

No:

**In the
Supreme Court of the United States**

ANTHONY OBUTE,

Petitioner,

vs.

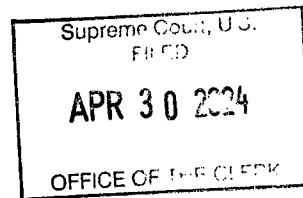
UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does a defendant's waiver of appellate rights in a plea agreement, which explicitly reserves the right to challenge the constitutionality of a statute and the applicability of the defendant's behavior under the statute, remain enforceable when the Presentence Investigation Report applies an enhancement under § 2d1.1(b)(12) for maintaining premises for the purpose of distributing a controlled substance, even though the defendant's actions fall outside of the scope of § 2D1.1(b)(12) when the location for distribution is a legitimate operating pharmacy?

**PARTIES TO THE PROCEEDINGS
IN THE COURT BELOW**

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Southern District of Texas.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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23-7542
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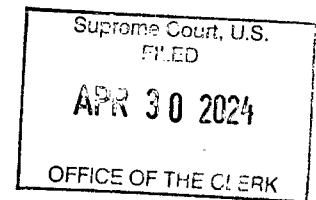
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FOR THE FIFTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

Anthony Obute, ("Obute") the Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause.



OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, was entered on February 15, 2024, *United States v. Obute*, No. 23-20143, 2024 U.S. App. LEXIS 3595 (5th Cir. Feb. 15, 2024) and is reprinted in the separate Appendix A to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on November 3, 2023. The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense 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.

Id. Fifth Amendment.

STATEMENT OF THE CASE AND FACTS

I. Mr. Obute's Background as a Pharmacist

Mr. Anthony Obute, was the proprietor, administrator, and acting pharmacist of Keystone Pharmacy (hereinafter referred to as "Keystone"). Throughout the period spanning from August 2018 to August 2021, Mr. Obute assumed sole responsibility for all operations at Keystone. Furthermore, Mr. Obute possessed a DEA Registration Number and held the requisite licensure from the Texas State Board of Pharmacy, thereby enabling him to lawfully manage Keystone. In all respects, Mr. Obute was an admired pharmacist.

Throughout a collaborative investigation carried out by the DEA and the Houston Texas Police Department, law enforcement officers pinpointed Keystone as a suspected establishment engaging in illicit pharmaceutical practices, commonly known as a "pill mill," wherein Schedule II substances were prescribed without legitimate medical necessity. From August 2018 to August 2021, investigators ascertained that Keystone exclusively accepted cash transactions, typically pricing the combination of 120 hydrocodone 10-325mg pills and 90 carisoprodol 350mg pills at \$400. It is alleged that Mr. Obute was aware that this

quantity of pills exceeded the limits typically covered by insurance providers. On May 28, 2020, law enforcement officers conducting surveillance observed Krisean Johnson, a suspected crew leader, departing Keystone in Johnson's vehicle. Subsequently, officers initiated a traffic stop and arrested Johnson for driving without a valid license. A search of the vehicle incident to the arrest uncovered several pill bottles in the center console. Among these, two bottles contained a total of 110 hydrocodone 10-325mg pills and 30 carisoprodol 350mg pills, both prescribed by a suspected pill-mill doctor to a patient identified as W.S., who was not present in Johnson's vehicle. The labels on these bottles indicated that they had been filled at Keystone earlier that same day. Additionally, officers discovered state identification cards belonging to W.S. and two other individuals who were not occupants of Johnson's vehicle. Furthermore, officers located two pill bottles in Johnson's name with older labels (reflecting prescriptions filled around March 2020), containing a total of 100 hydrocodone 10-325mg pills and 19 carisoprodol 350mg pills.

Johnson informed officers that he had transferred his more recent medications into older bottles, but he failed to provide a legitimate

explanation for this action. Subsequent investigation into Johnson's phone records unveiled that he had been in frequent communication with Mr. Obute. Records obtained from Mr. Obute's cell phone provider further revealed that from March 2020 through June 2020, Johnson's cell phone number consistently appeared as the top contact on Mr. Obute's phone during that period. On August 4, 2020, law enforcement officers conducting surveillance at a suspected pill-mill clinic operated by Physician A observed the arrival of Person A, a recognized crew leader.

After departing the clinic, Person A proceeded to Keystone. Subsequently, upon leaving Keystone, law enforcement officers conducted a traffic stop on the vehicle driven by Person A. A search of Person A's vehicle uncovered two pill bottles: one containing 120 hydrocodone 10-325mg pills and the other containing 90 carisoprodol 350mg pills. Both medications were prescribed by Physician A to a purported patient named D.M.H., who was not present with Person A in the vehicle. During an interview with Person A, he confessed to regularly obtaining prescriptions from Physician A for himself and other purported patients. Person A admitted to compensating Physician A

approximately \$100 to "consult" with him, receive a prescription, and provide Person A with their identification and prescription to be filled at Keystone. On the specified date, Mr. Obute permitted Person A to utilize a photocopied driver's license belonging to D.M.H. to acquire drugs, which Mr. Obute knew were unlawfully prescribed by Physician A. Person A disclosed that he paid Mr. Obute \$400 in cash for D.M.H.'s prescription. From August 2018 to August 2021, a significant portion of the drugs dispensed by Mr. Obute to patients of Physician A, Keystone's primary prescriber, comprised hydrocodone 10-325mg or carisoprodol 325mg, often both, in combination. The investigation revealed that between September 2018 and September 2021, Mr. Obute distributed a minimum of 406,000 hydrocodone 10-325mg pills prescribed by Physician A. Additionally, it was determined that between September 2018 and September 2021, Mr. Obute distributed an undisclosed quantity of carisoprodol. Mr. Obute accrued at least \$4,000,000 in profit from his involvement in the criminal conduct.

II. Arrest and Charges

On December 20, 2021, the Government lodged a two-count Indictment against Mr. Obute in the Southern District of Texas

(Houston Division). These charges accused him of aiding and abetting the unlawful distribution and dispensing of controlled substances without a legitimate medical purpose and beyond the confines of his professional practice, contravening 21 U.S.C. § 841(a)(1), (b)(1)(C), and 18 U.S.C. § 2 (Counts One and Two). The Indictment also included notification of criminal forfeiture for Mr. Obute. Subsequently, the Court appointed counsel to represent Mr. Obute against the alleged offenses. However, Mr. Obute later opted to retain counsel for his trial proceedings.

III. Plea and Sentencing.

Mr. Obute later opted to waive his right to a jury trial and instead entered into a Plea Agreement with the prosecution. According to the terms of this agreement, Mr. Obute agreed to plead guilty to Count Two of the Indictment, which accused him of unlawfully distributing and dispensing controlled substances without a legitimate medical purpose and outside the scope of professional practice, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), and 18 U.S.C. § 2. As part of the Plea Agreement, Mr. Obute acknowledged and accepted a factual summary, admitting to his knowing involvement in the offense conduct within the Southern District

of Texas and acknowledging that all elements of the crime charged were met.

Furthermore, Mr. Obute affirmed in the Plea Agreement that he would relinquish his right to appeal or collaterally challenge his conviction or sentence, except under narrowly defined circumstances such as a claim of ineffective assistance of counsel. Additionally, he agreed to the application of a base offense level of 34 for sentencing, along with a 2-level enhancement for abuse of a position of trust or use of a special skill, and a 2-level enhancement for a leadership role.

In return for Mr. Obute's concessions, the Government committed not to pursue any further charges against him based on the conduct underlying his guilty plea and agreed to dismiss any remaining counts in the pending Indictment. The case of Mr. Obute was presented before the Honorable David Hittner, United States District Judge for the Southern District of Texas, for a plea hearing on August 4, 2022. During this hearing, Mr. Obute confirmed his guilty plea in alignment with the terms outlined in his Plea Agreement. Following Mr. Obute's in-court affirmations, the District Court duly acknowledged and accepted the

defendant's guilty plea. Subsequently, the Court proceeded with the sentencing phase:

I find the defendant's plea of guilty is voluntarily and knowingly made and that the defendant understands the nature of these proceedings and understands the consequences of his plea of guilty. Upon your plea of guilty, I find you guilty as charged in the one count to which you pled, and I will consider the parties' plea agreement before the imposition of sentence.

Following the preparation of a Presentence Investigation Report (PSR) by the Probation Office for Mr. Obute's sentencing, it was initially calculated that his offense level was 37, with a criminal history category of I. The base offense level of 34 was determined pursuant to United States Sentencing Guidelines § 2D1.1(c)(3). The PSR then applied various adjustments, including a 2-level upward adjustment for maintaining premises for the purpose of distributing a controlled substance, a 2-level upward adjustment for abuse of a position of trust or special skill, a 2-level upward adjustment for acting as an organizer or leader in the offense, and a 3-level downward adjustment for acceptance of responsibility. Due to Mr. Obute's lack of a prior criminal history, he was assigned zero criminal history points.

With a total offense level of 37 and a criminal history category of I, the Guidelines recommended a sentencing range of imprisonment from 210 to 262 months. Mr. Obute's trial counsel filed objections to the PSR, primarily contesting the 2-level increase for maintaining premises for distributing controlled substances. After considering the arguments presented by both parties and the factors outlined in 18 U.S.C. § 3553(a), the District Court imposed a sentence at the lower end of the Guidelines range for Mr. Obute. Consequently, Mr. Obute was sentenced to 210 months of imprisonment, followed by a 3-year term of supervised release.

Mr. Obute advanced his case to the appellate court. Nevertheless, his attorney submitted an *Anders v. California*, 386 U.S. 738 (1967) brief, indicating no meritorious grounds for appeal, despite the presence of a substantive issue warranting review. This filing raises concerns regarding the adequacy of counsel's representation, as it appears to overlook a potentially significant avenue for legal challenge. Such an oversight not only undermines the effectiveness of the appellate process but also jeopardizes Mr. Obute's right to a fair consideration of his appeal.

On appeal Mr. Obute argued that his appellate waiver was not knowingly based on the PSI enhancement for the 2-level increase associated with maintaining premises for the purpose of distributing a controlled substance, as outlined in § 2d1.1(b)(12). Mr. Obute argued that the plea agreement outlined the defendant's deliberate and voluntary relinquishment of the right to appeal or review any contention that (1) the statute they're pleading guilty to is unconstitutional, and (2) the admitted behavior doesn't fall under the statute's purview. In essence, Mr. Obute's actions did not justify the PSI enhancement for the 2-level increase associated with maintaining premises for the purpose of distributing a controlled substance, as outlined in § 2d1.1(b)(12), thus he was not bound by the appellate waiver. The Fifth Circuit Court of Appeals affirmed his conviction adopting counsel's *Anders* brief.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides relevant parts as follows:

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review of writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons, therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a ... United States court of appeals has decided an important question of federal law which has not been but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.

Id. Supreme Court Rule 10.1(a), (c).

ARGUMENT

I. DOES A DEFENDANT'S WAIVER OF APPELLATE RIGHTS IN A PLEA AGREEMENT, WHICH EXPLICITLY RESERVES THE RIGHT TO CHALLENGE THE CONSTITUTIONALITY OF A STATUTE AND THE APPLICABILITY OF THE DEFENDANT'S BEHAVIOR UNDER THE STATUTE, REMAIN ENFORCEABLE WHEN THE PRESENTENCE INVESTIGATION REPORT APPLIES AN ENHANCEMENT UNDER § 2D1.1(B)(12) FOR MAINTAINING PREMISES FOR THE PURPOSE OF DISTRIBUTING A CONTROLLED SUBSTANCE, IF THE DEFENDANT'S ACTIONS FALL OUTSIDE OF THE SCOPE OF § 2D1.1(B)(12)?

The plea agreement entered into by Mr. Obute contained a provision which ostensibly waived his rights to both appeal and seek collateral relief. This waiver, broad as it may appear, was delineated with specific limitations that directly impact its applicability to the present circumstances. Notably, the plea agreement explicitly limited the waiver to appeals challenging the constitutionality of the statute under which Mr. Obute was charged or asserting that his admitted conduct fell outside the statutory scope. Therein lies the crux of the issue: the plea agreement did not encompass guideline enhancements, such as the 2-level increase for maintaining premises for drug distribution under U.S.S.G. § 2D1.1(b)(12).

This critical distinction was seemingly overlooked by all parties involved, including defense counsel, as evidenced by their objections and apparent belief at the time of plea that guideline determinations remained appealable. This misinterpretation underscores the fundamental principle that ambiguities in waiver agreements must be construed against the drafter, particularly in the criminal context where the stakes—liberty and fairness—are at their highest.

Given this backdrop, it is imperative to assert that the appellate waiver, as drafted and understood by the parties, fails to bar Mr. Obute's right to contest the guideline enhancements that were objected to at sentencing. The application of the waiver to the current appeal would not only misrepresent its intended scope but would also unjustly curtail Mr. Obute's appellate rights under a misapprehension of the agreement's terms. It is therefore argued that the court should adopt a narrow interpretation of the appellate waiver, aligning with principles of justice and contractual interpretation, to ensure that Mr. Obute retains his rightful access to appellate review concerning disputed guideline enhancements. This approach not only respects the explicit language of

the plea agreement but also safeguards the essential procedural rights that are foundational to the integrity of our judicial system.

The interpretation of appellate waivers should be narrowly tailored to encompass only explicit and clearly defined limits, as dictated by the plea agreement's terms and any ambiguity will be read against the government. *United States v. Hartley*, 34 F.4th 919, 922 (10th Cir. 2022) (Waivers of appellate rights in a plea agreement are to be construed narrowly and any ambiguity will be read against the government and in favor of the defendant's appellate rights.) *United States v. Cockerham*, 237 F.3d 1179 (10th Cir. 2001).

This position is grounded in the preservation of constitutional safeguards and the necessity of maintaining the integrity of the judicial process. The essence of a just legal system is its steadfast protection of fundamental rights. Broad appellate waivers, as applied in this case, threaten to undermine these rights by potentially precluding substantive appeals on matters beyond the direct scope of the statute's constitutionality or the applicability of the admitted conduct to the statutory provisions. The Fifth Circuit has taken an opposite position enforcing broad appellate waivers but refusing to examine the correction of

the waiver. See, *United States v. McAbee*, No. 22-60565, 2023 U.S. App. LEXIS 30569 (5th Cir. Nov. 16, 2023), quoting *United States v. Bond*, 414 F.3d 542, 544-46 (5th Cir. 2005); see also *United States v. Meredith*, 52 F.4th 984, 987-88 (5th Cir. 2022) (quoting *United States v. Smith*, 404 F. App'x 884, 887 (5th Cir. 2010) (*per curiam*) ("We enforce broad appellate waivers and have declined to examine the correctness of applying a particular guideline where the defendant has agreed to a general waiver of the right to appeal the sentence.") This Court needs to address the Fifth Circuit's position for clarity.

It is paramount that waivers of appeal not be so expansive as to bar challenges to convictions on grounds that could reveal constitutional violations. Limiting the scope of such waivers to specific issues—such as the constitutionality of the statute and the relevance of the conduct to the statute—allows defendants to retain the capability to assert their constitutional rights effectively. A narrow interpretation of appellate waivers aids in ensuring that defendants, like Mr. Obute, are fully aware of what rights they relinquish in a plea bargain. Broad and ambiguous waivers risk leading defendants to unknowingly forfeit substantial legal protections, which is antithetical to the principles of informed consent and

voluntariness. A waiver clearly limited to certain aspects of legal challenge, as argued here, is more likely to be entered into knowingly and voluntarily, thus upholding the procedural justice the Court has long sought to preserve.

This Court has consistently held that rights are not to be waived lightly or inadvertently. The principle that waivers of fundamental legal rights must be clear, unequivocal, and not presumed aligns directly with the necessity for narrow construction. Mr. Obute argues that a broad interpretation of appellate waivers, where the defendant could inadvertently waive the right to appeal substantive procedural and sentencing errors, deviates from established legal standards which favor precise and unambiguous terms in waiver agreements.

By this Court adopting a standard that encourages clear and narrowly defined waivers, the Court will foster a more efficient judicial system. Defendants may be more inclined to accept plea agreements, understanding that while they waive certain rights, they retain the ability to appeal on significant issues. This balance between efficiency and fairness can reduce court burdens while ensuring that justice is duly served. However, broadly construed waivers may result in unintended and

unjust consequences, such as preventing a defendant from appealing significant legal errors that do not pertain to their guilt or innocence. By limiting the scope of waivers, the Court ensures that justice is administered in a balanced and equitable manner.

Furthermore, protecting appellate rights enhances public trust in the criminal justice system. Allowing defendants the opportunity to appeal based on constitutional grounds or discrepancies between their conduct and the statute creates a perception of fairness and legitimacy within the legal process. In essence, advocating for a narrowly construed appellate waiver, in contrast to the overly broad one at issue in this case, is essential for upholding constitutional rights, ensuring judicial fairness, and sustaining public confidence in the justice system. This approach rightly balances the efficiency of plea bargaining with the imperative to protect fundamental legal rights. An appellate waiver is enforceable if entered into knowingly and voluntarily, as established in *United States v. Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993) (A waiver-of-appeal provision is enforceable when either of two circumstances are present: "(1) the district court specifically questioned the defendant concerning the sentence appeal waiver during the Rule 11 colloquy, or (2) it is manifestly clear from the

record that the defendant otherwise understood the full significance of the waiver."); *United States v. Boyd*, No. 3:02-CR-0235-H (02), 2007 U.S. Dist. LEXIS 97663, at *10 (N.D. Tex. Mar. 6, 2007) (To determine whether a waiver was made knowingly and voluntarily, the government must demonstrate that either: (1) the district court specifically addressed the waiver with the defendant during the plea colloquy, or (2) the record clearly shows that the defendant understood the full implications of the waiver); *United States v. Chi*, No. 22-12135, 2023 U.S. App. LEXIS 1329, at *2 (11th Cir. Jan. 19, 2023). In the present case, the waiver suffered from a lack of clarity and this court should intervene.

a. Mr. Obute's objection to the imposition of a 2-level enhancement for maintaining a premises for the purpose of distributing a controlled substance was well-founded and deserved consideration.

The application of a sentencing enhancement under U.S.S.G. § 2D1.1(b)(12), which mandates that such an enhancement should only apply if the premises in question were used "primarily or principally" for the distribution of illegal drugs. The District Court's decision to apply a two-level increase to Mr. Obute's sentence based on the use of a property for drug-related activities necessitates a thorough judicial review to ensure adherence to the sentencing guidelines and judicial precedent.

Per the directives of U.S.S.G. § 2D1.1(b)(12), an enhancement is justifiable solely when the illicit activities constitute the primary or principal function of the property. This principle is reinforced by the Fifth Circuit in *United States v. Galicia*, 983 F.3d 842, 844 (5th Cir. 2020), which clearly delineates the conditions under which such enhancements are applicable. In contrast, Mr. Obute challenges the factual foundation for this enhancement, positing that the evidence does not support a finding that the drug-related activities were the predominant use of the property.

Given that the question of whether the property was primarily used for drug distribution is a factual one, this Court's review for clear errors is guided by the precedent set in *United States v. Guzman-Reyes*, 853 F.3d 260, 263 (5th Cir. 2017). The scrutiny under this standard is crucial to determine if the District Court's application of the enhancement was indeed justified by the evidence presented.

This inquiry not only affects Mr. Obute but also serves a broader judicial function by ensuring that sentencing enhancements are imposed strictly within the confines of the Guidelines. This rigorous adherence to the legal framework ensures fairness in sentencing and maintains the integrity of judicial proceedings. It is therefore imperative for this Court

to examine the factual basis of the District Court's decision regarding the two-level increase and to evaluate its consistency with the sentencing guidelines and established case law.

In the case before this court, the District Court imposed a two-level premises enhancement on Mr. Obute based on activities conducted at *his pharmacy*, his primary place of employment, not his residence. It is important to clarify that the main function of a pharmacy is to lawfully dispense medications. The basis of the premises enhancement under U.S.S.G. § 2D1.1(b)(12), which is typically applied to properties primarily used for illegal drug activities, does not align with the primary operations of a pharmacy. The court's decision draws an uneasy parallel with the precedent in *United States v. Eustice*, 952 F.3d 686, 2020 U.S. App. LEXIS 8540 (5th Cir. 2020) (sentence enhancements were justified based on clear evidence that the *defendant's residence* was used for distributing methamphetamine.) In contrast, the record in Mr. Obute's case substantiates that Keystone Pharmacy operated predominantly within the bounds of his DEA licensure, dispensing legal medications. Although the indictment alleges illegal drug distribution, these claims do not overshadow the legal activities that principally took place at the

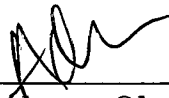
pharmacy. Moreover in *United States v. Ajayi*, 64 F.4th 243, 250 (5th Cir. 2023) sets a relatively low threshold for proving a premises was used primarily for illegal activities, yet even this threshold has not been convincingly met in Mr. Obute's case. It must be demonstrated *conclusively* that the pharmacy was used predominantly for illegal distribution for the enhancement under § 2D1.1(b)(12) to apply. The evidence does not support such a conclusion. Furthermore, the decision to deny an *Anders* Brief, which is typically reserved for instances where legal counsel considers an appeal to be without merit, undermines Mr. Obute's right to a comprehensive review of his case. Such a decision restricts his opportunity to contest the application of the enhancement and to seek relief for potential legal or constitutional errors identified during his trial. Each aspect of Mr. Obute's trial warrants thorough scrutiny to uphold the integrity of the judicial process and ensure his right to effective legal representation and a fair appeal.

Thus, this court should grant this writ of certiorari, remanding the matter to the lower court to establish a precedent as to when a premises was used primarily for illegal activities as per § 2D1.1(b)(12), versus a legitimate business venture.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand to the Court of Appeals for the Fifth Circuit.

Done this 30, day of April 2024.



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