 2020) (“[T]he decision of whether to review [an ineffective assistance of counsel] claim ‘is best left to the discretion of the district court.’” (citation omitted)).

DISMISSED IN PART and AFFIRMED IN PART.

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN 18 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ALBERTO PEREZ, AKA Rhino,
Defendant-Appellant.

No. 22-50178

D.C. No.
2:21-cr-00112-FLA-1
Central District of California,
Los Angeles

ORDER

Before: GRABER, CHRISTEN, and OWENS, Circuit Judges.

The panel judges have voted to deny Appellant's petition for panel rehearing. Judges Christen and Owens have voted to deny Appellant's petition for rehearing en banc, and Judge Graber has so recommended.

The full court has been advised of Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for panel rehearing and rehearing en banc, Docket No. 42, is DENIED.

CONSTITUTION ANNOTATED

Analysis and Interpretation of the U.S. Constitution

Constitution of the United States

Fifth Amendment

Fifth Amendment Explained

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.

PART D – OFFENSES INVOLVING DRUGS AND NARCO-TERRORISM

Historical Note

Effective November 1, 1987. Amended effective November 1, 2007 (amendment 711).

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

- (1) **43**, if—
 - (A) the defendant is convicted under 21 U.S.C. § 841(b)(1)(A) or (b)(1)(B), or 21 U.S.C. § 960(b)(1) or (b)(2), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a serious drug felony or serious violent felony; or
 - (B) the defendant is convicted under 21 U.S.C. § 841(b)(1)(C) or 21 U.S.C. § 960(b)(3) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or
- (2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or
- (3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a felony drug offense; or
- (4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If the resulting offense level is greater than level **32** and the defendant receives the **4**-level (“minimal participant”) reduction in §3B1.2(a), decrease to level **32**.

(b) Specific Offense Characteristics

- (1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
- (2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by **2** levels.
- (3) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.
- (4) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.
- (5) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.
- (6) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.
- (7) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.
- (8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.

(c) DRUG QUANTITY TABLE

CONTROLLED SUBSTANCES AND QUANTITY*	BASE OFFENSE LEVEL
(1) <ul style="list-style-type: none"> ● 90 KG or more of Heroin; ● 450 KG or more of Cocaine; ● 25.2 KG or more of Cocaine Base; ● 90 KG or more of PCP, or 9 KG or more of PCP (actual); ● 45 KG or more of Methamphetamine, or <ul style="list-style-type: none"> 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of “Ice”; ● 45 KG or more of Amphetamine, or <ul style="list-style-type: none"> 4.5 KG or more of Amphetamine (actual); ● 900 G or more of LSD; ● 36 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); ● 9 KG or more of a Fentanyl Analogue; ● 90,000 KG or more of Marihuana; ● 18,000 KG or more of Hashish; ● 1,800 KG or more of Hashish Oil; ● 90,000,000 units or more of Ketamine; ● 90,000,000 units or more of Schedule I or II Depressants; ● 5,625,000 units or more of Flunitrazepam; ● 90,000 KG or more of Converted Drug Weight. 	Level 38
(2) <ul style="list-style-type: none"> ● At least 30 KG but less than 90 KG of Heroin; ● At least 150 KG but less than 450 KG of Cocaine; ● At least 8.4 KG but less than 25.2 KG of Cocaine Base; ● At least 30 KG but less than 90 KG of PCP, or <ul style="list-style-type: none"> at least 3 KG but less than 9 KG of PCP (actual); ● At least 15 KG but less than 45 KG of Methamphetamine, or <ul style="list-style-type: none"> at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or at least 1.5 KG but less than 4.5 KG of “Ice”; ● At least 15 KG but less than 45 KG of Amphetamine, or <ul style="list-style-type: none"> at least 1.5 KG but less than 4.5 KG of Amphetamine (actual); ● At least 300 G but less than 900 G of LSD; ● At least 12 KG but less than 36 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); ● At least 3 KG but less than 9 KG of a Fentanyl Analogue; ● At least 30,000 KG but less than 90,000 KG of Marihuana; ● At least 6,000 KG but less than 18,000 KG of Hashish; ● At least 600 KG but less than 1,800 KG of Hashish Oil; ● At least 30,000,000 units but less than 90,000,000 units of Ketamine; ● At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants; ● At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam; ● At least 30,000 KG but less than 90,000 KG of Converted Drug Weight. 	Level 36
(3) <ul style="list-style-type: none"> ● At least 10 KG but less than 30 KG of Heroin; ● At least 50 KG but less than 150 KG of Cocaine; ● At least 2.8 KG but less than 8.4 KG of Cocaine Base; ● At least 10 KG but less than 30 KG of PCP, or <ul style="list-style-type: none"> at least 1 KG but less than 3 KG of PCP (actual); 	Level 34