NO._____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN PEREZ, also known as Homebody
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

SANDRA A. EASTWOOD
Attorney at Law
CJA Panel

By: /s/Sandra Eastwood
3636 S. Alameda Street
Suite B197
Corpus Christi, Texas 78411
Email: sandraeastwoodlaw@yahoo.com
Telephone: (361) 688-4900
Fax: (361) 271-1310
Texas State Bar No. 00789274
Attorney for Petitioner

QUESTION PRESENTED

I. Was it improper for the Court to find the base offense level was 34 because Mr. Perez should only have been held accountable for the 15 pounds of "botanical leaf" found on May 9, 2018 during a traffic stop in Atascosa County?

II. Was it improper for the Court to enhance for *Mass Marketing, distributing a controlled substance through mass marketing by means of an interactive computer service,* and impose a two-point increase?

III. Was it improper for the Court to enhance for *Maintaining a Premises, for purpose of manufacturing or distributing a controlled substance,* and impose a two-point increase?

IV. Was it improper for the Court to deny Mr. Perez's objection to not receiving a *minor role* adjustment?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are named in the caption of the case before this Court.

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CONSTITUTIONAL PROVISION

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PRAYER

Petitioner John Perez ("*Mr. Perez*") respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on March 23, 2021.

OPINION BELOW

On March 23, 2021, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. The Westlaw version of the Fifth Circuit's opinion is reproduced in the appendix to this petition.

JURISDICTION

On March 23, 2021, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. This petition is filed within 150 days after that date and thus is timely. See Sup. Ct. R. 13.1 and COVID pandemic special orders. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Due Process Clauses of the Fifth and Fourteenth Amendments "[protect] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 90 S.Ct. 1068 (1970).

The Fifth Amendment to the United States Constitution provides:

> No person shall be *** deprived of life, liberty, or property, without due process of law;***

U.S. Const. amend. V.

STATEMENT OF THE CASE

A. Course of proceedings.

On December 6, 2018, a federal grand jury in the Corpus Christi Division of the Southern District of Texas returned a Second Redacted indictment charging Defendant-Appellant John Perez, AKA Homeboy and Co-Defendants with count 1: On or about October 1, 2017 to October 1, 2018 knowingly and intentionally conspiring to possess with intent to distribute a synthetic cannabinoid controlled substance, in violation of 21 U.S.C. § 846, 841(a)(1)and 841(b)(1)(C). ROA.31-32.

On April 16, 2019, without a plea agreement, Mr. Perez appeared before United States District Judge John D. Rainey and pleaded guilty to Count One of the indictment. ROA.221.

After receiving a copy of the PSR, Mr. Perez filed an Objection to the PSR on October 1, 2019, in which he objected to the Base Offense Level of 36 and denied the quantity amounts alleged in paragraphs 43 and 44 of the PSR. ROA.507. Mr. Perez also objected to the two level increase under 2D1.1(a)(5) for distributing a controlled substance through mass-marketing means of an interactive computer service. ROA.507. Additionally Mr. Perez objected to the two level increase under 2D1(b)(12) for maintaining a premises for the purpose of manufacturing or distributing a controlled substance. ROZ.507. Mr. Perez filed a supplemental PSR objection on December 10, 2019, stating the Co-Defendant, Victoria Martinez, had recently testified to the recipe she used to produce synthetic cannabinoid, to wit: 3.3 grams of chemical product produced 150 grams of final user product (manufactured synthetic

cannabinoid), which would be the equivalent of 18,887 kilograms converted synthetic to marihuana drug weight, resulting in a base offense level of 34, instead of 36. ROA.514. Mr. Perez maintained he should be held accountable only for the 15 pounds of botanical leaf found during a traffic stop on May 9, 2018, which would result in an offense level of 30. ROA. 514-515.

At sentencing on October 16, 2019, the Court determined Mr. Perez's base offense level would be changed to a 34 instead of a 36, over-ruled the objection for the Mass Marketing enhancement, over-ruled the objection for the Premises enhancement, and his request for a Minor role, and sentenced Mr. Perez to 156 months in the Bureau of Prisons, to be followed by a 3-year term of supervised release, and the Court imposed substance abuse treatment with a recommendation for the R-DAP program. ROA. 461-463. The district court waived imposition of a fine, but the court imposed the mandatory $100 special assessment. ROA.462.

On December 20, 2020, Mr. Perez timely filed notice of appeal. See ROA.129. On March 23, 2021, the Fifth Circuit affirmed the judgment of conviction and sentence. See United States v. JOHN PEREZ, also known as Homeboy, 840 Fed.Appx. 792 (Mem) (5th Cir. March 23, 2021) (unpublished) (Appendix A).

B. Statement of the relevant facts.

1. District Court.

Indictment and plea.

On December 6, 2018, a federal grand jury in the Corpus Christi Division of the Southern District of Texas returned a Second Redacted three-count indictment

charging Defendant-Appellant John Perez, AKA Homeboy and Co-Defendants with count 1: On or about October 1, 2017 to October 1, 2018 knowingly and intentionally conspiring to possess with intent to distribute a synthetic cannabinoid controlled substance, in violation of 21 U.S.C. § 846, 841(a)(1)and 841(b)(1)(C). ROA.31-32.

On December 19, 2018, this case was certified as complex. ROA.48.

On April 16, 2019, without a plea agreement, Mr. Perez appeared before United States District Judge John D. Rainey and pleaded guilty to Count One of the indictment. ROA.221.

The Judge accepted Mr. Perez's guilty plea, and adjudged Mr. Perez guilty of the offense charged in Count One of the indictment. ROA.195.

Presentence report and Sentencing.

After Mr. Perez's plea, the court ordered that a presentence report ("PSR") be prepared to assist the court in sentencing him. ROA. 484. Using the 2018 edition of the United States Sentencing Guidelines ("USSG"), ROA. 496, the PSR as adopted by the district court calculated Mr. Perez's total offense level as shown in the table below:

Calculation	**Levels**	**USSG §**	**Description**	**Where in record?**
Base offense level	36	2D1.1(a) (5)	21U.S.C. § 841(a)(1)-held accountable for 44,255 kilograms of converted drug weight for the manufactured useable product, in addition to the 269 kilograms of converted	ROA.496(PSR ¶ 48)

			drug weight for the synthetic cannabinoid chemicals which were seized.Therefore,44,524 kilograms of converted drug weight.	
Enhancement(s)	+2 +2	U.S.S.G.§ 2D1.1(b)(7) U.S.S.G. § 2D1.1(b)(12)	Distributed a controlled substance through mass marketing by means of an interactive computer service Maintained a premises for the purpose of manufacturing or distributing a controlled substance	ROA.496 (PSR ¶ 49) ROA.497 (PSR ¶ 50)
Adjustment to offense level	-3	3E1.1(a) & (b)	Clearly demonstrated acceptance of responsibility for the offense and timely notified of his intention to enter a plea of guilty	ROA.497 (PSR ¶ 56 & 57)
Total offense level	**37**			ROA.497 (PSR ¶ 58)

The PSR placed Mr. Perez in a criminal history category of II with a total criminal history score of three. ROA.499. (PSR ¶ 65). Based on a total offense level of 37and a criminal history category of II, the PSR calculated an advisory Guidelines imprisonment range of 235 to 293 months. ROA.502 (PSR ¶ 85).

Mr. Perez filed an Objection to the PSR on October 1, 2019, in which he objected to the Base Offense Level of 36 and denied the quantity amounts alleged in paragraphs 43 and 44 of the PSR. ROA.507. Mr. Perez also objected to the two level increase under 2D1.1(a)(5) for distributing a controlled substance through mass-

marketing means of an interactive computer service. ROA.507. Additionally Mr. Perez objected to the two level increase under 2D1(b)(12) for maintaining a premises for the purpose of manufacturing or distributing a controlled substance. ROZ.507. Mr. Perez filed a supplemental PSR objection on December 10, 2019, stating the Co-Defendant, Victoria Martinez, had recently testified to the recipe she used to produce synthetic cannabinoid, to wit: 3.3 grams of chemical product produced 150 grams of final user product (manufactured synthetic cannabinoid), which would be the equivalent of 18,887 kilograms converted synthetic to marihuana drug weight, resulting in a base offense level of 34, instead of 36. ROA.514. Mr. Perez maintained he should be held accountable only for the 15 pounds of botanical leaf found during a traffic stop on May 9, 2018, which would result in an offense level of 30. ROA. 514-515.

On October 16, 2019, the Court sentenced Mr. Perez to 156 months in the Bureau of Prisons, to be followed by a 3-year term of supervised release, and the Court imposed substance abuse treatment with a recommendation for the R-DAP program. ROA. 461-463. The district court waived imposition of a fine, but the court imposed the mandatory $100 special assessment. ROA.462.ROA. 117, 260.

Appeal.

After sentencing, Mr. Perez filed notice of appeal. In his brief to the Fifth Circuit Court of Appeals, Mr. Perez challenged his below-guidelines sentence of 156 months in prison, imposed following his guilty plea to conspiracy to possess with intent to distribute a synthetic cannabinoid mixture and substance containing a

detectable amount of Schedule 1 controlled substance, 21 U.S.C. § 841(a)(1), (b)(1)(C), 846. Mr. Perez challenged the district court's attribution to him of 10,000 to 30,000 kilograms of converted drug weight, the denial of a minor role adjustment, and the application of the sentencing enhancements for distributing a controlled substance through mass-marketing by means of an interactive computer service and for maintaining a premises for purpose of manufacturing or distributing a controlled substance.

The Fifth Circuit affirmed, rejecting Mr. Perez's arguments, because the "district court plausibly concluded that the preponderance of the evidence showed that the offense involved, at the very least, 10,000 kilograms of converted drug weight," and "even assuming Perez preserved his challenge regarding what quantity was foreseeable to him, his arguments are unavailing… in light of the unrebutted evidence that Perez was fully engaged in the activities of the conspiracy, from receiving packages of botanical material, to the pick up and delivery of other ingredients, to selling the synthetic cannabinoid in person and online, and to regular conversations with his co-conspirators regarding the manufacture and sale of the finished product;" because the "same evidence supports the district court's plausible conclusion that Perez failed to show he qualified for a mitigating role adjustment… show Perez to have been regularly involved in almost all aspects of the enterprise, thus belying his claims that he lacked an understanding of the scope and structure of the enterprise or the activities of the others in the group;" because the "preponderance of the evidence showed that the members of the conspiracy, including Perez, used

Facebook and Facebook Messenger to solicit a large number of persons to purchase synthetic cannabinoid from them; " and because the "preponderance of the evidence showed that Perez maintained the Dinn Street residence for the manufacture, including storage of the ingredients, and distribution of narcotics."

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court has jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE WRIT

I. As to the first question presented, this Court should grant certiorari to address the district court's imposition of a base offense level of 34 as opposed to a level 30, thus violating Mr. Perez's Fifth and Fourteenth Amendment right to proof of every fact necessary to constitute the crime with which he is charged, and to not be deprived of life, liberty or property without due process of law.

Base Offense Level of 34.

A major issue during Mr. Perez's sentencing was the appropriate quantity of drugs attributable to him for his base offense level under the federal Sentencing Guidelines. Under §2D1.1 of the Guidelines, the offense level of a defendant convicted of a drug trafficking offense is determined by the quantity of drugs involved, including both drugs with which the defendant was directly involved, and drugs that can be attributed to the defendant in a conspiracy as part of his "relevant conduct" under §1B1.3(a)(1) of the Guidelines. The commentary to §1B1.3(a)(1) defines relevant conduct for conspiratorial activity as the "conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant." §1B1.3(a)(1), comment. (n. 1). Just because a defendant is a member of a conspiracy does not automatically prove reasonable foreseeability, which is a separate finding, *United States v. Puma*, 937 F.2d 151 (5th Cir.1991). "Thus, for a sentencing court to attribute to a defendant a certain quantity of drugs, the court must make two separate findings: (1) the quantity of drugs in the entire conspiracy, and (2) the amount which each defendant knew or should have known was involved in the conspiracy." *Id at 159-160.* The acts of co-conspirators

may be unforeseeable, *Pinkerton v. United States*, 328 U.S.640 (1946). As the Fifth Circuit pointed out in *U.S. v. Puma*, 937 F.2d 151 (5th Cir. 1991):

"Reasonable foreseeability is mentioned in the comment to §2D1.4 as an addition to an act's being in furtherance of a conspiracy. The government's argument that reasonable foreseeability follows automatically from membership in a conspiracy leaves the second clause of the comment without meaning."

Because this case involved synthetic cannabinoid, the ordinary method of matching the quantity of the controlled substance to the appropriate entry in the Guidelines' drug quantity table could not be applied. See U.S.S.G. §2D1.1(c). Rather, the court first converted the quantity of drugs attributable to the defendant to an "equivalent quantity" of marijuana using the ratio supplied in the drug equivalency tables, and then, the court used the equivalent quantity of marijuana to calculate the proper base offense level under the drug quantity table. *See* 2D1.1 comment. (n.8(A),(D)).

Although the PSR deemed Mr. Perez was responsible for 44,254 kilograms of converted drug weight, an amount that was later reduced by the district court after objections from the Defendants and a slight concession by the Government, to a base offense level of 34 (10,000 KG but less than 30,000 KG of Marihuana), Mr. Perez argued he should be held responsible for only the 15 pounds of botanical leaf he was found with during a traffic stop on May 9, 2018, which would place him at a base offense level of 30, using the following calculation: "fifteen pounds of 'botanical leaf' equals 6.8 kilograms and multiply that by 167 (ratio to synthetic to marijuana) equals

1,135 kilograms of converted drug quantity." ROA.514. Mr. Perez did not challenge the 1:167 THC-to marijuana ratio, but rather challenged the quantity of drugs attributable to him.

The district court's calculation of the quantity of drugs involved in an offense is a factual determination, *United States v. Betancourt*, 422 F.3d 240 (5th Cir.2005), which receives considerable deference and will be reversed only if it is clearly erroneous. *Id.* Generally, a factual finding is not clearly erroneous if it is plausible in light of the record as a whole by a preponderance of the relevant and sufficiently reliable evidence. *Id.* A district court may consider 'estimates of the quantity of drugs for sentencing purposes,' *United States v. Sherrod*, 964 F.2d 1501 (5th Cir.1992). The 5th Circuit held in *United States v. Huskey*, 137 F.3d 283 (5th Cir.1998) that in determining the quantity attributable to a defendant, the district judge may consider any information that has "sufficient indicia of reliability to support its probable accuracy,' including a probation officer's testimony, a policeman's approximation of unrecovered drugs, and even hearsay."

The PSR stated Mr. Perez was often with M. Lamas, he sold synthetic cannabinoid, allowing his residence to be used for receipt of mailed chemicals to be used for manufacturing of synthetic cannabinoid, each of the co-conspirators maintained communication throughout the conspiracy regarding drug manufacturing and trafficking, and Mr. Perez was held accountable for 44,254 kilograms of converted drug weight. ROA. 496-496. However, the Government failed to meet its burden of proving it was reasonably foreseeable Mr. Perez would know in

fact how much synthetic was being produced and sold. The Government agreed Mr. Perez was not a high level distributor and there was no evidence presented he ever saw the amount of drugs produced, received large sums of money, was involved in formulating the recipe or ordering the supplies, nor was even involved in making the product. Rather, it appeared he was a drug user who sold the synthetic, collected the leaves and accepted possibly a package(s) of chemicals for delivery to the higher-level conspirators. Further, there was no testimony presented that Mr. Perez was sophisticated enough to understand the complex drug amount calculations that even the attorneys struggled with in determining the base offense level quantity amount. How could Mr. Perez, then, possibly contemplate or have any knowledge as to the amount of product produced or sold to warrant reasonable foreseeability?

II. As to the second question presented, this Court should grant certiorari to address the district court's imposition of a Mass Marketing enhancement, thus violating Mr. Perez's Fifth and Fourteenth Amendment rights.

Mass Marketing Enhancement.

Under § 2D1.1(b)(7), if a defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, the base offense level is increased by 2 levels. In the comment section, note 13 of § 2D1.1, "*Mass-marketing by means of an interactive computer service*" is defined as the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance, *See* § 2D1.1, comment (n.13), and would apply to a defendant who operated a web site to

promote the sale of, for example, Gamma-hydroxybutyric Acid (GHB), but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense.

Defense counsel has not located cases directly analyzing the applicability of the *Mass Marketing* enhancement under § 2D1.1(b)(7), but the Eighth Circuit in *U.S. v. Kieffer*, 621 F.3d 825 (8thCir. 2010) found the District Court did not err when it assessed a two-level *mass marketing* enhancement pursuant to § 2B1.1(b)(2)(A)(ii), for a defendant who was an attorney-impersonator who misled federal courts, even if all his clients were referred through attorneys, because his websites were accessible to millions of persons worldwide via the internet. In *Kieffer*, the 8th Circuit reasoned "mass-marketing" was applicable even though Kiefer argued his websites stated he was an "Executive Director," rather than a licensed attorney; they were largely "informational in nature"; and concerned his advocacy and consulting business; and Kieffer argued one could not "mass market" the services of a federal criminal defense practice. The 8th Circuit stated:

"It is irrelevant that all of Kieffer's clients were referred through attorneys… Kieffer does not dispute his websites were "accessible to millions of persons worldwide via the Internet," which is equivalent to " 'a billboard on the information superhighway' to advertise his fraudulent scheme."… Indeed, the evidence presented at Kieffer's trial and sentencing established that Kieffer used his websites to solicit "clients" and solidify the impression that he was a licensed attorney." *Id.*

Here, the PSR calculated a two-level increase for using a computer or interactive computer service, stating "email was utilized by the Defendant and J. Townzen. Facebook and Facebook Messenger were utilized by S. Townzen, McNabb and Perez." ROA. 496. The PSR stated a search warrant of Mr. Perez' Facebook account revealed numerous conversations of selling illegal narcotics, including synthetic cannabinoid and methamphetamine, and the "Facebook application revealed communications related to narcotic distribution." ROA.489.

Per the testimony of Agent Kirkland, Mr. Perez was involved "early on" in one closed Facebook group, "361 Hustle Town Christi," which was only accessible to like-minded criminals, had 450 Facebook friends, used the word "bags" (aka synthetic) 36 times in only private Facebook messages, and he posted the price of synthetic, "25 bags for 800, 50 bags for 1300," responding to requests from other people versus Mr. Perez "throwing it out there." ROA. 278-282, 295. The private group he was a member of was not mass-marketed and was not available to millions of persons worldwide via the Internet. There was no evidence presented this conspiracy mass advertised. Further, the application note states that communications between the conspirators does not count towards the enhancement, such that, emails between the conspirators regarding the conspiracy would not be applicable. The enhancement is not applicable in this case absent a clear showing by the Government Mr. Perez was mass-marketing.

III. As to the third question presented, this Court should grant certiorari to address the district court's imposition of Maintaining a Premises for Drug Related purposes as an enhancement, thus violating Mr. Perez's Fifth and Fourteenth Amendment rights.

Premises Enhancement.

U.S.S.G § 2D1.1(b)(12) provides that a defendant's offense level is increased by two levels if he "maintains a premises for the purpose of manufacturing or distributing a controlled substance." In applying the enhancement, the Guidelines commentary instructs the court to consider whether a defendant "held a possessory interest in (e.g. owned or rented) the premises" and the extent to which he "controlled access to, or activities at, the premises." § 2D1.1, comment. (n.17). "Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant's primary or principal uses for the premises," not merely the defendant's "incidental or collateral use for the premises." *Id*. The court considers "how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes."

In *U.S. v. Guzman-Reyes*, 853 F.3d 260 (5th Cir. 2017), the Fifth circuit supported a finding the defendant maintained the premises for drug distribution even though the defendant's name was not on the formal lease agreement or ownership documents because the defendant paid the owner of the auto shop $1,000 worth of methamphetamine per month in exchange for use of the premises for the *sole* purpose of storing his drug supply, and the defendant had unrestricted access to the premises through the owner. Likewise, in *U.S. v. Benitez*, 809 F.3d 243 (5th Cir. 2015), the 5th Circuit found the District court properly applied the two-level

enhancement for *maintaining a premises for purpose of manufacturing or distributing a controlled substance* where the defendant rented the apartment, kept a key to the apartment, described it as his to police officers, received water bills there addressed to him, his associate used the apartment rent-free *on condition that he would help the defendant with his drug distribution*, and the defendant intended for the apartment to be used *primarily* to sell drugs. The 6th Circuit found a premises enhancement was appropriate where the Defendant's home played a significant part in drug distribution, the Defendant had no job other than cooking crack cocaine in the kitchen of the home and selling it, the house contained tools of the drug trade as well as $4000 in cash, and guns and drugs were found inside the Defendant's truck, U.S. v. Bell, 766 Fed 634 (6th Cir. 2014). In *U.S. v. Barragan-Malfabon*, 537 Fed.Appx. 483 (5th Cir. 2013) the 5th Circuit found the premises enhancement was proper because the Defendant maintained exclusive control over a locked room in the house that was used ONLY for storage of marijuana, he possessed over 1000 kilograms of marijuana and was paid for the storage, was holding $81,220 for an unknown person, had a compressor, and a burned drug ledger:

"The district court did not clearly err in determining that the large amounts of marijuana and currency, combined with evidence indicating that Barragan might be involved in packaging the drugs and in either recording sales or destroying evidence of such sales, established that a primary use of the home was the storage of controlled substances for distribution purposes."

Here, the PSR alleged an international package was received at 4337 Dinn Street, where John Perez resided, there were recorded phone calls between Townzen and Martinez discussing packages being received at the Dinn address, Mr. Perez was always with M. Llamas when delivering synthetic, surveillance at the Dinn address revealed heavy pedestrian and vehicle traffic consistent with narcotic distribution, and sources advised Perez was paid with a 50-pack of synthetic cannabinoid for allowing them to use his address for receipt of "this international package of synthetic cannabinoid chemicals." ROA.489. When Agent Kirkland testified as the case agent, he testified there were approximately 6 international packages delivered, and one package made it to Lawnview, where "Shane was staying," and one made it to Dinn, where Mr. Perez was "staying." ROA. 292. Ms. Martinez testified there were 5 packages of chemicals, and of those, she received two, one was left at her mothers' home, one package was intercepted and seized by Shane and one package with remaining chemicals when Bryan Townzen was arrested. ROA. 375-377. Ms. Martinez testified she was aware a chemical package was delivered to Dinn Street (May 8th), but she did not remember if she ordered it, she was not present when the package was delivered and to her knowledge, no synthetic cooking was done at the house on Dinn Street. ROA. 396. The address on Dinn Street, which the PSR equated with Mr. Perez would hardly qualify as a premises being used primarily for narcotics sells or distribution. The PSR and Government *failed* to prove : 1) the primary purpose of the Dinn Street residence was NOT to house Mr. Perez, 2) there was cash found at the property, 3) there was a room inside the house used solely to house drugs

or to manufacture drugs, 4) drugs were found inside the home, 5) a drug ledger was found and 6) the Defendant actually sold or manufactured drugs from his home. Therefore, the premises enhancement should not apply.

IV. As to the fourth question presented, this Court should grant certiorari to address the district court's order that Mr. Perez would not receive a minor role.

Minor Role.

U.S.S.G § 2D1.1(b)(12) provides Section 3B1.2 of the Guidelines directs the district court to reduce a defendant's offense level if he or she occupied a comparatively less culpable role than other offense participants. It provides:

Based on the defendant's role in the offense, decrease the offense level as follows:

> If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.
> If the defendant was a minor participant in any criminal activity, decrease by **2** levels.
> In cases falling between (a) and (b), decrease by **3** levels.

USSG § 3B1.2 (bold in original).

"The commentary to § 3B1.2 provides that a mitigating role adjustment is available to any defendant 'who plays a part in committing the offense that makes him substantially less culpable than the average participant.'" *United States v. Gomez-Valle*, 828 F.3d 324 (5th Cir. July 5, 2016) (quoting USSG § 3B1.2, comment. (n.3(A)). A minor participant is a person who "is less culpable than most other participants in the criminal activity, but whose role could not be described as minimal." USSG § 3B1.2, comment. (n.5).

Effective November 1, 2015, the Sentencing Commission amended § 3B1.2 based on its determination that courts had been applying the mitigating-role

adjustment "inconsistently and more sparingly than the Commission intended." USSG. App. C, amend 794, at 117 (Supp. Nov. 1, 2015). The amendment made changes to the guideline's commentary intended to clarify its proper application.

First, the amendment revised Application Note 3(A) to specify that, when determining whether to apply a mitigating-role adjustment, the defendant is to be compared with the other participants "in the criminal activity." USSG § 3B1.2, comment. (n.3(A)). The Commission intended this revision to clarify that the "average participant" encompasses "only those persons who actually participated in the criminal activity at issue in the defendant's case, so that the defendant's relative culpability is determined only by reference to his or her co-participants in the case at hand." USSG. App. C, amend 794, at 117 (citing cases applying this analysis). Second, responding to cases denying defendants a mitigating-role adjustment solely because they performed a role that was "indispensable" to the commission of the offense, the amendment revised Application Note 3(C) "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." Id. at 118 (quoting USSG § 3B1.2, comment. (n.3(C)). Third, the amendment added a "non-exhaustive list of factors" in order to "give the courts a common framework" for determining whether to apply a mitigating-role adjustment and, if so, to what degree. Id. These factors are:

> (1) the degree to which the defendant understood the scope and structure of the criminal activity;

(2) the degree to which the defendant participated in planning or organizing the criminal activity;

(3) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;

(4) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts; [and]

(5) the degree to which the defendant stood to benefit from the criminal activity.

USSG §3B1.2, comment. (n.3(C)).

Under these standards set by the Sentencing Commission, Mr. Perez was eligible for a minor-role reduction. The facts of this case demonstrate that: (i) he did not participate in planning or organizing the criminal activity; (ii) he exercised no decision-making authority or influence in the exercise of decision-making authority and had no discretion as to his activities in the offense; (iii) the nature and extent of his participation in the commission of the criminal activity was limited to obtaining the plant and selling the bags; and (iv) he stood to benefit from the criminal activity by only a minimal fee- he was a drug user and was paid with synthetic. *See* USSG § 3B1.2, comment. (n.3(C)). In other words, he did not have a proprietary interest in the criminal activity and was simply being paid to perform a certain task. Therefore, he should have been afforded a downward departure.

CONCLUSION

For the foregoing reasons, petitioner John Perez prays that this Court grant certiorari to review the judgment of the Fifth Circuit in his case.

Date: August 18, 2021 Respectfully submitted,

SANDRA A. EASTWOOD
Attorney at Law
CJA Panel

/s/ Sandra Eastwood
SANDRA EASTWOOD
Attorney for Petitioner
3636 S. Alameda, Suite B197
Corpus Christi, Texas 78411
Telephone: (361) 688-4900

APPENDIX A- United States Court of Appeals, Fifth Circuit- Memorandum Opinion (March 23, 2021)

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 23, 2021
Lyle W. Cayce
Clerk

No. 19-41049
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JOHN PEREZ,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:18-CR-1336-7

Before KING, SMITH, and WILSON, *Circuit Judges*.

PER CURIAM:*

John Perez appeals his below-guidelines sentence of 156 months in prison, imposed following his guilty plea to conspiracy to possess with intent to distribute a synthetic cannabinoid mixture and substance containing a detectable amount of a Schedule 1 controlled substance, 21 U.S.C.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

§§ 841(a)(1), (b)(1)(C), 846. Perez challenges the district court's attribution to him of 10,000 to 30,000 kilograms of converted drug weight, the denial of a minor role adjustment, and the application of sentencing enhancements for distributing a controlled substance through mass-marketing by means of an interactive computer service and for maintaining a premises for the purpose of manufacturing or distributing a controlled substance.

We engage in a bifurcated review of a sentence imposed by a district court. *See Gall v. United States*, 552 U.S. 38, 51 (2007). We first consider whether the district court committed a "'significant procedural error,' such as miscalculating the advisory Guidelines range." *United States v. Odom*, 694 F.3d 544, 547 (5th Cir. 2012) (citation omitted). If there is no procedural error, or if any such error is harmless, we "may proceed to the second step and review the substantive reasonableness of the sentence imposed for an abuse of discretion." *Id.* For preserved errors, we review a district court's interpretation and application of the Guidelines de novo, and the factual findings for clear error. *See United States v. Zuniga*, 720 F.3d 587, 590 (5th Cir. 2013).

As to the drug weight attributed to Perez, from his own activities and relevant conduct, the unrebutted evidence from the presentence report and the contested sentencing hearing indicates that the district court plausibly concluded that the preponderance of the evidence showed that the offense involved, at the very least, 10,000 kilograms of converted drug weight. *See United States v. Arayatanon*, 980 F.3d 444, 451 (5th Cir. 2020); *United States v. Windless*, 719 F.3d 415, 420 (5th Cir. 2013); U.S.S.G. § 2D1.1(c)(3); § 2D1.1 comment. (n.8(D)). Even assuming Perez preserved his challenge regarding what quantity was foreseeable to him, his arguments are unavailing. The district court's attribution of a converted drug weight of between 10,000 and 30,000 kilograms to Perez was plausible in light of the unrebutted evidence that Perez was fully engaged in the activities of the conspiracy, from

receiving packages of botanical material, to the pick up and delivery of other ingredients, to selling the synthetic cannabinoid in person and online, and to regular conversations with his co-conspirators regarding the manufacture and sale of the finished product. *See* U.S.S.G. § B1.3(a)(1); § 2D1.1(c)(3); *United States v. Suchowolski*, 838 F.3d 530, 532 (5th Cir. 2016); *Zuniga*, 720 F.3d at 590; *Windless*, 719 F.3d at 420.

The same evidence supports the district court's plausible conclusion that Perez failed to show he qualified for a mitigating role adjustment. *See* U.S.S.G. § 3B1.2; *United States v. Castro*, 843 F.3d 608, 612 (5th Cir. 2016); *United States v. Gomez-Valle*, 828 F.3d 324, 327 (5th Cir. 2016). The testimony adduced at the hearing and the facts set out in the presentence report show Perez to have been regularly involved in almost all aspects of the enterprise, thus belying his claims that he lacked an understanding of the scope and structure of the enterprise or the activities of the others in the group, and so was less culpable than the other participants in the conspiracy. *See* § 3B1.2, comment. (n.4); *United States v. Bello-Sanchez*, 872 F.3d 260, 264 (5th Cir. 2017). Perez shows no clear error in the denial of the minor role adjustment. *Gomez-Valle*, 828 F.3d at 327.

As to the U.S.S.G. § 2D1.1(b)(7) enhancement for mass marketing through an interactive computer service, Perez argues that he was only involved in the online sales early on, did so in a limited manner, primarily responding to requests, and did so in a private social media group rather than on a public website. Perez had 450 friends on his Facebook account and was a member of a group associated with criminal activity. In his posts, Perez referenced "bags," a common term for the synthetic cannabinoid product, 36 times. Investigators determined that Perez posted early in the conspiracy that he was selling "50 bags for 1300 bucks," and that Perez's co-conspirator, while in custody, referred online buyers to Perez. Additionally, one of Perez's co-conspirators had 3,100 Facebook friends while another had 1,100

friends, and both advertised that they had synthetic cannabinoid for sale. A third co-conspirator had only 688 friends on Facebook but mentioned or discussed bags 528 times in various groups over the course of the conspiracy. Perez fails to show the district court erred in concluding that the preponderance of the evidence showed that the members of the conspiracy, including Perez, used Facebook and Facebook Messenger to solicit a large number of persons to purchase synthetic cannabinoid from them. *See* § 2D1.1(b)(7) comment. (n.13); *United States v. Mauskar*, 557 F.3d 219, 232 (5th Cir. 2009); *United States v. Martinez*, 823 F. App'x 284, 285 (5th Cir. 2020).

Perez likewise fails to show that the district court clearly erred in applying the § 2D1.1(b)(12) enhancement for "maintain[ing] a premises for the purpose of manufacturing or distributing a controlled substance." § 2D1.1(b)(12); *see United States v. Haines*, 803 F.3d 713, 744 (5th Cir. 2015). Perez focuses on what the Government did not show, but he did not rebut the Government's evidence that one of several large packages of the materials to make the synthetic cannabinoid was delivered in early May 2018 to an address on Dinn Street, Perez's residence at the time and when the PSR was written; that Perez's co-conspirators paid Perez with synthetic cannabinoid for allowing them to use his address for the delivery; that one co-conspirator advised another to prepare Perez to secure the contents of the package; and that investigators observed heavy pedestrian and vehicle traffic at the home, consistent with distribution of narcotics from the home. *See Alaniz*, 726 F.3d at 619. The district court plausibly concluded that the preponderance of the evidence showed that Perez maintained the Dinn Street residence for the manufacture, including storage of the ingredients, and distribution of narcotics. *See* § 2D1.1(b)(12); *United States v. Guzman-Reyes*, 853 F.3d 260, 263 (5th Cir. 2017); *Haines*, 803 F.3d 713, 744.

The judgment of the district court is AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 23, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 19-41049 USA v. Perez
USDC No. 2:18-CR-1336-7

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

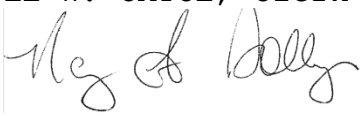
Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk



By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Ms. Sandra Eastwood
Mr. Seth Christian Gagliardi
Ms. Carmen Castillo Mitchell