No. 19-5421

IN THE

Supreme Court of the United States

CHARLES EARL DAVIS,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

The government does not dispute that the circuits are split on the question presented: whether factual error is categorically immune from plain-error review. Nor does it defend the merits of the Fifth Circuit's *per se* rule. And with good reason: The Fifth Circuit's approach "is contrary to the text of Federal Rule of Criminal Procedure 52(b), Supreme Court precedent, and the practice in every other circuit." *United States* v. *Carlton*, 593 F. App'x 346, 349 (5th Cir. 2014) (Prado, J., concurring). Rule 52(b) allows review of any "plain error that affects substantial rights"; the courts may not graft additional requirements onto this clear language. That is presumably why "no other court of appeals has adopted" the Fifth Circuit's "misguided" position. *Carlton* v. *United States*, 135 S. Ct. 2399, 2399–2400 (2015) (statement of Sotomayor, J., respecting the denial of certiorari).

Yet the Fifth Circuit has dug in. In the years since Justice Sotomayor urged the court of appeals "to rethink its approach to plain-error review," *id.* at 2401, it has repeatedly adhered to its categorical rule, recently denying rehearing en banc on this precise issue, see *United States* v. *Lindsey*, 774 F. App'x 261 (5th Cir.) (per curiam), *reh'g en banc denied*, No. 18-10604 (Sept. 18, 2019). This Court should grant review to resolve this entrenched split and correct the Fifth Circuit's outlier approach.

Rather than contest any of this, the government relies mainly on three supposed vehicle issues. Opp. 9–13. But these arguments rely on outdated Guidelines language, misunderstand the "relevant conduct" standard, and clash with *Molina-Martinez* v. *United States*, 136 S. Ct. 1338 (2016). And the government's

remaining arguments simply underscore the need for this Court's review.

1. The government first asserts that the Sentencing Guidelines recommend concurrent sentences only when the relevant conduct is "the basis for an increase in the offense level for the instant offense." *United States* v. *Heard*, 359 F.3d 544, 550 n.10 (D.C. Cir. 2004). On this view, Petitioner cannot show plain (or any) error "because [his] October 2015 offenses were not used to determine petitioner's offense level or Guidelines range," so there was no "double-counting." Opp. 9.

This argument relies on language that no longer appears in the governing Guideline. The version of the Guideline at issue in *Heard* did require a marginal increase in the offense level to trigger its concurrent-sentencing provisions, and it required that any relevant conduct be "fully taken into account . . . ." U.S. Sentencing Guidelines Manual ("USSG") § 5G1.3(b) (2000). But the Sentencing Commission eliminated that language in 2014. USSG App. C, Amend. 787 (2014). The Guideline now recommends concurrent sentencing for *all* relevant conduct, whether or not it led to an offense level increase, and whether or not it was otherwise accounted for. See *id.* (requiring "concurrent sentences in any case in which the prior offense is relevant conduct . . . regardless of whether the conduct from the prior offense formed the basis for" an offense level increase); USSG § 5G1.3(c) (2016) ("If . . . a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction . . . the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment."). Thus, if the district court erred in finding that Petitioner's state offenses were

not "relevant conduct," it erred in failing to apply § 5G1.3(c). The government's lead vehicle argument is therefore meritless.

2. The government next argues that Petitioner cannot show that his October 2015 offenses were plainly "relevant conduct" under § 1B1.3 that would trigger § 5G1.3's concurrent-sentence recommendation. Opp. 10–12. This argument misunderstands the standards governing "relevant conduct" determinations.

As the government agrees, a "course of conduct" can be established under § 1B1.3 by an "ongoing series of offenses," as identified by their similarity, regularity, and temporal proximity. USSG § 1B1.3, cmt. n.(5)(B) (2018); *United States* v. *Ocana*, 204 F.3d 585, 590 (5th Cir. 2000); Opp. 9–10. And as the government also concedes, Petitioner's "October 2015 offense occurred less than one year before the July 2016 offense of conviction," and thus satisfies the Fifth Circuit's one-year benchmark for temporal proximity. Opp. 10 (citing *United States* v. *Rhine*, 583 F.3d 878, 886–887 (5th Cir. 2009)). Even so, the government argues that the October 2015 and July 2016 offenses are not similar or regular enough to qualify as a course of conduct.

The Fifth Circuit, however, does not require a significant showing of similarity or regularity for drug offenses within a year of each other. "Particularly in drug cases, [the] circuit has broadly defined what constitutes 'the same course of conduct,'" often treating "drug-related activities" within a year of each other as relevant conduct. *United States* v. *Bryant*, 991 F.2d 171, 177 (5th Cir. 1993) (per curiam) (collecting cases). Indeed, it is "well settled" that drug "offenses which occur within one year of the offense of conviction" are often relevant conduct. *Ocana*, 204

F.3d at 590–91. A strong showing of similarity or regularity is required only if the temporal gap is *longer* than one year. See *id.*; see also *United States* v. *Rhine*, 583 F.3d 878, 886 (5th Cir. 2009) ("A weak showing as to any one of these factors will not preclude a finding of relevant conduct . . . ."); *United States* v. *Wall*, 180 F.3d 641, 646 (5th Cir. 1999) ("Where the temporal proximity of the offenses is *nonexistent*, the other factors must be stronger." (emphasis added)).

Because Petitioner's offenses occurred within a year of each other, no such showing is needed here. Cf. *Rhine*, 583 F.3d at 886. Indeed, the government cites no case in which the Fifth Circuit has refused to find that a drug offense within one year was relevant conduct based on a lack of similarity or regularity. Instead, it cites only cases where the other offense fell outside the one-year benchmark. Opp. 10–11 (citing *Rhine*, 583 F.3d 878 (17-month gap); *United States* v. *Culverhouse*, 507 F.3d 888 (5th Cir. 2007) (three-year gap); *Wall*, 180 F.3d 641 (four- and five-year gaps)). Those cases are thus distinguishable. This case is much more like *Ocana*, where the court disregarded differences in the type of drug, *modus operandi*, and accomplices to find relevant conduct because the two offenses were close in time. 204 F.3d at 590–91.

In any event, Petitioner's offenses are fundamentally similar: Both cases involved a vehicle stop, possession of a handgun, and possession of a drug quantity at the border of personal use and small-scale distribution. ROA 143, 155. True, the two offenses involved different types of drugs, Opp. 10, but the Fifth Circuit has treated drug type as significant only "where two drug transactions are separated by more than one year," *Wall*, 180 F.3d at 647. And the remaining differences the government identifies (Op.

10–11) are trivial at most. The caliber of handgun and the number of passengers in Petitioner's car are mere quibbles, and the possibility of a different supplier or accomplice hardly changes the fundamental nature of the offense. These two offenses were also part of a regular pattern spanning many years, including four within the last decade. See *Rhine*, 583 F.3d at 890 (regularity may be based on offenses older than the purported relevant conduct).

In short, Petitioner's October 2015 and June 2016 offenses were part of the same "course of conduct" and thus constituted relevant conduct. After all, the relevant-conduct Guideline errs in favor of inclusion, requiring only that the defendant's conduct be part of an "ongoing series of offenses." See USSG § 1B1.3, cmt. n.(5)(B) (2018). Petitioner's drug and gun offenses were surely that. The district court plainly erred in failing to apply § 5G1.3's concurrent-sentencing provisions.

3. The government also says Petitioner cannot show that this error "'affected the outcome of the district court proceedings,' or 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings,'" because the Guidelines are advisory, so the district court could impose a consecutive sentence despite § 5G1.3's recommendation. Opp. 12.

Molina-Martinez forecloses this argument. There, this Court held that "[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." 136 S. Ct. at 1345. That holding applies equally to the district court's failure to recognize that § 5G1.3's concurrent-sentence rule applies here. Cf. *United States* v. *Can-*

dia, 454 F.3d 468, 473 (5th Cir. 2006) ("A consecutive or concurrent sentence imposed contrary to the applicable federal guidelines provision . . . deviates from the recommended punishment and enjoys neither the presumption of reasonableness nor the deference accorded a consecutive or concurrent determination made pursuant to the guidelines.").

Likewise, where "the record is silent as to what the district court might have done had it considered the correct Guidelines range, the court's reliance on an incorrect range in most instances will suffice to show an effect on the defendant's substantial rights." *Molina-Martinez*, 136 S. Ct. at 1347; see also *Rosales-Mireles* v. *United States*, 138 S. Ct. 1897, 1911 (2018) ("In the ordinary case . . . 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."). And nothing in the record suggests that the district court would have imposed the same consecutive sentences if it correctly understood § 1B1.3 and § 5G1.3.

In short, the government cannot avoid plain-error review just because the district court could exercise its discretion to reach the same result once the error is corrected. *Molina-Martinez*, 136 S. Ct. at 1345. For the same reasons, the other courts of appeals would indeed grant relief in this case. *Contra* Opp. 13. Only the Fifth Circuit's outlier rule—which was the sole basis for the decision below—prevented the court from correcting this error. Pet. App. B at 2.

4. The government also suggests two non-vehicle reasons to deny certiorari. Both lack merit.

The government first argues that "unpreserved assertions of factual error will rarely warrant or result in appellate relief." Opp. 13 (citing *United States* v.

Ahrendt, 560 F.3d 69 (1st Cir. 2009); *United States* v. *Saro*, 24 F.3d 283 (D.C. Cir. 1994)). That is a *non sequitur*. Plain error is hard to show in any case, but that is no reason to insulate an entire category of errors from review. Indeed, the Fifth Circuit's rule matters only in those cases where the defendant *can* show plain factual error. The sole effect of the Fifth Circuit's rule is thus to deny relief even when the defendant can establish an outcome-determinative error that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Marcus*, 560 U.S. 258, 262 (2010). That is a reason to grant review, not deny it.

Further, even if plain factual error is rarer than plain legal error, factual questions arise in almost every case. Each sentencing decision rests on the district judge's factual determinations. The sheer number of issues that qualify as "factual" thus produces many potentially correctable errors—from questions of pure historical fact[1] to questions involving the legal characterization of undisputed facts (as here)[2]—and many in between.

A plain error in resolving any of these questions can have a dramatic impact. Consider *Carlton*, where the Fifth Circuit invoked its *per se* rule to deny relief even though the government's own concededly "incorrect assertion" about a witness's testimony "tipped the scale in favor of the two-level sentencing

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[1] *E.g.*, *Carlton*, 593 F. App'x at 348–49; *United States* v. *Sphabmisai*, 703 F. App'x 275, 276 (5th Cir. 2017) (per curiam); *United States* v. *Hawkins*, 670 F. App'x 309, 310 (5th Cir. 2016) (per curiam), *cert. denied*, 138 S. Ct. 525 (2017).

[2] *E.g.*, *United States* v. *Rogers*, 599 F. App'x 223, 225 (5th Cir. 2015) (per curiam); *United States* v. *McCain-Sims*, 695 F. App'x 762, 767 (5th Cir. 2017) (per curiam).

enhancement." *Carlton*, 593 F. App'x at 349–50 (Prado, J., concurring). Or take *United States* v. *Claiborne*, where the Fifth Circuit's rule "cost Claiborne months, if not years, of additional time in prison." 676 F.3d 434, 443 (5th Cir. 2012) (Prado, J., concurring). These examples "demonstrate[ ] the fundamental injustice" of the Fifth Circuit's rule. *Carlton*, 593 F. App'x at 351 (Prado, J., concurring).

Finally, the government suggests that "denying the petition . . . would be consistent with Justice Sotomayor's statement respecting the denial of certiorari in *Carlton*" because "the Fifth Circuit ha[s] not uniformly" applied its *per se* rule, and Petitioner did not seek rehearing en banc "to give the Fifth Circuit an opportunity to revisit the plain-error issue that he raises." Opp. 13–14. In fact, the Fifth Circuit's rule is established and entrenched—as the government admitted below. The government's appellate brief emphasized "the regularity and consistency with which [the Fifth Circuit] has applied the rule . . . for the past 27 years," asserting that the court "has applied this rule over a hundred times," and "at least eleven times in the last two years" alone. Pet. App. C at 9–11 & 9 n.2.

What is more, another Fifth Circuit panel recently noted the court's settled "acceptance of this standard," emphasizing that the court has not "just ritualistically repeat[ed]" it, but has considered and reaffirmed its accuracy. *Lindsey*, 774 F. App'x at 261. The panel emphasized that the rule is "this court's precedent," and rejected arguments that "other precedents undermine" it. See *id.* And the full court denied a petition for rehearing en banc in that case, which raised this precise issue. Order Denying Rehearing En Banc, *United States* v. *Lindsey*, No. 18-10604 (5th Cir. Sept. 18, 2019). No judge on the full

court concurred in the denial or otherwise suggested that the Circuit's rule might be revisited in another case. The Fifth Circuit simply will not correct its outlier stance. The time is ripe for this Court to do so.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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