

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**

APPENDIX VOLUME

JAMES SCOTT SULLIVAN
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APPENDIX A

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

No. 18-40725
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

August 5, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSE ARMANDO BAZAN,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:16-CR-1376-4

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before SMITH, WIENER, and WILLETT, Circuit Judges.

PER CURIAM:*

When first presented with Defendant-Appellant Jose Armando Bazan's appeal, this court affirmed his sentence on the ground that, because his sole assertion of error was a question of fact capable of resolution at sentencing, the issue could not constitute plain error. *United States v. Bazan*, 772 F. App'x 214 (5th Cir. 2019). The Supreme Court vacated that decision and remanded for

* 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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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.

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further consideration in light of *Davis v. United States*, 140 S. Ct. 1060, 1061 (2020), which requires that unpreserved claims of factual error be reviewed under the full plain error test. Because Bazan does not show that the district court committed a clear or obvious error, we again affirm.

Bazan pleaded guilty to conspiracy to possess with the intent to distribute 500 grams or more of cocaine. The conspiracy began when Bazan's father and Hugo De Hoyos stole some of the forty bundles of cocaine that they were transporting for a third party. They took thirty of the bundles for themselves and diluted the remaining ten into forty counterfeit bundles. They then staged a car accident so that the cloned bundles would be seized by law enforcement. Bazan's father took fifteen bundles as his share and asked Bazan to put him in touch with someone who would sell some of them. Bazan contacted a friend to see if the friend could sell part of the cocaine and then gave his friend's phone number to his father. Bazan's father and the friend arranged to sell three bundles of the cocaine but abandoned the plan when the cocaine would not sell because of its poor quality.

For the first time on appeal, Bazan contends that the district court erred when calculating his United States Sentencing Guidelines imprisonment range by failing to award an offense level reduction under section 3B1.2 for having a mitigating role in the offense. When a defendant has failed to object before the district court, "our review is for plain error under Federal Rule of Criminal Procedure 52(b)." ¹ *United States v. Fuentes-Canales*, 902 F.3d 468, 473 (5th Cir. 2018). Under plain error review, the defendant has the burden to show four prongs. First and second, the defendant must show "(1) an error[,] (2) that is clear and obvious." *United States v. Hernandez-Martinez*, 485 F.3d

¹ "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." FED. R. CRIM. P. 52(b).

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270, 273 (5th Cir. 2007). A factual finding, as is at issue here, “is not clearly erroneous as long as it is plausible in light of the record as a whole.” *United States v. Jeffries*, 587 F.3d 690, 692 (5th Cir. 2009). Then a defendant must show “(3) that [the error] affected his substantial rights.” *Hernandez-Martinez*, 485 at 273. If the first three prongs are met, “the court of appeals should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1905 (2018) (quoting *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1340 (2016)).

Section 3B1.2 of the Guidelines directs that a defendant’s offense level be reduced by two levels “[i]f the defendant was a minor participant in any criminal activity,” and a further reduction up to a total of four levels if the participation was “minimal.” U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (U.S. SENTENCING COMM’N 2016). The reduction applies to a defendant “who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity.” *Id.* cmt. n.3(A). “The defendant has the burden to show that he is entitled to the adjustment.” *United States v. Sanchez-Villarreal*, 857 F.3d 714, 721 (5th Cir. 2017). Whether a defendant played a mitigating role is a question of fact, and the court 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.

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U.S.S.G. cmt. n.3(C). “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.” *United States v. Thomas*, 932 F.2d 1085, 1092 (5th Cir. 1991); *see also United States v. Castro*, 843 F.3d 608, 613 (5th Cir. 2016).

Bazan has failed to show that the district court clearly erred in not awarding him a mitigating role reduction. In light of the record as a whole, the district court’s implicit finding that Bazan did not play a minor role in the criminal activity is plausible. First, many of the factors set forth in the Guidelines commentary weigh against granting the reduction. Bazan cites to no evidence, not even his own statement, that he did not know the scope of the overall conspiracy. Bazan helped organize the drug-trafficking conspiracy by acting as a broker, helping his father arrange for the sale of the stolen cocaine. Bazan not only exercised decision-making authority over whom he selected to put in touch with his father, he effectively recruited his friend as an additional participant in the crime. It is therefore plausible to view Bazan’s involvement as more than merely peripheral.

Second, in light of those factors, it is not at all clear that Bazan is significantly less culpable than the average participant in the criminal activity here. Bazan is less culpable than his father and De Hoyos, who agreed to transport forty bundles of cocaine for a third party, developed a plan to steal part of the cocaine by cloning bundles, executed the plan by staging a vehicle accident and taking the cocaine, and maintained possession of the stolen cocaine. But Bazan’s culpability as compared to the other three participants is not as clear. Victor Gonzales accompanied Bazan’s father and De Hoyos when they picked up the cocaine and then, in exchange for \$5,000, he staged the car

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accident, which led to the seizure of the counterfeit bundles by driving the wrecked car and placing a fraudulent 911 call. Bazan presents no evidence, however, that Gonzales had any of the discretion that Bazan possessed or that Gonzales recruited another member of the conspiracy as Bazan did.

Vanessa Rios discovered her husband, De Hoyos, repackaging the diluted cocaine at their house, then took it on herself to help package five of the bundles when her husband told her that he needed to work quickly. Finally, the unindicted friend of Bazan's arranged with Bazan's father to sell three of the bundles and attempted to do so, stopping only when he could not find buyers. In his brief, Bazan does not address his culpability as compared to Gonzales, Rios, or Bazan's friend. It would be plausible based on the record to conclude that Bazan was roughly as culpable as those three, so Bazan has failed to show that he was substantially less culpable than the average participant.

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. He has certainly not shown that failing to grant him the reduction was a clear error, and therefore cannot meet the high bar of plain error.

The judgment is AFFIRMED.

APPENDIX B

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

United States District Court

Southern District of Texas

ENTERED

September 06, 2018

David J. Bradley, Clerk

UNITED STATES OF AMERICA
v.
JOSE ARMANDO BAZAN

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 7:16CR01376-S5-004
USM NUMBER: 91492-379 See Additional Aliases.

THE DEFENDANT:

pleaded guilty to count(s) 1 on May 10, 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:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 846, 841(a)(1) and 841(b)(1)(B)	Conspiracy to possess with intent to distribute 500 grams or more of cocaine.	09/03/2016	1

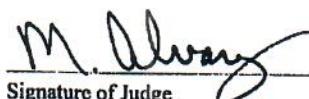
 See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 6 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) 2nd SS Ind., 3rd SS Ind., and 4th SS Ind., as to this defendant. 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 23, 2018
Date of Imposition of Judgment
Signature of JudgeMICAELA ALVAREZ
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

September 4, 2018

Date

18-40725-80
Entered 1751241
NP

DEFENDANT: JOSE ARMANDO BAZAN
CASE NUMBER: 7:16CR01376-S5-004

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 24 months.

The Court further orders that the imprisonment term imposed in the instant offense run concurrently with the imprisonment terms that were imposed in Criminal Docket Numbers 7:15CR00936-001 and 7:17CR00691-001.

See Additional Imprisonment Terms.

The court makes the following recommendations to the Bureau of Prisons:
That the defendant be placed in an institution where he can receive drug and/or alcohol abuse treatment and/or counseling.

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

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DEFENDANT: JOSE ARMANDO BAZAN
CASE NUMBER: 7:16CR01376-S5-004

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SUPERVISED RELEASE

Upon release from imprisonment you will be on supervised release for a term of: 3 years.
said Supervised Release Terms to run concurrently with the Supervised Release Terms imposed in Criminal Docket Number
7:15CR00936-001 and 7:17CR00691-001.

See Additional Supervised Release Terms.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (check if applicable)
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5. You must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)
7. You must participate in an approved program for domestic violence. (check if applicable)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

See Special Conditions of Supervision.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

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DEFENDANT: JOSE ARMANDO BAZAN
CASE NUMBER: 7:16CR01376-S5-004

SPECIAL CONDITIONS OF SUPERVISION

You must participate in an inpatient or outpatient substance-abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the costs of the program, if financially able.

You must participate in an inpatient or outpatient alcohol-abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the costs of the program if financially able.

You may not possess any controlled substances without a valid prescription. If you do have a valid prescription, you must follow the instructions on the prescription.

You must submit to substance-abuse testing to determine if you have used a prohibited substance, and you must pay the costs of the testing if financially able. You may not attempt to obstruct or tamper with the testing methods.

You may not use or possess alcohol.

You may not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances, including synthetic marijuana or bath salts, that impair a person's physical or mental functioning, whether or not intended for human consumption, except as with the prior approval of the probation officer.

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DEFENDANT: JOSE ARMANDO BAZAN
CASE NUMBER: 7:16CR01376-SS-004

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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>
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<input type="checkbox"/> See Additional Restitution Payees.		
TOTALS	<u>\$0.00</u>	<u>\$0.00</u>
<input type="checkbox"/> Restitution amount ordered pursuant to plea agreement \$ _____		
<input type="checkbox"/> 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).		
<input type="checkbox"/> The court determined that the defendant does not have the ability to pay interest and it is ordered that:		
<input type="checkbox"/> the interest requirement is waived for the <input type="checkbox"/> fine <input type="checkbox"/> restitution.		
<input type="checkbox"/> the interest requirement for the <input type="checkbox"/> fine <input type="checkbox"/> restitution is modified as follows:		
<input type="checkbox"/> 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: JOSE ARMANDO BAZAN
CASE NUMBER: 7:16CR01376-SS-004

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

Defendant and Co-Defendant Names
including defendant number

Total Amount

Joint and Several
Amount

Corresponding Payee,
if appropriate

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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