Number _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

FRANKLYN MORILLO,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

1. Should certiorari be granted to decide whether a district court can only ask a Petitioner a single question about an appellate waiver, even though that does not establish it is knowing, intelligent or voluntary?

2. Should certiorari be granted in this case of first impression to decide whether a district court abuses its discretion when it imposes a two-level enhancement for maintaining a premises for the purpose of distributing a controlled substance, even when it is used principally as a residence?

3. Should certiorari be granted in this case of first impression to decide whether a district court abuses its discretion when it imposes a four-level role enhancement, even when Petitioner is neither an organizer nor a leader?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

STATE CASES

UNREPORTED CASES

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OPINION BELOW

There was one decision below, *United States v. Morillo*, No. 17-1506, 2018 U.S. App. LEXIS 34070 (1st Cir. Dec. 4, 2018), and is attached to this petition.

JURISDICTION

The order of the Court of Appeals was decided on December 4, 2018, and this petition for a writ of certiorari is being filed within 90 days thereof, making it timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory right to appeal, U.S.S.G. §2D1.1(b)(12) and 18 U.S.C.S. § 3B1.1(a).

STATEMENT OF THE CASE

Petitioner pleaded guilty, on October 28, 2016, to Conspiracy to Distribute, and Possess with Intent to Distribute, Controlled Substances, in violation of 21 U.S.C. § 846, §§ 841 (a)(1) and (b)(1)(C), and was sentenced, on May 18, 2017, to 168 months' imprisonment.

STATEMENT OF FACTS

Petitioner pleaded guilty to Conspiracy to Distribute, and Possess with Intent to Distribute Controlled Substances. The Court told him that, under the plea agreement, he would be waiving his right to appeal if the base offense level was less than 30.

At sentence, defense counsel objected to an aggravated role enhancement on the ground that he was not an organizer or leader. He also objected to an enhancement for maintaining premises for the purpose of distributing a controlled substance on the ground that Petitioner and his wife used the home principally as a residence for them and their two-year-old child, Gia.

The Court found a total offense level of 33 and sentenced Petitioner to 168 months' imprisonment.

SUMMARY OF ARGUMENT

Certiorari should be granted for three reasons.

First and foremost, here, as in countless thousands of state and federal appeals, the Petitioner's statutory right to appeal has been barred, after the district court asked him a single question about the appellate waiver, even though that does not establish it was knowing, intelligent and voluntary. This Court should thus grant certiorari, and find that this practice, employed in both federal and state courts, should be banned, because an unknowing, unintelligent and involuntary waiver of one of the most important rights in the criminal process--the right to appeal to a higher court--results in a substantial infringement on a defendant's liberty.

Second, certiorari should be granted to decide whether a two-level enhancement for maintaining a premises for the purpose of distributing a controlled substance can be imposed, even though the drug distribution was merely an incidental and collateral rather than primary and principal use of the property.

Third, and finally, certiorari should be granted to decide whether a district court can impose a four-level role enhancement, even when Petitioner is not a leader or organizer.

ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER AN APPELLATE WAIVER IS ENFORCEABLE WHEN THE DISTRICT COURT ONLY ASKS THE PETITIONER A SINGLE QUESTION ABOUT IT, EVEN THOUGH THAT DOES NOT ESTABLISH IT IS KNOWING, INTELLIGENT OR VOLUNTARY.

At the plea colloquy, the district court told Petitioner that, "under the terms of your [plea] agreement with the government[,] you've waived or given up your right to file either a direct appeal of your conviction or sentence or a subsequent collateral challenge to your conviction or sentence" if his base offense level was 30 or less. The court then asked whether he had "discussed each term of the written plea agreement" with his attorney, and Morillo said that he had. Based on this single question, the First Circuit Court of Appeals ruled that the waiver of appeal was enforceable, such that it " ... bars his challenges to his sentence, including both the sentencing enhancements and the supervised-release conditions." *Morillo*, 2018 U.S. App. LEXIS 34070, at *4. The court's ruling is wrong, and its rationale suspect.

A single question cannot begin to ensure that such a vital right, such as appellate review, has been waived voluntarily, knowingly and intelligently, and because this is a question of first impression in this Court, which impacts countless federal and state defendants, this Court should grant certiorari to finally define the contours of a valid and enforceable appellate waiver.

Here, the district court's limited interrogation did not establish that Petitioner freely, knowingly and intelligently waived his right to appeal for seven discrete reasons. First, it failed to tell the Petitioner the ramifications of the waiver. It never explained, for example, that, if he signed the waiver, he would be barred from asking a higher court to find that the lower court was wrong. *United States v. Teeter*, 257 F.3d 14, 24 (1st Cir. 2001)(the district court must "question the defendant specifically about [his] understanding of the waiver provision and adequately inform [him] of its ramifications.").

Second, it did not explain to him, in plain English, what a waiver meant, namely, the loss of appellate rights. *Compare United States v. Sura*, 511 F.3d 654, 659 (7th Cir. 2007)("Most criminal defendants are not legal experts, which is why Rule 11(b)(1)(N) puts a check in the

system in the form of a requirement that the district court explain in plain language what consequences will flow from the guilty plea, including (where applicable) the loss of appellate rights")(emphasis added).

Third, it did not explain that its decision on the length of the sentence would be firm and final. *Compare United States v. Lara-Joglar*, 400 F. Appx. 565, 569 (1st Cir. 2010)("[I]f I sentence you Mr. Lara to 156 months and Mr. Aponte if I sentence you to 108 months concurrent, then you will accept that as the final sentence. You will not be asking a higher Court to review what I have done or how I made the analysis of the sentencing guidelines or what w[ere] the factors that l[ed] to any sentence, to that sentence that I imposed. Which means this sentence will be firm and final.").

Fourth, the Court never questioned the Petitioner about his understanding of the waiver. Hence, it cannot be divined if the appellate waiver was intelligently entered. *See United States v. Chambers*, 710 F.3d 23, 30 (1st Cir. 2013)("the district court must question the defendant specifically about his understanding of the waiver provision ....")(citation, quotation and grammatical marks omitted).

Fifth, the Court never asked the Petitioner if he had any questions about the waiver. Hence, it is impossible to know if he knew what he was doing, or if he understood this legal procedure. Hence, there is no evidence the waiver was knowing.

Sixth, the Court never asked the Petitioner if anyone had forced or coerced him to waive his right to appeal. Hence, it is even unknown if the waiver is voluntary, or was somehow induced by off-the-record threats or promises.. *Cf. United States v. Smith*, 36 F.3d 128, 131 (1st Cir. 1994)("We must assume that there are some circumstances in which a coerced and involuntary waiver of an appeal constitutes a denial of the opportunity for meaningful judicial review and thus cannot serve as a bar ....").

Seventh, the Court never advised the Petitioner that, if he elected to proceed to trial, rather than plead guilty, he would be statutorily entitled to free counsel, under the Criminal Justice Act, both at trial, and on appeal, at no charge to him. Hence, Petitioner may have signed the appellate waiver because he could not afford appellate counsel, rather than because he was, in fact, guilty.

On all of these facts, it cannot be said, with any requisite assurance, that Petitioner's surrender of his appellate rights was sufficiently informed.

The First Circuit disagreed, however, ruling that "Morillo's brief poses lines of questioning employed in other cases assessing the adequacy of appeal-waiver colloquies but not used in this one, arguing that these alternatives show the colloquy in his case to be faulty; but the number of possible questions is infinite, and this mustering of questions asked by other judges does not itself show any inadequacy in the judge's colloquy in this case. It is the defendant's task to identify a substantive flaw--not merely to compare this colloquy with others." *Morillo*, 2018 U.S. App. LEXIS 34070, at *5. The Court's ruling is wrong and its rationale unsound.

Counsel relied on other cases for a very simple reason: to underscore that this appellate waiver was fatally flawed. A single sentence inquiry does not remotely establish that an appellate waiver is knowing, intelligent and voluntary.

That can only be established when the Court engages the defendant in an on-the-record colloquy. As an example, the Criminal

Jury Instructions & Model Colloquies include a model colloquy for the waiver of the right to appeal. It provides:

> ... a defendant ordinarily retains the right to appeal even after pleading guilty. In this case, however, as a condition of the plea agreement, you are asked to waive your right to appeal.
>
> First, what is an appeal? An appeal is a proceeding before a higher court, an appellate court. If a defendant cannot afford the costs of an appeal or of a lawyer, the state will bear those costs. On an appeal, a defendant may, normally through his/her lawyer, argue that an error took place in this court which requires a modification or reversal of the conviction. A reversal would require either new proceedings in this court or a dismissal. Do you understand?
>
> By waiving your right to appeal, you do not give up your right to take an appeal by filing a notice of appeal with this court and the District Attorney within 30 days of the sentence. But, if you take an appeal, you are by this waiver giving up the right to have the appellate court consider most claims of error, and whether the sentence I impose, whatever it may be, is excessive and should be modified. As a result, the conviction by this plea and sentence will normally be final. Do you understand?
>
> [Optional: Among the limited number of claims that will survive the waiver of the right to appeal are: [a defendant's competency to stand trial, a defendant's constitutional right to a speedy trial], the voluntariness of this plea, the validity of this waiver, and the legality of the sentence. Do you understand?]

> Have you spoken to your lawyer about waiving your right to appeal?
>
> Are you willing to do so in return for the plea and sentence agreement?
>
> Do you waive your right to appeal voluntarily, of your own free will and choice?"

See http://www.nycourts.gov/judges/cji/8-Colloquies/1MCTOC.shtml.

The same appellate "waiver" that Judge Michael Boudin in the First Circuit found "enforceable," hence barring this appeal, has routinely been found improper in literally hundreds of other cases. *See, e.g.*, *People v. Batista*, 2018 NY Slip Op 07445, ¶ 4 (2d Dept. November 7, 2018)("Far too often, trial courts instead conduct a perfunctory appeal waiver colloquy that serves only as a pathway to future litigation. Far too often, this Court is compelled to hold invalid a bargained-for waiver of the right to appeal. Our research has shown that this Court has held an appeal waiver invalid in well over 200 appeals over the past five years.").[1]

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1. It is irrelevant that they are state cases, because the validity of an appellate waiver turns not on the court in which it is heard, but, rather, simply on whether it is voluntary, knowing and intelligent.

The *Batista* court is correct. Countless thousands of state and federal defendants have had their appellate rights barred without any evidence, as here, that the waiver was knowing, intelligent and voluntary. That has, and will continue to, result in a substantial infringement on their liberty. Certiorari should thus be granted to finally announce rules for federal and state courts, that are consistent with the model colloquy for the waiver of the right to appeal.

POINT II

CERTIORARI SHOULD BE GRANTED TO ADDRESS WHETHER A DISTRICT COURT ABUSES ITS DISCRETION WHEN IT IMPOSES A TWO-LEVEL ENHANCEMENT FOR MAINTAINING A PREMISES FOR THE PURPOSE OF DISTRIBUTING A CONTROLLED SUBSTANCE, EVEN WHEN IT IS USED PRINCIPALLY AS A RESIDENCE.

At sentence, defense counsel objected to the "stash house enhancement[]" on the ground that Petitioner's home was "principally a residence" where he lived with his wife and co-defendant, Mara Morillo, and their young child. He insisted, correctly, that "[d]rug distribution was an incidental or collateral use of this property." The district court disagreed, and imposed the enhancement. This Court, which has never ruled on this issue, should grant certiorari and find that, when a home is principally used as a residence under U.S.S.G. §2D1.1(b)(12), the stash house sentencing enhancement does not apply.

"The stash house enhancement applies when a defendant knowingly maintains a premises for the purpose of manufacturing or distributing a controlled substance." *United States v. Jones*, 778 F.3d 375, 384-85 (1st Cir. 2015)(*citing* USSG §2D1.1, comment. (n.17);

United States v. Verners, 53 F.3d 291, 295-96 (10th Cir. 1995). The term "maintains" is not defined. *Id.*

The Sentencing Commission's commentary instructs courts to consider, among other things, "whether the defendant held a possessory interest in (e.g., owned or rented) the premises" and "the extent to which the defendant controlled access to, or activities at, the premises." *Id*. (*citing* U.S.S.G. §2D1.1, comment. (n.17). Non-exhaustive relevant considerations include "[a]cts evidencing such matters as control, duration, acquisition of the site, renting or furnishing the site, repairing the site, supervising, protecting, supplying food to those at the site, and continuity." *Id*. (*citing United States v. Clavis*, 956 F.2d 1079, 1091 (11th Cir. 1992).

For the enhancement to apply, drug distribution must be a "primary or principal" use--as opposed to one that is merely "incidental or collateral." *Id*. (*citing* U.S.S.G. §2D1.1, comment. (n.17). "A defendant's purpose may be inferred from the totality of the circumstances, including such facts as the quantity of drugs discovered and the presence of drug paraphernalia or tools of the drug-trafficking trade." *Id*. (*citing United States v. Flores-Olague*, 717 F.3d 526, 533-34

(7th Cir. 2013); *see also United States v. Verners*, 53 F.3d 291, 296-97 (10th Cir. 1995)("the more characteristics of a business that are present, the more likely it is that the property is being used" for a prohibited purpose). "One relevant consideration is frequency; that is, how often the defendant used the premises for drug-related purposes and how often he used the premises for lawful purposes." *Id*. (*citing* U.S.S.G. §2D1.1, comment. (n.17)).

Here, Petitioner simply lived in the home. That was the primary or principal use of the residence. Drug distribution was merely an incidental or collateral use. The very fact that he, his wife and child lived in the home, slept there, ate there, bathed there, and engaged in countless other activities there that are part of the routine of home ownership, necessarily relegated the drug distribution to a collateral use. Indeed, were a ratio constructed of time spent on living in the home compared to selling narcotics, the former would necessarily dwarf the latter, which *ipso facto* proves its incidental use. *Cowart v. United States*, No. 15-00402-KD, 2016 U.S. Dist. LEXIS 64734, at *19 (S.D. Ala. Mar. 28, 2016)("One relevant consideration is frequency; that is, how often the defendant used the premises for drug-related purposes and

how often he used the premises for lawful purposes")(*citing United States v. Cintora-Gonzalez*, 569 F. Appx. 849, 855 (11th Cir. June 24, 2014)(per curiam).

Petitioner's house also had all the indicia of a home, rather than a stash house. *Compare United States v. Verners*, 53 F.3d 291, 296-97 (10th Cir. 1995)(explaining that "the more characteristics of a business that are present, the more likely it is that the property is being used" for a prohibited purpose).

The lack of multiple employees, customers, laboratory equipment, scales, drug paraphernalia, tools of the drug-trafficking trade, or guns or ammunition further undermine the government's claim that Petitioner's home was a stash house. *United States v. Johnson*, 737 F.3d 444, 447 (6th Cir. 2013)("[T]he more characteristics of a business that are present in the home--such as tools of the trade (e.g., laboratory equipment, scales, guns and ammunition to protect the inventory and profits), profits, including large quantities of cash, and multiple employees or customers—the more likely it is that the property is being used for the purpose of [prohibited] drug activities")(citation and internal quotation marks omitted).

Notably, Petitioner did not maintain a drug distribution facility or drug factory in a garage or shed on the same property, for which there would have been concededly no legitimate use. Nor did he procure a stash apartment, in a drug-infested inner-city, for the express purpose of either establishing a drug factory or maintaining a drug distribution center.

Even Petitioner's limited time in the family home militates against the stash house enhancement. From the time the Drug Enforcement Agency commenced its narcotics investigation in 2014, to the time of Petitioner's arrest on October 1, 2015, he had only been living in the family house with his wife and co-defendant, Mara Morvillo, on 89 Farwood Drive, in Haverhill, Massachusetts, for a total of 18 weeks. During all those months when Petitioner did not live there, but was separated, and living with his girlfriend, Angela Mayo, or was hospitalized for various medical treatments at Tewksbury Hospital, Petitioner had no possessory interest in the premises and did not control access to, or activities at, the home. Hence, while the enhancement may have applied to his wife during this period of time, it did not apply to Petitioner. On these facts, the Government failed to prove this

enhancement by a preponderance of the evidence. This Court should thus grant certiorari on this issue of first impression, to rule that, when a home is principally used as a residence under U.S.S.G. §2D1.1(b)(12), the stash house sentencing enhancement does not apply.

POINT III

CERTIORARI SHOULD BE GRANTED IN THIS CASE OF FIRST IMPRESSION BECAUSE THE DISTRICT COURT IMPOSED A FOUR-LEVEL ROLE ENHANCEMENT, EVEN THOUGH PETITIONER WAS NEITHER AN ORGANIZER NOR A LEADER.

At sentence, the district court imposed a four-level role enhancement on Petitioner as an organizer or leader. It was wrong. Because this Court has never ruled on an enhancement for an organizer or leader, certiorari should be granted to define the contours of this section of the guidelines. *See* 18 U.S.C.S. § 3B1.1(a).

This section authorizes increasing a defendant's offense level "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." An enhancement under § 3B1.1(a) requires a district court to make (1) a "status determination," i.e., that "the defendant acted as an organizer or leader of the criminal activity," as well as (2) a "scope determination," i.e., "that the criminal activity met either the numerosity or the extensiveness benchmarks established by the guideline." *United States v. Tejada-Beltrán*, 50 F.3d 105, 111 (1st Cir. 1995).

In order to meet § 3B1.1(a)'s status requirement,[2] the defendant must have either organized or led at least one other participant in the offense. U.S.S.G. § 3B1.1(a), cmt. n.2. While a defendant "may be classified as an organizer, though perhaps not as a leader, if he coordinates others so as to facilitate the commission of criminal activity," *Tejada-Beltrán*, 50 F.3d at 112, there is a difference " ... between organizing criminal activities and organizing criminal actors." *United States v. Fuller*, 897 F.2d 1217, 1220 (1st Cir. 1990). Only the latter may be used to ground an enhancement under § 3B1.1(a). *See United States v. Jones*, 523 F.3d 31, 43 (1st Cir. 2008). "Assessing a defendant's role in the offense is a fact-specific task [requires that considerable respect be paid to the views of the *nisi prius* court." *Tejada-Beltrán*, 50 F.3d at 110 (*citing United States v. McDowell*, 918 F.2d 1004, 1011 (1st Cir. 1990)).

Here, the district court's ruling was clearly erroneous because no view of the record supports a finding that Petitioner was a leader or organizer. Defense counsel correctly argued, in his sentencing

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2. Petitioner conceded numerosity; hence, the issue on certiorari is status, not scope.

memorandum, that, due to a combination of a lengthy separation from his wife Mara, during which time he did not live in the family residence, his drug addiction, which led to either three or four overdoses, and various hospitalizations as a result of injuries sustained from falling after overdoses, Petitioner had only been living in the Farwood residence for 18 weeks. During this period of time, as defense counsel argued, "[h]e was [in such] bad [shape] he couldn't manage himself, [let alone] anyone else."

That is borne out by the facts. On five separate occasions, between November 2014 and February 2015, a confidential source purchased oxycodone pills from co-defendant Justin Bartimus, at a time when Petitioner was not even present at the Farwood Drive home. Then, on February 17, 2015, a search warrant was executed at Bartimus's home. Of the three cellphones seized, there were numerous drug-related communications between Bartimus and Mara Morillo–but none with Petitioner. This proves that Mara--and not Franklyn--assumed the supervisory role, and, therefore, deserved the leader-organizer enhancement.

Critically, throughout all the time Petitioner was not in the family home, the conspiracy was led by Mara Morillo. She was the leader, not Petitioner, and she alone deserved the enhancement, not Petitioner. Although "[t]he government bears the burden of proving that an upward role-in-the-offense adjustment is appropriate in a given case * * * by preponderant evidence," *United States v. Al-Rikabi*, 606 F.3d 11, 14 (1st Cir. 2010), here, it failed to establish precisely what Petitioner did--as distinguished from his wife--*vis a vis* Bartimus.

To prove Petitioner was an organizer, the government also argued that he " ... was involved in the planning and commission of the offenses." Even if that were true, it would be irrelevant under §3B1.1(a), because it fails "to distinguish between organizing criminal activities and organizing criminal actors." *United States v. Fuller*, 897 F.2d 1217, 1220 (1st Cir. 1990). The government's claim may have proved Petitioner organized offenses, but not actors.

Because the organizer or leadership enhancement is an issue of first impression in the Court, and because it impacts countless defendants at sentence, this Court should grant certiorari to define the contours of the statute, which do not apply to Petitioner.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: December 12, 2018
Uniondale, New York

Respectfully Submitted,

/s/ Steven A. Feldman
Steven A. Feldman

UNITED STATES
SUPREME COURT

FRANKLYN MORILLO,

Petitioner,

v. CERTIFICATE OF SERVICE

UNITED STATES OF AMERICA,

Respondent.

I affirm, under penalties of perjury, that, on December 12, 2018, we served a copy of Petitioner's petition for writ of certiorari, by first class United States mail, on the United States Attorney, District of New Hampshire, James C. Cleveland Federal Building, 53 Pleasant Street, Fourth Floor, Concord, NH 03301, on the Office of the Solicitor General, 950 Pennsylvania Avenue, NW, Washington, D.C. 20530-2203, and on Franklyn Morillo, 14154-049, Allenwood FCI, Route 15, Allenwood, PA 17810.

/s/ Steven A. Feldman
Steven A. Feldman