

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FIDEL ALAIN MARTIN-SOSA

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

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QUESTION PRESENTED

A district court's guidelines calculations are reviewed for clear error. Did the court of appeals err in holding that the district court's guidelines calculations did not constitute clear error where it denied a mitigating role adjustment to a conspirator who engaged in only one transaction of three kilograms of methamphetamine—in which he merely introduced the buyer and seller?

PARTIES TO THE PROCEEDINGS

Fidel Alain Martin–Sosa is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Fidel Alain Martin–Sosa, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Martin–Sosa*, ___ Fed. Appx. ___, 2020 WL 3579761 (5th Cir. Jul. 1, 2020) (unpublished), and is provided in the Appendix to the Petition. [Appendix A]. The judgment of conviction and sentence was entered July 12, 2019 and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on July 1, 2020. [Appendix A]. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Proceedings Below

On February 13, 2019, Defendant-Appellant Fidel Alain Martin-Sosa (“Mr. Martin-Sosa” or “Appellant”) was charged by information with conspiracy to possess with intent to distribute a controlled substance. [ROA.25]; *see* 21 U.S.C. §§ 841(a)(1), (b)(1)(B); 846.

On February 25, 2019, Appellant entered his plea of guilty before the Honorable John McBryde to the offense set forth in the information.¹ [ROA.111]. On July 12, 2019, Appellant was sentenced by the district court to a term incarceration of 135 months. [ROA.139]. Appellant filed timely notice of appeal on July 15, 2019. [ROA.60].

B. *Statement of the Facts*

The record shows that Appellant was involved in a conspiracy to distribute methamphetamine for four days, from December 7, 2018 until December 11, 2018. [ROA.156]. During that time period, he was involved in one transaction of distributing methamphetamine, a three-kilogram transaction which was supposed to take place on December 11, 2018, but which never occurred due to the police raiding the buy location and arresting Appellant and his codefendants.

¹

On that same date, Appellant executed a waiver of indictment. [ROA.35].

[ROA.156]. The PSR thus attributed only that single transaction of three kilograms of methamphetamine to Appellant. [ROA.158].

Pursuant to the Factual Resume filed on February 25, 2019, Appellant admitted his willful participation in a conspiracy to distribute methamphetamine. [ROA.37]. On February 25, 2019, in demonstration of his acceptance of responsibility for his conduct, Appellant entered his plea of guilty before the Honorable John McBryde to the offenses set forth in the indictment. [ROA.111].

The government, fully aware that Appellant timely accepted responsibility for his actions, filed its Notice Regarding Acceptance of Responsibility on February 27, 2019, formally notifying the court of its position that Appellant was entitled to a downward adjustment for acceptance of responsibility under § 3E1.1(b) of the sentencing guidelines. [ROA.42].

The United States Probation Officer prepared and submitted Appellant's Presentence Investigation Report ("PSR") to the parties and the court on April 23, 2019. [ROA.151]. Consistent with his early guilty pleas, the PSR recommended that Appellant receive a two-level downward adjustment under § 3E1.1(b) of the Guidelines for readily and clearly acknowledging his guilt. [ROA.158]. Echoing the government's position regarding acceptance of responsibility, the PSR further recommended that Appellant receive the third point of downward adjustment under § 3E1.1(b) for timely accepting

responsibility. [ROA.158].

The PSR correctly calculated the amount of narcotics for which Appellant could be held responsible. [ROA.158]. Problematically, the PSR denied Appellant the “safety valve” provision set forth in 18 U.S.C. § 3553(f)(1) - (5), on the grounds that he had failed to provide “truthful information and evidence to the government concerning the offense, as determined by the government,” notwithstanding the fact that he was otherwise eligible. [ROA.158]. Appellant filed notice of no objections to the PSR on May 21, 2019. [ROA.177].

The Addendum to the PSR (the “Addendum”) submitted on June 25, 2019, included a three-level increase in Appellant’s total offense level on the grounds that laboratory testing had revealed that the methamphetamine at issue was 100% pure. [ROA.170].

On June 26, 2019, Appellant submitted a *Sentencing Memorandum for Downward Variance* which argued on two grounds for a downward variance: (1) the Court should grant Appellant a two-level reduction as a minor participant in the conspiracy as set forth in § 3B1.2(b); and (2) the Court should grant Appellant the safety valve as set forth in 18 U.S.C. § 3553(f), and § 5C1.2 of the sentencing guidelines. [ROA.181]. *See* U.S.S.G. §§ 3B1.2(b), 5C1.2; 18 U.S.C. § 3553(f).

At the sentencing hearing, counsel for Appellant examined Edward

Quintana, who was one of the case agents who investigated the subject conspiracy. During that examination for following transpired:

Q. Good morning. Could you please introduce yourself to the Judge.

A. Yes, ma'am. Good morning. My name is Edward Quintana, Special Agent with the FBI.

Q. And Mr. Quintana, have you been the primary case agent investigating Mr. – a gentleman by the name of Hernandez?

A. I was one of the case agents on this case.

Q. And have you become familiar with this case?

A. Yes, ma'am.

Q. Specifically, have you, on more than one occasion, met with Mr. Martin-Sosa?

A. Yes.

Q. Okay. And during that time, did you determine that Mr. Martin-Sosa only played one minor role in the conspiracy involving Juan Ernesto Hernandez?

THE COURT: I don't think it's appropriate to get him to define whether it's a minor role or not. You can ask him what the role was, specifically what he did.

Q. (BY MS. LEDERMAN) All right. Specifically, did you come in to learn about Mr. Martin-Sosa between December 7th and December 11th of 2018?

A. Yes.

Q. And in that, Mr. Martin-Sosa, basically you learned, was the middle between Mr. Hernandez and another individual; is that correct?

A. Correct.

Q. And at some point in time, you sat down and discussed with Mr. Martin-Sosa, and he was open and honest with you about the events from December 11th to – December 7th to December 11th of 2018; is that correct?

A. With regard to that particular transaction, yes, ma'am.

Q. And to the degree that you even requested that, should there be a trial, that perhaps you can again speak with Mr. Martin-Sosa about the events of December 7th to December 11th, 2018; is that correct?

A. We've – the investigative team has talked about that, but my understanding is that we will not be utilizing your client for trial.

Q. Correct, and that's because the trial has been postponed and it is now not taking place until September; is that correct?

A. The trial was moved to September, yes, ma'am.

Q.

Okay. So because of, now, the trial being after Mr. Martin-Sosa's sentencing, obviously factors have changed; is that correct?

A. I don't believe it was, in as much, just because of the change of the trial date. Just the investigative team had collectively decided that we would not be utilizing your client as one of our witnesses.

Q. Correct. But you did – when you were investigating and deciding who your witnesses were going to be, you did reach out to Mr. Martin-Sosa; is that correct?

THE COURT: What do you mean “reach out?” I don't know what that means.

Q (BY MS. LEDERMAN) You called my office and asked if we could sit down and meet with Mr. Martin-Sosa to talk to him about potentially testifying at another trial; is that correct?

A. He was debriefed. He was proffered, yes, ma'am.

Q. Well, he was first debriefed and proffered, and then after that, we were called to ask about testifying, correct?

A. To make sure that I understand that, you're saying that I called your office to ask if we could utilize your client for trial?

Q. May 13th of 2019.

A. Okay. That sounds right.

Q. And the debrief was March 6th of 2019, correct?

A. Yes, ma'am.

Q. So after the debrief, and after hearing Mr. Martin-Sosa's information about just the events of December 11th – December 7th to December 11th, in the debrief, then again a phone call was made to my office after that to say, can we sit down and discuss potentially testifying against a codefendant, correct?

A. Yes, ma'am, that sounds right.

[ROA.127-130].

At that sentencing hearing, the district court accepted the offense computations set forth in the PSR and as modified by the Addendum.

[ROA.125]. The court denied the request for a downward variance. [ROA.132].

The resulting total offense level of 33 was calculated along with Appellant's limited criminal history resulted in one criminal history points, which correctly established a criminal history category of I, which together resulted in a guideline range of 135 to 168 months. [ROA.125]; *See* U.S.S.G. Ch. 5, Pt. A.

C. The Appeal

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, contending inter alia that the district court had committed clear error in denying his requested downward variance predicated on the contention that he was a minimal or minor participant in the short-lived conspiracy. The court rejected this claim, holding that because there was some evidence that Petitioner "had a mitigating role, when some factors support the adjustment, but others do not, the district court does not clearly err in denying the adjustment." *Martin-Sosa*, _ _ _ Fed. Appx. _ _ _, 2020 WL 3579761, at *1 (citing *United States v. Bello-Sanchez*, 872 F.3d 260, 264-65 (5th Cir. 2017)).

REASON FOR GRANTING THE PETITION

In November 2015, Amendment 794 became effective. *See United States v. Gomez-Valle*, 828 F.3d 324, 327 (5th Cir. 2016). It left the text of § 3B1.2 unchanged but made various revisions to the commentary. *See United States v. Castro*, 843 F.3d 608, 611–12 (5th Cir. 2016). Among other things, the amended commentary clarified that “the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.”²

An “average participant” under § 3B1.2 “means only those persons who actually participated in the criminal activity at issue in the defendant’s case so that the defendant’s culpability is determined only by reference to his or her co-participants in the case at hand.” *United States v. Torres-Hernandez*, 843 F.3d 203, 208-09 (5th Cir. 2016) (footnote omitted). To address relative culpability, a district court “should consider” the following non-exhaustive, five-factor list:

- (i) The degree to which the defendant understood the scope and structure of the criminal activity; (ii) the degree to which the

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U.S.S.G. § 3B1.2 cmt. n. 3(C); *see also United States v. Sanchez-Villarreal*, 857 F.3d 714, 722 (5th Cir. 2017) (explaining that, though a court may consider the fact that a defendant performed an essential task, it may not deny a mitigating-role adjustment solely on that basis).

defendant participated in planning or organizing the criminal activity; (iii) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority; (iv) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts; (v) the degree to which the defendant stood to benefit from the criminal activity.

§ 3B1.2, cmt. n.3(c). Additionally, the revised commentary provides 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 under this guideline.” *Id.*

Under the Guidelines commentary, Appellant was eligible to receive a mitigating-role reduction. This fact becomes plainly evident when considered in light of the factors enumerated in Application Note 3(C) of the commentary to §3B1.2, the record evidence demonstrates that Appellant's participation was, at the very least, minor.

Understanding of the scope and structure. The record evidence demonstrates that Appellant's participation in the conspiracy was limited to a single transaction which took place over the four days between December 7 and December 11, 2018. [ROA.37, 156]. As a result, Appellant “lack[ed] knowledge or understanding of the scope and structure of the [criminal] enterprise and of the activities of others,” which “is indicative of a role as [a] minimal participant.”

U.S.S.G. § 3B1.2, comment. (n.4).

Participation in planning or organization. There is no evidence in the record that Appellant played a role in planning or organizing the criminal activity. Thus, this factor weighs in Appellant's favor. *See Torres–Hernandez*, 843 F.3d at 209 (“There is no evidence as to his participation in planning or organizing the criminal activity This weighs in favor of an adjustment.”).

Exercise or influence on the exercise of decision-making authority. Nothing in the record suggests that Appellant had authority to make decisions or had sway over those who did. Nor does any evidence indicate that he held supervisory authority over any other offense participant. Once again, this factor thus weighs in favor of an adjustment. *See Torres–Hernandez*, 843 F.3d at 209 (“There is no evidence as to ... the degree to which he exercised decision-making authority or influenced the exercise of that authority. This weighs in favor of an adjustment.”)

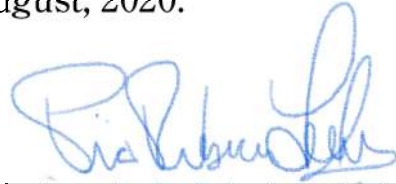
Nature of participation and discretion. The extent of Appellant's participation reflected in the record is that he brokered a single transaction for three kilograms over the course of four days in December of 2018. [ROA.38, 137]. There is no evidence in the record that Appellant had a proprietary interest in the drugs. He was merely responsible for connecting the buyer and seller.

Degree of benefit. The record demonstrate that Appellant was to be compensated in the amount of \$3000 for brokering the lone transaction. [ROA.157]. The record contains no evidence that Appellant had any equity interest in the drugs or was entitled to any share of profits from their distribution. The lack of a proprietary interest is another factor that weighs in favor of an adjustment. *See* U.S.S.G. § 3B1.2, comment. (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 th[e] [G]uideline.”).

Appellant merely brokered the lone December transaction. Other participants owned the drugs, planned the activity and made decisions. Application of the factors enumerated in § 3B1.2, comment. (n.3(C)), to the record evidence thus make clear that Appellant should have received a downward variance on the grounds that he had a mitigating role in the conspiracy. The district court clearly erred by denying his request for a variance on this ground, based not on its weighing of the Guidelines factors, but on some other factors which were not identified by the district court. Because the district court failed to properly grant Petitioner his requested mitigating role adjustment, it committed clear error, which the Fifth Circuit failed to correct. This Court is respectfully requested to remedy the error of the court of appeals.

CONCLUSION

Petitioner respectfully prays that this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to which he may justly entitled. Respectfully submitted this 24th day of August, 2020.



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