CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Respondent/Appellee,

vs.

ERSKIN PERRYMAN

Petitioner/Appellant,

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

NOW COMES the Petitioner, ERSKIN PERRYMAN, by and through his assigned attorney, SANFORD A. SCHULMAN, to grant this Petition for Writ of Certiorari and to review the Opinion and Order of the United States Court of Appeals for the Sixth Circuit Court, entered in the above-entitled proceeding on February 10, 2022 granting the Government's Motion to Dismiss the Appeal to the Sixth Circuit Court of Appeals and refusal to address the issues raised on appeal.

The Sixth Circuit Court of Appeals erroneously granted the Government's Motion to Dismiss and refused to address whether the trial court calculated the petitioner's guideline range correctly when it erroneously applied a base level of 34 points instead of the initially calculated base level of 14 points based on Section 2X1.1 of the USSG and refused to review the issue of whether the petitioner's sentencing guidelines should have been reduced by two point for his role as a minor participant.

OPINIONS BELOW

On June 25, 2020, the appellant, ERSKIN PERRYMAN, was charged by way of a First Superseding Indictment with the following crimes: felon in possession of a firearm in violation 18 U.S.C. §922(g); conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846; possession with intent to distribute heroin and cocaine in violation of 21 U.S.C. § 841(a)(1); maintaining a drug premises in violation of 21 U.S.C. § 856; sex trafficking using force, fraud and coercion in violation of 18 U.S.C. § 1591(a)(1), and conspiracy to engage in sex trafficking in violation of 18 U.S.C. § 1594(c). (R. 47, Superseding Indictment, PgID 274-287).

On November 6, 2020, Perryman entered a guilty plea, pursuant to a Rule 11 Plea Agreement, to three counts: felon in possession of a firearm (Count 1),

conspiracy to distribute a controlled substance (Count 4), and conspiracy to engage in sex trafficking (R 62, Plea Agreement, PgID 331-354)

Prior to sentencing, a presentence investigation report was prepared (R. 78, Presentence Investigation Report, PgID 507-533) and on March 3, 2021 an Addendum to the Presentence Report was filed noting the defense objections. (R. 82, Presentence Report Addendum, PgID 550-555).

On March 22, 2021 the defense filed a timely Sentencing Memorandum and Objections to the Presentence Investigation Report and the advisory sentencing guideline calculation. (R. 90, Defense Sentencing Memorandum and Objections, PgID 642-658).

On March 29, 2021, the petitioner appeared for sentencing at which time, the trial court overruled the defense objections and imposed a sentence committing the appellant to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 120 months on Count 1, 180 months on Count 4, and 180 months on Count 8, all to be served concurrently. (R. 109, Sentencing Hearing Tr., PgID 882-952)

A final judgment was entered on March 30, 3021, (R. 93, Judgment, PgID 711-717) and on April 4, 2021, a timely notice of appeal was filed. (R. 98, Notice of Appeal, Page ID 723).

On appeal to the Sixth Circuit Court of Appeals, the respondent filed a motion to dismiss the appeal because the Rule 11 Plea Agreement contained an appeal waiver. The Sixth Circuit Court of Appeals issued an Opinion granting the motion and indicated:

"Perryman does not dispute that he waived his appellate rights knowingly and voluntarily. Instead, he argues that his issues on appeal fall outside the scope of his waiver because the district court calculated his guideline range incorrectly and imposed a sentence that exceeded the correct advisory guideline range by fifty-five months. However, Perryman reserved the right to appeal his sentence only if it exceeded the guideline range calculated by the district court at sentencing, not the range that he calculated himself or some objectively correct range. See Griffin, 854 F.3d at 915 ("Defendant fails to realize . . . that the maximum of the sentencing range that must be exceeded before [he] may appeal his sentence is not the sentencing range associated with the sentence computation that [he] believes is appropriate." (internal quotation marks and citation omitted); United States v. Beals, 698 F.3d 248, 255 (6th Cir. 2012). Perryman agreed that if he received a sentence below the range calculated by the district court, his waiver of the right to appeal that sentence on any grounds, including challenging the calculation itself, would be effective. At sentencing, the district court calculated Perryman's guideline range as 188 to 235 months imprisonment. Perryman was sentenced

below this range to a total term of 180 months' imprisonment. Perryman's appeal of his sentence, below the guideline range calculated by the district court, is therefore precluded by his valid appellate waiver." (Sixth Circuit, Opinion)

JURISDICTION

The opinion and order granting the respondent's motion to dismiss the Petitioner, ERSKIN PERRYMAN's appeal was entered by the Sixth Circuit Court of Appeals on February 10, 2022. This Petition for Writ of Certiorari is timely filed within ninety (90) days of the February 10, 2022 Opinion as required by Rule 13.1 of the United States Supreme Court Rues. This Court has jurisdiction to grant this Petition for Writ of Certiorari and address the issue of whether

Jurisdiction is proper under the Supreme Court Rule 10(a) and 10(c) and 28 USC § 1254(1) and Article III, §2 of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. **USCS Const. Amend. 5**

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**; nor shall private property be taken for public use, without just compensation.

2. **18 U.S.C.S. § 1591**

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 25 years, or both.

INTRODUCTION

The case involved the conduct of Erskin Perryman and his father Eligah Perryman. Erskin took responsibility for his role in the offense which focused on a residential home on Hazelwood Street in Detroit which was owned and maintained by Eligah. Erskin, admitted to providing the narcotics to several of the woman who came to the home voluntarily and who would apparently perform commercial sex acts there for money to pay for their drugs.

The petitioner acknowledged that he committed the offense of possession with intent to distribute a controlled substance in violation of 18 USC Sec. 841(a) and that he had access to the firearms that were recovered from the home and further that his conduct contributed to the conspiracy to engage in sex trafficking by force, fraud and coercion. However, he denied that he played a leadership role and, instead, argued that he was actually a minor participant who never assaulted any of the complainants who resided in the home, was likely one of many who provided narcotics and was for the most part guilty by his association with his father Eligah.

The question at sentencing was what is the appropriate base offense level and whether the appellant should receive a two-point reduction for his minor role in the offense. The Court ruled against the defense on both issues.

STATEMENT OF FACTS

In September of 2016, Detroit Police began investigating and responding to complaints of sexual misconduct taking place at a residence on Hazelwood Street in Detroit, Michigan. The home was alleged to have been maintained by the appellant and his father the co-defendant, Eligah Goodman. The home was owned by Eligah and he lived primarily in the home. The appellant did not live there and in fact lived with his wife and children in a different location.

Several woman in the home were purportedly interviewed and reported that the appellant, ERSKIN PERRYMAN, would visit the home on a nearly daily basis and regularly prove heroin and crack cocaine to these woman who further related that they performed commercial sex "dates" at the residence. A search of the residence revealed crack cocaine, currency, heroin and several weapons. The weapons were in a closet at the home and no one claimed that Erskin Perryman had ever used or threatened to use the firearms but some of the woman stated that there was the threat of violence which the appellant has asserted was from the co-defendant.

The defendant, ERSKIN PERRYMAN pled guilty to Count One: Felon in Possession of a Firearm 18 USC Sec. 922(g); Count Four: Possession with intent to distribute Heroin in violation of 21 USC Sec. 841(a)(1) and Count Eight: Conspiracy to Engage in Sex Trafficking by Force, Fraud or Coercion in violation

of 18 USC Sec. 1594(c). Probation initially calculated the base level as 14 based on Section 2X1.1 of the USSG and in the amended report recommended an increase in the guidelines from base level 14 to base level 34 based on USSG Sec. 2X1.1(a) and 2G1.1(a)(2) instead of 2G1.1(a)1).

The defense position was that Erskin Perryman was far more a supplier of drugs than he was engaged in sex trafficking. He never transported the woman to his father's house or away from his father's house and he certainly never held them hostage or assaulted them. However, he was at least one of the suppliers of drugs to the woman residing in the home and for his contributing role and the firearms at the home, he has accepted full responsibility. (R. 90, Sentencing Memorandum PgID 642-658)

The home at Hazelwood was admittedly a den for drugs and commercial sex crimes. Many of the woman had long been involved in drug use and had worked in the sex for money industry. That certainly does not excuse Erskin's conduct. But, quite frankly, most individuals seeking to purchase drugs may already be involve in the exchange of sexual acts for money or drugs. There is no evidence that Erskin ever used force or assaulted anyone but acknowledges that there firearms found at the home however his role was focused on supplying the drugs and for this a sentence which is sufficient but not greater than necessary is requested.

Erskin pled guilty and the advisory guidelines for possession with the intent to distribute controlled substances starts at 20 points and is increased by 2 points for the firearms that were recovered from the home and an additional 2 points because one of the firearms apparently had been reported stolen and then an addition 4 more points because the firearms was in the same location as the drugs for a total of 28 points before reduction for acceptance of responsibility.

The parties entered into a Rule 11 Plea Agreement that anticipated a base level of 34 points for the charge of conspiracy to engage in sex trafficking by force, fraud or coercion. (R. 62, Plea Agreement, PgID 331-354). However, after a more careful consideration the defense was permitted to argue that the base level assessment was erroneous and that there appears to be some division in the various circuits with the 9th Circuit reversing a conviction where the trial court applied the 34-point base level. Indeed, the presentence report initially calculated the base level as 14 with 4-point enhancement for threats of violence and the exploitation of the victim.

The presentence investigation report assessed 34 points as a base level based on the guideline for a violation of 18 USC Sec. 1594© based on USSG Sec2X1.1. Probation reasoned that pursuant to Section 2X1.1(a), 2G1.1 is reference when determining the offense level. (R. 78, Presentence Investigation Report, PgID 515). The defense objected.

The probation department reasoned that the base and total offense level are calculated correctly in the presentence report. When scoring a conspiracy under U.S.S.G. § 2X1.1 it is necessary to determine the substantive offense. In this case, the probation department determined that the underlying offense was Sex Trafficking by Force, Fraud, or Coercion, under 18 U.S.C. § 1591. The penalty statute would be part of the conviction, based on the conduct of the defendant. The probation department does not dispute that section (b) is the penalty statute; however, it would have been part of the conviction as the defendant clearly used force, fraud, or coercion during the instant offense. Additionally, the guideline specifically uses the phrase "if the offense of conviction is 18 U.S.C. § 1591(b)(1). Probation concluded that this indicates that the penalty statute would be a determining factor in choosing the proper base offense level. Therefore, the probation maintained that the base offense level is 34, under USSG § 2G1.1(a)(1).

At the sentencing hearing the court and the parties engaged in the following discussion:

Trial Court: "And Mr. Schulman, let me ask you first, I am aware that there is a split in the Circuits on this issue, and it does cause me some concern that under the plea agreement this would not be appealable.

Do you still wish me to accept the parties' plea agreement?

MS. SCHULMAN: Yes, your Honor. And in all fairness, we understand that the plea agreement addressed the scoring by way of, I think, page 10 of 24 of the plea agreement, I think. I'm sorry, hold on. I'm sorry, And we didn't want to look disingenuous by filing objections to points that appear to have been stipulated in the plea, but having reviewed the pre -- initial presentence report and then having looked up the case law, we recognize that there was some dispute as to the scoring.

So we want to proceed with sentencing. His intent was to accept responsibility. But at the same time, you know, we at least want the Court to pass on the issue of the proper base level.

THE COURT: All right. And do you wish to make any further argument other than what is set forth in the objection and in your sentencing memo?

MS. SCHULMAN: No, Judge. I think I cited the case law from the Ninth Circuit. I recognize that it may not be our Circuit and, you know, the initial presentence report did calculate guidelines consistent with that case law. I'm also aware of what -- how the government has responded, so I will rely on the briefs on -- that, you know, the Ninth Circuit in Lin, which found that it was not subject to the 1591(b)(1) application of the guidelines, including the application of the 11(c) -- I'm sorry -- of the 2G1.1(a)(1)application.

So what it comes down to is what is an appropriate base level, and we believe that the Ninth Circuit's application would be appropriate and is appropriate and should be the base level applied here.

THE COURT: All right. Thank you, Mr. Schulman.

And Ms. Woodward, anything further you would like to argue with respect to this objection?

MS. WOODWARD: Well, your Honor, I think we're in a difficult spot procedurally, because the argument that the defendant and Mr. Schulman are making is a breach of the Rule 11 Plea Agreement.

Mr. Schulman stated that the Rule 11 Plea Agreement appeared to have stipulated to the offense level. It didn't appear to, it did. It did include a stipulation that 2G1.1(a)(1) was the appropriate base offense level here, and the plea agreement also states that the parties agree not to take any position or make any statement that is inconsistent with any of the guideline recommendations or factual stipulations.

I think the Court is aware, and I think the plea agreement also makes it clear, that in this plea agreement both sides were coming together at essentially a compromise and the government agreed not to go forward to trial with a 15-year mandatory minimum and to allow the defendant to be in the position he is in here, which is to ask the Court to use its discretion to impose an appropriate sentence without regard to the mandatory minimum.

But by making this argument now at sentencing that the guideline range should be dramatically lower than what the parties had agreed to is a breach of the Rule 11 Plea Agreement. So I'm not sure exactly best how we should proceed.

THE COURT: Well, I suppose from my reading of it, you're right, you all agreed to that, but then in the plea agreement it's a recommendation to me.

MS. WOODWARD: That's correct, it is. So –

THE COURT: And so those -- those provisions are not binding. I'm still obligated to then calculate the proper base offense level.

MS. WOODWARD: That's correct. But by making this objection the defendant is breaching the plea agreement, so I think as a procedural matter it's -- we would potentially be withdrawing from the plea agreement based on the breach and going back to start anew.

MS. SCHULMAN: Your Honor --

THE COURT: Well, what if he didn't raise the objection, but I raised it as part of my obligation to calculate the guidelines range?

MS. WOODWARD: Well, certainly the Court can consider whatever the Court wishes to consider, but the parties had an agreement on a certain calculation of the guideline range.

And what Mr. Schulman and I had spoken about several weeks ago before the sentencing was adjourned -- and I just want to be clear on what his position was -- was that he was going to raise this for the Court to consider, but that it wouldn't be a formal objection.

I think his sentencing memo, it goes both ways, honestly. And what he said here today sounds to me like it's -- he's asking the Court to rule on the objection which is properly before the Court and the Probation Department did respond to it.

THE COURT: All right.

Yes, Mr. Schulman?

MS. SCHULMAN: One thing -- you know, I can't say Ms. Woodward is entirely in error with her representations. Only thing I'm saying is, we're obligated to give the Court the law. We can't hide it from you. I mean, we -- and I guess at the time of the plea, even though it recommended it, we need
to present to the Court what the law is, is certainly what our obligation is, even if it's adverse to our positions.

But while it does say the parties did recommend, under the Federal Rules of Criminal Procedure, that certain sentencing guidelines would apply, but ultimately, as the Court knows, you -- I mean, it doesn't -- it's not unusual for the Probation Department to recommend things that are different
from our agreement and ultimately the Court can accept or reject any or all of it.

But to stay true to the agreement, yes, that was part of the recommendation. And in my memo I was just pointing out that there is case law that places the guidelines differently.

In fact, the initial report was consistent with that.

But we do want the Court to ultimately accept the plea, and we certainly don't want to get in a position that we withdraw or would find -- be found in breach of the agreement. I don't think that's what Mr. Perryman wishes to do. But at the same time, there is case law and there's other positions that are both pro or adverse

to our positions or -- you know, that's something the Court should be allowed to consider."

After a further colloquy with the court, the parties agreed that the objection would be withdrawn but the court could consider it as part of the argument for variance or departure based on a dispute in the guideline range calculation.

MR. SCHULMAN: That would mean withdrawing the objection, I assume that's what the government is asking us to do, and then including that argument in our argument for a variance or departing from the guidelines.

MS. WOODWARD: Yes, I think that's right.

THE COURT: All right. Well, because it's going to be raised, and because I'm obligated to calculate the base offense level, I think I will address it. I'm prepared to address it.

. . .

THE COURT: All right. Thank you. Well, it is somewhat of a complicated issue and the Circuits are split on whether the proper base offense level is 34 or 14. The Sixth Circuit has not directly addressed the issue.

The probation officer now recommends 34. The superseding indictment here describes the conspiracy as one, quote, "to cause Victim 1 to engage in a commercial sex act in violation of 18 United States Code Section 1591(a)(1)," and that's ECF Number 47.

Conspiracy, under 15924(c), is not covered by a specific offense guideline, so the Court must follow Section 2X1.1 to determine the appropriate base offense level.

Section 2X1.1(a), in turn, directs the Court to apply, quote, "the base offense level from the guideline for the substantive offense," and that's guideline 2X1.1(a). After determining the substantive offense underlying the conspiracy, the Court must apply the base offense level associated therewith. Mr. Perryman pled guilty to violating Section 1594(c) by conspiring to violate Section 1591(a). Guideline 2G1.1(a) applies to violations of that substantive offense and provides for a base offense level of 34 if the "offense of conviction" is Section 1591(b)(1), or 14 otherwise, and that's Guideline 2G1.1(a)(1) and (2).

Again, the superseding indictment lists the underlying substantive offense as 18 U.S.C. Section 1591(a)(1). That is because 1591(a) describes the offense of sex trafficking and 1591(b) describes the different penalties applicable to convictions under 1591(a).

1591(b)(1) imposes a 15-year mandatory minimum if the offense involved minors under the age of 14, or force, threats of force, fraud, or coercion. Defendant relies on the Ninth Circuit decision in United States v. Wei, W-e-i, Lin, L-i-n, 841 F.3d. 823, Ninth Circuit, 2016. Lin, like Perryman, was convicted of violating 18 United States Code Section 1594(c). The substantive offense underlying his

conspiracy conviction was 1591(a). As here, the plea agreement and judgment did not mention 1591(b)(1). Nevertheless, the District Court found that for purposes of determining the defendant's base offense level, the underlyingoffense of conviction was 1591(b)(1) because the conduct involved in the underlying substantive offense would have been punished under 1591(b)(1) if Lin had been convicted of the substantive offense.

The District Court reasoned that because 1591(b)(1) is not a separate offense, no one can ever be convicted of violating 1591(b)(1). So in order for guideline 2G1.1(a)(1) to have any meaning, it must require something other than a conviction for violating 1591(b)(1).

The District Court then found that Lin's offense level of conviction should be determined by looking at his offense conduct. Since his underlying substantive offense was a violation of 1591(a) by means of fraud or coercion, and since 1591(b)(1) punishes violations of 1591(a) that are committed by means of fraud or coercion, the District Court concluded that Lin's offense of conviction was 1591(b)(1).

All of that is directly applicable here, as Mr. Perryman's underlying substantive offense was a violation of 1591(a), by force and coercion.

But the Ninth Circuit reversed. The Ninth Circuit interpreted Section 2G1.1(a)(1)'s reference to a defendant's offense of conviction to mean that a base offense level of 34 applies only to defendants, quote, "actually convicted of an offense subject to the punishment provided in 18 United States Code Section 1591(b)(1)."

The Ninth Circuit further stated, quote, "To determine if 18 U.S.C. Section 1591(b)(1) is the offense of conviction, Courts should simply ask if the defendant was convicted of an offense subject to the punishment provided in 18 U.S.C. Section 1591(b)(1); that is, was the defendant subject to the statute's 15-year mandatory minimum sentence?"

The Court held that, quote, "The plain language of the Guidelines and the Sentencing Commission's commentary all show that Guideline 2G1.1(a)(1) only applies to defendants who are subject to a 15-year mandatory minimum sentence under 18 United States Code Section 1591(b)(1)." And that's all a cite to the Wei Lin Ninth Circuit opinion.

Two Circuits in cases similar to this one have disagreed with the Ninth Circuit: United States v. Carter, 960 F.3d. 1007, Eighth Circuit, 2020; and United States v. Simms, 957 F.3d. 362, Third Circuit, 2020.

In Simms, the defendant contributed to the forced prostitution, abuse, and drug addiction of numerous young women. True, in both the Simms and Carter cases the defendants, unlike Mr. Perryman here, pleaded guilty to conspiring to violate both Section 1591(a) and (b)(1), but those Courts disagreed with the Ninth Circuit in other ways that pertain to this case. The Simms Court

relied on a hypothetical involving sex trafficking and labor trafficking to find that following the Ninth Circuit's Wei Lin opinion would lead to absurd results.

The Simms Court further stated that defendant's argument, which is the same one being made by Mr. Perryman here, quote, "Fails to recognize that Section 1591(b)(1) is not a stand-alone offense; rather, it is the punishment for violating Section 1591(a) if the offense was effected by means of force, threats of force, fraud, or coercion."

As -- as the Court went on to say, one District Court astutely noted if the Court interpreted offense of conviction in Guideline 2G1.1 literally, a base offense level of 34 would never be proper because the offense of conviction would always be 18 U.S.C. Section 1591(a), not (b)(1). And that's Simms, 957 F.3d. at 365.

Lastly, the Simms Court found that the count of the indictment to which the defendant pled guilty charged him with conspiring with others to use force, threats of force, fraud, and coercion to cause numerous young women to engage in a commercial sex act. And the relevant conduct in Section 1591(b)(1) is sex trafficking through means of force, threats of force, fraud, or coercion, or any combination of such means.

Thus, that defendant's offense conduct was identical to that prescribed conduct in 1591(b)(1), so the Court found the appropriate base offense level for the conspiracy conviction was 34. And that's id. at 365 to 366.

The Eighth Circuit in Carter also declined to follow Wei Lin where the applicable guidelines provision unambiguously directs the Court to apply the provisions of 2G1.1(a)(1) as though the defendants were convicted of violating 1591(b)(1).

The same is true here. As the probation officer correctly explained, Mr. Perryman was convicted of conspiring to violate 18 United States Code Section 1591(a) as a result of underlying conduct that involved sex trafficking by force, fraud, or coercion. That is the conduct covered by Section 1591(b)(1). Thus, the Simms and Carter cases and the District Court analysis in Wei Lin appear to this Court to be the better analysis such that base offense level 34 applies.

The government's sentencing memo also identifies numerous cases in this District where the Courts have used the base offense level 34 for defendants that plead guilty to conspiracy to engage in sex trafficking using force, fraud, or coercion, ECF Number 89 at Page ID 639. And as discussed, as part of the plea agreement, the parties agreed that several specific guidelines applied, including 2G1.1(a)(1), which states that the base offense level is 34, ECF 62 at page 340.

So the Court will apply the base offense level of 34.” (R. 109, Sentencing Transcripts, PgID 889-902)

The trial court then took up the second issue at sentencing, whether the advisory guidelines by 2 points for being a minor participant.

The petitioner argued that he did not live at the residence where the co-defendant and the victims resided. He admitted his role in the offense and denied that he ever held anyone against their will, used force or even the threat of force against anyone or threatened eviction. The victims were involved in acts of prostitution long before they came to the co-defendant's house. The victims were also already addicted to drugs. This does not justify the fact that the petitioner, Erskin Perryman visited the home nearly daily and provided heroin and crack to the residents. However, his role was more aligned with a minor participant. He never used any firearms, never assaulted, had almost no physical contact with the residents at the home. For his role, Mr. Perryman should have received a two point reduction for a minor participant.

The probation department acknowledged that the defendant did not reside at the residence, however probation reasoned that the discovery information indicates that the defendant played a significant role in this conspiracy. Several women involved in the conspiracy stated that the defendant used threats and controlled substances to keep women in the home. Additionally, it is clear by the defendant's daily trips to the residence that he was well aware and involved in the dealings taking place at the residence. Discovery information also indicates the defendant

was usually seen carrying a firearm and stored several firearms in the home and while he may not have discharged a firearm, these weapons can be used to intimidate other individuals.

At the March 29, 2021 sentencing hearing, the court did not agree that the petitioner played a minor participant role in the instant offense and ruled as follows:

> MS. SCHULMAN: Well, it does somewhat overlap with what the Court might have had the impression of based on the government's sentencing memorandum, and it kind of flows like this: The -- in this case, as in many federal cases, you don't hear any testimony. There's never been a preliminary examination. In fact, I don't even believe that although I never saw any grand jury testimony, I don't believe any of the complainant or victims testified at the grand jury. So we have a factual basis and a plea agreement that does not speak to Mr. Perryman assaulting anybody.
>
> It does say that the co-defendant's home was the location where the adult victims resided. And it says at the co-defendant's home Mr. Perryman's role was to provide drugs to the adult victims there, and at the co-defendant's home, which is mentioned about three or four times within the paragraph of the factual basis, that he then conspired or agreed to use violence and heroin addiction to cause people to engage in these commercial sex acts.
>
> The reason why I point that out is because it does --it goes from that to obviously the presentence report, which doesn't really say that Mr. Perryman was involved in assaultive behavior. It says that they would use -- utilize threats of violence, and then it says that "several complainants also indicated." It seemed like there was third-party type of information.
>
> And, of course, these presentence reports are based very much on information provided by the government's information and says that they utilized the threat of violence. And then it goes to the government's sentencing memorandum, which it says: "If the women in the home did not comply with Perryman's demands, he was violent with them."
>
> So really, it goes from what we maintain and what Mr. Perryman always maintained as a minor participant role. I mean minor in terms of not really assaulting the women, didn't bring the guns to the home. You know, he doesn't

want to – he doesn't want to excuse his conduct, but I think ultimately the Court needs to find what is his role in this offense.

The 3553(a) factors start with the nature and circumstances of the offense. So obviously it's important, and without it you kind of are in a void.
And I have done trials where -- in fact, the last trial before the pandemic was a three-month trial in front of Judge Levy where, at the time of sentencing, her sentence was completely different in what was potentially a death penalty case to what ultimately her sentence was after hearing all the
testimony. It was just completely a different – entirely different sentencing.
And it could also work adversely too. If there is a co-defendant that goes to trial and the Court hears the testimony and then you plea and you go in front of that judge for sentencing, sometimes that becomes very different. The
Court has been enlightened, so to speak, by the testimony.

And so that's where the argument on the minor participant grows out of, because we believe that while his role was similar to someone who was supplying narcotics, whether it would have been that he wasn't really maintaining this home, he wasn't using -- he wasn't the main participant
in any violence.

And I think that's consistent with the factual basis that he provided, and I don't know if testimony is necessary or how the Court needs to ultimately make its findings, and it's an important one, but we think that we maintain and we argue that his role was much more of a minor participant.

And every -- unfortunately, and as cold as this might sound, every drug dealer probably is selling drugs to people with addiction problems who are, in their own way, you know, kind of a slave, so to speak, to their addiction and they are being fed this. I mean, that's kind of the nature of that.
But that doesn't necessarily make them a major participant in an offense that requires sex trafficking.

I'm not trying to excuse it. He has pled guilty. He was an aider and abetter. He supplied the narcotics to these women. But he has been very, very adamant from the very beginning, and his plea is adamant, he was not an assaulter. He did not engage in assaultive behavior.

And when he pled, I explained to him that even intentional indifference is a problem, and conspiring means an agreement, and you don't have to actually be the leader. And that's why the factual basis, I think, is consistent with his and it's not inconsistent with the plea. It's certainly
consistent with his sentencing memorandum and that's why --

THE COURT: What is a fair inference of someone being at the home on a daily basis that contains several loaded firearms?

MS. SCHULMAN: Right. Well, yes, I mean, the loaded firearms were -- I'm not sure of where they were located in the home, but it wasn't a situation where, you know, he was ever found with the firearm or using it, those kind of things. He doesn't dispute that a search of the home recovered
six firearms and that -- yeah. So, yeah, it was in the house, no question about it. The question is, what was his role relative to the firearms? Is it more in line to a minor participant? You know --

THE COURT: And in a case like this where you, in effect, have a two-person conspiracy, and as part of the plea agreement, as you indicated, the plea says, quote, "The defendant" -- which is a reference to Mr. Perryman -- "and Goodmon conspired or agreed to use violence and AV1's" -- Adult Victim 1's -- "heroin addiction to cause her to engage in
commercial sex acts," so --

MS. SCHULMAN: Yes. Well --

THE COURT: -- you've got a situation where perhaps that means they both used violence, perhaps that means one used violence, but the other agreed that that's what they were going to do and allowed it.

Does that make one a minor participant?

MS. SCHULMAN: I'm not sure, but -- yes. But the idea is that if they conspired to do this, what ultimately was his role? I mean, two or more parties have agreed to conspire to commit this act, but what actually does he do? Does he point guns? Does he handle the guns? Does he assault these women?

He can still conspire, in theory, and his -- how he moves the conspiracy forward is by supplying the drugs. But he has always been very adamant that violence was never in his mode of conduct, nor were the firearms.

He acknowledges there were firearms in the house, and as the Court notes, it may very well have been an atmosphere of fear, but he is really -- his acknowledgment was that supplying the narcotics to these women who were residing in this home helped the conspiracy, but he did not participate in the conspiracy by assaulting, by threatening in terms of firearms.

That doesn't mean he didn't further the conspiracy.

That was his plea. So he could, in theory, get a minor participant's role even in a two-party conspiracy because one is significantly more involved to the point that the other one is really the supplier of narcotics, where the other one is really handling the bulk of the other offense in terms of the assault, in terms of running the house, and those kinds of things. And so that's how our argument would be framed.

THE COURT: All right. All right. Thank you.

…

THE COURT: All right. Thank you. As has been argued, Mr. Perryman denies that he ever held anyone against their will, used force or even the threat of force against anyone, or threatened eviction, and that the
victims were involved in acts of prostitution and drug addicts before they came to the co-defendant's house.

Under the sentencing guidelines a minor participant is one, quote, "who is less culpable than most other participants but whose role could not be described as minimal." Guideline 3B1.2, Comments 4 and 5: A defendant who performs a limited function in the criminal activity may receive an adjustment under this guideline.

3B1.2, Note 3A: The Sixth Circuit has further defined a minor participant as one whose conduct was substantially less culpable than the average participant and was not necessary to the success of the enterprise, United States v. Williams, 505 F.App'x 426, Sixth Circuit, 2012, citing Sixth Circuit case law.

In deciding whether to apply this adjustment, the Court should consider the degrees to which a defendant understood the scope and structure of the criminal activity, participated in planning or organizing the activity, influenced or exercised decision-making authority, and stood to benefit from the activity, in addition to the nature and extent of his participation in the activity. 3B1.2, Comment Note 3C.

In the factual basis for the plea Mr. Perryman acknowledged that he visited his father's home on a near daily basis. This is where the commercial sex acts took place. Mr. Perryman regularly provided Victim 1 with drugs.

The Court has also reviewed text messages between Mr. Perryman and one of the female victims that make clear he was supplying drugs and expected the women to engage in prostitution in return. The home where the trafficking took place contained six firearms that belonged to Mr. Perryman, several loaded. He admits possessing those guns in connection with drug trafficking and sex trafficking. During the execution of the search warrant he was in possession of controlled substances and over $1,000 in cash. He admitted that he and Mr. Goodmon agreed to use violence and Victim 1's heroin addiction to cause her to engage in commercial sex acts.

Mr. Perryman's role is further detailed in the presentence report. Several victims reported to law enforcement that Mr. Perryman often carried a gun while he was at Mr. Goodmon's home. Victim 1 indicated that both Mr. Goodmon and Mr. Perryman exploited her addiction and utilized threats of violence to cause her to engage in commercial sex acts and that she gave the proceeds from these acts to Mr. Perryman and Mr. Goodmon in exchange for drugs.

So Mr. Perryman has not established that he was any less culpable than Mr. Goodmon or that he was any less involved in the planning and execution of the criminal conduct or that he shared less in the proceeds.

It may be that he engaged in less violence or assaultive conduct, but that does not make him a minor participant in the counts that he has pled guilty to. He has not established an entitlement to a minor role reduction, so that objection is overruled." (R. 109, Sentencing Transcripts, PgID 902-911)

The trial court overruled the defense objections and imposed a sentence committing the appellant to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 120 months on Count 1, 180 months on Count 4, and 180 months on Count 8, all to be served concurrently. (R. 109, Sentencing Hearing Tr., PgID 882-952)

A final judgment was entered on March 30, 3021, (R. 93, Judgment, PgID 711-717) and on April 4, 2021, a timely notice of appeal was filed. (R. 98, Notice of Appeal, Page ID 723).

The respondent filed a motion to dismiss the appeal that was filed with the Sixth Circuit Court of Appeals that was granted and precluded any redress on the issue of whether the 34 point base level was erroneous and should have, instead been assessed at 14 points and the second issue whether the trial court erred in not reducing the sentencing guidelines by two points for the role as a minor participant.

REASONS IN SUPPORT OF GRANTING THE WRIT

There is a split in the Circuits on the issue of the appropriate application of the sentencing guideline points. The 9th Circuit in the case of United States v. Lin, 841 F.3d 823 (9th Cir. 2016), determined the applicable base offense level for a § 1594(c) conspiracy offense under a similar guideline. There, the Ninth Circuit considered the correct base offense level to apply for conspiracy to violate 18 U.S.C. § 1591(a) where the applicable penalty provision for the substantive crime would have been § 1591(b)(1) (sex trafficking involving fraud or coercion). The Ninth Circuit determined that a base offense level of 14 under § 2G1.1(a)(2) should apply for conspiracy to violate 18 U.S.C. § 1591(a) where the penalty provision of § 1591(b)(1) applies, instead of a base offense level of 34 under § 2G1.1(a)(1). See Lin, 841 F.3d at 825-27.

The Ninth Circuit reached this conclusion because § 1591(b)(1) (like § 1591(b)(2)) is solely a penalty provision. See id. So the Ninth Circuit reasoned that "[t]he most straightforward interpretation" of the guideline required the conclusion that "the offense of conviction" under § 2G1.1 was § 1591(b)(1) only "if the defendant was convicted of an offense subject to the punishment provided in 18 U.S.C. § 1591(b)(1)—that is, . . . the defendant [was] subject to the statute's fifteen-year mandatory minimum sentence." Id. at 826. Because a conspiracy conviction under § 1594(c) does not subject a defendant to § 1591(b)(1)'s fifteen-

year mandatory minimum sentence, the Ninth Circuit did not apply the base offense level for a violation that satisfies the penalty provision of § 1591(b)(1). See id. at 827. In further support of this interpretation, the Ninth Circuit asserted that its understanding was "most likely what the Sentencing Commission intended," based on the Ninth Circuit's review of the history of § 2G1.1. See id.

The petitioner contends that he should have been assessed a base offense level of 14 as opposed to 34 for the offense for which he pled guilty. The defense argues that while the conduct that forms the basis of their conspiracy conviction tracks the language of the penalty subsection 18 U.S.C. § 1591(b)(1), defendant pleaded guilty to the conspiracy charge and its related penalty provision under 18 U.S.C. § 1594(c) instead. The defendant/appellant contends that the language of §2G1.3 of the Guidelines specifies the count of conviction as the basis for selecting the proper offense level.

The petitioner contends that the base offense level is 14. Because the defendant who entered into a plea agreement were "convicted under" § 1591(b)(1), the appellant contend that the guideline base offense level of 34 is incorrect. Several circuit courts agree including the 9th Circuit in the case of United States v. Wei Lin, 841 F.3d 823, 825 (9th Cir. 2016) and several district courts such as the court in the 4th Circuit in the case of United States v. Jackson, No. 2:16-cr-00054-DCN, 2018 U.S. Dist. LEXIS 41571 (D.S.C. Mar. 14, 2018)

The base offense level of 34 applies only to defendants who were convicted of the penalty subsection § 1591(b)(1), which the defendant/appellant in the pending case did not plead to. Therefore, the trial court erred by refusing to find that the appropriate base offense level under the plain language of § 2G1.1(a) is 14.

The petitioner also argued that the court erred when it refused to grant a decrease in the appellant's offense level by two points as a "minor participant" in the criminal activity. U.S.S.G § 3B1.2(b). The petitioner was a minor participant because he is less culpable than most other participants, but his role could not be described as minimal." U.S.S.G. § 3B1.2, cmt. n.5. In determining whether a mitigating-role reduction is warranted, the trial court failed to consider two principles discerned from the Guidelines: first, the defendant's role in the relevant conduct for which he has been held accountable at sentencing, and, second, his role as compared to that of other participants in her relevant conduct." De Varon, 175 F.3d at 940. In looking to relevant conduct the district court failed to assess whether the defendant is a minor or minimal participant in relation to the relevant conduct attributed to the defendant in calculating his base offense level. In this case, his role was to provide narcotics, he was not the leader, he did not reside at the house, he held no one hostage and never assaulted anyone. He played a minor role relative to the co-defendant.

ARGUMENT

I. THIS COURT SHOULD GRANT THIS PETITION FOR WRIT OF CERTIORARI BECAUSE THE TRIAL COURT ERRED IN APPLYING A BASE LEVEL OF 34 POINTS INSTEAD OF THE INITIALLY CALCULATED BASE LEVEL OF 14 BASED ON SECTION 2X1.1 OF THE USSG WHERE THE PLAIN LANGUAGE OF THE GUIDELINES AND THE SENTENCING COMMISSION'S COMMENTARY ALL SHOW THAT he U.S.S.G. § 2G1.1(a)(1) ONLY APPLIES TO DEFENDANTS WHO ARE SUBJECT TO THE FIFTEEN-YEAR MANDATORY MIMINUM SENTENCE UNDER 18 U.S.C. § 1591(b)(1) AND THE DEFENSE WOULD ENCOURAGE THIS COURT TO ADOPT THE REASONING APPLIED IN THE 9th CIRCUIT COURT CASE THE 9TH CIRCUIT COURT CASE OF UNITED STATES vs .WEI LIN, 841 F.3d 823 (9th Cir. 2016) WHICH HELD THAT IT WAS NOT SUBJECT TO THE 18 U.S.C. § 1591(b)(1)'s MANDATORY MINIMUM AND THE DISTRICT COURT ERRED IN APPYING § 2G1.1(a)(1).

The defense does not dispute that the plea agreement contains a specific provision that "the parties recommend under Federal Rule of Criminal Procedure 11©(1)(B) that the following sentencing guideline provisions apply: 2G1.1(a)(1) (base level), 2K2.1(a)(4)(A). 2K2.1(b)(1)(A), 2K2.1(b)(4) (base level and enhancement for possession of firearm and number of firearms found) (2 point increase for firearm that was located) and 2k2(1.(b)(6(B) (firearm in close proximity with firearm)." (R. 62, Plea Agreement, Page 10, PgID 341).

The Government and the defense acknowledge that there is a split in various circuits as to the application of sentencing guideline provision 2G1.1(a)(2) and 2G1.1(a)1) and the appropriate base level. The defense points out that there is a division in the application of the guideline and that some circuits apply a 14 point base level and not the 34 point base level. The objection is not intended to be

viewed as a breach of the agreement, but to allow this Court to consider the variance in application of the sentencing guidelines.

Probation initially calculated the base level as 14 based on Section 2X1.1 of the USSG and in the amended report recommended an increase in the guidelines from base level 14 to base level 34 based on USSG Sec. 2X1.1(a) and 2G1.1(a)(2) instead of 2G1.1(a)1). The defense maintains that the application of the sentencing guidelines in paragraphs 32, 29, 41, 45 and 76 of the presentence report will have a bearing on the base level calculation and the overall advisory guidelines.

Under the federal sentencing guidelines, attempt crimes are generally governed by USSG § 2X1.1. See U.S. Sentencing Guidelines Manual § 2X1.1 (2001). "Where a defendant is convicted of an attempt crime not itself covered by a specific offense guideline, calculation of the defendant's sentence must be pursuant to § 2X1.1." United States v. Martinez, 342 F.3d 1203, 1205 (10th Cir. 2003) (USSG § 2X1.1 can apply even when the attempt crime and the completed offense are included in the same statute).

When an attempt crime is not expressly covered by another guideline, USSG § 2X1.1(a) first directs the sentencing court to calculate the defendant's offense level pursuant to the guideline applicable to the substantive offense. More specifically, the court must apply "the base level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended

offense conduct that can be established with reasonable certainty." See U.S. Sentencing Guidelines Manual § 2X1.1(a) (2001). HN5 "Under 2X1.1(a), the base offense level will be the same as that for the substantive offense. But the only specific offense characteristics from the guideline for the substantive offense that apply are those that are determined to have been specifically intended or actually

The base offense level for a conspiracy to commit sex trafficking is the same as the base offense level for the underlying substantive sex trafficking crime. See U.S.S.G. § 2X1.1(a). The base offense level for sex trafficking is 34 "if the offense of conviction is 18 U.S.C. § 1591(b)(1)." U.S.S.G. § 2G1.1(a)(1). Otherwise, the base offense level is 14. U.S.S.G. § 2G1.1(a)(2).

The petitioner relies on United States v. Wei Lin, 841 F.3d 823 (9th Cir. 2016) for direction. In Wei Lin the appellate court held that 18 U.S.C. § 1591(b)(1) is not a separate offense. See United States v. Todd, 627 F.3d 329, 334 (9th Cir. 2009). 18 U.S.C. § 1591(a) describes the offense of sex trafficking, and § 1591(b) describes the different penalties applicable to convictions under § 1591(a). Id. 18 U.S.C. § 1591(b)(1) imposes a fifteen-year mandatory minimum if the offense involved minors under the age of fourteen, or force, threats of force, fraud or coercion. Lin's underlying substantive sex trafficking offense involved fraud or coercion, but the mandatory minimum in 18 U.S.C. § 1591(b)(1) does not apply to conspiracy to commit sex trafficking, see 18 U.S.C. § 1594(c), so Lin was not

subject to the fifteen-year mandatory minimum. The same as the case with Mr. Perryman.

According to Lin's plea agreement and judgment, Lin was convicted of violating 18 U.S.C. § 1594(c). The substantive offense underlying his conspiracy conviction was 18 U.S.C. § 1591(a). The plea agreement and judgment do not mention 18 U.S.C. § 1591(b)(1). Nevertheless, the district court found that, for purposes of determining his base offense level, Lin's underlying offense of conviction was 18 U.S.C. § 1591(b)(1), because the conduct involved in the underlying substantive offense would have been punished under § 1591(b)(1) if Lin had been convicted of the substantive offense. The appellate court disagreed and reversed.

The most straightforward interpretation of U.S.S.G. § 2G1.1(a)(1) is that a base offense level of 34 applies only when the defendant is actually convicted of an offense subject to the punishment provided in 18 U.S.C. § 1591(b)(1). However, the district court rejected this interpretation of U.S.S.G. § 2G1.1(a)(1). The district court erroneously reasoned that because 18 U.S.C. § 1591(b)(1) is not a separate offense, no one can ever be convicted of violating 18 U.S.C. § 1591(b)(1). See Todd, 627 F.3d at 334. In order for U.S.S.G. § 2G1.1(a)(1) to have any meaning, then, it must require something other than a conviction for violating 18 U.S.C. § 1591(b)(1).

The district court then found that Lin's "offense of conviction" should be determined by looking at his offense conduct. Since Lin's underlying substantive offense was a violation of 18 U.S.C. § 1591(a) by means of fraud or coercion, and since § 1591(b)(1) punishes violations of § 1591(a) that are committed by means of fraud or coercion, the district court concluded that Lin's offense of conviction was 18 U.S.C. § 1591(b)(1).

The district court stated that this interpretation was consistent with the definition of "offense of conviction" found in U.S.S.G. § 1B1.2(a). But U.S.S.G. § 1B1.2(a) does not give a general definition for the term "offense of conviction" to be applied throughout the guidelines. Instead, it merely instructs courts on what "offense of conviction" means when "[d]etermin[ing] the offense guideline section . . . applicable to the offense of conviction." U.S.S.G. § 1B1.2(a). In this context, a conduct-based definition makes perfect sense. Offense guideline sections are not named with reference to specific statutes, although Appendix A to the Sentencing Guidelines provides an index matching certain statutes to their corresponding guideline sections. When trying to determine which guideline sections apply to which crimes, a court must naturally look at the offense conduct of the crime. For example, in determining which offense guideline applies to a 18 U.S.C. § 1591(a) conviction, a court must necessarily look at the offense conduct involved, because there is no offense guideline named "18 U.S.C. § 1591(a)."

The 9th Circuit Court stated as follows: "…the situation at hand is much different. Here, a simple matching exercise can be done to determine if the offense of conviction is 18 U.S.C. § 1591(b)(1) — simply by looking at the judgment. This is not a situation where we must translate from state statutes to federal statutes, or from plain English names of crimes to federal statutes. We are translating from federal statutes to federal statutes. It seems tortured to say that, when we know what federal statutes the defendant was convicted of, and we are asked to determine if the defendant's offense of conviction was a specific federal statute, we should break those statutes down into their offense conduct and then compare that conduct, as opposed to simply comparing the federal statutes that we have on both sides of the equation."

With regards to the argument that 18 U.S.C. § 1591(b)(1) describes a punishment, and not an offense, there is a much simpler answer than the one given by the district court. To determine if 18 U.S.C. § 1591(b)(1) is the offense of conviction, courts should simply ask if the defendant was convicted of an offense subject to the punishment provided in 18 U.S.C. § 1591(b)(1) — that is, was the defendant subject to the statute's fifteen-year mandatory minimum sentence. This solution is not only simple, and as close to a literal reading of U.S.S.G. § 2G1.1(a)(1) as possible without rendering the guideline meaningless, it is also most likely what the Sentencing Commission intended.

First, it is unlikely that the Sentencing Commission intended an offense conduct comparison, because the Sentencing Commission knew how to require such a comparison explicitly, and did not do so. For example, later in the same guideline section, U.S.S.G. § 2G1.1(c)(1) directs courts to apply another guideline "[i]f the offense involved conduct described in 18 U.S.C. § 2241(a) . . ." If the Sentencing Commission wanted § 2G1.1(a)(1) to apply whenever the defendant's offense involved conduct described in 18 U.S.C. § 1591(b)(1), the Commission would have used the same language in § 2G1.1(a)(1) as it used in § 2G1.1(c)(1). The Commission's choice not to use that language indicates that it was not their intention to require an offense conduct comparison.

Second, the Commission likely intended § 2G1.1(a)(1) to apply only when the defendant received a fifteen-year mandatory minimum sentence, because the higher base offense level in § 2G1.1(a)(1) was created in direct response to Congress's creation of the fifteen-year mandatory minimum. See United States Sentencing Commission, Amendments to the Sentencing Guidelines 27 (2007) available at htttp://www.ussc.gov/Legal/Amendments/Official_Text/20070501_Amendments.pdf ("[T]he Adam Walsh Act added a new mandatory minimum . . . of 15 years under 18 U.S.C. § 1591(b)(1) . . . In response, the amendment provides a new base offense level of 34 . . . if the offense of conviction is 18 U.S.C. § 1591(b)(1), but

retains a base offense level of 14 for all other offenses."). The Commission therefore likely did not want the higher base offense level to apply when the defendant was not subject to § 1591(b)(1)'s fifteen-year mandatory minimum.

In sum, common sense, the plain language of the guidelines, and the Sentencing Commission's commentary, all show that U.S.S.G. § 2G1.1(a)(1) only applies to defendants who are subject to a fifteen-year mandatory minimum sentence under 18 U.S.C. § 1591(b)(1). The 9th Circuit in Lin found that it was not subject to 18 U.S.C. § 1591(b)(1)'s mandatory minimum and the district court erred in applying § 2G1.1(a)(1) to Lin. This error was not harmless. See United States v. Munoz-Camarena, 631 F.3d 1028, 1030-31 (9th Cir. 2011). The 9th Circuit reversed the district court's base offense level determination, vacated Lin's sentence, and remand for re-sentencing." United States v. Wei Lin, 841 F.3d 823 (9th Cir. 2016). The petitioner is requesting a similar result. The Sixth Circuit in the case at bar, however, dismissed the appeal without addressing this issue.

II. THIS COURT SHOULD GRANT THIS PETITION FOR WRIT OF CERTIORARI BECAUSE THE TRIAL COURT ERRED IN REFUSING TO APPLY A TWO-POINT REDUCTION FOR A MINOR PARTICIPANT WHEN THE COURT FAILED TO CONSIDER ERSKIN PERRYMAN'S ROLE IN THE RELEVANT CONDUCT WHO PROVIDED NARCOTICS BUT DID NOT HOLD REQUIRE ANY OF THE VICTIMS TO REMAIN IN THE HOUSE NOR DID HE THREATEN OR ASSAULT THEM AND THE COURT FAILED TO COMPARE HIS CONDUCT TO THAT OF THE CO-DEFENDANT.

The defendant objected to the failure to reduce the advisory guidelines by 2 points for being a minor participant.

USSG § 3B1.2(b) provides that the district court may reduce a defendant's base offense level by two levels "[i]f the defendant was a minor participant in any criminal activity." A minor participant is one who is less culpable than most other participants, but whose role cannot be described as minimal. USSG § 3B1.2, cmt. n.5. The defendant must be substantially less culpable than the average participant in the offense to benefit from the reduction. United States v. Lanham, 617 F.3d 873, 888 (6th Cir. 2010) (citation and internal quotation marks omitted). A court may consider whether the defendant's "role was indispensable or critical to the success of the scheme, or if his importance in the overall scheme was such as to justify his sentence." United States v. Skinner, 690 F.3d 772, 783-84 (6th Cir. 2012) (quoting United States v. Salgado, 250 F.3d 438, 458 (6th Cir. 2001)). "The salient issue is the role the defendant played in relation to the activity for which the court held him or her accountable." United States v. Roper, 135 F.3d 430, 434 (6th Cir. 1998).

Erskin Perryman did not live at the residence where the co-defendant and the victims resided. He has admitted his role in the offense and denies that he ever held anyone against their will, used force or even the threat of force against anyone or threatened eviction. The victims were involved in acts of prostitution long before they came to the co-defendant’s house. The victims were also already addicted to drugs. This does not justify the fact that Erskin Perryman visited the

home nearly daily and provided heroin and crack to the residents. However, his role was more aligned with a minor participant. He never used any firearms, never assaulted, had almost no physical contact with the residents at the home. For his role, Mr. Perryman should receive a two point reduction for a minor participant.

USSG § 3B1.2(b). The mitigating-role adjustment for a minor participant in a criminal activity allows for a 2-level reduction in offense level under the guidelines. Id. That reduction applies to defendants who are "less culpable than most other participants, but whose roles could not be described as minimal." United States v. Tatum, 462 F. App'x 602, 607 (6th Cir. 2012) (quoting USSG § 3B1.2, comment (nn.4-5)). United States v. Hill, 982 F.3d 441, 444 (6th Cir. 2020)

The petitioner’s due process right was violated when the trial court erred in refusing to reduce the sentencing guidelines by two-points. The Sixth Circuit Court of Appeals refused to address this issue when it granted the respondent’s motion to dismiss.

CONCLUSION

WHEREFORE, the Petitioner, ERSKIN PERRYMAN, by and through his assigned attorney, SANFORD A. SCHULMAN, respectfully requests this most Honorable Court grant this Petition for Writ of Certiorari and reverse the Opinion and Order of the United States Court of Appeals for the Sixth Circuit Court, entered in the above-entitled proceeding on February 10, 2022 because the Sixth Circuit Court of Appeals erroneously refused to address the issues presented which concern the violation of the petitioner's Fifth Amendment Right to due process and a fair sentencing hearing based on accurate sentencing guidelines including an accurate base level for the offense charged and an a reduction of two points for a role as a minor participant.

Respectfully submitted,

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