

No. 20-

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**

PETITION FOR WRIT OF CERTIORARI

JAMES SCOTT SULLIVAN
LAW OFFICES OF J. SCOTT SULLIVAN
22211 I.H. 10 WEST, SUITE 1206
SAN ANTONIO, TEXAS 78257
(210) 722-2807

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 24 months to run concurrently with sentences imposed in separate drug/ failure to appear cases.

On direct appeal, Mr. Bazan argued he should have received a minor or mitigating role downward adjustment under the Guidelines. 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 and held: “because this issue was a question of fact capable of resolution at sentencing, this ‘can never constitute plain error.’” (Appendix A, page 2) (quoting *United States v. Fierro*, 38 F.3d 761, 774 (5th Cir. 1994)).

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. (Appendix A, pages 2-5). The opinion is discussed below.

Mr. Bazan now files this Petition for Writ of Certiorari to review the Fifth Circuit's opinion. (Appendix A); *also found at United States v. Bazan*, 772 F. App'x 214 (5th Cir. 2019)). 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)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW.....	i-ii
PARTIES TO THE PROCEEDING.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES.....	v-vi
CITATIONS TO OPINIONS AND RELEVANT ORDERS.....	1
GROUNDΣ FOR JURISDICTION.....	1-2
CONSTITUTIONAL PROVISIONS.....	2
STATEMENT OF THE CASE.....	3-8
ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.....	8-11
CONCLUSION.....	11-12

INDEX TO APPENDIX

APPENDIX A	Decision of the United States Court of Appeals for the Fifth Circuit denying relief on direct appeal.
APPENDIX B	Judgment in a Criminal Case issued by the United States District Court for the Southern District of Texas, McAllen Division.

TABLE OF AUTHORITIES

CASES:

<i>Bazan v. United States</i> , 140 S. Ct. 2016 (2020) (mem.).....	i, ii
<i>Davis v. United States</i> , 140 S. Ct. 1060, 1061 (2020).....	i, ii, 7, 8, 10-11
<i>Rosales-Mireles v. United States</i> , 138 S. Ct. 1897, 1910 (2018).....	8
<i>United States v. Bazan</i> , 772 F. App'x 811 (5th Cir. 2019).....	i, 1
<i>United States v. Fierro</i> , 38 F.3d 761, 774 (5th Cir. 1994).....	i
<i>United States v. Martinez-Rodriguez</i> , 821 F.3d 659, 662 (5th Cir. 2016).....	8, 9
<i>United States v. Olano</i> , 507 U.S. 725, 732-33 (1993).....	8
<i>United States v. Thomas</i> , 932 F.2d 1085, 1092 (5th Cir. 1991).....	10

CONSTITUTIONAL PROVISIONS:

U.S. CONST. amend V.....	2
U.S. CONST. amend VI.....	2

STATUTES:

21 U.S.C. § 841(a)(1).....	2
21 U.S.C. § 841(b)(1)(B).....	2
21 U.S.C. § 846.....	2
28 U.S.C. § 1254.....	2

UNITED STATES SENTENCING GUIDELINES:

U.S.S.G. § 1B1.3(a)(1)(A).....	5
U.S.S.G. § 1B1.3(a)(1)(B).....	5
U.S.S.G. § 3B1.2.....	12
U.S.S.G. § 3B1.2, n.3.....	10
U.S.S.G. § 2D1.1(a)(5).....	5
U.S.S.G. § 2D1.1(c)(7).....	5

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 appears at Appendix A, is reported at *United States v. Jose Armando Bazan*, 772 F. App'x 214 (5th Cir. Aug. 5, 2020), and is unpublished.

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 and unpublished.

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 conspiracy to possess with intent to distribute

500 grams or more of 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 August 5, 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 April 15, 2017, 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.10-11. On May 8, 2018, Mr. Bazan pleaded guilty to the conspiracy count. ROA.90-112.

There was no plea agreement in this case. ROA.105. However, at the time of the plea, there was a possibility Mr. Bazan would testify for the Government, and he did, in fact, testify for the Government. ROA.106, 117.

The Guilty Plea Hearing

The District Court accepted Mr. Bazan's guilty plea. ROA.110. 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:

Ms. Rees [for the United States]: On or about August 27th, 2016, to on or about September 3rd, 2016, the Defendant did knowingly and intentionally conspire and agree with others to possess with intent to distribute more than 500 grams of cocaine, a Schedule II controlled substance.

On August 27, 2016, law enforcement responded to a vehicle abandoned in an orchard in San Juan, Texas, that had—that investigation led to the arrest and detention of Hugo De Hoyos and Arturo Bazan, who admitted to a scheme to steal bundles of cocaine by creating cloned or diluted bundles of cocaine that they had left in the orchard.

Mr. De Hoyos and Mr. Bazan each received a cut of the original amount of bundles; Mr. Bazan receiving 15. Arturo Bazan admitted he had contacted his son, Jose Bazan, after the staged seizure of the cloned bundles and asked for assistance in trying to sell the stolen cocaine bundles in his possession.

Jose Bazan admitted to law enforcement that he assisted his father, Arturo Bazan, by contacting an individual and trying to see if they would be able to sell a portion of the bundles.

The Defendant joined in the drug trafficking conspiracy willingly with the intent to further its unlawful purpose. To further the drug trafficking conspiracy, Jose Bazan agreed to contact on behalf of Arturo Bazan with the understanding that three bundles of cocaine that weighed more than 500 grams would be transferred to this third party for transport and eventual sale.

THE COURT: Mr. Bazan, do you agree with what the Government stated?

THE DEFENDANT: Yes, Your Honor.

THE COURT: So, at some point in time, and for the record, Arturo Bazan is your father, correct?

THE DEFENDANT: Correct.

THE COURT: Okay, so at some point in time on or after August the 27th and then before or up to at least September the 3rd, Arturo Bazan contacted you to help him sell these 15 bundles of what you understood to be cocaine; is that right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you, in turn, contacted somebody else and, at least made some sort of arrangement whereby three bundles were going to be transferred over to that person. Is that correct?

THE DEFENDANT: Three, yes, ma'am.

THE COURT: Three bundles, okay. And you understood, again, that these were bundles, to your understanding that they contained cocaine, correct?

THE DEFENDANT: That's correct.

ROA.108-10 (emphasis in original).

The Presentence Investigation Report:

A United States Probation Officer prepared and filed a Presentence Investigation Report (“PSR” or “the report”). 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 26 under U.S.S.G. § 2D1.1(c)(7). ROA.159. To this end, the PSR provides:

Base Offense Level: The United States Sentencing Commission Guideline for a violation of 21 U.S.C. § 846, 841(a)(1), and 841(b)(1)(B) 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. Pursuant to U.S.S.G. § 1B1.3(a)(1)(A) and (B), Relevant Conduct, the defendant who engaged in a jointly undertaken criminal activity, can be held responsible for the cocaine that he attempted to assist his father (Arturo Bazan) in selling. In this case, the defendant made contact with his friend (an unidentified co-conspirator) and brokered an arrangement between him/her to sell 3 kilograms of cocaine for his father (Arturo Bazan). Although said arrangement was abandoned because of the poor quality of the cocaine, which was subsequently disposed of, the defendant is still responsible for having coordinated the agreement between his friend and father. Thus, he will be held accountable for the 3 kilograms/bundles of cocaine that were disposed and unseized. It should be noted that the standard 5% reduction assessed for the weight of the packaging material, the resulting weight of the cocaine would be 2.85 kilograms, which does not impact the guideline range. Pursuant to U.S.S.G. § 2D1.1(c)(7), offenses involving at least 2 kilograms but less than 3.5 kilograms of cocaine establish a base offense level of 26.

ROA.159 (emphasis in original). Important to this Petition is the fact that the Probation Officer made no role adjustments. *See* ROA.159.

The Officer next deducted 2-levels for Mr. Bazan’s acceptance of responsibility. ROA.159. This left Mr. Bazan with a Total Offense Level of 24. ROA.160. With respect to

Criminal History, the Probation Officer scored 2-history points to Mr. Bazan. ROA.160. This gave Mr. Bazan a Criminal History category of II. ROA.160.

PSR: Specific Factual Conclusions:

The PSR provided two pertinent conclusions on the issue of Mr. Bazan's role in the offense. ROA.155, 157. These two conclusions provide:

42. **Jose Bazan** who was called to testify during the second jury trial as to Salvador Hernandez and Richard Castillo, revealed that his father, Arturo Bazan, had informed him of the 15 kilograms/bundles of cocaine he (Arturo Bazan) had obtained. Arturo Bazan had asked his son, **Jose Bazan**, to place him in contact with someone who would sell some cocaine for him. **Jose Bazan** thereafter provided his father, Arturo Bazan, with the telephone number for his friend, whom he did not identify, and an arrangement to sell three kilograms of cocaine was made. The three kilograms/bundles of cocaine were turned over to **Jose Bazan's** unidentified friend (an unindicted co-conspirator), and he/she then attempted to sell the same in Victoria, Texas. However, it was subsequently discovered that the cocaine would not sell because it was of poor quality. Said cocaine, which was unseized, was subsequently disposed.

* * * * *

47. **Jose Bazan** was a narcotics broker in this drug trafficking venture; he made arrangements with his father, Arturo Bazan, to locate an individual who would sell three kilograms of cocaine. **Jose Bazan** thereafter provided Arturo Bazan with the telephone number for his friend, whom he did not identify by name, and the arrangement to sell the three kilograms was made between his father and his friend. **Jose Bazan's** unidentified friend subsequently attempted to sell the kilograms of cocaine in Victoria, Texas, but was unsuccessful due to the poor quality of the same. Because **Jose Bazan** participated in the brokering of three kilograms of cocaine with his father

(Arturo Bazan) and his unidentified friend, he will be held accountable for said amount.

ROA.155, 157 (emphasis in original).

Sentencing:

Mr. Bazan was sentenced on July 23, 2018. ROA.113. The Government filed a motion to remove the 60 month minimum sentence, *i.e.*, pursuant to the safety valve, ROA.117, which was granted by the Court. ROA.126. The Court sentenced Mr. Bazan to serve a 24-month prison term for this offense, to run concurrently with sentences imposed in a separate drug case, which was 119 months, and a failure to appear. ROA.80-86.

Mr. Bazan's attorney did not file any objections to the PSR. He did not move for any adjustments to the Guidelines at the sentencing hearing. After sentencing, he did not object to any portion of the sentence imposed.

Initial Appeal to the Fifth Circuit

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 August 5, 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, page2-5). 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.

At the outset, it is important to note that the Fifth Circuit has made it clear that plain error 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.

It should be acknowledged that the Fifth Circuit did review the evidence in this case which is generally relevant to whether the Defendant was a minor/minimal party. (Appendix A, pages 2-5). The Fifth Circuit also correctly explained that “whether a defendant played a mitigating role is a question of fact” and District Courts should consider:

- (i) the degree to which the defendant understood the scope and structure of the criminal activity; (ii) the degree to which the defendant participated in planning or organizing the criminal activity; (iii) the degree to which the defendant exercised decision-making authority or 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.

(Appendix A, page 3). This led the Fifth Circuit to cite its own rule of law on the issue of when the adjustment for minor/minimal party is warranted. Specifically, the Court stated:

It is improper for a court to award a minor participation adjustment simply because a defendant does less than the other participants. Rather, the defendant must do enough less so that he at best was peripheral to the advancement of the illicit activity.

(Appendix A, page 4) (quoting *United States v. Thomas*, 932 F.2d 1085, 1092 (5th Cir. 1991)). The Fifth Circuit concluded that it applied this rule in affirming the District Court's "implicit" denial of Mr. Myers' requested sentencing adjustment.

However, the Fifth Circuit did not address the fact that Mr. Bazan was pulled into this conspiracy by his father. ROA.155, 157. Mr. Bazan merely put his father in contact with a seller for the cocaine by giving his father the seller's telephone number. ROA.155, 157. His participation was only further diminished in light of the fact that the proposed seller was not able to sell the cocaine. ROA.155, 157. Providing a phone number and merely following the various orders as to how the conspiracy was to be orchestrated is merely peripheral activity. This low level of participation was only further diminished due to the fact that there is no indication in the record that Mr. Bazan had a proprietary interest in the criminal activity. *See* U.S.S.G. § 3B1.2, n.3. Respectfully, the Fifth Circuit's application of the minor/minimal adjustment therefore requires this Court's supervision such that the guideline adjustment is applied in accordance with this Court's precedent.

It is further important to observe the Fifth Circuit's final conclusion in this case is contrary to the basis for this Court's initial remand. When this Court remanded this matter, it relied exclusively on *Davis v. United States*, 140 S. Ct. 1060, 1061-67 (2020). The holding

in *Davis* required the Fifth Circuit to apply the plain error standard of review, and not the Fifth Circuit's old rule that such findings and conclusions were unreviewable. *Id.*

Respectfully, the Fifth Circuit's opinion necessarily concludes that its previous rulings of "no review" on such issues were revived as part of the Rule of Law in this case. Specifically, in the Fifth Circuit's resolution of this appeal, the Court concluded:

Finally, Bazan does not cite to a single case in which this court, or any other, has reversed a district court's denial of a mitigating role adjustment. At the very best, Bazan has shown that his entitlement to the reduction was debatable. . . .

(Exhibit A, page 5).

Mr. Bazan submits the Fifth Circuit, by looking to its now overruled caselaw as authority in this case for affirming the District Court, is taking action which is contrary to this Court's holding in *Davis*. To this end, *Davis* is clear. The Appellate Courts must apply plain error review to unpreserved arguments. 140 S. Ct. at 1061. In other words, by relying on the fact that there is no case history to establish plain error—when plain error was not the law in the Fifth Circuit on unpreserved errors—is a new decision which is contrary to this Court's holding in *Davis*. Thus, Mr. Bazan respectfully argues that he has shown sufficient grounds to grant this Petition and to encourage this case to proceed to further review.

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,

James Scott Sullivan
JAMES SCOTT SULLIVAN
LAW OFFICES OF J. SCOTT SULLIVAN
22211 I.H. 10 WEST, SUITE 1206
SAN ANTONIO, TEXAS 78257
(210) 722-2807