NO._____

IN THE
SUPREME COURT
OF THE
UNITED STATES

2019-2020 TERM

MALIK TIMBERS,

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.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN FINDING THAT TIMBERS' GUILTY PLEA WAS VOLUNTARY AND THE SENTENCE-APPEAL WAIVER ENFORCEABLE.

II.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN DENYING TIMBERS' OBJECTION TO THE ENHANCEMENT FOR DANGEROUS WEAPON AND THE ENHANCEMENT FOR THREAT OF USE OF VIOLENCE.

III.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN DENYING TIMBERS' REQUEST FOR A MINOR ROLE REDUCTION.

IV.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN DENYING TIMBERS' REQUEST FOR A VARIANCE.

V.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED TIMBERS' SENTENCE WHERE TIMBERS' SENTENCE WAS UNREASONABLE IN LIGHT OF THE STATUTORY SENTENCING FACTORS LISTED IN 18 U.S.C. §3553(A)-(F) AND PRINCIPLES APPLIED BY THE ADVISORY FEDERAL SENTENCING GUIDELINES.

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The Petitioner, MALIK TIMBERS (hereinafter "TIMBERS"), by and through his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the proceedings on May 5, 2020.

OPINION OF THE COURT BELOW

The Court of Appeals for the Eleventh Circuit entered an unpublished Order dismissing TIMBERS' appeal and affirming TIMBERS' and sentence on May 5, 2020. *Appendix 1*.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals dismissing TIMBERS' appeal and affirming the judgment of the United States District Court was entered on May 5, 2020. The Eleventh Circuit Court of Appeals entered its order denying TIMBERS' Petition for Rehearing and Petition for Rehearing *En Banc* on July 9, 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

On November 1, 2018, a federal grand jury issued a seventeen (17) count indictment against Tony Wilson, Monique Moore, Jeffrey Beard, II, Elizabeth Kuc, Eileen Smith, William Thomas, MALIK TIMBERS ("TIMBERS"), Kennteh Tippins, Darniel Williams and Tyrome Wright, charging them all with conspiracy to distribute and possess with intent to distribute controlled substances, including cocaine base, heroin and fentanyl in violation of 21 U.S.C. §841(b)(1)(B), 21 U.S.C. §846 and 18 U.S.C. §2 (Count One); and also charging TIMBERS with knowingly and intentionally distributing a controlled substance in violation of 21 U.S.C. §841(b)(1)(C) and 21 U.S.C. §841(a)(1) (Count Seven) and a forfeiture count. (DE:3).

On June 11, 2019, TIMBERS pled guilty to Count I, conspiracy to distribute and possess with intent to distribute controlled substances, including cocaine base, heroin and fentanyl in violation of 21 U.S.C. §841(b)(1)(B), 21 U.S.C. §846 and 18 U.S.C. §2 Count Seven was dismissed. (DE:231).

The probation office obtained the following information through a review of investigation reports furnished by the United States Attorney's. TIMBERS shall utilize this factual position in the Presentence Investigation Report (PSI) to articulate TIMBERS' offense conduct and relevant conduct underlying the offense of conviction relative to his direct appeal.

In April 2014, the Lee County Sheriff's Office (LCSO) received information from a confidential informant (CI) that a male, identified as Tony Wilson, Jr., was known to sell large amounts of heroin and crack cocaine from the Suncoast Estates area of North Fort Myers, Florida, dating back to 2013. Detectives learned Wilson enlisted multiple dealers to distribute drugs from residences used specifically for drug distribution, known as trap houses.

Runners, who were frequently dealers themselves, picked up bulk drugs from Wilson and brought the drugs to trap houses for further breakdown and distribution. Runners also picked up bulk cash from the trap houses and brought the funds back to Wilson. Dealers, especially in the busiest trap houses, often worked side-by-side

with other dealers to supply customers, even working together on occasion to fulfill a request.

The investigation determined this drug organization began operating out of North Fort Myers, at least by 2013, and ended by August 29, 2018. The organization utilized various residences for the storage, packing and distribution of drugs, as well as the storing of money. At least by 2016, the organization was distributing at least four, eight gram "cookies" of crack cocaine (32 grams of cocaine base) and 200, .1gram bags of heroin and/or fentanyl (20 grams of heroin and/or fentanyl), daily. The following is an overview of activities that occurred during this conspiracy.

On June 10, 2014, a CI made a controlled purchase of heroin from Wilson at 7813 Breeze Drive in North Fort Myers. Wilson stood in the doorway of the residence as the CI approached. Once inside, the CI provided Wilson with $600 and Wilson told the CI to take a bag of heroin off a table. The substance was field tested and determined to be 3.8 grams of heroin. The Florida Department of Law Enforcement (FDLE) subsequently tested the substance and found the substance to have the presence of heroin and cocaine.

On June 17, 2014, a CI placed a controlled cellular phone call to Wilson and arranged to purchase $800 worth of heroin. Wilson advised the substance was packaged in multiple bags. The CI was concerned that several bags would result in less product. Wilson reassured the CI that the bags were "fat." The CI went to 7813

Breeze Drive to complete the transaction and was let into the residence by an unindicted male (M.B.). Inside the residence, the CI met with an unindicted female (L.H.). The CI provided L.H. with $800 and L.H. provided the CI with 32 bags of heroin. The FDLE tested the substance and found it to be 4.84 grams of heroin.

On June 30, 2014, a CI met Wilson at 8335 Tolles Drive, North Fort Myers, for the controlled purchase of heroin. Wilson told the CI to make sure the area is "free of cops" before coming to the house. An undercover (UC) officer drove the CI to the location and the CI entered the residence and met with Wilson. The CI provided Wilson $860 and Wilson walked into the back bedroom of the residence. A few minutes later, M.B. walked out of the bedroom and provided the CI with a bag of crack cocaine. M.B. told the CI they were out of heroin and all they had was "crack." The Drug Enforcement Administration (DEA) tested the substance and found it to be 4.1 grams of cocaine base.

On July 17, 2014, LCSO executed a search warrant on L.H.'s residence located at 8335 Tolles Drive. L.H. and M.B. were present during the search and arrested. A search of L.H.'s bedroom found a safe containing a loaded .22 caliber handgun, a large amount of heroin and crack cocaine, various illegally possessed prescription pills, and $3,000. M.B. and L.H. provided post-*Miranda* statements indicating that they were selling drugs for Wilson. L.H. advised the organization was making $15,000 a day. The FDLE found the substances seized to be 16 grams of

heroin, and 15.5 grams of a substance containing cocaine.On December 11, 2014, a traffic stop was conducted on a vehicle driven by Wilson, and a law enforcement canine alerted to his vehicle. A search located .02 grams of crack cocaine.

Law enforcement found a residence located at 8306 Nault Drive in North Fort Myers being utilized by Wilson as the main drug hub for the organization. This residence belonged to Monique Moore, who was also actively participating as a drug dealer for Wilson.

On January 16, 2016, Moore was arrested during a traffic stop and during a search of her vehicle, law enforcement found several crack pipes, heroin, and pills. Around March 2016, Samantha Badger resided at 8306 Nault Drive with Michael Perez. Wilson and Perez packaged drugs from this house. Both indicted and unindicted individuals were seen conducting business from this house during this time, to include A.M., R.J., C.W., Christopher Connor, Tyrome Wright, and Patrick Graham. Jeffrey Beard was also seen with the organization.

During March 2016, the LCSO conducted surveillance operations at 8306 Nault Drive. Various individuals were stopped by law enforcement after leaving the residence and found to be in possession of controlled substances. Some of the individuals admitted that the substances were purchased at the Nault residence.

On March 28, 2016, while Moore was incarcerated at the Lee County Jail, she placed a telephone call to Wilson. The jail call was recorded. Moore and Wilson

spoke of individuals arrested after leaving Moore's residence. Wilson comforted Moore by telling her the arrests were unrelated to their business, and that Wilson has people "taking care of things" at the house, referencing an unindicted individual (S.S.), as well as his cousin, his brother and himself. Wilson and Moore then discussed an unindicted individual (C.B.), and how C.B. and C.B.'s mother was working for Wilson, but Wilson planned to stop having them work for him. Wilson then reassured Moore he had everything under control.

On April 15, 2016, a traffic stop was conducted on a vehicle occupied by Tippins and three unindicted individuals, leaving 8306 Nault Drive. M.B. was the driver, J.B. was the front seat passenger; and A.J. and Tippins were rear passengers. A.J. was in possession of a stun-gun and a large amount of cash. Tippins was arrested on outstanding warrants and in possession of $2,735. No drugs were present.

During a recorded jail telephone call, Moore and Wilson discussed Tippin's arrest with money, and how Wilson could not take another loss. Wilson and Moore discussed Moore's house and how Wilson had people there watching over things and selling drugs. Moore suggested having her sister come to the house, but Wilson advised Moore's sister could not sell drugs.

On July 21, 2016, LCSO deputies assisted Florida State Probation Officers in a probationary check at 8494 Hart Drive, North Fort Myers. Michelle Gladys and an unindicted individual T.M. were present at the home. During the walk through of the

residence, Gladys and T.M. allowed the deputies inside a locked bedroom. Gladys moved a cooler and began hysterically crying and shaking. Gladys eventually opened the cooler and inside was 22.7 grams of crack cocaine. A search warrant was obtained for the residence, and Gladys frantically text messaged someone on her cellular phone. When asked to stop texting for officer safety, Gladys immediately broke her cellular phone.

During the search of 8494 Hart Drive, another cooler was located in a storage room. Within the cooler, three separate plastic bags with currency was recovered. The first bag had the word "Donk" written on a small piece of paper and had $1,200 in cash within it. The other two plastic bags, containing a total of $1,150, had the names "Mike" and "Jimmy" written on the pieces of paper. Gladys was federally indicted with one count of possession with intent to distribute crack cocaine. Gladys identified her residence as being a safe house, a place used by local drug dealers to store their product and cash. Gladys identified the baggies as belonging to Patrick Graham ("Donk"), Jimmy Estrella ("Jimmy") and Michael Perez ("Mike"). The bags contained the money each owed Wilson for the drugs. Gladys stated Wilson often came to her house and bagged up product to be distributed by his dealers from various residences in Suncoast.

In August 2016, Lee County Housing Authorities found that 8306 Nault Drive was unsafe for occupancy and drug dealers were forced to leave the premises. On

August 5, 2016, law enforcement responded to 8306 Nault Drive in reference to a report that several suspicious individuals may be trying to break into the residence. Upon arrival, two females were located in the front yard; one fled and the other stayed and was identified as C.B. C.B. reported she just learned the house had been condemned and came to retrieve her bicycle. As officers began to check the property from the outside, Tyrome Wright ran from the garage and attempted to flee, before being apprehended.

After securing Wright, officers called into the garage telling any occupants to come out. Hearing no response, deputies entered through an opened garage and found unindicted and indicted individuals: D.W., Graham, and C.W. hiding in various locations. All were arrested for failing to comply with a lawful order. Graham was found in possession of a white rock substance inside a pill bottle in his pocket. The DEA tested the substance and found it to be 2.2 grams of crack cocaine.

On August 24, 2016, during a recorded jail telephone call, Graham advised Wilson he was in jail with Wright. Wilson advised Graham he would attempt to get Graham released from jail but would not get Wright out because Wright owed Wilson money. Wright was described by Wilson as "smoking too much, and not making money." Wilson compared Wright to Perez who he advised was "a smoker, but he still made money."

On August 30, 2016, during a recorded jail telephone call, Perez asked Wilson why Badger was not making money. Wilson reported Badger was making money on heroin but still owed Wilson for crack cocaine. Wilson advised the product was moving; however, Badger was fronting drugs to buyers too often, and Connor was taking some of Badgers customers.

On September 1, 2016, a traffic stop was conducted on a vehicle leaving Fort Myers Beach, driven by Badger. A search of the vehicle located 216 bags of heroin and multiple bags of cocaine base. The DEA tested the drugs and found them to contain 21.8 grams of cocaine base and 28.5 grams of heroin. Badger was federally indicted for one count of possession with intent to distribute heroin. Badger provided statements admitting she was supplied by Wilson and became involved after her boyfriend, Perez, was arrested.

On September 1, 2016, a recorded jail telephone call was placed from Perez to Wilson. Perez asked Wilson if he planned to bond Badger out of jail. Wilson stated he had told Badger to not drive with all of the drugs in her vehicle, and because of her doing so, he would only pay for half her bond.

On September 7, 2016, law enforcement approached a known trap house located at 2008 Laurel Lane, owned by C.B. to question about a suspected stolen vehicle at the residence. Three individuals were found sitting on the unlit front porch of the residence, and identified as unindicted individuals M.M., J.B. and Connor.

For officer's safety, the trio were patted down. Connor had a loaded Kel-tec .380 caliber pistol in his back pocket. A later check revealed the firearm was stolen. On the table next to Connor were approximately 25 bags containing suspected heroin and eight suspected rocks of crack cocaine, as well as hundreds of small empty jewelry bags. C.B. came to the door and mentioned C.B.'s children were inside. Wilson and A.M., as well as two children exited the residence.

A search warrant was soon obtained for the residence. The search found a backpack containing a food-stamp card belonging to Connor, a small amount of marijuana and a scale. M.M. and J.B. both waived their Miranda rights and provided statements to police stating the drugs on the porch belonged to Connor. Connor also provided a post-Miranda statement in which he admitted he sold heroin earlier in the night, and that he "sold drugs for other people." Connor denied the ownership of the heroin on the table. The DEA tested the drugs located and found them to be 1.6 grams of crack cocaine and 3.8 grams of fentanyl.

On September 15, 2016, Graham who had been in jail for trespassing in August, made a recorded jail telephone call to Kuc. Graham and Kuc discussed Kuc's falling out with A.M. Kuc reported when Wilson went on vacation, he brought everything to Kuc, and she felt that A.M. was upset. When A.M. picked up money from Kuc, he was surprised how she sold all the product. Kuc gave A.M. $9,000, but was $10 short, and A.M. made a "big deal" over her being short. Kuc told

Graham she last saw A.M. on September 14, 2016, when she went to him for a quarter of cocaine so she could finish making crack cocaine.

On January 8, 2017, Perez obtained cocaine base from Connor at a trap house located at 8315 Hart Drive. Shortly after, law enforcement conducted a traffic stop on a vehicle driven by Badger, with Perez as the passenger. Perez was observed throwing an object from the vehicle and was found clenching his other hand. The thrown item and the items in his other hand were found to be a crack pipe, 7.5 grams of marijuana, and 37 rocks of crack cocaine, weighing 5 grams.

January 11, 2017, LCSO detectives were conducting patrols in the area of Hart Drive and conducted a traffic stop on a vehicle for speeding. The driver was unindicted individual M.N. and the passenger was Jeffery Beard. M.N. stated he was a taxi driver and hired by Beard to drive him to a nearby gas station. As officers spoke with M.N., Beard appeared nervous.

M.N. denied any knowledge of drugs inside the vehicle and consented to a search of the vehicle. A search of a cigarette pack sitting on the front passenger seat where Beard had been sitting found a partially smoked tobacco cigar. Upon inspecting the cigar several hard objects were found wrapped inside and found to be crack cocaine.

A search of Beard found a bag of crack cocaine inside his underwear. Located inside the same baggie were 11 smaller clear plastic bags containing an off-white

substance which appeared to be heroin. Beard spontaneously stated he had no idea that the bags of drugs were in his underwear. Further search of Beard found another cigar, containing additional crack cocaine. Beard was also in possession of $1,789. The DEA tested the seized drugs and found them to be .75 grams of heroin/fentanyl/cocaine mixture, and 1.3 grams of crack cocaine.

On June 16, 2017, a LCSO CI was taken to 8306 Nault Drive to purchase drugs from multiple dealers. The CI was driven to the residence and first met with Tippins and purchased .45 grams of crack cocaine for $40. The CI then met with TIMBERS and purchased three bags of heroin weighing .42 grams for $60. The CI last met with Williams and purchased $100 worth of crack cocaine weighing 1.1 grams. The DEA tested the drugs and found them to be .9 grams of cocaine base and .2 grams of heroin.

On July 21, 2017, agents met with Hallmon after her arrest earlier in the day. Hallmon provided a post-Miranda statement. Hallmon identified Wilson as the "biggest" drug dealer in Suncoast. Hallmon met Wilson in 2013 at a friend's house, and advised he brought drugs to the house. Hallmon reported there was an "instant connection," they were romantically involved, and they called themselves "Bonnie and Clyde." Hallmon reported she moved in with L.H. to run a trap house for Wilson in 2013. Hallmon and L.H. sold mostly crack cocaine out of the residence, and Wilson would deliver it to them.

On occasion, Hallmon would go to Lehigh Acres to meet Wilson, who would provide the drugs to her. On average, Hallmon was obtaining four to five cookies per day from Wilson. Hallmon describes a cookie as weighing between seven to ten grams of crack cocaine, and noted the weight often varied. Hallmon advised she went to jail for a while and stayed drug free. Later, Hallmon began selling drugs again after a bad break- up with her fiancé. Hallmon advised in January or February of 2007, she moved in with Kuc and began selling drugs out of the residence.

Hallmon advised A.M. and Wilson brought drugs to the residence for them to sell, generally four to seven cookies of crack cocaine per day. Often, A.M. and Wilson brought powder cocaine and converted it into crack cocaine. Hallmon eventually moved to 8306 Nault Drive in May or June of 2017, and during that time, she picked up crack cocaine and heroin from Wilson every day. Usually Hallmon met Wilson at a public location in Lehigh Acres, and A.M. was with him. Wilson refused to come to the 8306 Nault Drive alone for fear of law enforcement presence. At a minimum, Hallmon picked up seven cookies and 50 bags of heroin on each occasion. Hallmon was in charge of letting Wilson know when 8306 Nault Drive was getting low of drugs in the house. Hallmon and Rochford kept the drugs in safes and were the only people with access to the safes at that time.

The probation officer who prepared TIMBERS' PSI set his base offense level at 34, pursuant to U.S.S.G. §2D1.1 and U.S.S.G. §2D1.1(c)(3)[1]. (PSI: 120) The probation office gave TIMBERS a two level enhancement pursuant to U.S.S.G. §2D1.1(b)(1) for a dangerous weapon being in possession and a two level enhancement pursuant to U.S.S.G. §2D1.1(b)(2) for the use of violence. (PSI:121-122). The probation office gave TIMBERS a three-level decrease for acceptance or responsibility, pursuant to U.S.S.G. §3E1.1(a) and U.S.S.G. §3E1.1(b). (PSI: 128-129) Accordingly, the probation officer set TIMBERS' total offense level at 35. (PSI:130)

The probation office found that TIMBERS had a total offense level of 35 and a criminal history category of I. As such, the guideline imprisonment range was 168 to 210 months. (PSI:177)

TIMBERS filed his Amended Objection to Presentence Investigation Report on November 13, 2019 objecting to the enhancement pursuant to U.S.S.G. §2D1.1(b)(1) and U.S.S.G. §2D1.1(b)(2). (DE:435). TIMBERS also filed a Sentencing Memorandum where he requested a downward departure or variance. TIMBERS argued he was entitled to a downward departure because his criminal history category "substantially overrepresents the seriousness of the defendant's

[1] The final Pre-Trial Report was filed on November 8, 2019 amending the original Pre-Trial Report that was filed on October 15, 2019 (DE:383;425).

criminal history or the likelihood that the defendant will commit other crimes" and because of his category he was in zone D which zone substantially overrepresented his criminal history. (DE:422) TIMBERS sought a variance since his criminal history category was I and because of TIMBERS personal history and because he accepted responsibility immediately and in fact provided substantial assistance to the government. *United States v. Whitehead*, 532 F.3d 991 (9th Cir. 20008). (DE:33).

TIMBERS also argued that the District Court should impose a sentence "sufficient, but not greater than necessary" in order to achieve individual accountability and just punishment. *See generally, United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010). (DE:422; 585:46).

TIMBERS' sentencing hearing was held on December 9, 2019 (DE:585). At the sentencing hearing, defense counsel argued TIMBERS' objections to the PSI, his request for a minor role reduction and his request for a variance. TIMBERS' objections to the enhancements for dangerous weapon and use of violence were overruled as was his request for a minor role reduction and a variance. (DE:585:37-38, 56). TIMBERS' request for a variance and downward departure were also denied. (585:56) As such, the District Court sentenced TIMBERS to 121 months of incarceration followed by four (4) years of supervised release and the payment of a $100.00 assessment. (DE:585:57-60; 478). As a result of the sentence that was imposed, TIMBERS timely filed his notice of appeal and is incarcerated. (DE:48)

The Eleventh Circuit Court of Appeals upheld TIMBERS' appeal waiver and dismissed his appeal on May 5, 2020. The Eleventh Circuit Court of Appeals entered its Order denying TIMBERS Petition for Rehearing and Petition for Rehearing *En Banc* on July 9, 2020.

A. TIMBERS' Appeal should not have been dismissed as his Guilty Plea Was Not Entered into Voluntary. Therefore, TIMBERS' Sentence-Appeal Waiver Was Unenforceable.

A defendant's waiver of the right to appeal the sentence imposed is a question of law that this Court reviews *de novo*. *United States v. Copeland*, 381 F.3d 1101 (11th Cir. 2004).

A waiver of a defendant's right to appeal is upheld if it is knowing and intelligent. (*Id*.) However, even if the waiver was knowing and intelligent, the waiver cannot be enforced if it would result in a miscarriage of justice. *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004). In reviewing the totality of the circumstances, more particularly TIMBERS' abusive childhood and addiction to drugs, he did not have the ability to knowingly and intelligently enter into a waiver of such an important right and therefore, the Eleventh Circuit should not have upheld the waiver. In order to prevent a miscarriage of justice, this Court must grant TIMBERS' Petition for Writ of Certiorari.

B. The Denial Of TIMBERS' Objection to The Enhancement for Dangerous Weapon and Use of Violence Should Not Have Been Affirmed by The Eleventh Circuit.

The District Court erred in denying TIMBERS objections to the enhancement for a dangerous weapon and use of violence based on the facts of this case. Because the Eleventh Circuit affirmed said denial, TIMBERS' Petition for Writ of Certiorari must be granted.

C. The Denial of TIMBERS Request for A Minor Role Reduction Should Not Have Been Affirmed by The Eleventh Circuit.

The District Court's decision not to grant TIMBERS' request for a minor role reduction due to the fact that his involvement was both for a short period of time and was limited as to his involvement and profit of the conspiracy should not have been affirmed by the Eleventh Circuit.

TIMBERS was only in the conspiracy from June 16, 2017 through December 31, 2017 or for only 198 days. He is also accountable for one of the least amounts of drugs, with only one of the co-conspirators being accountable for a lesser amount of drugs. (PSI:109, 111). Furthermore, TIMBERS was not a leader or organizer of the conspiracy and TIMBERS was found to be a dealer and a runner only once during his involvement. (PSI:124). There is no evidence to support any claim that TIMBERS was an intricate player in the conspiracy. Therefore, said denial should

not have been affirmed by the Eleventh Circuit. However, because it was, then this Court must grant TIMBERS' Petition for Writ of Certiorari.

D. The Denial of TIMBERS' Request for a Variance by the District Court Should not have been Affirmed by the Eleventh Circuit.

The District Court's decision not to grant a variance is reviewed by the Appellate Court for reasonableness in light of the sentencing factors set forth in 18 U.S.C. §3553(a). *United States v. Johnson*, 485 F.3d 1264 (11th Cir. 2007).

Case law and the facts of this case do not support the Eleventh Circuit affirming the District Court's denial of TIMBERS' request for a variance under 18 U.S.C. §3553. The facts of this case, more particularly the fact that TIMBERS has no prior criminal history, his personal characteristics, the fact that he immediately took acceptance of responsibility and provided substantial assistance to the Government, supports the granting of a downward variance. Therefore, TIMBERS' Petition for Writ of Certiorari must be granted.

E. TIMBERS' Sentence Should Not Have Been Affirmed by the Eleventh Circuit Where TIMBERS' Sentence was Unreasonable in Light of the Statutory Sentencing Factors Listed in 18 U.S.C. §3553(A)-(F) and Principles Applied by the Advisory Federal Sentencing Guidelines.

TIMBERS' sentence was unreasonable in light of the sentencing factors listed in 18 U.S.C. §3553(a)-(f) and the totality of the circumstances, to wit, TIMBERS'

childhood and his limited role in the conspiracy. 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 TIMBERS as it did, and because of this, the Eleventh Circuit should not have affirmed TIMBERS' sentence. Based on the above, TIMBERS' Petition for Writ of Certiorari must be granted.

REASONS FOR GRANTING THE PETITION

I.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN FINDING THAT TIMBERS' GUILTY PLEA WAS VOLUNTARY AND THE SENTENCE-APPEAL WAIVER ENFORCEABLE.

An appeal waiver should only be upheld if the waiver was in fact knowing and voluntary. *United States v. Howle*, 166 F.3d 1166 (11th Cir. 1999). In upholding a waiver, the appellate Court must be assured that upholding or enforcing the waiver will not result in a "miscarriage of justice". *Warren v. United States*, 2011 WL 5593183 (M.D. Ala., Oct. 26, 2011); *see also, Gourdine v. United States*, 2012 WL 32446 (S.D. Ga., Jan. 5, 2012). In reviewing the totality of the circumstances, more particularly TIMBERS' abusive childhood and addiction to drugs, the Eleventh Circuit should have found that although TIMBERS' appeared to have answered all

of the District Court's questions in the positive regarding his understanding of the appeal waiver, the Eleventh Circuit in affirming TIMBERS' sentence failed to consider that TIMBERS' understanding of what he was waiving was limited and therefore not voluntary due to TIMBERS' abusive childhood and drug addiction. The Eleventh Circuit failed to consider that just because a defendant understands one thing does not mean that that defendant understands the legal consequences of "waiving your right to an appeal" – especially when you have a diminished capacity due to an abusive childhood and addiction to drugs. Therefore, in allowing the dismissal of TIMBERS' appeal by the Eleventh Circuit is allowing TIMBERS' due process rights to be ignored.

Because TIMBERS did not have the ability to understand the waiver, the Eleventh Circuit should not have upheld the appeal waiver and should have allowed the appeal to proceed. However, because this did not happen, TIMBERS' Petition for Writ of Certiorari must be granted.

Though a defendant enters into a plea agreement which provides that he will waive the right to appeal the sentence, this waiver must be explicit and, at the plea colloquy, the District Court must expressly and clearly discuss this with the defendant to ensure that this provision in the plea agreement is fully understood by the defendant. *United States v. Bushert*, 997 F.2d 1343 (11th Cir. 1993). Merely stating on the record that the defendant was "waiving his right to appeal regarding

the charges" was not sufficient. (*Id.*) *See, United States v. Buchanan*, 131 F.3d 1005 (11th Cir. 1997). Although TIMBERS affirmatively responded to the District Court's inquiry during the plea colloquy regarding his understanding of the waiver of his appeal rights, his understanding is questionable when you consider TIMBERS' childhood and drug addiction. See*, United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993) (appeal waiver is valid if knowingly and voluntarily entered); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938).

When a defendant agrees to plead guilty, the loss of his right to a jury trial or to cross-examine witnesses and his accusers is unavoidable, to-wit: there is no trial. However, waiving the right to challenge constitutional issues or other errors that may occur in the future should be a concern to this Court. The language used in the government's plea agreements concerning the waiver of a defendant's right to appeal is routinely inserted and leaves a defendant without the right to file for post-conviction relief no matter what meritorious issues a defendant may have. Again, the upholding of TIMBERS' appeal waiver, based on the fact that he lacked the understanding of what he was waiving, caused a "miscarriage of justice" and a violation of TIMBERS' due process rights. *United States v. Nguyen*, 618 F.3d 72 (1st Cir. 2010). As such, and in the interest of justice, the Eleventh Circuit should have found that the waiver was not voluntary and should not have dismissed the appeal. Because, TIMBERS' constitutional rights were not protected, and the

waiver is in violation of TIMBERS' due process rights, the Eleventh Circuit should not have dismissed the appeal. However, because TIMBERS' appeal was dismissed, this Court must grant TIMBERS' Petition for Writ of Certiorari.

Case law is clear that this Court has discretion not to enforce the plea and waiver if it would result in a "miscarriage of justice". *Warren v. United States*, 2011 WL 5593183 (M.D. Ala., Oct. 26, 2011); *see also, Gourdine v. United States*, 2012 WL 32446 (S.D. Ga., Jan. 5, 2012). Because the dismissal of TIMBERS' appeal was in fact a "miscarriage of justice" and a violation of TIMBERS' due process rights, this Court must grant his Petition for Writ of Certiorari. *United States v. Nguyen*, 618 F.3d 72 (1st Cir. 2010).

Although there is a necessity in having finality in a case and having plea agreements and waivers upheld, if there is doubt as to a defendant's voluntary waiver of his right to appeal a valid claim, then justice is not served by upholding the waiver. Accordingly, this Court must find that TIMBERS' appeal waiver was not voluntary and grant TIMBERS Petition for Writ of Certiorari.

II.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN DENYING TIMBERS' OBJECTION TO THE ENHANCEMENT FOR DANGEROUS WEAPON AND THE ENHANCEMENT FOR THREAT OF USE OF VIOLENCE.

TIMBERS' offense level was enhanced by two levels pursuant to U.S.S.G. §2D1.1(b)(1) for possession of a dangerous weapon and a two-level increase pursuant to U.S.S.G. §2D1.1(b)(2) for use of violence. (PSI:121, 122).

U.S.S.G. §2D1.1(b)(1) requires that TIMBERS had possession of the firearm, not just that a firearm was used during the conspiracy. In reviewing all of the evidence introduced, it is quite evident that TIMBERS did not have the weapon. Also, case law provides that the government must prove that the use of a weapon was foreseeable by TIMBERS.

United States v. Gallo requires that the government prove that the defendant who was in possession of the weapon was a co-conspirator, that the co-conspirator's possession of the weapon was in furtherance of the conspiracy, that TIMBERS was a member of the conspiracy, and that possession of the weapon by the co-conspirator was foreseeable by TIMBERS. *United States v. Gallo*, 195 F.3d 1278 (11th Cir. 1999).

Again, reviewing the evidence, the government did prove the first three elements; however the third element that is needed to wit: that TIMBERS knew or could foresee that one of his co-conspirators had a weapon was not proven by the government. The fact that TIMBERS was not involved in the conspiracy as long as his other co-conspirators and clearly was not a manager or supervisor in the conspiracy supports a finding that TIMBERS could not foresee what his co-conspirators would or would not do, including possessing a weapon. Because of his lack of "knowledge' and "involvement" in the conspiracy, the element that he could "foresee" that a weapon would be involved is clearly not proven by the facts of the case. Therefore, TIMBERS objection should have been granted and because it was not, TIMBERS' Petition for Writ of Certiorari must be granted.

The same is true for the two-level enhancement pursuant to U.S.S.G. §2D1.1(b)(2) for use of violence. TIMBERS acknowledged that there was an altercation and that he was present. However, his involvement is questionable. During TIMBERS' sentencing, the government played the video of the incident where the weapons were seen and where one of the co-conspirators was roughed up by the other co-conspirators. (DE:585:16-26) As such, although TIMBERS was present during the incident clearly does not mean that he was involved in the violence. Mere presence and mere association are not enough for TIMBERS to be

found guilty of being involved in the violence. *See generally United States v. Brantley*, 68 F.3d 1283 (11th Cir. 1995).

Based on the fact that the videos clearly show that TIMBERS did not have possession of the weapon and that he was not involved in the violence against the other member, the District Court should have granted his objection. Therefore, the Eleventh Circuit should have found that the District Court abused its discretion; but it did not. As such, TIMBERS' Petition for Writ of Certiorari must be granted in order to prevent a further miscarriage of justice as it relates to TIMBERS' sentence.

III.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN DENYING TIMBERS' REQUEST FOR A MINOR ROLE REDUCTION.

A District Court is authorized to reduce a defendant's offense level by two if the defendant establishes that he was a "minor participant" in the crime by a preponderance of the evidence. United States Sentencing Guidelines, §3B1.2(b); *United States v. De Varon*, 175 F.3d 930, 939 (11th Cir. 1999) (*en banc*). A minor participant is one "who is less culpable than most other participants, but whose role could not be described as minimal". United States Sentencing Guidelines, §3B1.2(b), Comment (n. 5). For a District Court to determine whether to grant a minor role reduction, it considers two principles. *De Varon*, 175 F.3d at 940. First,

the Court must measure the defendant's role against the relevant conduct for which he is being held accountable. *De Varon*, 175 F.3d at 940 "Only if the defendant can establish 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 – should the district court grant" a minor role reduction." *De Varon*, 175 F.3d at 944. The second prong of the minor role reduction analysis permits a District Court, "where the record evidence is sufficient, … [to] measure the defendant's conduct against that of other participants in the criminal scheme attributed to the defendant". (*Id*. at 934)

Pursuant to United States Sentencing Guidelines, §3B1.2, Mitigating Role, a defendant's role in an offense can be decreased by two levels if the defendant was a minor participant in any criminal activity. *See*, United States Sentencing Guidelines, §3B1.2(b). Commentary Application Note 5 (formerly Note 3) states that this section provides a range of adjustments for a defendant who is less culpable than most other participants:

> A defendant who is accountable under Section 1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who is accountable under Section 1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.

TIMBERS was only in the conspiracy from June 16, 2017 through December 31, 2017 or for only 198 days. He is also accountable for one of the least amounts of drugs, with only one of the other co-conspirators being accountable for a lesser amount of drugs. (PSI:109, 111). Furthermore, TIMBERS was not a leader or organizer of the conspiracy and TIMBERS was found to be a dealer and a runner only once during his involvement. (PSI:124). There is no evidence to support any claim that TIMBERS was an intricate player in the conspiracy. In fact, during the testimony of Detective Bubley at TIMBERS' sentencing hearing, Detective Bubley testified that they did 16 controlled buys and that TIMBERS was only involved in one of those buys. (DE:585:27).

Because of the conflict among the Circuits, the Commission wrote Amendment 794 which adopts the approach that "when determining mitigating role, the defendant is to be compared with the other participants 'in the criminal activity.'" U.S.S.G. app. C, amend. 794 at 117. The Commission also reasoned that at least four Circuit Courts of Appeals had "denied [a defendant] a mitigating role adjustment solely because he or she was 'integral' or 'indispensable' to the commission of the offense." U.S.S.G. app. C, amend. 794 at 118. Disagreeing with this approach, the Commission explained that Amendment 794 "revise[d] the commentary to emphasize that the fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative and that such a

defendant may receive a mitigating role adjustment, if he or she is otherwise eligible." U.S.S.G. app. C, amend. 794 at 118. The commentary was amended to specify that "[t]he fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative [and] [s]uch a defendant may receive an adjustment under this guideline if he or she is substantially less culpable than the average participant in the criminal activity." U.S.S.G. app. C, amend. 794 at 116.

Again, Amendment 794 introduced a list of non-exhaustive factors that a District Court should consider in determining whether to apply a mitigating role adjustment and further, the amendment provides that at "a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment under this guideline." U.S.S.G. app. C, amend. 794 at 116. Based upon the new language in the commentary and the factors enumerated herein, it is quite evident that TIMBERS' participation and role in the conspiracy was substantially less than most of the other co-defendants charged in this conspiracy. Accordingly, TIMBERS should have been given a two-level decrease for his minor role due to the fact that he was not an organizer or manage 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*); *see also*, U.S.S.G. app. C, amend. 794. However, TIMBERS did not receive said decrease, and the Eleventh Circuit in dismissing his appeal, in reality affirmed said denial by

the District Court. Because the Eleventh Circuit erred, this Court must grant TIMBERS Petition for Writ of Certiorari to assure that TIMBERS due process rights were protected.

IV.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT ERRED IN AFFIRMING THE DENIAL OF TIMBERS' REQUEST FOR A VARIANCE.

Variances are used by the District Courts to remedy unjustified disparity of sentences among the districts. *United States v. Boscarino*, 437 F.3d 634, 638 (7th Cir. 2006). TIMBERS' request for a variance comports 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). Because of the facts of this case, the Eleventh Circuit should have vacated TIMBERS' sentence due to the denial of TIMBERS' request for a variance by the District Court.

The statutory factors set forth in Section 3553(a) weigh strongly in favor of a sentence substantially below the sentence given. Among the factors which the District Court "shall consider" under 18 U.S.C. §3553(a)(1) are "the nature and

circumstances of the offense and the history and characteristics of the defendant" and under 18 U.S.C. §3553(a)(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; and (D) to provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner". 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).

In the instant case, the District Court entered a sentence greater than necessary for punishment under 18 U.S.C. §3553(a). The District Court failed to consider the individual history and characteristics and sentenced TIMBERS to a sentence that is grossly disproportionate to the offense committed. *United States v. Davis*, 754 F.3d 1205 (11th Cir. 2014). The District Court failed to give any credence to the fact that TIMBERS' father was murdered when TIMBERS was a child causing TIMBERS to be placed in foster care. TIMBERS also accepted responsibility and his criminal history is a category one. Furthermore, TIMBERS provided substantial assistance to the government which is evidenced by the three-level reduction TIMBERS received

at sentencing and the motion made by the government at the sentencing hearing. (DE:585:41, 43). Although, the District Court granted a reduction as requested by the government, the sentence that TIMBERS received was still greater than necessary considering all of the arguments made herein, but apparently were not properly considered by the District Court. It is quite clear that the District Court and the Eleventh Circuit failed to consider, in total, TIMBERS' history and grant an appropriate variance. Because said abuse of discretion was affirmed by the Eleventh Circuit, TIMBERS' Petition for Writ of Certiorari must be granted to assure justice for TIMBERS.

V.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED TIMBERS' SENTENCE WHERE TIMBERS' SENTENCE WAS UNREASONABLE IN LIGHT OF THE STATUTORY SENTENCING FACTORS LISTED IN 18 U.S.C. §3553(A)-(F) AND PRINCIPLES APPLIED BY THE ADVISORY FEDERAL SENTENCING GUIDELINES.

The Sentencing Reform Act requires the Court to consider the "history and characteristics" of the defendant. TIMBERS' cooperation sheds a positive light on his "history and characteristics" because of his willingness to cooperate. It also

reflects positively on his character. *See, United States v. Fernandez*, 443 F.3d 19 (2nd Cir. 2006). Because of his cooperation, lack of criminal history and the facts surrounding his childhood, the Eleventh Circuit should have considered his argument and found that his sentence was both procedurally and substantially unreasonable. In a nutshell, TIMBERS contends that he was denied his right to due process of law and a reasonable sentence pursuant to the dictates of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005); *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586 (2007); and *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558 (2007). TIMBERS' final sentence, in its entirety, was violative of the Section 3553(a) requirements. Given the totality of the circumstances, TIMBERS' sentence was unreasonable and therefore, TIMBERS received a sentence that was "greater than necessary" causing him not to receive just punishment. *United States v. Livesay*, 525 F.3d 1081 (11th Cir. 2008). *See generally, United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010).

The sentence entered by the District Court was "grossly disproportionate to the offense committed." *United States v. Flanders*, 752 F.3d 1317 (11th Cir. 2014). TIMBERS' sentence did not provide just punishment considering the fact that TIMBERS pled guilty, accepted responsibility and has substantial personal characteristics, i.e., TIMBERS has no criminal history and the horrific events he suffered during his childhood.

These factors clearly supported a finding that his sentence was unreasonable. *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035 (1996); *United States v. Livesay*, 525 F.3d 1081 (11th Cir. 2008). Therefore, TIMBERS' sentence should have been vacated by the Eleventh Circuit Court of Appeals; but because the Eleventh Circuit Court of Appeals dismissed TIMBERS' appeal and therefore affirmed the sentence imposed by the District Court, TIMBERS' Petition for Writ of Certiorari must be granted, in the interest of justice.

In considering all of TIMBERS' arguments, it is clear that TIMBERS has met his burden of demonstrating that the sentence imposed by the District Court and affirmed by the Eleventh Circuit was substantially unreasonable and that the sentence should have been vacated by the Eleventh Circuit. *United States v. Thomas*, 446 F.3d 1348 (11th Cir. 2006); *see also, United States v. Saac*, 632 F.3d 1203 (11th Cir. 2011). *See also, United States v. Bonilla*, 579 F.3d 1233 (11th Cir. 2009).

CONCLUSION

This Court should explicitly adopt TIMBERS' position based upon law and equity. The upholding of his 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, MALIK TIMBERS, 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 5th day of August, 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
DAVID J. JOFFE, ESQUIRE