

No. _____

In The
Supreme Court of the United States

OSCAR PLIEGO-PINEDA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Seth A. Neyhart
Counsel of Record
LAW OFFICE OF SETH A. NEYHART
5226 Revere Road
Durham, NC 27713
(202) 870-0026
setusn@hotmail.com

Counsel for Petitioner

QUESTIONS PRESENTED

- I. Whether a Leadership Sentencing Enhancement Is Erroneous Without Evidence That a Defendant Supervised any Specific Individual.

LIST OF PARTIES

OSCAR PLIEGO-PINEDA, *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

TABLE OF CONTENTS

	Page:
QUESTIONS PRESENTED.....	i
LIST OF PARTIES	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
ORDER BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	1
A. Procedural History	1
B. Statement of the Facts	3
REASON WHY CERTIORARI SHOULD BE GRANTED	17
I. The Court Should Grant Certiorari to Establish that a Leadership Sentencing Enhancement Is Erroneous Without Evidence That a Defendant Supervised any Specific Individual	17
CONCLUSION.....	27
APPENDIX	
Opinion	
U.S. Court of Appeals for the Fourth Circuit	
filed February 24, 2025.....	Appendix A

TABLE OF AUTHORITIES

Page(s):

Cases:

<u>Gall v. United States</u> , 552 U.S. 38 (U.S. 2007)	17, 18
<u>Spears v. United States</u> , 555 U.S. 261 (2009)	18
<u>United States v. Avila</u> , 95 F.3d 887 (9 th Cir. 1996)	25
<u>United States v. Burnley</u> , 988 F.3d 184 (4 th Cir. 2021)	23
<u>United States v. Chambers</u> , 985 F.2d 1263 (4 th Cir. 1993)	19
<u>United States v. Jewel</u> , 947 F.2d 224 (7 th Cir. 1991)	25
<u>United States v. Kamper</u> , 748 F.3d 728 (6 th Cir. 2014)	24
<u>United States v. Kimbrough</u> , 552 U.S. 85 (2007)	18
<u>United States v. Luca</u> , 183 F.3d 108 (9 th Cir. 1999)	25
<u>United States v. Maldonado-Pineda</u> , No. 21-4353 (4 th Cir. Dec. 13, 2022).....	21
<u>United States v. Medina</u> , 167 F.3d 77 (1 st Cir. 1999)	24
<u>United States v. Oscar Pliego-Pineda</u> , Case No. 23-4286 (4 th Cir. 2025).....	1
<u>United States v. Rames-Paulino</u> , 488 F.3d 459 (1 st Cir. 2007)	24

Statutes:

18 U.S.C. § 1956.....	14
18 U.S.C. § 1956(a)(2)(A)	2
18 U.S.C. § 1956(h)	2
18 U.S.C. § 3553(a)	17, 18
21 U.S.C. § 841(b)(1)(A)	2
21 U.S.C. § 846.....	2
28 U.S.C. § 1254.....	1
28 U.S.C. § 2101.....	1

Constitutional Provisions:

U.S. Const. amend. V.....	1
---------------------------	---

Sentencing Guidelines:

U.S.S.G. § 2D1.1(b)(15)(C).....	19
U.S.S.G. § 2D1.1(b)(16)(C).....	14
U.S.S.G. § 2D1.1(b)(18).....	19
U.S.S.G. § 3B1.1.....	14, 20, 24
U.S.S.G. § 3B1.1(a)	25
U.S.S.G. § 3B1.1(b)	18, 19
U.S.S.G. § 5K1.1	15

ORDER BELOW

The order appealed from is the Judgment located at the CM/ECF Docket of the Fourth Circuit in United States v. Oscar Pliego-Pineda, Case No. 23-4286, Docket Entry No. 53, entered on February 24, 2025. A copy of the published opinion of the Fourth Circuit issued that date is attached as Appendix A.

JURISDICTIONAL STATEMENT

This petition for writ of certiorari is from a final judgment by the Fourth Circuit Court of Appeal entered on February 24, 2025 in a direct appeal of a conviction and sentence imposed against Petitioner Oscar Pliego-Pineda in the United States District Court for the Middle District of North Carolina in M.D.N.C. No. 1:20-cr-272-CCE. Accordingly, this Court has jurisdiction over this petition for writ of certiorari and the matter referenced herein pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2101.

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend V.

STATEMENT OF THE CASE

A. Procedural History.

On July 27, 2020, a federal grand jury in the Middle District of North Carolina returned a two-count indictment against Oscar Pliego-Pineda. Count One charged Mr. Pliego-Pineda with conspiracy to distribute 500 grams or more of a substance and mixture containing a detectable amount of methamphetamine from in or about

September 2019, continuing up to and including the present, in Forsyth, Alamance, and Randolph Counties, NC, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)). Count Two charged Defendant with conspiracy to transport, transmit, and transfer monetary instruments and funds from the United States to and through a place outside of the United States with the intent to promote a conspiracy to distribute controlled substances from in or about September 2019, continuing up to and including June 30, 2020, in Forsyth, Alamance, and Randolph Counties, NC, in violation of 18 U.S.C. §§ 1956(a)(2)(A) and (h)). [JA10-11.]

On November 23, 2020, Mr. Pliego-Pineda pled guilty to Counts One and Two pursuant to a written Plea Agreement. [JA4, JA12-52.]¹ On January 12, 2021, a Draft Presentence Investigation Report was filed. [JA4.] On February 17, 2021, a Revised Presentence Investigation Report was filed. [JA115-144.]

After a number of continuances, Mr. Pliego-Pineda's sentencing hearing was held on April 4, 2023. [JA53-96.] He was sentenced to 120 months of imprisonment. A written Judgment reflecting the sentence and a Statement of Reasons was filed on April 19, 2023. [JA97-104, JA218-221.]

On April 22, 2023, the undersigned filed a Notice of Appeal to the Fourth Circuit Court of Appeals. [JA105-106.] On June 1, 2023, the district court filed an Amended Judgment and a Sealed Reason for Amendment. [JA105-106, JA222.]

On February 24, 2025, the Fourth Circuit Court of Appeals affirmed the district court in a published decision. App. A.

¹References in the record are made to the Joint Appendix filed in the Fourth Circuit Court of Appeals below.

B. Statement of the Facts:

In this case, all factual objections to earlier drafts were resolved via discussion prior to the Final Pre-Sentence Report. The sentencing hearing proceeded on the following undisputed description of the offense conduct:

5. In 2019, the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), and local law enforcement agencies began an investigation into a Mexican drug trafficking organization operating in the Middle District of North Carolina, and other jurisdictions. The investigation revealed that **Oscar Pliego-Pineda**, Francisco Javier Maldonado-Pineda, Wences Mondragon-Penaloza, Luis Alberto Garcia-Tovar, Willy Espinal-Martinez, Jesus Carbajal-Hernandez, Orbin Wady Barnica, Juanita Bustos, Abril Bustos-Martinez, and Bertha Delapaz Luviano were engaged in a conspiracy to distribute methamphetamine. **Oscar Pliego-Pineda**, who lived in the Northern District of Georgia, coordinated shipments of methamphetamine into the Middle District of North Carolina. The investigation revealed that Oscar Pliego-Pineda was a member of a Mexican drug trafficking organization with members of the organization operating in Mexico, California, Georgia, and North Carolina.

6. On or about August 12, 2019, an FBI confidential source (CS) reported having contact with Melsar Penaloza Millan who was involved in the trafficking of large amounts of both cocaine and methamphetamine in the Greensboro, NC, area. It was reported that Melsar Penaloza Millan was being deported to Mexico, but advised he would be able to provide the CS with multiple kilogram quantities of methamphetamine as soon he as was back in Mexico. The CS was provided with contact telephone numbers for Melsar Penaloza Millan. In September 2019, Melsar Penaloza Millan contacted the CS from a Mexican telephone and offered the CS up to thirty (30) pounds of methamphetamine.

7. On September 16, 2019, FBI agents met with the CS to arrange for a controlled drug purchase that would take place on September 18, 2019. The CS advised he/she called Mencho Penaloza who acted as the primary contact, and told him that he/she was ready and would go to Atlanta, Georgia, on Wednesday. The CS received a contact number for Mencho Penaloza's drug connection in Atlanta, Georgia. The CS called the telephone number and spoke with the Atlanta connection, later identified as **Oscar Pliego-Pineda** (aka: "Michigan"). Note: It appears the CS and the defendant referred to each other as "Michigan." **Oscar**

Pliego-Pineda asked the CS what he/she wanted and the CS used coded language to request methamphetamine. The CS told **Oscar Pliego-Pineda** that he/she was coming from North Carolina on Wednesday and would be in Atlanta, Georgia, around lunch. The CS was told to call back when he/she approached Exit 108 on Interstate 85.

8. On September 18, 2019, a controlled purchase of one kilogram of methamphetamine was conducted by members of the FBI and DEA. The CS arranged the purchase of one kilogram of methamphetamine with **Oscar Pliego-Pineda**. The drugs were delivered by Francisco Yesdirguer Santana Pineda. The location of the controlled purchase was 1801 Howell Mill Road NW SW, Atlanta, Georgia. The drug amount was analyzed by the DEA laboratory. The analyst determined that the substance seized was **945 grams (net weight) of actual methamphetamine**.

9. On September 22, 2019, the CS was contacted on Facebook by Melsar Penaloza Millan. Melsar Penaloza Millan asked the CS about the quantity of the “ice” he/she received. The CS contacted Melsar Penaloza Millan by a Facebook application and spoke with him. The CS stated he/she told Melsar Penaloza Millan the quality of the “ice” was good and he/she was ready to order a larger amount. Melsar Penaloza Millan told the CS that he/she could not go from one (1) kilogram to 30 kilograms as the “guy in Atlanta” would have to trust him/her first. The CS advised he/she knew the guy in Atlanta from the time he/she served in detention center with him. The “Atlanta guy” (**Oscar Pliego-Pineda**) was in detention block 5C and left the detention center when Melsar Penaloza Millan was transported to Mexico.

10. The CS made a telephone call and spoke with **Oscar Pliego-Pineda**. The CS asked **Oscar Pliego-Pineda** about arranging a load of drugs to be sent to the CS. **Oscar Pliego-Pineda** told the CS to come back one more time to Atlanta, Georgia, before he would send a load of drugs to the CS in North Carolina. **Oscar Pliego-Pineda** stated he wanted to make sure the money was there before sending a load of drugs. The CS offered to pay a portion of the transportation costs by paying more per kilogram. The CS called **Oscar Pliego-Pineda** and spoke about coming down to Atlanta, Georgia, to meet with him. The CS advised that during the call, **Oscar Pliego-Pineda** agreed to meet with the CS at a restaurant the following Tuesday (October 8, 2019). **Oscar Pliego-Pineda** told the CS there was a good Mexican restaurant near the TJ Maxx in Atlanta, Georgia.

11. On October 8, 2019, FBI and DEA agents utilized the CS to conduct a controlled purchase of one kilogram of methamphetamine from **Oscar Pliego-Pineda**. The location of the controlled purchase was the parking lot of the La Parrilla Mexican restaurant located at 1801 Howell Mill Road NW #420, Atlanta, Georgia. A DEA undercover employee (UC) was utilized as part of this operation as well as an undercover vehicle supplied by the DEA. **Oscar Pliego-Pineda** delivered the one kilogram of methamphetamine to the CS for \$5,000. According to the DEA laboratory report, the substance seized was 982 grams (net weight) of actual methamphetamine. **Oscar Pliego-Pineda** advised he returned to Atlanta, Georgia, only a couple of days after being deported to Mexico. **Oscar Pliego-Pineda** and the UC agreed on the price of \$6,000 per kilogram of methamphetamine to be delivered to Greensboro, NC. **Oscar Pliego-Pineda** advised he would later instruct them where to wire the drug proceeds.

12. Over the next two months following the October 8, 2019, controlled purchase, there were several conversations between the CS and **Oscar Pliego-Pineda** about arranging a shipment of methamphetamine to the CS in North Carolina. **Oscar Pliego-Pineda** offered to provide a shipment of methamphetamine in a liquid or alternative form directly from Mexico to avoid the increased courier cost of transporting the crystal methamphetamine from Atlanta, Georgia, to Greensboro, NC. **Oscar Pliego-Pineda** told the CS that the liquid or alternative form could be converted into approximately two (2) kilograms worth of crystal methamphetamine that the CS could then sell. The CS agreed to the receiving the alternative form of methamphetamine.

13. On December 3, 2019, **Oscar Pliego-Pineda** contacted the CS to inform him/her that the liquid methamphetamine was nearby and ready to be picked up. The package was shipped using DHL from San Juan Del Rio, Queretaro, Mexico, and eventually delivered to North Carolina. The CS informed **Oscar Pliego-Pineda** that he/she was busy; therefore, he/she was going to send "Tio" to receive the shipment. ("Tio" was an agent working in undercover capacity (UC).) On December 4, 2019, **Oscar Pliego-Pineda** coordinated the delivery of the methamphetamine soap package. The meeting was coordinated by the UC after **Oscar Pliego-Pineda** forwarded a telephone number to the CS. This telephone number was believed to belong to Wences NMN Mondragon-Penalzoa. Subsequently, Wences NMN Mondragon-Penalzoa directed the UC to meet him at the Compare Foods Supermarket parking lot located at 951 Silas Creek Parkway in Winston-Salem, NC. Wences NMN Mondragon-Penalzoa, the driver and only occupant in the vehicle, delivered a 17 kilogram package containing

methamphetamine in soap bar form (170 bars) to the UC. According to the DEA laboratory report, the substance seized was 17,035 grams (net weight) of methamphetamine. (Pursuant to USSG §2D1.1, comment. (n.1), a mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the Court use any reasonable method to approximate the weight of the mixture or substance to be counted. Pursuant to USSG §2D1.1, comment. (n.5), the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. The weight of approximately 2 kilograms of methamphetamine will be used for calculation purposes based on the agreed-upon quantity noted in the above paragraph. This determination is subject to review and/or modification by the Court.)

14. Subsequent to December 4, 2019, the CS maintained contact with subjects in Mexico regarding the methamphetamine soap package. **Oscar Pliego-Pineda** told the CS that he would send someone to Greensboro, NC, to teach the CS how to convert the soap to crystal methamphetamine. The CS spoke with Benjamin Islas Melfavon in Mexico and another unidentified individual who gave the actual conversion instructions. This individual gave the CS step-by-step instructions on how to convert the methamphetamine in soap form to crystal methamphetamine. On or about December 7, 2019, **Oscar Pliego-Pineda** contacted the CS and asked the CS to pay Wences NMN Mondragon-Penaloza two hundred dollars (\$200) for receiving the package from Mexico and delivering the package to the UC. The CS agreed to take care of the matter. On December 9, 2019, the UC met Wences NMN Mondragon-Penaloza at the same parking lot and paid him \$200 for the methamphetamine soap shipment.

15. On approximately December 27, 2019, Oscar Pliego-Pineda requested the UC pay \$2,000 for the methamphetamine soap package since no money had been previously paid for shipment. Oscar Pliego-Pineda provided a Wells Fargo Bank account number of 2673689325 and the name Tanya Aldana (**Oscar Pliego-Pineda's** wife) as the account holder. On December 31, 2019, the UC wired \$2,000 of special funds to the above-noted account as payment for the methamphetamine soap package.

16. In January of 2020, the UC was contacted by **Oscar Pliego-Pineda** regarding a possible future shipment of crystal methamphetamine because the UC was disappointed in the results of the methamphetamine soap extraction. During one conversation, Oscar **Pliego-Pineda** passed his phone to Francisco Javier Maldonado-Pineda. The UC spoke with Francisco Javier Maldonado-Pineda regarding a shipment of methamphetamine to North Carolina. On January 29, 2020, the UC received a call from Francisco Javier Maldonado-Pineda who asked for an address to give his couriers and noted the shipment would be there in two days. On February 5, 2020, **Oscar Pliego-Pineda** told the UC that the courier would be leaving the following morning to deliver the methamphetamine (“ice”) to the UC. The UC had been negotiating with **Oscar Pliego-Pineda**. During several recorded telephone conversations and text messages between **Oscar Pliego-Pineda** and the UC, **Oscar Pliego-Pineda** agreed to sell three (3) kilograms of crystal methamphetamine to the UC at a price of \$6,500 per kilogram. This included delivery of the methamphetamine to North Carolina. **Oscar Pliego-Pineda** requested a partial payment of \$12,000 to be provided to the courier at the time of delivery.

17. On February 6, 2020, **Oscar Pliego-Pineda** provided the UC the phone number for Luis Alberto Garcia-Tovar to coordinate the delivery in Randleman, NC. Luis Alberto Garcia-Tovar met the UC outside of Walmart in Randleman, NC. Luis Alberto Garcia-Tovar arrived in a brown colored Honda sedan with taxi decals which was being driven by Willy Alejandro Espinal-Martinez. Luis Alberto Garcia-Tovar was dropped off by Willy Alejandro Espinal-Martinez and retrieved two (2) bags from the trunk of the vehicle. Luis Alberto Garcia-Tovar entered the UC’s vehicle. While the drug transaction took place, Willy Alejandro Espinal-Martinez circled the Walmart parking lot before parking at a Hardees nearby.

18. Luis Alberto Garcia-Tovar told the UC that he previously moved some methamphetamine from California and it was “really good stuff.” Luis Alberto Garcia-Tovar advised the methamphetamine was very potent and that was the important thing. Luis Alberto Garcia-Tovar stated he came in a taxi from Atlanta, Georgia, to see “how the show was” (believed to be referring to the route and how the exchange went). During the drug transaction the UC noted that there were only two kilograms, and not the expected three kilograms for delivery. According to the DEA laboratory report, the substance seized was 1,784.4 grams (net weight) of actual methamphetamine. The UC called **Oscar Pliego-Pineda** and Luis Alberto Garcia-Tovar called Francisco Javier Maldonado-Pineda to work out the issue. A lesser amount was paid due

to the fact that only two (2) kilograms were delivered instead of the three (3) as originally negotiated. The controlled buy was ultimately completed using \$8,000 of DEA official funds and \$1,000 of FBI official funds. At the conclusion of the transaction, Willy Alejandro Espinal-Martinez picked up Luis Alberto Garcia-Tovar and travelled south on Interstate 85. The taxi was later stopped near Charlotte, NC. Willy Alejandro Espinal-Martinez advised officers that he was on his way back to Georgia after picking up a passenger, Luis Alberto Garcia-Tovar. After the deal concluded, the UC was contacted directly by Francisco Javier Maldonado-Pineda regarding the payment given to **Oscar Pliego-Pineda**. Francisco Javier Maldonado-Pineda further stated that he could provide future larger shipments if the UC gave him one week notice and he (Francisco Javier Maldonado-Pineda) would send his “guys” up there again. A court order was obtained allowing agents to obtain GPS location for the phone utilized by Francisco Javier Maldonado-Pineda which resulted in agents positively identifying him as residing in California.

19. On February 14, 2020, the UC conducted a wire transfer of \$4,000 to **Oscar Pliego-Pineda** as partial payment for the two kilograms of methamphetamine that was delivered on February 6, 2020. A total of \$4,000 worth of money orders were transferred to Tonya Aldana’s Wells Fargo bank account (26736893250).

20. On February 18, 2020, the UC had another recorded conversation with **Oscar Pliego-Pineda**. **Oscar Pliego-Pineda** stated he would be sending an additional ten kilograms of methamphetamine (“ice”) to the UC in North Carolina on February 22, 2020. **Oscar Pliego-Pineda** asked the UC to have \$12,000 available to pay the “taxi driver.” As of February 25, 2020, the ten kilograms of methamphetamine never arrived. During recorded conversations, **Oscar Pliego-Pineda** indicated to the UC that two kilograms of “ice” were immediately available in Burlington, NC, until the ten kilograms arrived. The UC agreed to purchase the two kilograms. **Oscar Pliego-Pineda** provided the UC a number of the person who would provide the UC with the two kilograms. The UC called the number and spoke with Jesus NMN Carbajal-Hernandez. **Oscar Pliego-Pineda** told the UC that the point of contact (Jesus NMN Carbajal-Hernandez) was in the Burlington, NC area. **Oscar Pliego-Pineda** told the UC that the drug delivery would be fronted and he would instruct the UC where to wire the payment once the transaction was complete. The UC and Jesus NMN Carbajal-Hernandez agreed to conduct the transaction on the following day.

21. The UC coordinated with Jesus NMN Carbajal-Hernandez who stated he would send his courier to meet and deliver the shipment to the UC. Shortly thereafter, the UC was contacted by Orbin Wady Barnica, who stated he was told to bring the UC a shipment. On February 26, 2020, agents conducted surveillance of Jesus NMN Carbajal-Hernandez as he left his residence at 158 Dewey Drive, Gibsonville, NC. Jesus NMN Carbajal-Hernandez and a female then arrived at 351 Meadowbrook Drive, Burlington, NC. Jesus NMN Carbajal-Hernandez met with several people and outside and received a plastic bag. Jesus NMN Carbajal-Hernandez then returned to 158 Dewey Drive and texted the UC and told him to go to 430 Kernodle Drive in Graham, NC. The UC then received a call from Orbin Wady Barnica who told the UC he was instructed to call about delivering a “vayna.” They agreed to meet at the Waffle House/gas station at 801 E. Hardin Avenue, Graham, NC. Orbin Wady Barnica was observed pulling into the parking lot of the Waffle house with a plastic bag in his hand. The UC conducted a controlled buy of methamphetamine from Orbin Wady Barnica in the parking lot. Prior to the exchange, the UC had been negotiating the purchase with **Oscar Pliego-Pineda**. The UC also told him the shipment was short approximately one-half kilogram. According to the DEA laboratory report, the substance seized was 1,460 grams (net weight) of actual methamphetamine.

22. The UC was then contacted by Jesus NMN Carbajal-Hernandez who asked details about how the delivery was short. Jesus NMN Carbajal-Hernandez claimed the delivery should have been three (3) bags with one pound and another bag was loose crystal methamphetamine to make the full two (2) kilograms. Jesus NMN Carbajal-Hernandez specifically wanted to know the weight of the loose bag because he believed his guy (Orbin Wady Barnica) may have taken some of the product. Jesus NMN Carbajal-Hernandez was upset at Orbin Wady Barnica and insisted the shipment was two (2) kilograms.

23. On February 28, 2020, the UC conducted a wire transfer of \$8,000 to Oscar Pliego-Pineda as partial payment for the half kilogram of methamphetamine that was delivered on February 26, 2020, in Graham, NC. A total of \$8,000 worth of money orders was transferred to Tanya Aldana’s Wells Fargo bank account (26736893250).

24. **Oscar Pliego-Pineda** arranged for ten (10) kilograms of crystal methamphetamine to be delivered to the UC in North Carolina on behalf of Orfael Bustos Macedo (aka “Guero”) who was in Mexico. Oscar Pliego-Pineda told the UC he would only need \$10,000 at the time of the delivery and the remaining balance for the ten kilograms could be paid

later. **Oscar Pliego-Pineda** then provided the number for the courier of this transaction who was identified as Abril NMN Bustos-Martinez. At this point, Abril NMN Bustos-Martinez started communicating with the UC via text and telephone calls. They agreed to meet at a gas station, and Abril NMN Bustos-Martinez also indicated they would need a location to access a hidden compartment in the vehicle. The deal was coordinated by Oscar Pliego-Pineda. The UC and his accomplice (UC#2) met Abril NMN Bustos-Martinez at a residence located at 1822 Sechrest Circle, Archdale, NC, on March 2, 2020. Abril NMN Bustos-Martinez was the driver and Juanita NMN Bustos was in the passenger seat. (Note: Abril NMN Bustos-Martinez and Juanita NMN Bustos are sisters.) Wences NMN Mondragon-Penaloza and his minor daughter (age 17) were in the vehicle. The vehicle was backed into the carport and the drugs were removed from a hidden compartment in the vehicle. Wences NMN Mondragon-Penaloza used his minor daughter as a lookout while others retrieved the drugs from the trap of the vehicle. The UC conducted a controlled purchase of approximately 9.2 kilograms of crystal methamphetamine (initially supposed to be 10 kilograms). DEA provided \$10,000 in official funds as an initial payment at the time the crystal methamphetamine was delivered with the understanding that the balance would be paid in payments as the product was supposedly sold. According to the DEA laboratory report, the substance seized was 8,737 grams (net weight) of actual methamphetamine.

25. Post-operation surveillance and vehicle tracker information revealed that after the delivery on Sechrest Circle, Abril NMN Bustos-Martinez and Juanita NMN Bustos ultimately traveled to Atlanta, Georgia, and stayed for four days. On March 7, 2020, the vehicle left the Atlanta area and traveled southwest toward Mobile, Alabama. A traffic stop was conducted with the assistance of the DEA Mobile office. Juanita NMN Bustos advised they were all traveling back to Houston, Texas, after seeing her sick uncle (Eucaro Mondragon) in North Carolina who had cancer. Juanita Bustos gave consent to search her vehicle. The vehicle had two hidden compartments which were lined with Dynamat and dryer sheets in an attempt to conceal the odor of narcotics. One trap was empty and the other one contained \$287,609 in United States currency. Abril NMN Bustos-Martinez, Juanita NMN Bustos, and two males were in the vehicle. All four individuals disavowed any knowledge of the money in the trap. Officers found some of the “buy money” used to pay for the ten (10) kilograms of methamphetamine. The buy money was in the possession of Abril NMN Bustos-Martinez. Arrests were not made at that time and the vehicle and United States currency were seized. Based on cooperator information, the seized money represented drug proceeds that was destined for Mexico.

26. The UC received a telephone call from **Oscar Pliego-Pineda** inquiring about the trustworthiness of the UC's accomplice (UC#2) after **Oscar Pliego-Pineda** was contacted by a supervisor from Mexico. **Oscar Pliego-Pineda** informed the UC that the "girls" (Abril NMN Bustos-Martinez and Juanita NMN Bustos) had been stopped in Alabama and the money (\$10,000 in DEA funds) provided to the Bustos sisters by the UC on March 2, 2020, had been seized. The UC informed **Oscar Pliego-Pineda** that the UC had wired him \$1,750 to pay off the balance of approximately 1.5 kilograms of crystal methamphetamine delivered to the UC on February 26, 2020. The UC provided **Oscar Pliego-Pineda** with the passcode and name of sender so he (**Oscar Pliego-Pineda**) could withdraw the money. The money was sent via MoneyGram from Walmart to Tanya Aldana on March 9, 2020. The UC informed **Oscar Pliego-Pineda** that the UC had wired **Oscar Pliego-Pineda** a \$500 advance through Walmart. The UC provided **Oscar Pliego-Pineda** with the passcode and name of sender so that **Oscar Pliego-Pineda** could withdraw the money. The money was sent via MoneyGram from Walmart on Sunday, March 15, 2020.

27. The UC made a partial payment of \$10,500 (\$10,250 FBI funds and \$250 NCSBI special funds) to Wences NMN Mondragon-Penaloza. The UC met with Wences NMN Mondragon-Penaloza at the Compare Foods Supermarket located at 951 Silas Creek Parkway in Winston-Salem, NC, to make the partial payment on March 18, 2020. This was the third partial payment for delivery of approximately 9.2 kilograms of crystal methamphetamine coordinated by **Oscar Pliego-Pineda**.

28. On March 26, 2020, the UC made another partial payment of \$10,000 (FBI funds) to Bertha Delapaz Luviano, wife of Wences NMN Mondragon-Penaloza. During the delivery, Wences NMN Mondragon-Penaloza was unavailable but agreed to send his wife and daughter to pick up the money. The UC met with Bertha Delapaz Luviano at the Compare Foods Supermarket located at 951 Silas Creek Parkway in Winston-Salem, NC, to make the partial payment on March 26, 2020. During the money drop, Bertha Delapaz Luviano walked from her residence (shared with Wences NMN Mondragon-Penaloza) with her minor daughter (S.M.D) to meet with the UC. The UC provided the money in a Smithfield's BBQ cup to conceal the money. Bertha Delapaz Luviano told the UC she was sent there to pick something up for her husband. The UC showed the \$10,000 to Bertha Delapaz Luviano and told her to tell Wences NMN Mondragon-Penaloza that it was \$10,000. During the delivery, the minor daughter (S.M.D.) stood behind the UC's vehicle as a lookout. This was the fourth partial payment for delivery of

approximately 9.2 kilograms of crystal methamphetamine coordinated by **Oscar Pliego-Pineda**.

29. Starting in June of 2020, **Oscar Pliego-Pineda** started having phone calls with the UC and CS regarding an additional shipment of methamphetamine that would be mailed directly from Mexico. On June 14, 2020, **Oscar Pliego-Pineda** told the UC that a shipment of liquid methamphetamine would be arriving in North Carolina the next day. **Oscar Pliego-Pineda** also assured the UC that he would send an individual that could help the UC convert the methamphetamine from liquid form to crystal. On June 16, 2020, **Oscar Pliego-Pineda** used WhatsApp to send a picture of a shipping label to the UC. On June 19, 2020, a package containing approximately 6 kilograms of methamphetamine was intercepted in Memphis, TN. (Note: The government has yet to provide a laboratory analysis for this drug amount.) Agents determined this was the same package that **Oscar Pliego-Pineda** had arranged to be shipped from Mexico to the UC in North Carolina.

30. On June 23, 2020, agents established surveillance at the apartment belonging to Abril NMN Bustos-Martinez and Juanita NMN Bustos. The address of the apartment was 23200 Forest North Drive, Apt. #1002, Kingwood, Texas. Agents knocked on the door and the Bustos sisters both exited the apartment. Juanita NMN Bustos exited the apartment while carrying an infant child. The minor brother and sister of Abril NMN Bustos-Martinez and Juanita NMN Bustos also exited the apartment. Consent was given to search the apartment. Agents found a .380 Browning handgun in Juanita NMN Bustos' bedroom. Juanita NMN Bustos advised her father, Orfael Bustos Macedo, coordinated the drug transactions. Juanita NMN Bustos stated she was not aware of the quantity of drugs she was to deliver to North Carolina. Juanita NMN Bustos noted she loved her father but acknowledged what he was doing was not right. Juanita NMN Bustos stated they stayed in a hotel in Winston-Salem, NC, and then went to their uncle's house. Their uncle was identified as Wences NMN Mondragon-Penalzoa. Juanita NMN Bustos admitted to helping access the hidden compartment in the vehicle. She noted after the drug transaction occurred, Wences NMN Mondragon-Penalzoa and his daughter were dropped back off at their home. Juanita NMN Bustos noted they traveled to Atlanta, Georgia, and went to an unspecified address. She noted they removed the front seat again and placed bulk United States currency in the hidden compartment. Juanita NMN Bustos noted she was not sure how much money was placed in the hidden compartment. Juanita NMN Bustos stated that on the way back to Texas they were stopped by police.

Juanita NMN Bustos admitted she and Abril NMN Bustos-Martinez made three previous trips at the direction of their father. She noted her father paid them to make the trips. Juanita NMN Bustos stated her father introduced her to Oscar Pliego-Pineda and his wife, Tanya Aldana.

31. Luis Alberto Tovar-Garcia was interviewed by law enforcement agents. Luis Alberto Garcia-Tovar noted he frequently used Willy Alejandro Espinal-Martinez for his taxi services. He noted Willy Alejandro Espinal-Martinez drove him to North Carolina to look for a job. He stated Willy Alejandro Espinal-Martinez had no knowledge of his true intentions. Luis Alberto Garcia-Tovar advised he met **Oscar Pliego-Pineda** in a bar in Atlanta, Georgia, and has been doing some work “here and there” but North Carolina was the furthest he had been.

32. **Oscar Pliego-Pineda** was interviewed by law enforcement agents. **Oscar Pliego-Pineda** reported he started working for Orfael Bustos Macedo several years ago and that Orfael Bustos Macedo was his source of supply. **Oscar Pliego-Pineda** stated he knew that Orfael Bustos Macedo’s daughters transported drugs for their father but he never received any money from them directly. **Oscar Pliego-Pineda** stated he worked as a “middle man” connecting people looking for drugs with Orfael Bustos Macedo. He stated he met Francisco Javier Maldonado-Pineda while he was in Atlanta, Georgia, but Francisco Javier Maldonado-Pineda lived in California. **Oscar Pliego-Pineda** recalled arranging a shipment to North Carolina through Francisco Javier Maldonado-Pineda.

33. Francisco Javier Maldonado-Pineda was interviewed by law enforcement agents. He admitted he had been to Mexico within the last week (prior to his arrest on June 30, 2020) visiting his uncle. He stated he and his wife rent a home at 1965 Echo Road, San Jacinto, California. Francisco Javier Maldonado-Pineda admitted he had been arrested for drug related offenses eight to ten years ago. He stated he had ties with Luis Alberto Garcia-Tovar and knew **Oscar Pliego-Pineda** from a ranch in Guerrero, Mexico. Francisco Javier Maldonado-Pineda stated Luis Alberto Garcia-Tovar previously wired money to him. Francisco Javier Maldonado-Pineda stated he did not know anyone else in the photographs shown to him. Francisco Javier Maldonado-Pineda admitted the 9mm belonged to him and the AR-15 had been given to him.

34. For guideline computations, **Oscar Pliego-Pineda** is responsible for **approximately 8 kilograms of methamphetamine and 13,908.4**

grams (13.9 kilograms) (net weight) of methamphetamine (actual) for a total converted drug weight of 294,168 kilograms as shown below. . .

[JA169-173.]

The Final PSR calculated Defendant's adjusted offense level for Count One at 43, which involved a level 38 for Defendant's accountable drug weight, 3 levels for leadership under U.S.S.G. § 3B1.1, and a two level enhancement for the importation of a controlled substance under U.S.S.G. § 2D1.1(b)(16)(C). [JA178.] The level for Count Two used this as a base offense level, and added another two levels pursuant to U.S.S.G. § 2S1.1(b)(2)(B) because Defendant was convicted under 18 U.S.C. § 1956. [JA178.]

This resulted in an adjusted offense level of 45. [JA178.] After awarding three levels for acceptance of responsibility, Defendant's total offense level was calculated as 42. [JA179.] Based upon a Criminal History Category of I and a total offense level of 42, the Probation Officer calculated Mr. Pliego-Pineda's guideline imprisonment range at 360 months to life. [JA179.]

Mr. Pliego-Pineda objected to the leadership enhancement, and it was ultimately adjudicated by the district court. [JA55-68]. The undersigned contended that there was no individual in the conspiracy whom Mr. Pliego-Pineda employed, paid, controlled or oversaw. Thus, without any specific followers identified, Mr. Pliego-Pineda was ineligible for the leadership enhancement. [JA204-211.] The undersigned noted that without the leadership enhancement and other

enhancements predicated on leadership, Mr. Pliego-Pineda's guideline range would have been 168-210 months. [JA211.]

The district court overruled this objection and found a guideline range of 360 months to a year. [JA70-71.] The district court then announced a variant sentence of 180 months prior to granting the Government's motion pursuant to U.S.S.G. § 5K1.1. [JA90.]

In overruling the objection, the district court stated the following:

Well, looking at these seven factors in the guidelines, 3D1.1, comment four, it is--seems to me, that he did exercise some decision making authority in the sense that he decided whether to go through- whether to arrange the deal. Now, that is the same kind of decision making authority any drug dealer has, you know, whether to sell to someone. So that, you know, that kind of decision making authority is fairly narrow, but of course here we are talking about repeat drug deals, very significant amounts of methamphetamine, and deciding whether to trust a seller--excuse me, buyer, and presumably a seller, but more the buyer here, is pretty significant decision making authority.

The nature of the participation, he was obviously key to all of these transactions. He put the buyer together with those in the organization and the conspiracy for bringing the drugs to the deal. He certainly was involved in the recruitment and approval of the [UC] as an accomplice. I don't know what his right to share of the proceeds were, but the money is going into his bank account, where presumably he was keeping certainly some of it, but I don't think I know a lot about that.

But his degree of participation in planning and organizing [was] very, very high. He was at the center of these deals, and he had--the nature and scope of the illegal activity, obviously very, very significant. A wide-ranging drug conspiracy involving a number of players at very significant amounts, and he was as [the AUSA] says, the hub of this.

The degree of control and authority exercised over others, that's an interesting point. I'm confident that if he had told the person, you know, the mule, the person delivering the drugs not to take them, that that person would have obeyed, that person would not have done it, and that,

you know, was he able by himself to tell the person who delivered the drugs to do it? I don't know.

There is clearly some other people involved in the chain of the command but, you know, there could be mutual control, and we're not talking here joint control. We're not talking here about being an organizer or a leader with the five level enhancement.

We're talking about the manager or supervisor, and it is totally clear that he was supervising these operations. He had a lot of oversight. He was helping work through delivery problems. Quality problems involving the liquid meth, amounts--disputes over the amounts. He was involved in all of these things and he was communicating the prices to the buyer, and seems to have had at least some authority to negotiate a price.

I'm sure, you know, there may have been some constraints on that from others, but it seems to me, that he did have this supervisory role and this management role. You know, I appreciate that there is some--there is not direct evidence that he's telling people, you know, specific people do this, do that, but he is clearly managing and supervising the operation. I have no doubt that if he had told these other folks, don't do it, you know, they wouldn't have done it, that he had a degree of management and supervisory authority and clearly somebody is telling these folks, yes, go deliver the drugs, and he is telling the [UC], which is an important point, take--deliver the money this way, put it in the bank account. He is supervising the [UC's] actions, or managing them, certainly. Managing them might be a better word in that particular way.

So when I look at all of these things together, it seems to me he falls under the enhancement as it is defined in the guideline, and also find by a preponderance of the evidence, which means I'll overrule [Pliego-Pineda's] objection.

[JA69–71.]

On appeal, the Fourth Circuit Court of Appeals upheld the finding of the leadership enhancement. See App. A. The Fourth Circuit, however, noted that the district court erred to the extent it considered Mr. Pliego-Pineda to have supervised the UC. App. A, p. 13. Notwithstanding this error, the Fourth Circuit held that “nearly all of the remaining factors support the district court’s factual findings.” Id.

REASON WHY CERTIORARI SHOULD BE GRANTED

I. The Court Should Grant Certiorari to Establish that a Leadership Sentencing Enhancement Is Erroneous Without Evidence That a Defendant Supervised any Specific Individual.

The factors to be considered by the Court in determining a sentence are set out in 18 U.S.C. § 3553(a), which states in relevant part:

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- 1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- 2) the need for the sentence imposed—
 - a. to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - b. to afford adequate deterrence to criminal conduct;
 - c. to protect the public from further crimes of the defendant;
 - d. to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- 3) the kinds of sentences available;
- 4) the kinds of sentences and the sentencing range established for – the applicable category of offense committed by the applicable category of defendant as set for in the guidelines...issued by the Sentencing Commission;
- 5) any pertinent policy statement...issued by the Sentencing Commission...;
- 6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- 7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

The trial court must begin the sentencing proceedings by correctly calculating the applicable Guidelines range. See Gall v. United States, 552 U.S. 38, 50 (U.S. 2007). "The Guidelines are not the only consideration, however. Accordingly, after

giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." Id. In so doing, she may not presume that the Guidelines range is reasonable. Id. She must make an individualized assessment based on the facts presented. If she decides that an outside-Guidelines sentence is warranted, she must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. Id. A sentencing judge may impose a sentence that varies from the Guidelines range based on a policy disagreement with the Guidelines. See, e.g., Spears v. United States, 555 U.S. 261, 263-67 (2009) (*per curiam*); United States v. Kimbrough, 552 U.S. 85, 109-10 (2007).

On review of a federal criminal sentence, the Court

must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range.

Gall v. United States, 552 U.S. 38, 51 (2007).

In this case, the district court procedurally erred by applying a sentencing enhancement pursuant to U.S.S.G. § 3B1.1(b). The effect of this error was magnified by the fact that although the sentencing enhancement itself was three levels, the

consequences of this error resulted in a seven level difference in Mr. Pliego-Pineda's guideline range. Specifically, without this enhancement, Mr. Pliego-Pineda would not have been eligible for the two level enhancement under U.S.S.G. § 2D1.1(b)(15)(C), as a leadership enhancement is one of the stated qualifications under that provision. Further, he would be otherwise have been eligible for an additional two level reduction pursuant to the safety valve provision under U.S.S.G. § 2D1.1(b)(18).

With a criminal history category of I, the result of this seven level cumulative enhancement from 35 to 42 changed Mr. Pliego-Pineda's advisory range from 168 to 210 months to 360 months to life. [JA212-213].

Section 3B1.1(b) of the Sentencing Guidelines provides for a three-point enhancement "[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(b). Here, it is conceded that five or more participants were involved in this case. The issue is whether or not Mr. Pineda acted as a supervisor or manager.

The Guidelines do not define the terms "manager" or "supervisor," so their common meaning in everyday English usage should be applied to them. See, e.g., United States v. Chambers, 985 F.2d 1263, 1267 (4th Cir. 1993) (finding the defendant did not act as a "supervisor" because the evidence did not show that he "supervised people," and "no one testified that [he] performed a single supervisory task"); id. at 1268 (relying on dictionary definitions of "manager" as one who directs people). In so doing, the sentencing court "must consider seven factors":

[1] the exercise of decision making authority, [2] the nature of participation in the commission of the offense, [3] the recruitment of accomplices, [4] the claimed right to a larger share of the fruits of the crime, [5] the degree of participation in planning or organizing the offense, [6] the nature and scope of the illegal activity, and [7] the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1, cmt. n.4).

According to the Pre-Sentence Report, in his initial interview, Mr. Pineda described his role as essentially a “middle man” connecting buyers (including the federal undercover agent and confidential source) with Melsar-Penaloza Millan, Francisco Javier Maldonado-Pineda, and Orfael Bustos respectively. [JA176-177.]

The offense conduct in the Pre-Sentence Report that the district court relied on is repeated verbatim in its entirety supra. With respect to management or supervising, there is simply no evidence there that Mr. Pliego-Pineda gave orders to any co-defendant or other member of the conspiracy, determined how much any member of the conspiracy would or would not get paid, controlled any member of the conspiracy, or enforced any specific rules on another member of the conspiracy. [JA169-177.]

With respect to the seven factors, as a “middle-man” Mr. Pliego-Pineda made a number of statements to Government agents with respect to arranging the price and terms of delivery of methamphetamine shipments. He was also involved in telephone and other conversations with members of the conspiracy concerning the same. (Nos. 1, 2, 5, 6.) However, any discretion on his part was limited by the source of supply he was working with. He had no ability to act unilaterally.

Notably, the Presentence Report contains a number of incidents that show that Mr. Pliego-Pineda did not have decision making authority in the conspiracy, but instead was always working within the parameters set by the source of supply.

In paragraphs six through eleven of the Presentence Report, Mr. Pliego-Pineda clearly appears to be working for Melsar Penaloza Millan. Mr. Millan introduced Mr. Pliego-Pineda as his contact person in Atlanta. [JA169.] The drugs were delivered by Francisco Yesdirguer Santana Pineda. [JA169.] There is no indication that this individual was directly supervised or controlled by Mr. Pliego-Pineda. In paragraph 9, Mr. Millan contacted the CS directly and confirmed the quality of the methamphetamine purchased. [JA170.]

In paragraph 18, when there was an issue about the amount of kilograms being delivered, it was Francisco Javier Maldonado-Pineda who was consulted by the delivery person to resolve the issue. After the deal was concluded Francisco Javier Maldonado-Pineda “further stated he could provide future larger shipments if the UC gave him one week notice and he (Francisco Javier Maldonado-Pineda) would send his ‘guys’ up there again.” [JA172.] Thus, it was not Mr. Pliego-Pineda’s guys doing the delivery, it was Francisco Javier Maldonado-Pineda’s guys. Cf. United States v. Maldonado-Pineda, No. 21-4353 (4th Cir. Dec. 13, 2022)(upholding leadership enhancement for Mr. Pliego-Pineda’s codefendant on the basis of this incident). Again, throughout the PSR there is no individual who is identified as specifically working for Mr. Pineda.

Similarly, in Paragraph 22, The UC conducted a controlled buy of methamphetamine from Orbin Wady Barnica negotiated through Mr. Pliego-Pineda. When another problem arose with respect to the delivery being short, Jesus Carbajal-Hernandez called the UC about the issue, and “specifically wanted to know the weight of the loose bag because he believed his guy (Orbin Wady Barnica) may have taken some of the product. [JA174.] Once more, it is someone else who is in charge who is called when there is a problem with the transaction that needs to be resolved.

Finally, in Paragraph 24, Mr. Pliego-Pineda made arrangements for another shipment, and provided the contact information for the courier, Abril Bustos-Martinez. [JA174.] Although the PSR does not indicate it, an argument arose during the course of this transaction, and Abril Bustos-Menos called her father who talked on speaker phone with the UC to resolve payment issues. Payments were then made on the balance to another member of the conspiracy, Wences Mondragon-Penaloza. [JA175.]

With respect to the other factors, Mr. Pliego-Pineda did not actively recruit any individual to work for him, and no one in fact did. (No. 3.) Mr. Pliego-Pineda had no claim to a larger share of the fruits of the crime. Instead, he contended that the opposite was the case. (No. 4.) Critically, Mr. Pliego-Pineda had no ability or right to exercise any control or authority over any of his codefendants or anyone else involved in the conspiracy. (No. 7.)

The lack of the seventh factor in any degree in this case precludes application of the leadership enhancement to Mr. Pliego-Pineda.

As admitted by the district judge, she did not know from the evidence whether or not Mr. Pliego-Pineda “was able by himself to tell the person who delivered the drugs to do it.” [JA70.] Also, “I appreciate that there is not direct evidence that he’s telling people, you know, do that, but he is clearly managing and supervising the operation.” [JA70.]

The Fourth Circuit, however, upheld the enhancement stated and stated:

[a]lthough the district court lacked direct evidence of Pliego-Pineda instructing couriers to deliver drugs, this is immaterial, as an abundance of circumstantial evidence indicates Pliego-Pineda, as the Atlanta hub of the organization, controlled the activities of Pineda, Mondragon-Penaloza, Garcia-Tovar, Bustos-Martinez, and unnamed individuals who shipped packages of liquid methamphetamine from Mexico in December 2019 and June 2020.

App. A, p. 12-13.

The reasoning of the Fourth Circuit below thus inappropriately makes specific findings on appeal that are themselves clearly erroneous, findings that even the district court recognized that it was unable to make based upon the record in this case. It also appears to diverge from its earlier precedent, including United States v. Burnley, 988 F.3d 184, 188-89 (4th Cir. 2021), which is very close to the facts of this case.

To the extent that the Fourth Circuit’s holding can be construed as allowing a leadership enhancement with no specific followers identified as being controlled by a defendant, it appears to be at odds with cases in the First, Sixth, Seventh, and Ninth Circuits.

In United States v. Rames-Paulino, 488 F.3d 459 (1st Cir. 2007), the First Circuit remanded the case for resentencing where the district court had not made findings with respect to the defendant's control over other specific individuals but instead based the finding on the fact that the defendant had managed the criminal activities of organization. "For present purposes, then, we are constrained by the unambiguous case law holding that management of criminal activities, standing alone, does not constitute a basis for a role-in-the-offense enhancement under section 3B1.1." Ramos-Paulino, 488 F.3d at 464.

Also in United States v. Medina, 167 F.3d 77 (1st Cir. 1999), the First Circuit held that where the basis for a leadership role enhancement is not apparent from the record, "the sentencing court, in order to apply such an enhancement, must make a specific finding which identifies those being managed with enough particularity to give credence to the upward adjustment." Medina, 167 F.3d 80.

In United States v. Kamper, 748 F.3d 728 (6th Cir. 2014), the Sixth Circuit held that the district court erred because it failed to make a factual finding that a defendant managed or supervised other individuals involved in the conspiracy. "Indeed, the district court implicitly rejected defense counsel's argument that Head was not eligible for the enhancement because he did not exercise control over another person, and instead based its decision on the conclusion that Kamper, Head, and St. Onge created a "three-headed organization" in which they shared control of the *criminal enterprise*." Kamper, 748 F.3d at 748 (emphasis in the original).

In United States v. Jewel, 947 F.2d 224 (7th Cir. 1991), the Seventh Circuit remanded a two level enhancement under U.S.S.G. § 3B1.1 because “[t]he district court approved the two-level enhancement rather than the recommended three-level enhancement, but gave no indication which of the alleged participants each defendant had supervised.” Jewel, 947 F.2d at 235.

In United States v. Luca, 183 F.3d 108 (9th Cir. 1999), the Ninth Circuit held that “U.S.S.G. § 3B1.1(a) cannot apply unless the district court identifies a participant over whom the defendant exercised managerial or organizational control.” Luca, 183 F.3d at 1024.

In United States v. Avila, 95 F.3d 887 (9th Cir. 1996), a case extremely similar to this one, the Ninth Circuit reversed a leadership enhancement in which it was undisputed Avila “was the go-between for the buyer and the seller, that he obtained and mailed samples of cocaine, that he negotiated a \$1,000 personal fee for each kilogram of cocaine, that he was the only person to meet with the undercover officer, or that he accepted armed assistance.” Avila, 95 F.3d at 890. The Government contended Avila was an organizer or leader because he “organized the actions of his co-defendants in delivering the drugs. Id. The Avila court held that the fact that Avila relayed a price set by the seller to the buyer and was the sole personal contact with the buyer, had armed assistance from the conspiracy, and negotiated a fee for himself was not enough evidence to show that he was eligible for the leadership. Id. at 890-892.

Essentially, the lower courts in this case appear to be relying on a number of situations where Mr. Pliego-Pineda was communicating information and instructions about delivery details to Government agents and informants posing as buyers. However, none of these activities constituted leadership or an actual supervisory role within the actual conspiracy. There is no evidence of Mr. Pliego-Pineda ordering anyone to do anything within the conspiracy. There is no evidence of Mr. Pliego-Pineda determining how much he or other members of the conspiracy were going to get paid, or having a larger claim to the proceeds of the illegal activity. Again, Mr. Pliego-Pineda's lack of exercising control and leadership over any specific individual within the conspiracy is dispositive and prohibits the application of the leadership enhancement. Respectfully, the Court should grant certiorari in this case to clarify the boundaries and extent of the leadership enhancement in the United States Sentencing Guidelines and hold that a defendant who lacks control and leadership over any specific individual within a criminal is ineligible for this enhancement.

For these reasons, the Court should grant certiorari, reverse the courts below, find that the district court procedurally erred in applying the leadership enhancement to Mr. Pliego-Pineda, vacate his sentence, and remand the case to the district court for resentencing without a leadership enhancement.

CONCLUSION

For the above stated reasons, Petitioner respectfully requests that the Court grant this Petition for Certiorari, vacate his sentence, remand the matter to the district court with appropriate instructions, and grant whatsoever other relief the Court may find just and proper.

Respectfully submitted this the 12th day of May, 2025.

/s/ Seth A. Neyhart
Seth A. Neyhart, Esq.
Counsel of Record
N.C. Bar No. 27673
5226 Revere Road
Durham, NC 27713
Phone: 202-870-0026
Fax: 919-435-4538
setusn@hotmail.com

Counsel for Petitioner