

IN THE SUPREME COURT OF THE UNITED STATES

ERVIN MALDONADO-GOMEZ,

PETITIONER,

- v -

UNITED STATES OF AMERICA,

RESPONDENT.

PETITIONER'S PETITION FOR WRIT OF *CERTIORARI* TO THE COURT OF
APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

When the Sentencing Commission promulgates a list of factors to guide a district court's sentencing discretion and analysis, must the court, consistent with this Court's rule in *United States v. Taylor*, expressly consider all the listed factors and explain how it weighed them?

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner, Ervin Maldonado-Gomez, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit, in an unpublished decision, affirmed the district court's denial of an adjustment for minor role under U.S.S.G. § 3B1.2.¹ *See United States v. Maldonado-Gomez*, 689 F. App'x 571 (9th Cir. 2017).

The panel denied rehearing, and the Ninth Circuit declined to rehear the matter en banc. *See* Appendix B.

¹ A copy of the decision is attached in Appendix A.

JURISDICTION

On April 24, 2017, the Ninth Circuit affirmed the district court sentence. *See* Appendix A. On December 11, 2017, it denied his petition for rehearing. *See* Appendix B. The Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT LEGAL PROVISION²

U.S.S.G. § 3B1.2

STATEMENT OF THE CASE

Mr. Maldonado was charged with importation of a controlled substance, to which he pled guilty. The district court sentenced him to 48 months' custody and three years of supervised release. He is currently serving his custodial sentence; his projected release date is April 6, 2019.

The District Court's Ruling on the Request for Mitigating Role

The presentence report in Mr. Maldonado's case did not recommend an adjustment for minor role under U.S.S.G. § 3B1.2. However, in his objections to the report, he argued for a two-level reduction based on his limited role in the offense. He cited in particular the factors listed in the then-recent amendment to the Sentencing Guidelines that promulgated a list of factors guiding the determination of mitigating role in Application Note 3(C)(i)-(v) (listing degree of knowledge of the organization's structure, degree of planning and organizing the activity, degree of decision-making authority, extent and nature of involvement, and degree of benefit).

² Pursuant to Sup. Ct. R. 14(f), the text of the pertinent provisions is given in the attached Appendix C.

He argued that the facts of his case showed all but one of these factors pointed to a mitigated role in the overall criminal activity.

At the sentencing hearing, defense counsel particularly highlighted the line up of these new factors and how the facts here showed at least four of them supported mitigating role. Although Mr. Maldonado admitted involvement in 15 trips during his employ, suggesting extensive involvement, counsel noted that the nature of his involvement remained limited, and his role was fixed at a low level in the organization. However, the district court's discussion of minor role did not address a single one of the factors required by the current version of § 3B1.2 to gauge mitigating role. This was because the court preferred to treat the adjustment as a request for a variance. Nothing in the record plausibly demonstrated the court's considering and weighing any of the factors that Mr. Maldonado had cited from the Application Note list.

The Ninth Circuit Decisions

On appeal, Petitioner argued that the district court had erred *inter alia* by failing to follow the protocol for determining the role adjustment set by the Sentencing Commission's commentary to § 3B1.2. The court not only failed to make a full comparison of all the "participants" in the offense under § 3B1.2 cmt. nn. 1 & 3(A), but it conducted an incomplete and deficient analysis of the five factors in Application Note 3(C). Thus, Petitioner argued that the court's silence at sentencing either failed to follow the factor-based protocol in the Guideline or demonstrated the court had improperly short-circuited the sentencing process. The district court's

omitting analysis of these factors came despite Petitioner's pointing out evidence the factors lined up in favor of minor role, matching the Guideline's archetype for mitigating role of someone "who does not have a proprietary interest ... and who is simply being paid to perform certain tasks." § 3B1.2 cmt. n.3(C).

Deciding without the benefit of oral argument, the Ninth Circuit affirmed. The Memorandum asserted that the sentencing court did not fail to consider all the listed factors in Application Note 3(C). *See Maldonado*, 689 F. App'x at 572. The gap in the record showing no express consideration of the factors was not significant, because "district judges are presumed to know the law and need not 'tick off' all the sentencing factors." *Id.* (citing *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc)).

Petitioner sought rehearing and rehearing en banc, contending the decision contravened circuit case law on standards of review and the role-adjustment analysis, as well as this Court's decisions in *Rita v. United States*, 551 U.S. 338 (2007), and *Stinson v. United States*, 508 U.S. 36 (1993).

The Ninth Circuit declined to rehear the matter. *See* Appendix B.

REASONS FOR GRANTING THE PETITION

TO ENSURE MEANINGFUL APPELLATE REVIEW AND UNIFORMITY FOR DEFENDANTS SENTENCED UNDER THE UNITED STATES SENTENCING GUIDELINES, THIS COURT SHOULD CLARIFY THAT WHEN A GUIDELINE INCLUDES A MULTI-FACTOR TEST, A DISTRICT COURT PROPERLY EXERCISES ITS SENTENCING DISCRETION ONLY BY EXPLICITLY CONSIDERING AND EXPLAINING ALL FACTORS.

A. Introduction

This case involves a district court's proper exercise of its discretion when applying a multi-factor test to make a sentencing determination under the Sentencing Guidelines. In particular, it concerns whether the general principles articulated in *United States v. Taylor*, 487 U.S. 326 (1988), on how courts approach a multi-factor test set out in the law apply equally to the Guidelines context.³ The proper implementation of the Sentencing Guidelines remains a crucial part of federal criminal sentencing. The *Taylor* principles aim at more accurate and thorough decision-making on both the trial and appellate levels. Because the Ninth Circuit—here and in other cases⁴—and other circuit courts have neglected the full-consideration rule for evaluating factor-based inquiries (like mitigating role), this

³ The allied question whether the Tenth Circuit defied the requirements of *Taylor* in the context of re-sentencing under 18 U.S.C. § 3582 is currently pending before this Court in *Chavez-Meza v. United States*, Case No. 17-5639. That case is calendared for oral argument on April 23, 2018. The Court may wish to stay consideration of this Petition for decision in light of its ruling in *Chavez-Meza*.

⁴ See *United States v. Manzano*, 689 F. App'x 472 (9th Cir. 2017); *United States v. Barrera-Valdivia*, 689 F. App'x 487 (9th Cir. 2017); *United States v. Martin Del Campo*, 689 F. App'x 488 (9th Cir. 2017); *United States v. Aguilar Diaz*, ___ F.3d ___, 2018 WL 1220508, at *4 (9th Cir. Mar. 9, 2018).

Court should accept review to clarify whether this violates *Taylor*. It is an important question, because of the centrality of proper Guidelines operation in promoting national consistency and uniformity and the risk that similar misanalysis could infect the treatment of other factor-based inquiries in the Guidelines.

B. The Guidelines Remain an Important Tool to Promote National Uniformity in Criminal Sentencing

Though the Guidelines are advisory, this Court has repeatedly emphasized that Sentencing Guidelines remain an active and important part of the federal sentencing process. As a result, this Court has identified proper Guideline calculations as the “the starting point and the initial benchmark” of a federal sentence. *Gall v. United States*, 552 U.S. 38, 49 (2007). More recently, the Court characterized the role of the Guidelines as “not only the starting point for most federal sentencing proceedings but also the lodestar. The Guidelines inform and instruct the district court's determination of an appropriate sentence.” *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016).

Part of the reason the Guidelines remain a necessary part of criminal sentencing is the crucial, institutional role of the Sentencing Commission in research, data-gathering, and promulgation of amendments to refine the Guidelines. The Guidelines particularly seek to reflect the statutory sentencing factors in 18 U.S.C. § 3553(a) that Congress set to guide imposition of sentences. *See Rita*, 551 U.S. at 347-48. Thus, “Congressional statutes then tell the *Commission* to write Guidelines that will carry out these same § 3553(a) objectives.” *Id.* at 348. One of those objectives

is “to avoid unwarranted sentencing disparities.” 18 U.S.C. § 3553(a)(6); *see also* 28 U.S.C. § 991(b)(1)(B) (directing the Commission to take this factor into account in designing the Guidelines).

The goal of promoting national uniformity and consistency in federal sentences was a major part of the reason the Sentencing Commission added a list of factors to the Guideline provision at issue in Petitioner’s case—the mitigated role adjustment, *see* U.S.S.G. § 3B1.2. The Commission wanted to guide the exercise of a sentencing court’s broad discretion, and included a multi-factor test to guide courts in making a highly fact-specific mitigated-role determination. *See* U.S.S.G. § 3B1.2 cmt. n.3(C)(i)-(v). The Commission noted that its empirical study of sentencing behavior “confirmed that mitigating role is applied inconsistently to drug defendants who performed similar low-level functions (and the rates of application vary widely from district to district).” U.S.S.G. app. C amend. 794 reason for amendment (2015). In particular, in districts along the “southwest border,” the rates of role grants varied from 14.3% to 97.2%. *Id.* Likewise, the level of adjustment (-2, -3, or -4) varied “from district to district”. *Id.* In light of this, the Commission made a group of changes to the commentary to “provide[] additional guidance to sentencing courts in determining whether a mitigating role adjustment applies.” *Id.*

The most significant change was the addition of five, non-exhaustive factors “for the court to consider in determining whether to apply a mitigating role adjustment and, if so, the amount of the adjustment.” *Id.* The commentary “direct[s] the court to consider the degree” to which these factors apply to the case at hand,

with the express purpose of providing “a common framework for determining whether to apply a mitigating role adjustment ... [that] will help promote consistency.” *Id.*

Consequently, the multi-factor mitigated-role test in Application Note 3(C) was promulgated by the Commission to guide the determination of role adjustments in aid of securing greater uniformity and consistency across districts. The Commission has adopted multi-factor tests for various other Guideline determinations. *See, e.g.*, U.S.S.G §1B1.3 cmt. n.5(B) (determining “same course of conduct”); U.S.S.G. § 2B1.1 cmt. n.3(C) (loss calculation factors); U.S.S.G. § 5D1.1 cmt. n.3 (factors for imposing supervised release). As such, how a court properly exercises its discretion when conducting a multi-factor Guideline analysis is critical to calculating “the initial benchmark” and “lodestar” of federal criminal sentencing and is “an important federal question” that this Court should address. Sup. Ct. R. 10(a) & (c).

C. **In *Taylor*, This Court Established a General Principle That When a Multi-Factor Test Explicitly Guides a Court’s Exercise of Discretion, As Is the Case in Various Guideline Provisions, the Court Must Expressly Consider and Weigh All of the Listed Factors**

In *United States v. Taylor*, 487 U.S. 326 (1988), this Court established the rule that where a statute sets forth factors relevant to the exercise of a court’s discretion, a district court must consider the relevant factors and articulate the reasons behind its exercise of discretion.

Taylor addressed a provision of the Speedy Trial Act granting district courts the discretion to dismiss a charge with or without prejudice after weighing a number of enumerated factors. *Id.* at 332. It held that, “[w]here ... Congress has declared

that a decision will be governed by consideration of particular factors, a district court must carefully consider those factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review.” *Id.* at 336. Even though the ultimate decision was committed to the district court’s discretion, the proper exercise of that discretion depended “on the bounds of that discretion and the principles that guide its exercise.” *Id.* Accordingly, to allow for appellate review the district court had to clearly articulate its reasoning, so the appellate court could ascertain whether it had “ignored or slighted a factor that Congress has deemed pertinent to the choice of remedy, thereby failing to act within the limits prescribed by Congress.” *Id.* at 336-37. In sum, *Taylor* articulates a general rule of legal reasoning that goes back to the beginnings of American jurisprudence: that exercise of discretion must be made pursuant to the pertinent, legal standards. *See, e.g., United States v. Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (Marshall, C.J.) (“[A] motion to [a court’s] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.”).

The general *Taylor* principle applies with equal force to the Guidelines and particularly here, since the mitigated-role Guideline, U.S.S.G. § 3B1.2, sets out a non-exhaustive list of five factors that a district court “should consider” when determining whether to grant or deny a mitigated-role adjustment. U.S.S.G. § 3B1.2 cmt. n.3(C). Because Congress, through the Sentencing Commission, has explicitly constrained a sentencing court’s discretion by directing it to consider particular factors, *Taylor*

requires that a district court consider the factors and then explicitly articulate its reasons for the Guideline determination.

Though the Sentencing Guidelines are now advisory, and district courts have broad sentencing discretion, *Taylor* nevertheless governs a district court's exercise of that discretion. As this Court has noted, "[d]iscretion is not a whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005). This is especially important in the sentencing context, where the Guidelines are meant to "secure nationwide consistency" in sentencing. *See Gall* 552 U.S. at 50; *Rita*, 551 U.S. at 348-350 (Sentencing Commission's objective was to avoid unwarranted sentencing disparities, and its work is "ongoing" to ensure this objective). Indeed, given this goal to ensure uniformity in sentencing, this Court has reaffirmed that a sentencing court's discretion is not boundless, and is reviewable for an abuse of discretion. *Gall*, 552 U.S. at 51; *see also Taylor*, 487 U.S. at 336 ("a decision calling for the exercise of judicial discretion 'hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review.") (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975)).

This Court has not hesitated to reverse cases for abuse of discretion where the district court did not explain how it weighed relevant factors when exercising its discretion. For example, in *Northcross v. Board of Education*, 412 U.S. 427, 428-29 (1973), the Court vacated and remanded where the district court did not explain how it exercised its discretion in denying a fee award under the Emergency School Aid Act

of 1972. In *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 557 (2010), the Court determined that a district court had abused its discretion in enhancing a fee award made pursuant to 42 U.S.C. § 1988 where it did not provide sufficient justification for its “essentially arbitrary” decision. And in *Hensley v. Eckerhart*, 461 U.S. 424, 438-40 (1983), the Court reversed a fee award for an abuse of discretion because, even though the district court had put forth a “commendable effort to explain the fee award” and its ultimate decision may have been reasonable, it had failed to articulate just one of twelve factors that Congress had deemed relevant.

The import of these cases is that a district court’s ultimate decision is unreviewable if it does not explain the factors that went into it. The only way to ascertain whether a district court has abused its discretion is if, as the Court articulated in *Taylor*, the district court “carefully consider[s] those factors” guiding its exercise of discretion, and then “whatever its decision, clearly articulate[s] their effect in order to permit meaningful appellate review.” 487 U.S. at 336. That principle is equally important here, where a district court’s failure to consider or explain how the Guidelines factors weighed in its sentencing determination prevents a higher court from determining whether the sentencing determination was within the bounds of the district court’s discretion, as the Sentencing Commission intended.

D. Circuit Courts Are Violating the *Taylor* Principle in Their Review of Factor-Based, Guidelines Analyses

The Ninth Circuit’s holding that the “district court was not required to ‘tick off’ the relevant factors” violates the rule articulated by *Taylor* – that when the law

requires a multi-factor analysis, the court must address and weigh *all* the identified factors. Failure to do so skews the result and obscures the basis for appellate review.

The factors promulgated by the Sentencing Commission to guide the role analysis are no different from any other multi-factor test familiar in the law. The factors exist for the purpose of allowing a court to reach a reasoned decision, consistent with the intent of the Guideline and in step with a national standard to promote uniformity. Appellate review of that decision necessitates an examination of how thoroughly the sentencing court did its job. As stated in *Taylor*, consideration of *all* factors is required in this context, because “[o]nly then can an appellate court ascertain whether a district court has ignored or slighted a factor ... deemed pertinent” to the analysis. 487 U.S. at 337 (“Because the District Court did not fully explicate its reasons for dismissing with prejudice the substantive drug charges against respondent, we are left to speculate in response to some of the parties’ arguments pro and con.”).

The Ninth Circuit’s reasoning—that there is no need in this context to “tick off” the factors—is inconsistent with *Taylor*’s. For multi-factor tests, such as that in Application Note 3(C)(i)-(v), incomplete consideration of the identified factors not only undermines the accuracy of the ultimate ruling, but it inhibits the ability of proper review, because the court’s reasoning is opaque. Silence in the record is inscrutable as to whether “the district court ignored or slighted” the omitted factor. 487 U.S. at 337. Only by presumption or speculation can one fill the silence with a proper weighing of the missing factor(s). *See id.*

The Ninth Circuit’s “tick off” notion is particularly inapposite to the role analysis, which is analogous to the general multi-factor inquiry covered by the *Taylor* reasoning. Nonetheless, some circuits reviewing sentencing courts’ analysis under the new multi-factor test in Application Note 3(C) have, like the Ninth Circuit, departed from the general rule of reasoning in *Taylor*. See *United States v. Torres-Hernandez*, 843 F.3d 203, 209 (5th Cir. 2016) (“The district court was not required to expressly weigh each factor in § 3B1.2 on the record.”); *United States v. Soborski*, 708 F. App’x 6, 11 (2d Cir. 2017) (holding that omitting four of the five factors “would probably not” warrant remand). These cases reach their conclusion by deploying notions that: (1) judges are presumed to know and apply the law correctly (*Soborski*, 708 F. App’x at 12); (2) one can infer the judge’s reasoning from the parties’ presentation (*Torres-Hernandez*, 843 F.3d at 209 n.33); or (3) the role analysis is analogous to the unique situation of explaining a within-Guideline sentence, as in *Rita*, 551 U.S. at 356-57 (the instant case’s reliance on the “tick off” language in *Carty*, 520 F.3d at 992); see also *Aguilar Diaz*, 2018 WL 1220508, at*4 (citing *Carty*).

These deviations from the general *Taylor* approach are contrary to and undermine the entire rationale this Court applied in that decision. A presumption that the court has followed the law proves too much. Contrary to *Taylor*’s demand for full and explicit consideration of identified factors, presumption reasoning would justify ‘appellate review-lite’ in every case, since it permits one to assume that learned judges always make the call right. Inferring reasoning from the record as a whole was expressly dismissed by *Taylor* as leaving the reviewing court “to speculate in

response to some of the parties’ arguments pro and con.” *Taylor*, 487 U.S. 337. And analogy to the explanation needed under § 3553 for a within-guideline sentence is also inapt. Even there, when the defendant offers non-frivolous reasons to impose a different sentence (as would be the case with a request for a minor-role adjustment), “the judge will normally go further and explain why he has rejected those arguments.” *Rita*, 551 U.S. at 357. The unique circumstance of the statute-Guideline relationship, whereby the latter incorporates the substance of the former—*Rita*, 551 U.S. at 348, is inapposite in circumstances where the factor-based analysis is the *sole* protocol for determining the answer to the legal question at hand.

The Ninth, Fifth, and Second Circuits are ignoring the general requirement of sound, legal analysis set out in *Taylor*. They are instead treating the multi-factor test in the role Guideline as somehow different from any other test to which the *Taylor* rationale applies. This Court should grant the writ to address this divergence from this Court’s precedent on a matter that threatens to undermine the uniform application of the Guidelines.

E. The Newly Implemented Factor-Test for Role Provides the Court an Ideal Vehicle for Providing Guidance to the Courts on This Question

This case provides an ideal vehicle for determining the amount of explanation required for multi-factor, Guideline determinations. The minor-role issue centers on a clear multi-factor test that was adopted to promote uniform application of the adjustment. The record is clear that the district court did not address or weigh any of the factors. The denial of minor role had a large impact on Petitioner’s sentence,

which he is still serving. And the Court of Appeals expressly upheld the district court's flawed analysis in violation of *Taylor*.

For these reasons, the instant case provides an appropriate means to test the important question of law raised by the Petition.

CONCLUSION

The Ninth Circuit's upholding Petitioner's sentence when the district court failed to identify and address the required factors relevant to a minor-role determination violated the principles of multi-factor analysis set forth in *Taylor*. This Court should grant the writ to address this divergence from precedent on an important question of federal law.

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