NO._____

IN THE
SUPREME COURT
OF THE
UNITED STATES

2019-2020 TERM

ZACHARIAS ABAB AGUEDO

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED

I.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED AGUEDO'S CONVICTIONS WHERE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT AGUEDO'S CONVICTION AND THEREFORE, AGUEDO'S MOTIONS FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

II.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED AGUEDO'S SENTENCE WHERE THE DISTRICT COURT COMMITTED SENTENCING ERRORS.

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The Petitioner, ZACHARIAS ABAB AGUEDO (hereinafter "AGUEDO"), by and through his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in the proceedings on October 22, 2019.

OPINION OF THE COURT BELOW

The Court of Appeals for the Eleventh Circuit entered a non-published opinion affirming the District Court's Conviction and Sentence, *United States of America v. Zacharias Abab Aguedo,* on October 22, 2019. *Appendix 1*.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals affirming the Judgment of the United States District Court was entered on October 22, 2019. The Eleventh Circuit Court of Appeals entered its Order Denying AGUEDO'S Petition for Rehearing and Petition for Rehearing *En Banc* on January 17, 2020. *Appendix 2*. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254 and Rule 10.1, Rules of the Supreme Court. This Petition for Writ of Certiorari is filed pursuant to Rule 13.1, Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT V

The Fifth Amendment to the Constitution provides, in relevant part that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person … be deprived of life, liberty, or property, without due process of law…."

UNITED STATES CONSTITUTION, AMENDMENT VI

The Sixth Amendment to the Constitution provides in relevant part that: "In all criminal prosecutions, the accused shall enjoy the right … to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence."

STATEMENT OF THE CASE

1. Course of Proceedings

On September 2, 2015, a federal grand jury issued a six (6) count indictment against AGUEDO, Gorge Antonio Vargas, Javier Martin Villar, Daniel Vargas, Kathleen Smith and Britiny Amber Ward charging them with knowingly and willfully combining and conspiring to possess with intent to distribute a kilogram or more of heroin in violation of 21 U.S.C. §841(a)(1) and §841(b)(1)(A)(i) (Count 1); possession with intent to distribute and distribute and aid and abet such possession and distribution of heroin in violation of 21 U.S.C. §841(a)(1) and §841(b)(1)(A)(i) and 18 U.S.C. §2. (Counts 2 and 3); possession with intent to distribute a quantity of heroin in violation of 21 U.S.C. §841(a)(1) and §841(b)(1)(C) (Count 4); possession with intent to distribute and aid and abet such possession of heroin in violation of 21 U.S.C. §841(a)(1) and §841(b)(1)(C) (Count 5); and possession with intent to

distribute and aid and abet such possession of 100 grams or more of heroin in violation of 21 U.S.C. §841(a)(1) and §841(b)(1)(B)(i) and 18 U.S.C. §2 (Count 6).

In addition, there is a forfeiture Count. AGUEDO is only charged in Counts 1 and 5 of said indictment. (DE:3).

The matter went to trial on January 20, 2017 and lasted nine days. (DE: 458,459,460,461,462,463,464,465,466) At the end of the government's case, AGUEDO'S counsel renewed all of his objections raised during the trial and he also renewed any and all motions for mistrial that were raised during the trial. (DE:465:78). AGUEDO'S counsel then moved for a judgment of acquittal pursuant to Rule 29(a) and argued that "the government has failed to prove any standard whatsoever that from on or about 2013 through the date listed in the indictment that Mr. Aguedo conspired or came to an agreement with anyone in this particular case. The only evidence presented in this case is that Mr. Aguedo was living in the Dean Street Residence was a heroin addict. There was testimony that he was not trusted by one of the females that testified, that he would ask for bags of heroin to use. There was testimony that purportedly on June 11, 2015, was seen by law enforcement walking down a street. Law enforcement did not see Mr. Aguedo hand anything to the cooperating source in this particular case, and the cooperating source who allegedly was high on heroin allegedly received heroin from Mr. Aguedo and went back to the car. That's it. All of this evidence is presented during the course of this

case has nothing to do with Mr. Aguedo at all. . . There's no audio, there's no video, there's no telephone calls, there's nothing from any objective law enforcement witnesses which typically are given more credence. What we have is testimony from women who admittedly lied to the Court, lied to the jury, have a history of lying, are not credible, are heroin addicts, are using heroin. . . But . . . in terms of a conspiracy, there is no conspiracy as it relates to Mr. Aguedo. He may have been merely present, he may have sold on one occasion in the light most favorable to the government, and clearly he was a heroin user and he was living at Dean Street with his girlfriend." (DE:465:78-80).

As to Count 5, AGUEDO'S counsel argued that "on June 11th, 2015, the government needs to prove that Mr. Aguedo actually possessed the heroin on that particular date". (DE:465:80) Counsel further argued that the "government failed to show that Mr. Aguedo knowingly possessed a quantity of heroin and the he intended to distribute the heroin. We don't see that on the video, we just have testimony of a cooperating source, and I would ask the Court to grant my judgment of acquittal as to Mr. Aguedo." (DE:465:80-81).

After hearing argument, the District Court held "[i]n viewing the evidence in the light most favorable to the government, the Court does believe that Gorge Antonio Vargas, Javier Villar, Daniel Vargas and Zacharias Aguedo did knowingly and willfully combine, conspire, confederate and agree with each other and with

other persons to possess with intent to distribute a mixture of substance containing a detectable amount of heroin. There's sufficient evidence to show all of the individuals were involved in this conspiracy clearly at different levels of the conspiracy to the point where Zacharias Aguedo was one of the – his role was mainly as a seller." (DE:465:91-92) As such, AGUEDO'S Rule 29(a) motion as to Count 1 was denied.

The District Court then addressed AGUEDO'S Rule 29(a) motion as to Count 5. The District Court found "that viewing the evidence in the light most favorable to the government that there is sufficient evidence for a rational juror to conclude that Mr. Aguedo was guilty as to each element of the criminal charge against him beyond a reasonable doubt, and that would be his sale to Ms. Deltoro on June 11, 2015. . . The Court believe that there is sufficient evidence to go to the jury, to send this charge to the jury as well." (DE:465:93). As such, AGUEDO'S Rule 29(a) motion as to Count 5 was also denied. AGUEDO rested and again counsel renewed his Rule 29 motion, which was denied. (DE:465:100). On February 1, 2017, the jury returned its verdict finding AGUEDO guilty of Counts 1 and 5 of the six count indictment. (DE:335;466:136-137).

On May 31, 2017, the District Court sentenced AGUEDO as to Count 1 to ninety-six (96) months incarceration, followed by five (5) years of supervised release together with a special assessment of $100.00 and as to Count 5, to ninety-six (96)

months incarceration to serve concurrently with Count 1, followed by three (3) years of supervised release to serve concurrently with Count 1, together with a special assessment of $100.00. (DE:408; 468:46-50). AGUEDO timely filed his Notice of Appeal and is confined. (DE:414).

On October 22, 2019, the Eleventh Circuit affirmed AGUEDO'S convictions and sentence. On January 17, 2020, the Eleventh Circuit denied AGUEDO'S Petition for Rehearing and Rehearing *En Banc*.

2. <u>Statement of the Facts</u>.

The matter went to trial on January 20, 2017 and lasted nine (9) days. (DE: 458-466) The government called Detective Russel Park who is a detective for Lee County Sheriff's Office in the narcotics field support unit. (DE:459:27-28). Detective Park testified about his experience, about conspiracies and what a trap house is (DE:459:27-31).

Detective Park testified that he was part of the investigation of Gorge Vargas, Daniel Vargas, Javier Villar and AGUEDO. (DE:459:46). Detective Park identified Gorge Vargas and Daniel Vargas and confirmed they were brothers. (DE:459:46-49). He also identified Javier Villar and AGUEDO (DE:459:49-40).

Detective Park also identified Britiny Ward and Kathleen Smith as being two alleged co-conspirators and pictured in the government's Exhibit 1 and that the two

females were sisters and that Ms. Smith was the girlfriend of Gorge Vargas and that they lived together and had a child together. (DE:459:52).

Detective Park confirmed that he did not observe AGUEDO during the execution of any of the search warrants but that he first saw him at Lee County headquarters and that he never saw AGUEDO before. (DE:459:88-89). Detective Park confirmed he was not the one who approached AGUEDO to make a deal but that they used Ms. Deltoro as the confidential informant. He confirmed that he did not believe that Ms. Deltoro was indicted in this case or charged in this case. (DE:459:88-91).

Detective Park confirmed that the safe deposit box that was searched was not registered to AGUEDO and that he did not have a key to the safe deposit box when he was arrested and that AGUEDO was not involved in any of the jail calls that were being monitored or of value regarding AGUEDO and that of the hundreds he listened to, AGUEDO'S name was not mentioned. (DE:459:93-95).

The government then called Detective Gabriel Rose, who is a detective with Lee County Sheriff's Office in the narcotics unit. Detective Rose confirmed he was involved in the investigation of Gorge Vargas, Javier Villar, Daniel Vargas and AGUEDO for distributing heroin that started in 2014 when they first became aware that the Dean Street house was a trap house. (DE:459:117-119)

On cross examination, Detective Rose confirmed that he met Deltoro on May 6, 2015, after a "take away" was performed from the trap house. Deltoro was stopped leaving the trap house and when they ran her information they found that there was an outstanding warrant. (DE:460:41-42) Detective Rose confirmed that it was his understanding that Deltoro knew people in the narcotics trade. (DE:460:46). Detective Rose confirmed that she was never deactivated because she was "never outside of our custody and arrested". (DE:460:53). Detective Rose confirmed he never asked Deltoro to provide a urine, blood or hair follicle sample and that he would see her more when she was making purchase then when she was not. (DE:460:54). Detective Rose confirmed that "[u]pon the initial debrief, she was able to give targets, what we would call targets, who she can buy from" and that on May 7, 2015, Deltoro never mentioned AGUEDO nor did she during any of the other debriefings. (DE:460:58).

The government called Britiny Ward to testify, who was the sister of Kathleen Smith. (DE:461:205). She testified she began working for Gorge Vargas in 2015 selling heroin. (DE:461:206). She confirmed she was testifying as a result of her entering into a plea agreement with the government in order to obtain a lesser sentence for her involvement. (DE:461:207-212). Ms. Ward testified that she saw Gorge Vargas and Javier bagging heroin. (DE:461:219). Ms. Ward testified that she did not know if AGUEDO slept at the Dean Street house and she was told he ran

things at night, but she never saw him at night. (DE:462:194). She also confirmed that she never saw AGUEDO working at the Dean Street house and that the only way she knew if AGUEDO was selling heroin was what she was told by other heroin users(DE:462:213-214).

The government called Guillermo Monmany ("Monmany"), who was a detective with the Lee County Sheriff's Office and was also assigned to the field support unit directly under the narcotics unit. (DE:462:215-216). In June, 2015 Monmany was a detective with the field support until and was involved with serving a search warrant at 4958 Dean Street in Lee County, (DE:462:218). Monmany testified that two males and one female were arrested the day the search warrant was executed at the residence and that one of them was AGUEDO. (DE:462:222). Monmany confirmed that during the search the found suspected narcotics on the kitchen counters, which were several small baggies themselves inside a bag with what was later field tested as heroin in them. (DE:462:223-224).

On cross examination, Monmany testified that they found a prescription for methadone, ten-milligram tablets and that the prescription was made out to AGUEDO. Monmany testified he did not know what the prescription was for. (DE:462: 247-248). Monmany further testified that the mail that was seized in AGUEDO's name had the address of 4703 Southeast 17th Place apartment 204, Cape Coral and that address was not the address being searched. He confirmed that

AGUEDO was in the house when arrested and that he did not know if the female was AGUEDO'S girlfriend or what her name was. Monmany confirmed that she was eventually released. (DE:462:249). Monmany testified that he did not see anything unusual about AGUEDO or the female that was arrested and that he did not ask AGUEDO if he was under the influence of heroin and that he did not check AGUEDO'S arms or see track mark. (DE:462:258-259).

Monmany testified that Enrique de Jesus, who was arrested during the execution of the search warrant, was located near the kitchen sitting next to the kitchen counter and in close proximity to the 33 bags of heroin while AGUEDO was in the living room along with the female. (DE:462:264-265). Monmany could not testify if the baggies found in the kitchen were sent out to be examined for the presence of DNA or fingerprints. (DE:462:267-268).

Smith testified about the trap house on Dean Street and that Javier worked at the trap house. She confirmed that Javier would resupply the trap house so that if somebody ran out, Javier would go and deliver a bundle which has 50 bags of heroin in it. (DE:463:198-199). Smith confirmed the drugs were Gorge's because the brothers would bring back the money to Gorge and that the "brothers" would supply the trap house. (DE:463:201). Smith also confirmed that Daniel Vargas moved in with them from Puerto Rico and he also sold heroin and that she saw him also bagging heroin three or four times. (DE:201-223). She confirmed that there were

times that all three brothers and Daniel Vargas would be together bagging the heroin. (DE:463:227-228). Smith confirmed that the trap house on Dean Street opened in 2013 and that her sister had a role with the trap house at Dean Street from sometime in 2015 and her role was to sell heroin. (DE:463:234-235). Smith confirmed that Gorge and Daniel Vargas would supply the trap house and would drop off the heroin and pick up the money and bring it to Gorge and he would split the money between him and his brothers. (DE:463:236-243).

Smith testified that she only heard Gorge speaking to AGUEDO maybe twice in one week. (DE:463:243-245). On cross examination, Smith testified that she had only met AGUEDO when they were arrested although she was involved with the case for approximately 24 months or two years. Smith confirmed she had never seen him before they all were arrested. (DE:464:241-243).

3. Facts Pertaining to AGUEDO'S Sentence and Sentencing Hearing.

The probation officer who prepared AGUEDO'S PSI set his base offense level at 24 pursuant to U.S.S.G.§2D1.1(c)(8)). (PSI:109) AGUEDO'S base offense level was enhanced by 2 levels pursuant to U.S.S.G.§2D1.1(b)(1), because there was a dangerous weapon involved. (PSI:110) AGUEDO received no reductions for minor role on any other reductions. (PSI:113-114). AGUEDO'S total offense level was 26 (PSI:118). AGUEDO had a criminal history category of III. (PSI:180). AGUEDO'S guideline range was 78 months to 97 months. However, the statutorily

authorized minimum sentence for AGUEDO was ten (10) years and therefore, AGUEDO'S presumptive guideline imprisonment range was 120 months pursuant to U.S.S.G.§5G1.2(b) (PSI:179-180).

AGUEDO filed his objections to the PSI on April 20, 2017 (DE:368). AGUEDO objected to the amount of heroin he was accountable for, that he was homeless and did not reside at the "residence" and therefore his base offense should not be enhanced by two (2) levels pursuant to U.S.S.G. §2D1.1(b)(1), and that he should receive a two level reduction for his minor role in the conspiracy. AGUEDO also sought a two (2) level decrease for acceptance of responsibility due to the fact that he did not testify at trial. (DE:368).

In his Sentencing Memorandum, AGUEDO sought both a departure and a variance in his sentence. (DE:369). AGUEDO sought a downward departure pursuant to U.S.S.G. §5H1.3, due to AGUEDO'S mental disabilities. AGUEDO also sought a downward departure pursuant to U.S.S.G. §5H1.3 because of AGUEDO's addiction to heroin, which he started using at 13 and continued to use on a daily basis until his arrest. AGUEDO also sought a variance based upon his diminished capacity and other reasons. (DE:369).

As a result of AGUEDO'S objections, probation issued a final presentence investigation report that was filed on May 31, 2017, with an Addendum (DE:397). In the new presentence investigation report, AGUEDO'S total offense level

remained the same, his criminal history remained the same, and his guideline range remained the same. (DE:397).

AGUEDO'S sentencing hearing was held on May 31, 2017 (DE:468). At the hearing, AGUEDO'S counsel argued his factual objections to the PSI, his request for a minor role reduction and his request for a departure due to diminished capacity and his drug addiction. AGUEDO'S counsel also argued for a variance. (DE:468).

The Court agreed that AGUEDO'S base offense should be 24 and not 30 because he should not be accountable for the full amount of heroin involved in the conspiracy. (DE:468:14-15).

The District Court found that because AGUEDO "put the government to its burden of proof at trial by denying essential factual elements of the conspiracy to possess, with intent to distribute heroin, . . . the Court does not believe at this time that the acceptance of responsibility of a minus two levels would be appropriate. However, I will take in to consideration your argument in regard to that being a reasons to vary in the case. The government did not advise the Court that you were going to challenge the base offense level."(DE:468:30-31).

The District Court ruled that AGUEDO's base offense level would be 24 and that "[t]he Court believes that the defendant does have a minor role" because he "didn't receive substantial monies" and "he had no involvement in negotiating the price, he only assisted in the sale." (DE:468:36). The Court found that the "PSR is

correct in the role in the offense adjustment, and he should receive zero points but not an additional amount taken off. He is an average participant, not a minor participant." (DE:468:36). As such, the District Court overruled AGUEDO'S request for a mitigating role reduction and his other objections as well.

On May 31, 2017, the District Court sentenced AGUEDO on Counts 1 and 5 that he was found guilty of and charged in the indictment for a total term of 96 months consisting of 96 months as to Count 1 and Count 5, to be served concurrently to each other, followed by 5 years supervised release for Count 1 and 3 years for Count 5, all to be served concurrently. In addition, the District Court waived fines, and ordered a $200.00 special assessment. (DE:408;468:46-49).

A. AGUEDO'S Conviction Should Not Have Been Affirmed Where The Evidence The Government Introduced Was Insufficient To Support AGUEDO'S Convictions.

Challenges to the sufficiency of the evidence in a criminal case are reviewed *de novo*. *United States v. Evans*, 473 F.3d 1115, 1118 (11th Cir. 2006). When making a *de novo* review of the sufficiency of the evidence, the reviewing court examines the evidence in a light most favorable to the prosecution with all reasonable inferences and credibility determinations being in the government's favor. *United States v. Hamaker*, 455 F.3d 1316, 1332 (11th Cir. 2006). The reviewing court must ask whether any reasonable fact finder could conclude that the

evidence demonstrates the guilt of the defendant beyond a reasonable doubt. *United States v. Eckhardt*, 466 F.3d 938, 944 (11th Cir. 2006). In order for AGUEDO'S convictions to be upheld, there had to be sufficient evidence to prove all of the elements of the crimes charged. *United States v. Ndiaye*, 434 F.3d 1270, 1294 (11th Cir. 2006). AGUEDO argues that the evidence does not support his convictions. The affirming of AGUEDO'S convictions by the Eleventh Circuit allowed AGUEDO to be convicted in violation of his due process rights. Accordingly, AGUEDO'S Petition for Writ of Certiorari must be granted.

The Fifth and Sixth Amendments to the United States Constitution, guarantee that "criminal convictions [will] rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt". *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 2313 (1995). Therefore, "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged". *United States v. Gaudin*, 115 S.Ct at 2314.

It is quite clear that in reviewing the evidence and testimony presented by the government that the elements required to support AGUEDO'S convictions, were not proven beyond a reasonable doubt. Therefore, AGUEDO'S motions for judgment of acquittal should have been granted. *United States v. Garcia*, 405 F.3d 1260 (11th Cir. 2005). Accordingly, the failure of the Eleventh Circuit to reverse the denial of

AGUEDO'S motion for judgment of acquittal justifies the granting of AGUEDO'S Petition for Writ of Certiorari.

B. AGUEDO'S Sentence Should Not Have Been Affirmed By The Eleventh Circuit Where The District Court Committed Sentencing Errors.

The denial of AGUEDO'S request for a minor role and a downward departure and variance by the District Court should not have been affirmed by the Eleventh Circuit due to AGUEDO'S minimal involvement in the conspiracy and his diminished capacity and his other objections. In conclusion, AGUEDO'S sentence was unreasonable in light of the sentencing factors listed in 18 U.S.C. §3553(a)-(f) and the totality of the circumstances. Moreover, the sentence was not minimally sufficient, but greater than necessary to comply with the purposes of sentencing under 18 U.S.C. §3553(a). Therefore, the District Court did in fact err in sentencing AGUEDO as it did, and because of this, the Eleventh Circuit should not have affirmed AGUEDO'S sentence. Based on the above, AGUEDO'S Petition for Writ of Certiorari must be granted.

REASONS FOR GRANTING THE PETITION

I.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED AGUEDO'S CONVICTIONS WHERE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT AGUEDO'S CONVICTION AND THEREFORE, AGUEDO'S MOTIONS FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

At trial, the evidence presented by the government was not sufficient to establish the offenses charged in the indictment as to AGUEDO'S role in the conspiracy and his involvement in the sell and distribution of heroin. In other words, "[a] conviction must be reversed, if a reasonable jury must necessarily entertain a reasonable doubt as to the defendant's guilt". *United States v. Vera*, 701 F.2d 1349, 1357 (11th Cir. 1983). Accordingly, the District Court should have granted a judgment of acquittal under Fed.R.Crim.P. 29(b) and because the District Court did not, this Court must reverse the convictions. *United States v. Salman*, 378 F.3d 1266 (11th Cir. 2004).

"[T]he elements of the offense of conspiracy under 21 U.S.C. §846 are: (1) an agreement between the defendant and one or more persons, (2) the object of which is to do either an unlawful act or a lawful act by unlawful means." *United States v.*

Toler, 144 F.3d. 1423, 1426 (11th Cir. 1998). Although the government may prove a conspiracy by circumstantial evidence, "[o]nce the existence of the conspiracy is established there must be substantial evidence that each alleged conspirator knew of, intended to join and participated in the conspiracy". *United States v. Avila-Dominguez*, 610 F.2d 1266, 1271 (5th Cir. 1980); s*ee generally, United States v. Hasson*, 333 F.3d 1264, 1270 (11th Cir. 2003); *United States v. Brantley*, 68 F.3d 1283 (11th Cir. 1995). In other words, for the conviction to be upheld, the government had to prove that there was an agreement by two or more persons to commit an unlawful act and that AGUEDO knew of the plan and was willing to participate in it. *United States v. Moran*, 778 F.3d 942 (11th Cir. 2015).

Furthermore, the government must prove that AGUEDO knew and agreed that the object of the unlawful conspiracy was to distribute the heroin. The government failed to prove this element of the conspiracy and therefore AGUEDO'S conviction as to Count One must be vacated.

It is a known fact that mere presence is not enough to uphold a conviction for conspiracy. *United States v. Brantley*, 68 F.3d 1283 (11th Cir. 1995). A person who does not know about a conspiracy but happens to act in a way that advances some purpose of a conspiracy, does not automatically become a conspirator. The evidence and testimony introduced at the trial merely proved that for two to four weeks, AGUEDO, who was homeless and a drug addict, stayed at the trap house and

sold and used heroin in order to support his addiction. Nothing supports a finding that AGUEDO was involved in a large scale drug trafficking conspiracy or that he intended to distribute and possess with intent to distribute heroin. More particularly, there is no substantial evidence to support the finding that AGUEDO was involved with the distribution of the drugs. In fact, in reviewing the transcripts, it seems that although there may have been a conspiracy going on with the other defendants, most if not all of the testimony and evidence was about all of the other defendants and none about AGUEDO.

In addition, there was no DNA or fingerprint evidence to tie AGUEDO to the drugs and therefore the conspiracy. (DE:462:267-268). Therefore, the evidence does not tie AGUEDO to distributing heroin, but merely that he was homeless, stayed at the trap house and sold heroin in order to obtain heroin for his own use.

Furthermore, there were no recorded phone conversations where AGUEDO was involved or even where his name comes up. Detective Rose testified that he listened to a lot of phone calls from the jail and that AGUEDO was not in any of them and that his name was not even mentioned. (DE:459:93-95). Again, if he was part of the conspiracy, one would assume his name would be mentioned at some point in time.

Further evidence that AGUEDO was not involved in the conspiracy can be seen in Detective Park's testimony where he testified that he never saw AGUEDO

during any of the executions of the search warrants and that the only time he saw him was Lee County Sheriff's headquarters after he was arrested. (DE:459:88-89).

The fact that AGUEDO was not involved in the conspiracy can also be seen from the testimony of Detective Rose when he was questioned about Ms. Deltoro, the confidential informant used by the police in this case. Detective Rose confirmed that "[u]pon the initial debrief, she [Deltoro] was able to give targets, what we would call targets, who she can buy from" and Deltoro never mentioned AGUEDO at her initial debriefing nor at any of the other debriefings. (DE:460:58).

Therefore, based on the testimony presented, the evidence was circumstantial at best. *United States v. Kim*, 435 F.3d 182, 183 (2nd Cir. 2006). Where the government's case is based on circumstantial evidence, "reasonable inferences, and not mere speculation, must support the jury's verdict". *United States v. Charles*, 313 F.3d 1278, 1284 (11th Cir. 2002) [*quoting, United States v. Perez-Tosta*, 36 F.3d 1552, 1557 (11th Cir. 1994)]. *See generally, United States v. Williams*, 390 F.3d 1319 (11th Cir. 2004); *United States v. Morris*, 20 F.3d 1111 (11th Cir. 1994).

The government must prove that AGUEDO knew of the conspiracy and voluntarily participated in it. *United States v. Guerra*, 293 F.3d 1279 (11th Cir. 2002). And, that AGUEDO intended to be involved in a conspiracy. However, there was nothing but circumstantial and speculative evidence tying AGUEDO to the conspiracy. In fact, the evidence clearly supported a finding that because of

AGUEDO being homeless and a heroin addict, that he was there merely to sell some heroin to support his drug habit. Even the District Court found that his role was merely to sell drugs. (DE:465:92). It is quite clear that the government failed to prove AGUEDO'S knowing and intentional participation in the conspiracy by substantial evidence. *See, United States v. Avila-Dominguez*, 610 F.2d 1266 (5th Cir. 1980); *see also, United States v. Guerra*, 293 F.3d 1279 (11th Cir. 2002). Everything was circumstantial at best.

At trial, the evidence was legally insufficient to support the substantive convictions charged against AGUEDO (Count 5). It is quite clear that the testimony was inconclusive, inconsistent and untrustworthy, particularly when you consider that the witnesses who testified about AGUEDO'S involvement were co-conspirators and or witnesses getting paid to do work for the police. It is "widely accepted" that where the prosecution has "condition[ed] leniency" on cooperation in criminal cases, the situation "is ripe with the potential for abuse". R. Michael Cassidy, *"Soft Words of Hope": Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 N.W.U.L. Rev. 1129, 1130 (2004). Not only is there a potential for abuse, statistics have shown that abuse is prevalent.

As such, the District Court should have granted a judgment of acquittal under Federal Rule of Criminal Procedure 29(b). *United States v. Salman*, 378 F.3d 1266, 1268 (11th Cir. 2004). Pursuant to Fed.R.Crim.P. 29(c)(2), "[i]f the jury has returned

a guilty verdict, the court may set aside the verdict and enter an acquittal", if there is insufficient evidence to convict. *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

In deciding a Rule 29 motion for judgment of acquittal, a District Court must determine whether viewing all the evidence in a light most favorable to the government and drawing all reasonable inferences and credibility choices in favor of the jury's verdict, a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. The District Court's decision on sufficiency of the evidence in determining a motion for judgment of acquittal is entitled to no deference by the Appellate Court which reviews the denial of a motion for acquittal *de novo*. *United States v. Ellington*, 348 F.3d 984 (11th Cir. 2003). Accordingly, a defendant's motion for judgment of acquittal must be granted if the evidence was insufficient to support the conviction. *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

The Fifth and Sixth Amendments to the United States Constitution guarantee that "criminal convictions [will] rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt". *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 2313 (1995). Therefore, "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged". *United States v. Gaudin*, 115 S.Ct at 2314.

The government bears the burden of proving beyond a reasonable doubt all the elements of the crime charged. *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310 (1995). No element may be removed from the jury's consideration. *United States v. Goetz*, 746 F.2d 705 (11th Cir. 1984). Furthermore, the law requires that a criminal act be performed voluntarily and intentionally and not because of mistake or accident. *United States v. Woodruff*, 296 F.3d 1041 (11th Cir. 2002). At trial, the evidence presented by the government was not sufficient to establish the offense charged in the indictment against AGUEDO.

Accordingly, the District Court should have granted AGUEDO'S motions. *United States v. Salman*, 378 F.3d 1266 (11th Cir. 2004); *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995). However, the District Court denied AGEUDO'S Motions and the Eleventh Circuit affirmed said denial. Therefore, in the interest of justice, AGUEDO'S Petition for Writ of Certiorari must be granted.

II.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED AGUEDO'S SENTENCE WHERE THE DISTRICT COURT COMMITTED SENTENCING ERRORS.

AGUEDO argues that the Eleventh Circuit erred in affirming his sentence where the District Court denied his request for a minor role reduction.

It is quite evident that AGUEDO'S participation and role in the conspiracy was substantially less than most of the other co-defendants charged in this conspiracy. In the case at hand, AGUEDO should be given a two-level decrease for his minor role due to the fact that he was not an organizer or manager and his actual benefit from the conspiracy was minimal at best. *See, United States v. De Varon*, 175 F.3d 930 (11th Cir. 1999) (*en banc*). As such, AGUEDO should receive a mitigating role reduction in comparison with the other defendants. There is no evidence to support any claim that AGUEDO was an intricate player in the conspiracy and there is no evidence that he did it for financial gain and/or even knew the extent of the conspiracy. Accordingly, since AGUEDO established that "[he] played a relatively minor role in the conduct for which [he] has already been held accountable – not a minor role in any larger criminal conspiracy", the District Court should have granted his reduction for his minor role in the offense. *United States v. DeVaron*, 175 F.3d 930 at 944; *see also, United States v. Neils*, 156 F.3d 382 (2nd Cir. 1998); *United States v. LaValley*, 999 F.2d 663 (2nd Cir. 1993) (remanding because the District Court appeared not to determine whether defendant was substantially less culpable than codefendants); *United States v. Sostre*, 967 F.2d 728 (1st Cir. 1992).

AGUEDO'S request should have been granted due to the commentary. In Amendment 794 which emphasized the fact that whether a defendant performs an

essential or indispensable role in the criminal activity, that is not determinative, and that such a defendant may receive a mitigating role adjustment if he or she is otherwise eligible. The commentary was amended to specify that the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative, and such a defendant may receive an adjustment under this guideline, if he or she is substantially less culpable than an average participant in the criminal activity. *United States v. Quintero-Leyva*, 2016 WL 2865713 (9th Cir. May 17, 2016). So, pursuant to the amendment to the guidelines, AGUEDO clearly qualified for a minor role adjustment in this particular case.

AGUEDO showed that the District Court did err in denying his request for a minor role and therefore the Eleventh Circuit should not have affirmed it. It is quite evident that AGUEDO'S participation and role in the conspiracy was substantially less than most of the other co-defendants charged in this conspiracy. *See, United States v. De Varon*, 175 F.3d 930 (11th Cir. 1999) (*en banc*). Consequently, AGUEDO was entitled to a minor role finding and because the denial of said minor role was denied by the District Court and affirmed by the Eleventh Circuit, AGUEDO'S Petition for Writ of Certiorari must be granted.

Furthermore, AGUEDO sought a reduction for acceptance of responsibility due to the fact because AGUEDO went to trial "to preserve a Fourth Amendment issue to preserve constitutional issue" and that when AGUEDO was arrested, he

"provided a post-arrest statement that was incriminating and he should have been given credit for that. (DE:468:29-30).

AGUEDO'S counsel also argued that because AGUEDO was homeless and at the residence for a very short amount of time, that the two (2) level enhancement for the firearm is not supported by the facts, i.e., "[t]here's no evidence to suggest that he had any possessory interest over the firearm, or even knew the firearm was there, and I think the Court has some discretion in determining whether or not that applies. . . I think it's overly punitive to apply that enhancement for the firearm. He was essentially a homeless drug addict residing there from two to four weeks. I don't think that this enhancement would be appropriate for Mr. Aguedo.". (DE:468:13).

In addition, AGUEDO also sought a downward departure pursuant to U.S.S.G. §5K2.13 and U.S.S.G. §5H1.3 and a variance based upon diminished capacity and other arguments. The District Court denied AGUEDO'S requests. The Eleventh Circuit affirmed said denial.

U.S.S.G. §5H1.3 provides that "[m]ental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, . . . are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines". In the case at hand, said mental illness and diminished capacity were the reasons for AGUEDO'S drug addiction and actions which led to him being arrested. Because of AGUEDO'S mental illness and diminished capacity,

he was more vulnerable to control by others and easily influenced and therefore became involved in the conspiracy.

It is quite clear that AGUEDO has and will be suffering from diminished capacity. It is also quite clear that the facts in the indictment do not indicate a "need to protect the public because the offense involved actual violence". Therefore, there is no "need to incarcerate the defendant to protect the public" and he has not been convicted of an offense under "chapter 71, 109A, 110 or 117, of Title 18, United States Code". *United States v. Cook*, 53 F.3d 1029, 1031 (9th Cir. 1995).

Based on this error by the District Court, AGUEDO'S sentence should have been vacated and remanded for resentencing, taking into consideration AGUEDO'S argument for a downward departure. *See generally, United States v. Himick*, 338 F.Supp.2d 1310 (S.D. Fla. 2004); *United States v. Simpson*, 228 F.3d 1294 (11th Cir. 2000) Therefore, because there is "reliable information [to] indicate … that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted". U.S.S.G. §4A1.3(b).

The same is true with AGUEDO'S request for a variance. AGUEDO'S request for a variance comported with the sentencing procedures that have evolved since the Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), and *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586 (2007). *See,*

United States v. Livesay, 525 F.3d 1081, 1089-90 (11th Cir. 2008) (summarizing current sentencing procedures in Eleventh Circuit); *United States v. Pugh*, 515 F.3d 1179, 1188-91 (11th Cir. 2008). As such, his request should have been granted.

The denial of said requests by the District Court and the Eleventh Circuit was not supported by the evidence or testimony and clearly was an abuse of discretion.

It is quite clear that the strict application of the advisory sentencing guidelines produced a sentence greater than necessary for punishment under Section 3553(a) for AGUEDO. The statutory factors set forth in Section 3553(a) weigh strongly in favor of a sentence outside of and below the advisory sentencing guidelines. Case law is clear that where circumstances warrant, a District Court can impose sentences that vary downward significantly from the advisory guidelines range and the Appellate Court will affirm such sentences as reasonable. *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558 (2007); *see also, United States v. Phaknikone*, 605 F.3d 1099 (11th Cir. 2010). However, that is not what happened in the case at hand. "This standard requires that there be error, that the error be plain, and that the error affect a substantial right." *United States v. Bennett*, 472 F.3d 825, 831 (11th Cir. 2006). "A substantial right is affected if the appealing party can show that there is a reasonable probability that there would have been a different result had there been no error." *United States v. Bennett*, 472 F.3d at 831-32.

Because of the above, the sentence imposed by the District Court should have been reversed by the Eleventh Circuit as there was a "definite and firm conviction that the District Court committed a clear error of judgment in weighing the §3553(a) factors". *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008). Accordingly, the Eleventh Circuit should have reversed the sentence and because it did not, AGUEDO'S Petition for Writ of Certiorari must be granted.

In considering all of AGUEDO'S arguments, it is clear that AGUEDO has met his burden of demonstrating that the sentence imposed by the District Court was substantially unreasonable and that the sentence should have been vacated. *United States v. Thomas*, 446 F.3d 1348 (11th Cir. 2006); *see also, United States v. Saac*, 632 F.3d 1203 (11th Cir. 2011). Because AGUEDO'S sentence was affirmed by the Eleventh Circuit, his Petition for Writ of Certiorari must be granted.

CONCLUSION

This Court should explicitly adopt AGUEDO'S position based upon law and equity. The upholding of his conviction and sentence by the Eleventh Circuit seriously affects the fairness, integrity and public reputation of the judicial proceedings. *See generally, United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005); *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993). For all of these reasons and in the interest of justice, the Petitioner, ZACHARIAS ABAB

AGUEDO, prays that this Court will issue a Writ of Certiorari and reconsider the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 3rd day of March, 2020, to the SOLICITOR GENERAL OF THE UNITED STATES, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

By /s/ David J. Joffe
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