No. 19-

IN THE

Supreme Court of the United States

DOMINIC LINDSEY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a 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

Does plain-error review under Federal Rule of Criminal Procedure 52(b) include factual errors?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Dominic Lindsey. Respondent is the United States. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

United States v. *Dominic Lindsey*, No. 18-10604 (5th Cir. August 9, 2019)

United States v. *Dominic Lindsey*, No. 3:17-cr-512-1 (N.D. Tex. May 14, 2018)

No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dominic Lindsey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The Fifth Circuit's opinion is reported at 774 F. App'x 261 (per curiam) and reproduced at Petition Appendix at 1a–2a ("Pet. App.").

JURISDICTION

The Fifth Circuit entered judgment on August 9, 2019. The court of appeals denied Mr. Lindsey's timely petition for rehearing en banc on September 18, 2019. Pet. App. 10a–11a. On December 9, Justice Alito extended the time in which to file this petition to and including January 16, 2020. On January 6, he granted a further extension to and including February 15. This Court has jurisdiction under 28 U.S.C. § 1254.

FEDERAL RULES AND SENTENCING GUIDELINES INVOLVED

Federal Rule of Criminal Procedure 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

U.S. Sentencing Guidelines Manual § 5G1.3(c) (2018) ("USSG") states:

> If [USSG § 5G1.3(a)] does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provi-

> sions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

USSG § 1B1.3(a)(2) states in relevant part that "the base offense level . . . shall be determined on the basis of," among other things, "all acts and omissions described in [USSG § 1B1.3(a)(1)(A), (B)] that were part of the same course of conduct or common scheme or plan as the offense of conviction." USSG § 1B1.3(a)(2).

STATEMENT OF THE CASE

Federal Rule of Criminal Procedure 52(b) allows appellate courts to consider "[a] plain error" even if the defendant did not object below. Rule 52(b) makes no distinction between legal and factual errors. Nor do most federal courts of appeals. Only the Fifth Circuit categorically excludes factual errors from plain-error review.

Five years ago, Justices Sotomayor and Breyer noted that "no other court of appeals has adopted" the Fifth Circuit's "misguided" position and urged the court of appeals "to rethink its approach to plain-error review." *Carlton* v. *United States*, 135 S. Ct. 2399, 2399–401 (2015) (statement of Sotomayor, J., joined by Breyer, J., respecting the denial of certiorari). It has not. Instead, the Fifth Circuit has repeatedly applied and reaffirmed its *per se* exclusion, including in this case. Pet. App. 2a. And the full court denied Mr. Lindsey's petition for rehearing en banc—without noted dissent—which urged the court to correct its erroneous approach. *Id*.

The Fifth Circuit's categorical exclusion "is contrary to the text of [Rule] 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 engraft additional requirements onto this clear language. "Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988).

This issue is important. Every sentencing decision rests on the district judge's factual determinations. And the sheer number of issues that qualify as "factual" produces many potentially correctable errors. Correcting these plain errors—or failing to do so—affects the integrity of judicial proceedings. The Fifth Circuit's categorical exclusion leads to sentences that are concededly months or years longer than they should be.

Although the "ordinary course of action is to allow the court of appeals the first opportunity" to correct itself, the Fifth Circuit has declined that opportunity. *Carlton*, 135 S. Ct. at 2401 (statement of Sotomayor, J., respecting the denial of certiorari). This lopsided split will not go away by itself, and the issue has had ample time to percolate.

A. Factual background.

This sentencing case arises out of a vehicle stop. When police arrested Mr. Lindsey on July 18, 2017, he was continuing an ongoing course of conduct. The July 2017 stop was the fourth time police stopped his vehicle in eight months, all in the Dallas-Fort Worth area of Texas, and all involving comparable quanti-

ties of marijuana for personal use and small-scale trafficking.

First, in November 2016, police found five baggies of marijuana, $1,330 in currency, and a 9mm pistol in the car. Then in April 2017, police found 139.7 grams of marijuana, 0.5 grams of Xanax, and $1,565 in currency. Two months later in June 2017, police found 27.3 grams of marijuana. See Presentence Investigation Report ¶¶ 43–46, *United States* v. *Lindsey*, No. 3:17-cr-512 (N.D. Tex. Mar. 14, 2018), ECF No. 26 ("PSR") (filed under seal). Finally, at the July 2017 stop, police found 233.3 grams of marijuana and 4.2 grams of hydrocodone, as well as a 9mm pistol. *Id.* ¶ 7.

The government indicted Mr. Lindsey for the marijuana and gun found in his car in July 2017. *Id.* ¶ 18. He also faced three pending state charges from that same July 2017 stop. *Id.* ¶¶ 49–51. The three prior stops, meanwhile, led to five pending state charges for unlawful possession of marijuana, a controlled substance, and a firearm. *Id.* ¶¶ 41–42, 44–47.

Mr. Lindsey pleaded guilty to the federal charges.

B. Sentencing proceedings.

The Presentence Report did not address whether Mr. Lindsey's federal sentence should run concurrently with his anticipated sentences for the five pending state charges from the November 2016 and April and June 2017 stops. But if the conduct from those offenses are part of the "same course of conduct" as the instant offense, USSG § 1B1.3(a)(2), then the Guidelines recommend a concurrent sentence. USSG § 5G1.3(c).

The district court sentenced Mr. Lindsey to seventy-eight months of imprisonment, within the Guide-

lines range. Pet. App. 4a. But the district court ran the sentence consecutively to the five anticipated state sentences. *Id.* Mr. Lindsey did not preserve a challenge to the "fact questions pertaining to whether the conduct underlying his three previous arrests was sufficiently connected or related to the underlying offense so as to qualify it as relevant conduct under U.S.S.G. § 1B1.3." *Id.* at 1a–2a.

C. Proceedings below.

Mr. Lindsey challenged the consecutive sentence on appeal, arguing that the district court plainly erred in failing to apply (or acknowledge and explain its failure to follow) the Guidelines recommendation for a concurrent sentence.

The panel below disposed of Mr. Lindsey's appeal in short order, relying on binding circuit precedent holding that "[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." Pet. App. 2a (quoting *United States* v. *Lopez*, 923 F.2d 47, 50 (5th Cir. 1991) (per curiam)). The panel rejected Mr. Lindsey's argument that "other precedents undermine the *Lopez* holding regarding the impossibility of plain error as to fact questions." *Id.* Rather, the panel emphasized the court's continued "acceptance of this standard," noting "no reason to doubt" the government's estimate that "this Circuit has applied *Lopez* over 100 times to resolve factual disputes." *Id.* The court also noted that various judges had debated the correctness of this rule "[a]t some length." *Id.* (citing *United States* v. *Claiborne*, 676 F.3d 434, 438–40 (5th Cir. 2012) (Jones, C.J., concurring); *id.* at 440–44 (Prado, J., concurring)).

Mr. Lindsey asked the full Fifth Circuit to reconsider this *per se* exclusion of factual errors from plain-

error review, but the court denied his timely petition for en banc review. Pet. App. 10a–11a.

REASONS FOR GRANTING THE PETITION

I. EVERY OTHER CIRCUIT APPLIES PLAIN-ERROR REVIEW TO FACTUAL ERRORS.

The Fifth Circuit is the only court of appeals that categorically excludes factual errors from plain-error review under Rule 52(b). As the government and the panel noted below, the circuit has applied its *per se* rule at least 100 times, Pet. App. 2a, including at least eleven times in the past two years.[1] The panel also emphasized that the circuit's approach is "well-settled," with members of the court having "engaged with its reasonableness" in other cases. *Id.* And in this case, the full court denied rehearing en banc on this precise issue, without noted dissent. *Id.* at 10a–11a. In short, the Fifth Circuit's approach is clear and entrenched: "Questions of fact capable of resolution by the district court upon proper objection at sentencing can *never* constitute plain error." *Id.* at 2a (quoting *Lopez*, 923 F.2d at 50 (emphasis added)).

No other circuit has adopted the Fifth Circuit's categorical exclusion. Instead, they apply plain-error review to both factual and legal errors.

For example, in *United States* v. *Saro*, the D.C. Circuit saw "no warrant for th[e] categorical rule" adopted by the Fifth Circuit. 24 F.3d 283, 291 (D.C. Cir. 1994). It explained that "factual errors . . . may well tend to survive plain-error review more readily than

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[1] This number appears to include only cases citing *Lopez*, 923 F.2d 47. Other cases apply this rule without citing *Lopez*, meaning the total number is even higher. *E.g.*, *United States* v. *Tijerina*, 35 F. App'x 390 (5th Cir. 2002) (per curiam).

legal errors," but when a sentencing court's "findings are internally contradictory, wildly implausible, or in direct conflict with the evidence that the sentencing court heard at trial, factual errors can indeed be obvious." *Id.* *Saro* therefore remanded for reconsideration of the defendant's sentence, because the district court had committed "obvious error" in treating certain quantities of drugs as relevant conduct. *Id.* The court saw "no reasoned basis . . . for declining to exercise our discretion to correct th[is] plain error" of fact. *Id.* at 292.

Likewise, the Seventh Circuit in *United States* v. *Corona-Gonzalez* saw "no reason why" ordinary plain-error rules "should not apply when the issue is whether a district court relied on a clearly erroneous fact at sentencing." 628 F.3d 336, 341 (7th Cir. 2010). Like other circuits, the Seventh has been able to efficiently spot and correct plain factual errors. See *id.* at 340 (agreeing that "the district court committed a significant procedural error, amounting to plain error, when it sentenced [defendant] while under a misapprehension as to the circumstances surrounding his presence in the United States"); see also *United States* v. *Durham*, 645 F.3d 883, 900 (7th Cir. 2011) (finding that "a plain error occurred" and remanding for resentencing because the district court "misapprehended the record with respect to [defendant's] past use of firearms").

There are many more examples from other circuits. *E.g.*, *United States* v. *Wilson*, 614 F.3d 219, 226 (6th Cir. 2010) ("[W]e find that the district court committed plain error by selecting Wilson's sentence based on the clearly erroneous notion that she was responsible for the theft of fifteen hundred financial instruments."); *United States* v. *González-Castillo*, 562 F.3d 80, 83 (1st Cir. 2009) (finding plain error and re-

manding for resentencing based on the district court's "assumption of [an] unsupported fact"); *United States* v. *Griffiths*, 504 F. App'x 122, 126–27 (3d Cir. 2012) ("[W]e hold that, under either plenary or plain-error review, resentencing is appropriate because the sentence assigned to Griffiths was based on a clearly erroneous fact"); *United States* v. *Romeo*, 385 F. App'x 45, 49 (2d Cir. 2010) (remanding for resentencing based on the district court's "clearly erroneous factual finding" about the number of victims); see also *United States* v. *Wells*, 163 F.3d 889, 900 (4th Cir. 1998) (applying plain-error review to an alleged factual error, but rejecting the claim on the merits); *United States* v. *Wajda*, 1 F.3d 731, 732–33 (8th Cir. 1993) (per curiam) (same); *United States* v. *Thomas*, 518 F. App'x 610, 612–613 (11th Cir. 2013) (per curiam) (same); *United States* v. *Sahakian*, 446 F. App'x 861, 863 (9th Cir. 2011) (same).

Only the Tenth Circuit has suggested that factual errors are subject to stricter plain-error review, but it still corrects at least some of those errors. Although the court has said that "factual disputes not brought to the attention of the [trial] court do not rise to the level of plain error," *United States* v. *Overholt*, 307 F.3d 1231, 1253 (10th Cir. 2002), it has explained that this rule does not apply if "the appellant can establish the certainty of a favorable finding on remand," *United States* v. *Dunbar*, 718 F.3d 1268, 1280 (10th Cir. 2013). This may simply be a more forceful articulation of the "reasonable probability" standard other circuits use at prong three of plain-error review. See *Wilson*, 614 F.3d at 223–24 (collecting cases). Either way, in the Tenth Circuit, finding a plain factual error is "rare," *Dunbar*, 718 F.3d at 1280—not impossible.

The other circuits have thus heeded this Court's admonition that a "*per se* approach to plain-error review is flawed." *Puckett* v. *United States*, 556 U.S. 129, 142 (2009). After all, a factual error is still an "error" that may be "plain." See Fed. R. Crim. P. 52(b). The Fifth Circuit stands alone in categorically refusing to review these errors.

What is more, other circuits properly recognize that correcting plain factual errors furthers "the profound interest—shared by all parties—in fair disposition and just sentencing." *Griffiths*, 504 F. App'x at 127. Indeed, several courts have corrected factual errors on plain-error review specifically to protect defendants' constitutional due-process rights. See *González-Castillo*, 562 F.3d at 83 ("It is well-established that a criminal defendant holds a due process right to be sentenced upon information which is not false or materially incorrect.") (internal quotation marks omitted); see also *Griffiths*, 504 F. App'x at 125–26; *Wilson*, 614 F.3d at 225–26; *Corona-Gonzalez*, 628 F.3d at 343; cf. *Romeo*, 385 F. App'x at 50 ("It is plain that imposition of sentence based on clearly erroneous facts constitutes 'significant procedural error.'").

The upshot is a stable but lopsided split. Both sides' positions have been fully aired.

II. THE FIFTH CIRCUIT'S *PER SE* EXCLUSION OF FACTUAL ERRORS IS WRONG.

A *per se* approach to plain-error review clashes with text of Rule 52(b) and this Court's decisions. And the Fifth Circuit's arguments in favor of its categorical rule lack merit.

A. Rule 52(b) does not exempt factual errors.

Rule 52(b)'s text is clear: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." This language "makes no distinction between factual and legal errors." *Carlton*, 593 F. App'x at 349 (Prado, J., concurring).

Courts have "no authority" to "creat[e] out of whole cloth . . . an exception to" Rule 52(b). *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (stating that doing so would be "[e]ven less appropriate than an unwarranted expansion of the Rule"). As a textual matter, therefore, this case is straightforward. "Courts must apply the Federal Rules as they are written." *Carlton*, 135 S. Ct. at 2400 (statement of Sotomayor, J., respecting the denial of certiorari) (citing *Leatherman* v. *Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)); accord *Bank of Nova Scotia*, 487 U.S. at 255. If factual errors are to be placed beyond Rule 52(b)'s reach, "that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman*, 507 U.S. at 168. The Fifth Circuit's exclusion thus "disturb[s] the careful balance [Rule 52(b)] strikes between judicial efficiency and the redress of injustice." *Puckett*, 556 U.S. at 135.

B. The Fifth Circuit's *per se* exclusion clashes with this Court's precedent.

The Fifth Circuit's categorical rule clashes with this Court's plain-error precedent and creates serious due-process concerns.

This Court has "never suggested that plain-error review should apply differently depending on wheth-

er a mistake is characterized as one of fact or one of law." *Carlton*, 135 S. Ct. at 2400 (statement of Sotomayor, J., respecting the denial of certiorari). On the contrary, the Court has "emphasized that a '*per se* approach to plain-error review is flawed.'" *Puckett*, 556 U.S. at 142 (quoting *United States* v. *Young*, 470 U.S. 1, 17 n.14 (1985)). The scope of review permitted by Rule 52(b) is already "circumscribed." *United States* v. *Olano*, 507 U.S. 725, 732 (1993). A "rigid and undeviating judicially declared" exception that immunizes a whole category of errors is thus "out of harmony with . . . the rules of fundamental justice." *Id.* (quoting *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941)).

This Court also reviewed and corrected plain factual errors in early cases that Rule 52(b) was intended to codify. In *Wiborg* v. *United States*, the issue was whether the defendants formed an intent, while within the territorial waters of the United States, to lead a hostile military expedition. 163 U.S. 632, 655 (1896). At trial, the defendants did not properly object on that issue. *Id.* at 658. This Court still found plain error because the defendants, in fact, did not participate in the military expedition, nor did they know of the nature of the expedition before leaving U.S. waters. See *id.* at 659 ("We are of opinion that adequate proof to that effect is not shown by the record, and that, as the case stood, the jury should have been instructed to acquit them."). In other words, the defendants' convictions were based on a fact unsupported by the record—and the defendants made no objection to this factual error at trial. That did not stop the Court from granting relief. *Id*; see also *Clyatt* v. *United States*, 197 U.S. 207, 222 (1905) ("We have examined the testimony with great care to see if there was anything which would justify a finding of

the fact [that provided the basis for defendant's conviction], and can find nothing."); cf. *Hemphill* v. *United States*, 312 U.S. 657 (1941) (mem.) (summarily reversing and remanding "to consider the sufficiency of the evidence to support the verdict" despite the defendant's failure to preserve an objection at trial). As the Advisory Committee explained, citing *Wiborg* and *Hemphill*, Rule 52(b) "is a restatement of existing law" as reflected in these decisions. Fed. R. Crim. P. 52, Notes of Advisory Committee, *Note to Subdivision (b)* (1944).

Failing to correct plain factual errors also raises serious due-process concerns. Under *Townsend* v. *Burke*, 334 U.S. 736 (1948), defendants "have a due process right to be sentenced upon information which is not false or materially incorrect," *United States* v. *Pellerito*, 918 F.2d 999, 1002 (1st Cir. 1990) (citing *Townsend*, 334 U.S. 736; *United States* v. *Tucker*, 404 U.S. 443 (1972)); see also *Wilson*, 614 F.3d at 225–26. Yet the Fifth Circuit's *per se* approach to plain-error review allows just that.

Townsend held that a defendant's sentence violated due process because the trial judge's "misreading of the record" revealed that defendant "was sentenced on the basis of assumptions concerning his criminal record that were materially untrue." 334 U.S. at 740–41. This Court emphasized that it reversed the sentence *not* because the sentence was "unduly severe," but because it rested on an "extensively and materially false" factual foundation. *Id.* at 741; cf. *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1345 (2016) ("When 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 differ-

ent outcome absent the error."). Yet the Fifth Circuit regularly applies its categorical rule to affirm sentences based on materially false information—even when the government admits the error. *E.g.*, *Carlton*, 593 F. App'x at 348–49. The Fifth Circuit's rule thus contradicts this Court's precedent.

C. The arguments in favor of the Fifth Circuit's *per se* exclusion lack merit.

Given the *per se* rule's lack of support in text and precedent, "[t]he real question in this case is not *whether* plain-error review applies when a defendant fails to preserve" a challenge to a factual error, "but rather what conceivable reason exists for disregarding its evident application." See *Puckett*, 556 U.S. at 136. No reason exists.

Defending the prohibition, one judge has argued that plain factual errors should be rare because "[i]t seems highly unlikely that a competent counsel will fail to timely raise a factual objection to an enhancement in the district court." *United States* v. *Claiborne*, 676 F.3d 434, 439 (5th Cir. 2012) (Jones, C.J., concurring); see also *id.* at 438 ("[P]lain error is by definition error so clear and obvious that the district court should not have erred in the first place.").

This 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. The Fifth Circuit's rule matters only if the defendant *can* show plain factual error. Compare *Carlton*, 593 F. App'x at 348–49 (Fifth Circuit denying relief even though the "the government concede[d]" that it mistakenly caused the factual error), with *Corona-Gonzalez*, 628 F.3d at 340 (Seventh Circuit correcting a conceded factual error). And the truth is that, in the back-and-forth immediacy of trials and sentencings, com-

petent lawyers and judges sometimes miss even clear errors. 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 abolish this rule, not keep it.

Lopez similarly reasoned that "[t]he plain error doctrine is designed to avoid . . . [the] circuitous waste of judicial resources" resulting from a remand to the sentencing court. *United States* v. *Lopez*, 923 F.2d 47, 50 (5th Cir. 1991) (per curiam). But that is why "[m]eeting all four prongs [of plain error] is difficult," *Puckett*, 556 U.S. at 135, not why plain factual errors should be read out of Rule 52(b). If *Lopez*'s reasoning were taken seriously, then there would be no plain-error review at all—a remand is required every time a defendant satisfies plain-error review, whether the error is factual or legal. There are no meaningful gains in judicial economy from insulating all plain factual errors from review, and certainly no benefits that outweigh the injustice of refusing to correct even clear, prejudicial factual mistakes.

Finally, any concern about appellate courts replacing district courts as factfinders is misplaced. See *Claiborne*, 676 F.3d at 439 (Jones, C.J., concurring) (arguing that appellate courts "should not be in the business of reviewing factfindings on appeal."). To be sure, district courts' role as factfinders should be respected. And it is. Plain error is difficult to show, "as it should be," in part because appellate courts are less equipped to make factual determinations. See *Puckett*, 556 U.S. at 135 (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)). But

less equipped does not mean completely *un*equipped—as the experience of other circuits shows.

In all events, the Fifth Circuit's rule does not simplify matters. It complicates them. A rule that allows review of legal errors but not factual ones requires parties and courts to draw a bright line between those categories. "It will not always be easy" to do so. See *Wainwright* v. *Witt*, 469 U.S. 412, 429 (1985); see also *Williams* v. *Taylor*, 529 U.S. 362, 408 (2000) (noting that "it is sometimes difficult to distinguish a mixed question of law and fact from a question of fact"). Judicial energy is better spent applying Rule 52(b) to *all* errors than trying to decide how to categorize an error in the first place.

Finally, the Fifth Circuit's rule clashes with the Sentencing Reform Act. Denying relief to a defendant like Mr. Lindsey, when another defendant with the same record would receive a concurrent sentence under the Guidelines, produces "unwarranted sentence disparities." 18 U.S.C. § 3553(a)(6); see *Gall* v. *United States*, 552 U.S. 38, 54 (2007) (noting that "avoidance of unwarranted disparities was clearly considered by the Sentencing Commission when setting the Guidelines ranges").

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

The question presented is important and arises often. Almost every criminal case involves a judge making a factual finding to determine a defendant's sentence. And the issues that qualify as "factual" range from questions of pure historical fact[2] to ques-

[2] *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).

tions involving the legal characterization of undisputed facts[3] 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* exclusion 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 enhancement." 593 F. App'x at 349–50 (Prado, J., concurring). Or take *Claiborne*, where the Fifth Circuit's rule "cost Claiborne months, if not years, of additional time in prison." 676 F.3d at 443 (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).

In another circuit, these cases would turn out differently. Again, other courts of appeals have corrected these sorts of injustices by applying ordinary plain-error principles to factual errors. See *supra* § I. For example, the Eleventh Circuit recently found plain error under the same Guideline provisions at issue here, explaining that "district courts must still correctly calculate the guideline range" and in this case "[the court] neither referenced § 5G1.3 nor accounted for its policy." *United States* v. *Ward*, No. 19-10470, 2019 WL 6461259, at *5–6 (11th Cir. Dec. 2, 2019) (per curiam) ("To the extent the court meant that the state offenses did not constitute relevant conduct, that was clearly erroneous . . . .").

The sky has not fallen in these other circuits. No "circuitous waste of judicial resources" has occurred.

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[3] *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).

Contra *Lopez*, 923 F.3d at 50. The opposite is true: reviewing and correcting plain factual errors has protected the fairness, integrity, and public reputation of sentencing proceedings. See *Olano*, 507 U.S. at 732. That is worth the judicial resources when "[a] plain error that affects substantial rights" is found, "even though it was not brought to the court's attention" at the first sentencing. See Fed. R. Crim. P. 52(b).

IV. THIS CASE IS AN IDEAL VEHICLE.

This case is an ideal vehicle to decide the question presented. The Fifth Circuit's rule was the sole basis for the decision below. See Pet. App. 2a. The panel 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. *Id.* The panel also rejected the argument that "other precedents undermine" it. *Id.* And the full court denied the petition for rehearing en banc. *Id.*

Moreover, Mr. Lindsey's five offenses at issue fall comfortably within the "relevant conduct" standard. See USSG § 1B1.3(a)(2). A "course of conduct" can be established under § 1B1.3 by an "ongoing series of offenses," as identified by their similarity, temporal proximity, and regularity. USSG § 1B1.3, cmt. n.(5)(B)(ii); *United States* v. *Ocana*, 204 F.3d 585, 589–90 (5th Cir. 2000). Mr. Lindsey's offenses fit the bill.

First, the similarity of Mr. Lindsey's offenses is striking. The five offenses arise from three arrests, and in each Mr. Lindsey was detained in his vehicle, in the same area, and with similar quantities of marijuana for personal use or small-scale trafficking. See *United States* v. *Bethley*, 973 F.2d 396, 401 (5th Cir. 1992) (affirming relevant-conduct finding when the

quantity, source, and type of drug were similar); see also *United States* v. *Favors*, 263 F.3d 164 (5th Cir. 2001) (per curiam) (unpublished).

Second, the Fifth 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; cf. *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)). Here, all five offenses occurred within eight months of the offense of conviction.

Third, the offenses were regularly repeated. Mr. Lindsey was arrested for these offenses in November 2016, and in April and June 2017. PSR ¶¶ 41–47. See *Ocana*, 204 F.3d at 591 (affirming regularity finding when offenses were committed in July, September, and November of one year). In short, all three factors point toward a finding of relevant conduct and thus a concurrent sentence.

In turn, a concurrent sentence could reduce Mr. Lindsey's prison time by several years, which satisfies the third and fourth prongs of plain error. "When 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." *Molina-Martinez*, 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. *E.g.*, *Ward*, 2019 WL 6461259, at *6 (reversing where "[t]he difference between the concurrent sentence recommended by § 5G1.3(c) and the consecutive sentence imposed by the court was substantial" and the court of appeals could not "tell what the district court might have done had it properly considered § 5G1.3(c)"); cf. *United States* v. *Candia*, 454 F.3d 468, 473 (5th Cir. 2006) (appellate courts do not defer to a "consecutive or concurrent sentence imposed contrary to the applicable federal guidelines provision").

Other circuits would have considered Mr. Lindsey's arguments and granted relief under plain-error review. But the Fifth Circuit simply will not correct its outlier stance. The time is ripe for this Court to do so.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

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