No. _____

In the

Supreme Court of the United States

_____

Lee Montez Thompson,

Petitioner,

v.

United States of America,

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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QUESTIONS PRESENTED

I. Whether there is a reasonable probability of a different result in the event that the court below is instructed to reconsider the decision in light of *Davis v. United States*, __U.S.__, 140 S.Ct. 1060 (2020)?

II. Whether this Court should grant certiorari to determine whether the failure of a district court to advise a pleading defendant of the element recognized in *Rehaif v. United States,* __U.S. __, 131 S.Ct. 2191 (June 21, 2019), and whether it should hold the instant case in light of any such case.

PARTIES TO THE PROCEEDING

Petitioner is Lee Montez Thompson, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lee Montez Thompson seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported at *United States v. Thompson*, 792 Fed. Appx. 338 (5th Cir. February 4, 2020)(unpublished). It is reprinted in Appendix A to this Petition. The district court's judgement and sentence is attached as Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on January 21, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT RULE

Federal Rule of Criminal Procedure 52 reads in relevant part:

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

STATEMENT OF THE CASE

A. Proceedings through Sentence

1. The investigation

At 8:50 PM on April 27, 2017, Arlington, Texas police initiated an investigation into the stabbing of a man named Toddrick Wilson. *See* (Record in the Court of Appeals at 144). They went to Mr. Wilson's home and talked to his father, who said that Petitioner Lee Montez Thompson had stabbed his son during an argument. *See* (Record in the Court of Appeals at 144). Then they went to a hospital to find the younger Mr. Wilson. *See* (Record in the Court of Appeals at 144). They succeeded in interviewing him, and he also implicated Petitioner. *See* (Record in the Court of Appeals at 144).

After these undertakings, the officers went to the apartment of Rochelle Taylor, looking for Petitioner. *See* (Record in the Court of Appeals at 144). Coincidentally, other officers had been called to the same complex 50 minutes earlier on a "shots fired" call. *See* (Record in the Court of Appeals at 144). The record does not reveal whether the call pointed in the particular direction of Ms. Taylor's apartment, nor whether this call preceded the one about the stabbing. *See* (Record in the Court of Appeals at 144). In any case, they found five shell casings later linked to a gun found in Petitioner's possession. *See* (Record in the Court of Appeals at 144).

Still hunting for Petitioner, the officers went to his sister's apartment. *See* (Record in the Court of Appeals at 144). She said Petitioner had been there with blood on his clothes, but that she turned him away. *See* (Record in the Court of

Appeals at 144). She also said a woman named Elicia Rivera came later and picked up his clothes. *See* (Record in the Court of Appeals at 144).

Ultimately, the officers found Petitioner lying in a bed at Ms. Rivera's apartment, next to a firearm. *See* (Record in the Court of Appeals at 145). That gun ultimately became the basis of the instant federal charge: possession of a firearm after having sustained a prior felony conviction. *See* (Record in the Court of Appeals at 10). They arrested him on state charges, of which he would eventually be convicted prior to his federal sentencing. *See* (Record in the Court of Appeals at 153).

After Petitioner entered custody, the officers interviewed Ms. Rivera. *See* (Record in the Court of Appeals at 145). She said that Petitioner fired gun shots at Ms. Taylor's apartment, then went to the home of Mr. Wilson. *See* (Record in the Court of Appeals at 145). According to Ms. Rivera, Petitioner stabbed Mr. Wilson after Mr. Wilson punched Petitioner in the face. *See* (Record in the Court of Appeals at 145). She said that Petitioner took his clothes off at her (Ms. Rivera's) apartment, and then burned them in the lot. *See* (Record in the Court of Appeals at 145).

Finally, the police conducted a second interview of Mr. Wilson after his surgery. *See* (Record in the Court of Appeals at 145). He said that Petitioner stabbed him in a van when Mr. Wilson wouldn't smoke marijuana with him. *See* (Record in the Court of Appeals at 145). And he said that Petitioner pulled a gun on him during the fight. *See* (Record in the Court of Appeals at 145).

2. Presentence Litigation

After the resolution of state charges, Petitioner pleaded guilty to one count of possessing a firearm after having sustained a felony conviction. *See* (Record in the Court of Appeals at 33-35). At his plea hearing, the court did not tell him that a defendant convicted of violating 18 U.S.C. §922(g) must know that he is a felon at the time he possesses a firearm. See [Appendix C].

A Presentence Report (PSR), calculated a Guideline range of 92-115 months imprisonment. *See* (Record in the Court of Appeals at 159). This range stemmed from a base offense level of 20, a four level enhancement for possessing a firearm in connection with the stabbing, a two level adjustment for obstruction of justice, and a three level reduction for acceptance of responsibility. *See* (Record in the Court of Appeals at 147-148). This resulted in a final offense level of 25, which produced the 92-115 month range when coupled with a criminal history category of VI. *See* (Record in the Court of Appeals at 159).

The obstruction enhancement stemmed from Probation's conclusion that Petitioner burned his clothing to conceal evidence of the stabbing. *See* (Record in the Court of Appeals at 146). Significantly, however, Probation found that the burning "did not result in a material hindrance to the official investigation..." (Record in the Court of Appeals at 146). It also expressly found "no information to confirm the defendant produced the same firearm during the Aggravated Assault With a Deadly Weapon of Wilson as the firearm cited in the offense of conviction." (Record in the Court of Appeals at 148).

The defense objected to the base offense level, and contended that it ought instead to be 14. *See* (Record in the Court of Appeals at 168-177). Under its calculations, the final offense level should have been 17, and the Guidelines 51-63 months. *See* (Record in the Court of Appeals at 176). The district court issued an order rejecting the objection, and also "tentatively concluding" that a sentence in excess of 115 months would be necessary even if the Guidelines were 51-63 months imprisonment. *See* (Record in the Court of Appeals at 49-54).

3. The sentencing hearing

At the sentencing hearing, the court reversed course and accepted the objection, thus finding a range of 51-63 months. *See* (Record in the Court of Appeals at 118). It otherwise adopted the PSR. *See* (Record in the Court of Appeals at 117). After recounting the defendant's criminal history in some depth, it decided to impose sentence at the statutory maximum: 120 months. *See* (Record in the Court of Appeals at 123-128).

B. Appellate Proceedings

On appeal, Petitioner argued that the district court erred in failing to address the Guideline recommendation for a sentence reduction to account for time in pretrial state custody for related state cases. The court of appeals found the error unpreserved, and rejected the claim as not clearly established under current law. *See United States v. Thompson*, 792 F. App'x 338, 338-339 (5th Cir. 2020); [Appendix A, at 2].

Petitioner also argued that the district court plainly erred in applying a two level adjustment for obstruction of justice. The district court applied the adjustment on the basis of the defendant's act of burning his clothes. Under USSG §3C1.1, Petitioner argued, the obstruction adjustment should not be applied unless: 1) the defendant's conduct meriting the obstruction increase was likely to thwart the investigation, or 2) the conduct occurred after the beginning of an investigation into the offense of conviction. *See* USSG §3C1.1, comment. (n. 1). The PSR, he noted, expressly disclaimed any effect of Petitioner's clothes-burning on the investigation. And he argued that the facts plainly failed to establish that police had begun an investigation into the offense of conviction at the time he burned his clothes. Rather, it showed that the police had begun an investigation into the stabbing of Mr. Wilson, but "no information to confirm the defendant produced the same firearm during the Aggravated Assault With a Deadly Weapon of Wilson as the firearm cited in the offense of conviction." (Record in the Court of Appeals at 148).

Answering the obstruction claim, the government argued, *inter alia*, that "Thompson attempts to raise a new fact issue--whether his actions meet the definition of obstruction of justice--which the district court was capable of resolving on proper objection at sentencing, and therefore this fact issue cannot constitute plain error on appeal." Appellee's Brief in *United States v. Thompson*, No. 18-11520, 2019 WL 2417113, at *11 (5th Cir. Filed June 5, 2019). The court of appeals rejected the obstruction claim, offering only the following analysis:

> Thompson's § 3C1.1 claim likewise fails. Thompson argues that the district court plainly erred when it applied the obstruction-of-justice

> enhancement to his sentencing calculations. His argument hinges on a factual issue as to which we see no clear error.

Thompson, 792 F. App'x at 339; [Appendix A, at 3].

REASONS FOR GRANTING THE PETITION

I. There is a reasonable probability that the decision below rests on a basis that has been abrogated by *Davis v. United States*, __U.S.__, 140 S.Ct. 1060 (2020).

Federal Rule of Criminal Procedure 52 provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b). From 1991 until shortly after the decision below, the court below held that "[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991). As the government recently explained, this Rule was consistently and frequently to dispose of claims raised on plain error review. *See* Appellee's Brief in *United States v. Davis*, No. 18-10748, 2018 WL 6173268, at *9 (Nov. 20, 2018)("*Davis* Appellee's Brief")("…this Court has repeatedly applied the rule that '[q]uestions of fact capable of resolution by the district court on proper objection at sentencing can never constitute plain error.' Indeed, this Court has applied this rule over a hundred times…")(internal citation omitted, quoting *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991)).

Although the decision below provides very little of its reasoning, it does appear to have relied on the *Lopez* rule. It notes, expressly, that the obstruction claim was, in its view, "a factual issue." *United States v. Thompson*, 792 F. App'x 338, 339 (5th Cir. 2020); [Appendix A, at 3]. It followed an express request by the government to invoke the *Lopez* rule – indeed, this was the government's first defense against the obstruction error. *See* Appellee's Brief in *United States v. Thompson*, No. 18-11520, 2019 WL 2417113, at *11 (5th Cir. Filed June 5, 2019). And as the government has

previously noted, invocation of the *Lopez* rule would comport with the very consistent practice of the court below in disposing of factual claims of plain error. *Davis* Appellee's Brief, at 9. At a minimum, there is a reasonable probability that *Lopez* was the basis for the decision below.

Further, there is reason to think that the outcome would be different if the matter were reconsidered without the erroneous prohibition of finding factual error plain. Given the express findings in the PSR, there is very good reason to think another review might find clear error.

Guideline 3C1.1 assesses a two level adjustment if the defendant wilfully obstructs justice "with respect to the investigation, prosecution, or sentencing of the instant offense of conviction," and the obstructive conduct "related to the defendant's offense of conviction and any relevant conduct or a closely related offense." USSG §3C1.1. The first Note to the Guideline notes an important restriction on the use of obstructive conduct that "occurred prior to the start of the investigation *of the offense of conviction*." USSG §3C1.1, comment. (n. 1)(emphasis added). Such conduct, explains the Note, triggers the enhancement only if it is "purposefully calculated, and likely, to thwart the investigation of the offense of conviction." USSG §3C1.1, comment. (n. 1).

Here, the district court premised the obstruction enhancement on Petitioner's decision to burn clothing he wore during the stabbing. *See* (ROA146). The PSR expressly found that this conduct "did not result in a material hindrance to the official investigation..." (Record in the Court of Appeals at 146). And the district court

adopted the PSR. *See* (Record in the Court of Appeals at 117)("I adopt as the fact findings of the Court the facts set forth in the Presentence Report as modified or supplemented by the addendum and any facts I've found from the bench..."). As such, the Commentary permitted the enhancement only if the conduct occurred after the start of the investigation into the offense of conviction.

The PSR found that police commenced an investigation into the stabbing at 8:50 PM. *See* (Record in the Court of Appeals at 144). At least one reading of the (confused and conflicting) facts in the PSR would show that Petitioner burned his clothing after that time. Specifically, Petitioner's sister said that he still had his (presumably unburnt) clothes on at 9:00 PM. *See* (Record in the Court of Appeals at 144). If we believe her,[1] he must have therefore burned them after 8:50 PM. *See*

[1]Her account is plainly inconsistent with that of Ms. Rivera, who said that Petitioner took his clothes off at her (Ms. Rivera's) apartment. *See* (Record in the Court of Appeals at 145). Petitioner's sister said that Ms. Rivera took Petitioner's clothes from her apartment. *See* (Record in the Court of Appeals at 144-145). If Ms. Rivera took Petitioner's bloody clothes from his sister's apartment, he probably wasn't wearing them. And if he didn't have his bloody clothes on before he reached Ms. Rivera's apartment, why would he put them back on, only to burn them?

To put it mildly, this is not the only conflicting and incredible evidence in the PSR. Ms. Rivera said that Mr. Wilson hit Petitioner several times in the head just before the stabbing. *See* (Record in the Court of Appeals at 145). But Mr. Wilson says nothing about provoking the assault, and instead claims, with rather limited plausibility, that Petitioner became angry because Mr. Wilson wouldn't smoke marijuana with him. *See* (Record in the Court of Appeals at 145). Mr. Wilson describes a stabbing that began in a van, next to "an unknown young man," but the record doesn't say anything about physical evidence from the van, nor of efforts to identify this eye-witness. (Record in the Court of Appeals at 145). Finally, Ms. Rivera says nothing about Petitioner brandishing a gun during the stabbing, but Mr. Wilson does. *See* (Record in the Court of Appeals at 145). Notably, it is only because Mr. Wilson put a gun in Petitioner's hand during the stabbing that Petitioner received a four-level enhancement for possessing the firearm in

(Record in the Court of Appeals at 144). But the stabbing was not "the offense of conviction." As that term is used by the Guidelines, it refers to the particular offense charged in the indictment – possession of a particular firearm – not relevant conduct. *See* USSG §1B1.1, comment. (n. (1)(I)). So the beginning of an investigation into the stabbing does not imply an investigation into the defendant's possession of the indicted firearm.

According to Mr. Wilson, Petitioner did possess a firearm during the fight. *See* (Record in the Court of Appeals at 144). If this were the same firearm named in the indictment, we might treat the investigation into the stabbing as a *de facto* simultaneous investigation into Petitioner's firearm offense. But again the PSR's express findings foreclose this view: the PSR disclaims any evidence that the firearm present in the stabbing was the same one named in the indictment. *See* (Record in the Court of Appeals at 148)("There is no information to confirm the defendant produced the same firearm during the Aggravated Assault With a Deadly Weapon of Wilson as the firearm cited in the offense of conviction."). Again, the court adopted the PSR. *See* (Record in the Court of Appeals at 117).

The PSR found that the obstructive conduct occurred after the start of an investigation into a stabbing. But it also found that the firearm in the indictment may not have been present during the stabbing. Accordingly, the investigation underway at the time of the obstructive conduct was not necessarily an investigation

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connection with another felony, and a two level enhancement for obstruction of justice.

into the offense of conviction. And as the court further found that the conduct did not thwart the investigation, the very plain language of the Commentary forecloses the enhancement.

This Court may grant certiorari, vacate the judgment below, and remand for reconsideration (GVR) in light of developments following an opinion below when those developments "reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation..." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). As argued above, that standard is met.

II. This Court should grant certiorari to determine whether the failure of a district court to advise a pleading defendant of the element recognized in *Rehaif v. United States,* __U.S. __, 131 S.Ct. 2191 (June 21, 2019). It should hold the instant case in light of any such case.

Petitioner's statute of conviction, 18 U.S.C. §922(g), makes it a crime to possess a firearm after a felony conviction. After *Rehaif v. United States*, __U.S. __, 131 S.Ct. 2191 (June 21, 2019), decided after the submission of the reply brief below, the courts of appeals have recognized an additional element to §922(g): the defendant must of know of his or her felon status at the time of the gun possession. *See United States v. Gary*, 954 F.3d 194, 201-202 (4th Cir. 2020); *United States v. Williams*, 946 F.3d 968, 971 (7th Cir. 2020); *United States v. Hollingshed*, 940 F.3d 410, 415 (8th Cir. 2019); *United States v. Benamor*, 937 F.3d 1182, 1188 (9th Cir. 2019); *United States v. Reed*, 941 F.3d 1018, 1021 (11th Cir. 2019). But the courts of appeals have divided as to whether *Rehaif* requires reversal of a defendant's plea of guilty on direct appeal in the absence of an objection. ***Compare*** *United States v. Hicks*, 958 F.3d 358 (5th Cir. 2020) ***with*** *Gary*, 954 F.3d at 207–08.

This circuit split merits the Court's attention. The difference is not limited to the *Rehaif* context, but will recur in any case that finds additional elements necessary for conviction. *Rehaif*, of course, is neither the first nor the last of such cases. *See e.g. Flores-Figueroa v. United States*, 556 U.S. 646 (2009); *Staples v. United States*, 511 U.S. 600, 605 (1994); *Liparota v. United States*, 471 U.S. 419 (1985).

In the event that this Court accepts review of this issue, it should hold the instant petition pending its resolution. The defendant was not advised of the *Rehaif* element during the guilty plea proceedings. *See* [Appx. C]. Some precedent in the

court below permits defendants raising an issue for the first time in a petition for certiorari to receive plain error review. *See United States v. Clinton*, 256 F.3d 311, 313 (5th Cir. 2001); *but see United States v. Hernandez-Gonzalez*, 405 F.3d 260 (5th Cir. 2005). So if this Court holds that *Rehaif* error, particularly the failure to advise a defendant of the mental state element recognized in *Rehaif*, is reversible on plain error, there is a reasonable probability that it will change the result below. A hold is appropriate. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 1st day of July, 2020.

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