

No. 20-

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IN THE  
**Supreme Court of the United States**

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JOSE ARMANDO BAZAN,

*Petitioner,*

**v.**

UNITED STATES OF AMERICA,

*Respondent.*

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**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 the role adjustment request 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.” *United States v. Bazan*, 773 F. App’x 811 (5th Cir. 2019)(quoting *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991)).

Mr. Bazan filed a petition for writ of certiorari with this Court. *Bazan v. United States*, 140 S. Ct. 2016 (2020) (mem.). Mr. Bazan argued the Fifth Circuit’s practice of refusing to review un-presented factual determinations was in conflict with the doctrine of plain error review. *Id.* While the petition was pending, this Court concluded “there is no legal basis for the Fifth Circuit’s practice of declining to review certain unpreserved factual arguments for plain error.” *Davis v. United States*, 140 S. Ct. 1060, 1061 (2020). Based on this holding, this Court granted Mr. Bazan’s petition for writ of certiorari, vacated the

Fifth Circuit's judgment, and remanded this case for further consideration in light of *Davis*. *Bazan*, 140 S. Ct. at 2016.

On remand, the Fifth Circuit explained that review was for plain error. (Appendix A, page 2). The Court further determined that there was no plain error. *Id.* The opinion is discussed below.

Mr. Bazan now files this Petition for Writ of Certiorari to review the Fifth Circuit's published opinion. (Appendix A). Specifically, Mr. Bazan asserts the Fifth Circuit's application of plain error was flawed and thus the Fifth Circuit has decided an important federal question in a way which continues to conflict 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.

**PARTIES TO THE PROCEEDING**

The parties to the proceeding are listed in the caption:

Jose Armando Bazan:	Petitioner (Defendant-Appellant in the lower Courts)
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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 again 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. Respectfully, the Fifth Circuit did not apply the plain error standard of review as defined by this Court. 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.

### **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 13, 2020), appears at Appendix A to this petition and is reported at *United States v. Bazan*, 964 F.3d 439 (5th Cir. 2020).

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.

### **GROUND 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. The denial of the reduction was an issue in the original appeal and the petition to this Court, and was again the issue following remand. A copy of the Judgment appears at Appendix B. On remand, the Fifth Circuit rejected the argument that there was reversible error in an opinion dated July 13, 2020, and again 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.

#### Initial 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 decision of the District Court.

#### Initial Petition for Writ of Certiorari

Mr. Bazan filed a Petition for Writ of Certiorari challenging that decision, which was granted by this Court on March 23, 2020. *Bazan v. United States*, 140 S. Ct. 2016 (2020) (mem.). Specifically, this Court vacated the District Court’s judgment and remanded the case to the Fifth Circuit for further consideration in light of *Davis v. United States*, 140 S. Ct. 1060, 1061 (2020). The *Davis* decision is discussed below.

## The Opinion of the Fifth Circuit on Remand

On July 13, 2020, the Fifth Circuit rendered its opinion on remand from the Supreme Court of the United States. (Appendix A). The Court concluded there was no plain error and affirmed the District Court. (Appendix A, page 2). That opinion is also discussed below. Mr. Bazan now filed this Petition for Writ of Certiorari from that decision.

### **ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT**

#### **I. Standard of Review**

As noted, Mr. Bazan did not object at the District level 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, as this Court explained upon remand, review of this issue is for plain error. *Davis v. United States*, 140 S. Ct. 1060, 1061-67 (2020); *see also 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).

II.  
Applying Plain Error: Minor/Minimal Role Adjustment

Mr. Bazan respectfully asserts the Fifth Circuit did not apply the plain error standard of review as defined by this Court and that when said standard is correctly applied there was plain error in this case.

Indeed, the Fifth Circuit has made it clear this is not an insurmountable burden. *Martinez-Rodriguez*, 821 F.3d at 662. In *Martinez-Rodriguez*, 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. *Id.* If these criteria are established, the Appellate Court can exercise its discretion to remand if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* As set forth below, all of the criteria necessary for a finding of clear error are present in this case.

As the outset, the facts and Mr. Bazan's Fifth Circuit claims regarding his minor/minimal role in the offense must be examined. Indeed, the minimal/minor guideline adjustment is "heavily dependent on the facts of the particular case." U.S.S.G. § 3B1.2 n.5.

In its decision, the Fifth Circuit determined that Mr. "Bazan fails to cite any evidence showing that the district court would have granted the adjustment for his role in the offense." (Appendix A, page 2) (citing *United States v. Torres-Hernandez*, 843 F.3d 203, 207 (5th Cir. 2020)). However, the Fifth Circuit does acknowledge that, because Mr. "Bazan argues that he was merely a courier, the issue turns of his culpability relative to the other participants in the offense." (Appendix A, page 2) (citing *Torres-Hernandez*, 843 F.3d at



207). To this end, the Court reviewed the facts and the arguments in this case in the following fashion:

Bazan exercised decision-making authority by recruiting his brother and coordinating actions with Janet Villareal. *See* U.S.S.G. § 3B1.2, comment. (n.3(C)(iii)); *see also* U.S.S.G. § 3B1.1, comment. (n.4). Moreover, the plan between Bazan, his brother, and Villareal suggests that Bazan had some discretion regarding his role in the offense. *See* U.S.S.G. § 3B1.2, comment. (N.3(C)(iv)). Though Bazan contends that there was no evidence that he had a proprietary interest, there is likewise no evidence showing that he was paid a fee to transport the cocaine, and Bazan had the burden to demonstrate that the adjustment was warranted. *See Torres-Hernandez*, 843 F.3d at 207; *see also* U.S.S.G. § 3B1.2, comment. (N.3(C)(v)). Bazan has failed to show error, plain or otherwise. The judgment of the district court is AFFIRMED.

(Appendix A, page 2) (full citations to sentencing guidelines added).

However, the PSR in this case shows otherwise. The report provides:

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. All of this led Mr. Bazan to argue to the Fifth Circuit, and now to this Court, that Mr. Bazan did not plan, organize or make decisions for the conspiracy. (Opening Brief, pages 14-15). Indeed, the PSR demonstrates that Mr. Bazan had the single task of driving his own tractor trailer and enlisted only his brother's help. ROA.218. Thus, Mr. Bazan was situated to be considered for the adjustment because, as the notes to the guidelines provide, if a defendant is simply being paid to perform certain tasks, he should be considered for the adjustment. U.S.S.G. § 3B1.2, n.3.

By contrast, the Fifth Circuit's conclusions about the facts are based on speculation or are contrary to the record. The Fifth Circuit noted the relationship between Mr. Bazan and his brother resulted in a "plan" which "suggests" that Mr. Bazan had "some" discretion regarding his role. (Appendix A, page 2). The Fifth Circuit also believed it was relevant that there was "no evidence showing that he was paid a fee to transport the cocaine." (Appendix A, page 2). However, as noted above, the PSR (the facts of which were not disputed) established that Mr. Bazan was to be "paid" by an unindicted co-conspirator. ROA.218. Furthermore, the PSR established Mr. Bazan was a "transporter of cocaine" who would share his payment with his brother. ROA.218. Hence, the Fifth Circuit's conclusions that there was no evidence to support the minor/minimal role adjustment is contrary to the undisputed facts as applied when applied to the specifics of the guidelines which govern this determination.

Finally, Mr. Bazan respectfully asserts the Fifth Circuit's explanation for its ruling is contrary to plain error review. As noted above, the Fifth Circuit concluded Mr. Bazan "had the burden to demonstrate that the adjustment was warranted" and that he had failed to meet this burden. (Appendix A, page 2). The Fifth Circuit's announced predicate to this conclusion was that, although Mr. "Bazan contends that there was no evidence that he had a proprietary interest, there is likewise no evidence showing that he was paid a fee to transport the cocaine." (Appendix A, page 2).

While the facts in the PSR showed Mr. Bazan was paid a fee, and thus had no proprietary (*i.e.*, ownership) interest in the drugs, the conclusion that it was Mr. Bazan's

burden to show he had no proprietary interest is not part of plain error review. Rather, the Fifth Circuit's conclusion is a step back to the old Fifth Circuit rule that the issue could not be reviewed by the Appellate Court.

The rule the Fifth Circuit is applying in this regard provides: "a party seeking an adjustment in a base level of an offense bears the burden of providing by a preponderance of the evidence that the adjustment is warranted." *Torres-Hernandez*, 843 F.3d at 207 (quoting *United States v. Miranda*, 248 F.3d 434, 436 (5th Cir. 2001)). The conclusion by the Fifth Circuit that there was no evidence Mr. Bazan had a proprietary interest in the cocaine misconstrues the evidence and its application to the law. This is because, as established above, the evidence in this case showed Mr. Bazan had no proprietary interest in the conspiracy. Respectfully, the Fifth Circuit's conclusion there was no evidence to rebut what was proven in the PSR is irrelevant. Stated another way, when the undisputed evidence establishes a fact is true, "no evidence" to the contrary is not part of the inquiry.

In this regard, Mr. Bazan submits the Fifth Circuit is applying the rule overruled by this Court that the issue of an unpreserved sentencing adjustment cannot be reviewed on appeal. *Davis*, 140 S. Ct. at 1061-67. Respectfully, the Fifth Circuit's ruling in this case—requiring the defendant to rebut what was true before the District Court—is the same rule of law that mandated such matters cannot be reviewed by the Appellate Court. As this Court has explained, "the text of [Fed. R. Crim. P.] 52(b) does not immunize factual errors from plain error review." *Id.* at 1061. In other words, by holding that Mr. Bazan carries the burden of rebutting evidence which was undisputed at the District Court level, the Fifth

Circuit is again erecting a wall of “no review” on such issues, which is contrary to plain error review. *Id.*

### 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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