DOCKET NO. _____

In The
Supreme Court of the United States

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FERNEY SALAS TORRES,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SAM A. SCHMIDT, ESQ.
Attorney for Petitioner
FERNEY SALAS TORRES
29 Broadway - Suite 1412
New York, NY 10006
(212)346-4666

QUESTIONS PRESENTED

1. A writ of certiorari is requested to determine whether the Second Circuit Court of Appeals erred in affirming Ferney Salas Torres' judgment of conviction and sentence which was procedurally unreasonable.

PARTIES TO THE PROCEEDING

The parties to the proceeding are those named in the caption. The Petitioner is Ferney Salas Torres. The Respondent is the United States of America.

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SUPREME COURT
OF THE UNITED STATES

FERNEY SALAS TORRES,

Petitioner,

- against -

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The Petitioner, Ferney Salas Torres, respectfully prays that a Writ of Certiorari issue to review the Decision of the United States Court of Appeals for the Second Circuit dated November 17, 2021 affirming a judgment of conviction entered in the United States District Court for the Southern District of New York following a plea of guilty (Sullivan, J.).

CITATION TO THE OPINION BELOW

The Decision of the Second Circuit Court of Appeals is a published Opinion. United States v. Salas Torres, ___ F.3d ___ (2d Cir. 2021), and appears in the Appendix annexed hereto [A1-A26].

STATEMENT OF JURISDICTION

The Decision of the United States Court of Appeals for the Second Circuit was entered in this case on November 17, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in the issues raised herein include, *inter alia*, U.S.S.G. §2D1.1 and U.S.S.G. §3B1.2.

STATEMENT OF THE CASE

I. THE CRIMINAL CONDUCT

According to the Probation Department's Pre-Sentence Report ["PSR"], on March 17, 2018, the United States Coast Guard was patrolling eighty nautical miles southwest of Panama, when it identified what is known as a "go-fast" or "panga" boat heading north at approximately thirty knots. The Coast Guard launched a smaller boat to investigate. The Coast Guard crew observed two people on the go-fast boat, later identified as Saul Calonjes Salas and Heyder Renteria Solis, throwing packages overboard. Ferney Salas Torres was also seen steering the go-fast panga boat. A few minutes later, the boat came to a complete stop and the three men surrendered to the

Coast Guard officers who recovered approximately thirty-four packages containing about 945 kilograms of cocaine and about 10 kilograms of amphetamine from the go-fast panga boat and the water. PSR at ¶¶11-14.

II. THE INDICTMENT

Mr. Salas Torres, his brother Saul Calonjes Salas, and Heyder Renteria Solis were charged by a Southern District of New York grand jury in a two-count indictment filed on July 19, 2018. The indictment generally charged the men as follows: Count One – conspiracy to manufacture, distribute or possess with intent to manufacture and distribute, five kilograms and more of mixtures and substances containing a detectable amount of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. §§70506(b) and 70504(b)(2); and, Count Two – manufacturing and distributing, and possessing with intent to manufacture and distribute, while on board a vessel subject to the jurisdiction of the United States, five kilograms and more of mixtures and substances containing a detectable amount of cocaine in violation of 46 U.S.C. §§70503(a)(1), 70504(b)(2), 70506(a) and 18 U.S.C. §2.

III. THE GUILTY PLEA

Mr. Salas Torres entered into a written plea agreement with the Government dated January 11, 2019. In the agreement, the Government calculated that Mr. Salas Torres' total offense level would be 29, his Criminal History Category a III[1], and estimated that the advisory Sentencing Guidelines range would be 108 to 135 months' imprisonment, with a mandatory minimum term of sixty months' imprisonment as follows:

Base Offense Level (450 kilograms of cocaine) [U.S.S.G. §2D1.1(a)(5)] with reduction for minor role adjustment [U.S.S.G. §2D1.1(c)(1)]:	34
Adjustment for role in the offense – minor participant [U.S.S.G. §3B1.2(b)]:	-2
Acceptance of Responsibility [U.S.S.G. §§3E1.1(a) and (b)]:	-3
Total Offense Level:	29

[1] The Criminal History Category was III because, on March 17, 2008, Mr. Salas Torres pleaded guilty in the United States District Court for the Middle District of Florida to conspiracy to possess with intent to distribute cocaine while on board a vessel subject to the jurisdiction of the United States after he was apprehended by the Coast Guard while driving a go-fast boat near the border of Costa Rica and Panama carrying approximately 1,700 kilograms of cocaine. As a result, on June 19, 2008, he was sentenced to 120 months' imprisonment to be followed by three years of supervised release. He was released from Bureau of Prisons custody on October 14, 2016 and then deported. PSR ¶40.

The plea agreement also included a condition "... that the defendant will not file a direct appeal; nor bring a collateral challenge, including but not limited to an application under Title 28, United States Code, Section 2255 and/or Section 2241; nor seek a sentence modification pursuant to Title 18, United States Code, Section 3582(c), of any sentence within or below the Stipulated Guidelines Range of 108 to 135 months' imprisonment..." Plea Agreement at p. 4.

On February 4, 2019, Mr. Salas Torres appeared with counsel before the Honorable Richard J. Sullivan and pleaded guilty to a lesser included offense contained in Count One of the indictment, conspiracy to manufacture, distribute or possess a controlled substance on a vessel, in violation of 46 U.S.C. §§70506, 70504(b)(2) and 21 U.S.C. §960(b)(2)(B). (P.18, 39-40).[2] There, he admitted that, in March of 2018, he entered into an agreement with others in Colombia to deliver a quantity of cocaine in excess of 450 kilograms to others in the open seas that would end up in the United States, knowing that it was illegal. (P.39-42).

IV. THE PRE-SENTENCE REPORT

The PSR, finalized on April 26, 2019, included a Sentencing Guidelines

[2] Numbers in parentheses preceded by the letter "P" refer to the pages of the transcript of the February 4, 2019 proceeding.

calculation that was identical to the estimate included by the Government in the plea agreement. With a total offense level of 29, and a Criminal History Category of III, Mr. Salas Torres faced an adjusted Guidelines range of 108-135 months in prison, with a mandatory minimum of sixty months' imprisonment. 21 U.S.C. §960(b)(2)(B). PSR ¶¶29-38, 67. However, the Probation Officer found that a sentence "...of 84 months' imprisonment, a variance below the minimum term prescribed by the guidelines, is appropriate in this case and will serve to sufficiently punish the defendant for his criminal behavior and to promote respect for the law, pursuant to the sentencing factors outlined in 18 USC 3553(a)." PSR at p. 24.

V. THE MAY 17, 2019 PROCEEDING

When the parties appeared in the district court on May 17, 2019 for what was scheduled to be Mr. Salas Torres' sentencing, it immediately became clear that the judge fundamentally disagreed with the Guidelines calculations prepared by the Government and Probation Officer. Specifically, the court addressed the parties about two issues: (1) why a pilot enhancement [U.S.S.G. §2D1.1] had not been included in their calculations even though the Probation Officer used the word "pilot" when describing Mr. Salas Torres' conduct in the PSR; and (2) the inclusion of the minor

participant reduction [U.S.S.G. §3B1.2]. (T.11-23).[3] At that time, although he had not done so previously, defense counsel told the court that he was objecting to the use of the word "pilot" in the PSR (T.13, 23). At the end of that discussion, the court requested submissions on the issues and ordered that a Fatico hearing, a sentencing hearing at which the prosecution and defense may introduce evidence relating to the appropriate sentence [United States v. Fatico, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980)], be held (T.54).

VI. THE *FATICO* HEARING

On August 28, 2019, a Fatico hearing was held during which the Government called one witness, Special Agent Ronald Sandoval, who testified that he became involved in this case after hearing on a wire intercept about a load of narcotics that was going to be transported to Costa Rica. Mr. Salas Torres was not heard on the wire, nor was his name mentioned. SA Sandoval learned about the location of the go-fast boat when he heard on the intercept that the GPS signal to the boat had been lost and a picture of the boat's last-known coordinates was sent. The boat was later found by the United States Coast Guard with three crewmen aboard. Sandoval described the boat

[3] Numbers in parentheses preceded by the letter "T" refer to the pages of the transcript of the May 17, 2019 proceeding.

as having a compartment underneath the floor to store the kilos of cocaine. He added that a typical go-fast boat was not the really fast ones seen on television, but is a "small boat" called a "panga"[4] with no cabin or sleeping quarters below for the crew, approximately "... 30-, 40-, 50-footer, the most," that is easily maneuvered during low tide (FH.16, 18, 21, 45-52).[5] SA Sandoval added that these boats are considered by narcotics organizations to be disposable as evidenced by the fact that the mariners are instructed to sink them once the narcotics are loaded onto the next boat for the next leg of the journey (FH.36).

SA Sandoval also testified that in May or June of 2018, he spoke with Mr. Salas Torres, who he described as credible, during a proffer session with the Government. He described him as a "typical mariner" – low socio-economic status and very little education. During that proffer session, Mr. Salas Torres identified three to five members of the narcotics organization for which he had been working. Because of the corruption in the Colombian National Police, they were unable to fully investigate Mr.

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[4] A "panga" boat is "any of various small boats often used for fishing specifically: a skiff with a raised bow that is typically powered by an outboard motor." https://www.merriam-webster.com. The Government admitted into evidence at the Fatico hearing photographs of the boat seized in this case which was approximately30-40 feet.

[5] Numbers in parentheses preceded by the letters "FH" refer to the pages of the transcript of the August 28, 2019 Fatico Hearing.

Salas Torres' information. However, SA Sandoval testified that in March of 2019, he recruited a new confidential informant who corroborated what Mr. Salas Torres had told him about the people in the organization (FH.52-55, 58-61).

VII. THE SENTENCING PROCEEDING

On December 10, 2019, Mr. Salas Torres appeared with counsel again for sentencing before Judge Sullivan. The court began by outlining his Sentencing Guidelines calculation. He began with a base offense level of 38, and added two levels because he determined that Mr. Salas Torres was the "pilot" of the go-fast boat. He deducted three levels for acceptance of responsibility, but refused to give the two-level reduction suggested by the Government and the PSR for his role as a minor participant. His reasons for denying the minor participant reduction included his beliefs (some of which were erroneous) that: (1) any duress under which Mr. Salas Torres was acting as a result of the extortion plot does not require a role reduction; (2) he was a link in the chain and knew that he was transporting cocaine; (3) he was paid $45,000 or $50,000 for his services; (4) he was the person on the go-fast boat who was responsible for communicating with the others in the organization during the journey; and (5) this was not his first time making one of these trips. He added that, if Mr. Salas Torres is the type of player who is a minor participant, "... it seems to me then virtually everyone

is a minor participant other than Pablo Escobar." The district court's Guidelines calculation resulted in a total offense level of 37. As a Criminal History Category III, the applicable Guidelines range was 262 to 327 months. (T.25-27; S.10-27)

The district court then engaged in a discussion with the parties about the §3553(a) factors. The first issue that the defense asked the court to consider as a mitigating factor was the fact that Mr. Salas Torres was acting under a degree of duress. Counsel explained that Mr. Salas was driving the go-fast panga boat because his wife and daughter had been kidnaped and a man known as "the Chair" (whom he previously identified as the leader of the organization that was confirmed by SA Sandoval) paid the ransom for his family and then, to pay off the debt to the Chair, Mr. Salas Torres made four narcotics deliveries. He was arrested on the fourth trip. He corroborated his story with a photograph of the Chair that he gave to the Government which he had given to his wife to hold in the event that he was arrested.[6] The district court refused to consider Mr. Salas Torres' explanation, instead finding that it was his choice to make these narcotics deliveries. The court was strongly influenced by his factual findings that: (1) this arrest came less than two years after his release from prison after serving a sentence for committing the same crime and while on post-release

[6] The photograph was emailed to counsel who presented it to the government.

supervision; and (2) there was no corroboration for his duress claims.[7] (S.28-34, 39-40)

The second issue discussed was the potential sentencing disparity both within the Southern District of New York and with other districts. The court was not moved by this argument either, finding that Mr. Salas Torres was not similarly situated to other defendants because of his status as a recidivist. He added that this makes him "unique," especially given that this crime was committed within two years of release. Defense counsel argued that the bottom of the range for the Guidelines calculation included in the plea agreement and PSR would be reasonable here because it would be triple what first offenders generally receive when convicted of the some conduct in the Southern District of New York. (S.34-39)

The Government disagreed with the district court and asked the judge to impose a sentence within the plea agreement and PSR's Guidelines calculation, citing the facts that: (1) there was no allegation of violence here; (2) Mr. Salas Torres did not have a leadership role in the organization; (3) he will be old when he is released from prison and will not have the physical ability required to make this type of boat trip; (4) a sentence within the plea agreement's Guidelines range would deter him and others from

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[7] Contrary to the district court's claim that there was no corroboration, SA Sandoval did obtain some corroboration from others regarding the players in the organization, there were documents that supported his explanation, and his brother's proffers also confirmed his explanation.

committing this type of crime; and (5) the Guidelines range in the plea agreement and PSR takes into account Mr. Salas Torres' life and the seriousness of the charged offense (S.44-45).

Before imposing sentence, Mr. Salas Torres was given the opportunity to address the court. At that time, he admitted his conduct and explained that he did not want to do it, but that he did it to protect his family following the kidnaping of his wife and daughter. (S.45-50)

The district court then explained that he did not find credible Mr. Salas Torres' explanation that he only committed these crimes because of the duress because it was uncorroborated and inconsistent with SA Sandoval's Fatico hearing testimony about mariners being a dime a dozen which, to the court, would mean that there would be no need to threaten people like Mr. Salas Torres to convince them to comply when others would willingly do the job. He also found that it did not make sense that Mr. Salas Torres would go to the police to report that his family had been robbed but not tell them about the extortion plot when he ultimately relocated his family to another part of Colombia anyway. (S.52-53) The court then imposed a sentence of twenty years' imprisonment to be followed by a five-year term of post release supervision (S.58-59). He claimed that this lengthy sentence was appropriate in this case because: (1) this is an incredibly serious crime; (2) Mr. Salas Torres was involved in multiple trips with

"ton quantity loads" of cocaine; (3) after his prior conviction for which he got a ten-year sentence, he resumed the boat trips within two years of his release; (4) he is a "drug trafficker," not a boat captain or fisherman, and is responsible for the consequences that those drugs have in the United States; (5) the fact that he only has a grade school education is not an excuse; and (6) he did not think about the consequences for his daughter of his drug trafficking (S.54-58).

VIII. THE DIRECT APPEAL TO THE SECOND CIRCUIT COURT OF APPEALS

On direct appeal, Mr. Salas Torres argued that the district court committed procedural and substantive errors in imposing sentence. First, he argued that his sentence was procedurally unreasonable when viewed in the context of the entire record because the district court had no legitimate basis to: (1) add a two-level enhancement for being the pilot of the go-fast boat; (2) increase the base offense level by four levels; and (3) remove the two-level benefit given to minor participants. Second, he argued that his sentence was substantively unreasonable because it cannot be said that the sentence imposed was sufficient but not greater than necessary to accomplish the goals of sentencing. Although the sentence was below the Guidelines range as determined by the court, it is clear that the judge did not give the appropriate

weight to the 18 U.S.C. §3553(a) sentencing factors outlined by the defense, the Government, and Probation including, *inter alia*: (1) the duress Mr. Salas Torres was under when he agreed to make the trips to transport narcotics for the Chair (specifically, the threats to his family); (2) the cooperation he offered the Government to assist with the prosecution of others; (3) his truthfulness during proffer sessions with the Government; (4) his limited education; (5) his medical history; and (6) the disparity between the sentence imposed upon Mr. Salas Torres and the other defendants in this case as well as defendants in other cases in the Southern District of New York and elsewhere.

By decision dated November 17, 2021, the Second Circuit affirmed Mr. Salas Torres' conviction, holding that the district court did not err in its findings or abuse its discretion in applying the pilot enhancement or refusing to give the reduction for being a minor participant. Decision at p. 22. The Court further held that the sentence was not substantively unreasonable. Decision at p. 26.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. A WRIT OF CERTIORARI IS REQUESTED TO DETERMINE WHETHER THE SECOND CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING FERNEY SALAS TORRES' SENTENCE WHICH WAS PROCEDURALLY UNREASONABLE

The issue presented here – whether the district court committed procedural errors in imposing sentence upon Ferney Salas Torres following a guilty plea – is of national significance because (1) the definition of the term "pilot," as used in U.S.S.G. §2D1.1 is vague and needs to be defined by this Court in order to protect criminal defendants from its arbitrary application; (2) the minor role adjustment included in U.S.S.G. §3B1.2 is being mis-applied by district courts throughout the nation which are using other, unrelated factors as a basis for denying the adjustment. As a result, this sentence, which was imposed by the district court using an extremely broad definition of the terms pilot and the denial of the minor role adjustment to determine the offense level, cannot stand.

An examination of the record of this case reveals that Mr. Salas Torres' sentence was procedurally unreasonable when viewed in the context of the entire record because the district court's Sentencing Guidelines calculation was wrong as it included enhancements that were not deserved and took away benefits that were deserved.

Although they are now only advisory [United States v. Booker, 543 U.S. 220

(2005)], district courts must begin all sentencing proceedings by correctly calculating the applicable Sentencing Guidelines range. Gall v. United States, 552 U.S. 38, 49 (2007); United States v. Preacely, 628 F.3d 72, 79 (2d Cir. 2010). And, an error in determining the Guidelines range renders the sentence procedurally unreasonable. Gall v. United States, 552 U.S. at 51. Here, there can be no doubt that there were procedural errors in the court's Guidelines calculation.

The plea agreement and PSR contained identical Sentencing Guidelines calculations:

Base Offense Level (450 kilograms of cocaine) [§2D1.1(a)(5)] with 4-level reduction for minor role adjustment [§2D1.1(c)(1)]:	34
Adjustment for role in offense – minor participant [§3B1.2(b)]:	-2
Acceptance of Responsibility [§3E1.1(a), (b)]:	-3
Total Offense Level:	29

With a total offense level of 29, and a Criminal History Category of III, Mr. Salas Torres faced an adjusted Guidelines range of 108-135 months in prison, with a mandatory minimum of sixty months' imprisonment [21 U.S.C. §960(b)(2)(B). PSR ¶¶ 29-38, 67.

However, that calculation was not high enough for the district court who, at

sentencing, dramatically increased Mr. Salas Torres' Guidelines calculation as follows:

Base Offense Level [§2D1.1(a)(5)]:	38
Pilot Enhancement [§2D1.1(b)(3)]:	+2
Acceptance of Responsibility [§3E1.1(a), (b)]:	-3
Total Offense Level:	37

(S.10-26). With a new total offense level of 37, and a Criminal History Category of III, Mr. Salas Torres' adjusted Guidelines range was now an astronomical 262 to 327 months [S.27] – significantly more than double the 108-135 months range included in the plea agreement and PSR.

The following chart provides a comparison between the Guidelines calculations included in the plea agreement and PSR and the one ultimately used by the district court in imposing sentence:

	PLEA AGMT and PSR	***SENTENCING***
Base Offense Level [§2D1.1(a)(5)]:	34	38
Pilot Enhancement [§2D1.1(b)(3)]:	--	+2
Adjustment for role in offense – minor participant [§3B1.2(b)]:	-2	--
Acceptance of Responsibility [§§3E1.1 (a) and (b)]:	-3	-3

Total Offense Level:	29	37
Advisory Sentencing Range:	108-135 mos.	262 to 327 mos.

Mr. Salas Torres submits that the district court made procedural errors in his Guidelines calculation as he had no legitimate basis to: (1) add a two-level enhancement for being the pilot of the go-fast panga boat [U.S.S.G. §2D1.1(b)(3)]; (2) increase the base offense level by four levels (by removing the four-level base offense level adjustment for minor role [§2D1.1(c)(1)]; and (3) remove the two-level benefit given to minor participants [§3B1.2(b)].

A. *The District Court Abused its Discretion in Including a Pilot Enhancement Pursuant to U.S.S.G. §2D1.1 in His Sentencing Guidelines Calculation*

The first procedural error committed by the district court was in imposing a two-level enhancement pursuant to §2D1.1(b)(3) upon determining that Mr. Salas Torres was the "pilot" of the go-fast panga boat.[8] The Sentencing Guidelines state that a defendant's offense level is to be increased by two levels "[i]f the defendant unlawfully imported or exported a controlled substance under circumstances in which ... the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other

[8] The district court did not base its determination on a finding that Mr. Salas Torres was the captain, "I don't [sic] whether Mr. Salas Torres was a captain of the boat." (S.19).

operation officer aboard any craft or vessel carrying a controlled substance." U.S.S.G. §2D1.1(b)(3)(c).

The critical problem with U.S.S.G. §2D1.1(b)(3)(c) is that it fails to define, in the context of this enhancement, the terms "pilot, copilot, captain, navigator, flight officer, or any other operation officer," leaving it to the district courts and Courts of Appeals to make their own interpretations and insert their own definitions. And, although we know that undefined terms used in the Guidelines should customarily be given their plain and ordinary meanings [see Chapman v. United States, 500 U.S. 453, 461-62 (1991)], the courts must use some common sense in doing so. This case presents the perfect example of when the plain meanings simply are not enough.

According to the Second Circuit, the pilot enhancement was properly included in the district court's Sentencing Guidelines calculation. In so finding, the Second Circuit applied what it claimed to be the "plain meanings" or "ordinary dictionary definitions" of the terms "pilot" and "navigator" which it obtained from the Merriam-Webster's Collegiate Dictionary (11th ed. 2003). Decision at pp. 17-18. It defined "pilot" as "one employed to steer a ship." Decision at p. 17. This definition, according to the Second Circuit, does "...not require possession of special skill, authority, or training." Decision at pp. 17-18. That finding is shortsighted.

In using this ordinary dictionary definition, what the Second Circuit and other

Circuits have failed to do was to refine it by investigating the terms used within that definition. Since the dictionary defined a pilot as "one employed to steer a ship," the Court should have used that same dictionary to determine the ordinary definition of a "ship." Had it done so, it would have discovered that a "ship" is defined as "a large seagoing vessel" or "a sailing vessel having a bowsprit and usually three masts each composed of a lower mast, a topmast, and a topgallant mast." https://www.merriam-webster.com. That definition does not even come close to describing the go-fast panga boat used by Mr. Salas Torres and the others which the Second Circuit has previously described simply as "... a small, rapid speed boat, which, because of its speed and low profile, is often used in drug trafficking." United States v. Prado, 933 F.3d 121, 126 (2d Cir. 2019).[9] Applying the ordinary dictionary definition of a "ship," it is difficult to conceive under what circumstances a go-fast panga boat, like the one Mr. Salas Torres was alleged to be steering in this case, can be defined as a "ship."[10]

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[9] In its effort to uphold this conviction, the Second Circuit, without explanation, stretched its definition of a go-fast boat from the "... small, rapid speed boat..." definition it provided in United States v. Prado, 933 F.3d at 126, to a "...thirty-to-fifty-foot fishing boat with a hidden compartment below deck used by drug-trafficking organizations ('DTOs') to transport narcotics" in this case. Decision at p. 4. However, under either definition, a go-fast speed boat cannot be deemed a "ship" and, thus, its steerer, who is not required to have much skill, should not be deemed a "pilot" for these purposes.

[10] Similarly, U.S.S.G. §2D1.1(b)(3)(c) qualifies the list of the positions subject to the pilot enhancement as "officers" using the phrase "or other operational officers."

On direct appeal, Mr. Salas Torres acknowledged that several Circuits have defined the terms "pilot" and "navigate" in an overly broad manner to include steering any nautical vessel. See United States v. Bautista-Montelongo, 618 F.3d 464, 466 (5th Cir. 2010) (Adopting the holdings of the First, Seventh, and Eleventh Circuit Courts of Appeals that the enhancement should apply to a defendant who "drove a boat containing contraband."); United States v. Rendon, 354 F.3d 1320, 1329 (11th Cir. 2003) (The Court declined to adopt a technical definition of the term "captain" and applied it to a defendant who operated a boat.); United States v. Senn, 129 F.3d 886, 896-97 (7th Cir. 1997) (Stating that "the plain language of the statute carries the day" and declining to find that a pilot or captain of a boat must have special skills) *abrogated on other grounds* United States v. Vizcarra, 668 F.3d 516, 523 n. 2 (7th Cir. 2012); United States v. Guerrero, 114 F.3d 332, 346 (1st Cir. 1997) (Finding that the term "pilot" did not require proof of any special skill or authority, only evidence that the person steered the vessel.).

As an example, the First Circuit, in its majority decision in United States v. Trinidad, 839 F.3d 112, 114 (1st Cir. 2016), held that the appellant was a "navigator"

The Second Circuit and other Circuits should use the "ordinary" definition of "officer" which is "the master or any of the mates of a merchant or passenger ship." https://www.merriam-webster.com. The important word in that definition being the word "ship" which, as discussed above, is a category of nautical vessels that would not include go-fast panga boats.

because he took "turns steering the vessel... traveling from Colombia to the Dominican Republic... utilizing Global Positioning Devices." In doing so, the majority cited the definition of the term "navigate" found in various ordinary English language dictionaries:

> The Oxford English Dictionary 259 (2d ed. 1989) (defining "navigate" to mean, among other things, "to sail, direct, or manage (a ship)" and "to plot and supervise the course of (an aircraft or spacecraft)"); The Random House Dictionary of the English Language 1282 (2d ed. 1987) (defining "navigate" to mean, among other things, "to direct or manage (a ship ...) on its course"); Webster's Third New Int'l Dictionary 1509 (1981) (defining "navigate" to mean, among other things, "to steer, direct, or manage in sailing: conduct (a boat) upon the water by the art or skill of seamen").

Id. at 115. What is most interesting about this excerpt is that the vessels being described, include "a ship" and "an aircraft or spacecraft," which, unlike a go-fast panga boat, are vessels that one would expect the person steering to have a great deal of skill and licensing.

As argued by Mr. Salas Torres in the Second Circuit, and as recognized by the dissent in Trinidad, these general definitions are not what should be used in rendering this determination. The Trinidad dissent carefully considered the difference between an overly broad definition of the term "navigator," like those found in ordinary English dictionaries, and the definition provided in a nautical dictionary which is more

appropriately applied in a case of this nature:

> The majority's opinion relies on an overly broad way of reading this term. To be a navigator contains its own particular subset of skills that are more easily summarized by than merely driving a boat. Although the majority cites common dictionaries of the English language to equate "navigate" with "steer," much more telling, in my view, is the definition of "navigate" found in nautical dictionaries. Here the definition is "[t]o safely operate a vessel employing the elements of position, course and speed" and "[t]o determine position, course and speed using instruments." Definition of "Navigate", Sea Talk Nautical Dictionary, http://www.seatalk.info/(last visited Oct. 6, 2016). This definition embraces the notion that in nautical terms "to navigate" actually requires extra abilities to determine "position, course and speed using instruments."... To assume a broader definition of "navigator" suggests that the sheer act of driving somehow enhances the individual's criminal conduct. But would we ever suggest that suburban or rural drug dealers should receive an enhanced sentence simply because they drive a car to the location of their drug transactions rather than walk or take public transportation as their more urban counterparts might?... If the truth be said he was a water borne "mule," nothing more than the common "mules" that sit in commercial airlines, transporting contraband in and on their bodies, for which they are not penalized additionally as has been done with Trinidad.

United States v. Trinidad, 839 F.3d at 119-20. It is these nautical dictionary definitions, which more accurately describe the role of a pilot or navigator, that Mr. Salas Torres asks this Court to apply to U.S.S.G. §2D1.1.

The Second Circuit disagreed with Mr. Salas Torres' request to apply the

Trinidad dissent's reasoning and definitions, finding that "The Guideline lacks technical references that could suggest that the drafters used 'pilot' and 'navigator' in a technical sense such as to warrant the use of a technical dictionary." Decision at p. 21. While it may be true that the Guideline "lacks technical references," that is because it does not include any references whatsoever to the skills required that would assist a district court in determining the proper application of the enhancement. That is what Mr. Salas Torres asks this Court to do here.

While refusing to utilize the nautical definition in making its determination as to whether the pilot enhancement should be applied, the Second Circuit held that "even if we were to employ a technical definition, we would not reach a different result because the district court properly found that the defendant here had special skills." Decision at p. 20. According to the Court, that special skill is his ability to steer this go-fast panga boat. Decision at p. 20. Both the district court and Second Circuit got this wrong. Looking at the definition of a go-fast speed boat provided in United States v. Prado, 933 F.3d at 126, which is simply "... a small, rapid speed boat," it is difficult to see how special the skills would need to be to steer it, especially when using a pre-programed GPS device.

Mr. Salas Torres' affidavit included with defense counsel's October 3rd letter disputing the addition of the pilot enhancement makes it crystal clear that he did not

possess "special" skills that would render a "pilot" enhancement appropriate. There, he stated that he: (1) was one of three crewmen on the boat; (2) at times he steered the boat and, at other times, he held the GPS instrument which is about the size of a cell phone; (3) the GPS was programed by someone else before they left Colombia; (4) he does not know how to program a GPS; (5) to reach their destination, all they had to do was follow the arrow on the GPS which required the person steering the boat to compare the numbers that the arrow pointed to with the numbers on the compass; and (6) if the boat traveled off course, the GPS would ring to alert them that they were off course and would also ring to let them know when they reached their destination. Salas Torres Affidavit dated October 3, 2019 at ¶¶2-9. In addition, the testimony at the Fatico hearing made it clear that, although SA Sandoval called him the captain, the only difference between the role of Mr. Salas-Torres and his co-defendants was that he was "probably the most trusted out of the three" and was supposed to be the one who spoke with the people in charge of the narcotics distribution (FH.37, 63-64). However, SA Sandoval's testimony also demonstrated how little authority or autonomy Mr. Salas Torres actually had. When it was clear that law enforcement was closing in on them, the crew needed to get permission before jettisoning bales of cocaine and it was not Mr. Salas Torres who made the call. It was another member of the crew. (FH.70). And, even though the organization knew where the crew's families lived for the purpose of

retaliation, there was so little trust in Mr. Salas Torres and the others that the organization tracked the boat using a hidden GPS device. (FH.37-38, 104).

All of this points to a finding that Mr. Salas Torres did not possess the skill, expertise or authority to label him a "pilot" to justify a two-level enhancement pursuant to U.S.S.G. §2D1.1. Simply put, having the course set on a GPS and following the arrow pointing in the appropriate direction is not navigation that requires a special skill set. Even the driver of a truck or a passenger vehicle must do more than simply follow the GPS arrow. He must have a license and must navigate through traffic, understand and obey road signs, obey traffic signals and regularly contend with the other vehicles on the road. And the pilot of an aircraft must have a license and operate the aircraft through the skies using a great deal of complex technological devices. These are skills that far outweigh what is needed to operate a go-fast panga boat, especially "[c]onsidering that the GPS had been already set up, presumably the 'handling' would have only required looking at the instrument's screen, which would indicate the direction to follow, something akin to looking at your watch to see the time or looking at the GPS screens on the phone or dashboard of an automobile." United States v. Trinidad, 839 F.3d at 118 fn. 9.

Logic tells us that a go-fast panga boat is not the type of nautical vessel that requires a great deal of skill to maneuver. At the Fatico hearing, SA Sandoval described

a go-fast boat as a "small boat" with no cabin or sleeping quarters below for the crew, approximately "... 30-, 40-, 50-footer, the most," that is easily maneuvered during low tide (FH.16, 18, 21, 45-52). That hardly seems like the type of boat that takes a great deal of skill to control. In contrast, the pilot, copilot, navigator or other operations officer of an airplane requires special skills and licensing. For a ship or a submersible, not a small, go-fast panga boat like the one used here, similar skills and generally licensing, are also required. To say that a person needs special skills to operate a go-fast boat, and placing them into a category with these skilled, licensed operators, defies logic. If a defendant like Mr. Salas Torres is labeled a pilot and given this enhancement for steering a small panga boat in a straight line, the result is that he is being treated the same as a person who pilots an airplane, a submersible or a large ship. That cannot be what the Sentencing Commission intended in drafting this Guideline provision.

In sum, this issue is of national importance because the use by district courts and Circuit Courts of Appeals of an overly broad definition of the term "pilot" necessitates action by this Court. The Circuits and the district courts are in desperate need of guidance as to how to properly apply this Sentencing Guideline by outlining the characteristics and skills that a "pilot" must have and the vessel he is accused of steering in order to justify the imposition of this enhancement.

B. *The District Court Erred in Refusing to Give a Minor Participant Adjustment Pursuant to U.S.S.G. §3B1.2(b)*

U.S.S.G. §3B1.2(b) permits a two-level reduction in the Sentencing Guidelines calculation "If the defendant was a minor participant in any criminal activity." This reduction, although included in both the plea agreement and PSR, was rejected by the district court, resulting in a procedural error that dramatically impacted Mr. Salas Torres' sentence.

The district court's second and third procedural errors – removal of the two-level benefit given to minor participants and increase of the base offense level by four levels – are intertwined because they are both based on a finding that Mr. Salas Torres was not a minor participant in the charged narcotics conspiracy. And, the reason they are connected is because, although technically Mr. Salas Torres' base offense level should have been 38 given that the amount of cocaine he is alleged to have transported is 450 kilograms or more [U.S.S.G. §2D1.1(c)(1)], U.S.S.G. §2D1.2(a)(5) states that if a minor participant adjustment is given pursuant to U.S.S.G. §3B1.2, then the base offense level should be reduced to 34. Thus, the district court's decision to deny Mr. Salas Torres status as a minor participant actually resulted, not just in the loss of a two-level reduction for being a minor participant, but in a six-level increase because four levels were added to the base offense level as a result of the rejection of the request for

the minor participant reduction.

The Application Notes of U.S.S.G. §3B1.2 themselves provide guidance on this issue as they state that a district court's determination as to whether a minor role adjustment should be applied must be "... based on the totality of the circumstances and involves a determination that is heavily dependent upon the facts of the particular case." The notes then provide the factors that a district court must consider:

> In determining whether to apply [the minor role adjustment] the court should consider the following non-exhaustive list of factors:
>
> > (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.
>
> For example, a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline.
>
> The fact that a defendant performs an essential or

> indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity.

U.S.S.G. §3B1.2 Note 3(c). This list makes it clear that whether to grant a minor role adjustment is a fact-sensitive determination that must be made on a case-by-case basis. United States v. Colorado, 716 Fed. Appx. 922 (11th Cir. 2017).

In 2015, Amendment 794, which revised the commentary to §3B1.2, but not the language of the Guideline section itself [U.S.S.G. app. C supp., amend. 794], made several changes, including the addition of the above "non-exhaustive list of factors" that district courts should consider in determining whether to apply the adjustment. As part of its "Reasons for the Amendment," the Sentencing Commission explained that it was making the changes because district courts had been erroneously denying mitigating-role adjustments solely because defendants were integral or indispensable to the charged criminal activity. Id. The Commission further explained that the amendment was intended to address a conflict among the Circuits regarding the meaning of the term "average participant" used in the Guidelines provision. The amendment "adopt[ed] the approach of the Seventh and Ninth Circuits, revising the commentary to specify that, when determining mitigating role, the defendant is to be compared with the other participants, 'in the criminal activity'." Id.

The Commission's addition of the following critical language at the end of Note 3(c) is a game-changer for this case: "The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity." The Sentencing Commission explained that it added this statement because the district courts had been denying mitigating-role adjustments solely because defendants were integral or indispensable to the charged criminal activity. Id.

Significantly, in the case at bar, the district court was the only person in the courtroom with the opinion that Mr. Salas Torres was not a minor participant in this narcotics organization. The Probation Officer's statement in the PSR on this topic makes that crystal clear:

> According to the Government, the involvement of SALAS TORRES and CALONJES SALAS in the instant offense between 2017 and 2018 was limited strictly to piloting the boats from Colombia to Central America. They did not load the narcotics onto the boats; decide the amount of narcotics to take; arrange for the crew of the boat; or select the route traveled. SALAS TORRES and CALONJES SALAS knew several members of the conspiracy and would typically stay with them in Cali, Colombia for several days prior to each trip; however, they did not do any work on behalf of the conspiracy during those times, and only waited until the boat was ready for departure. SALAS TORRES and CALONJES SALAS were told that they would receive

> $45,000 each for their involvement in the instant offense, but ultimately did not even receive half of that amount.
>
> Additionally, the Government has advised that in light of the large-scale nature of the conspiracy, which involved thousands of kilograms of cocaine being transported from Colombia to the U.S., a minor role adjustment is warranted for SALAS TORRES and CALONJES SALAS due to their limited role, which only involved transporting the narcotics over a period of several days; their complete lack of discretion in fulfilling this role; and their financial gain relative to the total amount of narcotics involved in the offense.

PSR¶¶17-18.

The Government clearly agreed with that assessment as well, as evidenced by the prosecutor's comments during the May 17, 2019 proceeding that was supposed to be Mr. Salas Torres' sentencing but transformed into a heated discussion regarding the Guidelines and potential mitigation factors, when the prosecutor explained:

> I believe this is a very fact-intensive process. I think that there are specific factors here that [defense counsel] Mr. Schmidt alluded to which I think bear on whether Mr. Salas Torres is a minor participant or not... When it was his time to go do a job, he would go to a home where he was by himself, for maybe 24 hours, and then they would say the boat is ready. He would step in the boat. They would tell him here are the coordinates... he didn't personally load the drugs in the boat. He couldn't say, I don't want to take that much. He had no choice over that. Essentially, I do believe he didn't have any discretion.

(T.34). And, during his Fatico hearing testimony, SA Sandoval agreed that Mr. Salas

Torres and others like him could be described as "a dime a dozen" and "easily replaceable" (FH.98). That is precisely how one might describe a minor participant.

The district court strenuously disagreed with those assessments (T.25). However, it is critically important to note that his disagreement was based on his findings, some of which were clearly erroneous, that: (1) any duress under which Mr. Salas Torres was acting as a result of the extortion plot does not require a role reduction; (2) he was a link in the chain and knew that he was transporting cocaine; (3) he was paid $45,000 or $50,000 for his services; (4) he was the person on the go-fast panga boat who was responsible for communicating with the others in the organization during the journey; and, (5) this was not his first time making one of these trips. Even if all of these statements are true, none of them precluded Mr. Salas Torres from receiving the two-level reduction. Indeed, some of these factors (such as the weight of the drugs and the fact that he was a repeat offender) were covered by other Guidelines considerations and should not have been the basis for denial of this reduction. And, to clearly demonstrate how distorted the district court's reality was on this issue, he added that, if Mr. Salas Torres is the type of player who is a minor participant, "... it seems to me then virtually everyone is a minor participant other than Pablo Escobar." (T.25-27; S.19-20). That comment demonstrates that the district court was operating on a skewed vision of what a "minor" participant is.

In making these erroneous findings, the district court failed to take into account the facts of this particular case and the Sentencing Commission's intent in drafting this section of the Guidelines. As argued by defense counsel at sentencing:

> ... Mr. Salas Torres should receive the adjustment when one views the overall scheme that he was involved in, his role, even though he was the 'likely the most trusted member of the three-person crew'; but his role was simply, as the other two, to guide his boat by steering it to the coordinates that were previously set by another person of more importance in this scheme to a location where the boat would be met by another boat and the boat that he was in would be sunk. I think that role properly, maybe not exclusively, but properly fits within the minor role in such a scheme. Therefore, I would hope that your Honor will agree with the government, probation, and myself that a minor-role adjustment would be appropriate.

(S.13).

Applying the five factors listed in the Guidelines Notes which the district court ignored, it is clear that Mr. Salas Torres had a minor role. He had knowledge of only a very limited part of the scope and structure of the narcotics enterprise. He had no role in planning or organizing the criminal activity – as evidenced by the fact that he showed up after the go-fast panga boat had been loaded with the narcotics and the GPS was programmed. He could not, and did not, exercise any decision-making authority or influence the exercise of decision-making authority – as evidenced by the fact that the crew needed to call to obtain permission to jettison some of the narcotics when they

realized that they were about to be apprehended by the Coast Guard. His sole responsibility was to drive the go-fast panga boat, along with the other two crew members, according to the pre-programmed GPS with no discretion – as evidenced by the fact that it had been programmed by someone else before they boarded the boat. And finally, he had no proprietary interest in the criminal activity and was paid only to perform one specific task – as evidenced by the fact that he was paid a flat fee for his service (at least half of which was taken by the Chair to repay the money he had paid to the extorters on Mr. Salas Torres' behalf) and had no financial stake in the organization's business. See U.S.S.G. §3B1.2 Note 3(c). These factors clearly point to a finding that Mr. Salas Torres was a minor participant in the organization's activities.

According to the Second Circuit, the district court's decision that the facts that the three men on the go-fast boat had only limited knowledge of the criminal activity, no role in the planning, organizing and financing the activity, and no decision-making authority carry "less weight than other[]" factors was not an abuse of his discretion. Decision at p. 15. The Second Circuit was wrong. In so holding, the Court relied upon its own case, United States v. Carpenter, 252 F.3d 230, 235 (2d Cir. 2001) (internal quotation marks omitted), *as amended* (July 19, 2001), in which it held that a minor role reduction "will not be available simply because the defendant played a lesser role

than his co-conspirators." However, it must be recognized that Carpenter was decided thirteen years before the commentary to §3B1.2 was changed by Amendment 794[11] which fundamentally altered the application of the minor role adjustment. Had it applied the more updated version of this Guideline and its notes, the Second Circuit and district court would have concluded that the minor role was appropriate in this case.

Moreover, in accordance with the Guidelines Notes, the fact that Mr. Salas Torres' task and his role in the criminal activity may be considered "essential or indispensable" to the narcotics organization is not determinative of this issue. Rather, the Notes specifically state that a defendant may receive the minor participant reduction so long as he is substantially less culpable than the average participant in the criminal activity: "The fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative. Such a defendant may receive an adjustment under this guideline if he or she is substantially less culpable" [See U.S.S.G. §3B1.2 Note 3(C)]. The district court ignored this instruction and the amendments to this Guideline which were meant to clarify when and to whom this Guideline should apply and, instead, made up his own bases for determining whether Mr. Salas Torres' role was minor. Those bases were wrong and the Second circuit was wrong to sanction their

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[11] Amendment 794 to commentary U.S.S.G. §3B1.2 was made effective November 1, 2015.

use.

Had the district court applied the amended Guidelines notes here, he would have been forced to acknowledge that Mr. Salas Torres had a minor role when compared with the duties of others in the organization such as the investors who financed the trips by laying out (and making) large sums of money, the recruiters who brought in the mariners to steer the boats, and the people who worked out the logistics for these trips. Simply because he participated in the transportation of large amounts of narcotics and the organization for which he was working was a large-scale operation, does not, in any way, preclude this reduction. To say that it does is illogical because that would mean that any employee of a large-scale narcotics operation would never be entitled to a minor role adjustment. The reality is that a large-scale operation may have many minor participants. Looking at Mr. Salas Torres' role and his lack of autonomy or authority, it is clear that he should have been classified as a minor participant.

In addition, as discussed in great detail *supra*, the boat used in this case – a go-fast panga boat – is not the type of vessel that requires a great deal of skill to steer. The fact that Mr. Salas Torres was labeled the boat's "captain" by SA Sandoval during his Fatico hearing testimony should not be taken to mean that he had some type of authority because Sandoval also testified that all three of the crew members shared the responsibilities and steered the boat, and that the captain had no discretion to change

anything (FH.37, 63-64, 69). And, even if he did have more of the trust of the organization's leaders than the other crew members, and did have a role that was essential or important, that did not, in any way, mean that he was not a minor participant. To demonstrate Mr. Salas Torres' lack of authority, one only needs to look at the fact that when it was clear that they were in trouble and that law enforcement was closing in on them, the crew needed to obtain the permission of the organization's leaders before they could jettison the narcotics off of the boat (FH.70). All of these facts paint the picture of a man who played a minor role in a major narcotics trafficking organization.

In short, a review of the above reveals that Mr. Salas Torres established by more than a preponderance of the evidence that he was a minor participant in this narcotics organization. Thus, it is clear that he was entitled to the two-level reduction pursuant to U.S.S.G. §3B1.2. This issue is of national significance because the amendments to and explanations included with U.S.S.G. §3B1.2 need to be reenforced by this Court. If this district court made this mistake, then undoubtedly many others around the nation are making the same error resulting in the erroneous sentencing of many defendants.

CONCLUSION

For the reasons set forth above, we respectfully request that this petition for a Writ of Certiorari be granted.

Dated: January 14, 2022

Respectfully submitted,

/s/ Sam A. Schmidt

SAM A. SCHMIDT, ESQ.
Attorney for Petitioner
FERNEY SALAS TORRES
29 Broadway - Suite 1412
New York, NY 10006
(212)346-4666

PETITIONER'S APPENDIX

19-4208-cr (L)
United States v. Torres et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2020

(Argued: April 21, 2021 Decided: November 17, 2021)

Docket Nos. 19-4208-cr, 19-4231-cr

UNITED STATES OF AMERICA,

Appellee,

v.

HEYDER RENTERIA SOLIS,

Defendant,

FERNEY SALAS TORRES, SAUL CALONJES SALAS,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Before:

CHIN and PARK, *Circuit Judges*, and BOLDEN, *District Judge*.*

Appeals from judgments of the United States District Court for the Southern District of New York (Sullivan, *J.*) convicting defendants-appellants Ferney Salas Torres and Saul Calonjes Salas, upon their guilty pleas, of conspiring to manufacture, distribute, or possess a controlled substance on a vessel, and sentencing Salas Torres principally to 240 months' imprisonment and Calonjes Salas principally to 180 months' imprisonment. Defendants-appellants contend that the district court erred in its application of the United States Sentencing Guidelines by (1) denying a mitigating role reduction and (2) applying a sentencing enhancement for acting as pilot, captain, or navigator. They also argue that the district court imposed substantively unreasonable sentences.

AFFIRMED.

SEBASTIAN SWETT, Assistant United States Attorney (Danielle R. Sassoon, Assistant United States Attorney, *on the brief*), *for* Audrey Strauss, Acting

* Judge Victor A. Bolden, of the United States District Court for the District of Connecticut, sitting by designation.

United States Attorney for the Southern District of New York, New York, New York, *for Appellee.*

SAM A. SCHMIDT, Law Office of Sam A. Schmidt, New York, New York, *for Defendant-Appellant Ferney Salas Torres*.

JEREMY SCHNEIDER, Rothman, Schneider, Soloway & Stern, LLP, New York, New York (Rachel Perillo and Robert A. Soloway, *on the brief*), for *Defendant-Appellant Saul Calonjes Salas*.

CHIN, *Circuit Judge*:

Defendants-appellants Ferney Salas Torres ("Torres") and Saul Calonjes Salas ("Salas") appeal from judgments entered December 10 and 12, 2019, respectively, following their guilty pleas, convicting them of conspiring to manufacture, distribute, or possess a controlled substance on a vessel in violation of 46 U.S.C. §§ 70504(b)(2) and 70506 and 21 U.S.C. § 960(b)(2)(B). The district court sentenced Torres principally to 240 months' imprisonment and Salas principally to 180 months' imprisonment. On appeal, Torres and Salas challenge their sentences on procedural grounds, arguing that the district court erred by denying minor-role reductions pursuant to U.S.S.G. §§ 3B1.2 and 2D1.1(a)(5)(iii) and applying two-level enhancements for their roles as pilot or navigator of a vessel carrying controlled substances pursuant to U.S.S.G. § 2D1.1(b)(3)(C). They

also contend that the district court did not give appropriate weight to the 18 U.S.C. § 3553(a) sentencing factors and therefore imposed substantively unreasonable sentences. For the reasons set forth below, the judgments of the district court are affirmed.

BACKGROUND

I. *The Facts*

The facts are drawn from the presentence reports (the "PSRs") to the extent the findings were adopted by the district court and from the evidence presented at a *Fatico* hearing held August 28, 2019. They may be summarized as follows:

A "go-fast boat" or "*panga*" is a thirty-to-fifty-foot fishing boat with a hidden compartment below deck used by drug-trafficking organizations ("DTOs") to transport narcotics. Investors in the Colombian drug trade hire DTOs to transport cocaine from Colombia to Central America and ultimately to the United States. DTO members communicate with the investors, coordinate logistics, track the cocaine's location by GPS, purchase gasoline, and serve as lookouts. The DTOs sometimes arrange for a go-fast boat to transport the cocaine from the Colombian coast through the Pacific Ocean to Central America. Typically, the go-fast boat will rendezvous with a second boat in the open ocean

fifty to one hundred miles, but as many as six hundred miles, off the coast, and the crews will move the cocaine to the second boat to continue the journey.

Three to four seasoned mariners typically make up the crew of a go-fast boat. The three main roles are captain, navigator, and mechanic, but all crewmembers "help each other out" by doing things like "driving the boat." The captain's responsibilities include driving the boat and communicating with the DTO via satellite phone. The mechanic maintains the engine. The navigator puts coordinates into a GPS and ensures the go-fast boat is going the right way by "steer[ing] the boat." Each mariner stands to earn between $40,000 and $60,000 for about one week's work -- seven to ten times what a Colombian police officer makes in a year -- transporting a load of cocaine on a go-fast boat.

On March 17, 2018, the U.S. Coast Guard Cutter *Decisive* was patrolling eighty nautical miles southwest of Panama, an area known for narcotics trafficking, when it identified a vessel heading north at approximately thirty knots.[1] Thereafter the *Decisive* dispatched a small boat to investigate. The crew of the small boat discovered that the northbound vessel was a go-fast boat with three individuals aboard, approached within thirty yards with flashing

[1] A nautical mile is 6076.115 feet, or 1.15 statute miles. *Nautical Mile, Merriam-Webster's Collegiate Dictionary* (11th ed. 2003).

lights and sirens, and gave chase. Two of the individuals, Salas and Heyder Renteria Solis ("Solis"), jettisoned packages before they were stopped. The crew of the small boat determined that the third person, Torres, was the "pilot" of the go-fast boat.

The Coast Guard recovered thirty-four packages containing 945 kilograms of cocaine and 10 kilograms of amphetamine. On March 28, Coast Guard special agents transported Torres, Salas, and Solis to the United States, where they were arrested.

Torres and Salas are "typical mariners"; that is, they are fishermen having "low socioeconomic status" and "very little education" who live in Colombia. They were to be paid about $45,000 for the weeklong trip during which they were arrested. The go-fast boat had departed Buenaventura, Colombia, and the Coast Guard seized it "in the middle of the ocean" -- eighty nautical miles offshore -- just south of the border between Panama and Costa Rica.

Torres served as the captain of the go-fast boat, meaning that he was the primary "steerer" of the boat, most responsible, and most trusted by the DTO.

Salas also piloted the boat, served as navigator, and, as he concedes, "steered the boat." Salas App'x at 265; Salas Br. at 35.

Between 2004 and 2008, Torres participated in about ten narcotics-trafficking trips by crewing on boats transporting narcotics from Colombia to Central America. In 2008, he was arrested while serving as the captain of a go-fast boat transporting cocaine and was later convicted in the U.S. District Court for the Middle District of Florida of conspiracy to possess with intent to distribute cocaine while aboard a vessel. Torres was imprisoned until 2016 and then returned to Colombia.

Between 2005 and 2006, Salas participated in about six narcotics-trafficking trips. He was arrested in 2006 while crewing a go-fast boat transporting cocaine, was convicted of the same crime as Torres, and was imprisoned until 2011, also returning to Colombia thereafter.

In 2017, Torres and Salas began operating boats transporting narcotics again. They had completed three trips and, on the fourth, were apprehended by the Coast Guard.[2]

[2] Torres and Salas contended below that they resumed drug trafficking to earn money to pay off extorters. Neither Torres nor Salas reported the extortion to Colombian authorities and the Government had minimal corroboration for the explanations. The

II. *Proceedings Below*

In February 2019, Torres and Salas pleaded guilty to conspiracy to manufacture, distribute, or possess controlled substances on a vessel in violation of 46 U.S.C. §§ 70504(b)(2) and 70506 and 21 U.S.C. § 960(b)(2)(B). The PSRs indicated that each was accountable for at least 450 kilograms of cocaine, which resulted in a base offense level of 38. The PSRs recommended a two-level mitigating-role reduction of the offense level because Torres and Salas were "minor participant[s] in the offense," U.S.S.G. § 3B1.2, as well as an additional four-level decrease for recipients of § 3B1.2 adjustments, § 2D1.1(a)(5).

After a three-level reduction for acceptance of responsibility, each defendant's total offense level was 29. Torres had a criminal history category of III, and the resulting Guidelines range was 108 to 135 months' imprisonment with a mandatory minimum of 60 months. Torres's PSR recommended a sentence of 84 months' imprisonment. Salas had a criminal history category of II, and the resulting Guidelines range was 97 to 121 months' imprisonment with a mandatory minimum of 60 months. Salas's PSR recommended a sentence of 72 months' imprisonment.

district court did not credit either defendant's extortion argument. Salas App'x at 321; Torres Dist. Ct. Dkt. No. 109 at 55-56.

At Torres's initial sentencing hearing held May 17, 2019, the district court scheduled a *Fatico* hearing to determine whether Torres qualified for a minor-role reduction or a pilot enhancement under the Guidelines. Salas's initial sentencing hearing was adjourned for the same reason.

On August 28, 2019, the district court held the *Fatico* hearing. Special Agent Ronald Sandoval ("Sandoval") of the Drug Enforcement Agency testified for the government about the Colombian drug trade and his investigation into Torres and Salas. The district court did not rule on the issues at the conclusion of the hearing but set a schedule for posthearing submissions.

Torres's and Salas's sentencings were held on December 10 and 12, 2019, respectively. At Torres's sentencing the district court began with a base offense level of 38. The district court did not apply a minor-role two-level reduction, finding that Torres's compensation -- $45,000 to $50,000 -- suggested the "importance" and "necessity" of his role on the boat. The district court applied a two-level pilot enhancement, finding that piloting a go-fast boat requires skill, an extended trip at sea, and a rendezvous in the open ocean, and concluding that Torres piloted the go-fast boat within the meaning of the enhancement. After applying a three-level reduction for acceptance of

responsibility, the district court concluded that the offense level was 37, the criminal history category was III, and the Guidelines range was 262 to 327 months.

During a discussion of the 18 U.S.C. § 3553(a) factors, Torres, through counsel, argued that he became reinvolved in drug trafficking to repay someone who paid a ransom for Torres's wife and daughter when they were kidnapped. The district court found this argument unpersuasive because it was not corroborated by letters from family members or by Special Agent Sandoval, and because Torres had a prior conviction for the same conduct. The district court also found Torres to be "unique" because he was previously convicted of the same crime, served a ten-year sentence, and reoffended within two years of his release. Thus, the district court concluded that Torres's sentence would not create an unwarranted disparity with other sentences because he was not situated similarly to other defendants. The district court sentenced Torres to 240 months' imprisonment, to be followed by five years of supervised release.

At Salas's sentencing on December 12, 2019, the district court began with a base offense level of 38. The district court found that Salas's role was "similar" to Torres's, and although Torres had "greater responsibility," defendants

were paid the same amount and both were "responsible at various times for directing and navigating the boat," which required "skill and experience." Accordingly, the district court did not apply a minor-role two-level reduction. As to the pilot enhancement, the district court concluded that Salas played a "pilot or navigator" role on the boat based on inferences drawn from Special Agent Sandoval's testimony about the makeup of a typical crew and the evidence that Torres and Solis were the captain and mechanic, respectively. The district court added those two levels and subtracted three for acceptance of responsibility, leaving Salas with an offense level of 37, a criminal history category of II, and a Guidelines range of 235 to 293 months.

As to mitigating factors, the district court found that the extortion plot Salas described was "very implausible," did not "make a lot of sense," and ultimately did not mitigate Salas's wrongdoing. The district court sentenced Salas to 180 months' imprisonment, to be followed by five years of supervised release.

These appeals followed.

DISCUSSION

Torres and Salas appeal the sentences on procedural grounds, arguing that the court erred in calculating the applicable ranges under the Guidelines by denying a reduction for minor role under U.S.S.G. § 3B1.2(b), which would have reduced the offense level by two levels and entitled defendants to an additional four-level decrease under U.S.S.G. §§ 2D1.1(a)(5),[3] and by wrongly applying a two-level increase for their roles as captain, pilot, or navigator of a vessel carrying narcotics under U.S.S.G. § 2D1.1(b)(3). They also appeal the sentences on substantive grounds.

In reviewing a sentence for substantive and procedural reasonableness, we apply a deferential abuse-of-discretion standard. *United States v. Thavaraja*, 740 F.3d 253, 258 (2d Cir. 2014). As to role adjustments, we review the district court's findings of fact as to the defendant's role for clear error, *United States v. Gomez*, 31 F.3d 28, 31 (2d Cir. 1994), and "reverse[] the district court's conclusion only for abuse of discretion," *United States v. Colon*, 220 F.3d 48, 51 (2d Cir. 2000) (citation omitted). Defendants must establish

[3] Torres and Salas both had a base offense level of 38. Hence, if they qualified for a mitigating role adjustment under § 3B1.2, the offense level would have been reduced by 4 levels. U.S.S.G. § 2D1.1(a)(5)(iii).

entitlement to a minor-role reduction by a preponderance of the evidence. *United States v. Kerr*, 752 F.3d 206, 223 (2d Cir. 2014), *as amended* (June 18, 2014).

We review a district court's interpretation and application of the Guidelines *de novo*, *see United States v. Adler*, 52 F.3d 20, 21 (2d Cir. 1995) (per curiam), and its factual findings for clear error, *see United States v. Mulder*, 273 F.3d 91, 116 (2d Cir. 2001). "If we identify procedural error in a sentence, but the record indicates clearly that the district court would have imposed the same sentence in any event, the error may be deemed harmless, avoiding the need to vacate the sentence and to remand the case for resentencing." *United States v. Mandell*, 752 F.3d 544, 553 (2d Cir. 2014) (per curiam) (internal quotation marks omitted).

"Our review for substantive unreasonableness is particularly deferential." *Thavaraja*, 740 F.3d at 259 (internal quotation marks omitted). Because district courts are largely responsible for sentencing, our role is to "patrol the boundaries of reasonableness." *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008). "We will identify as substantively unreasonable only those sentences that are so shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing them to stand would damage the

administration of justice." *Thavaraja*, 740 F.3d at 259 (internal quotation marks omitted).

We discuss the challenges in turn.

I. *Procedural Unreasonableness*

Torres and Salas argue that the district court committed procedural error when it denied them a reduction for minor role because they established by a preponderance of the evidence that they were minor participants in the offenses. Next, they argue that the district court erroneously applied the pilot enhancement because they did not possess the special skills or authority necessary to have the enhancement applied.

A. *Minor-Role Reduction*

Guideline § 3B1.2(b) allows for a two-level reduction in offense level when the defendant is a "minor participant," meaning that the defendant is "less culpable than most other participants in the criminal activity, but whose role could not be described as minimal." U.S.S.G. § 3B1.2(b) cmt. n.5. The minor participant determination is based on the "totality of circumstances," which may include the following:

> (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; [and]
> (v) the degree to which the defendant stood to benefit from the criminal activity.

Id. n.3.

We are not persuaded that the district court abused its discretion when it denied defendants minor-role reductions. Defendants contend that they had only limited knowledge of the criminal activity; no role in planning, organizing, or financing the activity; and no decision-making authority. Even assuming these facts to be true, however, the district court did not abuse its discretion when it gave these facts less weight than others because a reduction "will not be available simply because the defendant played a lesser role than his co-conspirators." *United States v. Carpenter*, 252 F.3d 230, 235 (2d Cir. 2001) (internal quotation marks omitted), *as amended* (July 19, 2001).

Indeed, the district court found that the minor-role reduction did not apply because Torres and Salas knew they were responsible for transporting nearly a ton of narcotics, employed skill in crewing the go-fast boat, were

recidivists, understood the scope of the conspiracy, and stood to earn about $45,000 each for their roles in the offense. As to Torres, the district court also found that he was in communication with other traffickers. The district court concluded that these facts underscored the "importance" and necessity" of Torres's role, Torres Dist. Ct. Dkt. No. 109 at 19, as well as the "skill" and "decision-making authority" employed by Salas, Salas App'x at 276-77. Even assuming defendants played a lesser role than others who planned, organized, and financed the narcotics activity, the district court did not abuse its discretion in concluding that defendants were not minor participants and declining to grant them the reduction. *See, e.g.*, *United States v. Garcia*, 920 F.2d 153, 155 (2d Cir. 1990) (per curiam) (holding that although some narcotics "couriers" may receive a minor-role reduction "based upon their culpability in light of the specific facts," that conclusion "is by no means mandated").

B. ***Pilot Enhancement***

Pursuant to U.S.S.G. § 2D1.1(b)(3), a two-level enhancement is appropriate when "the defendant unlawfully imported or exported a controlled substance" and "acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled

substance." When determining whether an enhancement is applicable, the district court uses the preponderance of the evidence standard. *United States v. Salazar*, 489 F.3d 555, 558 (2d Cir. 2007) (per curiam).

The Guidelines do not define the terms "pilot, copilot, captain, navigator, flight officer, or any other operation officer," nor has this Court defined these terms in the context of this enhancement. Defendants argue that the terms indicate possession of special skills or authority. Accordingly, they contend that the district court erred in applying the pilot enhancement because they merely "steered" the boat but did not have special skills or authority and, therefore, were not a pilot or navigator.

We are not persuaded. First, defendants' arguments fail as a matter of textual interpretation. Defendants' definitions are inconsistent with the plain meanings of "pilot" and "navigator." "Pilot" means "one employed to steer a ship." *Pilot*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003). "Navigator" means "one [who] navigates or is qualified to navigate," and "navigate" means, among other things, "to steer or manage (a boat) in sailing." *Navigator, Navigate*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003). Under these ordinary

dictionary definitions, "pilot" and "navigator" do not require possession of special skill, authority, or training.

Second, the circuits that have considered the meaning of "pilot" and "navigator" within § 2D1.1(b)(3)(C) have declined to interpret those terms to bear the more technical definitions advocated by defendants. *See United States v. Guerrero*, 114 F.3d 332, 346 (1st Cir. 1997) (affirming district court's finding that defendant "acted as a pilot" within the meaning of the pilot enhancement because defendant's conduct fell within "the common dictionary definition of 'pilot'": "a person hired to steer a vessel"*); United States v. Bautista-Montelongo*, 618 F.3d 464, 467 (5th Cir. 2010) (holding that no special skills are required; trial court properly applied pilot enhancement to person who "drove a boat containing contraband"); *United States v. Senn*, 129 F.3d 886, 896-97 (7th Cir. 1997) (holding that pilot enhancement does not require "proof of special skill"), *abrogated on other grounds by United States v. Vizcarra*, 668 F.3d 516 (7th Cir. 2012); *United States v. Cruz-Mendez*, 811 F.3d 1172, 1176 (9th Cir. 2016) (applying a "common sense approach" rather than "rigid requirements of professionalism" to the "pilot/captain" enhancement and holding that district court properly applied enhancement to

person who "operated a boat . . . in open water" (internal quotation marks omitted)).[4]

Here, defendants' conduct is consistent with the ordinary meaning of "pilot" and "navigator," as they were both employed to steer or navigate a boat. Each stood to earn $45,000 for operating the go-fast boat to transport a substantial load of narcotics. The Coast Guard observed Torres "piloting" the boat, and Torres identified himself as the captain to Special Agent Sandoval. Salas piloted and navigated the boat for at least part of the trip and, as he concedes, steered the boat. Additionally, go-fast boats are typically crewed by a captain, a mechanic, and a navigator, and Torres was the captain and Solis was the mechanic. The district court reasonably inferred that the third crewmember, Salas, must have filled the third role, navigator. *See United States v. Gaskin*, 364 F.3d 438, 464 (2d Cir. 2004) ("[A] sentencing court, like a jury, may base its factfinding on circumstantial evidence and on reasonable inferences drawn therefrom.").

Third, although the ordinary definitions of pilot and navigator do not require special skill, the district court found that defendants had special

[4] *Guerrero*, *Bautista-Montelongo*, and *Senn* interpret U.S.S.G. § 2D1.1(b)(2), a previous version of § 2D1.1(b)(3)(C).

skills. Piloting the boat required "real special skill" and "experience." Salas App'x at 265, 277. There was "more to it" than "putting [a destination] in your GPS to figure out how to get from here [to] Broadway." Torres Dist. Ct. Dkt. No. 109 at 20. The job required "a long time at sea" and traveling "hundreds of miles out into the open ocean." *Id.* As the district court observed, this was "no small feat" and was not something, for example, that the individuals in the courtroom other than defendants would have been able to do. Salas App'x at 264-65.

Defendants urge us to adopt the reasoning of a First Circuit dissent advocating the use of a nautical dictionary to define the term "navigate" as "'[t]o safely operate a vessel employing the elements of position, course and speed,'" which would require "extra abilities." *United States v. Trinidad*, 839 F.3d 112, 116, 119-20 (1st Cir. 2016) (Torruella, *J.*, dissenting) (quoting *Navigate*, Sea Talk Nautical Dictionary, http://www.seatalk.info/ (last visited Oct. 6, 2016)). But even if we were to employ a technical definition, we would not reach a different result because the district court properly found that defendants here had special skills.

Further, the *Trinidad* dissent provides no justification for employing a nautical dictionary rather than an ordinary one other than the avoidance of an

"unjust result." *Id.* at 119. Nor does the Guideline itself warrant departure from ordinary meaning. Section 2D1.1(b)(3)(C) refers to crewmembers of boats and aircraft. The dissent's approach would require use of a nautical dictionary for some words and an aeronautical dictionary for others. The Guideline lacks technical references that could suggest that the drafters used "pilot" and "navigator" in a technical sense such as to warrant the use of a technical dictionary. *Cf. Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012) (considering technical definition where statute contained technical language). Finally, on this record, we are not persuaded that the use of an ordinary dictionary would lead to an unjust result. Accordingly, we decline to employ a meaning other than ordinary meaning when interpreting the terms in U.S.S.G. § 2D1.1(b)(3)(C).

Defendants observe that the plea agreements and PSRs did not include the § 2D1.1(b)(3)(C) enhancement, but they do not argue that the district court committed procedural error by considering it *sua sponte*. In any event, the plea agreements explicitly provided that the district court was not bound by the agreements' Guidelines stipulations.

Finally, even if the application of the enhancement were inappropriate, the district court made clear that it would have imposed the same sentences in any event. First, the district court noted on the record at the sentencings that if the two-level pilot enhancement did not apply, a two-level enhancement for transporting methamphetamine would apply instead, as defendants were also transporting ten kilograms of methamphetamine. Torres Dist. Ct. Dkt. No. 109 at 21, 25; Salas App'x at 286. Second, when sentencing Torres, the district court found that "[a]nything less" than a twenty-year sentence "would not reflect [Torres's] culpability." Torres Dist. Ct. Dkt. No. 109 at 58. When sentencing Salas, the district court observed that a fifteen-year sentence was "appropriate" based on Salas's recidivism. Salas App'x at 322. Thus, any error would be harmless. *See Mandell*, 752 F.3d at 553 ("If we identify procedural error in a sentence, but the record indicates clearly that the district court would have imposed the same sentence in any event, the error may be deemed harmless, avoiding the need to vacate the sentence and to remand the case for resentencing." (internal quotation marks omitted)).

Accordingly, we hold that the sentencing court did not err in its findings or abuse its discretion in applying the pilot/navigator enhancement.

III. *Substantive Unreasonableness*

Torres and Salas argue that the district imposed substantively unreasonable sentences because it failed to properly weigh the 18 U.S.C. § 3553(a)(2) factors, resulting in sentences "greater than necessary" to achieve sentencing goals.

District courts are to use the Guidelines as a "starting point" and then make an independent sentencing determination, taking into account the "nature and circumstances of the offense and the history and characteristics of the defendant" and all other statutory factors. 18 U.S.C. § 3553(a); *see Cavera*, 550 F.3d at 188-89. "The particular weight to be afforded aggravating and mitigating factors is a matter firmly committed to the discretion of the sentencing judge, with appellate courts seeking to ensure only that a factor can bear the weight assigned it under the totality of circumstances in the case." *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012) (internal quotation marks and citations omitted).

Torres's 240-month sentence and Salas's 180-month sentence were neither shockingly high nor unsupportable as a matter of law. Applying the particularly deferential standard for substantive reasonableness review, we

conclude that the district court's decision fell within the range of permissible decisions.

As to Torres, the district court considered the "incredibl[e] serious[ness]" and "impact" of the crime, his previous conviction for the same crime, and the need for deterrence. Torres Dist. Ct. Dkt. No. 109 at 54. The district court did not credit Torres's duress explanation, finding it to be unsubstantiated and inconsistent with testimony by Special Agent Sandoval. *Id.* at 55. After considering all the factors, the district court concluded that "[a]nything less" than a 240-month sentence would be "inappropriate" and "would not reflect [Torres's] culpability." *Id.* at 58.

Torres argues that the district court did not give "appropriate weight" to the duress he encountered, his educational and medical history, sentencing disparities, and other factors. But "[t]he particular weight to be afforded aggravating and mitigating factors is a matter firmly committed to the discretion of the sentencing judge," *Broxmeyer*, 699 F.3d at 289 (internal quotation marks and citations omitted), and the district court gave careful consideration to all of the relevant factors here.

As to Salas, the district court considered the "destructive harm" of the crime and "amount of drugs" involved, his previous conviction for the same crime, his duress argument, his personal history, sentencing disparities, his culpability vis-à-vis Torres, and the need for deterrence. The district court "balance[d]" and "weigh[ed]" those and other factors, and carefully considered them, noting on the record that the task was "very difficult" and that he had been "thinking about this case for quite some time" and "preparing for sentencing for many months." Salas App'x at 291. The district court concluded that a sentence of 180 months was "appropriate" while constituting a "significant," but not "deep," discount. *Id.* at 322-23.

Salas argues that the district court gave no weight to his life circumstances and other factors and did not give the appropriate weight to the need to avoid sentencing disparities. These arguments are belied by the record. The district court explicitly considered Salas's life circumstances, as well as other pertinent factors. The district court and counsel also discussed sentencing disparities and whether and how other defendants were similarly situated to Salas. Salas App'x at 305-06.

Accordingly, Torres's and Salas's sentences are not substantively unreasonable, and the district court did not abuse its discretion in imposing them.

CONCLUSION

For the foregoing reasons, the judgments of the district court are AFFIRMED.