

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

DIEGO PALACIOS-VILLALON,
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 FOR REVIEW

Diego Palacios-Villalon (Palacios) made a written objection to the Presentence Report (PSR) for not being granted a reduction under §3B1.2 (Mitigating Role). At sentencing, Palacios advocated for the §3B1.2 reduction by stating that Palacios is an 18 years old, he was a student, he was recruited to transport narcotics from Mexico to the United States. He was working under the directions of another individual and was paid \$600.

On appeal, Palacios argued that the trial court had erred by denying the application of the mitigating role guideline adjustment provided by §3B1.2.

The Fifth Circuit held that Palacios had not satisfied his burden to establish his entitlement to a mitigating role reduction because he failed to show the level of culpability of the average participant in the offense, establish his own relative level of culpability, or otherwise demonstrate that he did so much less than other participants that he was peripheral to the criminal activity's advancement.

The question presented is “does a defendant have the sole obligation in the establishment of these elements or does the trial judge have a duty to inquire into them”.

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OPINION BELOW

The opinion from the Fifth Circuit was issued on May 1, 2020, was not selected for publication in the Federal Reporter, but reported at 802 Fed.Appx 868 and is attached hereto as Appendix A.

The criminal judgment from the Southern District of Texas was entered on September 5, 2018, and is attached hereto as Appendix B.

JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254. The date on which the United States Court of Appeals decided this case was May 1, 2020 and no petition for rehearing was filed with said court. The March 19, 2020 Covid-19 order extended the filing deadline to 150 days or September 28, 2020.

STATEMENT OF THE CASE

With a plea bargain, Palacios pled guilty to intentionally or knowingly importing five kilograms or more of a controlled substance, namely cocaine, into the United States. In return the Government agreed to recommend a reduction for acceptance of responsibility.

The PSR calculated Palacios' relevant conduct based upon 9.86 kilograms of cocaine, thereby making a base offense level of thirty.

Palacios filed a written objection to the PSR challenging that he had not been awarded a mitigating role adjustment under §3B1.2 of the United States Sentencing Guidelines. The PSR recorded that Palacios was always working under the direction of another individual. He had a lack of knowledge and understanding of the scope and

structure of the enterprise and of the activities of others involved in the criminal activity. These were indicative of a role as a minimal participant.

At the sentencing hearing, the Court inquired if trial counsel had anything to say on his client's behalf. Trial Counsel replied that "We'd ask this Honorable Court for an adjustment role in the offense. Mr. Palacios is 18 years old, was a student; he was recruited to transport narcotics from Mexico to the United States, Judge. He was working under the directions of another individual. I think he was to be paid \$600."

The Fifth Circuit held that Palacios had not satisfied his burden to establish his entitlement to a mitigating role reduction because he failed to show the level of culpability of the average participant in the offense, establish his own relative level of culpability, or otherwise demonstrate that he did so much less than other participants that he was peripheral to the criminal activity's advancement.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit has placed a burden of proof under §3B1.2 of the Federal Sentencing Guidelines upon Palacios that is contrary to its prior holding and disposition in *United States v. Sanchez-Villarreal*, 857 F.3d 714 (5th Cir. 2017).

ARGUMENT

In *Sanchez*, the defendant pled guilty to possession with the intent to distribute cocaine, and at sentencing, a mitigating role reduction was not applied. While discussing the facts of the case, the Fifth Circuit noted that Sanchez had approximately 5.95 kilograms and an additional four plastic baggies of cocaine in the vehicle. He had been hired by another person to transport the cocaine. He was being

paid \$1000 to deliver the cocaine to an unknown person who would be waiting at a convenience store and that he personally intended to sell the four baggies of cocaine. Sanchez had delivered approximately the same amount a month before. A handgun, a loaded magazine and second magazine clip, and nineteen rounds of ammunition were also found concealed in the vehicle.

Sanchez filed written objections in the trial court that the PSR failed to recommend a mitigating role adjustment under §3B1.2. At sentencing, Sanchez's attorney urged the court to grant a mitigation-role reduction, argued that Sanchez was a "standard mule" who had been ordered to transport drugs without knowing the end location and without coordinating or initiating the drug trafficking.

The district court judge responded that she understood the argument and the standards for assessing the role, but she ultimately overruled the objection and concluded that Sanchez's conduct did not warrant it. In doing so, she advised that this was one area where she probably had some disagreement with the guidelines as well and further explained that while Sanchez may not be the main person, she would classify him as critical.

The Fifth Circuit held that the district court erred in its interpretation and application of §3B1.[2] by giving conclusive weight to its finding that Sanchez's role was critical. Sanchez, 857 F.3d at 721. This error appears to have pretermitted the district court's application of §3B1.2 and the applicable commentary. The district court made no findings regarding the "average participant" in the criminal activity to assess whether Sanchez was substantially less culpable than the average participant.

The Sanchez Court finally stated that “in these circumstances, where mitigating-role facts are debatable” and where there are other questionable circumstances, remand is the proper course unless the record permits only one resolution of the factual issue.

The Case at Bar

In this case, Palacios properly objected to the PSR and at the sentencing hearing for not receiving a mitigating role adjustment under U.S.S.G. §3B1.2. (ROA.69, 209)

On appeal, Palacios asserted that the district court erred by not granting him a mitigating role adjustment and that his case is very similar to the Sanchez case.

An analysis of the §3B1.2 cmt. 3(C) factors applied to the facts recorded in the PSR demonstrate that:

(i) Palacios did not understand the scope and structure of the criminal activity.

Palacios was hired by another person to drive a vehicle into the United States to deliver narcotics at an undetermined location and return to Mexico for \$600.00.

(ii) Palacios did not participate in planning or organizing the criminal activity. He was simply a transporter of narcotics to an undetermined location.

(iii) Palacios did not exercise decision-making authority or influence the exercise of decision-making authority. He was simply a transporter of narcotics to an undetermined location.

- (iv) As simply a transporter of narcotics to an undetermined location, Palacios' participation in the commission of the criminal activity was minimal. He was minimally responsible for and had no discretion in performing those acts.
- (v) Palacios stood to benefit \$600.00.

At sentencing and in the PSR, Palacios was only held accountable for the quantity of drugs that he personally transported.

In comparison, Sanchez was a transporter that had transported multiple times, was a small dealer, had a firearm and ammunition that was provided by his employer, and was paid \$1000. Palacios was a transporter that transported only one time, was not a dealer, did not have a firearm or ammunition, and was paid only \$600.

In sum, both under the analysis above and by comparison to Sanchez, Palacios is a defendant that qualifies for consideration of a Mitigating Role adjustment under §3B1.2.

Finally, as in Sanchez, the district court made no findings regarding the “average participant” in the criminal activity to assess whether Palacios was substantially less culpable than the average participant. *See Sanchez*, 857 F.3d at 722. The Court summarily concluded that Palacios is anything other than an average participant based on all the facts in the PSR.

Fifth Circuit Standard Comparison

Even though the cases are factually similar, the Fifth Circuit remanded the Sanchez case for resentencing because the district judge had failed to make findings

regarding the application of §3B1.2 while Palacios' case was affirmed because he failed to establish his burden of proof.

PRAYER

WHEREFORE PREMISES CONSIDERED, Diego Palacios-Villalon prays that the Court will grant this petition for a writ of certiorari to the Honorable Fifth Circuit Court of Appeals.

Respectfully Submitted,

Lessman & Lessman
Attorneys & Counselors at Law
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/s/ Denton B. Lessman
Denny@LessmanLaw.com
Attorney for Petitioner,
Diego Palacios-Villalon

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that a true and correct copy of the foregoing document has been served upon the following party(ies) via First Class Mail with Tracking on September 29, 2020:

Solicitor General of the United States
Room 5616, Department of Justice
950 Pennsylvania Ave. N.W.
Washington, DC 20530-001

United States Attorney for the Southern District of Texas
Appellate Division
1000 Louisiana Street, Ste. 2300
Houston, TX 77002

Diego Palacios-Villalon BOP #33268-479
CI Great Plains
700 Sugar Creek Drive, Hinton, OK 73047

/s/ Denton B. Lessman
Attorney for Palacios Diego-Villalon

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This petition complies with the type-volume limitations of Supreme Court Rule 33 because this entire brief contains 1835 words including the parts that are excluded therefrom.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a) (5) and the type style requirements because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 12-point Century font.

/s/ Denton B. Lessman

Attorney for Palacios Diego-Villalon

Dated: September 28, 2020.

APPENDIX

Appendix A Fifth Circuit Panel Opinion

Appendix B Criminal Judgment from Southern District of Texas, McAllen
Division

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-41002
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

May 1, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

DIEGO PALACIOS-VILLALON,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:17-CR-1929-1

Before BARKSDALE, HAYNES, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Diego Palacios-Villalon challenges his sentence at the bottom of his advisory Sentencing Guidelines sentencing range (57-months' imprisonment), imposed upon his pleading guilty to importing five kilograms or more of a mixture or substance containing a detectable amount of cocaine, in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 952(a), 960(a)(1), and 960(b)(1)(B). He asserts the district court erred by refusing to reduce his offense level under Guideline

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

No. 18-41002

§ 3B1.2 (mitigating role), contending: he was entitled to a mitigating-role reduction because his conduct was limited to transporting drugs and nothing in the record shows he understood the scope and structure of the criminal activity, participated in its planning or organizing, or exercised any decision-making authority; and the court erred by failing to make required findings pursuant to *United States v. Sanchez-Villarreal*, 857 F.3d 714, 722 (5th Cir. 2017), regarding the criminal activity’s average participant.

Although post-*Booker*, the Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 46, 51 (2007). If no such procedural error exists, a properly preserved objection to an ultimate sentence is reviewed for substantive reasonableness under an abuse-of-discretion standard. *Id.* at 51; *United States v. Delgado-Martinez*, 564 F.3d 750, 751–53 (5th Cir. 2009). In that respect, for issues preserved in district court, its application of the Guidelines is reviewed *de novo*; its factual findings, only for clear error. *E.g.*, *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008).

Understandably, deciding whether to apply a mitigating-role reduction under Guideline § 3B1.2 is a factual finding reviewed for clear error. *United States v. Gomez-Valle*, 828 F.3d 324, 327 (5th Cir. 2016) (citation omitted). In that regard, “[a] factual finding is not clearly erroneous if it is plausible in [the] light of the record read as a whole”. *Id.* (citation omitted). And, critical to the issues at hand, to establish entitlement to a mitigating-role reduction, defendant has the burden of showing, “by a preponderance of the evidence: (1) the culpability of the average participant in the criminal activity; and (2) . . . [defendant] was substantially less culpable than that participant”. *United States v. Castro*, 843 F.3d 608, 613 (5th Cir. 2016) (footnote omitted).

No. 18-41002

Palacios has not satisfied this burden. He has totally failed to: show the level of culpability of the average participant in the offense, establish his own relative level of culpability, or otherwise demonstrate that he did so much less than other participants that he was peripheral to the criminal activity's advancement. *See id.* at 613–14 (citation omitted). Consequently, he has not shown entitlement to a mitigating-role reduction, *see id.*, and his contention based on *Sanchez-Villarreal* also fails. *See United States v. Garcia-Miranda*, 780 F. App'x 127, 131 (5th Cir. 2019) (per curiam) (noting, when affirming sentencing court's determination defendant was not entitled to Guideline § 3B1.2 reduction, that “[i]n [the] light of [defendant's] failure of proof, and despite the [court's] absence of findings of what constituted the average, we see no basis for reversal”).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in McAllen

ENTERED

September 05, 2018

David J. Bradley, Clerk

UNITED STATES OF AMERICA
 V.
 DIEGO PALACIOS-VILLALON

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 7:17CR01929-001

USM NUMBER: 33268-479

Robert L. Steindel

Defendant's Attorney

☐ See Additional Aliases.**THE DEFENDANT:**☒ pleaded guilty to count(s) 2 on March 28, 2018.☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

| <u>Title & Section</u> | <u>Nature of Offense</u> | <u>Offense Ended</u> | <u>Count</u> |
|--|--|----------------------|--------------|
| 21 U.S.C. § 952(a), 960(a)(1), 960(b)(1) and 18 U.S.C. § 2 | Importing, 5 kilograms or more, that is, approximately 10 kilograms of cocaine. | 11/25/2017 | 2 |

☐ See Additional Counts of Conviction.

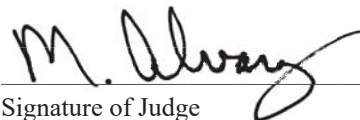
The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____☒ Count(s) 1, 3, and, 4 ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 30, 2018

Date of Imposition of Judgment



Signature of Judge

MICAELA ALVAREZ
UNITED STATES DISTRICT JUDGE

Name and Title of Judge

September 4, 2018

Date

DEFENDANT: **DIEGO PALACIOS-VILLALON**
CASE NUMBER: **7:17CR01929-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 57 months.

- ☐ See Additional Imprisonment Terms.
- ☐ The court makes the following recommendations to the Bureau of Prisons:
- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district:
- ☐ at _____ ☐ a.m. ☐ p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **DIEGO PALACIOS-VILLALON**
CASE NUMBER: **7:17CR01929-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | <u>Assessment</u> | <u>Fine</u> | <u>Restitution</u> |
|---------------|-------------------|-------------|--------------------|
| TOTALS | \$100.00 | | |

☐ See Additional Terms for Criminal Monetary Penalties.

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

| <u>Name of Payee</u> | <u>Total Loss*</u> | <u>Restitution Ordered</u> | <u>Priority or Percentage</u> |
|----------------------|--------------------|----------------------------|-------------------------------|
|----------------------|--------------------|----------------------------|-------------------------------|

☐ See Additional Restitution Payees.

| | | | |
|---------------|---------------|---------------|--|
| TOTALS | <u>\$0.00</u> | <u>\$0.00</u> | |
|---------------|---------------|---------------|--|

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **DIEGO PALACIOS-VILLALON**
CASE NUMBER: **7:17CR01929-001**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$100.00 due immediately, balance due
☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or
- D ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
Payable to: Clerk, U.S. District Court
Attn: Finance
P.O. Box 5059
McAllen, TX 78502

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number

| <u>Defendant and Co-Defendant Names (including defendant number)</u> | <u>Total Amount</u> | <u>Joint and Several Amount</u> | <u>Corresponding Payee, if appropriate</u> |
|--|---------------------|-------------------------------------|--|
|--|---------------------|-------------------------------------|--|

☐ See Additional Defendants and Co-Defendants Held Joint and Several.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

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