

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

Fernando Salazar-Figueroa,

v.

UNITED STATES OF AMERICA,  
Respondent.

On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED  
IN FORMA PAUPERIS

Petitioner, Fernando Salazar-Figueroa, pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(6), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit.

Date: Respectfully submitted,

May 9, 2022.

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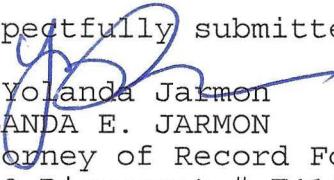
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QUESTIONS PRESENTED

I. Whether the Fifth Circuit violated federal law when it conducted a cursory review of the facts related to a warranted mitigating role adjustment under U.S.S.G. § 3B1.2 because **Fernando Salazar-Figueroa's** role in the drug related offense was minimal; and because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are named in the caption of the case before the Court.

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**Appendix B: Original Judgment and Sentence of the District Court,  
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(S.D. Tex. June 15, 2021).**

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PRAYER

The petitioner, **Fernando Salazar-Figueroa**, respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit issued on **February 9, 2022**.

OPINIONS BELOW

The original judgments reflecting Mr. Figueroa's original conviction and sentence can be found at United States v. Fernando Salazar-Figueroa, Cr. No. 7:20:CR:1787-2 (S.D. Tex. June 15, 2021). Appendix B). The United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Figueroa's conviction and sentence at United States v. Salazar-Figueroa, Nos. 21-40476, (5th Cir. Feb. 9, 2022) (affirmed) (unpublished). (Appendix A)

No petition for rehearing was filed.

JURISDICTION

On February 9, 2022, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence in this case. This petition is filed within ninety days after entry of the judgment. See. Sup. Ct. R. 13.1 and 13.3. Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

FEDERAL STATUTES INVOLVED

**U.S.S.G. § 3B1.2: Mitigating Role Adjustment**

Based upon the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

U.S.S.G. 3B1.2 (2018).

STATEMENT OF THE CASE

**A. Course of Proceedings**

On October 20, 2020, FERNDANDO SALAZAR-FIGUEROA Defendant-Appellant (Hereinafter "Salazar-Figueroa"), along with two co-defendants, William Zarco and Jose Rosales was charged in a Two-Count Indictment with drug related crimes. In Count One, Salazar was charged with conspiracy to possess with intent to distribute a Schedule II controlled substance, namely 5 kilograms or more of a mixture of a substance containing a detectable amount of cocaine, an alleged drug related crime committed on or about September 28, 2020 (Count One). (ROA.19-21). The conspiracy alleged is in violation of 21 U.S.C. §§ 846, 952(a), 841(a)(1), 841 (b)(1)(A). (ROA.21).

In Count Two, Salazar-Figueroa, along with the same two co-defendants, was charged with knowingly and intentionally possessing a controlled substance, namely 5 kilograms or more or approximately 62 kilograms of a mixture or substance containing a detectible amount of cocaine, a Schedule II controlled substance, on September 28, 2020, in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(A) and 18 U.S.C. § 2. (ROA.21-22).

#### **The Plea Agreement**

On January 26, 2021, pursuant to a plea agreement under Federal Rule of Criminal Procedure 11(C)(1)(A) and (B). Salazar-Figueroa entered a plea of guilty to Count Two of the Indictment, knowingly and intentionally possessing a controlled substance, approximately 62 kilograms of a mixture or substance containing a detectible amount of cocaine, a Schedule II controlled substance, on September 28, 2020 in violation of 21 U.S.C. § 841(a)(1), 841(b)(1)(A) and 18 U.S.C. § 2. (ROA.83-84). In exchange for the plea, the Government agreed to: (a) recommend a 2-level decrease for acceptance of responsibility in accordance with U.S.S.G. 3E1.1(a) if he were to demonstrate acceptance of responsibility; and (b) dismiss the remaining counts at the time of sentencing. (ROA.123).

Mr. Salazar-Figueroa agreed to be rearraigned via video due to the coronavirus pandemic. (ROA.72-73). The court asked whether he believed he was competent enough to proceed with the hearing. Salazar-Figueroa assured the court that he was competent. Then,

the court asked whether he had been given an opportunity to discuss the Indictment with his lawyer. (ROA.77). Salazar indicated that he had seen the Indictment. (ROA.78). When asked whether he was satisfied with his representation, Salazar-Figueroa responded, "I think so." (ROA..78).

The Government's attorney read the charge in Count Two of the Indictment in open court. (ROA.83-84). When asked how he would plead, Salazar-Figueroa responded with " I do accept responsibility for my actions, and I do plead guilty." (ROA.84).

Salazar-Figueroa was informed by the court that he had a right to plead not guilty and to have a trial before a judge or a jury. (ROA.84). When asked whether he understood, he indicated that he understood his rights in this regard. (ROA.85.) The court went on to say that he would have a right to a lawyer at every stage of the proceedings whether he could afford one or not, and at no cost to him. When asked whether his understood, Salazar-Figueroa answered in the affirmative. (ROA.85).

Next, the court stated that if he were to plead not guilty, the Government would have to prove him guilty at trial by competent evidence beyond a reasonable doubt. Salazar-Figueroa indicated that he understood. (ROA.86). The court also admonished that at trial, he would be presumed innocent and would not bear any burden to prove his innocence. When asked whether he understood, Salazar-Figueroa answered, " I understand." (ROA.86).

Salazar-Figueroa was admonished that during the course of the trial witnesses for the Government would come into the courtroom and testify in front of him and his lawyer and that his lawyer could question those witnesses. (ROA.86-87). He was also told that his lawyer could object to the evidence presented against him and that he could also present defense evidence. Salazar-Figueroa told the court that he understood. (ROA.87).

The court also told Salazar-Figueroa that, at trial, he could take the witness stand and testify in his own defense; however, no one could hold it against him if he chose not to testify. (ROA.87). When asked whether he understood, Salazar-Figueroa answered in the affirmative. (ROA.87-88).

Next, the court admonished that, if he were to enter a plea of guilty, he would be giving up his rights to a trial. The court added that if there were no trial, he would then be sentenced based upon his plea. (ROA.87). Salazar-Figueroa told the court that he understood. (ROA.88).

Furthermore, the court told Salazar-Figueroa that he could sentence him from minimum of 10 years up to life and impose a fine of up to \$10 million dollars against him. He indicated that he understood these penalties that could be imposed. (ROA.89). The court went on to admonish that he could impose a term of supervised release of up to life to begin upon the conclusion of serving his prison term. (ROA.89-90). Salazar-Figueroa indicated that he

understood. The court also explained that it was required to impose a special assessment of \$100.00 (ROA.90).

With respect to the sentencing guidelines, the court inquired as to whether Salazar-Figueroa's attorney had discussed them with him and how they might apply in this case. Salazar-Figueroa answered in the affirmative. The court also told him that he would not know exactly which sentencing range would apply in this case until after a presentence report had been prepared and his lawyer had been given sufficient time to review that report. (ROA.91). Additionally, the court told Salazar-Figueroa that after determining the appropriate guideline range in his case, the court could vary from the guidelines to impose the maximum penalty allowed. The court asked whether he understood the non-binary nature of the guidelines. Salazar-Figueroa indicated that he understood. (ROA.92).

When asked whether anyone had guaranteed or promised him anything or guaranteed him a sentence in exchange for a plea of guilty in this case, Salazar-Figueroa stated, "No, nobody has tried." The court then inquired as to whether there was a plea agreement in this case. The Government responded that in exchange for his plea, it would recommend a minus two for acceptance of responsibility as well as a dismissal of the remaining counts at sentencing. (ROA.93). Salazar-Figueroa confirmed that his understanding of the agreement was the same as outlined by the Government. (ROA.94).

The court then admonished that it did not have to accept the plea agreement and if it did not follow the agreement, he would have no right to withdraw his plea of guilty. (ROA.94). When asked whether he understood the non-binding nature of his plea agreement, Salazar-Figueroa indicated that he understood. (ROA.94-95).

The Government stated the following as the factual basis for the plea agreement:

On or about September 28, 2020, the Defendant did knowingly and intentionally possess with intent to distribute 5 kilograms or more, that is approximately 62 kilograms of cocaine, a Schedule 2 controlled substance. On the date in question, agents searched a warehouse and a tractor-trailer in Pharr, Texas where agents discovered 62 kilograms of cocaine. (ROA.100).

Fernando Salazar-Figueroa waived his Miranda rights and told agents that he had aided and abetted the plan by comingling or mixing the cocaine in the cover load and then wrapping it in plastic wrap so that it could be loaded onto the tractor-trailer for delivery to other locations. (ROA.100).

Jose Rosales waived his Miranda rights and told agents that he had been hired by individuals in Mexico to come to the warehouse and verified that the cocaine was properly concealed in the cover load so that it could be transported to other locations and the United States.

Jose Rosales had been living with the co-Defendants Zarco and Salazar during the preparations for the load to be moved by the tractor-trailer. (ROA.100).

William Zarco's role in this event was to rent the warehouse for the cover load and to arrange for the transportation of the cocaine once it was concealed in the cover load. (ROA.100-101).

Salazar-Figueroa told the court that he wanted to correct the Government's rendition of the facts. Salazar-Figueroa then told the court that he did not know or understand that he was loading and disguising drugs that were going to be transported north until just a minute before everything transpired and he was ultimately arrested. (ROA.101).

Ultimately, the court found that: (1) Salazar-Figueroa was competent and capable of entering an informed plea; (2) he understood the nature of the charges against him and the consequences of his guilty plea; (3) he understood the maximum; (4) and that his guilty plea was knowingly and voluntarily; (5) and the guilty plea was supported by facts containing the elements of the offense. (ROA.100-101). Finally, the court accepted his guilty plea. (ROA.101).

#### **The Sentence**

The 2018 Guidelines were used in this case. The Final PSI (PSI) set the Base Offense Level at a level 34 pursuant to U.S.S.G. 2D1.1(b) (18) and 5C1.2 and 2 (a). Furthermore, Salazar-Figueroa was afforded a two-level deduction in points for acceptance of responsibility pursuant to U.S.S.G. 3E.1.1 (a). Thus, the Total Offense Level resulted in a level 32. (ROA.173). Salazar-Figueroa had no prior criminal history and therefore was placed in a Criminal History Category of I (ROA.174).

At sentencing, and in written objections, Appellant argued for the court to deem him a minimal participant of the conspiracy under

U.S.S.G. § 3B1.2(a) and therefore decrease the offense level by 4 levels. (ROA.130-131). The sentencing court denied the objection and found him an average participant. (ROA.120-121). He also argued for the safety valve. (ROA.131-133). The sentencing court found that he qualified for the safety valve and two points were deducted from his sentencing points. The Government then moved for the third point deduction for acceptance of responsibility and it was granted. (ROA.107-108,121).

With a Criminal History Category of I and a Total Offense Level of 29, the sentencing guideline range resulted in 87-108 months. (ROA.121). The Government motioned for a 1/3 off of his sentence; however after considering the sentencing factors pursuant to 18 U.S.C. 3553(a) the court deducted more than a 1/3 off.

The court adopted the factual findings in the PSI. (ROA.121). Ultimately, the court sentenced Salazar-Figueroa to a 60-month term of imprisonment. No supervised relief was imposed because he qualified for the safety valve. The fine was waived, but a special assessment of \$100 dollars was imposed. (ROA.121).<sup>1</sup> All remaining counts were dismissed. (ROA.122).

This Court should grant certiorari to determine whether the Fifth Circuit violated federal law when it refused to vacate the sentence; and because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should decide this

question and, and upon review, should reverse the judgment of the Fifth Circuit.

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1 No restitution was imposed in this case. (ROA.137,172,178)  
10

BASIS OF FEDERAL JURISDICTION IN THE  
UNITED STATES DISTRICT COURT

This case was brought as a federal criminal prosecution involving the importation of drugs in violation of in violation of 21 U.S.C. §§ 846, 952(a), 841(a)(1), 841 (b)(1)(A) and 18 U.S.C. § 2. The district court therefore had jurisdiction pursuant to 18 U.S.C. § 3231.

## REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to determine whether the Fifth Circuit violated federal law when it conducted a cursory review of the facts related to a warranted mitigating role adjustment under U.S.S.G. § 3B1.2 because **Fernando Salazar-Figueroa's** role in a drug related offense was minor; and because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should decide this question and, upon review, should reverse the judgment of the Fifth Circuit.

**ISSUE ONE RESTATED:** Whether the Fifth Circuit's cursory review of the facts related to a warranted mitigating adjustment under U.S.S.G. § 3B1.2 violated federal law in light of the fact that Salazar-Figueroa's role was peripheral as defined by the sentencing guidelines.

### **A. Standard of Review**

A review of factual findings includes the district court's deciding whether defendant was a minor or minimal participant in order to apply a mitigating-role reduction under Guideline § 3B1.2. United States v. Gomez-Valle, 828 F.3d 324, 327 (5th Cir. 2016). "A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole." *Id.* (internal quotation marks and citation omitted). Defendant's burden of showing her entitlement to a mitigating-role reduction must include two things: "(1) the culpability of the average participant in the criminal activity; and (2) that [defendant] was substantially less culpable than that participant". United States v. Castro, 843 F.3d 608, 613 (5<sup>th</sup> Cir. 2016) (footnote omitted).

**B. Salazar-Figueroa Was A Minimal Participant Substantially Less Culpable Than Other Participants Warranting a Four-Level Minor Role Adjustment Pursuant to U.S.S.G § 3B1.2 (a).**

In written objections and at sentencing, Salazar-Figueroa objected to the presentence investigation report, in that it failed to acknowledge that he had a minimal role in the offense warranting a four-level mitigating role adjustment. (ROA.130-131) "A party seeking an adjustment in the base level of an offense bears the burden of proving by a preponderance of the evidence that the adjustment is warranted." United States v. Torres-Hernandez, 843 F.3d 203, 207 (5th Cir. 2016).

Guideline § 3B1.2 of the 2018 Guidelines Manual provides for a downward adjustment "for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant." U.S.S.G. § 3B1.2. comment. (n.3(A)).<sup>2</sup> A four-level reduction applies to "minimal" participants, and "is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group." Id. § 3B1.2 (a) & comment. (n.4) .

On the other hand, A "minor" participant, "who is less culpable than most other participants, but whose role could not be described as minimal[,]" receives a two-level reduction. Id. §

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<sup>2</sup> An "average participant" under section 3B1.2 " means only those persons who actually participated in the criminal activity at issue in the defendant's case so that the defendant's culpability is determined only by reference to his or her co-participants in the case at hand." Torres-Hernandez, 843 F.3d at 208-09 (footnote omitted).

3B1.2 (b) & comment. (n.5). Participants whose role is more than minimal, but not quite minor, qualify for a three-level reduction.

Id. § 3B1.2. "The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent on the facts of the particular case." Id. comment. (n.3(C)).

To address relative culpability, a district court " should consider" the following non-exhaustive, five-factor list:

- (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.

§ 3B1.2, comment. (n.3(C)).

How the court weighs the factors is a matter of discretion. United States v. Torres-Hernandez, 843 F.3d. at 210 (5th Cir. 2016).

Furthermore, the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative [and] [s]uch 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." Id at 207; § 3B1.2, cmt. n.3(C).

Significantly, the commentary provides that "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." Id; § 3B1.2, comment. (n.3(C)).

In the instant case, Salazar-Figueroa contends that he should have received a four-level reduction afforded a minimal participant pursuant to § 3B1.2.(a) and comment. (n.4) because his role in this case was peripheral. The Fifth Circuit opined that "the district court's denial of the § 3B1.2 reduction was plausible in light of the record as a whole." United States v. Salazar-Figueroa, 21-40476 No. (5th Cir. 2022).

The Fifth Circuit rendered an erroneous decision. In this case, Salazar-Figueroa's role was to do as Williams Zarco told him. Salazar-Figueroa was carrying some suitcases with cocaine when arrested for the instant offense. It was Williams Zarco who ordered Salazar-Figueroa to carry the suitcases. The sentencing court recognized the Williams Zarco was indeed the manager/leader of the offense of conviction. The conduct giving rise to the offense in this was Salazar-Figueroa's only drug related conduct in his life.

(ROA.131,171). Salazar-Figueroa has no previous criminal history whatsoever. (ROA.174).

Salazar-Figueroa neither organized the event, nor did he give any input about the planning of the event. Rather, it was Zarco who organized and planned the event. Furthermore, Salazar-Figueroa did not have decision-making authority about pricing, timing, or location. His only involvement was in physically lifting and moving the suitcases of cocaine to a warehouse. Salazar-Figueroa was neither familiar with the scope of the conspiracy nor the type of drug involved. He neither knew the source of supply nor to whom the cocaine was going to be delivered. Rather, Zarco was the person with all the connections who planned and organized the conspiracy and the offenses in this case. As stated before-hand, Salazar-Figueroa has never taken part in events involving cocaine or drugs other than the conduct alleged in this case. (ROA.113-114,131).

Salazar-Figueroa was not the owner of the drugs in this case. His only conduct in the instant offense was essentially that of a transporter of narcotics. In similar cases, mere physical workers, like lifters and transporters, have been recognized as being, as a general matter, less culpable than other participants in a drug offense. See, E.g., United States v. Valdez-Gonzalez, 957 F.2d 643, 649-50 (9<sup>th</sup> Cir. 1992) ("mules" less culpable participants in drug conspiracies), limited on other grounds, United States v. Webster, 996 F.2d 209, 211 (9<sup>th</sup> Cir. 1993); 28 CFR. § 2.20 Chapter 13, Subchapter B(14) (2000) (under parole commission guidelines,

"peripheral role" in drug offense refers to simple courier, chauffeur, deckhand, or drug-loader).

Furthermore, the facts of this case, as described in the presentence report and in the factual basis for the guilty plea, establish that Salazar-Figueroa acted as a minimal participant in the offense and that a four-level mitigating adjustment should have been awarded in this case. According to the PSI, in July 2020, Williams Zarco approached Salazar-Figueroa and asked him if he wanted to go on vacation with him and together they flew to Brownsville, Texas. (ROA.170-171). Salazar-Figueroa had known Zarco since 2012. After arriving in Texas, Zarco directed Salazar to assist him in carrying two suitcases of cocaine to a warehouse. (ROA.130,170).

As stated previously, the evidence showed that William Zarco was the leader and/or organized of the conspiracy and crimes alleged in this case. (ROA.114,120-121,170-171). According to the PSI, Williams Zarco's role was to recruit Salazar-Figueroa to assist him in receiving and shipping narcotics from McAllen, Texas, to another location. (ROA.170-171).

The evidence shows that initially Appellant thought he was simply going on vacation with William Zarco. At that time, he was unaware that anything nefarious had been planned by Williams Zarco. The two arrived in Texas on July 24, 2020. Once arriving in Texas, Zarco rented a condominium in Mission, Texas where he, Salazar-Figueroa, and Jose Rosales resided for at least two months. Williams Zarco

paid all of Appellant's expenses while he was in the United States.

Furthermore, while in the United States, Appellant worked under the direction or instructions of Williams Zarco. Appellant, Salazar-Figueroa, was only paid 1,500 during the time he spent assisting Williams Zarco. (ROA.170). Moreover, there was no drug trafficking whatsoever until the very end when Appellant was arrested in September of 2020. (ROA.108-109).

As discussed earlier, Application Note 3(C) further provides, as an example, that "[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 a mitigating role adjustment. The PSI shows that Salazar-Figueroa did not have a proprietary interest in the criminal activity in this case. On October 25, 2018, Salazar-Figueroa was paid only \$1,500 by Zarco. This is the only payment mentioned in the PSI. (ROA.170-171). Therefore, pursuant to Application Note 3 (C), Salazar-Figueroa should have been afforded a mitigating role adjustment. See United States v. Diaz, 884 F.3d 911, 918 (9<sup>th</sup> Cir. 2018) (remanding sentence of drug courier because the district court "ignored" the fact that the defendant's "compensation was relatively modest and fixed" and the absence of "evidence that [he] had a proprietary interest in the outcome of the operation or otherwise stood to benefit more than minimally.")

According to the PSI, Williams Zarco rented the two warehouses used in the instant offense. Zarco verified the boxes of scrap

plastics at Valley Plastics and Paper Recycling in McAllen, purchased a vehicle for the defendants to conduct their operations, and instructed Jose Rosales to meet the individuals who transported the cocaine to their residence. (ROA.171).

In light of the totality of the circumstances and facts of this case, Salazar-Figueroa should have received a four-level reduction afforded to minimal participants pursuant to U.S.S.G 3B1.2 (a) comment. (n.4).

**C. The District Court's Error Prejudiced Salazar-Figueroa.**

As outlined above, Appellant should have received a mitigating role adjustment. Had he received a four-level mitigating role adjustment, the two- level enhancement pursuant to U.S.S.G. §§ 2D1.1(b) (5) (A) and (B), would not have been assessed.<sup>3</sup>

**Possible Guideline Ranges**

With the mitigating adjustments, the Total Offense Level would have resulted in a level 22. (ROA132). The guideline ranges for imprisonment would have resulted in 41-51 months, rather than the 87-108 months assessed in this case. (ROA.121).

See U.S.S.G. Chapter 5 Part A. (Sentencing Table).

Here, the Government cannot show that the district court would have imposed the same sentence had it correctly assessed

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<sup>3</sup> Pursuant to U.S.S.G. § 2D1.1(a) (5) (A), if the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels. If the resulting offense level is greater than level 32 and the defendant receives the 4-level ("minimal participant") reduction in §3B1.2(a),

the four-level reduction. The district court-imposed a downward departure sentence of 60 months of imprisonment based upon its guidelines calculations. There is no evidence to show that the district court would not have imposed a lower term of imprisonment if the four-level adjustment had been applied. Because the court's error was not harmless, remand is required. See Williams v. United States, 503 U.S. 193, 203 (1992) (when sentencing error occurs, remand required unless government can show same sentence would have been imposed); see also United States v. Kimbrough, 536 F.3d 463 (5<sup>th</sup> Cir. 2008) (correctly calculated guideline range necessary to sentence a defendant).

Based upon the foregoing law and analysis, Fifth Circuit erred in affirming the sentence. This Court has opined that although post-Booker, the Sentencing Guidelines are advisory only, the district court must avoid significant procedural error, such as improperly calculating the Guidelines sentencing range. Gall v. United States, 552 U.S. 38, 48-51 (2007).

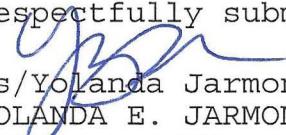
Because the proper application of the sentencing guidelines is of exceptional importance to the administration of justice in federal criminal cases, this Court should grant certiorari in this case to decide this question and, and upon review, should reverse the judgment of the Fifth Circuit.

CONCLUSION

For the foregoing reasons, petitioner **Fernando Salazar-Figueroa** respectfully prays that this Court grant certiorari, to review the judgment of the Fifth Circuit in this case.

**Date: May 9, 2022.**

Respectfully submitted,

  
/s/Yolanda Jarmon  
YOLANDA E. JARMON  
Attorney of Record for Petitioner  
2429 Bissonnet # E416  
Houston, Texas 77005  
Telephone: (713) 635-8338  
Fax: (713) 635-8498

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2021

**FERNANDO SALAZAR-FIGUEROA,**

v.

UNITED STATES OF AMERICA,  
Respondent.

On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

YOLANDA E. JARMON, is not a member of the Bar of this Court but was appointed under the Criminal Justice Act 18 U.S.C. § 3006 A(b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit, certifies that, pursuant to Rule 29.5, On May 9, 2022, she served the preceding Petition for Writ of Certiorari and the accompanying Motion for Leave to Proceed in Forma Pauperis on counsel for the Respondent by enclosing a copy of these documents in an envelope, and mailed by Federal Express at 2200 Southwest Fwy, Houston, TX 770098 and further certifies that all parties required to be served have been served and copies addressed to:

The Honorable Elizabeth Prelogar  
Solicitor General of the United States  
Room 5614, Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530-0001

/s/Yolanda Jarmon  
  
YOLANDA E. JARMON

**United States of America, Plaintiff-  
Appellee,  
v.  
Fernando Salazar-Figueroa, Defendant-  
Appellant.**

**No. 21-40476**

**United States Court of Appeals, Fifth  
Circuit**

**February 9, 2022**

Appeal from the United States District Court  
for the Southern District of Texas USDC No. 7:20-  
CR-1787-2

Before King, Costa, and Ho, Circuit Judges.

Per Curiam <sup>[\*]</sup>

Fernando Salazar-Figueroa pleaded guilty to possessing with intent to distribute 58.9 kilograms of cocaine. The district court sentenced him to 60 months of imprisonment, below the advisory guidelines range. On appeal, he

1

challenges the district court's refusal to grant a mitigating role reduction under U.S.S.G. § 3B1.2.

We review factual findings, including the determination whether to apply a mitigating role reduction under § 3B1.2, for clear error. *United States v. Gomez-Valle*, 828 F.3d 324, 327 (5th Cir. 2016). "A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole." *Id.* (internal quotation marks and citation omitted). The defendant has the burden of showing his entitlement to a mitigating role reduction and must demonstrate two things: "(1) the culpability of the average participant in the criminal activity; and (2) that [the defendant] was substantially less culpable than that participant." *United States v. Castro*, 843 F.3d 608, 613 (5th Cir. 2016) (footnote omitted).

The district court's denial of the § 3B1.2 reduction was plausible in light of the record as a

whole. *See Gomez-Valle*, 828 F.3d at 327. While Salazar-Figueroa pointed to another individual as the leader or organizer of the criminal activity, he failed to show the level of culpability of the average participant in the offense. *See Castro*, 843 F.3d at 613. And mitigating role reductions under § 3B1.2 do not automatically apply to every actor except the criminal mastermind. *See Gomez-Valle*, 828 F.3d at 331. Thus, the district court did not clearly err in refusing to grant a § 3B1.2 reduction. *See id.* at 327; *Castro*, 843 F.3d at 613.

The judgment is AFFIRMED.

2

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Notes:

<sup>[\*]</sup> Pursuant to 5th Circuit Rule 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 Circuit Rule 47.5.4.

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
Holding Session in McAllen

**ENTERED**

June 16, 2021

Nathan Ochsner, Clerk

UNITED STATES OF AMERICA

**JUDGMENT IN A CRIMINAL CASE**

v.

**FERNANDO SALAZAR-FIGUEROA**

CASE NUMBER: 7:20CR01787-002

USM NUMBER: 10433-509

Roberto Balli  
Defendant's Attorney

**THE DEFENDANT:**

pleaded guilty to count(s) 2 on January 26, 2021.

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:

<b>Title &amp; Section</b>	<b>Nature of Offense</b>	<b>Offense Ended</b>	<b>Count</b>
21 U.S.C. § 841(a)(1), 841(b)(1)(A) and 18 U.S.C. § 2	Possession with intent to distribute 58.9 kilograms of cocaine.	09/28/2020	2

See Additional Counts of Conviction.

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

The defendant has been found not guilty on count(s) \_\_\_\_\_

Count(s) 1 is 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.

June 15, 2021  
Date of Imposition of Judgment



Signature of Judge

**RANDY CRANE**  
**UNITED STATES DISTRICT JUDGE**  
Name and Title of Judge

June 16, 2021  
Date

*Exhibit B*

DEFENDANT: **FERNANDO SALAZAR-FIGUEROA**  
CASE NUMBER: **7:20CR01787-002**

## IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 60 months.

- See Additional Imprisonment Terms.
- The court makes the following recommendations to the Bureau of Prisons:
  - The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district:
  - at \_\_\_\_\_ 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:

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

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **FERNANDO SALAZAR-FIGUEROA**  
CASE NUMBER: **7:20CR01787-002**

## CRIMINAL MONETARY PENALTIES

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

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment<sup>1</sup></u>	<u>JVTA Assessment<sup>2</sup></u>
<b>TOTALS</b>	\$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 victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss<sup>3</sup></u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
	\$	\$	

- See Additional Restitution Payees.
- TOTALS** \$ \$
- Restitution amount ordered pursuant to plea agreement \$\_\_\_\_\_
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
  - the interest requirement is waived for the  fine  restitution.
  - the interest requirement for the  fine  restitution is modified as follows:
- Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

<sup>1</sup> Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

<sup>2</sup> Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

<sup>3</sup> 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: **FERNANDO SALAZAR-FIGUEROA**  
CASE NUMBER: **7:20CR01787-002**

## 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 \_\_\_\_\_ after the date of this judgment; or

D  Payment in equal \_\_\_\_\_ installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_, to commence \_\_\_\_\_ after release from imprisonment to a term of supervision; or

E  Payment during the term of supervised release will commence within \_\_\_\_\_ 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 the period of 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 <u>(including defendant number)</u>	<u>Total Amount</u>	<u>Joint and Several Amount</u>	<u>Corresponding Payee, if appropriate</u>
<input type="checkbox"/> See Additional Defendants and Co-Defendants Held Joint and Several. <input type="checkbox"/> The defendant shall pay the cost of prosecution. <input type="checkbox"/> The defendant shall pay the following court cost(s):  <input type="checkbox"/> The defendant shall forfeit the defendant's interest in the following property to the United States:			

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.