DOCKET NUMBER: _____

IN THE SUPREME COURT OF THE UNITED STATES

KAHWAHNAS NUCUMBHI POTTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this honorable Court should grant *certiorari* to resolve inter-Circuit disharmony regarding a District Court's consideration of consecutive sentencing issues under 18 USC §1028A.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings, both in the Federal District Court for the Western District of Michigan, Southern Division, as well as in the United States Court of Appeals for the Sixth Circuit, included the United States of America, Respondent herein, and Kahwahnas Nucumbhi Potts, the Petitioner herein. There are no parties to these present proceedings other than those named in the Petition.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Kahwahnas Nucumbhi Potts (hereinafter, Mr. Potts) hereby respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit issued January 8, 2020.

OPINIONS BELOW

The Decision of the Sixth Circuit in this matter was issued on January 8, 2020. It was selected for full-text publication, and the published decision of the Sixth Circuit is reproduced at Petitioner's Appendix A.

The relevant District Court Judgment underlying Mr. Potts' conviction was not published, but, is reproduced at Petitioner's Appendix B.

STATEMENT OF JURISDICTION

Because the underlying cases involved a federal indictment against Mr. Potts for violations of federal law, the United States District Court for the Western District of Michigan, Western Division, had jurisdiction pursuant to 18 U.S.C. §3231. Because Petitioner Potts timely filed a notice of appeal from the final judgment of a United States District Court, the United States Court of Appeals for the Sixth Circuit had jurisdiction pursuant to 28 U.S.C. §1291. Because Petitioner Potts is timely filing this Petition for Writ of Certiorari within the time allowed by the Supreme Court Rules, this honorable Court has jurisdiction pursuant to 28 U.S.C. §1254. *See also*, Supreme Court Rule 13.1.

STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The relevant statutory provisions are 18 U.S.C. §1028A and U.S.S.G. §5G1.2 Commentary Note 2(B), both of which are set forth, respectively, in the attached Petitioner's Appendix C and D.

STATEMENT OF THE CASE

The following Statement of the Case is intended to summarize the "facts material to consideration of the questions presented." *See generally*, Supreme Court Rule 14.1(g). A comprehensive narration of all factual history in the case is set forth in the published Opinion of the Sixth Circuit below, along with the Plea Agreement of the parties and the Presentence Investigation Report which was prepared in the District Court. *See generally*, *United States v. Potts*, 947 F.3d 357 (6th Cir. 2020); *see also*, Plea Agreement at 3-4; RE 18; Page ID 40-41; *and*, PSIR; RE 27.

Kahwahnas Potts was the subject of a nine-count Indictment issued by a federal grand jury in the Western District of Michigan on January 23, 2018. (Indictment) (RE: 1) (Page ID#1-9). That Indictment gave the District Court jurisdiction pursuant to 18 U.S.C. §3231, and charged Mr. Potts with Possession of Stolen Mail in violation of 18 U.S.C. §1708, Unauthorized Access Device Fraud in violation of 18 U.S.C. §1029, Possession of Fifteen or More Unauthorized Access Devices in violation of 18 U.S.C. §1029, three counts of Aggravated Identity Theft in violation of 18 U.S.C. §1028A, and three counts of Misuse of Social Security Account Number in violation of 42 U.S.C. §408. *Id.* He entered into a plea agreement on February 26, 2018, wherein he agreed to plead guilty to Counts 2, 3, and 8 – one "Unauthorized Access Device Fraud" count under 8 U.S.C. §1029 and two of the "Aggravated Identity Theft" counts under 18 U.S.C. §1028A. (Plea Agreement)(RE: 18)(Page ID 38-46). In exchange, the remaining charges in the indictment would be

dismissed. *Id*. at 4; Page ID 41. Mr. Potts entered his plea of guilty pursuant to that Agreement on February 28, 2018. (Change of Plea Minutes)(RE:19)(PageID47).

At the time of Mr. Potts' plea, the District Court ordered the preparation of a Presentence Investigation Report (PSIR), which was completed on May 18, 2018. *See*, (PSIR)(RE: 27). As part of its calculations, the PSIR set forth Mr. Potts' criminal history, concluding that his criminal history score was 13, resulting in a criminal history category of VI. *See* PSIR at 13-18; ¶¶69-82. The PSIR also noted that Mr. Potts was serving a state prison sentence for what would appear to be "1 to 5 years", and that he would not see the parole board again until 2019. *Id*. at 18; ¶80.

After analyzing the sentencing options, the PSIR recommended a guideline imprisonment range of 30 to 37 months. *Id*. at 24; ¶146. The PSIR recommended a period of supervised release along with certain mandatory and discretionary conditions, and also contained information regarding fines, special assessments, and restitution. *Id*. at 25-27; ¶¶153-163; 168-173.

In addition, the PSIR set forth a potential "departure" based on inadequacy of criminal history, stating "Mr. Potts has engaged in home invasions, theft of mail, and identity theft offenses for more than 15 years. He was sentenced to federal prison for Aggravated Identity theft in 2011, but soon after his release in 2013, he began engaging in additional criminal conduct involving domestic violence." *Id*. at 28; ¶176-179. Furthermore, the PSIR set forth a potential variance under 3553(a) because "The guideline range does not account for the fact that Mr. Potts broke into the [victims'] home on multiple occasions to continue his fraudulent behavior." *Id*.

at 28; ¶180-182. The PSIR also noted that the District Court had discretion to run the multiple 1028A sentences either concurrently or consecutively to each other. *Id.* at 24; ¶145. Neither party submitted any objections to the PSIR. *See*, Defendant's Sentencing Memorandum at 1; RE 34; Page ID 144; *see also*, United States' Sentencing Memorandum, at 1; RE: 29; Page ID 136.

The parties then convened for sentencing with the District Court on August 13, 2018. *See*, (Sentencing Minutes)(RE: 36)(Page ID 156); *see also*, Transcript of Sentencing (hereinafter, "T.p. Sentencing")(RE: 42). At that time, the Court reviewed the offense behavior, accepted the plea agreement, and found that there were no objections to the factual recitations from the PSIR. *Id*. at 3-4; Page ID 177-178. The Court then reviewed the PSIR calculations, as well as the Court's own calculations, including the calculations of losses for sentencing and restitution purposes. *Id*. at 4-7; Page ID 178-181.

Next, the Court heard arguments, primarily from Mr. Potts' counsel, regarding the potential for a departure under U.S.S.G. §4A1.3 for underrepresented criminal history. *Id*. at 7-11; Page ID 181-185. At the conclusion of those arguments, the Court found that an upward departure was warranted under 4A1.3, and departed upward by four levels resulting in an advisory Guidelines range on Count Two of 46 to 57 months imprisonment, which range was mitigated by an additional one-level reduction for a timely plea, resulting in an advisory range of 41 to 51 months of imprisonment. *Id*. at 11-14; Page ID 185-188.

The Court then turned its attention to the final sentencing arguments of the parties. Mr. Potts requested a within Guidelines sentence, and requested that the Court consider running the sentence concurrently to his state sentence. *Id*. at 8-9, 15; Page ID 182-183, 189. The government requested a sentence of around 7.5 years, less than that recommended by Probation, but still to be run consecutively to Mr. Potts' state sentence. *Id*. at 16-18; Page ID 190-192.

The District Court rejected the recommendations of both parties and, after setting forth its decisional reasoning, sentenced Mr. Potts to 60 months imprisonment on Count 2, and 24 months of imprisonment on Count 3, and 24 months of imprisonment on Count 8, all of which were to run consecutively to each other, and consecutively to his state sentence. *Id*. at 18-21; Page ID 192-195. The Court also sentenced Mr. Potts to a term of supervised release along with conditions and recommendations to the BOP, waived the fine, and ordered a $300 special assessment. *Id*. at 21-22; Page ID 195-196. The remaining indictment counts were dismissed. *Id*. at 22; Page ID 196. Mr. Potts' counsel objected to the upward departure and variance "on the grounds that the guideline range adequately reflected the sentence necessary in this case." *Id*. Judgment was entered accordingly on August 13, 2018. (Judgment) (RE: 37)(Page ID 157 – 163).

Mr. Potts filed a timely notice of appeal to the Sixth Circuit Court of Appeals on August 24, 2018. (Notice of Appeal)(RE: 40)(Page ID 171). New counsel was appointed shortly thereafter. (Ruling Letter)(6th Cir. Doc. 14).

Mr. Potts presented four main arguments on appeal, all related to the sentence he had received: (1) that the District Court had erred when it issued an upward departure under U.S.S.G. §4A1.3 for underrepresented criminal history; (2) that the District Court had erred when it ran Mr. Potts' federal sentence consecutively to his State sentence under U.S.S.G. §5G1.3; (3) that the District Court had erred when it ran both of Mr. Potts' sentences for Aggravated Identity Theft consecutively to each other under 18 U.S.C. §1028A; and, (4) that the District Court's sentence and variance were substantively unreasonable under 18 U.S.C. §3553(a). *See*, Appellant's Brief, 6th Cir. Doc. 26 at 2; 27-51. The United States responded to each of Mr. Potts' arguments, in turn. *See*, Appellee's Brief, 6th Cir. Doc. 34 at 2-3; 24-53. Oral argument was ultimately conducted on October 16, 2019. *See*, 6th Cir. Doc. 41 at 1.

The Sixth Circuit rejected each one of Mr. Potts' arguments and affirmed the District Court in a published Decision issued on January 8, 2020. *See*, Decision at 7. After reviewing the factual and procedural history, the Court discussed the standard of review which should be applied to Mr. Potts' arguments, finding that "abuse of discretion" governed Mr. Potts' claims under U.S.S.G. §4A1.3 and substantive reasonableness, but finding that Mr. Potts' consecutive sentencing arguments, under both 1028A and U.S.S.G. §5G1.3, should be reviewed only for "plain error" because Mr. Potts had failed to object to or raise these issues at sentencing. *Id.*, at 7 *citing*, *United States v. Vonner*, 516 F.3d 382, 386 (6th Cir. 2008)(en banc), *and* at 18.

On the substance, the Court below first turned its attention to Mr. Potts' consecutive sentencing claims under 18 U.S.C. §1028A. The Court noted that when deciding this issue, the District Court "did not expressly reference §5G1.2, nor did it expressly analyze by name the factors in Application Note 2(B)," and that Mr. Potts had argued that "the district court was required to refer to §5G1.2 and the Application Note factors when setting forth its rational for issuing consecutive §1028A sentences." *Id*. at 8.

In discussing this issue, the Court below noted the issue had not yet been addressed in the Sixth Circuit, and that the several Circuits were not uniform in their approach. *Id*. at 8-9. Some Circuits, as noted by the Court below, are "more lenient," and "look primarily to the substance of that sentencing analysis rather than the form it takes." *Id*. at 9. Other Circuits have "more rigid approaches," such as the Seventh Circuit, which "has held that failure to either reference §5G1.2 or formally recognize the factors in Application Note 2(B) can constitute plain error." *Id*. After reviewing the competing approaches of numerous sister Circuits, including the Second, Third, Fourth, Seventh, Ninth, and Eleventh, the Court found:

> we agree with the majority of our sister circuits that a district court's failure to reference expressly §5G1.2 or Application Note 2(B) does not amount to plain error, so long as there is some indication that the district court assessed the relevant factors included in that section and Application Note. A functional approach, one that looks to the sentencing colloquy in its entirety, is well-suited in this setting.

Id. at 11.

From this initial review, the Court found that Mr. Potts' claim was foreclosed based on the plain error standard. Specifically, because the law on this issue was not settled at the time of Mr. Potts' sentencing, plain error could not be established because the claimed error was not clear and obvious, as it "involves a question of first impression in this Circuit – especially one over which the remaining circuits were divided." *Id.* at 12; *citing*, *United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015).

Further, the Court addressed the merits of the issue, and found that "a functional approach is better suited to assess whether a district court applied §5G1.2 and its underlying considerations." *Id.* Under this standard, the Court found no error in the District Court's sentencing, finding that "the district court was aware of its discretion" to issue concurrent sentences, that the district court had "discussed in substance two of the three" factors from the Application Note, that the Court had referenced the PSR which itself had noted the discretionary nature of consecutive sentencing for multiple 1028A convictions, and that each of the parties at sentencing had discussed the Courts' discretion to fashion a consecutive or concurrent sentence. *Id.* Further, the Court found that the District Court had reviewed the nature and seriousness of the offense along with the purposes of sentencing, had additionally reviewed the specific facts of the case. *Id.* at 12-13. The Court also found that Mr. Potts' circumstances were distinguishable from the authority in his favor, and that the Court had addressed the factors which were at issue in his case. *Id.* at 13. The Court thus affirmed the sentence on this issue,

although reminded District Courts that relevant factors should be considered in 1028A sentencing. *Id*.

The Court similarly rejected Mr. Potts' claims regarding his federal sentence having been run consecutively to his State sentence. *Id*. First, the Court found that this issue, unlike the 1028A issue, was controlled by prior Circuit precedent which required only that "the totality of the record" reflect that the district court had considered the necessary factors when making consecutive sentencing decisions under this Guideline. Under that standard, the Court stated that it was "confident" that "the district court adequately considered those factors." *Id*. at 15.

The Court below similarly dispatched Mr. Potts' arguments regarding the "underrepresented criminal history" upward departure fashioned by the sentencing Court. *Id*. at 16-17. On this item, the Court rejected Mr. Potts' contention that the District Court had failed to sufficiently set forth its sentencing rationale, finding instead that the District Court's "explanation was procedurally sufficient." *Id*. at 16-17. The Court acknowledged that a sentencing court must "adequately explain why it has opted to depart or vary," but clarified that a court is not required "to include the court's rationale for rejecting other possible sentences," and that there need not be a "'mechanistic' explanation" why other sentencing ranges were rejected. *Id*., at 17; *citing*, *United States v. Presley*, 547 F.3d 625, 629 (6th Cir. 2008); *and*, *United States v. Sexton*, 889 F.3d 262, 265 (6th Cir. 2018). The Court thus rejected Mr. Potts' claim, finding that "the district court more than adequately explained its reasoning for the imposition of its sentence." *Id*.

Finally, the Court below rejected Mr. Potts' substantive reasonableness claims. In so doing, the Court recognized the mitigating evidence which existed in favor of Mr. Potts, but found that, even taking those matters into consideration, the court did not "view as unreasonable the district court's conclusion that Potts's criminal history category substantially under-represented the likelihood that he would commit other crimes." *Id*. at 19. Further, the Court found that the District Court had "carefully considered whether a departure was appropriate in this unique setting" and had "properly weighed the §3553(a) factors." *Id*. As such, the Court found no abuse of discretion in the above-Guidelines sentence of the District Court. *Id*. at 20.

Thereafter, the Court of Appeals affirmed the judgment of the District Court, and this Petition timely follows.

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REASONS FOR GRANTING THE WRIT

Certiorari is requested to resolve inter-Circuit disharmony regarding consecutive sentencing issues under 18 U.S.C. §1028A

18 U.S.C. §1028A governs "Aggravated Identity Theft." *Id*. As recognized by the Sixth Circuit below, 1028A stands in a somewhat unique position in the current era of Guidelines sentencing, as 1028A offenses are specifically punishable by a statutorily created sentence of precisely two years. 18 U.S.C. §1028A(a)(1). Such a sentence, additionally, is statutorily mandated to be imposed consecutively to any other term of imprisonment. *Id.* at (b)(2). However, a sentencing Court retains jurisdiction to impose a concurrent sentence where, as here, multiple 1028A violations are being sentenced at the same time. *Id*. at (b)(4). In making this determination between consecutive or concurrent sentences, a sentencing court is instructed that its discretion "*shall* be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28." *Id.* (emphasis added).

That guidance is found at U.S.S.G. §5G1.2 Commentary Note 2(B). That section states that a District Court, when making the consecutive vs. concurrent determination, "should" consider a "nonexhaustive list of factors," such as:

> (i) The nature and seriousness of the underlying offenses. For example, the court should consider the appropriateness of imposing consecutive, or partially consecutive, terms of imprisonment for multiple counts of 18 U.S.C. § 1028A in a case in which an underlying offense for one of the 18 U.S.C. § 1028A offenses is a crime of violence or an offense enumerated in 18 U.S.C. § 2332b(g)(5)(B).

(ii) Whether the underlying offenses are groupable under § 3D1.2 (Groups of Closely Related Counts). Generally, multiple counts of 18 U.S.C. § 1028A should run concurrently with one another in cases in which the underlying offenses are groupable under § 3D1.2.

(iii) Whether the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are better achieved by imposing a concurrent or a consecutive sentence for multiple counts of 18 U.S.C. § 1028A.

Id. As noted by the Sixth Circuit however, the District Court, when sentencing Mr. Potts, "did not expressly reference §5G1.2, nor did it expressly analyze by name the factors in Application Note 2(B)." *See* Opinion below at pg 8. Thus, the Sixth Circuit was called upon to determine what level of compliance by the District Court is necessary in order for the sentencing record to satisfy the obligatory, statutory requirement that the District Court "shall" make its sentencing decision in accordance with the applicable guidelines and policy statements.

Finding a lack of intra-Circuit authority to answer this question, the Court below turned to the decisions of other Circuits for guidance. *See*, Opinion below at pgs 8-9. In that review, the Court below found competing approaches, some more strict, and some more lenient.

Of the more "lenient" crop of cases, the Sixth Circuit discussed *United States v. Bonilla*, 579 F.3d 1233 (11th Cir. 2009). The Court below cited *Bonilla* for the proposition that "a district court need not explicitly reference the Application Note 2(B) factors during sentencing where it nonetheless considered those factors in some manner." *Id*; *see also*, *Opinion below* at 10. It is respectfully submitted that *Bonilla* may, in fact, offer less than clear support for this point of law, given that the panel

in *Bonilla* found that the District Court had actually "went through all the 5G1.2 factors," whereas in the proceedings below, it was acknowledged that the District Court "did not expressly reference §5G1.2, nor did it expressly analyze by name the factors in Application Note 2(B)." *Opinion below* at 8. Nevertheless, it does not appear that the Eleventh Circuit necessarily requires a District Court to explicitly reference §5G1.2 or the Application Note 2(B) factors in order for a District Court's sentence to survive a procedural reasonableness challenge. *See generally*, *United States v. Doe*, 536 Fed. Appx. 871, 873-974 (11th Cir. 2013).

The Court below also discussed, as an example of a "less formalistic approach in reviewing a sentence," the Fourth Circuit case of *United States v. Savage*, 885 F.3d 212, 230 (4th Cir. 2018). Once again, however, *Savage* is less than clear on its support for this particular point of law.

First, in *Savage*, it appears that the true merits of the Court's opinion never even discussed the question at hand. Instead, in *Savage*, the Court stated

> Savage argues that the district court necessarily erred in determining that part of the sentence should run consecutively because it erred in applying the sentencing enhancements discussed above. Because we now uphold each of the challenged sentencing enhancements, however, Savage's argument collapses. Additionally, *even if* we had concluded that the district court erred in applying any of these challenged sentencing enhancements, there is no indication that the district court abused its discretion because it specifically identified its reasons for providing a partial-consecutive sentence, and many of these reasons were unrelated to the sentencing enhancements.

Id. (emphasis added). Thus, even from the outset, it does not appear that the Court was even deciding the particular question for which it was cited by the Court below, because the arguments were actually framed with reference to, and decided on the

basis of the adjudication of, other claimed errors related to other sentencing enhancements.

Second, a full reading of *Savage* discloses that it found no error in the District Court's sentencing consecutive decision based on the District Court's consideration of the §3553(a)(2) factors. *Id.* at 230. However, it does not appear that *Savage* actually even discussed, much less decided, the question presented here: whether a District Court's consecutive sentencing decision under 1028A is procedurally reasonable where the District Court did not expressly reference §5G1.2, nor did it expressly analyze by name the factors in Application Note 2(B).

The Court found similar support in the unpublished decisions of the Third and Ninth Circuit in *United States v. Fudge*, 592 Fed.Appx. 86, 91-92 (3d Cir. 2014); *and*, *United States v. Hung Quoc Bui*, 500 Fed.Appx. 658, 660 (9th Cir. 2012). In *Fudge*, the Third Circuit found no plain error in a District Court's a 1028A consecutive decision even though the District Court had failed to "reference the 5G1.2 factors by name" because the "District Court considered the first and third factors listed—the nature and seriousness of Fudge's conspiracy and fraud convictions as well as the purposes of sentencing under § 3553(a)(2)—during the course of a thorough sentencing hearing." *Id.* at 92. However, a full review of *Fudge* discloses that the case was actually resolved based on the "appellate waiver" which Fudge had executed in his District Court proceedings, indicating that the Third Circuit's discussion of this issue may actually be *dicta*. *Id.* at 91-92. Nevertheless, it appears that the Third Circuit does not require rote recitation of

5G1.2. *See generally*, *United States v. Corbin*, 474 Fed. Appx. 66, 69 (3d Cir. 2012) ("We do not require sentencing courts to explicitly discuss the non-exhaustive factors in the commentary to § 5G1.2.")

The Court below also cited to *United States v. Hung Quoc Bui*, 500 Fed. Appx. 658 (9th Cir. 2012). It is noted that *Bui* was an unpublished memorandum decision approximately two pages in length. Nevertheless, the Court in *Bui* did affirm the District Court's sentence because the court sufficiently addressed the factors set forth in the U.S.S.G. § 5G1.2, Application Note 2(B), when it discussed the seriousness of Bui's offense and the purposes of sentencing underlying 18 U.S.C. § 3553(a). *Id*. at 660.

On the other hand, the Court below also recognized that some Circuits placed more value on compliance with the mandatory, statutory instructions of 1028A. For instance, the Court below also explored *United States v. Dooley*, 688 F.3d 318, 320-321 (7th Cir. 2012). As stated by the Court below, in *Dooley*, "the district court neither referred to § 5G1.2 nor addressed most of the Application Note factors, including whether the six underlying offenses were groupable." Opinion below at page 9. The Court found that *Dooley* had employed "a formalistic approach" and "concluded that because the underlying statute, § 1028A(b)(4), requires a sentencing court to exercise its discretion 'in accordance with any applicable [G]uidelines and policy statements,' consideration of the Application Note 2(B) factors is 'essential to the statutory process.'" *Id. citing Dooley* at 321. Further, the Court below noted that in *Dooley*, "the record was so bereft of these considerations, the government

conceded that the failure to reference § 5G1.2, the relevant Application Note, or the applicable considerations included therein, constituted plain error." *Id.*

The Court below also discussed Mr. Potts' cited case of *United States v. Chibuko*, 744 F.3d 259 (2d Cir. 2014); *see Opinion Below* at 11. The Sixth Circuit found that "the Second Circuit's rationale in *Chibuko* stakes out something of a middle ground between the two general approaches just identified," stating:

> [o]n the one hand, the *Chibuko* court remanded for resentencing a case in which the district court, during sentencing, "made no reference to Guidelines § 5G1.2; no reference to Application Note 2(B); and, no reference to groupability" in deciding to run multiple aggravated-identity-theft sentences consecutively. *Id.* at 263. Yet the Second Circuit made clear that it remanded the matter for resentencing not because the district court failed to name the relevant Guidelines section in a "robotic incantation," but because the second factor set forth in Application Note 2(B)—whether the multiple underlying convictions were groupable—was relevant but not at all considered by the district court. 744 F.3d at 263 (quoting *United States v. Cavera*, 550 F.3d 180, 193 (2nd Cir. 2008) (en banc)).

Id. citing Chibuko at 263.

Ultimately, and after the above review, the Court below found that:

> A district court's failure to reference expressly § 5G1.2 or Application Note 2(B) does not amount to plain error, so long as there is some indication that the district court assessed the relevant factors included in that section and Application Note. A functional approach, one that looks to the sentencing colloquy in its entirety, is well-suited in this setting.

See, *Opinion Below* at 11. Under this standard, the Court affirmed the sentencing decision of the District Court, and it is this specific decision upon which Mr. Potts' seeks certiorari.

First, it is respectfully submitted that certiorari should be granted to resolve this inter-Circuit lack of uniformity. As it presently stands, the various Circuits employ inconsistent means for determining whether a District Court had sufficiently explained its consecutive sentencing decision(s) pursuant to 1028A, ranging from strict (the Seventh), to substantial (Third, Ninth, Eleventh), to substantive (Sixth, and perhaps Second). As such, certiorari should be granted to clarify the necessary standard and harmonize the approaches of the Circuits.

Second, it is further respectfully submitted that certiorari should be granted in order to clarify that the proper course is to pay more deference to the statutory requirements, and hold that a District Court must explicitly reference the factors in §5G1.2 when making a consecutive v. concurrent sentencing decision for multiple 1028A convictions. On this item, it is noted that 1028A(b)(4) contains compulsory language, and states that a District Court's consecutive v. concurrent sentencing discretion "*shall* be exercised in accordance with any applicable guideline and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28." 18 U.S.C. 1028A(b)(4)(emphasis added). And as noted by the Seventh Circuit in *Dooley*, 1028A(b)(4) "makes consideration of Note 2(B) essential to the statutory process." As such, it is submitted that the proper course is to pay appropriate deference to this statutory sentencing requirement.

Upon such holding, it appears clear that the District Court's sentencing pronouncement did not satisfy this standard. Indeed, even the Sixth Circuit noted the District Court "did not expressly reference §5G1.2, nor did it expressly analyze

by name the factors in Application Note 2(B)." *Opinion below* at 8. As such, it is submitted that this matter should be reversed and remanded for resentencing.

Furthermore, it does not appear from the record below that the District Court's sentencing pronouncement even satisfied the more lenient, "functional approach" which was adopted by the Circuit Court. In making that determination, it would appear that the Sixth Circuit fashioned a two part test, under which a District Court's failure to reference Application Note 2(b) at sentencing may nevertheless survive appellate review so long as: (1) the District Court was aware of its discretion to run the sentences concurrently or consecutively; and, (2) the District Court considered the substance of the relevant factors from Application Note 2(B). *See*, *Opinion Below* at 12. The Sixth Circuit found this standard to be satisfied because the District Court was aware of its discretion to run the sentences concurrently or consecutively, and because the Court had considered both the nature and seriousness of the offense along with the purposes of sentencing as well as the need for the sentence to reflect just punishment. *Id*. at 12-13. However, and as argued below by Mr. Potts, a review of the sentencing transcript reveals that this information appears to have been received as part of the District Court's broader 3553(a) analysis rather than as directly related to the District Court's consecutive v. concurrent sentencing decision under 1028A. *See*, Appellant's Brief, 6th Cir. Doc. 26 at 36-37; 29-30 (referencing U.S.S.G. §5G1.3) *and discussing* T.p. Sentencing at 18-21; R.E, 42; Page ID 192-195; *see also*, *United States v. Kitchen*, 428 Fed. Appx. 593, 597-598 (6th Cir. 2011)(*stating* "We have held that a district court commits an

abuse of discretion where the district court's decision to impose a consecutive sentence does not include a separate discussion of the § 3553(a) factors *and* the decision appears to be 'divorced' from the analysis of the § 3553(a) factors that is required before imposing the general sentence. But, where a district court imposes a concurrent sentence in conjunction with or immediately following the court's invocation of the § 3553(a) factors, this Court has held that the court did not abuse its discretion because there is no obligation to conduct a separate §3553(a) analysis. As we have noted, requiring the § 3553(a) analysis in that instance would be 'repetitious and unwarranted.'")(emphasis in original) (internal citations omitted); *see also*, Appellant's Brief at 36 (regarding §1028A consecutive sentencing). As such, it is submitted that this matter should be reversed and remanded for resentencing.

In addition, the distinction drawn by the panel below between the instant proceedings and those in *Chibuko* does not appear to be well-founded. *See, Opinion below* at 13. Specifically, the panel below found that the instant proceedings were distinguishable from *Chibuko* and *Dooley* because in those cases, the district court had failed to consider at least one relevant factor from Application Note 2(B), whereas in the instant proceedings the District Court had, in the Sixth Circuit's opinion, considered the first and third factors, but "groupability was not at issue because Potts pleaded guilty to only one underlying offense." *Id.* However, the PSIR for Mr. Potts actually indicated that "had Mr. Potts been convicted of all counts charged in the Indictment, Counts 1, 2, 4, 6, 7, and 9 *would* have been

grouped under U.S.S.G. §3D1.2(d), and the offense level would have been determined based on the total loss caused in this case." PSIR at 25, ¶148 (emphasis added). Thus, even if Mr. Potts only pleaded guilty to one offense, the potential groupability of his charges should have weighed in his favor when assessing the Commentary Note 2(B) factors. As such, it is submitted that the Circuit Court erred as a matter of process on this distinction, and as a matter of substance on this result, and this matter should be reversed and remanded for resentencing.

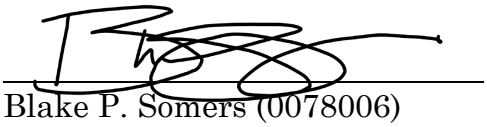
Finally, it is submitted that plain error, even if applicable, does not govern this issue. True enough, the Sixth Circuit generally holds that error cannot be "plain" if it involves a question of first impression. *See generally*, *United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015), *cited in Opinion Below* at 12. While the particular question presented below had not previously addressed by the Court, the plain language of 1028A clearly required a sentencing court to exercise its discretion in accordance with the appropriate Guidelines language, and even the Sixth Circuit noted that, in a related context, a District Court must "adequately explain" its sentencing decisions on departures and variances. *See*, *Opinion below at 18*, *citing*, *United States v. Presley*, 547 F.3d 625, 629 (6th Cir. 2008). As such, plain error should not control the outcome of this issue.

For these reasons, certiorari should be granted to review these issues, synthesize these approaches, and reverse the proceedings below.

CONCLUSION

Wherefore, and for all of the foregoing reasons, Petitioner Potts respectfully requests that this honorable Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document was prepared using Century Schoolbook typeface, Microsoft Word, Office 365, 12 point, throughout. I further certify that the foregoing document is less than 40 pages in total, and that the document contains 6,024 words, including footnotes.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, along with the attached Appendix, was served pursuant to Supreme Court Rules 29(3), (4)(a), and (5)(b) on this 1st Day of April, 2020, via overnight FedEx delivery service, postage prepaid, upon the following persons:

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