No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES EARL DAVIS, JR.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether factual error is categorically immune from plain error review?

PARTIES

Charles Earl Davis, Jr. is the petitioner; he was the defendant-appellant below. The United States of America is the respondent; it was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Earl Davis, Jr. respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court entered judgment on June 15, 2018, which judgment is attached as an appendix.[1] The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Davis*, 769 Fed. Appx. 129 (5th Cir. April 30, 2019)(unpublished), and is provided as an appendix to the Petition.[2]

JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on April 30, 2019.[3] This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULES AND SENTENCING GUIDELINES INVOLVED

Federal Rule of Criminal Procedure 52(b) provides:

> (b) PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Federal Sentencing Guideline 1B1.3(a) provides:

> (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were--
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> (i) within the scope of the jointly undertaken criminal activity,

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[1] [Appendix A].

[2] [Appendix B].

[3] *See* SUP. CT. R. 13.1.

(ii) in furtherance of that criminal activity, and
(iii) reasonably foreseeable in connection with that criminal activity;
that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense...

STATEMENT

A. Facts

On July 29, 2016, Petitioner Charles Earl Davis was approached by police in a parked car.[4] Smelling marijuana, the police ordered him out of his car.[5] After he complied, they found methamphetamine, ecstacy, and a firearm.[6]

A similar event had happened about ten months earlier. On October 4, 2015, Mr. Davis was riding in a car stopped for a broken tail light.[7] The police emptied the vehicle on account of a smell of marijuana, just as they would do again in ten months.[8] They found marijuana and a firearm on Mr. Davis's person, together with other guns and drugs in the car and on other passengers.[9]

These incidents extended a clear pattern. Mr. Davis was arrested for the possession of controlled substances in 2002, 2008, and 2010, and for gun possession in 2002 and 2003.[10]

B. District court proceedings

The federal government indicted Mr. Davis for the guns and methamphetamine found in his car during the July 19, 2016 stop.[11] He pleaded guilty, and a Presentence Report (PSR) found a Guideline range of 51-63 months imprisonment.[12] The PSR also noted four pending state charges.[13] Two of these – one for unlawful possession of a firearm, and one for delivery of a controlled

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[4] *See* (ROA.143)("ROA" refers of course to the record on appeal in the court below).

[5] *See* (ROA.143).

[6] *See* (ROA.143).

[7] *See* (ROA.155).

[8] *See* (ROA.155).

[9] *See* (ROA.155).

[10] *See* (ROA.146-154).

[11] *See* (ROA.9-10).

[12] *See* (ROA.49-53, 162).

[13] *See* (ROA.155-256).

substance – arose from the same July 29, 2016 conduct that produced the federal charges.[14] Two more – one for possession of a firearm, and one for possession of marijuana – arose from the October 4, 2015 traffic stop.[15]

The court sentenced the defendant to two concurrent terms of 57 months imprisonment on the instant federal charges.[16] Though the PSR contained no recommendation as to whether these charges should run concurrently or consecutively to the federal sentence, the court ordered the federal terms served concurrently with any state sentence that might arise from the July 29, 2016 arrest.[17]But it ordered consecutive service as to all other pending charges, including those arising from the October 4, 2015 arrest.[18]

C. Petitioner's contentions on appeal

On appeal, Petitioner argued that the district court plainly erred in failing to recognize the Guidelines recommendation for a concurrent sentence as to his pending state charges.[19] Specifically, he contended that the marijuana and firearm charge arising from the October 4, 2015, arrest arose from a "common course of conduct" as the instant federal offenses.[20] These offenses were similar to the instant gun and drug offenses, extended a pattern of similar offenses, and occurred within a year of the instant offenses.[21] As such, he argued, they plainly satisfied the test for a "common course of conduct" under the "relevant conduct" Guideline, USSG §1B1.3.[22] And while he conceded that

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[14]*See* (ROA.156); (PSR ¶54).

[15]*See* (ROA.1565; (PSR ¶¶52-53).

[16]*See* (ROA.133).

[17]*See* (ROA.135).

[18]*See* (ROA.135).

[19][Appendix C, at p. 5].

[20][Appendix C, at pp.6-9].

[21][Appendix C, at pp.8-9].

[22][Appendix C, at p.10].

a sentencing court is entitled to vary from the Guideline recommendation as to concurrent or consecutive sentencing, he noted that it is not presumed to do so on a silent record. [23]The plain contradiction between the sentence imposed and the Guideline recommendations on the concurrent/consecutive question, he argued, merited remand.[24]

In connection with this argument, Petitioner addressed Fifth Circuit case law regarding plain error review of factual questions.[25] Some Fifth Circuit precedent holds that "relevant conduct" determinations are factual in nature, and hence categorically immune from plain error review.[26] But Petitioner argued that the Fifth Circuit had in some cases afforded plain error review of "relevant conduct" determinations.[27] And he argued that the present case no disputed questions of fact, but only a disputed legal characterization of undisputed facts.[28] Finally, he maintained that *en banc* Fifth Circuit precedent and the precedent of this Court had abrogated the rule that factual error may never be plain.[29]

D. The government's contentions on appeal

The government argued that all "relevant conduct" issues are factual, and that all factual error is categorically immune from plain error review.[30] The overwhelming weight of Fifth Circuit

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[23][Appendix C, at p.9].

[24][Appendix C, at pp.10-14].

[25][Appendix C, at pp.6-16].

[26]*See United States v. McCaskey*, 9 F.3d 368, 376 (5th Cir. 1993); *United States v. Vital*, 68 F.3d 114, 118-119 (5th Cir 1995); *United States v. Pofahl*, 990 F.2d 1456, 1478-1479 (5th Cir. 1993); *United States v. Ables*, 2018 U.S. App. LEXIS 17169 (5th Cir. 2018)(unpublished).

[27][Appendix C, at p.10][citing *United States v. Ruiz*, 43 F.3d 985, 992 (5th Cir. 1994)(affording such review); *United States v. Garcia*, 588 Fed. Appx. 381, 381 (5th Cir. 2014)(unpublished)(same); *United States v. Buchanan*, 485 F.3d 274, 286-287 (5th Cir. 2007)].

[28][Appendix C, at pp.10-11].

[29][Appendix C, at pp.11-13].

[30][Appendix D, at pp. 9-11].

precedent, it argued, supported the rule that factual error may never be plain. It noted that the Fifth Circuit:

> has applied this rule over a hundred times [FN 2] - most recently, in *United States v. Melendez*, ____ F. App'x ____, 2018 WL 4781510 (5th Cir. Oct. 3, 2018), when the defendant attempted to attack the district court's "use of violence" enhancement of the defendant's sentence.
>
> [FN 2]
>
> In the interest of brevity, the government will not cite all of the cases that have applied this rule. Rather, it warrants to the Court that its Westlaw search turned up well over 100 cases in which the Court has resolved factual issues by applying the rule. In fact, the Court has applied the rule at least eleven times in the last two years. *See Melendez*, 2018 WL 4781510, at *2; *United States v. Owens*, 738 F. App'x 299, 299 (5th Cir. Sept. 19, 2018); *United States v. Ables*, 728 F. App'x 394, 394 (5th Cir. June 25, 2018); *United States v. Maxey*, 699 F. App'x 435 (5th Cir. Nov. 1, 2017); *United States v. Glaze*, 699 F. App'x 311, 311 (5th Cir. Oct. 16, 2017); *United States v. Oti*, 872 F.3d 678, 694 (5th Cir. Oct. 3, 2017); *United States v. Reynolds*, 703 F. App'x 295, 298 n.6 (5th Cir. Aug. 3, 2017); *United States v. Sphabmisai*, 703 F. App'x 275 (5th Cir. Aug. 1, 2017); *United States v. Bookout*, 693 F. App'x 332, 333 (5th Cir. July 13, 2017); *United States v. McCain-Sims*, 695 F. App'x 762, 766 (5th Cir. Jun. 12, 2017); *United States v. Ramirez-Castro*, 687 F. App'x 400, 400 (5th Cir. Apr. 25, 2017).[31]

E. The Fifth Circuit opinion

The Fifth Circuit affirmed, on the sole ground that Petitioner had raised "fact questions pertaining to whether the conduct underlying his previous arrest was sufficiently connected or related to the underlying offense to qualify as relevant conduct under U.S.S.G. § 1B1.3."[32] Further, it rejected any challenge to the prohibition on finding plain factual error as foreclosed by Fifth Circuit precedent.[33] And it declined to find any conflict between this rule and *United States v. Olano*, 507 U.S. 725 (1993).[34]

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[31][Appendix D, at pp. 9-10, & n.2][internal citation omitted].

[32][Appendix B, at p.2].

[33][Appendix B, at p.2].

[34][Appendix B, at p.2].

REASONS FOR GRANTING THE WRIT

The decision below conflicts with decisions of most other circuits, the precedent of this Court, and the plain text of Federal Rule of Criminal Procedure 52 on the important, recurring, question of whether factual error can ever be plain.

A. The decision below conflicts with that of other courts of appeals.

Federal Rule of Appellate Procedure 52 limits review of unpreserved error. When a party fails to object in district court, a court of appeals may offer relief only for "plain error."[35] The Rule contains a single restriction on the kind of plain error that is eligible for relief – such error must "affect[] substantial rights."[36] It does not mention any distinction between legal and factual error.

Nonetheless, the Fifth Circuit has held that factual error is categorically immune from plain error review.[37] This precedent – often termed "the *Lopez* rule" – is applied with striking frequency, and to a wide variety of "factual errors." These include simple misstatements of prior testimony,[38] and other matters of pure historical fact.[39] But they also include mixed questions of fact and law pertaining to the meaning of the sentencing Guidelines,[40] or the mathematical method by which drug

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[35]Fed. R. Crim. P. 52(b).

[36]*Id.*

[37]*See United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991).

[38]*See United States v. Carlton*, 593 Fed. Appx. 346, 348-349 (5th Cir. December 10, 2014)(unpublished)(erroneous recitation of trial testimony in support of Guideline enhancement), *cert. denied* __U.S.__, 135 S.Ct. 2399 (June 22, 2015).

[39]*See United States v. Sphabmisai*, 703 Fed. Appx. 275, 276 (August 1, 2017)(unpublished)(whether defendant actually undertook drug deliveries); *United States v. Hawkins*, 670 Fed. Appx. 309, 310 (5th Cir. November 9, 2016)(unpublished)(whether defendant fled law enforcement and damaged property).

[40]*See United States v. Rogers*, 599 Fed. Appx. 223, 225 (5th Cir. April 14, 2015)(application of USSG §1B1.3); *United States v. Glaze*, 2017 U.S. App. LEXIS 20173, at *2 (5th Cir. October 16, 2017)(unpublished)(sufficiency of nexus between firearm and other offense under USSG §2K2.1(b)(6)); *United States v. McCain-Sims*, 695 Fed. Appx. 762, 767 (June 12, 2017)(unpublished)(whether defendant's participation in offense is properly characterized as "minor").

quantity is calculated.[41] Further, the *Lopez* rule is applied to questions about whose merits the Court expresses no opinion,[42] and to plain and conceded errors resulting in obviously erroneous terms of imprisonment.[43] As the government commented below, there are "well over 100 cases in which the [c]ourt has resolved factual issues by applying the rule."[44]

The view of the Fifth Circuit conflicts with the decisions of other courts of appeals. As Justice Sotomayor observed in an opinion respecting the denial of certiorari, nine other circuits have applied plain error review to claims of factual error.[45] The Tenth Circuit has articulated a rule like that applied below,[46] but does not apply it when the defendant can show a high probability of success on remand.[47] In short, the courts of appeals are clearly divided.

B. This Court should resolve the circuit split.

1. This Court should overrule the prohibition on plain error review of factual error.

This conflict merits the Court's attention, for several reasons. First, the position of the Fuifth Circuit conflicts with the precedent of this Court, as Justice Sotomayor also observed.[48] This Court

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[41]*See United States v. Reynolds,* 703 Fed. Appx. 295, 298, n.6 (5th Cir. August 3, 2017)(unpublished)(method by which drug purity is averaged).

[42]*See Hawkins*, 670 Fed. Appx. at 310.

[43]*See Carlton*, 593 Fed. Appx. at 348-349.

[44][Appendix C, at pp.9-10, n.2].

[45]*See Carlton v. United States*, 135 S.Ct. 2399, 2400 & n* (June 22, 2015)(Sotomayor, J., opinion respecting denial of certiorari)(citing *United States v. Thomas*, 518 Fed. Appx. 610, 612-613 (11th Cir. 2013); *United States v. Griffiths*, 504 Fed. Appx. 122, 126-127 (3rd Cir. 2012)(unpublished); *United States v. Durham*, 645 F. 3d 883, 899-900 (7th Cir. 2011); *United States v. Sahakian*, 446 Fed. Appx. 861, 863 (9th Cir. 2011)(unpublished); *United States v. Romeo*, 385 Fed. Appx. 45, 50 (2d Cir. 2010)(unpublished); *United States v. Gonzalez-Castillo*, 562 F. 3d 80, 83-84 (1st Cir. 2009); *United States v. Sargent*, 19 Fed. Appx. 268 (6th Cir. 2001) (unpublished); *United States v. Wells*, 163 F. 3d 889, 900 (4th Cir. 1998); *United States v. Saro*, 24 F. 3d 283, 291 (D.C. Cir. 1994)).

[46]*See United States v. Overholt*, 307 F. 3d 1231, 1253 (2002).

[47]*See United States v. Dunbar*, 718 F. 3d 1268, 1280 (10th Cir. 2013).

[48]*See Carlton*, 135 S.Ct. at 2400 (Sotomayor, J., opinion respecting the denial of certiorari)("...in all the years since the doctrine arose, we have never suggested that plain-error review should apply differently depending on whether a mistake is characterized as one of fact or one of law.").

has cautioned against the use of *per se* rules in deciding what is and is not plain error.[49] A holding that no factual error can ever be plain is the quintessential example of such a *per se* rule. It is directly contrary to this Court's opinion in *Puckett*.

Second, and as again observed by Justice Sotomayor,[50] the Fifth Circuit's position directly conflicts with the text of Rule 52. The Rule demands only that error be plain and prejudicial in order to make the defendant eligible for relief.[51] Its language simply does not distinguish between factual and legal error. The courts are not at liberty to alter the plain text of Rule 52 where doing so would disrupt the careful balance it has struck.[52]

This view of the Rule is confirmed by the Advisory Notes. Both of the cases discussed in Rule 52's Advisory Notes suggest that factual plain errors are properly resolved on appeal even in the absence of objection. The 1944 Advisory Notes explain that:

> [the] rule is a restatement of existing law, *Wiborg v. United States*, 163 U.S. 632, 658; *Hemphill v. United States*, 112 F.2d 505 (C.C.A. 9th), reversed 312 U.S. 657. Rule 27 of the Rules of the Supreme Court (28 U.S.C., Appendix) provides that errors not specified will be disregarded, "save as the court, at its option, may notice a plain error not assigned or specified." Similar provisions are found in the rules of several circuit courts of appeals.[53]

Both *Wiborg* and *Hemphill* were criminal cases bearing on the power of the Court to review the sufficiency of evidence in the absence of an objection. *Wiborg* concerned a violation of the neutrality act committed on the high seas.[54] The defendants were accused of transporting a military expedition to Cuba; under the neutrality act, the defendants' guilt turned on whether they left the

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[49]*Puckett v. United States*, 556 U.S. 129, 142 (2009)("We have emphasized that a '*per se* approach to plain-error review is flawed.'")(quoting *United States v. Young*, 470 U.S. 1, 17, n. 14 (1985)).

[50]*See Carlton*, 135 S.Ct. at 2400 (Sotomayor, J., opinion respecting the denial of *certiorari*).

[51]*See* Fed. R. Crim. P. 52(b)("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.").

[52]*See Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-255 (1988).

[53]Fed. R. Crim. P. 52(b), advisory committee's notes (1944).

[54]*See Wiborg v. United States*, 163 U.S. 632, 654 (1896).

territorial waters of the United States intending to lead such an expedition.[55] Resolving the case, this Court noted the absence of a proper sufficiency objection on behalf of any defendant.[56] It nonetheless proceeded to reverse the conviction of one defendant on the grounds that there was insufficient evidence tending to show that the military nature of the trip was communicated to him prior to leaving U.S. territorial waters.[57] It pointed out:

> No motion or request was made that the jury be instructed to find for defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it.[58]

Wiborg accordingly refutes any notion that errors involving factual questions – such as the timing of criminal intent – are immune from reversal absent an objection.

The other case cited by the Advisory Notes as exemplary of "current law" is similar. In *Hemphill*, the court of appeals refused to consider the defendant's challenge to the sufficiency of the evidence in support of his conviction because it had not been raised in the appropriate forum.[59] This Court summarily reversed and remanded with instructions to the court of appeals to consider the sufficiency of evidence in support of the verdict.[60] Both cases thus emphasize the power of reviewing courts to reverse cases involving factual error even where no objection is lodged below. Nothing about Rule 52 – neither its text, nor its commentary, nor its history – suggests an intent to limit plain error review to purely legal questions.

Third, the *Lopez* rule depends on the capacity of circuit courts neatly to classify every claim

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[55] *See Wiborg*, 163 U.S. at 648-649, 655.

[56] *See id.* at 658.

[57] *See id.* at 659-660.

[58] *Wiborg*, 163 U.S. at 658.

[59] *See Hemphill v. United States*, 112 F.2d 505, 506 (9th Cir. 1940), *reversed by* 312 U.S. 657 (1941).

[60] *See Hemphill*, 312 U.S. at 658.

of error as either "factual" or "legal." This is not easy: the failure to adduce sufficient evidence on a given point, for example, may be understood either as the factual error of weighing the evidence incorrectly, or as the legal error of misapplying the correct legal standard. Similarly, the proper legal characterization of undisputed evidence may be described as either legal or factual.

The present case illustrates this point. The court below reasoned that claims "pertaining to whether the conduct underlying [Petitioner's] previous arrest was sufficiently connected or related to the underlying offense to qualify as relevant conduct under U.S.S.G. § 1B1.3" are necessarily factual.[61] But it might just as easily have understood the claim as a legal question: the meaning or application of the term "course of conduct" under USSG §1B1.3(a)(2) when the defendant's conduct is undisputed. Notably, the District of Columbia Circuit has held that many relevant conduct determinations are in fact mixed questions of fact and law, meriting a more stringent standard of review than "clear error."[62]

Fourth, and perhaps most importantly, the categorical prohibition on reversing plain factual error virtually invites miscarriages of justice. In many cases, it may be harder to describe factual than legal error as plain. But the categorical prohibition on reversing plain factual error surely encompasses many situations in which defendants have been subjected to unmistakably erroneous decisions. It would categorically forbid relief even where disputed conduct is caught on tape,[63] where defendants establish iron-clad alibis to relevant conduct, or where the unchallenged findings of a PSR "are internally contradictory, wildly implausible, or in direct conflict with the evidence that the sentencing court heard at trial."[64] The court system's interest in finality is adequately protected by the requirement that all unpreserved error must be plain to be reversed. The marginal contribution

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[61][Appendix B, at p.2].

[62]*See United States v. Mellen*, 393 F.3d 175, 183 (D.C. Cir. 2004).

[63]*See United States v. Claiborne*, 676 F.3d 434 (5th Cir. 2012).

[64]*Saro*, 24 F.3d at 291.

of the *Lopez* rule is to preclude reversal of ***precisely those*** factual errors that would otherwise meet the exacting standards of Rule 52. The rule ought to be abandoned.

Carlton well illustrates that point. In that case, the district court premised a sentence enhancement on a witness's trial testimony that the defendant intended to distribute marijuana in prison.[65] Contrary to the prosecutor's faulty representation to the trial court, however, there was no such testimony in the trial record – the sentence was affirmed due to the *Lopez* rule.[66] *Carlton*, then, demonstrates the kind of flagrant miscarriage of justice – sometimes caused primarily by government misstatements of fact – occasioned by the *Lopez* rule.

2. Review should not be delayed in hopes that the Fifth Circuit will rectify the split itself.

In *Carlton*, Justice Sotomayor expressed hope that the Fifth Circuit would revisit its application of the *Lopez* rule.[67] This hope should not further delay resolution of the conflict, for several reasons. First, in the years since *Carlton*, the Fifth Circuit has shown absolutely no interest in revisiting the *Lopez* rule. To the contrary, it continues applying the rule to a wide variety of purportedly factual claims.

Second, notwithstanding occasional deviations from the *Lopez* rule in the Fifth Circuit, that Court applied it with "regularity and consistency ...for the past 27 years."[68] As the government warranted below, there are more than 100 cases disposing of arguably factual claims of plain error in this period.[69] Here, it expressly declined to hear any challenge to the *Lopez* rule, on the ground that *Lopez* was well-settled in its precedent. The court below said flatly that it is powerless to reconsider the categorical prohibition on plain factual error, even after *Carlton*. This Court should take it at its word.

Third, the Fifth Circuit has already issued an *en banc* decision that should have dispensed

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[65] *See Carlton*, 135 S.Ct. at 2399.

[66] *See id.*

[67] *See id.* at 2400.

[68] [Appendix C, at p.11].

[69] *See* [Appendix C, at pp.9-10, n.2].

with the Rule. The *Lopez* rule may be traced to the Fifth Circuit's civil jurisprudence predating *United States v. Olano*, 507 U.S. 725 (1993). That older, civil, precedent limited plain error review to cases where "a pure question of law is involved and the refusal to consider it will result in a miscarriage of justice."[70] But in *United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994)(*en banc*), the *en banc* court explicitly overruled this formulation, grounding future uses of the doctrine instead in Rule 52 and *Olano*.[71] Indeed, in *United States v. Rodriguez*, 15 F.3d 408 (5th Cir. 1994), issued immediately after *Olano*, the court below recognized a conflict between *Lopez* and *Olano*, but nonetheless kept applying *Lopez* without further scrutiny, now regarding it as settled law.[72] It makes little sense to await another possible *en banc* decision on the question, after the court below has failed to apply the controlling law that emanated from its last such decision.

Finally, even if the Fifth Circuit did abandon the *Lopez* rule, this would not alleviate the division in the courts of appeals. The Fourth, Sixth, and Tenth Circuits have all applied a similar prohibition, though not consistently.[73] The rule is simply too convenient a tool for busy circuit courts. It will not be extinguished without intervention from this Court.

C. The present case is an ideal vehicle.

The present case is an excellent vehicle to resolve the conflict. The court below quite

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[70] *Holiday Inns, Inc. v. Alberding*, 683 F.2d 931, 933 (5th Cir.1982).

[71] *See Calverley*, 37 F.3d at 163-164.

[72] *Rodriguez*, 15 F.3d at 416, n.10 ("In *Lopez*, our court stated that '[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error', and that '[f]or a fact issue to be properly asserted, it must be one arising outside of the district court's power to resolve'. We need not resolve this apparent conflict, including with *Olano*, in light of our decision to exercise our discretion to decline to review Rodriguez's challenge to the fine.")(internal citation to *Lopez* omitted).

[73] *See United States v. Alford*, 1994 U.S. App. LEXIS 14582 (4th Cir. 1994)(unpublished)("Questions of fact capable of resolution by the district court during sentencing, such as the defendant's role in the offense, cannot constitute plain error.")(citing *Lopez*, 923 F.2d at 50); *accord United States v. Kent*, 1998 U.S. App. LEXIS 3750, 7-8 (6th Cir. Mar. 2, 1998)(unpublished)(citing *United States v. Saucedo*, 950 F.2d 1508, 1518 (10th Cir. 1991), *disapproved on other grounds by Stinson v. United States*, 508 U.S. 36, 123 L. Ed. 2d 598, 113 S. Ct. 1913 (1993)); *see also United States v. Smith*, 531 F.3d 1261, 1271 (10th Cir. 2008)("'While we have reviewed sentencing errors that were not raised in the district court under a plain error standard, plain error review is not appropriate when the alleged error involves the resolution of factual disputes.'") (quoting *United States v. Easter*, 981 F.2d 1549, 1555-1556 (10th Cir. 1992)).

explicitly held that factual error may never be plain, and offered no other rationale for its decision.[74] The court need go no further, and may, if it wishes, simply resolve the standard of review and remand to the Fifth Circuit for further proceedings.

But if the Court wishes to look further, the case remains an outstanding vehicle, because Petitioner would be due relief in the absence of the *Lopez* rule. Under USSG §1B1.3, criminal activity outside the offense of conviction may constitute "relevant conduct" where it and the offense of conviction comprise a "common scheme or plan," or a common "course of conduct."[75] Barring circumstances not at issue here (imprisonment following a revocation or an escape),[76] the Guidelines recommend that pending charges based on "relevant conduct" be run served concurrently to the instant federal offense.[77] And while the district court may vary from this (and most other) Guidelines,[78] it is not presumed to do so on a silent record.[79] So when the district court sentences at variance with a recommendation of the Guidelines, the parties are generally due a resentencing unless the court acknowledged that it was disagreeing with Guideline policy.[80]

The plain recommendation of the Commission on the facts of the instant case was for a concurrent sentence as to the October 4, 2015 charges. As such, the district court plainly erred in failing either to impose concurrent sentences as to the charges or to acknowledge the variance from

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[74]*See* [Appendix B, at p.2].

[75]*See* USSG §1B1.3(a)(2).

[76]*See* USSG §5G1.3(a).

[77]*See* USSG §5G1.3(c).

[78]*See United States v. Rangel*, 319 F.3d 710, 715-716 (5th Cir. 2003); *United States v. Booker*, 543 U.S. 220, 245 (2005).

[79]*See United States v. Simmons*, 470 F.3d 1115, 1131 (5th Cir. 2006)("Accordingly, a district court should acknowledge such a policy statement and explain why the prohibited or discouraged factor, as it relates to the defendant, is so extraordinary that the policy statement should not apply."); *Rangel,* 319 F.3d at 715-716 (declining to presume that the district court intended to impose a consecutive sentence where Guidelines called for a concurrent sentence); *Gall v. United States*, 552 U.S. 38, 50 (2007)(district court must correctly calculate Guidelines, even if it chooses to vary).

[80]*Simmons*, 470 F.3d at 1131; *Gall*, 552 U.S. at 50 (recognizing the availability of appellate relief from a procedurally unreasonable sentence where district court misunderstands or miscalculates the Guidelines)

that recommendation. As noted, the Commission defines "relevant conduct" to include:

> solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction.[81]

And

> [f]actors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses.[82]

The October 4, 2015 charges easily pass this test.

First, drug and gun offenses are "of a character for which § 3D1.2(d) would require grouping of multiple counts." USSG §1B1.3(a)(2). This is clear from the second table in USSG §3D1.2(d), which expressly names the gun and drug Guidelines as offenses that may be grouped under that Subsection.

Further, the three factors named in the Commentary to USSG §1B1.3 – similarity, regularity, and temporal proximity – all unequivocally support a relevant conduct finding.

Temporal proximity: The October 4, 2015 charges arose from conduct that occurred within one year of the instant federal offenses. "It is well settled in [the court below] that offenses which occur within one year of the offense of conviction may be considered relevant conduct for sentencing."[83]

Regularity: Petitioner's gun and drug offenses were regularly repeated. Specifically, he was arrested for gun and/or drug offenses in 2002 (gun and drugs), 2003 (gun), 2008 (drugs), 2010 (drugs), 2015 (gun and drugs), and 2016 (gun and drugs).[84] Comparable repetition has been held to support a relevant conduct finding.[85]

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[81]USSG §1B1.3(a)(2).

[82]USSG §1B1.3, comment. (n. (5)(B)(ii)).

[83]*United States v. Ocana*, 204 F.3d 585, 590 (5th Cir. 2000).

[84]*See* (ROA.146-154)

[85]*See Ocana*, 204 F.3d at 591.

Similarity: Finally, the similarity of the offenses is striking. In both the 2015 and 2016 arrests, the defendant was detained in a traffic stop with a handgun and a relatively small quantity of drugs: 1.55 grams of marijuana and a .380 pistol on October 4, 2015,[86] and 6 grams of ecstacy, 4 grams of methamphetamine mixture, and a .22 caliber revolver on July 29, 2016.[87] Because there was a common means of transportation, and comparable scale of offense, the similarity factor clearly supports a finding of relevant conduct.[88]

The sentencing Guidelines are the starting point and benchmark for federal sentencing.[89] Most sentences are accordingly imposed consistent with the Guideline recommendations.[90] As a result, a sentence that is inadvertently imposed at variance with the Guidelines presumptively affects the defendant's substantial rights.[91] Here, there was no evidence that the district court intended to sentence at variance with the Guidelines. One of the pending state charges has resulted in a term of imprisonment – after sentencing in the present case, the marijuana charge produced a term of two months and 15 days.[92] Because of the consecutive sentencing order, it will not be counted toward the federal term of imprisonment, lengthening the aggregate term by two and a half months, in spite of the Guideline recommendation.[93]

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[86](ROA.155); (PSR, ¶¶52-53)

[87](ROA.143); (PSR, ¶¶6-9)

[88]*See United States v. Bethley*, 973 F.2d 396, 401 (5th Cir. 1992)(affirming "course of conduct" finding where "[t]he quantities involved were similar--ounce quantities[,]" and "the source and type of drug were the same.").

[89]*See Molina-Martinez v. United States*, __U.S.__,136 S.Ct. 1338, 1345 (2016).

[90]*See Molina-Martinez*,136 S.Ct. at 1346.

[91]*See id.*

[92] *See* [Appendix E].

[93]The state term was imposed October 29, 2018, and satisfied with time served. If this term had been satisfied by time served prior to the federal sentencing, it could not have been counted toward the federal sentence even if the federal judge had run the sentences concurrent. *See* Bureau of Prisons, Sentence Computation Manual, Policy Statement 5880.28, at 1-13 (February 14, 1997)("**In no case can a federal sentence of imprisonment commence earlier than the date on which it is imposed.**")(emphasis in original); 18 U.S.C. §3585(b)(permitting pre-sentence credit only for time not credited to another sentence). But the federal sentence was imposed in June of 2018, *see*

A Guideline error that affects the term of imprisonment presumptively affects the fairness, integrity and public reputation of judicial proceedings. *See Rosales-Mireles v. United States*, 138 S.Ct. 1897 (2018). That presumption is fully implicated in this case, as consecutive service of additional criminal sentences would extend the defendant's aggregate term of imprisonment. A failure to offer relief in this case, moreover, would create the impression that the expansive definition of "relevant conduct" (which reaches beyond the offense of conviction in cases involving a common "course of conduct," and usually results in a ***higher*** sentence) is simply ignored when that definition benefits the defendant. That creates a perception that the law is not applied in an even-handed manner.

In short, all four inquiries actually mandated by Rule 52 and this Court's precedent would result in favorable outcomes for Petitioner. It is only the additional, extra-textual, requirement imposed by the Fifth Circuit to limit the availability of relief from plain and harmful errors – that challenged error be legal rather than factual – that precludes relief here. Because the courts are divided about the propriety of imposing that requirement, and because it is indefensible in terms of text, precedent, or the simple demands of justice, this Court should grant *certiorari*.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of *certiorari*.

Respectfully submitted this 26th day of July, 2019.

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[Appendix A], more than two months and 15 days prior to the state sentence, *see* [Appendix E]. So the federal judgment was dispositive on the treatment of this period of incarceration.