No. __________

IN THE
Supreme Court of the United States

JESUS ENRIQUE MORENO,
Petitioner,
vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Sentencing Guidelines Manual generally requires that courts use the manual in effect on the date of sentencing. On appeal, though, circuit courts must apply a post-sentencing guideline amendment, but only if the amendment "clarifies" the guideline. The circuits are divided over when a guideline amendment is "clarifying" (applicable on appeal) or "substantive" (inapplicable on appeal). Several circuits, including the Tenth Circuit below, hold that an amendment is "substantive" if it clashes with that circuit's precedent. Other circuits recognize the Sentencing Commission's authority to resolve a circuit split via a "clarifying" amendment even if the amendment overrules circuit precedent.

The question presented is:

> Should a guideline amendment's character as "clarifying" or "substantive" vary from circuit to circuit, depending on whether the amendment is consistent with case law within each circuit, regardless of the Sentencing Commission's intent?

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

Other Authorities

Petition for a Writ of Certiorari

Petitioner Jesus Enrique Moreno respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Opinion Below

The panel decision of the United States Court of Appeals for the Tenth Circuit is unpublished but is available at 696 Fed. Appx. 886, and is included as Appendix A. The unpublished order denying the petition for rehearing en banc is included as Appendix B. The district court's oral ruling denying Mr. Moreno's request for a mitigating role sentencing reduction is included as Appendix C.

Jurisdiction

The United States District Court for the District of Kansas originally had jurisdiction under 18 U.S.C. § 3231, which provides exclusive jurisdiction for offenses against the United States. Mr. Moreno timely appealed his sentence to the United States Court of Appeals for the Tenth Circuit under 18 U.S.C. § 3742 and 28 U.S.C. § 1291. The Tenth Circuit affirmed in an unpublished order. On August 21, 2017, the Tenth Circuit denied Mr. Moreno's petition for rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutes and Sentencing Guidelines Involved

Title 28 U.S.C. § 994(p) provides:

> The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons

> therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

The mitigating role guideline, USSG § 3B1.2, is included as Appendix E. An amendment to this guideline, Amendment 794, is included as Appendix D.

Statement of the Case

This case is an ideal vehicle not only to resolve the specific circuit split created by the Tenth Circuit's opinion, but also to resolve whether the United States Sentencing Commission has the authority to determine whether a guideline amendment is "clarifying," and thus applicable to non-final cases. Prior to the Tenth Circuit's decision below, the courts of appeals had unanimously held that, because Amendment 794 clarified USSG § 3B1.2, the amendment applied to cases on direct appeal. The Tenth Circuit's contrary decision in this case creates a circuit split on this issue.

More importantly, the courts of appeals disagree over how to determine whether any guideline amendment is "clarifying" or "substantive." In holding that Amendment 794 was "substantive," and therefore inapplicable in Mr. Moreno's appeal, the Tenth Circuit applied an against-circuit-precedent test. Under this test, an amendment's character as substantive or clarifying depends on whether the amendment conflicts with that circuit's precedent. This rule conflicts with precedent from at least three other courts of appeals. This Court should use this case to resolve this conflict and hold that the Sentencing Commission has the authority to determine whether guideline amendments are clarifying or substantive, subject only to constitutional and statutory constraints previously identified by this Court.

A. Legal Background

The United States Sentencing Guidelines set out detailed rules that take into account various offense and offender characteristics in order to yield specific sentencing recommendations. The Guidelines Manual contains three classes of such rules: (1) the guidelines themselves; (2) commentary that interprets the guidelines, explains their operation, or provides background information; and (3) policy statements, which pertain to the application of the guidelines or otherwise promote the purposes of sentencing. *See Stinson v. United States*, 508 U.S. 36, 41 (1993). At issue here, USSG § 3B1.2 provides for a two, three, or four-level reduction in the applicable offense level to reflect the degree to which a defendant's culpability falls below that of "the average participant." USSG § 3B1.2, comment. (n.3(A)).

Congress has authorized the Sentencing Commission to review and revise the guidelines periodically. 28 U.S.C. § 994(o). The Commission also periodically amends commentary, and "[a]mended commentary is binding on the federal courts" unless it violates the Constitution, federal statute, or is inconsistent with the guideline it interprets or explains. *Stinson*, 508 U.S. at 46. The guidelines generally require that courts apply the manual in effect on the date of sentencing. USSG § 1B1.11(a). But a widely recognized exception exists for subsequent "clarifying" amendments, which "change[] nothing concerning the legal effect of the guidelines, but merely clarif[y] what the Commission deems the guidelines to have already meant." *United States v. Smaw*, 22 F.3d 330, 333 (D.C. Cir. 1994). Clarifying amendments are applied to cases on appeal. *See Early v. United States*, 502 U.S. 920 (1991) (White, J., dissenting from denial of certiorari).

This case involves whether Amendment 794, which revised § 3B1.2, was a clarifying or substantive amendment. The Commission amended the guideline following a study that "found that mitigating role is applied inconsistently and more sparingly than the Commission intended." USSG Supp. to App. C., amend. 794 ("Reason for Amendment").

Amendment 794, which took effect November 1, 2015, addresses four main topics. First, it resolves a circuit split by overriding "case law that may be discouraging courts from applying the adjustment in otherwise appropriate circumstances." *Id.* That circuit split concerned whether the "average participant" reference class for assessing the defendant's culpability includes only the other participants in the crime or also offenders typical of those committing that type of crime. The amendment adopted the approach that relied only on other participants in the crime. *Id.* Second, the amendment squarely rejected the position of courts who deny the role reduction to offenders whose role in the offense was considered "integral" or "indispensable." *Id.* The amendment expressly rejected a Tenth Circuit case holding otherwise. *Id.* (quoting *United States v. Carter*, 971 F.2d 597, 600 (10th Cir. 1992)). Third, the amendment changed two phrases that "may have had the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances." USSG Supp. to App. C., amend. 794. Fourth, the amendment provided a nonexclusive list of factors to be considered in applying the mitigating role adjustment. *Id.*

B. The Offense

In June 2013, Mr. Moreno and his brother were traveling on an interstate highway when they were stopped for a minor traffic violation. Doubting their travel plans and noting their nervousness, an officer sought and obtained consent to search the rented car. The search uncovered over six kilograms of methamphetamine hidden in the car. Pet. App. 2a. Mr. Moreno eventually admitted to having been paid $3,000 to transport the drugs, something he had done twice before. Describing his trips, he said that "a guy" would bring methamphetamine from Mexico to Arizona. Mr. Moreno would leave the rental car at a location for it to be loaded with drugs, which he would then drive from Phoenix to a house in Kansas City. There, he would leave the car with the drugs and leave in a different car. He would return the next day, switch back into the now empty rental car, and return to Arizona. Pet. App. 2a-3a.

C. Proceedings In The District Court

Mr. Moreno was charged with and later pleaded guilty to possessing with the intent to distribute more than 500 grams of methamphetamine, 21 U.S.C. § 841(a)(1). The presentence investigation report calculated Mr. Moreno's guideline range using the 2014 version of the Guidelines Manual (the manual in effect on the date of sentencing). Pet. App. 3a. Mr. Moreno objected to the report's failure to include a two-level mitigating-role reduction, USSG § 3B1.2. Pet. App. 4a. The objection and a later sentencing memorandum identified by name seven other participants in the drug activity. These documents argued that Mr. Moreno's role as a courier rendered him substantially less culpable than almost all of these other participants. Reciting the history of amendments to the mitigating role guideline, Mr. Moreno argued that the Sentencing Commission had repeatedly signaled that drug couriers were eligible for a mitigating role reduction. The 2015 guideline amendment at issue here, later designated Amendment 794, was appended to the memorandum and cited in support of the argument. *See* USSG Supp. to App. C., amend. 794 (Nov. 1, 2015). The amendment had been proposed but had not yet taken effect by the sentencing date.

Mr. Moreno explained that, with the mitigating role reduction, his base offense level would have been reduced from level 38 (the highest base offense level on the drug quantity chart) to level 34 under USSG § 2D1.1(a)(5)(B)(iii). Furthermore, the reduction would have rendered Mr. Moreno ineligible for the two-level importation enhancement, USSG § 2D1.1(b)(5)(B). With a two-level minor role reduction, Mr. Moreno's total offense level would have been 27, resulting in a guideline range of 70 to 87 months' imprisonment. Without this reduction, the total offense level was 35, yielding a guideline range of 168 to 210 months' imprisonment. Mr. Moreno received a 168-month term of imprisonment. Pet. App. 4a.

D. Proceedings in the Court of Appeals

Mr. Moreno appealed, arguing that the district court erred in denying the mitigating-role reduction. In particular, Mr. Moreno argued that the district court failed to conduct the required within-case comparison (*i.e.*, a comparison of his culpability with that of the average participant in the offense). Mr. Moreno further argued that the proposed amendment to § 3B1.2, later designated Amendment 794, was a "clarifying amendment" and that the district court had erred in refusing to recognize its focus on within-case comparison of relative culpability. Br. 17.

In affirming the district court, the court of appeals began its legal analysis by reciting commentary from the pre-Amendment version of § 3B1.2, which identified the target of the adjustment as one who "plays a part in committing the offense that makes him *substantially less culpable than the average participant.*" Pet. App. 5a (quoting USSG § 3B1.2, comment. (n.3(A)) (emphasis in original). This pre-2015 guideline commentary failed to state expressly whether the reference class for identifying the "average participant" consisted of other participants in the case or offenders who commit similar types of crimes. *Id.* The opinion then quotes Tenth Circuit precedent from 1991 holding that "the Guidelines permit courts not only to compare a defendant's conduct with that of others in the same enterprise, but also with the conduct of an average participant in that type of crime. In other words, resort may be had to both internal and external measurements for culpability." *Id.*

The Tenth Circuit then turned to Amendment 794. The court mentioned two points made by the Sentencing Commission in its statement of reasons for Amendment 794. First, resolving a circuit split, the commentary to the mitigating role guideline made explicit that only an within-case comparison was allowed. Pet. App. 5a-6a (citing USSG Supp. to App. C., amend. 794). The Commission reasoned that focusing on the offense and its participants was required to maintain consistency with the other guideline provisions addressing role in the offense. Pet. App. 6a (citing USSG Supp. to App. C., amend. 794). The post-amendment commentary accordingly states that the adjustment applies to those "substantially less culpable than the average participant *in the criminal activity*," and a "minor participant" is now defined as an offender "who is less culpable than most other participants *in the criminal activity*, but whose role could not be described as minimal." Pet. App. 6a (quoting USSG § 3B1.2, comment. (n.3(A), (n.5)) (2015) (emphasis in original). Second, the Commission's own study concluded that the mitigating role adjustment was being "applied inconsistently and more sparingly than [it] intended." Pet. App. 6a-7a. (quoting USSG Supp. to App. C., amend. 794). The court noted another structural change to the commentary, which added a nonexclusive list of five factors relevant to whether a mitigating role reduction should apply and the extent of any such reduction. Pet. App. 6a (citing USSG § 3B1.2, comment. (n.3(C)) (Nov. 1, 2015)).

The court of appeals next addressed the crux of the case, whether the amended version of the commentary would be applied on appeal. It noted that "clarifying" amendments are applied to cases on appeal; "substantive" amendments are not. Pet. App. 7a (citing USSG § 1B1.11(b)(2)). It cited three "factors" to consider in classifying an amendment as clarifying or substantive: "(1) 'whether the amendment alters [our] controlling pre-amendment interpretation of the guideline,' (2) 'whether the amendment changes the text of the sentencing guideline or merely accompanying commentary,' and (3) 'how the Sentencing Commission characterized the amendment.'" Pet. App. 7a-8a (quoting *United States v. Groves*, 369 F.3d 1178, 1183 (10th Cir. 2004)).

The court of appeals found that the first "factor" weighed in favor of the amendment being substantive, bluntly stating that "[p]rohibiting something we deemed appropriate is substantive," and quoting a Tenth Circuit case stating that a guideline amendment contrary to case law "is necessarily substantive." Pet. App 8a (quoting *Groves*, 369 F.3d at 1183). The court conceded that the second factor — whether the amendment changed the commentary, rather than the guideline — weighed in favor of the amendment being clarifying. Pet. App. 8a. Despite noting that the amendment's text stated that it "provides additional guidance to sentencing courts," the court concluded that "[t]he Commission did not characterize the amendment as clarifying." Pet. App. 8a (quoting USSG Supp. to App. C., amend. 794). In support of this conclusion, the court of appeals cited two other amendments whose text includes the word "clarifies" or "clarify." Pet. App. 8a (quoting USSG Supp. to App. C., amend. 767, 780). The court further discounted the reference to "guidance" by finding that although the amendment "as a whole may provide 'guidance,'" that portion resolving the circuit split by requiring solely within-case comparison was deemed substantive. Pet. App. 9a. The court reasoned that insofar as the amendment gave the Tenth Circuit "the short end of the stick," the amendment's guidance must be solely prospective. *Id.*

In a footnote, the Tenth Circuit recognized that four circuits have held that Amendment 794 is clarifying. Pet. App. 9a n.7 The Tenth Circuit reconciled these cases with its own contrary holding by asserting that Amendment 794 had not overruled precedent in those circuits. Pet. App. 9a n.7. In other words, the amendment could be substantive in some circuits while merely clarifying in others

Having determined that the amended commentary was inapplicable, the court of appeals addressed two arguments: (1) that the district court's within-case comparison was defective; and (2) that Mr. Moreno was entitled to the minor-role reduction. Characterizing these issues as questions of fact, the court of appeals applied the deferential clear-error standard of review to the district court's ruling. Pet. App. 9a-10a.

Regarding the first issue, the court of appeals found that although the district court had conducted an "explicit[]" typical-case comparison, it had only "implicitly" conducted a within-case comparison. The implicit within-case comparison focused on

> Moreno's knowledge of the details of the overall operation, his repeated drug trips from Phoenix to Kansas City (long distance and high value cargo—6.6 kilograms of 100% pure methamphetamine), and his association with those who would qualify for an "aggravating role" in the operation at both ends of the trips.

Pet. App. 10a. The court of appeals found that "[t]his internal comparison of roles revealed Moreno to be closely associated with the movers and shakers and not substantially less culpable than co-participants." *Id.* 11a. In a footnote, the court of appeals used these findings to support its own typical-case comparison — conducted without identifying any authority — which led to the conclusion that Mr. Moreno's role was distinguishable from that of a typical courier. *Id.* 10a-11a.

The court of appeals next considered whether Mr. Moreno was entitled to a minor role adjustment. The court conceded that his role was that of a drug courier, but pointed to Tenth Circuit case law denying such a role reduction to couriers. *Id.* 14a. The court claimed that, because couriers fill a necessary role in drug organizations, they should not be deemed to be less culpable, quoting its earlier "three-legged stool" metaphor that had been explicitly rejected by the Commission in its statements of reasons for Amendment 794. *Id.* (quoting *United States v. Martinez,* 512 F.3d 1268, 1276 (10th Cir. 2008) (quoting with approval *United States v. Carter*, 971 F.3d F.2d 597, 600 (10th Cir. 1992)); *see* USSG Supp. to App. C., amend. 794 (quoting *Carter* with *dis*approval). Stating that Tenth Circuit "precedent allows filling in the blanks in a disciplined manner," the court of appeals inferred the existence of "all the penny ante actors and bit players everyone knows to exist but are not identified in the record." Pet. App. 16a. The court speculated that, considering the Tenth Circuit's hostility to granting a role reduction to drug couriers, the government may have thought it unnecessary to identify these actors to win. *Id.*

Shifting gears, the court of appeals conducted its own within-case comparison addressing the nine other participants identified by defense counsel below. The court summarily pruned six of the nine named participants from the comparator reference class on the basis that these six were not "average participant[s]" but rather "organizers, leaders, managers, or supervisors." Pet. App. 16a (citing USSG § 3B1.1, the aggravating role adjustment). The court next compared Mr. Moreno's role with that of the person who had rented the car. Despite that person's having "rented at least four other vehicles to be used to transport drugs" and having been caught driving a rental car carrying drugs and another named participant, the court concluded that Mr. Moreno was more culpable. Pet. App. 17a. The court reasoned that this was so because Mr. Moreno had contact with three of the persons previously labelled by the court as "leaders or supervisors" and he had been "entrusted" with drugs to transport. *Id.* The court of appeals next compared Mr. Moreno to his brother, despite tacitly conceding that the brother was not shown to have been a "participant" in the offense. *Id.* 17a-18a. Not surprisingly, the court of appeals considered Mr. Moreno more culpable than his possibly factually innocent brother. *Id.* 18a. Also, the named participant whose fingerprints were identified on the package was assumed to have had no role other than loading the drugs and was accordingly considered less culpable than Mr. Moreno. *Id.* 18a.

Lastly, the court of appeals conducted its own assessment of factors identified as relevant by Amendment 794: (1) Mr. Moreno's "aware[ness] of the scope and structure of the drug-trafficking activity:; (2) the extent of his "planning and decision-making responsibilities"; (3) "[t]he extent and nature of his participation in the criminal activity"; and (4) the extent to which Mr. Moreno "benefitted from the criminal activity." *Id.* 19a-20a. In an about-face from its earlier willingness to infer the existence of other unidentified participants in the offense "in a disciplined manner," the court of appeals refused to accept Mr. Moreno's claim that his $3,000 "fee was miniscule compared to the value of the seized drugs," as it was unsupported by record evidence. *Id.* 2a, 20a. Having removed the top six participants from the nine identified participants, the court found that Mr. Moreno had not met his burden of proving that his participation was below-average relative to the remaining three. *Id.* 19a-20a.

Mr. Moreno filed a petition for rehearing en banc, noting that the panel decision conflicts with that of other circuits on two grounds. First, five circuits had determined that Amendment 794 was clarifying and thus applicable to cases on appeal. Second, three circuits recognized that guideline amendments may be deemed clarifying even if they conflict with that circuit's precedent. The Tenth Circuit summarily denied the petition. Pet. App. 24a. This timely petition follows.

REASONS FOR GRANTING THE WRIT

Some circuits, including the Tenth Circuit in this case, hold that an amendment's character as substantive or clarifying – and thus whether it is to be applied to cases on direct appeal – is not a property of the amendment itself but instead actually varies from circuit to circuit, depending on whether circuit case law previously took a position contrary to the amendment. This against-circuit-precedent rule undermines the Sentencing Commission's authority to resolve circuit splits via clarifying amendments. The confusion in the circuit courts regarding this aspect of the Commission's authority is further reflected in the various inconsistent multi-factor tests being used, some of which treat a factor in contradictory fashion. For instance, some circuits treat the fact that an amendment resolves a circuit split as evidence that it is substantive, whereas other circuits properly recognize that resolving a circuit split is the hallmark of a clarifying amendment.

A. Some circuits, including the Tenth Circuit below, promote inter-circuit disparities by holding that the clarifying or substantive nature of an amendment varies from circuit-to-circuit, depending on the state of pre-amendment law within each circuit.

In this case, the Tenth Circuit declared that an amendment that is contrary to Tenth Circuit precedent "is necessarily substantive." Pet. App. 8a (quoting *United States v. Kissick*, 69 F.3d 1048, 1053 (10th Cir. 1995)). In applying this rule, the Tenth

Circuit "look[s] only to controlling precedent in our Circuit, not to the case law of other Courts of Appeals." *Groves*, 369 F.3d at 1185. The Fourth Circuit endorses an aggressive formulation of this rule:

> Even if an amendment is designed merely to elucidate the original intent of the Commission, we will regard it as substantive if it conflicts with our precedent. Thus, some amendments that would otherwise be considered clarifying will be treated as substantive amendments in this circuit. We will refer to such amendments as "hybrid amendments."

United States v. Goines, 357 F.3d 469, 474 (4th Cir. 2004) (internal citation omitted).

The First Circuit seems to take a less-dispositive position; whether an amendment is contrary to in-circuit precedent may be relevant to whether the amendment is clarifying, but it is not determinative. *See United States v. Godin*, 522 F.3d 133, 135 (1st Cir. 2008) (stating that the circuit court but "not the district court, could choose to alter our own prior reading of a newly clarified guideline even if in an earlier case we had read the original guideline adversely to the defendant"); *see also United States v. Crudup*, 375 F.3d 5, 9 (1st Cir. 2004) ("we have considered whether an amendment was inconsistent with, or prospectively abrogated by, our circuit precedent in determining whether that it effected a substantive change").

In contrast, at least three circuits place little or no weight on whether an amendment reverses in-circuit precedent. *See, e.g., United States v. Fones*, 51 F.3d 663, 669 (7th Cir. 1995) (holding amendment "must be viewed as clarifying" despite fact that "it effectively nullifies the law of the Seventh Circuit"); *United States v. Caballero*, 936 F.2d 1292, 1299 (D.C. Cir. 1989) (" In light of this clarification, we must reassess [circuit precedent] and reinterpret section 3B1 so that our interpretation comports with the language of the Guidelines"); *United States v. Van Alstyne*, 584 F.3d 803 (9th Cir. 2009) (retroactively applying Amendment 617, which rejected "risk theory of loss," thereby rendering circuit precedent "no longer good law").

There is an intra-circuit conflict on this issue in the Third and Fifth Circuits. In 1992, the Third Circuit held that "a panel may consider new commentary text where another panel of this court has already resolved the ambiguity and that a second panel is entitled to defer to the new commentary even when it mandates a result different from that of the prior panel." *United States v. Joshua*, 976 F.2d 844, 855 (3d Cir. 1992); *cf. Levy v. Sterling Holding Co., LLC*, 544 F.3d 493, 507 (3d Cir. 2008) ("we do not take the fact that an [SEC] amendment conflicts with a judicial interpretation of the pre-amendment law to mean that the amendment is a substantive change and not just a clarification."). But nine years after *Joshua*, the same Circuit held that the Sentencing Commission's own characterization of an amendment as clarifying was not only not binding but not "even entitled to substantial weight," reasoning instead that "it is our own interpretation of the pre-amendment guidelines that determines whether the Amendment clarified that interpretation or substantively changed it." *United States v. Diaz*, 245 F.3d 294, 304 (3d Cir. 2001).

The Fifth Circuit has similarly issued conflicting opinions on this factor. *Compare United States v. Huff*, 370 F.3d 454, 467 (5th Cir. 2004) (finding on plain error review that amendment is not clarifying in part because "it is directly inconsistent with the law clearly established in this circuit"), *with United States v. Fitzhugh*, 954 F.2d 253, 254-55 (5th Cir. 1992) (finding amendment clarifying despite fact that "the Commission has repudiated" a Fifth Circuit case, which court describes as "no longer controlling").

B. The circuit courts are divided one-to-five over whether Amendment 794 is clarifying or substantive.

This case also involves a more specific circuit split: the Tenth Circuit is alone among the circuits in holding that Amendment 794 is substantive, creating a one-to-five circuit split with the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits. *United States v. Sanchez-Villarreal*, 857 F.3d 714, 721 (5th Cir. 2017) ("Amendment 794 is clarifying"); *United States v. Carter*, 662 Fed.Appx. 342, 349 (6th Cir. 2016) (unpublished) (same); *United States v. Hunt*, 840 F.3d 554, (8th Cir. 2016) (same); *United States v. Quintero-Leyva*, 823 F.3d 519, 523 (9th Cir. 2016) (same); *United States v. Cruickshank*, 837 F.3d 1182, 1194 (11th Cir. 2016) ("Amendment 794 merely explains the meaning of the terms in the original guideline"). Furthermore, in three of these cases, the government conceded that the Amendment is merely clarifying. *Sanchez-Villareal*, 857 F.3d at 720 ("At oral argument, the Government conceded that Amendment 794 is clarifying"); *Quintero-Leyva*, 823 F.3d at 522 (same); *Cruickshank*, 837 F.3d at 1194 (same).

This outcome reflects the involved circuits' position on the against-circuit-precedent rule. Only the Tenth Circuit mentions this rule in deeming Amendment 794 substantive, while none of the five circuits mention this rule in deeming the amendment clarifying. *Compare*, Pet. App. 8a ("[p]rohibiting something we deemed appropriate is substantive"), *with Sanchez-Villarreal*, 857 F.3d at 720 (citing three other factors); *Hunt*, 840 F.3d at 557 (omitting analysis); *Carter*, 662 Fed.Appx. at 349 (citing three other factors); *Cruickshank*, 837 F.3d at 1194 (citing two other factors), *and Quintero-Leyva*, 823 F.3d at 522 (citing three other factors).

C. The against-circuit-precedent rule is symptomatic of some circuit courts' refusal to recognize the Sentencing Commission's authority to resolve circuit splits with clarifying amendments.

Another salient example of the confusion in the circuit courts regarding the clarifying/substantive distinction is that circuits disagree about whether the fact that an amendment resolves a circuit split weighs in favor of it being clarifying or substantive. Below, the Tenth Circuit twice recognized that Amendment 794 resolved a circuit split. Pet. App. 6a, 9a. The Tenth Circuit also recognized that the Commission's rationale for the amendment was to make the mitigating role guideline "more consistent with the other provisions of Chapter Three, Part B." *Id.* 6a (quoting USSG Supp. to App. C., amend. 794). But the Tenth Circuit's three-factor test for distinguishing clarifying from substantive amendments omits the circuit-split factor. Pet. App. 7a (quoting *Groves*, 369 F.3d at 1183). And the later reference to the circuit-split factor carries a note of tribalism consistent with the court's reliance on the against-circuit-precedent rule: "[W]hile Amendment 794 as a whole may provide 'guidance,' the portion of the amendment concerning the comparison required to decide whether a defendant is entitled to a mitigating role resolved a circuit split. In doing so, this Circuit ended up getting 'the short end of the stick.'" Pet. App. 9a. Assuming that the Tenth Circuit recognizes that resolving a circuit split suggests that an amendment is clarifying, it also implicitly holds that the against-circuit-precedent rule trumps that factor.

Two circuits hold that resolving a circuit split is a sign that an amendment is substantive. The First Circuit "consider[s] whether the amendment addresses an issue upon which the courts of appeals have already staked out opposing positions, this being some evidence that the amendment is *not* a mere clarification." *United States v. Crudup*, 375 F.3d 5, 10 (1st Cir. 2004) (emphasis added). The First Circuit reasons that the existence of a circuit split implies that "the original guideline language was ambiguous," but the circuit fails to justify the counterintuitive position that an amendment resolving an ambiguity should be seen as substantive rather than clarifying. *Id.* The Fifth Circuit agrees with the First. *See United States v. Sanchez-Villarreal*, 857 F.3d 714, 720 (5th Cir. 2017) (citing as relevant factor "whether the amendment is intended to address a circuit split, which generally indicates that the amendment is substantive, not clarifying").

On the other hand, the Ninth Circuit holds that an amendment resolving a circuit split is necessarily *clarifying*. *United States v. Van Alstyne*, 584 F.3d 803, 818 (9th Cir. 2009) ("the change was made for the express purpose of resolving a conflict among the circuits that resulted from reasonable though differing interpretations of the Guideline. We therefore conclude that the amendment must be applied retroactively."); *see also United States v. Sanders*, 67 F.3d 855, 857 (9th Cir. 1995) ("An amendment that resolves a circuit split generally clarifies and does not modify existing law"). The Third Circuit agrees with the Ninth. *See United States v. Marmolejos*, 140 F.3d 488, 492 (3d Cir. 1998) (positing that "new language . . .

fashioned to clarify the ambiguity made apparent by the caselaw" should be deemed clarifying). Thus, at least two circuits treat the circuit-split factor as evidence that the amendment is substantive while others treat this factor as evidence that the amendment is clarifying.

This Court recognizes that the Sentencing Commission is empowered to resolve inter-circuit disputes regarding the interpretation of the guidelines, and that in so doing, the Commission is merely clarifying the guidelines' intended meaning:

> The Guidelines are of course implemented by the courts, so in charging the Commission "periodically [to] review and revise" the Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever *clarifying* revisions to the Guidelines *conflicting judicial decisions* might suggest.

Braxton v. United States, 500 U.S. 344, 348 (1991) (quoting 28 U.S.C. § 994(o)) (emphasis added). From this statement, one would naturally conclude that an amendment should be deemed clarifying if it is designed to resolve circuit splits over the interpretation of an existing guideline. The Sentencing Commission has expressed this view as well. *See* USSG App. C., amend. 500 (identifying reason for amendment: "[t]his amendment clarifies the operation of this section to resolve a split among the courts of appeal"). The position of the First and Fifth Circuits on the circuit-split factor shows the need for this Court to reiterate the Commission's authority to resolve splits via clarifying amendments.

D. The Tenth Circuit's against-circuit-precedent rule violates the core purposes of the Sentencing Reform Act by perpetuating inter-circuit sentencing disparities and repudiating the Commission's authority to resolve circuit splits through clarifying amendments.

The Tenth Circuit's against-circuit-precedent rule apparently originated as a response to the ex post facto violation that resulted when an amendment, even one characterized by the Commission as "clarifying," had the effect of overturning circuit precedent and thereby *dis*advantaging an offender. *See United States v. Saucedo*, 950 F.2d 1508, 1514 (10th Cir. 1991); *see also United States v. Diaz*, 245 F.3d 294, 303 (3d Cir. 2001) (linking ex post facto concerns with rule that "if the amended guideline and commentary overrules a prior judicial construction of the guidelines, it is substantive"). Although unarticulated by these courts, this rule's rationale seems rooted in the doctrine that due process protects against "*ex post facto* judicial decisionmaking" by prohibiting the "unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face." *Rogers v. Tennessee*, 532 U.S. 451, 456, 457 (2001) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964)). But if the against-circuit-precedent rule is intended to protect due process interests, it is over inclusive and oddly solipsistic.

The over inclusive rule was invoked here to bar Mr. Moreno from benefitting from an ameliorative amendment that expressly rejected the Tenth Circuit's precedent limiting the application of the mitigating role reduction. *See* USSG Supp. to App. C., amend. 794 (quoting with disapproval *United States v. Carter*, 971 F.2d 597, 600 (10th Cir. 1992)). This Court has never suggested that ex post facto considerations prohibit a court from applying ameliorative changes in the law. *See Dobbert v. Florida*, 432

U.S. 282, 294 (1977) ("It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law."); *cf. Peugh v. United States*, 569 U.S. 530, ___, 133 S.Ct. 2072, 2081 (2013) (holding that "the Ex Post Facto Clause was violated by the use of the more onerous Guidelines in effect on the date of Peugh's sentencing").

The Tenth Circuit embraces a solipsistic rule that generates geographical sentencing disparities, undermining a core purpose of the Sentencing Reform Act of 1984, Pub.L. 98-473, Title II, ch. II, Oct. 12, 1984, 98 Stat. 1987. *See* 18 U.S.C. § 3553(a)(6) ("the need to avoid unwarranted sentence disparities); 28 U.S.C. § 991(b)(1)(B) (listing "avoiding unwarranted sentencing disparities" among the purposes of the Sentencing Commission); S. Rep. No. 98-225, at 45 (1984) (discussing study of federal sentencing practices revealing "widespread sentencing disparity" among circuits). The against-circuit-precedent rule is particularly perverse in that it flouts the Commission's use of the amendment process to resolve circuit conflicts over the interpretation of a guideline. *See Braxton*, 500 U.S. at 348 ("Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest").

The against-circuit-precedent rule, which denies offenders the benefit of ameliorative amendments in effect while their cases are pending on appeal (at least within the Tenth Circuit) and therefore not final, also treats similarly situated offenders differently based solely on the date of their sentencing hearings. In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Griffith* rests on "the principle that this Court does not disregard current law[] when it adjudicates a case pending before it on direct review," and this principle "applies regardless of the specific characteristics of the particular new rule announced." *Id.* at 326. And in *Dorsey v. United States*, 567 U.S. 260, 277 (2012), this Court similarly cited the SRA's goal of avoiding unjustified sentencing disparities in deciding that the lower sentences imposed by the Fair Sentencing Act would apply even to those who committed a crack offense before the Act took effect. In *Griffith*, this Court refused to permit "the fortuities of the judicial process" to justify "not treating similarly situated defendants the same." *Id.* at 327. This Court similarly "prohibit[s] the erection of selective temporal barriers to the application of federal law in *noncriminal* cases." *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993) (emphasis added). Although *Griffith* addressed rules announced by this Court in the context of individual cases, its rationale, avoiding the "selective application of new rules," 479 U.S. at 323, applies with even greater force to "judicial rulemaking" by the Sentencing Commission, *Mistretta v. United States*, 488 U.S. 361, 386 (1989), whose primary functions include promulgating rules that "avoid[] unwarranted sentencing disparities," 28 U.S.C. § 991(b)(1)(B).

If it is "unfair to apply different rules of criminal procedure to two defendants whose cases were pending on direct review at the same time," surely it is unfair to rely on circuit precedent incorrectly interpreting the guidelines to justify denying an offender the benefit of the Sentencing Commission's effort to correct the misapplication of a guideline. *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 197 (1990). And if this Court has no constitutional authority "to disregard current law or to treat similarly situated litigants differently," then surely the Tenth Circuit has no authority to achieve the same results via the against-circuit-precedent rule. *Harper*, 509 U.S. at 97 (citation omitted).

This rule also leads to the absurd outcome identified by the Ninth Circuit:

> If all amendments that overruled a circuit's own precedent were deemed substantive, an amendment would be a clarification, and therefore retroactive, only in those circuits whose prior case law already was consistent with the amendment. Any benefit of retroactive application would be entirely illusory, and the Commission's resolution of the circuit split would create uniformity more slowly.

United States v. Morgan, 376 F.3d 1002, 1013 (9th Cir. 2004); *cf. United States v. Huff*, 370 F.3d 454, 466 n.19 (5th Cir. 2004) (noting Fifth Circuit's practice of considering amendments clarifying regardless of "any statement by the Commission that clarification was intended" where "the amendment merely confirms the result we would reach apart from it"). That is, the Commission's attempt to resolve inter-circuit conflicts by implementing clarifying amendments is ineffective, at least for cases on appeal: in those circuits already applying the guidelines in the way deemed correct by the Commission, nothing changes; and in those circuits on the wrong side of the circuit split, offenders sentenced under a misinterpretation of the guidelines keep the harsher sentences that were issued under that misinterpretation. The Commission's attempt to remedy these circuits' misinterpretation of the guidelines is ignored.

E. Resolution of this issue is critically important because the against-circuit-precedent rule undermines the Sentencing Commission's authority to issue clarifying amendments.

This Court should grant review to instruct lower courts that when the United States Sentencing Commission resolves a circuit split regarding the correct application of a guideline provision, that resolution authoritatively clarifies the meaning of a provision. The circuits' misunderstanding of the Commission's power to authoritatively interpret its own writings – guidelines, commentary, and policy statements – has led to irreconcilable tests for applying the clarifying/substantive distinction and geographic disparities in sentencing similarly situated offenders. This confusion began shortly after the birth of the guidelines and shows no signs of abating. The Sentencing Commission has issued over 800 amendments and will presumably continue to do so, so the issues presented here will recur until this Court addresses it.

The distinction between substantive and clarifying guideline amendments was first addressed in a 1988 Second Circuit case, *United States v. Guerrero*, 863 F.2d 245 (2d Cir. 1988). *Guerrero* involved a defendant whose drug offense was committed in late 1987.[1] 863 F.2d 246. Guerrero argued that the applicable base offense level should have been calculated based solely on the drugs involved in the count of conviction, not drugs involved in dismissed counts, which would have yielded a short

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[1] The opinion states that Count 3, the offense of conviction, was committed "on December 4, *1988*," while the two dismissed counts were said to have occurred "on December 11, 1987." 863 F.3d at 246 (italics added). But the main issue in the case is whether amended commentary effective October, 1987, and amended guideline text effective January 15, 1988, represented substantive or clarifying amendments. *Id.* at 250. This issue would not have arisen if the amendments took effect after the commission of the crime. Thus, Count 3 must have been committed on December 4, *1987*.

guideline imprisonment range of six to twelve months. *Id.* at 246-47. The prosecution and probation office argued instead that the base offense level should have reflected all drugs involved in the entire scheme, yielding a range of 51 to 63 months. *Id.* While technically adopting the defense position, the district court departed upward to impose a 63-month sentence. *Id.*

On appeal, the Second Circuit noted that a provision in the original 1987 sentencing guidelines manual, USSG § 1B1.2(b), failed to explicitly require that a crime's base offense level be calculated based on the "relevant conduct" principle. *Guerrero* at 249. In October 1987, USSG § 1B1.2's commentary was amended to state that relevant conduct would be used to determine the base offense level, and on January 15, 1988, § 1B1.2's text was similarly changed. *Guerrero, supra.* Guerrero argued that the relevant conduct principle guideline was not used to calculate the base offense level when he committed the crime in December. *Id.* at 250. He further argued that the October amendment to the commentary "was a substantive change that could not validly be accomplished without amendment of the operative language of the guideline itself." *Id.* The Second Circuit noted that the Commission stated that its October commentary amendment was intended to be solely clarifying and "not intended to make substantive changes in the application of the guidelines." *Id.* (quoting 52 Fed.Reg. 44,647 (1987)). The Commission similarly described the January 15, 1988, guideline amendment as merely "clarify[ing]." *Id.* (quoting 53 Fed.Reg. 1287 (1988)).

The Second Circuit agreed with the Commission that the commentary and guideline amendments "only clarify a meaning that was fairly to be drawn from the original version." *Id.* Importantly, while granting "considerable deference" to the Commission's own characterization of the amendments, the Second Circuit refused to accept such characterizations as binding, "a result that would enable the Commission to make substantive changes in the guise of 'clarification[.]'" *Id.*

The Second Circuit failed to articulate *why* the Commission should be deemed to lack the power to definitively decide whether an amendment is merely clarifying and thus applies retroactively. This Court has repeatedly recognized the Commission's authority to promulgate and interpret guidelines, commentary, and policy statements, subject to the few restraints imposed by internal consistency, legislative supremacy, and the Constitution itself. *See United States v. LaBonte*, 520 U.S. 751, 757 (1997) (characterizing Commission discretion as "broad" but subordinate to "specific directives of Congress"); *Stinson v. United States*, 508 U.S. 36, 46-47 (1993) (recognizing commentary as "binding on the federal courts" unless it "run[]s afoul of the Constitution or a federal statute" or is inconsistent with the accompanying guideline); *Williams v. United States*, 503 U.S. 193, 201 (1992) (where "a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable Guideline."). If *Guerrero*'s concern was solely with the ex post facto effect of purportedly clarifying amendments, then at least the Commission's characterization of an amendment *reducing* sentences as "clarifying" should be dispositive. *Cf.* 28 U.S.C. § 994(u) (vesting the Commission with the authority to determine the retroactive effect of guideline amendments that "reduce[] the term of imprisonment recommended in the guidelines"). As discussed above, other circuits have adopted the Second Circuit's position that the Commission lacks the authority to definitively characterize amendments as clarifying or substantive, leading to a maze of vague and conflicting multi-factor standards. Mr. Moreno's case presents an ideal vehicle for ending the thirty years of confusion that has followed *Guerrero*.

This Court is reticent to resolve circuit splits arising from the interpretation of the Sentencing Guidelines, reasoning that "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton*, 500 U.S. at 348. This Court long ago declined the opportunity to provide guidance on this issue. *See Early*, 502 U.S. 920 (declining to review "whether an amendment to the commentary to the United States Sentencing Guidelines should govern a sentencing which occurred prior to the effective date of the amendment") (White, J., dissenting from denial of writ of certiorari). But since 1988, the Commission and the circuit courts have been unable to settle who has the authority to definitely characterize an amendment as clarifying, and thus applicable to non-final cases. This enduring circuit split has resulted in arbitrary but avoidable sentencing outcomes for offenders whose only relevant differences are the locations of their courthouses. The Court should grant certiorari to end the resulting 30 years of arbitrary sentencing outcomes and reiterate what the Court said in *Braxton* and *Stinson*: that the Commission is specifically empowered to "make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest," *Braxton*, 500 U.S. at 348, and unless they violate federal law or the constitution, such amendments are "binding on the federal courts," *Stinson*, 508 U.S. at 46.

F. This case is an ideal vehicle for ending the against-circuit-precedent rule and resolving associated confusion regarding the Commission's authority to issue clarifying amendments.

Below, the Tenth Circuit applied a three-factor test for determining whether Amendment 794 is clarifying or substantive: (1) "whether the amendment alters [our] controlling pre-amendment interpretation of the guideline," (2) "whether the amendment changes the text of the sentencing guideline or merely the accompanying commentary," and (3) "how the Sentencing Commission characterized the amendment." Pet. App. 7a (quoting *Groves*, 369 F.3d at 1183). The Tenth Circuit conceded that the second factor favored treating the amendment as clarifying, but concluded that the other two factors pointed the other direction. In doing so, the Tenth Circuit treated the against-circuit-precedent factor as dispositive, stating that "[p]rohibiting something we deemed appropriate is substantive." Pet. App. 8a. And the court found that although the Commission said that the "amendment provides additional guidance," the third factor weighed in favor of deeming the amendment substantive. Pet. App. 8a-9a.

The court supported its application of the third factor – the Commission's own characterization of the amendment – by pointing to two considerations. First, the amendment failed to expressly describe itself as "clarifying," as had been done in other amendments. Pet. App. 8a-9a. Second, the court distinguished the amendment's general characterization from the relevant aspect of the amendment, that which limited the reference class of "other participants" to only other participants in the offense." Pet. App. 5a, 9a. That is, after conceding that "Amendment 794 as a whole may provide 'guidance," the court nonetheless concluded that the third factor militated in favor of treating the amendment as substantive because "the portion of the amendment concerning the comparison required to decide whether a defendant is entitled to a mitigating role resolved a circuit split." Pet. App. 9a. In a footnote, the court explicitly tied the against-circuit-precedent rule with the circuit-split rule. *See* Pet. App. 9a, n.7. In this footnote, after listing four circuits who concluded that the amendment is clarifying, the court stated that these holdings were "[n]ot surprising, since Amendment 794 did not substantively overrule precedent in those circuits." *Id.*

The Tenth Circuit's analysis makes clear that it deemed Amendment 794 substantive because the amendment overruled its own precedent. Thus, if this Court agrees that the against-circuit-precedent rule is improper, Mr. Moreno would be entitled to relief.

CONCLUSION

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

Respectfully submitted,

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Tenth Circuit

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Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JESUS ENRIQUE MORENO,

Defendant – Appellant.

No. 15-3051
(D.C. No. 2:13-CR-20079-CM-001)
(D. Kan.)

ORDER AND JUDGMENT*

Before **KELLY**, **MURPHY**, and **O'BRIEN**, Circuit Judges.

Jesus Enrique Moreno was transporting over 6 kilograms of pure methamphetamine ("ice") from Phoenix, Arizona, to Kansas City, Kansas. It was his third such trip, but this time he was caught. He claims his role (according to him, that of

* This order and judgment is an unpublished decision, not binding precedent. 10th Cir. R. 32.1(A). Citation to unpublished decisions is not prohibited. Fed. R. App. 32.1. It is appropriate as it relates to law of the case, issue preclusion and claim preclusion. Unpublished decisions may also be cited for their persuasive value. 10th Cir. R. 32.1(A). Citation to an order and judgment must be accompanied by an appropriate parenthetical notation – (unpublished). *Id*.

a mere drug courier) was minor when compared to other participants in the criminal activity. USSG § 3B1.2(b). The district judge disagreed and so do we.

I. Background

On June 20, 2013, Moreno and his brother Kevin were traveling East on Interstate 70 in Wyandotte County, Kansas, when a patrol officer stopped their vehicle for an illegal lane change. Moreno, the driver, informed the officer his license was suspended and his friend, Robert, rented the vehicle. He also said they were travelling from Phoenix, Arizona, in order to tour Fort Hays State University in Hays, Kansas, because Kevin was interested in attending the school.

The officer doubted Moreno's story and reasonably so—the brothers had passed the university four hours and many miles earlier. They also appeared nervous. After citing Moreno for driving with a suspended license, the officer sought and received his permission to search the vehicle; he also called for a drug-sniffing dog. Upon its arrival, the dog alerted to the vehicle. A thorough search uncovered 6.605 kilograms of 100% pure methamphetamine ("ice") hidden inside the driver's side rear interior corner panel of the rented vehicle.

After telling various stories, Moreno eventually admitted to knowing the drugs were in the vehicle. He also said he was to be paid $3,000 for the trip and had transported drugs on two prior occasions. According to his statements at the time: "a guy" imports the drugs from Mexico to Arizona; Moreno arranges for a "friend" to rent a car for him; Moreno drops the car off "somewhere;" when he later returns for the car it is loaded with drugs; he drives the drugs from Phoenix to a "house" in Kansas City; he leaves the car with the drugs at the house and departs in a different vehicle left for him; the next day he retrieves the original vehicle, sans drugs, and returns to Arizona. (R. Vol. III at 7.)

Moreno was indicted for possession with intent to distribute more than 500 grams of methamphetamine, 21 U.S.C. § 841(a)(1), (b)(1)(A). He pled guilty without the benefit of a plea agreement. Using the 2014 edition of the United States Sentencing Guidelines Manual, the PSR calculated the base offense level as 38. *See* USSG § 2D1.1(c)(1) (establishing a base offense level of 38 if the offense involves 4.5 kilograms or more of "ice").[1] The base offense level was increased by two because the offense involved the importation of methamphetamine from Mexico to the United States. *See* USSG § 2D1.1(b)(5). Because he satisfied the requirements of USSG § 5C1.2 (the safety-valve guideline),[2] the offense level was decreased by two under USSG § 2D1.1(b)(17). Applying a three-level downward adjustment for acceptance of responsibility, USSG § 3E1.1, the total offense level was 35. With a Criminal History

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[1] Unless otherwise indicated, all references to the guidelines in this order and judgment refer to the 2014 edition of the United States Sentencing Guidelines Manual.

[2] To be eligible under the safety-valve guideline, the defendant must (1) have no more than one criminal history point; (2) not have used violence or credible threats of violence or possessed a firearm or other dangerous weapon in connection with the offense; (3) not have been an organizer, leader, manager or supervisor in the offense; and (4) have truthfully provided to the government before sentencing all information and evidence he has concerning the offense. USSG § 5C1.2(a). Moreover, the offense must not have resulted in death or serious bodily injury to any person. *Id*.

Category of I, the advisory guideline range was 168-210 months imprisonment.

Moreno objected to the PSR's guideline computations, saying he played only a minor role in the offense and was thus entitled to a two-level downward adjustment under USSG § 3B1.2. He claimed his role in the offense was minor compared to the other participants—he did not own the drugs and his fee for transporting them was a small fraction of their total value. In the alternative, he asked the judge to vary downward to 70-87 months, the guideline range resulting from the application of a mitigating role adjustment.[3] Both the government and the probation department opposed any reduction. The district judge concurred and sentenced Moreno to 168 months imprisonment.

II. Discussion

Before addressing Moreno's arguments, we pause to discuss the effect of a post-sentencing amendment to USSG § 3B1.2.

A. Amendment 794

1. Tenth Circuit Precedent

Section 3B1.2(b) allows a judge to reduce a defendant's offense level by two if he "was a minor participant in any criminal activity." At the time of Moreno's sentencing,

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[3] Although the minor role downward adjustment is two levels, had Moreno received the adjustment it would have actually reduced his offense level by eight levels: (1) a two-level downward adjustment for minor role; (2) a four-level decrease under USSG § 2D1.1(a)(5) (calling for a four-level reduction if the base offense level is 38 and the defendant is entitled to a mitigating role adjustment); and (3) the elimination of the two level increase for the offense involving the importation of methamphetamine, *see* § 2D1.1(b)(5)(A) (requiring a two-level increase to the offense level if the offense involved the importation of methamphetamine <u>and</u> the defendant is not subject to an adjustment under § 3B1.2).

the commentary to § 3B1.2 provided: "[The guideline] 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*." USSG § 3B1.2, comment. (n.3(A)) (emphasis added). It described a "minor participant" as a defendant "who is *less culpable than most other participants*, but whose role could not be described as minimal." *Id.*, comment. (n.5) (emphasis added). The commentary did not specify whether defining "average participant" or "other participants" "require[d] the defendant's role to be compared with that of the other participants in the specific criminal activity or with a typical offender committing this type of offense." *United States v. Rodriguez-Padilla*, 439 F. App'x 754, 758 (10th Cir. 2011) (unpublished). We concluded both comparators were relevant. *United States v. Caruth*, 930 F.2d 811, 815 (10th Cir. 1991) ("[T]he Guidelines permit courts not only to compare a defendant's conduct with that of others in the same enterprise, but also with the conduct of an average participant in that type of crime. In other words, resort may be had to both internal and external measurements for culpability.") (citation omitted)).

2. Amendment 794 Does Not Apply

After Moreno's sentencing, the Sentencing Commission amended the commentary (Amendment 794) to specify only an internal comparison is permitted.[4] *See* USSG App. C, Supplement, amend. 794 (Nov. 1, 2015); USSG §§ 3B1.2, comment. (n.3(A)) (2015)

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[4] A redline version showing the changes the Commission made to USSG § 3B1.2 is attached as Appendix A.

("[The guideline] 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*."); 3B1.2, comment. (n.5) (2015) (describing "minor participant" as a defendant "who is less culpable than most other participants *in the criminal activity*, but whose role could not be described as minimal") (emphasis added). In doing so, it resolved a circuit split on the issue and explained: "Focusing the court's attention on the individual defendant and the other participants is more consistent with the other provisions of Chapter Three, Part B." USSG App. C, supplement, amend. 794.

The Commission also added a non-exhaustive list of factors relevant to deciding whether to apply an adjustment and, if so, the level of the adjustment.[5] Those factors include: (1) the degree to which the defendant understood the scope and structure of the criminal activity, (2) his level of planning and organization, (3) whether he held a decision-making role or influenced the decisions of others, (4) the nature and extent of his participation in the offense, and (5) the degree to which he stood to benefit from the criminal activity. *Id.*; *see also* USSG § 3B1.2, comment. (n.3(C)) (Nov. 1, 2015). According to the Commission, the amendment resulted from a study it conducted which revealed the mitigating role adjustment "is applied inconsistently and more sparingly than

[5] Besides allowing for a two-level minor role adjustment, § 3B1.2 provides for a four-level downward adjustment for defendants playing a minimal role in the offense and a three-level downward adjustment for those whose roles fall between minimal and minor. The guideline defines "minimal participant" as a defendant "who plays a minimal role in the criminal activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group." USSG § 3B1.2, comment. (n.4(A)).

[it] intended." USSG App. C, supplement, amend. 794.

Moreno wants us to apply Amendment 794, arguing the judge failed to make the internal comparison it requires. In fact, he claims we are obliged to do so. He is wrong. While a change in law during an appeal generally requires us to apply the new law, *see Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1184 (10th Cir. 2004), the same is not true in applying changes to the guidelines. We normally apply the sentencing guidelines in affect at the time of sentencing, in this case, the 2014 guidelines. USSG § 1B1.11(a); *United States v. Hicks*, 146 F.3d 1198, 1200 n.2 (10th Cir. 1998). There is an exception for those amendments serving to clarify rather than make substantive changes. Retroactive application of clarifying amendments is required.[6] USSG § 1B1.11(b)(2).

"[D]istinguishing between substantive and clarifying amendments is often difficult." *United States v. Groves*, 369 F.3d 1178, 1182-83 (10th Cir. 2004). Generally, an amendment is clarifying if "it does not overrule existing precedent, it revises a commentary note rather than a guideline, and the authors characterized it as clarifying." *United States v. Gigley*, 213 F.3d 503, 506 n.3 (10th Cir. 2000); *see also Groves*, 369 F.3d at 1183 (to decide whether an amendment is clarifying or substantive, we consider (1) "whether the amendment alters [our] controlling pre-amendment interpretation of the guideline," (2) "whether the amendment changes the text of the sentencing guideline or merely the accompanying commentary," and (3) "how the Sentencing Commission

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[6] The Sentencing Commission may also specifically designate an amendment as retroactive. Amendment 794 is not listed in USSG § 1B1.10 as having retroactive effect.

characterized the amendment"). Only the second factor weighs in favor of Amendment 794 being a clarifying amendment. The other two factors reveal it to be substantive.

To the extent a "commentary" to a "guideline" can overrule our precedent, Amendment 794 does so by eliminating one of the comparisons we looked to in determining whether a defendant was entitled to a mitigating role adjustment. Prohibiting something we deemed appropriate is substantive. *See Groves*, 369 F.3d at 1183-85 ("If a guideline amendment contradicts either the plain meaning of the preexisting guideline *or* controlling case law [in this Circuit or from the Supreme Court], that amendment is necessarily substantive.") (emphasis added); *United States v. Kissick*, 69 F.3d 1048, 1053 (10th Cir. 1995) (holding that a guideline amendment was substantive because "our Circuit had reached a conclusion contrary to the Sentencing Commission's interpretation"); *cf. United States v. Farrow*, 277 F.3d 1260, 1265 (10th Cir. 2002) (amendment was clarifying because, among other things, it did not "compel this court to overrule existing circuit precedent "); *Gigley*, 213 F.3d 503, 506 n.3 (10th Cir. 2000) (considering an amendment clarifying because, *inter alia*, it "did not overrule existing precedent in this circuit").

The Commission did not characterize the amendment as clarifying. While it said the "amendment provides additional guidance to sentencing courts," it did not expressly state it to be clarifying, as it has in other amendments. *See, e.g.*, USSG App. C, supplement, amend. 780 ("This amendment clarifies . . . ."), amend. 767 ("[The amendment] amends the Commentary to clarify . . . ."); *see also Groves*, 369 F.3d at

1185 (noting amendment was clarifying because Sentencing Commission specifically said so); *United States v. Munguia-Sanchez*, 365 F.3d 877, 881 (10th Cir. 2004) (same); *United States v. Thompson*, 281 F.3d 1088, 1092 (10th Cir. 2002) (same). Moreover, while Amendment 794 as a whole may provide "guidance," the portion of the amendment concerning the comparison required to decide whether a defendant is entitled to a mitigating role resolved a circuit split. In doing so, this Circuit ended up getting "the short end of the stick." While the amendment may well guide prospective application of the guideline, it cannot do so retroactively, at least in this case.[7]

B. Minor Role Adjustment

Moreno's argument is two-fold. First, he complains the judge's comparison of his involvement in this case with that of co-participants (internal comparison) was inadequate. Second, he claims entitlement to a minor role adjustment.

"In determining whether the district court correctly calculated the recommended Guidelines range, we review *de novo* the district court's legal conclusions pertaining to the Guidelines and review its factual findings . . . for clear error." *United States v. Todd*, 515 F.3d 1128, 1135 (10th Cir. 2008). The denial of a minor role adjustment is a

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[7] *But see United States v. Sanchez-Villarreal*, --- F.3d ---, No. 15-41303, 2017 WL 2240297, at *4-5 (5th Cir. May 23, 2017) (Amendment 794 is clarifying); *United States v. Cruickshank*, 837 F.3d 1182, 1194 (11th Cir. 2016) (same); *United States v. Quintero-Leyva*, 823 F.3d 519, 522-24 (9th Cir. 2016) (same); *United States v. Carter*, 662 F. App'x 342, 349 (6th Cir. 2016) (unpublished) (same). Not surprising, since Amendment 794 did not substantively overrule precedent in those circuits. *See Groves*, 369 F.3d at 1184 ("If a guideline amendment contradicts either the plain meaning of the preexisting guideline *or* controlling case law [in this Circuit or from the Supreme Court], that amendment is necessarily substantive.") (emphasis added).

question of fact reviewed for clear error. *United States v. Martinez*, 512 F.3d 1268, 1275 (10th Cir. 2008).

1. Internal Comparison Was Adequate

Moreno acknowledges the judge's citation of the correct legal standard requiring an internal comparison. He also concedes the judge made factual findings as to his role in the offense and that of his co-participants. Nevertheless, he says, "the [judge]'s factual recitations were not followed by any actual legal analysis. Instead, [he] moved directly to an external case comparison." (Appellant's Reply Br. at 3.) Specifically, he complains that the judge compared him to typical couriers rather than to the individuals he nominated for comparison. We don't see it that way.

The judge explicitly compared his role to that of a typical drug courier and correctly found him to be much more than typical. While the judge did not expressly compare his conduct with that of other participants in this case, he did so implicitly by focusing on facts highlighting Moreno's deep involvement in this drug transaction, as well as his participation in the larger operation. Of particular interest were several matters: Moreno's knowledge of the details of the overall operation, his repeated drug trips from Phoenix to Kansas City (long distance and high value cargo—6.6 kilograms of 100% pure methamphetamine), and his association with those who would qualify for an "aggravating role" in the operation at both ends of the trips.[8] In particular, he noted

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[8] That association is important for two reasons. Such relationships are well beyond what a typical courier might have and it suggests Moreno enjoyed a high level of

(Continued . . .)

Moreno's meetings with Arturo Valle, the Kansas City drug distributor, and his possession of contact information for Jose Francisco Lares-Rodriguez, the drug supplier for Guillermo Villela, Jr., who used Moreno to transport the drugs from Phoenix to Valle in Kansas City. This internal comparison of roles revealed Moreno to be closely associated with the movers and shakers and not substantially less culpable than co-participants.

As Moreno recognizes, when deciding whether to apply an adjustment under the guidelines, a judge is not required to "make detailed findings, or explain why a particular adjustment . . . is or is not appropriate." *United States v. Bowen*, 437 F.3d 1009, 1019 (10th Cir. 2006) (quotation marks omitted). Only "when it is apparent from the court's optional discussion that its factual finding may be based upon an incorrect legal standard," "must [we] remand for reconsideration in light of the correct legal standard." *Id.* (quotation marks omitted). That is simply not the case here. The findings and analysis were terse, but they are adequate.

2. Moreno Is Not Entitled To A Minor Role Adjustment

To be eligible for a role adjustment, Moreno must establish that he was

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trust with those higher in the distribution chain. Couriers are typically kept in the dark about the details of transactions, the identity of the high-end players, and any understanding about the overall operations. Doing so insulates the ringleaders from discovery and prosecution. Moreno's cozy relations with them at least implies a more than average level of participation in their illicit endeavors and may even suggest that he was being groomed for something more.

"substantially less culpable than the average participant."[9] *United States v. Salazar-Samaniega*, 361 F.3d 1271, 1277 (10th Cir. 2004) (the defendant has the burden of proving his eligibility for a mitigating role adjustment by a preponderance of the evidence). He failed, as we will ultimately explain, but before getting to that point, we must consider what average culpability means in actual practice, where the rubber meets the road. First, the big picture.

The fountainhead of this and related drug streams was in Mexico, embodied in one, Valentin Beltran-Lopez, the leader of a Mexican drug-trafficking organization (DTO). Carlos Garcia-Duran imported multi-pound quantities of methamphetamine from the DTO into the United States and distributed them in Arizona and other states. Jose Francisco Lares-Rodriguez supplied at least some of the imported methamphetamine to Guillermo Villela, Jr., in Phoenix. Villela, who is known to be a large distributor and who also collects drug proceeds from Garcia-Duran on behalf of one of Garcia-Duran's Mexico-based sources of supply, distributed some of the drugs to Arturo Valle in Kansas City (his other distributions are not documented in the record). Villela used Moreno to transport drugs from Phoenix to Kansas City. Roberto Duran rented some of the vehicles used to transport the drugs.

[9] Section 3B1.2 defines "participant" as "a person who is criminally responsible for the commission of the offense, but need not have been convicted." USSG §§ 3B1.1, comment. (n.1), 3B1.2, comment. (n.1) (referring to Application Note 1 of § 3B1.1 for definition of "participant"). "We have held that a 'participant' for purposes of § 3B1.2 need not be charged with the offense of conviction to be considered as a participant under the Guidelines." *United States v. Salas*, 756 F.3d 1196, 1207 (10th Cir. 2014). Thus, it is immaterial that Moreno was the sole defendant named in the indictment.

Accentuating the obvious, this case is but a small part of an interstate and international drug distribution network, the intimate details of which, while possibly known to DEA and the Department of Justice, are not exhaustively documented in the record. However, we can reasonably infer, from known facts, that this case was a small part of a substantial, sophisticated drug distribution network involving many players—large, small, and everywhere in between. Our precedent takes note of that practical reality.

It looks not only at the thin slice of reality presented in a particular case, but also recognizes the benefits of a global perspective; it permits case peculiar facts to be considered in light of reliable inferences about other, perhaps larger and more pernicious operations. In doing so, we rely heavily on the experience of district judges who draw understanding from those factual inferences and whose judgment is informed by repeated, top to bottom, exposure to a wide range of diversely organized drug distribution chains.[10] In requiring a two-step approach—considering the facts of the case at bar and a case envisioned by a sophisticated understanding of the variety and complexity of the means and methods employed by drug lords—we primarily look to individual, case-specific acts, but refuse to ignore real world dynamics.- We now turn to the specifics of this case, concentrating on the internal comparison, as does Moreno.

Moreno refers to himself as a mere courier who had no control over the amount,

[10] Justice Oliver Wendell Holmes, Jr. famously said, "The life of the law has not been logic: it has been experience." Oliver Wendell Holmes, Jr., THE COMMON LAW, 1 (1881).

type, destination, or price of the drugs and he did not organize or negotiate the transaction. According to him, he did not profit from the distribution other than to receive a flat fee ($3,000) to deliver the drugs and he did not own the vehicle or rent it (conveniently ignoring that he asked Duran to rent it for him). Other than his brother, he says, his co-participants in the offense were considerably more culpable. While he admits to contact with these other individuals, he claims the contact was only necessary to his role as courier. Moreno's attempts to minimize his role fail.

Granted, he was a drug courier, but that role does not necessarily entitle him to a minor role adjustment. *See Martinez*, 512 F.3d at 1276 ("[W]e have consistently refused to adopt a per se rule allowing a downward adjustment based solely on a defendant's status as a drug courier.") (quotation marks omitted). Indeed, "drug couriers are an indispensable component of drug dealing networks" and "[t]o debate whether couriers as a group are less culpable would not be productive, akin to the old argument over which leg of a three-legged stool is the most important leg." *Id.* (quotation marks omitted). Instead, whether his role was minor depends on his culpability relative to "the average participant." The burden of proof is for him to bear. He must convince the fact-finder that he was "substantially less culpable than the average participant."[11]

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[11] The commentary to § 3B1.2 defines "minor participant" as a defendant "who is *less culpable* than most other participants in the criminal activity, but whose role could not be described as minimal." USSG § 3B1.2, comment. (n.5) (emphasis added). However, the same commentary (different application note) provides that §3B1.2 "provides a range of adjustment for a defendant who plays a part in committing the offense that makes him *substantially less culpable* that the average participant in the
(Continued . . .)

For the purpose of establishing relative culpability among involved actors, Moreno identifies the following: (1) Valentin Beltran-Lopez (the king pin—the leader of the DTO), (2) Jose Carlos Garcia-Duran (importer and local and regional distributor—imported multi-pound quantities of methamphetamine from Mexico and distributed them in Arizona and throughout the country), (3) Jose Francisco Lares-Rodriguez (supplier and drug courier—supplied drugs to Guillermo Villela, Jr., in Phoenix, had ties to Mexico and the United States, and traveled at least once with Moreno to Kansas City to deliver drugs), (4) Guillermo Villela, Jr. (regional distributor—used Moreno to transport drugs to Kansas City—and money courier), (5) Arturo Valle (Kansas City distributor), (6) Jose Ramon Ceniceros-Quintero (Phoenix distributor), (7) Roberto Duran[12] (upon Moreno's request, rented the vehicle Moreno used in this case), (8) Juan Carlos Marquez (possible drug courier), and (9) Jesus Pena-Lopez (his fingerprints were found on the drugs in this case).[13]

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criminal activity." USSG § 3B1.2, comment. (n.3(A)) (emphasis added). Therefore, for the adjustment to apply, it seems Moreno has to be "substantially less culpable than the average participant" rather than merely "less culpable than most other participants in the criminal activity." In the end, it doesn't matter. He has failed to satisfy either standard.

[12] Duran owns Duran-Duran Custom Upholstery, where Moreno worked his "day job" installing auto upholstery. Moreno's story was inconsistent as to who he contacted to rent the vehicle for his drive to Kansas City this time. He told the stopping officer Duran rented the vehicle. Later, he told the interviewing officers that his friend William, a/k/a Tapiceria, rented the vehicle for him.

[13] In identifying co-participants, Moreno looks to the larger DTO rather than the more narrow offense conduct. Does "average" suggest mathematical precision? If so, does it refer to the mean, the mode, the median, or something else? Is it just counting noses or is it a weighted test?

Conspicuously absent from his list are all the penny ante actors and bit players everyone knows to exist but are not identified in the record—for instance, Valle's distributors (street dealers and intermediate suppliers), runners, and enforcers. They may have been unknown to the government or it may have thought it unnecessary (according to our cases) to individually identify them in order to refute Moreno's claim that he was a mere drug courier entitled to the adjustment. After all, our precedent allows filling in the blanks in a disciplined manner. In any event, even comparing Moreno to his brother and those he identifies as participants, we cannot say he is less culpable than the average participant.

First, we do not view Beltran-Lopez, Garcia-Duran, Lares-Rodriguez, Villela, Valle, and Ceniceros-Quintero as "average participant(s)" or unqualified comparators. They controlled the amount, type, destination, and price of the drugs and, most probably, profited significantly from both this and other similar crimes. They are not "average participant[s]." Rather, they qualify as organizers, leaders, managers, or supervisors. The guidelines make special accommodations for such individuals. *See* USSG § 3B1.1 (calling for an upward adjustment for those playing an aggravating role). Nevertheless, we give them measured consideration in the culpability equation; they are, admittedly, more culpable than Moreno, but that does not end the debate.

We look now at those who are not leaders or supervisors. Of those specifically identified in the record, they are Duran, Moreno's brother Kevin, Marquez, and Jesus Pena-Lopez. Comparing the roles of those players to that of Moreno reveals him to be considerably more culpable than any of them.

At Moreno's direction, Duran rented the vehicle in this case.[14] Admittedly, he rented at least four other vehicles to be used to transport drugs (the record does not reveal who directed him to do so) and was discovered driving a rental car with Marquez, who, a month later, was found traveling with drugs. At first blush, that may suggest Marquez was a courier, like Moreno. However, no drugs were found in Duran and Marquez's rental car. We also know nothing about their profit from the operation and nothing suggests they profited any more than Moreno. But other matters are equally important; unlike Moreno, nothing of record shows them having personal contact with Lares-Rodriguez, Villela, or Valle. Duran's only significant contacts appear to be with drug couriers. Nor is there any evidence that the big boys entrusted Duran or Marquez with transporting a significant amount of drugs over a long distance. Moreno was more culpable than those two.

Kevin participated with Moreno in the transportation of a significant amount of drugs in this case. He also had contact with Villela over the telephone. But again, unlike Moreno, there is no indication he had contact with Lares-Rodriguez or Valle or had made previous trips. Moreover, no evidence shows him to have had any role in securing the vehicle or taking it "somewhere" to be loaded with drugs. Kevin claimed to have no knowledge of the methamphetamine seized in this case. Moreno agrees. In his words,

[14] Moreno also said William, a/k/a Tapiceria rented the vehicle for him in this case. If we consider him in the calculation, he too is less culpable than Moreno as that is all we know of his participation.

"[i]t's all on me." (R. Vol. III at 7.) Suspending disbelief,[15] we take the brothers at their word regarding culpable conduct. Kevin's culpability is nowhere near that of Moreno.

That leaves Pena-Lopez. His fingerprints were found on the methamphetamine in this case. A logical inference is that he may have loaded the drugs, but that is all we know.

With respect to known participants, we are left, then, with the movers and shakers (6) and others (4) with Moreno in the middle. It is tempting simply to say, as Moreno contends, he is less culpable than an average participant and entitled to a minor role adjustment. However, a qualitative, not quantitative, approach must guide the determination. When compared to the culpability and participation of the others, Moreno is, qualitatively, closer to the big guys than the little guys; at the very least, he is an average participant. He knew the scope of the DTO and several key players, he was a trusted member of the organization (given the number of trips and the amount of drugs involved), and he was paid well for his services.[16] As at least an average participant, he cannot be "substantially less culpable than the average participant."

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[15] Yet, in a separate investigation, officers intercepted Kevin talking with Villela over the telephone. Another anomaly invites skepticism about Kevin's unwitting participation. He told agents he was traveling with Moreno to visit Ft. Hays State University but could not explain why they continued to drive East four hours after passing the college.

[16] Moreno was paid $3,000 for this trip. Kansas City is approximately 19 hours from Phoenix. Even assuming it took him a total of five days (four days to travel there and back and one overnight stay in Kansas City), that is $600 tax-free dollars a day. Not a bad day's pay.

Although Amendment 794 does not apply, consideration of the factors outlined in it is a worthy pursuit. Doing so does not alter our conclusion. We briefly discuss them with apologies for being repetitious.

Moreno was aware of the scope and structure of the drug-trafficking activity. He knew the drugs were imported from Mexico to Arizona and then transported from Arizona to Kansas City. He knew Lares-Rodriguez (Villela's supplier), Villela (Valle's supplier), and Valle (the Kansas City buyer). Indeed, the facts show: (1) his cell phone contained a United States and a Mexican telephone number for Lares-Rodriguez; (2) in March 2013, the vehicle in which he and Lares-Rodriguez were traveling was stopped after delivering drugs to the Kansas City stash house; (3) he and Lares-Rodriguez personally met with Valle in Kansas City in April 2013; and (4) he delivered multiple loads of drugs to Valle in Kansas City for Villela. No evidence suggests Duran, Kevin, Marquez, or Pena-Lopez were similarly knowledgeable, trusted, or sophisticated.

Moreno had some planning and decision-making responsibilities. He obtained the vehicle used to transport the drugs (directing his friend/employer, Duran, to rent one for him). He also arranged the time to drop the car off to be loaded with drugs and the pick-up time. There is also some indication in the record that he may have chosen Kevin as his travel companion because he fit the description of a college student and therefore gave credence to the story he concocted concerning their travel plans.

The extent and nature of his participation in the criminal activity demonstrate his role as a trusted and valued member of the drug-trafficking organization. Villela trusted

Moreno with a significant amount of methamphetamine and trusted him to travel with three high value cargos over a long distance. Moreno knew the location of the Kansas City stash house and was a significant enough player in the organization to meet Valle in person. This was not an isolated event. It was one of three Moreno admitted.

Finally, Moreno benefitted from the criminal activity. He claims his fee was miniscule compared to the value of the seized drugs and asks that we take him at his word. That we cannot do; he did not bother to produce evidence or otherwise reveal the value to the district judge. *C.f. United States v. Salas*, 756 F.3d 1196, 1207 (10th Cir. 2014) ("A defendant's own assertion that he was a minimal participant is not enough to overcome the clearly erroneous standard."). Assuming he was paid for his previous trips, he profited not only from this crime but also from the larger criminal activity of the distribution network.

Since this is, at bottom, a qualitative evaluation, we necessarily accord much respect to the trial judge's better understanding of the circumstances and his greater experience in these matters. After all, "The life of the law has not been logic: it has been experience." Oliver Wendell Holmes, Jr., THE COMMON LAW, 1 (1881).

AFFIRMED.

Entered by the Court:

Terrence L. O'Brien
United States Circuit Judge

§3B1.2. Mitigating Role

Based on the ~~defendant’s~~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.

Commentary

Application Notes:

1. Definition.—For purposes of this guideline, ~~“~~"participant~~”~~" has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).

2. Requirement of Multiple Participants.—This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.

3. Applicability of Adjustment.—

(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.

A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in ~~concerted~~the criminal activity ~~is not precluded from consideration for~~may receive an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose ~~role~~participation in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored ~~is not precluded from consideration for~~may receive an adjustment under this guideline.

Likewise, a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the

~~defendant's~~defendant's personal gain from a fraud offense ~~and~~or who had limited knowledge of the scope of the scheme ~~is not precluded from consideration for~~may receive an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose ~~role~~participation in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, ~~is not precluded from consideration for~~may receive an adjustment under this guideline.

(B) Conviction of Significantly Less Serious Offense.—If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 12 under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

(C) Fact-Based Determination.—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.

In 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.

4. Minimal Participant.—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in ~~concerted~~the criminal activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under ~~thisprovision~~this provision, the ~~defendant’s~~defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.

5. Minor Participant.—Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal.

6. Application of Role Adjustment in Certain Drug Cases.—In a case in which the court applied §2D1.1 and the ~~defendant’s~~defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(a)(5), the court also shall apply the appropriate adjustment under this guideline.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1992 (see Appendix C, amendment 456); November 1, 2001 (see Appendix C, amendment 635); November 1, 2002 (see Appendix C, amendment 640); November 1, 2009 (see Appendix C, amendment 737); November 1, 2011 (see Appendix C, amendments 749 and 755); November 1, 2014 (see Appendix C, amendment 782~~).~~); November 1, 2015 (see Appendix C, amendment 794).

FILED
United States Court of Appeals
Tenth Circuit

August 21, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JESUS ENRIQUE MORENO,

Defendant - Appellant.

No. 15-3051

ORDER

Before **KELLY**, **MURPHY**, and **O'BRIEN**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

relational test, is the defendant's conduct, is his role significantly lower than the others involved, but instead, to just point to certain factors and say, in a prior case, an appellate court once pointed to that factor in denying minor role. And so, that's what the court should do here. So, we're asking the court look at all the facts of this case, and decide that his role is -- is reduced, and award him the minor role reduction.

THE COURT: Anything else from the government?

MS. TOMASIC: No, Your Honor. Thank you.

THE COURT: Again, the court had the benefit of all ready having reviewed the addendum which sets out the objection, and the government's response to the objection request, as well as on its own, done its own independent review, presentence investigation report, as well as applicable law, as well as guideline sections. Again, to -- to begin with, defendant is requesting a minor role reduction under Section 3 B 1.2. Appears the basis for that is the nature of defendant's involvement, and specifically, his role as this drug courier, as defendant would characterize it. Section 3 B 1.2 allows a two-level reduction when a defendant was a minor participant in the criminal activity. And the clarification from Application Note 3 A is that when defendant plays a part in committing the offense, that makes him substantially less culpable than the average participant. And again, from Tenth Circuit law, in evaluating culpability, the court compares defendant's conduct with that of others in the same enterprise, but also with the conduct of an average participant in that type of crime. This is a determination by the court that is heavily fact-specific, fact-dependent. The court did, in fact, and is aware of the Tenth Circuit law which sets out some of the factors; specifically, the case where it set out specifically whether a drug courier should receive a minor role adjustment, and the factors were defendant's knowledge or lack thereof concerning the scope and structure of the enterprise and activities of others involved in the offense, also defendant's involvement in more than one transaction, also the distance traveled by the courier, and amount of compensation, as well as the quantity of drugs entrusted to defendant for transportation, as well as the fact that defendant was specifically hired to transport, or duped into delivering the contraband, as well as the level of planning required to transport the drugs. And in this case, the court would, again, after review find that the defendant was driving a rental car when he was stopped and ticketed for driving with a suspended license. Officers eventually searched the vehicle finding 6.605 kilograms of methamphetamine, which was later determined to be 100 percent pure methamphetamine. Defendant was paid $3,000 to drive the drugs from Arizona to Kansas City, Kansas. Defendant admitted to authorities that this was his third such delivery. Furthermore, defendant stated that for the last six years, he has worked for Roberto Duran, the individual who rented the vehicle in question, and whom the investigators suspect has rented numerous cars for the same purpose. Defendant's phone revealed at least four contacts of alleged co-conspirators, including Arturo Valle, a known methamphetamine trafficker in Kansas City, Kansas area. According to investigators, defendant was a close associate of Jose Francisco Lares-Rodriguez, who was identified as the methamphetamine source of supply; in fact, also was indicated the defendant was -- actually had met Mr. Valle at his home. Mr. Moreno, Mr. Bartee is asking that based on the circumstances, we make a finding that you were -- you played a minor role in this activity, and as such, should be given a reduction in your sentence, and that reduction then would have some other possible impacts on the final sentence you receive. And he's -- again, he provided the court with his sentencing memorandum. He's repeated again what his argument's here, and he's argued on your behalf that in light of your circumstances, is that that, in fact, should be what takes place. Government's opposing that, and the government set out in writing and here in the courtroom again the reasons why they don't believe that that would be proper in your case. Again, I've set out the factual findings by the court. After reviewing the arguments and, again, the other items I've previously mentioned on the record, there are cases sometimes where an individual defendant acting as a courier is involved in this type of activity. Not every situation is the same. The ones that have done it on just one occasion, the ones that are doing it on that one occasion truly have had no contact with any of the other individuals involved, the amount of drugs actually in their possession or -- and/or money; their other contact with any of the other identified, either suspected individuals involved in this type of enterprise, or actually co-defendants, is also sometimes something for this court to consider. It is true that your earnings of $3,000 may be relatively small compensation for your role. What also still remains is that you did travel a considerable distance between Arizona and Kansas, at least three times -- this was not an isolated incident -- that you were caught with 6.605 kilograms of pure methamphetamine in a modified compartment of a rental car, and again, appeared to have direct contact with co-conspirators at both ends of your route. Again, upon review, the court would find that you did not have a substantially less culpable than the average participant, and as such, that you're not entitled to the two level minor role adjustment. With that finding, the court then would note that under the sentencing guidelines, the total offense level would be a total offense level of 35, and with a criminal history category of one, that under the guidelines, the imprisonment range would be 168 to 210 months. Any objection to those findings at this time by the government?

MS. TOMASIC: One inquiry, Your Honor. I'm not certain that I heard it correctly, but I believe that I heard on the factual findings, that the defendant had the phone number for Arturo Valle in his phone, and based on the government's understanding is, it was not Arturo Valle, but rather Francisco Lares-Rodriguez, the source of supply to Valle, Roberto Duran and Kevin Moreno who were actually saved in his contacts.

THE COURT: Let me check before I can

respond. That is a misstatement from the court. Mr. Valle's phone contact was not in the defendant's cell phone. Actually was an individual the court believes that the defendant had met with, looking at Paragraph 118 of the presentence investigation report, and which follows are, in fact, the telephone contacts in those other paragraphs, 119, 120, 121, 122, 123. Apologize for that. Anything else from the government regarding the court's findings at this time as it relates to the total offense level, criminal history category, as well as the term of imprisonment as suggested by the guidelines?

MS. TOMASIC: No objection, Your Honor.

THE COURT: Mr. Bartee, I'll give you an opportunity to also respond to what the government brought up, or if there's anything else before the court begins with proposed findings of fact and tentative sentence part of this?

MR. BARTEE: Your Honor, I would just note for the record my continuing objection to the failure to grant Mr. Moreno the role reduction. I think it's a procedural reasonableness error. Basically, it -- it appears to the defense that the court is applying a series of factors extracted from different Tenth Circuit cases, and that is outweighing of the overriding test, which is whether Mr. Moreno's role was substantially less than that of the other members of this drug organization. I still don't see that as an essentially contested claim. I think that's clearly the case here. So, that's my objection, Your Honor.

THE COURT: It's noted for the record, and again, the court did review the sentencing guidelines specifically -- specific section, as well as the commentary notes. As counsel's aware, there's references to Tenth Circuit court cases. I do attempt to follow the Tenth Circuit law and precedent as it relates to not only this issue, but any of the issues before the court. But again, the court understands the defendant's objections. They're noted for the record. The court is ready to announce its proposed findings of fact and tentative sentence. Prior to doing so, I'll tell you also, Mr. Moreno, that the court was provided with a number of letters that were written on your behalf from family members, your mother, brothers, sisters, also some other, I imagine, friends. So, I did read those as well. Mr. Bartee, in regards to the proposed findings of fact and tentative sentence, any statements or arguments you care to make in regards to the sentence?

MR. BARTEE: Your Honor, in light of the

scientific literature indicating that, in studies conducted under standards established by the Food and Drug Administration for determining the abuse liability of a particular drug, the potencies of hydrocodone and oxycodone when abused are virtually identical, even though some physicians who prescribe the two drugs in a clinical setting might not prescribe them in equal doses. Public comment indicated that both hydrocodone and oxycodone are among the top ten drugs most frequently encountered by law enforcement and that their methods of diversion and rates of diversion per kilogram of available drug are similar. Public comment and review of the scientific literature also indicated that the users of the two drugs share similar characteristics, and that some users may use them interchangeably, a situation which may become more common as the more powerful pharmaceuticals recently approved by the Food and Drug Administration become available.

Based on proportionality considerations and the Commission's assessment that, for purposes of the drug guideline, hydrocodone and oxycodone should be treated equivalently, the amendment adopts a marihuana equivalency for hydrocodone (actual) that is the same as the existing equivalency for oxycodone (actual): 1 gram equals 6,700 grams of marihuana.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 794

Amendment: The Commentary to §3B1.2 captioned "Application Notes" is amended in Note 3(A) by inserting after "that makes him substantially less culpable than the average participant" the following: "in the criminal activity", by striking "concerted" and inserting "the", by striking "is not precluded from consideration for" each place such term appears and inserting "may receive", by striking "role" both places such term appears and inserting "participation", and by striking "personal gain from a fraud offense and who had limited knowledge" and inserting "personal gain from a fraud offense or who had limited knowledge";

in Note 3(C) by inserting at the end the following new paragraphs:

" In 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.";

in Note 4 by striking "concerted" and inserting "the criminal";

and in Note 5 by inserting after "than most other participants" the following: "in the criminal activity".

Reason for Amendment: This amendment is a result of the Commission's study of §3B1.2 (Mitigating Role). The Commission conducted a review of cases involving low-level offenders, analyzed case law, and considered public comment and testimony. Overall, the study found that mitigating role is applied inconsistently and more sparingly than the Commission intended. In drug cases, the Commission's study confirmed that mitigating role is applied inconsistently to drug defendants who performed similar low-level functions (and that rates of application vary widely from district to district). For example, application of mitigating role varies along the southwest border, with a low of 14.3 percent of couriers and mules receiving the mitigating role adjustment in one district compared to a high of 97.2 percent in another. Moreover, among drug defendants who do receive mitigating role, there are differences from district to district in application rates of the 2-, 3-, and 4-level adjustments. In economic crime cases, the study found that the adjustment was often applied in a limited fashion. For example, the study found that courts often deny mitigating role to otherwise eligible defendants if the defendant was considered "integral" to the successful commission of the offense.

This amendment provides additional guidance to sentencing courts in determining whether a mitigating role adjustment applies. Specifically, it addresses a circuit conflict and other case law that may be discouraging courts from applying the adjustment in otherwise appropriate circumstances. It also provides a non-exhaustive list of factors for the court to consider in determining whether an adjustment applies and, if so, the amount of the adjustment.

Section 3B1.2 provides an adjustment of 2, 3, or 4 levels for a defendant who plays a part in committing the offense that makes him or her "substantially less culpable than the average participant." However, there are differences among the circuits about what determining the "average participant" requires. The Seventh and Ninth Circuits have concluded that the "average participant" means 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. See, e.g., United States v. Benitez, 34 F.3d 1489, 1498 (9th Cir. 1994); United States v. Cantrell, 433 F.3d 1269, 1283 (9th Cir. 2006); United States v. DePriest, 6 F.3d 1201, 1214 (7th Cir. 1993). The First and Second Circuits have concluded that the "average participant" also includes "the universe of persons participating in similar crimes." See United States v. Santos, 357 F.3d 136, 142 (1st Cir. 2004); see also United States v. Rahman, 189 F.3d 88, 159 (2d Cir. 1999). Under this latter approach, courts will ordinarily consider the defendant's culpability relative both to his co-participants and to the typical offender.

The amendment generally adopts the approach of the Seventh and Ninth Circuits, revising the commentary to specify that, when determining mitigating role, the defendant is to be compared with the other participants "in the criminal activity." Focusing the court's attention on the individual defendant and the other participants is more consistent with the other provisions of Chapter Three, Part B. See, e.g., §3B1.2 (the adjustment is based on "the defendant's role in the offense"); §3B1.2, comment. (n.3(C)) (a determination about mitigating role "is heavily dependent upon the facts of the particular case"); Ch. 3, Pt. B, intro. comment. (the determination about mitigating role "is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct)").

Next, the amendment addresses cases in which the defendant was "integral" or "indispensable" to the commission of the offense. Public comment suggested, and a review of case law confirmed, that in some cases a defendant may be denied a mitigating role adjustment solely because he or she was "integral" or "indispensable" to the commission of the offense. See, e.g., United States v. Skinner, 690 F.3d 772, 783–84 (6th Cir. 2012) (a "defendant who plays a lesser role in a criminal scheme may nonetheless fail to qualify as a minor participant if his role was indispensible or critical to the success of the scheme"); United States v. Panaigua-Verdugo, 537 F.3d 722, 725 (7th Cir. 2008) (defendant "played an integral part in the transactions and therefore did not deserve a minor participant reduction"); United States v. Deans, 590 F.3d 907, 910 (8th Cir. 2010) ("Numerous decisions have upheld the denial of minor role adjustments to defendants who . . . play a critical role"); United States v. Carter, 971 F.2d 597, 600 (10th Cir. 1992) (because defendant was "indispensible to the completion of the criminal activity . . . to debate which one is less culpable than the others . . . is akin to the old argument over which leg of a three-legged stool is the most important leg."). However, 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. Accordingly, the amendment revises the commentary to emphasize that "the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative" and that such a defendant may receive a mitigating role adjustment, if he or she is otherwise eligible.

The amendment also revises two paragraphs in Note 3(A) that illustrate how mitigating role interacts with relevant conduct principles in §1B1.3. Specifically, the illustrations provide that certain types of defendants are "not precluded from consideration for" a mitigating role adjustment. The amendment revises these paragraphs to state that these types of defendants "may receive" a mitigating role adjustment. The Commission determined that the double-negative tone ("not precluded") may have had the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances.

Finally, the amendment provides a non-exhaustive list of factors for the court to consider in determining whether to apply a mitigating role adjustment and, if so, the amount of the adjustment. The factors direct the court to consider the degree to which the defendant understood the scope and structure of the criminal activity, participated in planning or organizing the criminal activity, and exercised decision-making authority, as well as the acts the defendant performed and the degree to which he or she stood to benefit from the criminal activity. The Commission was persuaded by public comment and a detailed review of cases involving low-level offenders, particularly in fraud cases, that providing a list of factors will give the courts a common framework for determining whether to apply a mitigating role adjustment (and, if so, the amount of the adjustment) and will help promote consistency.

The amendment further provides, as an example, that 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 a mitigating role adjustment.

Effective Date: The effective date of this amendment is November 1, 2015.

AMENDMENT 795

AMENDMENT: The Commentary to §2L1.2 captioned "Application Notes" is amended in Note 4(B) by striking "not counted as a single sentence" and inserting "not treated as a single sentence".

Section 4A1.1(e) is amended by striking "such sentence was counted as a single sentence" and inserting "such sentence was treated as a single sentence".

The Commentary to §4A1.1 captioned "Application Notes" is amended in Note 5 by striking "are counted as a single sentence" and inserting "are treated as a single sentence"; and by striking "are counted as a single prior sentence" and inserting "are treated as a single prior sentence".

Section 4A1.2(a)(2) is amended by striking "those sentences are counted separately or as a single sentence" and inserting "those sentences are counted separately or treated as a single sentence"; by striking "Count any prior sentence" and inserting "Treat any prior sentence"; and by striking "if prior sentences are counted as a single sentence" and inserting "if prior sentences are treated as a single sentence".

The Commentary to §4A1.2 captioned "Application Notes" is amended in Note 3 by redesignating Note 3 as Note 3(B), and by inserting at the beginning the following:

" <u>Application of 'Single Sentence' Rule (Subsection (a)(2))</u>.—

(A) <u>Predicate Offenses</u>.—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (<u>see</u> §4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted "separately" from each other (<u>see</u> §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single

4. *In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.*

Background: This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of §3B1.1(c).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1991 (see Appendix C, amendment 414); November 1, 1993 (see Appendix C, amendment 500).

§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.

Commentary

Application Notes:

1. *Definition.—For purposes of this guideline, "participant" has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).*

2. *Requirement of Multiple Participants.—This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role*

in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.

3. Applicability of Adjustment.—

(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.

A defendant who is accountable under §1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under §1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.

Likewise, a defendant who is accountable under §1B1.3 for a loss amount under §2B1.1 (Theft, Property Destruction, and Fraud) that greatly exceeds the defendant's personal gain from a fraud offense and who had limited knowledge of the scope of the scheme is not precluded from consideration for an adjustment under this guideline. For example, a defendant in a health care fraud scheme, whose role in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount, is not precluded from consideration for an adjustment under this guideline.

(B) Conviction of Significantly Less Serious Offense.—If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 12 under §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy)) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1 (Unlawful Possession; Attempt or Conspiracy)), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

(C) Fact-Based Determination.—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, is based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case.

4. Minimal Participant.—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this *provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.*

5. *Minor Participant.— Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants, but whose role could not be described as minimal.*

6. *Application of Role Adjustment in Certain Drug Cases.—In a case in which the court applied §2D1.1 and the defendant's base offense level under that guideline was reduced by operation of the maximum base offense level in §2D1.1(a)(5), the court also shall apply the appropriate adjustment under this guideline.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1992 (see Appendix C, amendment 456); November 1, 2001 (see Appendix C, amendment 635); November 1, 2002 (see Appendix C, amendment 640); November 1, 2009 (see Appendix C, amendment 737); November 1, 2011 (see Appendix C, amendments 749 and 755); November 1, 2014 (see Appendix C, amendment 782).

§3B1.3. Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by **2** levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).

Commentary

Application Notes:

1. *Definition of "Public or Private Trust".—"Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense (e.g., by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment does not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.*

2. *Application of Adjustment in Certain Circumstances.—Notwithstanding Application Note 1, or any other provision of this guideline, an adjustment under this guideline shall apply to the following:*