No. 19-

IN THE
Supreme Court of the United States

JOSE ARMANDO BAZAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Petitioner, JOSE ARMANDO BAZAN, was charged with and pleaded guilty to a single count of possession with intent to distribute cocaine. The District Court imposed a sentence of 119 months.

On direct appeal, Mr. Bazan argued he should have received a minor or mitigating role downward adjustment under the Guidelines and that the sentence was unreasonable. Mr. Bazan agreed review was for plain error because he did not present these issues to the District Court. The Government responded that this claim was not reviewable on appeal because the issue of minor/mitigating role is a fact question. The United States Court of Appeals for the Fifth Circuit ("the Fifth Circuit") agreed, stating that "question of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." (Appendix A, page 2) (quoting *United States v. Lopez,* 923 F.2d 47, 50 (5th Cir. 1991)). The Fifth Circuit likewise held the reasonableness issue did not constitute plain error. (Appendix A, page 2).

The ruling of the Fifth Circuit directly affirmed the Government's position that there was to be "no review" of these claims as the Government had advocated. With respect to any factual findings by the District Court, those facts must not change when the issues change, contrary to the Government's advocacy to the contrary. Finally, the action by the Fifth Circuit reflects that the Appellate Court did not apply the plain error standard of review, as required by this Court. Critically, Mr. Bazan's request was for resentencing with the adjustment and a reasonable sentence. Hence, the Fifth Circuit has decided an

important federal question in a way that conflicts with relevant decisions of this Court. A compelling reason is thus presented in support of discretionary review. Mr. Bazan therefore respectfully requests that this Honorable Court grant this Petition and allow this case to proceed to resentencing with a reduction for minor/minimal party status and a reasonable sentence.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Jose Armando Bazan:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, JOSE ARMANDO BAZAN, requests this Court grant this petition and issue a Writ of Certiorari to review the decision of the Fifth Circuit. Mr. Bazan respectfully submits the District Court committed reversible error by failing to grant a Guideline reduction to the sentencing Guideline range under U.S.S.G. § 3B1.2. The Guidelines provide a 2-to-4-level reduction if the accused was a minor or minimal party. Based on the Government's arguments, the Fifth Circuit did not apply the law to the facts of the case and instead merely stated Mr. Bazan could not seek review. (Appendix A, page 2). More specifically, the Appellate Court directly accepted the Government's arguments for no review of this claim. Respectfully, the Fifth Circuit did not apply the correct standard for plain error review. The issue is the same for the reasonable sentence argument. Accordingly, the sentence imposed must be vacated and this matter reversed and remanded for resentencing with a reduction for minimal participation or minor party status and a reasonable sentence.

REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Jose Armando Bazan,* No. 18-40724 (5th Cir. July 25, 2019), appears at Appendix A to this petition and is unreported.

The Judgment in a Criminal Case of the United States District Court for the Southern District of Texas, McAllen Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

GROUNDS FOR JURISDICTION

This Petition arises from a direct appeal which granted final and full judgment against Mr. Bazan. This action is on a criminal prosecution initiated by the Government. Mr. Bazan pleaded guilty to a single count of possession with intent to distribute cocaine. The District Court did not impose a minor/minimal party reduction pursuant to U.S.S.G. § 3B1.2 and imposed what Mr. Bazan argues is an unreasonable sentence. The denial of the reduction and unreasonable sentence are at issue in this appeal. A copy of the Judgment appears at Appendix B. Mr. Bazan argued to the Fifth Circuit that the District Court committed reversible error in failing to implement the reduction and by imposing an unreasonable sentence. The Fifth Circuit rejected this argument in an opinion dated July 25, 2019, and affirmed the decision of the District Court. A copy of the decision appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

> ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Background:

Mr. Bazan was indicted on July 21, 2015, and charged with one count of conspiring to possess with intent to distribute 5 or more kilograms of cocaine and a second count of possession with intent to distribute cocaine. ROA.28-29. On December 2, 2015, Mr. Bazan pleaded guilty to the possession count. ROA.125-62.

There was a plea agreement in this case. ROA.46-47. The agreement provided that Mr. Bazan would plead guilty to Count Two of the indictment and Count One would be dismissed. ROA.46. Furthermore, Mr. Bazan would receive a 2-level reduction for his acceptance of responsibility. ROA.46-47. The agreement did not foreclose the possibility of arguing for sentence adjustments or a reasonable sentence. ROA.46-47.

The Guilty Plea Hearing:

The District Court accepted Mr. Bazan's guilty plea. ROA.160. During his guilty plea allocation, Mr. Bazan admitted the following facts were true and correct as recited by counsel for the Government and based on questioning by the Court:

> **MR. LEONARD [for the United States]:** On or about July 6, 2015, the Defendant did knowingly and intentionally possess, with intent to distribute more than 5 kilograms; that is, approximately 46.9 kilograms of cocaine, a Schedule II controlled substance.
>
> On that date, the Defendant drove a tractor-trailer with approximately 46.9 kilograms of cocaine hidden inside the trailer to the Falfurrias checkpoint.

> A K-9 alerted and agents discovered the cocaine. The Defendant admitted to possessing the cocaine with the intent to deliver it to another by transporting the trailer containing the cocaine.
>
> **THE COURT:** Thank you.
>
> Mr. Bazan, do you agree with what the Government stated?
>
> **DEFENDANT BAZAN:** Yes, your Honor.
>
> **THE COURT:** You were the driver of the tractor-trailer, correct?
>
> **DEFENDANT BAZAN:** Yes, your Honor.
>
> **THE COURT:** And that–that cocaine was hidden in the tractor-trailer–but–but you knew that it was there; is that correct–or that it was some sort of drug was there?
>
> **DEFENDANT BAZAN:** Yes, your Honor.
>
> **THE COURT:** And the intent was that you would be taking it north, wherever, to be delivered to some other location; is that correct?
>
> **DEFENDANT BAZAN:** Yes, your Honor.

ROA.159-60 (emphasis in original).

The Presentence Investigation Report:

A United States Probation Officer prepared and filed a revised Presentence Investigation Report ("PSR" or "the report"). ROA.213-36. Particularly important to the appeal and this Petition for Writ of Certiorari is the portion of the PSR which provides: (1) a factual basis for the offense and relevant conduct of the offense; (2) the recognition of potential sentencing Guideline provisions for Mr. Bazan; and (3) a conclusion by the Probation Officer as to which United States Sentencing Commission Guidelines ("U.S.S.G."

or "the Guidelines") are applicable in this case. ROA.143-70. Specific portions of the PSR facts are also discussed when they are relevant in the arguments.

PSR: Calculations:

The Probation Officer began the PSR calculations with a base offense level of 32 under U.S.S.G. § 2D1.1(a)(5). ROA.220. To this end, the PSR provides:

> **Base Offense Level:** The United States Sentencing Commission Guideline for a violation of 21 U.S.C. § 841(a)(1), and 841(b)(1)(A) and 18 U.S.C. § 2 and is found in U.S.S.G. § 2D1.1(a)(5). This guideline instructs that the base offense level is determined by the type and quantity of illicit controlled substance attributable to the relevant conduct findings for this defendant. As identified in the Offense Conduct section above, the defendant is held accountable for the 40 bundles of cocaine wrapped in gray duct tape weighing a total gross weight of approximately 46.9 kilograms. Since only representative samples of the cocaine seized in this case were submitted for laboratory analysis, the net weight cannot be determined. Given a 5% reduction for wrapping, the estimated weight of the cocaine becomes approximately 44.5 kilograms. Pursuant to U.S.S.G. § 2D1.1(c)(4), offenses involving at least 15 kilograms of but less than 50 kilograms of cocaine establish a base offense level of 32.

ROA.220-21 (emphasis in original).

The Probation Officer next deducted 2 levels because Mr. Bazan debriefed to the United States Attorney's satisfaction. ROA.221. However, 2 levels were then added due to a finding of obstruction of justice because Mr. Bazan failed to appear for sentencing. ROA.221. This left Mr. Bazan with a Base Offense Level of 32. Pursuant to U.S.S.G. § 3D1.3(a), 32 became the offense level for this case and Mr. Bazan received no reduction for acceptance of responsibility because he failed to appear at his original sentencing hearing. ROA.222.

PSR: Criminal History:

Mr. Bazan received one criminal history point for an offense that he would be sentenced on when he was sentenced in this case. ROA.223. Therefore, the PSR reflects that his Criminal History category was only I. ROA.223.

Sentencing:

Mr. Bazan was sentenced on July 23, 2018. ROA.164. The Government made its position clear: "We are moving for safety valve." ROA.169. The mandatory minimum punishment of 120 months therefore became irrelevant when the Court granted the safety valve. ROA.171. However, for the time being, the Court noted that the Guidelines range of punishment was 121 months to 151 months in the custody of the Bureau of Prisons. ROA.173. Based on this conclusion, the Government requested that the Court impose a 121 month sentence. ROA.177. Mr. Bazan's attorney also correctly pointed out that his client had testified on behalf of the Government at a co-defendant's trial. ROA.179.

Sentencing: The Court's Ruling:

The Judge initially noted Mr. Bazan would not be credited for acceptance of responsibility because he did not appear at his original sentencing hearing. ROA.172-73. The Judge then said: "I think the range I quoted you earlier [121 months to 151 months] had the safety valve included in there." ROA.173. However, the Judge then correctly pointed out "we wouldn't have the 10 year mandatory minimum." ROA.173.

With respect to the sentencing in this case, the Judge stated that the Court had considered all of the 18 U.S.C. § "3553(a) factors." ROA.183. The Judge then verified that

the U.S. Attorney did not have a problem with the sentence "at the low end of the 121 range." ROA.183. However, and more importantly, the Judge confirmed with the prosecutor that the 120 month mandatory minimum had been "knocked out." ROA.183. Indeed, the Judge agreed that the Court could have imposed a 60 month sentence in this case. ROA.183. This was undisputed on direct appeal. While the context presupposed a consecutive sentence to a sentence in one of Mr. Bazan's other cases, it was nonetheless clear that the Court could impose a 60 month sentence in this case. Indeed, the Judge concluded that, "considering all the 3553(a) factors, a total sentence of 121 months would be appropriate" when both cases were combined. ROA.184. After a discussion on the record, the Court imposed a sentence of 119 months, plus 2 months which would run consecutively to the sentencing implications on the failure to appear, for a total sentence of 121 months in the custody of the Bureau of Prisons. ROA.187. The Judgment is consistent with this ruling. ROA.117-22.

Appeal to the Fifth Circuit Court of Appeals

Mr. Bazan timely filed a notice of appeal with the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed the District Court in a written opinion. Mr. Bazan files this Petition for Writ of Certiorari challenging that decision.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.
Overview

This Court has developed a straightforward formula to prevent constitutionally infirm and inconsistent sentencing outcomes. To this end, the Guideline range must first be

determined. *Kimbrough v. United States,* 552 U.S. 85, 108-10 (2007); *Gall v. United States,* 552 U.S. 38, 51 (2007); *Rita v. United States,* 551 U.S. 338, 364 (2007). The various rules for determining the Guideline range to be applied by the District Court, and how this Court reviews those findings and conclusions, has been discussed by the Fifth Circuit on numerous occasions. *See e.g., United States v. Acosta,* 619 F. App'x 403, 404 (5th Cir. 2015); *United States v. Alaniz,* 726 F.3d 586, 618-19 (5th Cir. 2013); *United States v. Longstreet,* 603 F.3d 273, 275-76 (5th Cir. 2010). This process is important because, although the Fifth Circuit presumes sentences within the Guideline range are reasonable, the reasonableness of the sentence is the next consideration for sentencing. *Gall,* 552 U.S. at 51; *Rita,* 551 U.S. at 364.

Thus, after consulting and considering the Guidelines, the sentencing Judge must impose a "reasonable" sentence. *Gall,* 552 U.S. at 51. Whether a sentence is reasonable depends not only on the advisory sentencing range, but also on the numerous other factors listed under 18 U.S.C. § 3553(a), including, for example, "the need for the sentence imposed . . . to provide just punishment for the offense," *id.* at § 3553(a)(2)(A), "to afford adequate deterrence to criminal conduct," *id.* at § 3553(a)(2)(B), and "to protect the public from further crimes of the defendant." *id.* at § 3553(a)(2); *see also Booker v. United States,* 542 U.S. 220, 261 (2005) (explaining that § 3553(a) "factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable"). It should be noted at this juncture that, in light of so much emphasis on the continued viability of the Guidelines, Sentencing Judges are nonetheless required by the Sixth Amendment to refrain

from treating the Guidelines as mandatory whether out of "ignorance, negligence . . . defiance" or for any other reason. *United States v. Rodriguez,* 406 F.3d 1261, 1273 (11th Cir. 2005).

In any event, the first step to determining the Guideline range is to determine an offense level. U.S.S.G. § 1B1.2(a). Basically, pursuant to the Guidelines Manual, determining the applicable Guideline begins with an initial score for the offense of conviction. This is calculated by adding points assigned to the offense of conviction, as well as any "relevant conduct" to the specifics of the offense. This number is then changed by any applicable adjustments under the Guidelines. These adjustments can include harm to a victim, the defendant's role in the offense, and whether the defendant has cooperated or accepted responsibility. U.S.S.G. § 1B1.1(b)-(c).

Mr. Bazan did not object on the basis of a lack of minor/minimal reduction. Thus, he did not preserve for review any argument that he was entitled to a 2 to 4-level reduction in his sentence on that basis. Therefore, review of this issue was for plain error. *United States v. Olano,* 507 U.S. 725, 732-33 (1993); *see also United States v. Martinez-Rodriguez,* 821 F.3d 659, 662 (5th Cir. 2016). This Court has explained that plain error requires a showing of error which is "clear or equivalently obvious," which "affects [a defendant's] substantial rights and which "seriously affects the fairness, integrity, or public perception of judicial procedures." *Olano,* 507 U.S. at 732-34 (internal quotations omitted); *see also Rosales-Mireles v. United States,* 138 S. Ct. 1897, 1910 (2018) (discussing plain

error standard of review). Furthermore, Mr. Bazan did not object to the reasonableness of the sentence at the District Court level. Hence, review on that issue is for plain error.

II.
The Crucial Legal Error of the Fifth Circuit

The Fifth Circuit rejected Mr. Bazan's argument that the District Court's failure to grant Mr. Bazan a mitigating role reduction was reversible error. (Appendix A, page 2). The Court determined that "[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." *Id.* (quoting *United States v. Lopez,* 923 F.2d 47, 50 (5th Cir. 1991)). However, Mr. Bazan asserts this rule is a Fifth Circuit-created-rule which is based on a misinterpretation of this Court's law. Respectfully, a review of Fifth Circuit legal precedent establishes that the Supreme Court of the United States has not endorsed such a strict rule on plain error analysis.

As noted, the Fifth Circuit on direct appeal in this case quoted *United States v. Lopez,* 923 F.2d 47, 50 (5th Cir. 1991), to support its conclusion. However, an examination of the *Lopez* decision demonstrates this is a Fifth Circuit-created-rule on plain error review and moreover shows that this Court has never established such a strict standard of review.

In *Lopez*, the Fifth Circuit addressed plain error and the corresponding standard of review. *Id.* at 50. The Court noted "[r]eview for plain error is uniquely addressed to the appellate court's discretion." *Id.* (emphasis added). Nonetheless, the Fifth Circuit cited Fifth Circuit caselaw and declared: "Questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." *Id.* (citing *United States v. Mourning,* 914 F.2d 699, 703 (5th Cir. 1990)).

The remaining discussion from *Lopez* goes on to establish that this Court has never endorsed such a strict rule for refusal of review. The Fifth Circuit stated:

> For a fact issue to be properly asserted, it must be one arising outside of the district court's power to resolve. Errors of constitutional dimension will be noticed more freely under the plain error doctrine than less serious errors. *Alexander v. United States,* 390 F.2d 101, 103 n.3 (5th Cir. 1968). Closer scrutiny may also be appropriate when the failure to preserve the precise grounds for error is mitigated by an objection on related grounds. *United States v. Brown,* 555 F.2d 407, 420 (5th Cir. 1977), *cert. denied,* 435 U.S. 904 (1978).

Id.

The Fifth Circuit continued and counsel respectfully submits that in doing so implicitly provided authority which supports review of the claim in this case:

> Instead, Lopez made no objection even arguably related to the issue he now seeks to raise. Were we to reach Lopez's argument and find possible error, it would require remand to the district court, for we are without appellate authority to correct his sentence. *United States v. Stephenson,* 887 F.2d 57, 62 (5th Cir. 1989). The plain error doctrine is designed to avoid just such a circuitous waste of judicial resources.
>
> Lopez has characterized his attack as one of constitutional magnitude. However, the error asserted, involving as it does the technical application of a single guideline, is far from an obviously constitutional one. To the extent it could have substantial merit, it is an attack that in no way implicates the fairness, integrity or public reputation of the sentencing proceedings against him. Lopez does not contest the fact that he had ample opportunity to raise this matter below and express dissatisfaction with any facet of the computation of his criminal history category. *See United States v. Brunson,* 915 F.2d 942, 944 (5th Cir. 1990); *United States v. Garcia-Pillado,* 898 F.2d 36, 39 (5th Cir. 1990). He was at that time aware of all information the district court considered relevant to his sentence. He was also fully apprised of how the district court intended to apply the relevant guidelines to that information. Indeed, Lopez makes no attempt to excuse his failure "to call this matter to the district court's attention while that court still had the case under its jurisdiction or to then express dissatisfaction with the sentence. *Garcia-Pillado,* 898 F.2d at 39.

> Furthermore, if we remanded, the district court could impose the same sentence. Lopez's sentence was below the statutory maximum and within the applicable guideline range.

Id. at 50-51. Based on these observations, the Fifth Circuit refused to reach the merits of the claim. *Id.* at 51.

III.
Application of *Lopez* to this Case on the Enhancement

A.
The Standard

Respectfully, the above discussion establishes this Court has never recognized the strict line the Fifth Circuit applied in this case for dismissing claims of plain error. Petitioner therefore requests that this Petition be granted and the Fifth Circuit ordered to apply the rules of this Court for ruling on plain error claims.

More specifically, the plain error standard of review should be enforced as this Court has ordered it be applied. As noted in *Puckett v. United States,* 556 U.S. 129, 135 (2009), to establish plain error, Mr. Bazan was required to show that: (1) there is error, (2) the error was clear and obvious not subject to reasonable dispute, and (3) the error affected Mr. Bazan's substantial rights. Further, presuming these first three prongs are met, this Court will exercise its discretion to remedy the error only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

This standard of review establishes there was plain error as argued to the Fifth Circuit. According to the United States Sentencing Commission Guidelines Manual, a "minimal" participant finding "is intended to cover defendants who are plainly *among the*

least culpable of those involved in the conduct of a group." U.S.S.G. § 3B1.2, n.4 (emphasis added). A "minor" participant finding applies to a defendant who is "less culpable than most other participants, but whose role cannot be described as minimal." *Id.* at § 3B1.2, n.5. While the Guidelines do indicate that a "minimal" participant finding will be used "infrequently," they suggest no such limitation on findings of a minor participant role. *Id.* at § 3B1.2, n.4 & n.5. Accordingly, if the facts support an adjustment in this case, the next step would be for the Court to determine whether a 2, 3 or 4-level reduction should be granted.

The determination of whether to apply the minimal or minor participant label "involves a determination that is heavily dependent on the facts of the particular case." *Id.* at § 3B1.2 n.5. Specifically, "[d]etermining participant status is a complex fact question, which requires a court to consider the broad context of the defendant's offense." *United States v. Brown*, 54 F.3d 234, 241 (5th Cir. 1995) (citing *United States v Melton*, 930 F.2d 1096, 1099 (5th Cir. 1991)); *see also United States v. Mejia-Orosco*, 868 F.2d 807 (5th Cir.), *clarified on reh'g* 867 F.2d 216 (5th Cir.), *cert. denied,* 492 U.S. 924 (1989)). Bearing these authorities in mind, it is appropriate to examine the limited role Mr. Bazan played in this particular criminal offense and the low level of culpability under which he acted during the conspiracy to which he pleaded guilty.

B.

A 2 to 4-Level Reduction is Supported by the Facts of This Case

As set forth below, a finding supportive of the reduction is the only possible conclusion based on the undisputed findings in the PSR. The minimal role adjustment is

intended to be applied when a defendant is plainly among the least culpable of those involved in the conduct of the group. U.S.S.G. § 3B1.2, n. 4. The defendant's lack of knowledge or understanding of the scope and structure of the conspiracy and of the activities of others is indicative of a role as a minimal participant. *Id.* at n. 5. A minor participant is one who is less culpable than most other participants but whose role cannot be described as minimal. *Id.*

The facts establish that this is the situation in this case. For example, Mr. Bazan was not a "supervisor," as was the defendant in *United States v. Broussard,* 882 F.3d 104, 111 (5th Cir. 2018). Likewise, he was not an "equal participant," as was the defendant in *United States v. Anchundia-Espinoza,* 897 F.3d 629, 634-35 (5th Cir. 2018). Accordingly, he is entitled to a sentencing reduction based on his role in the offense.

Additionally, in determining whether to apply a mitigating adjustment, the Court should consider the following non-exhaustive list of factors:

* the degree to which the defendant understood the scope and structure of the criminal activity;

* the degree to which the defendant participated in planning or organizing the criminal activity;

* the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;

* the degree to which the defendant stood to benefit from the criminal activity.

U.S.S.G. Manual, Supp. to App. C, amend. 794 at 116, 80 Fed. Reg. 25,782-01, 25,792-93, 2015 WL 1968941 (May 5, 2015). These factors establish the mitigating adjustment is appropriate in this case because Mr. Bazan did not know the scope and structure of the offense, did

not plan or organize the offense, did not make any decisions for the group, and he stood to benefit only minimally if at all from the conspiracy.

To this end, the undisputed record in this case shows that Mr. Bazan was merely a "mule." Specifically, the PSR establishes Mr. Bazan's limited role and concludes:

> **Jose Bazan's** role appears to be that of a transporter of cocaine in his own tractor trailer and was to be paid by an unindicted co-conspirator known only as "El Pando." In turn, **Jose Bazan** recruited his brother, Jorge Bazan, to assist with the transportation of the cocaine from Falfurrias, Texas, to Houston, Texas, and was to pay Jorge Bazan a portion of the money. He also admitted that he was previously involved with the transportation of marijuana.

ROA.218. Thus, Mr. Bazan had no involvement in planning or organizing this conspiracy. *See* ROA.218. Nor did he exercise decision making authority. *See* ROA.218. He delegated nothing. *See* ROA.218. Instead, he was given the single task of transporting the cocaine. *See* ROA.218. He used his own tractor trailer and his brother to make sure he accomplished this single task. ROA.218. Clearly, he was a minor or minimal party. *See United States v. Williams,* 894 F.2d 208, 214 (6th Cir. 1990) ("The record indicates that Blanton delivered messages, drove Davis to various meetings, and allowed his phone to be used for setting up drug deals, which is consistent with minor role.").

Additional observations with respect to facts as set forth above which the Court reviewed further establishes this to be true. For example, a defendant who does not have a propriety interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under Guideline § 3B1.2, n.3. Moreover, the fact that a defendant performs an essential or indispensable role in the criminal activity is

not determinative. Such a defendant can receive an adjustment under this Guideline if he or she is substantially less culpable than the average participant in the criminal activity. *Id.*

In sum, the evidence clearly shows that Mr. Bazan was entitled to a minor or mitigating role reduction. He simply provided transportation. ROA.218. There is no evidence he had a propriety interest in the criminal activity. There is no evidence that he stood to benefit from the price of the cocaine which was to be received by the higher-ups in the organization. He was merely a mule. Accordingly, the minor or minimal deduction is applicable and supported by the undisputed facts as explained in the PSR. Hence, there was plain error in this case on the issue of minor/mitigating role.

As noted, a reversal based on plain error is available when there is an error, which is plain, and the error affects the substantial rights of the accused. *Martinez-Rodriguez,* 821 F.3d at 662. If these criteria are established, this Court can exercise its discretion to remand if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* All of the criteria necessary for a finding of clear error are present in this case.

The above discussion establishes that the failure to grant Mr. Bazan a deduction for his mitigating role in this case was error. Additionally, the PSR points out that the evidence of a minor/mitigating role is clear. Hence, the error is plain. Moreover, the error affected Mr. Bazan's substantial rights to a just and reasonable sentence. Accordingly, the fairness, integrity and public reputation of the proceedings are in jeopardy absent a finding of clear

error. In other words, what the evidence unequivocally establishes, per all of the parties and the PSR, the sentence should reflect the truth of these undisputed facts and conclusions. Finally, not only is error substantial where the incorrect range was applied, it cannot be presumed that the Court would grant the same sentence if it applied the correct range. *Martinez-Rodriguez,* 821 F.3d at 664. Hence, this Petition should be granted and this case should ultimately be remanded for resentencing to reflect Mr. Bazan's mitigating role in the offense or this Court should render a sentence which reflects at least a 2-to-4-level reduction in his sentence.

IV.
The District Court Imposed an Unreasonable Sentence

It is beyond dispute that Mr. Bazan testified for the Government in a case involving drug smuggling. ROA.179. It is further undisputed that the Government was satisfied with Mr. Bazan's assistance. ROA.169-179. Nonetheless, the District Court made the unreasonable determination that the extent of the departure for his substantial cooperation would be only 1 month below the mandatory minimum. Hence, the decision to affirm on this issue constitutes reversible error.

As the Fifth Circuit has explained, in the final analysis the District Judge must weigh the applicable 18 U.S.C. § 3553(a) factors. *United States v. Jacobs,* 635 F.3d 778, 782 (5th Cir. 2011). Respectfully, the Court failed to follow this well established Rule of Law in this case. As the above discussion of the facts establishes, Mr. Bazan testified at trial on behalf of the Government. ROA.177. At sentencing, the Government moved for a downward reduction. ROA.169. Nonetheless, the Court's departure was a mere one month reduction

on a mandatory minimum of 120 months in the custody of the Bureau of Prisons. Counsel respectfully submits that the well established history of the Appellate Court's review of downward departures demonstrates that this kind of substantial assistance should result in more than a reduction of less than 1% of the mandatory minimum. *See Jacobs,* 633 F.3d at 782; *see also* 18 U.S.C. § 3553(a). Respectfully, this Petition merits further review and Mr. Bazan's request for relief merits reversal of the lower courts.

CONCLUSION

For the reasons set forth above, Mr. Bazan respectfully submits, on the important issue of federal sentencing concerns, compelling reasons are presented in support of discretionary review by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner, JOSE ARMANDO BAZAN, respectfully requests that this Honorable Court grant this Petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit which affirmed the sentence imposed by the District Court. Mr. Bazan also respectfully requests any further relief to which he may be entitled under the law and in equity.

Respectfully Submitted,

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