NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

MARIA TERESA DUARTE GODINEZ
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 20-60596

PETITION FOR WRIT OF CERTIORARI

PETER H. BARRETT (MSB #2069)

P. & W. BARRETT LAWYERS, PLLC
2202C 25th Ave, C-3
Gulfport, MS 39501
Phone: (228) 864-9885

QUESTIONS PRESENTED FOR REVIEW

The two questions presented are (1) whether the appellate court erred when it enforced the waiver keeping the Defendant from appealing her sentence in violation of her due process rights, and (2) whether the district court erred when it failed to account for the need to avoid unwarranted sentence disparities among similarly situated defendants, leading to an untenable sentencing disparity in this case.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

On September 7, 2017, Appellant Maria Teresa Duarte Godinez (hereinafter "Godinez"), along with one co-defendant, Alfonso Jaimes, was charged in a single-count indictment with conspiracy to possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846.[1] Godinez entered into a plea agreement with the Government and pleaded guilty to the single-count indictment on July 26, 2018.[2]

As a part of the plea agreement, Godinez waived her right to appeal her sentence. She was sentenced at a hearing by the District Court on December 20, 2018, to 262 months in the custody of Bureau of Prisons, 5 years supervised release, a $7,500 fine, and a $100 special assessment.[3] Judgment was entered on January 2, 2019.[4] On June 30, 2020, the district allowed an out-of-time-appeal, and judgment was re-entered on June 30, 2020.[5] Thereafter, Godinez timely filed her notice of appeal on July 7, 2020.[6]

On October 5, 2020, the Government moved the Fifth Circuit to dismiss Godinez's appeal because she had previously waived her appellate rights. The

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[1] *See* ROA.21-22.
[2] *See* ROA.175-202
[3] *See* ROA.87-93.
[4] *Id*.
[5] *See* ROA.163-165.
[6] *See* ROA.167.

Fifth Circuit ultimately granted this motion, thereby dismissing the appeal on April 7, 2021, in an unpublished opinion. Both the Opinion and Judgment were filed on April 7, 2021. Copies of the Opinion and Judgment are attached hereto as composite Appendix.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Opinion and its Judgment in this case on April 7, 2021. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case pursuant to the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISION INVOLVED

"No person shall be…deprived of life, liberty, or property, without due process of law[.]" Due Process Clause to the Fifth Amendment to the United States Constitution.

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a charge of conspiracy to possess with intent to distribute 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charges levied against Ms. Godinez arose from the laws of the United States of America.

B. Statement of material facts.

Godinez and her co-defendant Jaimes were charged in a single count indictment, were arrested in the Western District of Texas and were removed to the Southern District of Mississippi.[7] The arrests of Godinez and Jaimes, and the investigation that followed, led agents to investigate other individuals in a larger drug trafficking organization.[8] One of the individuals arrested, Tiffany Snodgrass, participated in a proffer interview.[9] During her proffer, Snodgrass provided the following pertinent information regarding her relationship with Godinez:

> "Before working for Godinez, (known to Snodgrass as "Tere") and her husband, Alfonso Jaimes, Snodgrass said she worked for

[7] *See* ROA.309.
[8] *See* ROA.312-317.
[9] *See* ROA.312.

> Godinez's two brothers, Tony (last name unknown) and an individual whose name was unknown (UI) to Snodgrass. Snodgrass claimed that "Tony" and the UI were looking for an older, white female with a clean criminal history of work as a courier. Snodgrass admitted that she worked for the two brothers for approximately six to eights months, and transported eight to ten drug shipments for them during this time.
> Snodgrass said that after working for the brothers for approximately six to eight months, she felt they were not looking out for her and made her take excessive risks . . . Due to Snodgrass' concerns, the two brothers introduced her to their sister, Maria Teresa Duarte Godinez . . . Snodgrass said that she felt more comfortable working for Godinez."[10]

The two individuals that Snodgrass stated were Godinez's brothers were identified on the record as Jacob Duarte and Ontoniel ("Tony") Duarte Godinez.[11]

After entering into a plea agreement, the district court held a sentencing hearing for Godinez and her co-defendant, Alfonso Jaimes, on December 20, 2018. At the sentencing, the district court heard the testimony of FBI Special Agent Jason Dufault, the lead agent in the case. During direct examination, Agent Dufault testified consistently with the above-stated facts as they pertain to the relationship between Snodgrass, Jaimes, and Godinez.[12] He also stated that "[I]n my investigative opinion, I believe that [Godinez's] two brothers and [Godinez] were essentially on the same footing."[13] During the course of his testimony, Agent

[10] *See* ROA.312-313. (Paragraphs 25-27 of the presentence report)
[11] *See* ROA.229.
[12] *See* ROA.229-230.
[13] *See* ROA.237.

Dufault further testified as to the extent and the hierarchy of the drug trafficking organization.[14] Agent Dufault was also asked about the arrest and sentence of Ontoniel Godinez – who had been identified as the "Tony" from Snodgrass'proffer and one of the individuals she had worked for before meeting Godinez:

Defense counsel:	Okay. Now, one of the brothers, let's talk a little bit about one of the brothers, Ontoniel . . .
Agent Dufault:	Yes.
Defense counsel:	– he was arrested in Texas; is that correct?[15]
Agent Dufault:	That's correct.
Defense counsel:	And he was arrested selling two kilograms of methamphetamine; is that right?
Agent Dufault:	From my understanding, it was two kilograms. I know you had brought up a higher value. I'm not aware of any other information.
Defense counsel:	Okay. But in any event, he was arrested and charged federally in this case; is that right?
Agent Dufault:	Correct.
Defense counsel:	And he received 135 months as his sentence; is that right?
Agent Dufault:	I have not seen – I've just – I was told by you that that was the time he received, yes.
Defense counsel:	May I approach?
The Court:	You may.
Agent Dufault:	And this is a possession charge, not a conspiracy charge, so it's a little different offense that he's been charge with, but, yes, he got 133 months.
Defense counsel:	Okay. And that's a valid point. He was ultimately charged and pled guilty to possession with intent to distribute, right, instead of the conspiracy?
Agent Dufault:	Yes.[16]

[14] *See* ROA.236-241.

[15] Ontoniel Godinez was arrested and charged under the same facts and circumstances in this case in the Western Division of Texas.

[16] *See* ROA.238-239. It appears that later during the sentencing hearing, defense counsel submitted Ontoniel Duarte Godinez's judgment as an exhibit. *See* ROA.249. For reasons

Prior to the sentencing hearing, a presentence investigation report had been conducted for Godinez. The Probation Officer interviewed the case agent who described Godinez role in the drug trafficking organization: that she handled the accounting and logistics and was essentially a "bookkeeper," and that while her role was more than that of a courier, "she was not in charge of operations . . . did not make assignments, did not recruit accomplices, did not receive a larger share of the profits, or have decision-making authority."[17] The case agent also confirmed that Godinez's two brothers were "leaders" of the U.S. operation of the drug trafficking organization, and that Godinez herself was just Snodgrass' "handler."[18] Further, probation reports her criminal history as "none" and her criminal history score as "zero."[19]

unknown to counsel for appellant, this document does not appear in the Certified Record on Appeal. However, the pertinent facts are testified to during sentencing, and are uncontroverted.

[17] *See* ROA.316.

[18] *See* ROA.317.

[19] *See* ROA.320.

V. ARGUMENTS

A. Review on certiorari should be granted in this case.

As stated in Rule 10 of the Supreme Court Rules, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." Enforcing the appeal waiver and declining to reach the sentencing issue that resulted in an unjustifiable and unwarranted sentence disparity was a denial of due process and deprived Godinez of her Fifth Amendment right. This denial of due process represents a compelling reason to grant certiorari in Godinez's case.

B. The appellate court erred by enforcing the appeal waiver imposed during Godinez's plea because the waiver, by its nature, cannot be made knowingly and voluntarily.

"Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[20]. In this case, Godinez concedes that her plea agreement included a waiver of her right to appeal her conviction and sentence. Plea bargains are a predominant means of resolving criminal cases, and increasingly, many criminal defendants are required to waive their appellate rights

[20] *Brady v. United States*, 397 U.S. 742, 748 (1970)

as a condition of the plea bargain.[21] Most U.S. courts of appeal to address the issue have upheld the waiver of appellate rights as long as it is knowingly and voluntary, though one federal district court has held appellate waivers invalid because it is a per se violation of due process that contravenes the public interest in appellate review and fair negotiations.[22]

Federal courts have acknowledged that appellate waivers insulate sentences from review and lead to sentencing disparities[23], and that appellate review is essential to upholding judicial integrity.

1. Waiver of the right to appeal as part of a plea bargain cannot be knowing and voluntary

A waiver is "an intentional relinquishment or abandonment of a known right or privilege."[24] "In the typical waiver cases, the act of waiving the right occurs at the moment the waiver is executed. For example: one waives the right to silence, and then speaks; one waives the right to have a jury determine one's guilt, and then admits his or her guilt to the judge."[25] When a defendant waives the right to appeal a sentence, however, a separate event must occur at a later time. Only after the

[21] Alexandra W. Reimelt, An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal, 51 B.C.L. Rev. 871, 873 (2010) (explaining that requiring a defendant to waiver appellate rights is an increasingly common condition of plea agreements.)
[22] *Id*. at 878, citing *U.S. v. Raynor,* 989 F. Supp 43, 49 (D.D.C. 1997).
[23] *United States v. Ready*, 82 F.3d 551, 556 (2nd Cir. 1996); *Raynor*, 989 F. Supp. at 45.
[24] *United States v. Melacon*, 972 F.2d 566, 571 (5th Cir. 1992)(Parker, J.,concurring)(per curium)(quoting, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).
[25] *Id*.

sentencing can a defendant have knowledge of any factual inaccuracies, numerical miscalculations, misapplication of the guidelines, or other errors warranting an appeal.[26] Until then, there is insufficient information available to the defendant to make a knowing and intelligent waiver of the right to appeal the sentence. Godinez asserts that, in this case, upholding a blanket appeal waiver is inappropriate and a significant miscarriage of justice. To do so would insulate from review the errors of the district court in calculating her sentencing guideline range. By requiring Godinez to waive appeal of her sentence before entering into a plea agreement, Godinez was essentially required to waive an important procedural right that is designed to ensure a fair and accurate outcome.

2. Appellate waivers have a chilling effect on judicial review

The appellate system is designed to provide guidance when there are disputes within the district courts, and allows for courts of appeal to offer jurisprudence on complex legal issues. When a defendant is required to waive his right to appeal his sentence, it circumvents the ability of the higher courts to weigh in on these issues, even if those issues might substantially affect the sentence passed on the defendant.

The purpose of requiring a defendant to waive his right to appeal his sentence is, presumably, of "judicial efficiency." Sacrificing constitutional due

[26] *United States v. Raynor*, 989 F.Supp 43, 48 (D.D.C. 1997).

process rights in the name of efficiency, however, is damaging to the criminal appellate system. If a higher court is barred from considering important or recurring sentencing issues, that court is rendered ineffective for this purpose. The system benefits from having additional appellate scrutiny, and this role of an appellate court is thwarted if a defendant is required to waive his right to appeal his sentence in order to obtain the benefit of a plea bargain.

3. Waivers of appellate rights as a part of plea bargains lack contractual consideration

Even as contractual agreements, the waivers are inherently unfair. The Government holds the bargaining power by determining the charges brought and, ultimately, those charges determine the sentence imposed.[27] In consideration for the plea, the defendant has already waived the right to remain silent, confront witnesses, and have a public jury trial; in terms of contractual "consideration," – presuming the plea agreement is treated as a contract – the defendant has arguably met his part of the bargain. He should not also have to give up the right to appeal meritorious sentencing issues that will affect how much of his liberty the Government will take away.

[27] Reimelt, at 888 (arguing that appeal waivers are unconscionable contracts and incompatible with the public interest in appellate review.)

In this case, there is a meritorious issue, argued below, that would have a significant effect on the overall fairness of her sentence with respect to the 18 U.S.C. § 3553(a) factors. Godinez respectfully requests this Court to find that her waiver is unenforceable so that it may reach to the issues herein.

C. The district court erred when it failed to take into account an 18 U.S.C. § 3553(a) factor – avoiding unwarranted sentencing disparities – leading to an unjustifiable disparity in the imprisonment between similarly situated defendants charged under the same facts and circumstances.

1. Standard of review

While the District Court must still correctly calculate the guideline range,[28] it may not treat that range as mandatory or presumptive,[29] but must treat it as "one factor among several" to be considered in imposing an appropriate sentence under § 3553(a).[30] The Court must "consider all of the § 3553(a) factors," "make an individualized assessment based on the facts presented,"[31] and explain how the facts relate to the purposes of sentencing.[32] The Court's "overarching" duty is to "'impose a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing."[33]

[28] *Gall v. United States*, 552 U.S. 38, 49 (2007).
[29] *Id* at 51; *Nelson v. United States*, 555 U.S. 350, 352 (2009).
[30] *Kimbrough v. United States*, 552 U.S. 85, 90 (2007).
[31] *Id* at 49-50.
[32] *Id* at 53-60. *See Pepper v. United States*, 131 S.Ct. 1229, 1242-43 (2011).
[33] *Id* at 101; *Pepper*, 131 S.Ct. at 1242-43.

A key component of Supreme Court law, designed to ensure that the guidelines are truly advisory and constitutional, is the authority of this Court to disagree with a guideline as a matter of policy. Because "the Guidelines are now advisory . . . , as a general matter, courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines."[34]

Regardless of whether a sentence imposed is inside or outside the Guidelines range, an appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the 18 U.S.C. § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence.[35] Analyzing for procedural error, the reviewing court examines the district court's interpretation or application of the Sentencing Guidelines *de novo,* and its factual findings for clear error.[36]

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[34] *Kimbrough*, 552 U.S. at 101-02 (internal punctuation omitted)(*citing Rita v. United States*, 551 U.S. 338, 351 (2007)(district courts may find that the "Guidelines sentence itself fails properly to reflect § 3553(a) considerations")

[35] *Gall v. United States*, 552 U.S. 38, 51 (2007). See also *United States v. Armstrong*, 550 F.3d 382, 404 (5th Cir. 2008).

[36] *United States v. Armstrong*, 550 F.3d 382, 404 (5th Cir. 2008)(citing *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008)).

2. Prior cases in the Fifth Circuit

The Fifth Circuit considered this issue in *United States v. Balleza*.[37] In *Balleza*, the defendant argued that his sentence was unreasonable because it was substantially greater than the sentences of his co-defendants who were more culpable than he was.[38] Ultimately, this Court affirmed Balleza's sentence, concluding that given the facts of the case and the deference given to district court sentencing decisions, he had not shown that the district court abused its discretion or that the sentence was unreasonable.[39]

Balleza argued that his two co-defendants who received lesser sentences were similarly situated (and actually more culpable), the facts showed that the co-defendants were convicted of single charges while Balleza pleaded guilty to multiple charges.[40] Balleza also asserted discrepancies in the presentence report which created a sentence disparity.[41] The record also reflected that the co-defendants received downward departures for substantial assistance, which Balleza acknowledged did not apply to him.[42]

The Court went on to detail that a third co-defendant who, like Balleza, had pleaded guilty to multiple counts, yet the district court sentenced the co-defendant

[37] 613 F.3d 432 (5th Cir. 2010).
[38] *Id* at 434.
[39] *Id* at 436.
[40] *Id* at 435.
[41] *Id*.
[42] *Id*.

to 22 more months than Balleza, and in passing sentence, the district court had stated its intention to keep horizontal equity among the various defendants.[43] The Court found that facts in the record that showed Balleza and the co-defendants who received lesser sentences were not similarly situated.

This Court came to a similar conclusion in *United States v. Cedillo-Narvaez*.[44] Here again, Cedillo argued that his sentence was unreasonable because it was higher than that of many of his co-defendants.[45] However, this Court found that the defendants were not similarly situated because Cedillo has been convicted of additional and different offenses than his co-defendants.[46]

3. Godinez's case is distinguishable from other Fifth Circuit cases

The facts in Godinez's case, however, are different than those in *Balleza*. The similarly situated defendant in this case is Ontoniel Duarte Godinez (hereinafter "Ontoniel"), who is Godinez's brother, and was Snodgrass' point of contact prior to her meeting Godinez. Agent Dufault testified at the sentencing hearing that as a result of the investigation that started after Snodgrass' arrest, there were 43 other individuals involved in this drug trafficking organization that were arrested and charged in this case in the Western Division of Texas.[47] Among those

[43] *Id*.
[44] 761 F.3d 397 (5th Cir. 2014).
[45] *Id* at 406.
[46] *Id*.
[47] *See* ROA.232.

individuals charged was Ontoniel, who was arrested and federally charged in this case in the Western District of Texas.[48] Agent Dufault confirmed that after being charged and pleading guilty in this case, Ontoniel was sentenced to 133 months.[49]

During argument, it was specified that Ontoniel originally had a guideline range that had been significantly higher, and the sentencing court allowed a downward departure. Ontoniel did not cooperate, nor sign a plea agreement that would have explained such a departure.[50] The district court did inquire if there was any explanation for the departure, and the record does not speak to any such evidence, except that Ontoniel's defense counsel did submit a sentencing memorandum arguing, presumable from a policy standpoint, that the guideline range was too high for a non-violent drug offender.[51]

Godinez argues that she is at least similarly situated as to Ontoniel, and is actually in an arguably better position to receive a lesser sentence. Both defendants were arrested and charged in this case, although in different federal districts. Therefore the details and specific offense characteristics that may affect the

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[48] *See* ROA.239.
[49] *See* ROA.239. Agent Dufault notes at sentencing that Ontoniel Godinez was charged with possession with intent to distribute, presumably under 21 U.S.C. § 841(a)(1), which Godinez was charged with conspiracy to possess with intent to distribute under 21 U.S.C. §§ 841(a)(1) and 846. This difference, however would not affect the guideline range assuming the weight of the substance and role in the offense were calculated the same, because 21 U.S.C. § 846 requires that the individual charged be subject to the same penalties as those prescribed for the offense. 21 U.S.C. §846.
[50] *See* ROA.254.
[51] *See* ROA.255.

guideline ranges, such as weight of substance, would be the same. Both defendants pleaded guilty, so both likely received the acceptance of responsibility adjustment. And although Agent Dufault considered Godinez and Ontoniel to be at the same hierarchy level within the organization, making them at least similarly culpable, there is evidence in the presentence report that describes Ontoniel as a "leader" in the organization, and describing Godinez merely as "Snodgrass' handler."[52]

4. Resentencing is necessary to avoid unwarranted disparity

All available evidence in the record points to the argument that Ontoniel and Godinez are at least "similarly situated," and in fact, Godinez appears to be the less culpable of the two with regard to this specific offense, as well as to the drug trafficking organization as a whole. Ontoniel did not cooperate, nor sign a plea agreement with the Government. Moreover, it cannot be argued that criminal history is a factor; Godinez has a total criminal history score of zero, so Ontoniel's criminal history cannot be lower than that. There does not appear to be any significant difference between the two defendants except one: geography. Godinez was arrested and charged in the Southern District of Mississippi, and Ontoniel was arrested and charged in the Western District of Texas. As a result, Ontoniel was sentenced to 133 months, while Godinez was sentenced to 262 months –nearly

[52] *See* ROA.317.

double the length of imprisonment. With respect to § 3553(a)(6), this disparity is untenable.

Certainly, it is arguable that two defendants charged in essentially the same case, arising out of the same facts and circumstances, with no other apparent distinction, should not receive a decade's worth of difference in imprisonment. Even in *Balleza*, both the Fifth Circuit and the district court pointed out that there was an attempt to maintain some equity among the co-defendants.[53]

Godinez further notes that in sentencing her co-defendant, Jaimes, in this case, the district court varied substantially downward from the guideline range. Like Godinez, Jaimes' total offense level was 39, but since he had a criminal history category of IV, his imprisonment range under the guidelines was 360 months to life imprisonment.[54] Yet the district court sentenced him, like Godinez, to 262 months. It appears that of the three similarly situated defendants whose sentences are clearly shown in the record, Godinez is the only one who, inexplicably, did not benefit from a significant downward departure from the guideline range.

Godinez acknowledges, however, that the parity envisioned by § 3553(a)(6) has been held to reference avoiding only unwarranted disparities between similarly

[53] *Balleza* at 435.
[54] *See* ROA.247.

situated defendants nationwide. In this case, there is both: Godinez and Ontoniel were charged in the same crime, yet they are distinguished by the district in which they were charged. Such an arbitrary difference should not lead to the vast disparity that occurred in this case.

VI. CONCLUSION

For the reasons stated above, Ms. Godinez asks this Court to grant this Petition for Writ of Certiorari.

/s/ Peter H. Barrett
PETER H. BARRETT
P. & W. BARRETT LAWYERS, PLLC
2202C 25th Ave, C-3
Gulfport, MS 39501
Phone: (228) 864-9885
Attorney for Defendant Petitioner