No. _____

In the

Supreme Court of the United States

_____

Jason Andrew Cavazos,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

I. **Whether the court of appeals failed to properly apply the plain error analysis to the question of whether the sentencing court erred by including a two-level enhancement for the offense involving a sex act pursuant to U.S.S.G. §2G1.3(b)(4) when the conduct giving rise to the enhancement was not relevant conduct to the offense of conviction?**

PARTIES TO THE PROCEEDING

Petitioner is Jason Andrew Cavazos, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jason Andrew Cavazos seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Jason Andrew Cavazos*, 831 Fed. Appx. 130 (5th Cir. December 9, 2020) (unpublished). It is reprinted in Appendix A to this Petition. The district court's judgment and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on December 9, 2020. The 90-day deadline for filing a petition for writ of certiorari provided for in Supreme Court Rule 13 has been extended to 150 days from the date of the lower court judgment by order of this Court on March 19, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> 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 subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

U.S.S.G. §2G1.3(b)(4) provides:

> **[**i]f (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.

U.S.S.G. §1B1.3 Relevant Conduct (Factors that Determine the Guideline Range) provides that the application of specific offense characteristics shall be based upon:

> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
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> . . .
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> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense

LIST OF PROCEEDINGS BELOW

1. *United States v. Jason Andrew Cavazos*, 5:19-CR-00099-H-BQ-1, United States District Court for the Northern District of Texas. Judgment and sentence entered on February 6, 2020. (Appendix B).

2. *United States v. Fed. Appx.* 831 Fed. Appx. 130 (5th Cir. June 9, 2020), CA No. 20-10169, Court of Appeals for the Fifth Circuit. Judgment affirmed on December 9, 2020. (Appendix A)

STATEMENT OF THE CASE

On August 14, 2019, Jason Andrews Cavazos (Cavazos) was named in a one count indictment charging enticement of a minor, in violation of 18 U.S.C. § 2422(b). (ROA.7).[1] On October 18, 2019, Cavazos pleaded guilty to the one count indictment pursuant to a written plea agreement and written factual resume. (ROA.27-37,105-111). Cavazos stipulated to facts in the factual resume that showed on December 26 and 27, 2018, Cavazos, 32 years old, sent messages via Facebook to Jane Doe, 13 years old, in which Cavazos tried to persuade Jane Doe to engage in sexual acts with Cavazos. *See* (ROA.30-32). From the content of the Facebook messages, it appeared that Jane Doe had performed oral sex on Cavazos prior to the messages that were sent on December 26 and 27, 2019. *See* id. After Cavazos was arrested, he admitted he had sent the messages and that Jane Doe had performed oral sex on him. *See* (ROA.32).

The undisputed facts in the PSR showed that Jane Doe had performed oral sex on Cavazos once on a swing in the backyard of her grandmother's house. *See* (ROA.123). Cavazos admitted that after that, he tried to get Jane Doe to have sex with him but it never happened. *See* (ROA.123-124). Jane Doe "blocked him" and stopped talking to him. *See* id. It is clear from the context of the December 26 and December 27 messages that the meeting where Jane Doe had performed oral sex on Cavazos had occurred before the Facebook messages, because Cavazos and Jane

[1] For the convenience of the Court and the parties, the Petitioner has cited to the page number of the record on appeal.

Doe both said in the messages that the oral sex had already happened, and because Jane Doe said she was at her cousin's house, not her grandmother's house where the incident involving the oral sex had previously occurred. *See* (ROA.30-31,120-121). In fact, the sentencing judge recognized the sexual activity had occurred prior to the Facebook messages that were the basis of the conviction. *See* (ROA.97).

The PSR found a base offense level 28, applying U.S.S.G. §2G1.3. (ROA.125). The PSR included a two-level increase for the offense involving unduly influencing a minor to engage in prohibited sexual conduct (U.S.S.G. §2G1.3(b)(2)); a two-level increase for the offense involving the use of a computer or an interactive computer service (U.S.S.G. §2G1.3(b)(2)); and a two-level increase for the offense involving the commission of a sex act or sexual conduct (U.S.S.G. §2G1.3(b)(4)), resulting in an adjusted offense level of 34. (ROA.125). Allowing for a three-level reduction for acceptance of responsibility, the PSR found a total offense level of 31. (ROA.125). At a Criminal History Category II and a total offense level 31, Cavazos's advisory imprisonment range was 121-151 months. (ROA.133).

Both the defense and the government filed a notice of no objection to the PSR. (ROA.136-138). At the sentencing hearing, neither parties had objections to the PSR. (ROA.93). Cavazos's attorney asked for a sentence at the low end of the imprisonment range based upon Cavazos's mental health problems and lower level of intellectual functioning. *See* (ROA.94-95).

The district court sentenced Cavazos to 151 months imprisonment, a 20-year term of supervised release, a $100 mandatory special assessment, forfeiture of a cell phone and no fine or restitution. (ROA.49-56,99-102).

On Appeal, Cavazos argued that the district court committed plain error by enhancing the offense level by two levels because the previous sex act was not relevant conduct to the offense of conviction. The Court of Appeals for the Fifth circuit rejected this argument, stating, "it is neither clear nor obvious that the phrase "in preparation for", as used in Guideline 1B1.3(a)(1), must be interpreted to preclude Cavazos's prior sex act with Doe." *United States v. Cavazos*, 831 Fed. Appx. at 130. However, there is nothing in the PSR to suggest that the earlier sex act was in preparation for the offense of conviction. Moreover, the Court of Appeals disposed of the question based upon the argument that there was "no relevant authority holding that a prior sex act cannot be in preparation of a subsequent enticement offense involving the same victim and offender." *Id*. Of course, the Petitioner was not arguing that could never be the case. The argument on appeal was that there was nothing in the facts of this case to support the finding that the prior sex act had been committed in preparation for the offense of conviction.

REASONS FOR GRANTING THIS PETITION

I. This Court should grant review to determine whether the court of appeals misapplied the plain error standard of review.

Petitioner did not raise the Guidelines issue in the trial court, and therefore, the Fifth Circuit purported to apply the plain error standard of review. *See United States v. Cavazos*, 831 Fed. Appx. at 130. Plain error review requires the court of appeals to determine whether (1) the district court erred, (2) its error was plain, and (3) the error affected Cavazos's substantial rights. *See United States v. Mares*, 402 F.3d 511, 520 (5th Cir. 2005) (citing *United States v. Cotton*, 535 U.S. 625, 631 (2002)). If these conditions are met, then the court of appeals has the discretion to reverse the conviction and sentence if it also finds that the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *Cotton*, 535 U.S. at 631).

The Fifth Circuit's practice of dismissing out-of-hand an issue raised under the plain error standard unless there is binding precedent addressing the issue resulted in that court misapplying the four prongs of plain error. As is set forth below, the Petitioner's case met the four prongs of plain error review. However, the court of appeals rejected Cavazos' argument by simply stating that there was no binding precedent on an issue that was not even the argument that was raised on appeal. This Court should grant review and remand this case for the Fifth Circuit to properly apply the plain error standard.

(1) The district court erred by applying the two-level enhancement.

U.S.S.G. §2G1.3(b)(4) provides **"**if (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels."

"Offense" is broadly defined under the Guidelines to mean "the offense of conviction and all relevant conduct under § 1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context." U.S.S.G. §1B1.1, application note 1(I).

U.S.S.G. §1B1.3 Relevant Conduct (Factors that Determine the Guideline Range) provides that the application of specific offense characteristics shall be based upon:

> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
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> . . .
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> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense

There is simply no question that in order for the district court to find the offense of conviction involved prior unadjudicated conduct that prior conduct must qualify as relevant conduct. *See United States v. Fowler*, 216 F.3d 459, 461 (2000) (Defendant's prior receipt of sadistic images did not occur during the offense of conviction of shipping child pornography images to a minor with the intent entice

the minor, or in preparation for that offense, or for avoiding detection such as to qualify as relevant conduct for the purposes of applying the enhancement for an offense involving material that portrayed sadistic or masochistic conduct pursuant to U.S.S.G. §2G2.2(b)(3).

In this particular case, in order to qualify as relevant conduct, the record must show that the conduct that resulted in the two-level enhancement in question "occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. §1B1.3; *see also United States v. Randall*, 924 F.3d 790, 798 (5th Cir. 2019).

It is clear from the record that the conduct that involved the sex act or sexual contact occurred prior to the messages sent on December 26 and 27, 2018. The statements of Jane Doe and Cavazos reveal that Jane Doe conducted oral sex on Cavazos on one occasion at Jane Doe's grandmother's house on a swing in the backyard. *See* (ROA.122-123). The context of the December 26 and 27, 2018 Facebook messages make it clear that the one incident where Jane Doe performed oral sex on Cavazos occurred prior to the messages that were the basis of the conviction. *See* (ROA.121). Indeed, the sentencing judge found that the incident where Jane Doe performed oral sex was prior to the Facebook messages on December 26 and 27 and that the messages that were the basis of the conviction involved Cavazos attempting to induce the victim into participating in sexual activity. *See* (ROA.97). There is nothing in the record to support the conclusion that

Cavazos had engaged in the prior act in preparation for an enticement offense that he most likely had not even conjured at that point. There is certainly no language in the PSR that suggests that was the basis for finding the prior act was relevant conduct, and the district court certainly made no such finding.

Accordingly, the sex act that resulted in the two-level enhancement pursuant to U.S.S.G. §2G1.3(b)(4) did not occur during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. The single sex act that occurred prior to the Facebook messages that were the basis for the indictment was not relevant conduct to the offense of conviction under any theory of relevant conduct. It was error for the district court to use that conduct as the basis for the two-level enhancement.

2) Error that is plain and obvious

The provisions of U.S.S.G. §1B1.3 (relevant conduct) are relatively clear and straight forward, and have been a part of regular sentencing proceedings since 1987. Moreover, the principle that unadjudicated conduct not committed during the offense of commission can only be used to determine offense characteristics and enhancements if the conduct qualifies as relevant conduct is well-settled. *See United States v. Brummett*, 355 F.3d 343, 344 (5th Cir. 2003) ("A district court may consider non-adjudicated offenses (offenses for which the defendant has neither been charged nor convicted) that occur after the offense of conviction, provided they

constitute "relevant conduct" under U.S.S.G. § 1B1.3.") *citing United States v. Vital*, 68 F.3d 114, 118 (5th Cir.1995).

Moreover, the case law in the Fifth Circuit has made it clear that previous conduct with other victims, and previous possessions of child pornography do not qualify as relevant conduct either as conduct that occurred during the commission of the offense, in preparation for that offense, or in the course of attempting to avoid detection, or as a part of a the same course of conduct or common scheme or plan, simply because the conduct may be similar to the offense of conviction. *See United States v. Randall,* 924 F.3d at 799; and *United States v. Fowler*, 216 F.3d 459 at 461. The unadjudicated conduct must qualify as relevant conduct under the specific provision of U.S.S.G. §1B1.3 in order to be used to apply an offense characteristic enhancement. The error in this case was plain and obvious.

3) The error affected Cavazos's substantial rights

In Mr. Cavazos's case, absent the error calculating the total offense level and the advisory imprisonment range of 121-151 months, Mr. Cavazos's total offense level would have been 29. At a Criminal History Category II, the advisory imprisonment range would have been 97-121 months.

"In most cases a defendant who has shown that the district court deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome. And, again in most cases, that will suffice for

relief if the other requirements of Rule 52(b) are met." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016).

Accordingly, the error in this case affected Mr. Cavazos's substantial rights and satisfied the third prong of plain error.

4) The error affected the fairness, integrity and public reputation of the proceedings.

The court of appeals should have exercised its discretion to reverse the plain error in this case because the error seriously affected the fairness, integrity and public reputation of the proceeding.

"[A]ny exercise of discretion at the fourth prong of *Olano* inherently requires 'a case-specific and fact intensive' inquiry." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1909 (2018) *quoting Puckett v. United States*, 556 U.S. 129, 142 (2009).

"[W]hat reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?" *Rosales-Mireles v. United States*, 138 S. Ct. at 1908 (2018) *quoting United States v. Sabillon-Umana*, 772 F. 3d 1328, 1333-1334 (10th Cir. 2014) (Gorsuch, J.).

In this case, the district court sentenced Mr. Cavazos using an advisory imprisonment range of 121-151 months when it should have used an imprisonment

range of 97-121 months. The district court imposed a sentence of 151 months. The court of appeals should have exercised its discretion to correct this error.

Instead, the court of appeals rejected the argument by relying on the analysis that there was "no relevant authority holding that a prior sex cannot be preparatory for a subsequent enticement offense involving the same victim or offender." *See United States v. Cavasoz*, 831 Fed Appx. at 130. However Cavazos' argument was that there was nothing in the record to support a finding that the prior sex act had been committed in preparation for a future enticement offense which had likely not even been contemplated. There is nothing in the PSR or the district court's findings that indicate that this was the basis for a relevant conduct finding. The court of appeals' analysis and the basis for its opinion is a complete failure to apply a rational plain error analysis to the argument in this case.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 10th day of May, 2021.

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