24-6298

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

REYES ESPINOZA—PETITIONER

VS.

UNITED STATES OF AMERICA —RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

United States Sentencing Guidelines § 3B1.1(a), provides: "If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels." Given that the purpose of the Guideline is to increase punishment for defendants based on how far they extend the reach of their criminal activities beyond themselves, should the defendant be counted towards the five participants required to trigger the upward adjustment?

LIST OF PARTIES

All parties to these issues appear in the caption of the case on the cover page.

LIST OF PRIOR PROCEEDINGS

- *United States v. Reyes Espinoza, et al*, Southern District of California No. 21-cr-1559-H-1. Prosecution of petitioner and codefendants. Petitioner pled guilty to counts one and two of the indictment on April 22, 2022. The plea was accepted on May 10, 2022. Judgment was entered on November 8, 2022.
- *United States v. Reyes Espinoza*, 9th Cir. 22-50273. Direct appeal from judgment. Memorandum decision affirming judgment filed on July 10, 2024. Rehearing and en banc review denied on September 9, 2024.

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The memorandum decision of the Ninth Circuit and its order denying rehearing and en banc review are unpublished. App. 1-4, 5.[1]

JURISDICTION

On July 10, 2024, a panel of the U.S. Court of the Appeals for the Ninth Circuit affirmed petitioner's sentence on direct appeal. App. 1-4. On July 12, 2024, the clerk granted petitioner's request to extend the deadline for petitioner to file a petition for rehearing and en banc review to August 23, 2024. App. 22. Petitioner filed his rehearing petition on August 14, 2024. App. 6-21. On September 9, 2024, the Court denied the petition. App. 5.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction of the case pursuant to 18 U.S.C. § 3231. The Ninth Circuit had jurisdiction of petitioner's appeal pursuant to 28 U.S.C. § 1291. This petition is timely under Supreme Court Rules 13.1 and 13.3.

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[1] App.=Appendix in one volume; PSR=Presentence Report, filed under seal.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Sentencing Guideline § 3B1.1

"(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) 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, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels."

USSG § 3B1.1, Application Note 1

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

USSG § 3B1.1 Application note 2

"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."

STATEMENT OF THE CASE

On May 25, 2021, the government filed a ten-count indictment against petitioner and fifty-nine codefendants. App. 71-79. Petitioner was charged in counts one and two. Count one charged petitioner and all other defendants with conspiring to distribute fifty grams and more of actual methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. Count two charged petitioner and five other defendants with conspiring to launder the proceeds of an unlawful activity in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h). App. 72-74. The indictment also alleged that the government was entitled to forfeiture of a property in Minnesota, cash, vehicles, and firearms. App. 76-79.

Petitioner pled guilty to the two charges. App. 70. There was no plea agreement. App. 65. The district court sentenced him to 168 months in prison. App. 23-27, 63-64. On July 10, 2024, a panel of the U.S. Court of Appeals for the Ninth Circuit filed a memorandum decision rejecting his sole sentencing argument, presented here, and affirming the judgment. App. 1-4. On July 12, 2024, the Court granted petitioner's motion to extend the due date for filing a petition for rehearing and/or en banc review to August 23, 2024. App. 22. He filed a petition for panel rehearing and en banc review on August 14, 2024, which the Court denied on September 9, 2024. App. 6-21, 5.

STATEMENT OF FACTS

I. The Facts of the Offenses

According to the Presentence Report, petitioner and codefendants David Villegas, John Bomenka, Dennis Jones, and Darren Mosier were the principal players in an extensive methamphetamine distributing and money laundering network. PSR 5. Petitioner obtained 40 to 100 pounds of methamphetamine per week from unnamed sources. PSR 6, 15. He supplied this to Villegas. Villegas supplied this to his principal sub-distributors, Bomenka, Jones, and Mosier, and to other distributors. Bomenka, Jones, and Mosier supplied their own sub-distributors and facilitators. PSR 6, 12-13. Petitioner and codefendant Rodriguez also supplied methamphetamine to Charles Miller. PSR 9. Rodriguez is a methamphetamine supplier. PSR 11.

Approximately thirty stops, seizures, and controlled purchases between January 9, 2020 and March 3, 2021 yielded 53 kilograms of actual methamphetamine for which defendants were being held responsible. PSR 6-9. Petitioner was the principal source of supply. He was directly linked to three seizures on July 17, 2020, July 21, 2020, and October 8, 2020. PSR 9. He was also linked to a significant money laundering transaction, the purchase of residential property at 6815 Village Oak Drive in Remer,

Minnesota. PSR 9, 14-15. Multiple firearms were seized at that property on May 30, 2021, pursuant to a search warrant. PSR 15.

The PSR identified several people working under petitioner. Carlos and Mario Espinoza were methamphetamine couriers and facilitators. PSR 9-10. Gloria Sandoval ran a stash house. PSR 11. Petitioner's wife, Christian Lopez-Villegas was a facilitator who made deliveries of drugs and cash. PSR 12. Carlos and Mario Espinoza would smuggle the methamphetamine from Mexico into the United States. It would be stored at the stash house Sandoval ran. Sandoval and Lopez-Villegas would then make drug deliveries as petitioner directed. PSR 15. Importantly, the PSR does not mention anyone named "Sheriff" or John Mott.

II. Relevant Procedural History

The Presentence Report ("PSR") recited the offense conduct as set out above. It calculated the base offense level based on the interplay of USSG § 2S1.1, which governs money laundering crimes, and USSG § 2D1.1, which governs drug crimes. Under the drug quantity table set out in USSG § 2D1.1(c), the base offense level was 38. This was adjusted upward by two levels for possession or a firearm during the offense, USSG § 2D1.1(b)(1); by two levels because the offense involved the importation of methamphetamine, USSG § 2D1.1(b)(5); by two levels because petitioner maintained a premises

for distribution purposes; USSG § 2D1.1(b)(12); by two levels because petitioner was convicted of money laundering under 18 U.S.C. § 1956, USSG § 2S1.1(b)(2)(B); and by four levels for leadership under USSG § 3B1.1(a). The adjusted offense level of 50 was reduced to 47 for acceptance of responsibility. USSG § 3E1.1(a)-(b). PSR 17-18.

On the upward adjustment for leadership, the PSR recites:

> "Based on the information outlined below and in the Offense Conduct section, this writer opines that Espinoza is worthy of an aggravating role adjustment pursuant to USSG § 3B1.1(a). In summary, the defendant was the principal source of supply for this complex and sophisticated drug distribution and money laundering network. He worked as a leader of this organization and worked jointly with his coconspirators to import and distribute multi-kilogram quantities of methamphetamine throughout San Diego County and the United States. Specifically, Reyes Espinoza supplied about 40 to 100 pounds of methamphetamine to his main distributor, David Villegas. He was linked directly to three significant methamphetamine seizures (7/17/20, 7/21/20, and 10/8/20), as well as a significant money laundering transaction. As noted on pages two and three of this report, 60 defendants, including Espinoza, were charged in this offense. Based on the above, the undersigned maintains that the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive; therefore, four-levels are added. USSG § 3B1.1(a)." PSR 18.

Petitioner's criminal history consisted mostly of state law drug offenses, including a money laundering conviction in Arizona. He had five criminal history points. This put him in Criminal History Category IV. PSR 18-21. This yielded an advisory Guideline sentencing range of "life." Count one had

a mandatory statutory minimum sentence of ten years and a maximum sentence of life. Count two had a maximum sentence of twenty years and no mandatory minimum. PSR 25.

After summarizing petitioner's social history, the PSR recited that petitioner's case was mitigated by his youth, family situation, and lawful work history. It was aggravated by his having committed similar crimes, his drug problems, minimal education, and the fact that his work history had not been verified. PSR 22-27.

The PSR deemed specific deterrence to justify a lengthy sentence, albeit one that varied from the advisory Guideline range. PSR 27-29. It recommended a 270-month sentence on count one with a concurrent 120-month term on count two. This was to be followed by concurrent supervised release terms of five years and three years. PSR 29-30.

Petitioner objected to the factual recitation that he was at the top of the distribution chain with Villegas his principal distributor. Petitioner asserted that he was just a supplier and that Villegas bought from him and ran the distribution ring. PSR 33. For the same reasons, Petitioner objected to the four-level upward adjustment for leadership.

An Addendum to the PSR addressed petitioner's objections. No changes were made. Factually, his provision of drugs to the principal distributor put

him in the leadership chain of the distribution network. PSR 33. The leadership adjustment was maintained. The Addendum repeated the above-quoted initial justification for it. PSR 34.

At the sentencing hearing, petitioner adhered to his position that his activities were focused exclusively on providing drugs to his buyer, Villegas, who ran his own extensive distribution network. This only supported a two-level upward adjustment. App. 30-31.

The government agreed that petitioner was not responsible for all of Villegas's sub-distributors. This still left "multiple defendants here, in this conspiracy, that Mr. Espinoza led supervised, managed." App. 37. These included, petitioner's alleged personal sub-distributors, Villegas and Charles Miller, whom petitioner supplied with methamphetamine, the couriers, Mario and Carlos Espinoza, Gloria Sandoval, the stash house operator, an alleged courier named John Mott, who was charged in a separate case, and someone known as "Sheriff," who was supposedly petitioner's right-hand man in Mexico, when it came to arranging shipments for the couriers. App. 37-39. As for "control over others," the government argued that there was "no question" petitioner exercised control over all the above people. App. 39-40.

Defense counsel agreed that petitioner exercised control over some of them but disagreed that it added up to "the magic number factually of . . .

five[.]" App. 41. For instance, Villegas was not controlled by petitioner, and there was not "much information on Sheriff." App. 41. Petitioner was just a middle man who had connections with drug suppliers in Mexico and was able to supply Villegas. App. 42.

The court imposed the upward adjustment. It agreed with the Probation Officer that petitioner supplied "a large-scale drug trafficking organization[.]" He also supervised and managed at least five other co-conspirators, including his wife, his courier brother and cousin, stash house operator Gloria Sandoval, courier John Mott, and Sheriff, the right-hand man. App. 42. The court did not find that petitioner supervised or managed Villegas or Miller. It did not count petitioner towards the five.

The district court agreed that petitioner's criminal history was overstated. It reduced it to Category III. App. 46. In light of his work history, his status as a drug addict, and the hardship on petitioner's family, defense counsel asked for a sentence close to the 120-month mandatory minimum rather than the 210 months the government sought. App. 46-49. The court imposed 168 months. App. 63-64.

In affirming, the Ninth Circuit panel noted appellant's argument that Sheriff and John Mott could not count towards the five because they had not been mentioned in the PSR. Because the government did not defendant their

inclusion, the Court did not count them. App. 2, fn. 2. However, citing Ninth Circuit precedent, the Court counted petitioner. App. 2-3. The panel also counted the distributors Villegas and Miller despite the district court's not having done so. App. 3.

REASONS FOR GRANTING THE PETITION

I. To Support a Four-Level Upward Adjustment to the Offense Level for Leadership under USSG § 3B1.1(a), the "Criminal Activity" that the Defendant Organized or Led Must Involve "Five or More Participants" in Addition to the Defendant.

A. Introduction: Reasons for Granting Certiorari

Under the Sentencing Guidelines, a defendant receives an upward adjustment to his offense level of his offense level if he organized and/or led a "criminal activity" that involved five or more persons. Cases interpreting this Guideline have held that the defendant counts towards the five. Given that the thrust of the upward adjustment is how far the defendant extended his criminal reach beyond himself, having the defendant count towards the five is absurd. As this issue has arisen before and will certainly recur, the petition should be granted to settle this important question of federal law. Supreme Court Rule 10(c).

This is an appropriate case in which to do so. The district court never said that 168 months would be the extent of the reduction regardless of any Guidelines errors it might have made. To the contrary, it noted that its

sentence amounted to "the equivalent of a level 33, which would be a significant departure from a level 47." App. 63. The court's linkage of petitioner's sentence to his total adjusted offense level suggests that even though the advisory range would not change, if the offense level were 45 instead of 47, he could receive a correspondingly lower sentence.

B. The Merits

1. Standard of Review

When a sentence is imposed as a result of an incorrect application of the United States Sentencing Guidelines, reversal and remand for resentencing in light of the correct Guideline range are required. 18 U.S.C. § 3742(f)(1). Whether the district court identified the correct legal standard is reviewed *de novo*. Findings of fact at sentencing are reviewed for clear error. *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc); *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000). There must be evidence in the record that supports a finding by a preponderance of the evidence. *United States v. Holden*, 908 F.3d 395, 401 (9th Cir. 2018); *United States v. Syrax, supra*, 235 F.3d at 427.

2. Discussion

USSG § 3B1.1 provides:

> "(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
>
> (b) 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, increase by 3 levels.
>
> (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels."

Under Application Note 1, "A 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted." Under Application note 2, "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."

Factoring out John Mott and Sheriff, who were not mentioned in the PSR, and distributors Villegas and Miller, about whom the district court made no findings, leaves only four people under petitioner's leadership: petitioner's wife, his two courier relatives, and the stash house operator. While this would support the two-level upward adjustment under USSG § 3B1.1(c), it does not support the four-level adjustment under USSG § 3B1.1(a) because petitioner does not count.

Courts have held that the district court may count a defendant towards the needed five under USSG § 3B1.1(a) or (b). See, e.g., *United States v. Egge*, 223 F.3d 1128, 1134 (9th Cir. 2000); *United States v. Atkinson*, 966 F.2d 1270, 1276 n. 7 (9th Cir. 1992); *United States v. Barbontin*, 907 F.2d 1494, 1498 (5th Cir. 1990). These cases all rely on *United States v. Preakos*, 907 F.2d 7 (1st Cir. 1990). *Preakos* held that because the convicted defendant was, under USSG § 3B1.1, Application Note 1, "criminally responsible for the commission of the offense," he is necessarily a "participant." Thus, the district court "was entitled to count the defendant" towards the five. *Id.* at 10.

Preakos is wrong. The fact that the defendant can tautologically be deemed a criminal participant does not mean he counts towards the five required for the upward adjustment. The definition applies to situations where who is a criminal participant requires a meaningful factual finding. Indeed, the test for whether someone is or is not a criminal participant is incompatible with applying it to the defendant.

Criminal participants are "persons who were (i) aware of the criminal objective, and (ii) knowingly offered their assistance." *United States v. Anthony*, 280 F.3d 694, 698 (6th Cir. 2002). However, "mere unknowing facilitators of crimes will not be considered criminally responsible participants." *United States v. Cyphers*, 130 F.3d 1361, 1363 (9th Cir. 1997).

Yes, this test can be applied to the defendant: he knew what he was doing, wanted to help himself do it, and did not dupe himself. However, it is a very awkward fit not in keeping with what is truly at issue.

Cases on who is a criminal participant involve inquiry into what people other than the defendant knew and intended with respect to the defendant's crimes. *Egge* applied authority holding that customers and end users are not automatically criminal participants in a convicted drug defendant's activities. *United States v. Egge*, *supra*, 223 F.3d at 1133-1134. It then analyzed the activities of others to uphold the finding. *Id.* at 1134-1135. In *United States v. Lewis*, 68 F.3d 987 (6th Cir. 1995), the defendant's use of passersby at a casino to purchase gift certificates with stolen credit card information did not make the passersby participants even though some were suspicious. *Id.* at 988-990.

There is nothing to inquire into about the defendant's participation. Further, it is strange to ask, "How far did the defendant extend his criminal reach beyond himself" and have the question partially pre-answered; the "magic number" is five but the starting point, rather than being zero, is already one. The Guidelines should be interpreted to avoid such absurdities. *United States v. Evans-Martinez*, 611 F.3d 635, 642 (9th Cir. 2010).

CONCLUSION

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

Dated: December 5, 2024

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