NO. 14-50509

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NORBERTO QUINTERO-LEYVA,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of California
Honorable Larry A. Burns, Judge Presiding

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BRIEF OF AMICUS CURIAE, FEDERAL DEFENDERS OF SAN DIEGO, INC., IN SUPPORT OF APPELLANT AND REVERSAL

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MICHAEL A. MARKS
REUBEN C. CAHN
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL RULES

UNITED STATES SENTENCING GUIDELINES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. NORBERTO QUINTERO-LEYVA, Defendant-Appellant.	U.S.C.A. No. 14-50509 U.S.D.C. No. 14CR1821-LAB **BRIEF OF AMICUS CURIAE**

I. IDENTITY, INTEREST, AND AUTHORITY OF AMICUS CURIAE

Representing approximately half of the criminal defendants charged in the Southern District of California, Federal Defenders of San Diego, Inc., defends hundreds of people each year charged with importing drugs from Mexico into the United States. The question of whether these "mules" or "couriers" qualify for a downward adjustment under U.S.S.G. § 3B1.2 for their minor role in the offense arises in nearly all of these cases. The issue is commonly litigated in the Southern District, and the denial of an adjustment has resulted in dozens of appeals filed and litigated by Federal Defenders, including four that have been stayed pending the

outcome of the present cases.[1] With special expertise and interest in the issues presented, Federal Defenders of San Diego writes to explain the effect of the recent amendment to § 3B1.2 on the resolution of these cases[2] and others like them.

Federal Defenders has confirmed that both parties to the cases have consented to the filing of this brief. Fed. R. App. P. 29(a). No party's counsel authored the brief in whole or in part, and no party or other person contributed money for the preparation or submission of the brief. Fed. R. App. P. 29 (c)(5).

II. SUMMARY OF ARGUMENT

On November 1, 2015, the Sentencing Commission amended § 3B1.2 of the Sentencing Guidelines, pertaining to mitigating-role adjustments ("minor role"). U.S.S.G. app. C amend. 794 (2015) ("Amend. 794"). As the Commission explained in its Reason for Amendment, the changes clarify the governing legal principles that a court must apply in deciding whether a minor-role adjustment is warranted in a particular case. The amended commentary to § 3B1.2—a response to the Commission's finding that the adjustment was being applied inconsistently and more sparingly than it had anticipated—controls the disposition of the present cases

[1] *United States v. Zatarain-Pena*, No. 14-50163; *United States v. Gale-Velazquez*, No. 14-50392; *United States v. Solano-Yanez*, No. 15-50056; *United States v. Centeno-Sepulveda*, No. 15-50135.

[2] Amicus curiae has filed identical briefing in *United States v. Lopez-Diaz*, No. 14-50050, and *United States v. Enriquez*, No. 14-50182, set for oral argument on the same day as the present case.

because: (1) it is retroactive and (2) it supersedes *United States v. Hurtado*, 760 F.3d 1065 (9th Cir. 2014), the case driving the district courts' denials of minor-role adjustments. The sentences in these cases must be vacated so that the district court can analyze appellants' roles consistent with amended § 3B1.2.

A Guideline amendment is retroactive when it is "a clarification of existing law rather than a substantive change in the law." *United States v. Christensen*, 598 F.3d 1201, 1204-05 (9th Cir. 2010) (quotation marks omitted). This Court has further explained that the Guidelines' characterization of an amendment as a "clarification" and the resolution of a circuit split are prominent factors indicating that an amendment is retroactive. *Id.* Here, each of these factors are present. In amending § 3B1.2, the Sentencing Commission explained that the amendment resolves a circuit split regarding the definition of "average participant" and clarifies the application of the adjustment through updated and expanded commentary. Thus, because the amendment clarifies the Guideline rather than creating new substantive law, the amendment is retroactive and binding on all courts, even in cases involving defendants sentenced before November 1, 2015.

In the cases at bar, the government largely ignores the amendment and relies heavily on *United States v. Hurtado*, 760 F.3d 1065 (9th Cir. 2014), to argue that a minor-role adjustment was not warranted. But *Hurtado* conflicts with the retroactive, amended commentary to § 3B1.2 in several ways, so it cannot control. First, the amendment rejects *Hurtado*'s reasoning that a defendant is precluded from receiving an adjustment merely because his role is essential or indispensable. *See* 760 F.3d at 1067 (affirming the denial of a minor-role adjustment because defendant was an "essential cog" in the offense). Second, the amendment re-affirms the centrality of an inclusive comparative analysis of the defendant's role to the role of *all* other co-participants in the offense. This analysis rejects *Hurtado*'s exclusion of more culpable participants in the minor-role analysis. *See id.* at 1069 (holding that "[t]he requisite comparison is to average participants, not above-average participants"). Third, the amendment provides a list of relevant factors for district courts to consider that is absent from *Hurtado*. These factors foreclose *Hurtado*'s suggestion that drug quantity, payment, or preparatory acts alone are sufficient to warrant the denial of a minor-role adjustment. *See id.* ("Any of these facts alone may justify denial of a minor role"). In light of this conflict with binding commentary, *Hurtado* is no longer good law, and it cannot inform the outcome of these cases or any minor-role decisions going forward.

In vacating the sentences in these cases, this Court accordingly should indicate that *Hurtado* is superseded to provide guidance to district courts in applying § 3B1.2. In addition, discarding *Hurtado* will bring this Court's precedent in line with the Sentencing Commission's long-held belief that typical mules and couriers, whose function is limited to transporting drugs and who have no discretion in the planning or execution of the tasks they perform, are archetypal examples of minor participants deserving of a downward adjustment.

III. AMENDED § 3B1.2 IS RETROACTIVE

The commentary to U.S.S.G. § 3B1.2 was amended on November 1, 2015, in response to the Sentencing Commission's finding that "mitigating role is applied inconsistently and more sparingly than the commission intended." Amend. 794. The amendment "provides *additional guidance* to sentencing courts in determining whether a mitigating role adjustment applies," *id*. (emphasis added), while addressing a circuit split at the heart of the minor-role analysis. Because the commentary clarifies the Guideline, rather than creating a substantive change in existing law, it is binding on district courts that sentenced defendants prior to November 1, 2015, and provides the relevant law for the resolution of appeals from those decisions. *See Christensen*, 598 F.3d at 1204 ("Generally, 'we may consider [a subsequent amendment] of the Sentencing Guidelines only if that amendment is a clarification of existing law rather than a substantive change in the law.'" (quoting

United States v. Morgan, 376 F.3d 1002, 1010 (9th Cir.2004)); *see also United States v. Flores*, 93 F.3d 587, 592 (9th Cir. 1996) ("[A] substantive change would more likely take the form of an amendment to the Guideline itself rather than to an application note.").

This Court has identified three "prominent" factors to consider in determining whether an amendment to the Guidelines should be applied retroactively:

> (1) whether the amendment is included on a list of retroactive amendments in U.S.S.G. § 1B1.10(c)[3];
>
> (2) whether the Commission characterized the amendment as a clarification; and
>
> (3) whether the amendment resolves a circuit conflict.

Morgan, 376 F.3d at 1011. Here, the amended commentary is not listed as retroactive by the Commission. But the Sentencing Commission's Reason for Amendment explains that it is specifically meant to resolve a circuit split and provide "additional guidance" rather than enact a substantive change in § 3B1.2. Amend. 794.

First, the Commission expressly stated that the initial part of the amendment resolves a circuit split regarding the definition of "average participant." The Sentencing Commission "generally adopt[ed]" the approach of this Court in *United*

[3] The current version of § 1B1.10 lists retroactive amendments at § 1B1.10(d).

States v. Cantrell, 433 F.3d 1269, 1283 (9th Cir. 2006), in clarifying that a defendant must be compared to other participants "in the criminal activity" rather than the "typical offender" in similar, but unrelated cases. Amend. 794. Because it expressly addresses a circuit split, this part of the amended commentary is retroactive. *Morgan*, 376 F.3d at 1011; *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 remainder of the amendment is retroactive because it merely clarifies how courts are to apply the adjustment. For example, the amendment emphasizes 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." Amend. 794. This commentary rejects contrary case law that denied a mitigating role adjustment solely because the defendant was integral or indispensable to the commission of the offense. *Id*. (explaining disagreement with *United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012); *United States v. Panaigua-Verdugo*, 537 F.3d 722 (7th Cir. 2008); *United States v. Deans*, 590 F.3d 907 (8th Cir. 2010); and *United States v. Carter*, 971 F.2d 597 (10th Cir. 1992)). This commentary is retroactive because it is merely meant to "emphasize" that a defendant's "integral" role in the offense "does not alter the requirement, expressed in [pre-existing] Note 3(A), that the court must assess the

defendant's culpability relative to the average participant in the offense." Amend. 794. It does not expand the definition of "minor participant," but rather clarifies how the Sentencing Commission has intended the term to be defined all along.

Next, the amendment revises Note 3(A) to clarify that the examples previously provided of defendants "not precluded from consideration" were meant to encourage application of an adjustment for similarly situated defendants. In changing "not precluded" to "may receive," the Commission aimed to eliminate "the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances." Amend. 794. Again, this does not change the substance of the commentary, but rather brings the language in line with the guidance the Commission intended and attempts to avoid ambiguity or mistake.

Finally, the Commission added commentary setting out the factors that a district court should consider in determining whether a defendant has a minor role in an offense. As with the rest of the amendment, this non-exhaustive list of factors does not make a substantive change to the Guideline. Instead, the Commission simply determined that "a list of factors will give 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." Amend. 794. The new commentary also 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." Like the list of factors, this example does not change the minor-role analysis, but merely provides a concrete example to clarify the Commission's conceptualization of a typical "minor participant."

In sum, the Commission's reasons for amending § 3B1.2 all provide clarification rather than enacting substantive change. In light of its finding that district courts were too inconsistent and too stingy in applying minor-role adjustments, the Commission only intended to make clear the required analysis under the Guideline by eliminating vague language and adding concrete factors and examples to which the courts should look for guidance. *See, e.g., United States v. Felix*, 87 F.3d 1057, 1060 (9th Cir. 1996) (holding that a Guideline amendment was retroactive where an application note "was revised because there were many disputes over the proper interpretation of the prior version"). And because the amendment is clarifying rather than substantive, it is retroactive. *Id*.

This Court's review of the district court's analysis is accordingly governed by the current, amended version of the commentary to § 3B1.2, and the Court must reject any Circuit precedent inconsistent with the Guideline's language. *See, e.g., Sanders*, 67 F.3d at 856 ("The Ninth Circuit has consistently stated that when an amendment is a clarification, rather than an alteration, of existing law, then it should

be used in interpreting the provision in question retroactively."). In addition, this Court must vacate the sentence if the district court's role analysis failed to account for and apply the enumerated factors provided by the amended Guideline. *See Christensen*, 598 F.3d at 1206 (holding that a district court erred in applying commentary to U.S.S.G. § 2G1.3 in light of amended language, applicable retroactively); *see also United States v. Hinkson*, 585 F.3d 1247, 1260 (9th Cir. 2009) (en banc) (holding that a district court necessarily abuses its discretion if it fails to identify the correct legal rule to apply to the relief requested).

IV. *HURTADO* IS NO LONGER GOOD LAW IN LIGHT OF THE AMENDMENT TO § 3B1.2

Finding that "mitigating role is applied inconsistently and more sparingly" than intended, the Sentencing Commission's amendment to § 3B1.2 aims to expand the application of the adjustment, while specifically targeting the inconsistency of the application to couriers in southwest border districts. Amend. 794. Although the amendment does not expressly overrule *United States v. Hurtado*, 760 F.3d at 1065—which generally disfavors minor-role adjustments for typical cross-border couriers—the opinion directly conflicts with several of the changes to § 3B1.2. In light of its conflict with retroactive and binding Guidelines commentary, *Hurtado* is no longer good law.

In *Hurtado*, the panel ruled that a courier did not deserve a minor-role adjustment under § 3B1.2, commenting that the "typical commercial drug smuggler" is "not entitled to a minor-role reduction." 760 F.3d at 1067. While *Hurtado* claims that couriers in general are not excluded per se from a minor-role adjustment, *id.* at 1068, its reasoning creates just such a de facto exclusion. By holding that payment, the quantity of drugs, or the common act of car registration *alone* justifies the denial of an adjustment, *id.* at 1069, *Hurtado* guarantees that the "typical" courier will never deserve a reduction. After all, a person who transports a load of drugs for a fee is the very definition of a courier. *Hurtado*'s remark that "some other courier in some other case might [] be eligible for a minor role adjustment," *id.* at 1069, is thus an empty promise for the great majority of defendants accused of transporting drugs.

Hurtado achieves this result by adopting legal reasoning wholly incompatible with § 3B1.2, as amended. First, *Hurtado* proposes that a courier is not deserving of an adjustment if his role is "essential" to the success of the drug-trafficking scheme. 760 F.3d at 1067. Next, the opinion compares the defendant to the "typical commercial drug smuggler," while rejecting comparison to other known actors in the alleged scheme. *Id.* at 1067, 1069. Last, it holds that the presence of particular facts may alone justify the denial of an adjustment, without any reference to how those facts define the defendant's role vis-à-vis other players in the criminal scheme. *Id.* at 1069. As explained below, the amended Guideline commentary, retroactive

and binding on this Court's analysis, rejects each of these erroneous rationales, so *Hurtado* cannot survive the amendment.

A. The amended commentary to § 3B1.2 rejects *Hurtado*'s emphasis on a courier's "essential" role in a drug importation scheme

There is an alluring simplicity to concluding that no conduct essential to the completion of a crime is "minor." As the Tenth Circuit put it, "to debate which [indispensable actor] 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." *Carter*, 971 F.2d at 600. But whatever place this reasoning might have, § 3B1.2 now expressly states that the fact that a defendant's role is "essential" to the offense is *not* determinative in the minor-role analysis.

In amending the commentary to the Guidelines, the Sentencing Commission specifically addressed its concern that the courts were failing to perform the required comparative analysis under § 3B1.2 solely because the defendant was "essential," "integral," or "indispensable" to the commission of the offense. Amend. 794. The Commission cited and expressed disagreement with four cases from the Sixth, Seventh, Eighth, and Tenth Circuits where those courts affirmed the district court's denial of a minor-role adjustment based on a finding that the defendant was essential to the completion of the offense. *See* U.S.S.G. app. C amend. 794 (citing and rejecting *Skinner*, 690 F.3d at 783-84; *Panaigua-Verdugo*, 537 F.3d at 724-25; *Deans*, 590 F.3d at 910; and *Carter*, 971 F.2d at 599). In each of those cases, the

defendant had argued that he or she was less culpable than other participants with proprietary interest in the drugs. And in each case, the circuit court affirmed the district court's denial of a minor-role adjustment because the defendant was essential to the drug trafficking scheme. Yet according to the Sentencing Commission, the circuit courts got it wrong every time, because "[t]he fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative." U.S.S.G. § 3B1.2 cmt. n.3.

Just like the defendants in the cases cited by the Commission, Hurtado was far from a kingpin; he was just a courier transporting a single load of drugs for a fee. *Hurtado*, 760 F.3d at 1067-68. The panel ruled, however, that "[t]he district court was not clearly erroneous in finding that although Hurtado may have been a cog in some larger wheel, he was an *essential* cog who, solely for a sizeable sum of money, knowingly smuggled a large quantity of narcotics into the United States via a hidden compartment in his truck." *Id*. at 1067 (emphasis in original). This language repeats—with deliberate emphasis—the erroneous reasoning of the cases rejected by the Guideline amendment. *See Skinner*, 690 F.3d at 783 ("As a courier, Skinner's role in the conspiracy was *critical* to its success." (emphasis added)); *Deans*, 590 F.3d at 911 (holding that defendant was not entitled to a minor role adjustment because he was "*deeply involved* in the offense" even though he was "arguably less culpable" than a co-conspirator (emphasis added)); *Panaigua-Verdugo*, 537 F.3d at

725 ("Panaigua-Verdugo acted as an '*essential* component' in the conspiracy, and the fact that [a co-conspirator] was arguably more involved does not entitle a defendant to a reduction in the offense level." (emphasis added)). In fact, the Commission expressly rejected the reasoning of *United States v. Carter*, in which the Tenth Circuit used the same "essential cog" metaphor employed by *Hurtado* to affirm the denial of an adjustment. *See* 971 F.2d at 600 ("A courier is an essential cog in any drug distribution scheme and in the instant case transporting 42 pounds of marijuana from Los Angeles, California to Boston, Massachusetts, was apparently quite important to all parties.").

The unavoidable conclusion is that *Hurtado*—just like *Skinner*, *Panaigua-Verdugo*, *Deans*, and *Carter*—is superseded by Amendment 794 to the extent it suggests a drug courier should be denied a minor-role adjustment simply because his role was essential to the success of the drug-trafficking scheme.

B. The amendment rejects *Hurtado*'s comparative analysis that excludes other, more culpable co-participants

A defendant has a minor role if he "plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity." U.S.S.G. § 3B1.2 cmt. n. 3(A). The Guidelines specify that the universe of comparison for determining a defendant's relative role includes the conduct of *all* those who participated in the criminal scheme, even if not arrested or charged along with the defendant. *See* U.S.S.G. § 3B1.1 cmt. n.1 ("A 'participant' is a person who

is criminally responsible for the commission of the offense, but need not have been convicted."); U.S.S.G. ch. 3, pt. B, introductory cmt. ("The determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), i.e., all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction."). Every analysis of a defendant's role under § 3B1.2 must therefore begin with the identification of players in the criminal scheme whose acts are to be compared in gauging relative culpability. This Court has prescribed that the district court accordingly must "look beyond the individuals brought before it to the overall criminal scheme when determining whether a particular defendant is a minor participant in the criminal scheme." *United States v. Rojas-Millan*, 234 F.3d 464, 473 (9th Cir. 2000).

By limiting the comparison to participants "in the criminal activity," the Guideline also necessarily excludes comparison to similar defendants in other, unrelated cases. The Commission thus expressly rejected the First and Second Circuits' contrary approach of comparing the defendant both to his co-participants *and* to the "typical offender." *See* Amend. 794 ("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.'"). Hence, in determining whether a

defendant had a minor role, whether the defendant is more or less culpable than other similarly-situated defendants is irrelevant. *See*, *e.g.*, *Cantrell*, 433 F.3d at 1283 (explaining that the relevant comparison is to the conduct of co-participants in the case at hand).

Despite the Commission's approval of other Ninth Circuit precedent,[4] *Hurtado*'s formulation of the requisite analysis is both over- and under-inclusive in ways prohibited by § 3B1.2. First, *Hurtado* improperly *expands* the universe of comparison by affirming the district court's comparison of the defendant to the typical offender. In its opening paragraph, the opinion states that "Hurtado was a typical commercial drug smuggler—no better, no worse—and not entitled to a minor role reduction." 760 F.3d at 1067. In other words, the Court affirmed the district court's finding that Hurtado was no less culpable than the typical courier in similar cases, a factor rejected by the Guidelines and prior Ninth Circuit precedent as irrelevant. *See* Amend. 794 (rejecting comparison to the "typical offender").

Next, *Hurtado* improperly *narrows* the universe of comparison by holding that "the requisite comparison is to average participants, not above-average participants." 760 F.3d at 1069. This rule is incorrect in two ways. First, identifying the "average participant" necessarily entails identifying *all* of the actors in the

[4] Notably, *Hurtado* does not cite *Cantrell* or *Benitez*, the two cases cited with approval in the Commission's Reason for Amendment. Amend. 794.

criminal scheme—even those with the most aggravated roles. U.S.S.G. § 3B1.2 cmt. n.1 (referencing § 3B1.1 cmt. n.1 to define "participant" as any "person who is criminally responsible for the commission of the offense" even if not convicted). Leaders, organizers, and supervisors are "participants," so they must be considered in calculating the "average participant." Otherwise, a truncated list of participants excluding the most culpable players would unfairly skew the analysis by pushing those with the least culpable roles closer to the top.

Second, *Hurtado* mistakenly declares supervisors and recruiters as per se "above-average" participants and thus not the "average participant" spoken of in the commentary to § 3B1.2. 760 F.3d at 1069. But that is not the case. The Sentencing Commission ranked the roles of participants in drug trafficking organizations as part of reports to Congress in 2002, 2007, and 2011. Unsurprisingly, the Commission ranked couriers and mules as having low-level functions. *See* U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* app. C tbl. C1 (May 2002) (listing couriers as 13th and mules as 14th in an 18-level hierarchy of active participants in drug-distribution conspiracies, that is, in the bottom third of participants); U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* app. C tbl. A-1 (May 2007) (same); U.S. Sentencing Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 165-67 & app. H (Oct. 2011) (listing couriers as

eighth in a nine-level hierarchy and mules at the bottom level). But contrary to *Hurtado*'s suggestion, the studies also found that the "average" participants were precisely the managers and supervisors that *Hurtado* excludes from its comparative analysis. *See* 2002 Report (listing "Supervisors" as the ninth most culpable out of 18 functions); 2007 Report (same); 2011 Report (listing "Manager/Supervisor" as the fifth most culpable out of nine functions).

Hurtado's erroneous assumption is also inconsistent with the Guidelines. While § 3B1.2 (governing *mitigating* role adjustments) orients the adjustment to a comparison with the "average participant," § 3B1.1 (governing *aggravating* role adjustments) nowhere states that an aggravating role enhancement depends on the same comparison. In fact, § 3B1.1 does not include the term "average participant." That is because, as the Commission has suggested, mid-level actors in large conspiracies may be "average" even though they also maintain supervisory or managerial authority triggering an upward adjustment for aggravating role under § 3B1.1.

Ultimately, *Hurtado*'s principal error is in drawing a bright-line legal rule as part of an analysis that is "heavily dependent upon the facts of the particular case." U.S.S.G. § 3B1.2 cmt. n.3(C). By excluding comparison to other actors who are criminally responsible for the offense, *Hurtado* unfairly curtails a factual analysis that is supposed to "look beyond the individuals brought before it to the overall

criminal scheme." *Rojas-Millan*, 234 F.3d at 473. The amendment to § 3B1.2 reaffirms that the requisite comparative analysis includes all of the actors the criminal activity, and *Hurtado*'s opposite conclusion is incorrect.

C. The amendment rejects *Hurtado*'s ruling that certain lone facts may justify the denial of a minor-role adjustment

The application notes to § 3B1.2 make clear that the determination of whether to apply a minor-role adjustment is based on the totality of the circumstances. U.S.S.G. § 3B1.2 cmt. n.3(C). But flying in the face of this language, *Hurtado* holds that the presence of just one fact alone—either payment, the quantity of drugs, or allowing a car to be registered in one's name—is sufficient to justify the denial of an adjustment. That holding is incompatible with § 3B1.2, and the recent amendment drives home the idea that the facts identified in *Hurtado* cannot possibly be dispositive on their own.

First, the amendment flatly rejects the idea that a courier's payment may justify the denial of an adjustment. As part of the amendment, the Commission clarified 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 an adjustment." U.S.S.G. § 3B1.2 cmt. n.3(C) (emphasis added). In the context of drug importation conspiracies, "the degree to which the defendant stood to benefit from the criminal activity" will almost always be paltry—hundreds or a few thousand dollars—in comparison to the extremely valuable narcotics couriers are

paid to transport. U.S.S.G. § 3B1.2 cmt. n.3(C)(v).[5] In that regard, the money a courier receives to transport drugs is more likely to weigh *in favor of* a minor-role adjustment rather than against it.

Second, both the amendment to § 3B1.2 and the structure of § 2D1.1 reject *Hurtado*'s holding that the quantity of drugs carried by a courier may alone justify the denial of an adjustment. The Commission amended the application notes to § 3B1.2 to state that a person responsible only for the amount of drugs he transported "may receive" a mitigating role adjustment. U.S.S.G. app. C amend. 794. The Commission changed this language from "not precluded" because the previous wording had "the unintended effect of discouraging courts from applying the mitigating role adjustment in otherwise appropriate circumstances." *Id*. Attempting to expand the application of the adjustment, the amendment also re-focuses courts on "proprietary interest" in the transported drugs rather than sheer amount. U.S.S.G. § 3B1.2 cmt. n.3(C) ("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." (emphasis added)).

[5] *Hurtado* is correct to note that "the mere fact that Hurtado may have been doing criminal work for hire does not itself establish that he was a minor participant." 760 F.3d at 1069. The salient consideration is that, when coupled with a lack of proprietary interest, "simply" being paid to perform a limited task without any supervisory authority or discretion in the execution of the task makes the adjustment applicable.

Read together, these provisions mean that a person who transports a large quantity of drugs *should* be considered for a minor-role adjustment if the drugs belong to someone else—a defining condition of acting as a typical courier.

In addition, § 2D1.1(a)(5) provides for "role caps" triggered by the minor-role adjustment, even for those who warrant the highest possible offense levels for carrying the largest quantities of drugs. There would be no need for such an adjustment if large quantities alone could preclude the minor-role adjustment in the first place. Automatic denial of a minor-role adjustment based simply on a particular quantity of drugs would render the role caps mere surplusage, a result this Court must avoid.[6] *See*, *e.g.*, *United States v. Caceres-Olla*, 738 F.3d 1051, 1056 (9th Cir. 2013) (rejecting an interpretation of a Guideline provision that created surplusage).

Last, the amended Guidelines also reject the idea that "allowing" another person to register a car in one's name may independently warrant the denial of a minor-role adjustment. The Guideline does not address a circumstance as specific as car registration in the context of a drug-importation scheme, and the fact that this sole act alone could justify the denial of an adjustment has no support in the language

[6] Notably, Hurtado carried 11.64 kilograms of cocaine, which would warrant a base offense level of 30. U.S.S.G. § 2D1.1(c)(5). Hurtado's load was small enough that the Guidelines would not even provide for a role cap in his case, which applies to offense levels 32 and above. *Id*. at § 2D1.1(a)(5). Setting a threshold at 11.64 kilograms of cocaine as *Hurtado* suggests would therefore entirely eliminate the applicability of § 2D1.1(a)(5) in cocaine cases.

of § 3B1.2. Instead, the list of factors provided in the amended commentary all address the "degree" or "extent" of the defendant's conduct in relation to the entire scheme. U.S.S.G. § 3B1.2 cmt. n.3(C)(i)-(v). The mere fact that a courier allows a car to be registered in his name cannot be dispositive without an analysis of how that act illustrates the *degree* to which he "participated in planning or organizing the criminal activity" or "the responsibility and discretion the defendant had in performing those acts." *Id*. Viewed through that comparative lens, the act of "allowing" other members of an organization to register a car in one's name, a compelled act about which a courier has no control or discretion in performing, cannot mean by itself that a person's role is so aggravated as to preclude an adjustment.

In fact, the list of factors provided by the Commission in the amended application notes show that *no fact* alone will ever justify the denial of an adjustment. Each fact of a particular case must be weighed against the totality of the circumstances in an effort to measure a defendant's role against the role of other co-participants. U.S.S.G. § 3B1.2 cmt. n.3(C). The same fact, say a payment of $3,000 for services rendered, might make a person look more or less culpable than other co-participants depending on the other facts of a case. On one hand, that amount might indicate a more aggravated role if most participants make only $100. On the other hand, that amount might indicate a minor role when compared to a half-million-

dollar profit. The point is that the payment itself has no legal importance in evaluating the defendant's role except as part of the requisite *comparative* analysis.

Hurtado is thus incorrect and superseded to the extent it holds that particular acts are dispositive and sufficient to preclude the adjustment without any comparison. On the contrary, particular facts are only relevant insofar as they show a person is more or less culpable than other co-participants, an analysis generally defined by the list of factors and explanatory examples now provided under the amendment.

V. THE GUIDELINES FAVOR A DOWNWARD ADJUSTMENT FOR THE TYPICAL COURIER

"Hurtado was a typical commercial drug smuggler—no better, no worse." *Hurtado*, 760 F.3d at 1067. This premise animates *United States v. Hurtado*, and it is undeniably true of the large majority of defendants charged with importation offenses along the United States-Mexico border. There is often little to distinguish between the conduct of one mule or courier versus another. They have no special skills in the drug trade and often have no prior association with drug trafficking at all. They have extremely limited knowledge of the drug-trafficking organization's structure and operation, and they have no discretion in the planning or execution of their smuggling attempts. Typical mules and couriers are paid to perform one simple task: transport drugs, nothing more.

Contrary to *Hurtado*'s general disfavor of an adjustment for these defendants, the Sentencing Commission has consistently encouraged courts to grant role reductions for "typical" mules and couriers. Reviewing the several past amendments to § 3B1.2, the Commission's efforts to encourage role reductions for these defendants is obvious:

- **Amendment 635 (2001)** – The Sentencing Commission amended § 3B1.2 to clarify that a defendant is not precluded from an adjustment because he is responsible solely for the amount of drugs he carried. The Commission specifically discussed the amendment's application to couriers, explaining that drug couriers were "not precluded" from an adjustment. U.S.S.G. app. C amend. 635 reason for amendment (2001).
- **Amendment 640 (2002)** – The Commission amended § 2D1.1 to create "role caps" in cases involving low-level trafficking functions. To illustrate the sort of defendant eligible for a reduced offense level, the Commission expressly provided as an example "'mules' and 'couriers' whose most serious trafficking function is transporting drugs and who qualify for a mitigating role adjustment." U.S.S.G. app. C amend. 640 reason for amendment (2002).
- **Amendment 755 (2011)** – The Commission amended the commentary to § 3B1.2 to remove language suggesting that the minimal participant adjustment should be used "infrequently" and that a court was not required to

> credit the defendant's statements in assessing role. The Commission determined that the deleted language might unintentionally discourage application of the adjustment. U.S.S.G. app. C amend. 755 reason for amendment (2011).

When the most recent 2015 amendment (*again* specifically noting drug couriers) is viewed with this history in mind, one can only conclude that the Commission intends the minor-role adjustment to apply to typical mules and couriers; *all* of its changes work toward that end.

That conclusion is also consistent with the Commission's studies. As discussed above, the Commission concluded three times in reports to Congress that couriers are among the least culpable players in drug-trafficking organizations. U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002); U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007); U.S. Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Oct. 2011). That makes sense. Couriers have no proprietary interest in the drugs they carry. U.S.S.G. § 3B1.2 cmt. n.3(C). They have no discretion over where they pick up the drugs or where they drop them off. *Id.* at § 3B1.2 cmt. n.3(C)(iii). They

have no special skills[7] and no decision-making authority. *Id*. Couriers are not leaders, organizers, or supervisors, and they are intentionally shielded from any deep knowledge of the organization's operations to protect the more culpable players. *Id.* at § 3B1.2 cmt. n.3(C)(iv). They are just one example of the pawns employed by drug-trafficking organizations to do the dirty work and take all the risk. Thus, a courier whose role is limited to transporting drugs and has no discretion in planning or executing that task is precisely the sort of defendant at whom the minor-role adjustment is aimed.

This view was confirmed by two Commissioners during a 2014 public hearing discussing the Commission's plan to lower drug offense levels across the board by two levels. In support of the change, an assistant federal defender from the Western District of Texas complained that her client, Oscar, a 22-year-old with no criminal history, faced a Guideline range of 135 to 168 months at sentencing. *See* United States Sentencing Commission, *Transcript of Hearing*, 86-87, 97 (Mar. 13, 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20140313/transcript.pdf. Oscar was convicted of transporting twelve kilograms of methamphetamine and seven kilograms of heroin

[7] In this regard, the Sentencing Commission distinguishes couriers and mules from pilots and boat captains who use their special skills to transport drugs. *See* U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy*, app. C table A-1 (May 2007).

in his truck. Like most couriers, Oscar did not know the type or quantity of drugs he carried, and he only agreed to transport the drugs to help make ends meet. *Id*. at 86-87.

Commissioner Wroblewski, surprised by the high Guidelines range, responded that "someone like Oscar, who's a first-time, non-violent, low-level offender, the way the guidelines are supposed to work is *that person is supposed to get a reduction based on the mitigating role cap, a reduction based on mitigating role*, a reduction based on safety valve, a reduction based on acceptance of responsibility that would drive that sentence far lower than 135 months." *Id*. at 112 (emphasis added). Wroblewski explained, "[T]hat's the way the policy is written and it's the policy that we're supporting, which is, again, to identify those low-level, non-violent offenders and bring their sentences way down." *Id*. Vice Chair Hinojosa "echo[ed] Commissioner Wroblewski's comments about how the guidelines are written so that somebody should have considered overall adjustments here." *Id*. at 114. These comments make clear the Commission's view that typical couriers like Oscar and Hurtado—and Lopez-Diaz, Enriquez, and Quintero-Leyva—should receive minor-role adjustments, and the Commissioners are surprised that courts might view the Guideline differently.

With the Commission's efforts to expand application of § 3B1.2 to drug mules and couriers made clear, this Court must follow its guidance. "Carrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007). While district courts are free to vary from the advisory Guidelines range when appropriate, *id.*, they must treat the Guidelines as the "starting point and the initial benchmark," *Gall v. United States*, 552 U.S. 38, 49 (2007). And an appellate court must not usurp the Commission's "important institutional role" by interpreting a Guideline in a manner wholly inconsistent with the Commission's reasoned definition. *See Stinson v. United States*, 508 U.S. 36, 46 (1993) ("Amended commentary is binding on the federal courts . . ."); *United States v. Fox*, 631 F.3d 1128, 1132-33 (9th Cir. 2011) (applying *Stinson* post-*Booker*).

In the context of § 3B1.2, "[t]he Commission has tried a number of times to tweak, to make a direction to courts to apply it." United States Sentencing Commission, *Transcript of Hearing* at 114. This Court should heed that direction. *Hurtado* is in considerable tension with the Commission's efforts to expand the application of § 3B1.2, especially in regard to cross-border mules and couriers. Just as *Hurtado*'s legal reasoning conflicts with and cannot survive the amendment to

§ 3B1.2, neither can its spirit. This Court must properly inform district courts' role analysis by ruling that *Hurtado* is superseded.

VI. CONCLUSION

The Sentencing Commission has encouraged greater application of § 3B1.2 through its most recent amendment, specifically targeting changes in the Guideline to address inconsistent and infrequent application of the adjustment for drug couriers. Because application of the Guideline depends on the unique facts of each case, the Commission will likely never amend the language to require that all couriers receive a downward adjustment. But its several amendments indicate that the run-of-the-mill drug courier, whose role is limited to transporting drugs for a fee and who has no discretion or authority in the organization, is the prime example of a person substantially less culpable than the average participant in a drug-trafficking ring. In light of the Commission's intent and the recent amendment to § 3B1.2, *Hurtado*'s disfavor of minor-role reductions for these couriers cannot survive.

Operating under *Hurtado*'s authority, however, district courts that sentenced defendants prior to the amendment mistakenly believed that individual, common facts such as payment or a high quantity of drugs alone could preclude an adjustment. The clarifying amendment shows that those decisions were incorrect. Accordingly, in the cases presently before the Court and all those like them, this Court must vacate

the sentence and remand for the district court to perform in the first instance the fact-based, comparative analysis required by the Guideline.

DATED: December 11, 2015

Respectfully submitted,

s/ Michael A. Marks
REUBEN C. CAHN
MICHAEL A. MARKS
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101

Attorneys for Amicus Curiae

FORM 8.

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 14-50509

I certify that:

x 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering /reply/cross- appeal brief is

√ Proportionately spaced, has a typeface of 14 points or more and contains 6,716 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; amicus curiae must not exceed 7,000 words),

Date: December 11, 2015

s/ Michael A. Marks
Signature of Attorney

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that on (date) Dec 11, 2015 , I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature s/Michael A. Marks

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that on (date) , I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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