

No. _____

In the

Supreme Court of the United States

Alexander Lee Salazar,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Brandon E. Beck
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
1205 Texas Ave. #507
Lubbock, Texas 79401
(806) 472-7236
brandon_beck@fd.org

QUESTIONS PRESENTED

- I. Did the district court err when it declined to grant Mr. Salazar a mitigating role adjustment under the Guidelines?
- II. Did the district court err when it refused to find that Mr. Salazar accepted responsibility for Guidelines purposes?

PARTIES TO THE PROCEEDING

Petitioner is Alexander Lee Salazar, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alexander Lee Salazar seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is *United States v. Salazar*, 770 F. App'x 697 (5th Cir. 2019). It is reprinted in Appendix A to this Petition. The district court did not issue a written opinion.

JURISDICTION

The opinion and judgment of the Fifth Circuit were entered on May 24, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This petition involves two Guidelines provisions. They provide, in relevant part:

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.

U.S. Sentencing Guidelines Manual 3B1.2 (2018).

* * *

If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

U.S. Sentencing Guidelines Manual 3E1.1(a) (2018).

STATEMENT OF THE CASE

On October 18, 2017, police conducted a traffic stop of Alexander Lee Salazar, Appellant. After Mr. Salazar failed to produce a driver's license and exhibited signs of nervousness, officers called a canine unit, whose dog alerted to the presence of narcotics. When the officers searched the vehicle, they recovered 221.6 grams of methamphetamine.

Mr. Salazar waived indictment and was charged by information with Possession with Intent to Distribute a Controlled Substance, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). On December 19, 2017, Mr. Salazar pleaded guilty to the one-count information. When U.S. Probation returned its presentence investigation report (PSR), it had calculated Mr. Salazar's base offense level at 34, holding Mr. Salazar accountable for 806.13 grams of methamphetamine, in total. The PSR, however, declined to apply the 3-level reduction for acceptance of responsibility or any reduction for mitigating role. This resulted in a total offense level of 34.

Defense counsel objected to the PSR because it both denied acceptance of responsibility after a timely guilty plea and failed to characterize Mr. Salazar as a minor participant in the offense. In its Response, the Government did not take a position on acceptance of responsibility and concluded that Mr. Salazar "was an average participant in the conspiracy." Probation, in its PSR Addendum, declined to make any changes and deferred judgment to the district court. Defense counsel persisted in its objections.

On May 18, 2018, the district court held its sentencing hearing. At the hearing,

Mr. Salazar took the stand and testified about the circumstances surrounding his violations that lead Probation to recommend a denial of acceptance of responsibility. In doing so, he admitted that he broke the rules of his release but provided valuable context about the very limited extent of his wrongdoing. For example, he did use alcohol but it was limited to two glasses of wine with his Christmas dinner. Additionally, although his GPS monitor was unplugged and he stayed a night at his mother's house for one night, it was because his apartment electricity was out. Additionally, Mr. Salazar tested positive for methamphetamine in one test, after passing multiple tests. Throughout his testimony, Mr. Salazar was honest and contrite.

At the close of Mr. Salazar's testimony, the district court overruled both defense objections, explaining that it had not "been persuaded that he has accepted responsibility within the meaning of Section E1.1 of the guidelines," and that it agreed that "he's just an average participant." After adopting the PSR, the court sentenced Mr. Salazar to 220 months imprisonment, which was 20 months below the guideline range, which had been capped at 240 months.

On May 24, 2019, the Fifth Circuit affirmed.

REASONS FOR GRANTING THIS PETITION

I. The district court erred when it refused to reduce Mr. Salazar's offense level as a minor participant.

U.S. Sentencing Guidelines Manual (USSG) § 3B1.2 allows the district court to decrease the defendant's offense level by two to four points if the defendant was a "minor" or "minimal" participant "in any criminal activity." USSG § 3B1.2. To qualify for this reduction, the defendant must be "substantially less culpable than the average participant." USSG § 3B1.2, comment., n.3(A). In the 2015 Sentencing Guidelines, the Sentencing Commission issued Amendment 794, which altered the language in the commentary to § 3B1.2 from the 2014 version in two respects: (1) the addition of more inclusive language, and (2) an added list of factors meant to aid courts in applying the mitigating-role offense-level reduction.

The 2015 amendment to § 3B1.2 is the result of the Commission's study of the Mitigating Role Guideline, which revealed that it is "applied inconsistently and more sparingly than the Commission intended." USSG app. C, amend. 794 at 117 (Supp. 2015). The Commission particularly noted that in economic crime cases, the adjustment was frequently applied in a limited fashion, with courts often denying mitigating role "to otherwise eligible defendants if the defendant was considered 'integral' to the successful commission of the offense." *Id.* To combat this inequity, the Commission addressed a circuit conflict and case law that may have discouraged courts from applying the adjustment in appropriate circumstances and provided a non-exhaustive list of factors for courts to incorporate into the analysis. *Id.*

For example, the amendment revised two paragraphs in Note 3(A), which demonstrate how mitigating role interacts with relevant conduct, by replacing the phrase “is not precluded from consideration for [the reduction]” with “may receive” a mitigating role adjustment. *Id.* at 118. The Commission was concerned that the “double-negative tone” in the 2014 version might have had the unintended effect of discouraging courts from applying the adjustment. *Id.*

It also addressed a circuit conflict with regard to the definition of “average participant.” The Seventh and Ninth Circuits concluded the term only referred to those who actually participated in the criminal activity at issue in the case, while the First and Second Circuits concluded that it referred to persons participating in similar crimes. *Compare United States v. Benitez*, 34 F.3d 1489, 1498 (9th Cir. 1994) with *United States v. Santos*, 357 F.3d 136, 142 (1st Cir. 2004). The Commission adopted the approach of the Seventh and Ninth Circuits, noting that it was consistent with other provisions in § 3B, which focus on the individual defendant and the other participants. USSG app. C, amend. 794 at 117 (Supp. 2015)

But the amendment also addressed case law in which a defendant was denied a mitigating role adjustment “solely because he or she was ‘integral’ or ‘indispensable’ to the commission of the offense.” *Id.*; 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 indispensable or critical to the success of the scheme”); *United States v. Franklin*, 148 F.3d 451, 461 (5th Cir. 1998) (holding district court did not err in denying a mitigating role

adjustment when the defendant “played a significant role, if not an integral one, in the conspiracy”); *United States v. Moreno*, 598 F. App’x 261, 263 (5th Cir. 2015) (holding mitigating role adjustment did not apply when the defendant “performed tasks that were integral to the success of the enterprise”); *United States v. Perez*, 183 F. App’x 477, 481 (5th Cir. 2006) (same).

The Commission clarified that “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.” USSG app. C, amend. 794 at 118 (Supp. 2015). Therefore, the amendment revised the commentary to emphasize that “the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative” and the defendant may receive the adjustment if otherwise eligible. *Id.*; USSG § 3B1.2, comment., n.3(C).

Finally, the Commission included a non-exhaustive list of factors that courts should consider when determining whether to apply the adjustment:

- (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 influence over 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.

USSG § 3B1.2, cmt. n.3(C). When applied to the facts of this case, these factors, in the totality of the circumstances, support a mitigating role adjustment.

As explained in Mr. Salazar's objections to the PSR, the co-participants include Mr. Salazar's cousin, Jose Rosales, and two unidentified sources of supply. Mr. Salazar's conduct was limited to acting at his cousin's direction to pick up drugs at one location and deliver them to another. On two occasions, Mr. Salazar accompanied Mr. Rosales on drives from Coleman to Fort Worth, and on two others, Mr. Salazar came alone. On the latter two trips, Mr. Rosales supplied the funds to pay for the drugs and coordinated a series of drop-off maneuvers between Mr. Salazar and the unidentified source of supply. Mr. Salazar never interacted directly with the source of supply, could not identify the source or the source's source, and acted always at his cousin's behest. These facts suggest that Mr. Salazar did not engage in any planning, did not understand the scope or structure of the larger drug-dealing scheme, and exercised no discretion of his own. USSG § 3B1.2 cmt. n.3(C). As a result of his limited role, he should receive § 3B1.2's minor-participant adjustment.

II. The district court erred when it denied Mr. Salazar a reduction in offense level for acceptance of responsibility.

Under U.S. Sentencing Guidelines Manual (USSG) § 3E1.1(a), a defendant is entitled to a 2-level reduction to his offense level if he "clearly demonstrates acceptance of responsibility for his offense." USSG § 3E1.1(a) (2015). If the defendant qualifies for a reduction under subsection (a), he may receive an additional 1-level

reduction, on the government's motion, "by timely notifying authorities of his intention to enter a plea of guilty." USSG § 3E1.1(b). In order to evaluate whether a defendant has "clearly demonstrate[d] acceptance of responsibility," the USSG suggests a series of nonexhaustive factors for consideration:

1. truthfully admitting the conduct comprising the offense of conviction and not falsely denying any additional relevant conduct;
2. voluntary termination or withdrawal from criminal conduct or associations;
3. voluntary payment of restitution prior to adjudication of guilt;
4. voluntary surrender to authorities promptly after commission of the offense;
5. voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
6. voluntary resignation from the office or position held during the commission of the offense;
7. post-offense rehabilitative efforts; and
8. the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

In its PSR, U.S. Probation believed that Mr. Salazar did not qualify for a reduction for acceptance of responsibility based on use of methamphetamine, on one occasion, and series of minor technical violations while on pretrial release. Defense counsel filed an objection to the PSR, arguing that Mr. Salazar should not be denied acceptance because his timely guilty plea provided "significant evidence of acceptance of responsibility" that was not outweighed by the violations. Defense counsel further stated an intent to develop testimony regarding the allegations at the sentencing

hearing. Based on the explanations provided at the sentencing hearing, defense counsel's argument was sound and the objection should have been sustained.

Of all factors that courts consider when determining whether to award a reduction for acceptance, all that could apply to Mr. Salazar do, except for "withdrawal from criminal conduct." We know that he pleaded guilty in a timely manner, without expending government resources, and did not falsely deny any additional relevant conduct. Although this does not create a presumption in favor of acceptance, it is "significant evidence" toward applying the reduction. *United States v. Brigman*, 953 F.2d 906, 908-09 (5th Cir. 1992). Such evidence should have been sufficient in this case, given that Mr. Salazar had compelling explanation for most every violation. Specifically, Mr. Salazar explained that his consumption of alcohol was limited to two glasses of wine with Christmas dinner, provided by a neighbor. He stayed at his mother's house when his electricity was out. His GPS monitor was unplugged because he was going into custody. Finally, he testified about the progress he made to recover from drug addiction. This testimony was honest and went directly to his acceptance of responsibility in this case. The district court should have given him that benefit.

CONCLUSION

Mr. Salazar respectfully requests that this Court grant this Petition, and reverse and remand his case for resentencing with a minor participant and acceptance of responsibility Guidelines adjustment.

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

Brandon Beck

Brandon Beck
Assistant Federal Public Defender
Federal Public Defender's Office
1205 Texas Ave. #507
Lubbock, TX 79424
Telephone: (806) 472-7236
E-mail: brandon_beck@fd.org

Attorney for Petitioner