No. _____

In The

Supreme Court of the United States

DWAYNE LEE STALLINGS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the case below, the Fourth Circuit found that the district court erred and erred plainly by violating Federal Rule of Criminal Procedure 32(i)(1)(A). That rule requires that the sentencing court "must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report." Fed. R. Crim. P. 32(i)(1)(A). However, the Fourth Circuit refused to find that the error affected Petitioner's substantive rights because there was no indication it directly affected his sentence. The first question presented is:

Whether the Court's plain error analysis is properly applied to violations of Fed. R. Crim. P. 32(i)(1)(A), and, if so, whether such violations are structural.

2. Also in this case, the Court of Appeals upheld an enhancement for obstruction of justice under U.S.S.G. § 3C1.1 where Petitioner induced a girlfriend to submit a false written statement to the police claiming she owned the firearm at issue in Petitioner's case. There was no evidence in the record that law enforcement ever believed her or took any action on account of this false statement. Under the Application Note 5(b), this enhancement does not apply for "making false statements, not under oath, to law enforcement officers, unless Application Note 4(g) above applies." U.S.S.G. § 3C1.1, Note 5(b). Note 4(g) references "providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense." U.S.S.G. § 3C1.1, Note 4(g). The second question presented, therefore, is:

Whether procuring a false statement to police not under oath which does not in fact significantly impede an investigation is a proper basis for enhancement under U.S.S.G. § 3C1.1.

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This petition is appealed from is the Per Curiam Opinion and Judgment located at the CM/ECF Docket of *United States v. Stallings*, Fourth Circuit Case No. 18-4389, Docket Entry Nos. 37 and 38, affirming a criminal sentence and judgment in the Eastern District of North Carolina, *United States v. Stallings*, E.D.N.C. No. 4:17-cr-00066-BO-1. These are attached to this petition. (Appendix A and B).

JURISDICTIONAL STATEMENT

This petition for writ of certiorari is from a final judgment by the Fourth Circuit Court of Appeals on March 17, 2019, in a direct appeal of a sentence imposed against Petitioner Dewayne Lee Stallings in the United States District Court for the Eastern District of North Carolina for a criminal violation of 18 U.S.C. § 922(g). Accordingly, this Court has jurisdiction over this petition for writ of certiorari and the matter referenced herein pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2101.

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend V.

STATEMENT OF THE CASE

On December 20, 2017, Mr. Stallings was named in a one count Indictment charging him with possession of a firearm on or about October 24, 2017, in violation of 18 U.S.C. § 922(g). [J.A. at 6-8.][1] No other codefendants were charged in the

[1]Record citations are to the Joint Appendix filed with the Fourth Circuit Court of Appeals.

Indictment. [J.A. at 6-8.] Mr. Stallings was arraigned on the Indictment on February 21, 2018. [J.A. at 3.] At that time, Mr. Stallings pled guilty without a written plea agreement. [J.A. at 9-22].

A Pre-Sentence Investigation Report (hereinafter "PSR") was prepared. In the Pre-Sentence Report below, the Probation Officer wrote the following description of the Mr. Stallings' offense conduct:

> 6. On October 10, 2017, law enforcement in Craven County, North Carolina, intercepted a phone call between **DWAYNE LEE STALLINGS** and Calvin Mark Wilson. Wilson was the subject of an investigation by authorities for his role as the leader of a drug trafficking organization (DTO) based in New Bern, North Carolina. Information obtained from confidential informants identified **STALLINGS** as a member of the DTO. During the aforementioned phone call, investigators learned that **STALLINGS** was in possession of a firearm and possibly narcotics at his residence in Cove City, North Carolina. Based on this information, law enforcement subsequently obtained a search warrant for the premises.
>
> 7. On October 24, 2017, a search of **STALLINGS'** residence was conducted and uncovered **a stolen loaded .223 MP-15 rifle with a 30 round magazine, 9 rounds of .44 caliber ammunition**, and $6,000 in U.S. currency divided into six separate stacks of 10 $100 bills. The currency was found in safe surrounded by dryer sheets. The firearm was reported stolen from a vehicle in New Bern on June 19, 2017. No drugs or drug paraphernalia were found during the search of the dwelling during which **STALLINGS** was not present. As **STALLINGS** was identified as a convicted felon, a warrant for his arrest was issued. Several hours later, Mariah Ward (unindicted) arrived at the New Bern Police Department (NBPD) and claimed ownership of the firearm found during the search of **STALLINGS'** residence. Ward signed a written statement to this effect which she submitted to investigators. Shortly thereafter, **STALLINGS** arrived at the NBPD and was placed under arrest for Possession of a Stolen Firearm.
>
> 8. On November 21, 2017, while testifying before a federal grand jury, Ward stated that the firearm in question belonged to **STALLINGS**. Ward went on to explain that **STALLINGS** convinced her to tell police that she was the owner of the firearm because he was a felon and could not possess a gun.

> 9. Based on the aforementioned information, **STALLINGS** is responsible for possessing an assault style firearm with a high capacity magazine after having been convicted of a felony. In addition, the firearm **STALLINGS** possessed was stolen. **STALLINGS** further tried in vain to have a third party claim ownership of the aforementioned firearm in an attempt to mislead investigators. Although there was evidence that **STALLINGS** was part of a drug trafficking organization, there is insufficient evidence to show that he possessed the firearm in this offense with drug trafficking activity. On March 8, 2018, **STALLINGS** submitted a written statement to the United States Probation Office accepting responsibility for possessing a firearm.

[J.A. at 78-79 (emphasis in the original).]

The Probation Officer calculated Mr. Stallings base offense level at 22 pursuant to U.S.S.G. § 2K2.1(a)(3) and found two enhancements to be applicable. The first enhancement was two levels for the firearm being stolen, pursuant to U.S.S.G. § 2K2.1(b)(4). The Probation Officer also enhanced another two levels for obstruction of justice enhancement pursuant to U.S.S.G. § 3C1.1. [J.A. at 88-89.] The Probation Officer thus calculated Mr. Stallings Adjusted Offense Level at 26, and decreased three levels for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1. [J.A. at 89.] This resulted in a total offense level of 23. [J.A. at 89.] With a criminal history category of IV, the Probation Officer initially calculated the guideline imprisonment range at 70 to 87 months. [J.A. at 89.]

Both the Government and trial counsel for Mr. Stallings submitted written objections. On April 23, 2018, counsel for Mr. Stallings filed a written objection to the two level increase for obstruction of justice. [J.A. at 70-72.] Also on April 23, 2018, the Government filed on objection to the First Draft Presentence Report, arguing that a four level enhancement pursuant to U.S.S.G. § 2K2.1(b)(6)(B) should

be applied, and contending that Mr. Stallings possessed the firearm in connection with drug dealing activity. [J.A. at 73-75.] The Probation Officer declined to adopt either objection to the Final Presentence Report.

On May 30, 2018, the trial court conducted a sentencing hearing in the case. [J.A. at 23-60.] Contrary to the requirements of Rule 32(i)(1)(A) of the Federal Rules of Criminal Procedure, at no time in the hearing did the trial court ever inquire of Mr. Stallings or his counsel whether or not Mr. Stallings read the Presentence Report or discussed it with his attorney. [J.A. at 23-60.] Nor did Mr. Stallings or his trial counsel make any statements affirming that he had read the Presentence Report and discussed it with his attorney. [J.A. at 23-60.]

At the beginning of the hearing, the two objections to the Presentence Report were noted by counsel. [J.A. at 24-26.] The government called the case agent, Detective Doyle, who was the only witness who testified at the hearing. [J.A. at 26-39.]

On direct examination, Detective Doyle testified that Mr. Stallings had been identified in connection with drug trafficking organizations in and around the New Bern and Craven areas of North Carolina. [J.A. at 27.] As a result of this investigation, Mr. Stallings was picked up in a wiretap surveillance talking with the primary target of that investigation, Calvin Wilson. [J.A. at 28-29.]

On October 10, 2017, Mr. Stallings was involved in a domestic incident at his home where one of his girlfriends was in the process of ramming his car with her own vehicle, causing damage to it. Mr. Stallings called 911 and then panicked because he realized he was in the possession of illegal contraband. [J.A. at 28-29.]

In their recorded conversation, Mr. Stallings was asking Calvin Wilson to intervene because his girlfriend was ramming his car and their mutual child was still in the car being rammed. [J.A. at 29-30.] Mr. Stallings told Calvin Wilson that he was "dirty" and that he was going to "keep it 100." [J.A. at 29.] When asked what keeping at 100 and being dirty meant, Detective Doyle testified that it meant "he was in possession of illegal contraband, whether it be drugs or firearms, and that keeping at 100 was he was telling the truth." [J.A. at 30.]

Detective Doyle also testified to a second phone call, in which Mr. Stallings told Calvin Wilson that the law was enroute, and that he had "Fat Boy" stash something in the woods and that he had a "chopper" in the residence. [J.A. at 32.] "Fat Boy" was identified as an individual named Ontario Webb, and a "chopper" referred to a semiautomatic rifle. [J.A. at 32.]

After this call, Detective Doyle obtained a search warrant for Mr. Stallings' residence. [J.A. at 32-33.] The search took place on October 24, 2017, and law enforcement found a Smith & Wesson .223 caliber rifle with a 30 round magazine. [J.A. at 33.] In addition, Detective Doyle testified that they located in addition to the firearm, a number of .44 caliber rounds, and a false wall within the closet that had a floor safe that contained $6,000.00. [J.A. at 34.] In addition, there were dryer sheets in the safe, which the case agent stated are common to mask the odor of various drugs. [J.A. at 34.]

Mr. Stallings was not present when officers executed the search warrant, and several law enforcement officers attempted to locate him at various known locations.

One of the sergeants contacted another girlfriend's mother, and she was able to get him to turn himself in. [J.A. at 35.]

Detective Doyle testified that the second girlfriend, Ms. Mariah Ward, had indicated that the firearm that was at the premises was hers. [J.A. at 35.] It was her mother who contacted Mr. Stallings and convinced him to turn himself in. [J.A. at 36-38.] Later, Detective Doyle interviewed Ms. Ward, who indicated that Mr. Stallings asked her to lie on his behalf to the police. [J.A. at 38.]

On cross examination, Detective Doyle confirmed that when law enforcement executed the search warrant and found the gun, no drugs were found. [J.A. at 39.]

At the end of the argument, the trial court found that by a preponderance of the evidence, the government had satisfied "that there's sufficient evidence that would warrant an inclusion of the four-level enhancement and obstruction of justice." [J.A. at 41.]

As a result the trial court found that the total offense level to be 27, with a criminal history category of IV, and that Mr. Stallings' advisory Sentencing Guidelines range was 100 to 120 months. [J.A. at 42.] After hearing argument from counsel, the trial court stated:

> Okay. I'll incorporate the argument by the government into the factors that I find to support a ruling under 3553(a). I think he has a significant criminal history, that he was engaged in a very dangerous and wide-reaching criminal activity, at the time of his arrest that the charge of being a felon in possession under-represents the level of his criminality and the examination of criminal history that would support that, I think a sentence within the guideline range is appropriate.

[J.A. at 46.]

The Court then sentenced Mr. Stallings to 108 months imprisonment and three years of supervised release. [J.A. at 46.] Finally, the trial court, in its only reference to Mr. Stallings' appeal rights, stated "And he can appeal to the Court of Appeals, he didn't have a plea agreement. [J.A. at 47.] A written judgment was filed the same day. [J.A. at 61-67.]

On June 6, 2018, Mr. Stallings filed a timely notice of appeal to the Court of Appeals. [J.A. at 68-69.]

On direct appeal, Mr. Stallings through the undersigned counsel argued that his sentence was not procedurally reasonable, in that the trial court made four procedural errors during sentencing.

The first error was a violation of Fed. R. Crim. P. 32(i)(1)(A), which requires that the sentencing court "must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report." Fed. R. Crim. P. 32(i)(1)(A). That did not happen in this case, requiring a resentencing under Fourth Circuit precedent. "The district court must, without exception, determine that a defendant has had the opportunity to read and discuss the presentence investigation report with his counsel." *United States v. Miller*, 849 F.2d 896, 897–98 (4th Cir. 1988) (holding that "a bright-line approach is mandated by the clear language of Rule 32").

The second and most relatively minor error was a violation of Fed. R. Crim. P. 32(j)(1)(C) which requires that a trial court advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal *in forma pauperis*. Fed. R. Crim. P. 32(j)(1)(C). This did not happen for Mr. Stallings.

Third, Mr. Stallings argued that the trial court erred substantively by finding that the firearm at issue in this case was used in connection with another state or federal felony offense under U.S.S.G. § 2K2.1(b)(6)(B). That Sentencing Guidelines enhancement applies a defendant who "used or possessed any firearm or ammunition in connection with another felony offense" is subject to a four-level enhancement. U.S. Sentencing Guidelines Manual § 2K2.1(b)(6)(B) (2016). "Subsection[ ] (b)(6)(B) ... appl[ies] if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense." USSG § 2K2.1 cmt. n.14(A).

Mr. Stallings argued that the trial court erred in overruling the Probation Officer, who noted that there was simply no evidence of Mr. Stallings' possessing this firearm in the vicinity of drugs, drug-manufacturing materials, or drug paraphernalia. [J.A. at 91.] At the sentencing hearing, the only such evidence available was the presence of dryer sheets in a safe. [J.A. at 34.]

Fourth, Mr. Stallings argued that the trial court erred in applying the obstruction of justice enhancement under U.S.S.G. § 3C1.1. Petitioner noted that the evidence presented to the trial court was that Mr. Stallings convinced a girlfriend to go to the police and submit a false written statement to them that the firearm in question was hers. There was no evidence in the record that law enforcement ever believed this to be the case or took any action on account of the false statement to law enforcement. Nor there is no evidence in the record that his girlfriend ever made any statements under oath or that Petitioner attempted to persuade her to commit perjury.

Petitioner argued that this distinction is critical under the Application Notes to U.S.S.G. § 3C1.1, in that under Application Note 5(b), the sentence enhancement under § 3C1.1 does not apply for "making false statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies." Therefore, not all false statements to law enforcement officers automatically incur the sentence enhancement. Petitioner quoted Fifth Circuit precedent that "[o]nly material statements that significantly impede the investigation shall qualify." *United States v. Ahmed*, 324 F.3d 368, 372 (5th Cir. 2003) (citing § 3C1.1, cmt. n. 4(g)).

Petitioner argued that other circuits also held that statements "which do not cause investigators to expend any additional resources on their investigation are not the type of statements which significantly impede the investigation." *Ahmed*, 324 F.3d at 372-73 (citing *United States v. Surasky*, 976 F.2d 242, 247 (5th Cir.1992); *United States v. Griffin*, 310 F.3d 1017, 1022–23 (7th Cir. 2002) *(United States v. Phillips*, 210 F.3d 345, 349 (5th Cir. 2000). Accordingly, Petitioner argued that the trial court did not analyze U.S.S.G. § 3C1.1 under the proper commentary note, and as a result erred and plainly erred in applying it.

In addition to these procedural errors, Mr. Stallings argued that because his sentence was driven by an improperly enhanced sentencing guideline range this affected a number of the 18 U.S.C. § 3553(a) factors, thereby rendering his sentence substantively unreasonable as well as procedurally unreasonable.

On March 18, 2019, the Fourth Circuit issued a *per curiam* opinion and judgment affirming the district court.

The Fourth Circuit agreed that the district court failed to inquire whether Mr. Stallings had read and discussed the PSR and that it was not clear from the record that Mr. Stallings had done so. *See* App. A at 3. The Fourth Circuit however, applied a plain error review because Mr. Stallings had not objected at sentencing. App. A at 2. The Fourth Circuit then concluded that Mr. Stallings did not show prejudice, and declined to vacate the sentence. App. A at 3.

Similarly, the Fourth Circuit held that Mr. Stallings did not show prejudice under a plain error review for the district court's failure to notify him that he would be eligible to appeal in forma pauperis. Id.

The Fourth Circuit then upheld the district court's finding that the four level firearm enhancement for possession in connection with another felony offense under a clearly erroneous standard of review. App. A. at 4. Without substantive discussion, the Fourth Circuit also upheld the district court's application of the obstruction of justice enhancement under U.S.S.G. § 3C1.1, and dismissed Mr. Stalling's substantive unreasonable argument. App. A at 5.

This petition follows.

REASONS FOR GRANTING CERTIORARI

I. The Court Should Grant Certiorari To Address The Standard of Review for Violations of Fed. R. Crim. P. 32(i)(1)(A) and Determine Whether Such Violations are Structural Error Under the Plain Error Analysis of *United States v. Olano,* 507 U.S. 725 (1993) and Subsequent Precedent.

Rule 32(i)(1)(A) requires that the sentencing court "must verify that the defendant and the defendant's attorney have read and discussed the presentence

report and any addendum to the report." Fed. R. Crim. P. 32(i)(1)(A). The Fourth Circuit has held in the past that "[t]he district court must, without exception, determine that a defendant has had the opportunity to read and discuss the presentence investigation report with his counsel." *United States v. Miller*, 849 F.2d 896, 897–98 (4th Cir. 1988) (reasoning that "a bright-line approach is mandated by the clear language of Rule 32").

The Fourth Circuit's language about a bright line approach to Rule 32(a)(1)(A) recognizes its structural importance to the sentencing process. Applying a plain error test to it in the manner done by the Fourth Circuit, however, vitiates the so-called "bright-line approach" due to the very nature of the rule being enforced. Specifically, if a trial counsel were to raise an objection that the trial court had failed to determine whether counsel discussed the Pre-Sentence Report with his client, it is hard to conceive of a situation where the matter would not be corrected during the hearing.

While this, of course, would be the desired outcome, it still presents an anomaly under the Court's case law concerning plain error under Rule 52(b) of the Federal Rules of Criminal Procedure.

In federal criminal cases, parties can preserve claims of error under Rule 51(b) "by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Fed. R. Crim. P. 51(b). Rule 52(b) also states: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

> Rule 52(b) permits an appellate court to recognize a "plain error that affects substantial rights," even if the claim of error was "not brought" to the district court's "attention." Lower courts, of course, must apply the Rule as this Court has interpreted it. And the cases that set forth our interpretation hold that an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an "error"; (2) the error is "clear or obvious, rather than subject to reasonable dispute"; (3) the error "affected the appellant's substantial rights, which in the ordinary case means" it "affected the outcome of the district court proceedings"; and (4) "the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Puckett v. United States,* 556 U.S. 129, ——, 129 S.Ct. 1423, 1429, 173 L.Ed.2d 266 (2009) (internal quotation marks omitted); see also *United States v. Olano,* 507 U.S. 725, 731–737, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *Johnson v. United States,* 520 U.S. 461, 466–467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); *United States v. Cotton,* 535 U.S. 625, 631–632, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002).

U.S. v. Marcus, 560 U.S. 258, 262 (2010).

Specifically, no error of this type would realistically be expected to occur in the trial court unless trial counsel failed to object to it. If, however, the error is subject to plain error analysis on review, such review is practically inconsistent with a putative bright line approach formally adopted by the Fourth Circuit and several others.

In the case, the Fourth Circuit found that the error occurred, and was plain error. However, because Mr. Stallings was not able to show how the error affected the outcome of his sentence, the Fourth Circuit did not remand for a new sentencing. App. A at 3.

> The Court repeatedly has reversed judgments for plain error on the basis of inadvertent or unintentional errors of the court or the parties below. *See, e.g., Silber v. United States,*370 U.S. 717, 717–718, 82 S.Ct. 1287, 8 L.Ed.2d 798 (1962) (*per curiam*) (reversing judgment for plain error as a result of insufficient indictment); *Brasfield v. United*

> *States,* 272 U.S. 448, 449–450, 47 S.Ct. 135, 71 L.Ed. 345 (1926) (reversing judgment for plain error where the trial judge improperly inquired of a jury's numerical division); *Clyatt v. United States,*197 U.S. 207, 222, 25 S.Ct. 429, 49 L.Ed. 726 (1905) (reversing judgment for plain error where the Government presented insufficient evidence to sustain conviction). The Court also "routinely remands" cases involving inadvertent or unintentional errors, including sentencing errors, for consideration of *Olano* 's fourth prong with the understanding that such errors may qualify for relief. *Hicks v. United States,* 582 U.S. ——, ——, 137 S.Ct. 2000, 2000–2001, 198 L.Ed.2d 718 (2017) (GORSUCH, J., concurring).

Rosales-Mireles v. United States, ___ U.S. ___, 138 S. Ct. 1897, 1906-7 (2018) "In the ordinary case, as here, the failure to correct a plain Guidelines error that affects a defendant's substantial rights will seriously affect the fairness, integrity, and public reputation of judicial proceedings." *Rosales-Mireles v. United States*, ___ U.S. ___, 138 S. Ct. 1897, 1911 (2018).

In addition to affecting the substantive outcome of a sentencing or other court procedure, there is an additional category of errors that the Court has considered to be structural.

> We recognize that our cases speak of a need for a showing that the error affected the "outcome of the district court proceedings" in the "ordinary case." *Puckett,* 556 U.S., at ——, 129 S.Ct., at 1429 (internal quotation marks omitted). And we have noted the possibility that certain errors, termed "structural errors," might "affect substantial rights" regardless of their actual impact on an appellant's trial. See *id.,* at ——, 129 S.Ct., at 1432 (reserving the question whether "structural errors" automatically satisfy the third "plain error" criterion); *Cotton, supra,* at 632, 122 S.Ct. 1781 (same); *Johnson, supra,* at 469, 117 S.Ct. 1544 (same); *Olano, supra,* at 735, 113 S.Ct. 1770(same). But "structural errors" are "a very limited class" of errors that affect the " 'framework within which the trial proceeds,' " *Johnson, supra,* at 468, 117 S.Ct. 1544 (quoting *Arizona v. Fulminante,*499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)), such that it is often "difficul[t]" to "asses[s] the effect of

> the error," *United States v. Gonzalez–Lopez,*548 U.S. 140, 149, n. 4, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

U.S. v. Marcus, 560 U.S. 258, 263 (2010).

> The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it "affect[s] the framework within which the trial proceeds," rather than being "simply an error in the trial process itself." *Id* ., at 310, 111 S.Ct. 1246. For the same reason, a structural error "def[ies] analysis by harmless error standards." *Id.,* at 309, 111 S.Ct. 1246 (internal quotation marks omitted).

Weaver v. Massachusetts, ___ U.S. ___, 137 S. Ct. 1899, 1907-8 (2017).

The failure to ensure that a criminal defendant has had the opportunity to discuss the basis for his sentencing with his lawyer is such a structural error. It is a fundamental breakdown of the modern sentencing hearing in a manner whereby it is often difficult to assess *ex post facto* the effect of such error. The Court should grant certiorari in order to address the standard of review for violations of Fed. R. Crim. P. 32(i)(1)(A) and determine whether such violations are structural error under the plain error analysis of *United States v. Olano,* 507 U.S. 725 (1993) and the Court's subsequent precedents.

II. The Court Should Grant Certiorari to Clarify the Meaning of U.S.S.G. § 3C1.1, Application Note 5(b).

Section 3C1.1 of the Sentencing Guidelines provides that "[i]f ... the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, ... increase the offense level by 2 levels." U.S.S.G. § 3C1.1. The Fourth Circuit's failure to enforce and apply the text

of the application notes of this guideline provision differs markedly from the caselaw of other circuits. The Court should grant certiorari to clarify and enforce the literal meaning of U.S.S.G. § 3C1.1, Application Note 5(b).

In this case, the evidence presented to the trial court was that Mr. Stallings convinced a girlfriend to go to the police and submit a false written statement to them that the firearm in question was hers. There is no evidence in the record that law enforcement ever believed this to be the case or took any action on account of the false statement to law enforcement. More critically, there is no evidence in the record that Ms. Ward ever made any statements under oath or that Mr. Stallings attempted to persuade Ms. Ward to commit perjury. [J.A. at 1-92.]

Under Application Note 5(b), the sentence enhancement under § 3C1.1 shall not apply for "making false statements, not under oath, to law enforcement officers, unless Application Note 4(g) above applies." U.S.S.G. § 3C1.1, Note 5(b). Application Note 4(g) identifies "providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense" as a basis for the enhancement. U.S.S.G. § 3C1.1, Note 4(g).

Unlike the Fourth Circuit below, other Circuits have recognized that not all false statements to law enforcement officers automatically incur this sentencing enhancement. *United States v. Phillips,* 210 F.3d 345, 349 (5th Cir.2000) ("The application notes to § 3C1.1 make clear that not all false statements to law enforcement justify the enhancement."). Application Note 6 in turn defines a

material statement as a statement that, "if believed, would tend to influence or affect the issue under determination." § 3C1.1, cmt. n. 6. "Only material statements that significantly impede the investigation shall qualify." *United States v. Ahmed*, 324 F.3d 368, 372 (5th Cir. 2003) (citing § 3C1.1, cmt. n. 4(g)).

Statements which lead officers on a misdirected investigation do qualify as significant impediments so as to give rise to the application of this enhancement. *See, e.g.*, *United States v. Phipps,* 319 F.3d 177, 191 (5th Cir. 2003) (finding that defendants' statements which misidentified an accomplice significantly impeded the investigation so as to warrant the enhancement).

"Conversely, courts have held that statements which do not cause investigators to expend any additional resources on their investigation are not the type of statements which *significantly* impede the investigation." *Ahmed*, 324 F.3d at 372-73 (citing *United States v. Surasky*, 976 F.2d 242, 247 (5th Cir.1992) (finding that even if the Court were to hold that the defendant's statements were more than mere denials of guilt, they still did not significantly impede the investigation into a prison escape attempt because a co-conspirator had already confessed to the defendant's involvement and other evidence also already pointed to the defendant's involvement); *United States v. Griffin, 310* F.3d 1017, 1022–23 (7th Cir. 2002) (holding that because there was no evidence that the defendant's statement impeded the official investigation, the statement alone could not support the obstruction enhancement); *United States v. Phillips*, 210 F.3d 345, 349 (5th Cir. 2000) (finding that a defendant's false statement to officers that he did not know who owned a

station wagon or the drugs it contained did not qualify for an obstruction of justice enhancement because the statement did not lead the officers on a misdirected investigation or impede the investigation)).

Accordingly, both the Fifth and the Seventh Circuit follow the plain language of Application Note 4(g), which "requires a causal relationship between the materially false statement given and a resulting impediment upon the investigation or prosecution." *Ahmed*, 324 F.3d at 373 (quoting *Griffin*, 310 F.3d at 1023).

The courts below, however, failed to analyze this enhancement under the proper commentary note, and as a result erred and clearly erred in applying it. The Court should grant certiorari in order to resolve the divergence by the Fourth Circuit from the clear text of the Guidelines and the position based thereon of the Fifth and Seventh Circuits.

CONCLUSION

For the above stated reasons, Petitioner respectfully requests that the Court grant this petition for writ of certiorari to the Fourth Circuit Court of Appeals, and also grant whatsoever other relief may be just and proper.

Respectfully submitted this the 13th day of June, 2019.

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