NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTIAN JOSEPH CHAVEZ

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

/s/ Abe Factor
ABE FACTOR
Counsel of Record
FACTOR & CAMPBELL
5719 Airport Freeway
Fort Worth, Texas 76117
(817) 222-3333
lawfactor@yahoo.com

Attorney for Petitioner

QUESTION PRESENTED

The Fifth Circuit Court of Appeals has held that to determine whether an appeal of a sentence is barred by an appeal waiver provision in a plea agreement, the this Court will conduct a two-step inquiry: (1) whether the waiver was knowing and voluntary and (2) whether the waiver applies to the circumstances at hand, based on the plain language of the agreement. However, many of the other circuit courts of appeal also conduct a third step, inquiring whether the circuit court's "failure to consider [the defendant's] claim will result in a miscarriage of justice." This dichotomy thus raises the specter of a circuit split and renders the Fifth Circuit Court of Appeals's stance on the issue to be an outlier. Should this Court therefore grant certiorari in this case in order to clarify the law on this often-occurring situation and to resolve the circuit split?

PARTIES TO THE PROCEEDINGS

Christian Joseph Chavez is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Christian Joseph Chavez, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The unpublished judgment and mandate of the United States Court of Appeals for the Fifth Circuit is captioned as *United States of America v. Christian Joseph Chavez*, and is provided in the Appendix to the Petition. [Appendix A]. The judgment of conviction and sentence was entered February 28 2019, and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTIONAL STATEMENT

The judgment and mandate of the United States Court of Appeals for the Fifth Circuit were filed on August 27, 2019. [Appendix A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Proceedings Below

On September 19, 2018, Defendant-Appellant Christian Chavez ("Mr. Chavez" or "Petitioner") was charged by amended information with conspiracy to possess with intent to distribute a controlled substance (21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(B). [ROA.58]; *see* 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(B).

On September 25, 2018, pursuant to a plea agreement, Mr. Chavez entered his plea of guilty before Magistrate Judge Hal Ray, Jr., to the offense as set forth in the amended information.[1] [ROA.257]. On February 26, 2019, Mr. Chavez was sentenced by the district court to a term of imprisonment of 210 months. [ROA.289]. Mr. Chavez filed timely notice of appeal on February 28, 2019. [ROA.82].

B. Statement of the Facts

On September 19, 2018, Mr. Chavez was charged by amended information with conspiracy to possess with intent to distribute a controlled substance (21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(B). [ROA.58].

[1] Mr. Chavez entered a waiver of indictment, [ROA.55], and consent to proceed before the magistrate judge. [ROA.62].

On September 25, 2018, pursuant to a plea agreement, Mr. Chavez entered his plea of guilty before Magistrate Judge Hal Ray, Jr., to the offense as set forth in the amended information. [ROA.257]. Amongst the terms of the plea agreement is a waiver of appeal, which states that Mr. Chavez may bring a direct appeal only for: 1) a sentence exceeding the statutory maximum punishment; 2) an arithmetic error at sentencing; 3) to challenge the voluntariness of his plea of guilty or his waiver of appeal; and 4) to bring a claim of ineffectiveness of counsel. [ROA.295].

Mr. Chavez was subsequently sentenced by the district court to a term of imprisonment of 210 months. [ROA.289]. Prior to assessing that sentence, the court accepted the findings in the Presentence Report ("PSR") and found that Mr. Chavez had an offense level of 35 and a criminal history category of III, which yielded a guideline range of between 210 to 262 months incarceration. [ROA.284]. Included in those calculations was a two-level increase under U.S.S.G. § 2D1.1(b)(12) in the offense level based on the government's finding that the defendant maintained a premises for the purpose of manufacturing or distributing

a controlled substance.[2] [ROA.271]; *see* United States Sentencing Commission, Guidelines Manual ("USSG") § 2D1.1(b)(12).

However, had the two-level increase under § 2D1.1(b)(12) not been calculated, the Mr. Chavez's total offense level would have been 33, rather than 35, which, when indexed with his criminal history category of III would have yielded a guideline range of 168–210 months. *See* USSG Chapter 5, Part A, Sentencing Table.

C. The Appeal

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, contending that the District Court erred in finding that he had maintained a premises for the purpose of manufacturing or distributing a controlled substance. The government filed a *Motion to Dismiss the Appeal*, based on the terms of the plea agreement which incorporated a waiver of appeal provision. The Fifth Circuit then summarily dismissed Mr. Chavez's appeal. *See* Appendix A.

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[2]Mr. Chavez objected to the two-level enhancement set forth in the Presentence Investigation Report ("PSR"). [ROA.330]. The trial court overruled the objection and adopted the findings in the PSR. [ROA.283].

REASON FOR GRANTING THE PETITION

A. Miscarriage of Justice Exception

Mr. Chavez argued in his Brief on Appeal that the Fifth Circuit should adopt the "miscarriage of justice exception" recognized by other circuit courts of appeal as a valid way to avoid the harshness of a waiver of appeal. Specifically, Mr. Chavez argued that even assuming the waiver of appeal in this case is valid, the miscarriage-of-justice exception should have been observed here. The Fifth Circuit has held that a plea agreement must be interpreted "like a contract, in accord with what the parties intended." *United States v. Bond*, 414 F.3d 542, 545 (5th Cir. 2005). Pursuantly, "a plea agreement is construed strictly against the Government as the drafter." *United States v. Elashyi*, 554 F.3d 480, 501 (5th Cir. 2008). "A criminal defendant's waiver of the right to appeal relinquishes significant rights. Such a waiver therefore involves special concerns and will be narrowly construed." *United States v. Harris*, 434 F.3d 767, 770 (5th Cir. 2005). "To determine whether an appeal of a sentence is barred by an appeal waiver provision in a plea agreement, the Fifth Circuit will conduct a two-step inquiry: (1) whether the waiver was knowing and voluntary and (2) whether the waiver applies to the

circumstances at hand, based on the plain language of the agreement." *Bond*, 414 F.3d at 544.

However, some courts also conduct a third step, inquiring whether the circuit court's "failure to consider [the defendant's] claim will result in a miscarriage of justice," though currently the Fifth Circuit Court of Appeals has not found it necessary to adopt or reject this step. *United States v. Powell*, 574 Fed. Appx. 390, 394 (5th Cir. 2014); *see, e.g., United States v. Snelson*, 555 F.3d 681, 685 (8th Cir. 2009); *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004); *United States v. Khattak*, 273 F.3d 557, 562–63 (3d Cir. 2001); *United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001). However, the Fifth Circuit explained recently that "we repeatedly have declined to apply the miscarriage of justice exception." *United States v. Flores*, 765 F. App'x 107, 108 (5th Cir. 2019) (citing *United States v. Arredondo*, 702 F. App'x 243, 244 (5th Cir. 2017); *United States v. De Cay*, 359 F. App'x 514, 516 (5th Cir. 2010)). Thus, this situation presents a classic circuit split, as the cases cited above definitively show that there are many other circuit courts of appeal which have no reservations about factoring in the "miscarriage of justice" exception to a waiver of appeal incorporated into a plea bargain. *see, e.g.,*

Snelson, 555 F.3d at 685; *Hahn,* 359 F.3d at 1327; *Khattak*, 273 F.3d at 562–63; *Teeter*, 257 F.3d 25.

The reality is that several federal jurisdictions permit the appeal of an illegal sentence pursuant to a rule refusing enforcement of an "otherwise valid waiver [of appeal] if to do so would result in a miscarriage of justice." *United States v. Andis*, 333 F.3d 886, 891 (8th Cir. 2003); *see also Hahn*, 359 F.3d at 1327; *United States v. De–La–Cruz Castro*, 299 F.3d 5, 10 (1st Cir.2002).

Considerations in assessing a "miscarriage of justice" vary by jurisdiction but may include "the clarity of the alleged error, its character and gravity, its impact on the defendant, any possible prejudice to the government, and the extent to which the defendant acquiesced in the result." *United States v. Pratt*, 533 F.3d 34, 37 (1st Cir. 2008) (quoting *United States v. Cardona–Díaz*, 524 F.3d 20, 23 (1st Cir. 2008))*; see also Hahn*, 359 F.3d at 1325–1327 (employing the *Andis* court's three-pronged approach analyzing the scope of the waiver, the knowing and voluntary character of the waiver, and whether enforcement of the waiver would result in a miscarriage of justice, where miscarriage of justice may be found only in four specific situations and then subject to additional

constraints). Such an approach would undoubtedly have value in certain situations. *See, e.g.*, *Lee v. State*, 816 N.E.2d 35, 38 (Ind. 2004) (agreeing that "we would not enforce a sentence of death for jay walking simply because the sentence was the product of a plea agreement." (quoting *Sinn v. State*, 609 N.E.2d 434, 436 (Ind. App. 1993)).

Finally, this Court has quite often correctly granted certiorari in order to resolve a circuit split. *See e.g., Green v. Brennan*, 578 U.S. 1769, 1775 (2016) ("We granted certiorari to resolve this split.") (citations omitted); *Scialabba v. De Osorio*, 573 U.S. 41, 56 (2014) ("We granted certiorari, to resolve a Circuit split ... ") (citations omitted); *Abramski v. United States*, 573 U.S. 169, 176 (2014) ("We granted certiorari, principally to resolve the Circuit split ... ")(citations omitted); *Bousley v. United States*, 523 U.S. 614, 619 (1998) ("We then granted certiorari, to resolve a split among the Circuits ... ") (citations omitted). This Court should therefore grant certiorari to address the circuit split identified above and to clarify the law surrounding this frequently-occurring sentencing enhancement.

B. District Court's Sentencing Error

1. *Standard of Review*

Pursuant to this Court's opinion in *Gall v. United States*, an appellate court employs a bifurcated process for reviewing a sentence. *United States v. Cisneros-Gutierrez,* 517 F.3d 751, 764 (5th Cir. 2008) (citing *Gall v. United States,* 552 U.S. 38 (2007)). The reviewing court,

> must first ensure that the district court committed no significant procedural error, such as failing to calculate(or improperly calculating) the Guideline range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentenced based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range.

Cisneros-Gutierrez, 517 F.3d at 764 (quoting *Gall,* 128 S.Ct. at 587). Provided that the sentence is procedurally sound, the appellate court then considers the "substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Cisneros-Gutierrez*, 517 F.3d at 764 (quoting *Gall,* 128 S.Ct. at 587).

More specifically, a reviewing court will "... review a district court's interpretation or application of the Guidelines de novo and its factual findings for clear error." *United States v. Conner*, 537 F.3d 480, 489 (5th

Cir. 2008).

Finally, factual findings regarding relevant conduct are reviewed for clear error. *United States v. Rhine*, 583 F.3d 878, 885 (5th Cir.2009). These findings are not clearly erroneous as long as they are "plausible in light of the record as a whole." *Id.*

2. *Discussion*

a. History and Structure of the Enhancement

Section 2D1.1(b)(12) was added to the Guidelines as part of the 2010 Fair Sentencing Act, and became effective on November 1, 2010. This provision states: "If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase [the base offense level] by two levels." Application note 28 to Section 2D1.1 provides the following guidance regarding subsection(b)(12):

> Subsection (b)(12) applies to a defendant who knowingly maintains a premises (i.e., a building, room, or enclosure) for the purpose of manufacturing or distributing a controlled substance, including storage of a controlled substance for the purpose of distribution. Among the factors the court should consider in determining whether the defendant 'maintained' the premises are (A) whether the defendant held a possessory interest in (e.g., owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.

> Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises, rather than one of the defendant's incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

USSG §2D1.1, comment., n. 17.

Recognizing that the term "maintains" is not expressly defined in the guidelines, the Fifth Circuit has sought interpretive guidance of the term "maintain,"from parallel caselaw examining a similar statutory provision, 21 U.S.C. § 856 (commonly known as the "stash house" statute), which makes it unlawful to "knowingly ... maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance[.]" *See United States v. Guzman-Reyes*, 853 F.3d 260, 264 (5th Cir. 2017) (citing *United States v. Carter*, 834 F.3d 259, 261–63 (3d Cir. 2016); *United States v. Flores-Olague*, 717 F.3d 526, 531–32 (7th Cir. 2013); *United States v. Johnson*, 737 F.3d 444, 446–47 (6th Cir. 2013); *United States v. Miller*, 698 F.3d 699, 705–06 (8th Cir. 2012)).

In the § 856 context, the Fifth Circuit has explained that "whether

a defendant has 'maintained' a place is necessarily a fact-intensive issue that must be resolved on a case-by-case basis." *United States v. Morgan*, 117 F.3d 849, 857 (5th Cir. 1997). Similar to interpreting § 2D1.1, the Fifth Circuit customarily will "typically consider whether a defendant (1) has an ownership or leasehold interest in the premises, (2) was in charge of the premises, or (3) exercised 'supervisory control' over the premises." *United States v. Barnes*, 803 F.3d 209, 216 (5th Cir. 2015) (citing *United States v. Soto-Silva*, 129 F.3d 340, 346 (5th Cir. 1997)). These factors are not necessarily determinative alone, but should be considered together. *See United States v. Chagoya*, 510 Fed. Appx. 327, 328 (5th Cir. 2013). The Fifth Circuit has also suggested that "not just any showing of dominion and control will suffice to support a maintenance finding" under § 856. *Morgan*, 117 F.3d at 856. Instead, the evidence should support "that the defendant exercised 'sufficient dominion and control' over" the premises, or else "dominion and control may fall short of maintenance." *Id.* (quoting *United States v. Roberts*, 913 F.2d 211, 221 (5th Cir. 1990)).

Here, the undisputed evidence shows that although Appellant did live at the home located at 3412 Arthur Street in Wichita Falls, the residence was in fact owned by his father. [ROA.321]. Appellant was

arrested pursuant to a warrant on April 4, 2016, police discovered 14.4 grams of cocaine, 15 grams of marijuana, and 2.3 grams of methamphetamine. [ROA.311]. These amounts don't reflect that Appellant was using his home to store or distribute narcotics, rather, such small amounts more generally show to be personal use amounts. In fact, Appellant argued in the district court that the primary purpose of the residence located at 3412 Arthur was to house his family. [ROA.330].

In *United States v. Rodriguez*, 707 Fed. Appx. 224 (5th Cir. 2017), the Fifth Circuit stated:

> In fact, the parties have not directed us to, and we have not found, a decision by a United States Court of Appeals reversing the application of Section 2D1.1(b)(12). But that does not mean the enhancement is automatic any time a home or other dwelling under the control of the defendant is implicated in a drug crime—the enhancement does not apply where drug distribution is a mere "incidental or collateral use[ ] for the premises.

Id. at 227. For the enhancement in question to not be considered "automatic" there would necessarily need to be some situation or fact pattern in which a circuit court would find the enhancement to be clear error. Where, as here, the primary purpose of the home was to house his family, and the incidental presence of or the minimal distribution of

narcotics from that home was merely a collateral purpose, the two-level enhancement is clear error by the district court.

Because the district court improperly enhanced Mr. Chavez's sentence by two levels under § 2D1.1(b)(12) which calculated an improper guideline range, the court committed a procedural error. *See United States v. Delgado-Martinez*, 564 F.3d 750, 752 (5th Cir. 2009) (citing *Gall*, 552 U.S. 38, 128 S.Ct. at 597). However, procedural errors that are "harmless" will not require reversal. *Id.*

A procedural error during sentencing is harmless if "the error did not affect the district court's selection of the sentence imposed." *See Williams v. United States*, 503 U.S. 193, 203 (1992); *see also United States v. Mejia–Huerta*, 480 F.3d 713, 720 (5th Cir. 2007). The burden of establishing that an error is harmless rests on the party seeking to uphold the sentence: The proponent of the sentence "must point to evidence in the record that will convince a reviewing court that the district court had a particular sentence in mind and would have imposed it, notwithstanding the error made in arriving at the defendant's guideline range." *United States v. Huskey*, 137 F.3d 283, 289 (5th Cir.1998); *see also United States v. Langford*, 516 F.3d 205, 215–17 (3rd Cir. 2008) (explaining that "the

improper calculation of the Guidelines range can rarely be shown not to affect the sentence imposed").

The Fifth Circuit has already held that a two-point error in guideline range calculations is not harmless. *Delgado-Martinez*, 564 F.3d at 753-54. Additionally, the district court here articulated into the record the calculations used to obtain the 210 month sentence assessed. There is nothing in the record to suggest that the district court would not have used the same calculations had the two-point enhancement under § 2D1.1(b)(12) not been applied. See *Delgado-Martinez*, 564 F.3d at 754. Thus, the district court's sentencing error is not harmless. *Id.*

CONCLUSION

Petitioner respectfully prays that this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to which he may be justly entitled.

Respectfully submitted this 30th day of September, 2019.

/S/ ABE FACTOR
Abe Factor
Counsel of Record
FACTOR & CAMPBELL
5719 Airport Freeway

Fort Worth, Texas 76117
(817) 222-3333
lawfactor@yahoo.com

Attorney for Petitioner