No. _____

In the

Supreme Court of the United States

_____

James David Perryman,

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

Whether 18 U.S.C. §922(g) permits conviction for the possession of any firearm that has ever crossed state lines at any time in the indefinite past, and, if so, if it is facially unconstitutional?

Whether USSG §3C1.1(1) permits the assessment of a two-level enhancement for the commission of perjury at the trial of a non-codefendant?

PARTIES TO THE PROCEEDING

Petitioner is James David Perryman, 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 James David Perryman seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the court of appeals is reported at *United States v. Perryman*, 965 F.3d 424 (5th Cir. July 14, 2020). 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 July 14, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTE, GUIDELINE, AND CONSTITUIONAL PROVISION

Section 922(g)(1) of Title 18 reads in relevant part:

> (g) It shall be unlawful for any person—
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year
> ***
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Guideline 3C1.1 provides:

> If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

Article I, Section 8 of the United States Constitution provides in relevant part:

The Congress shall have Power

***

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes…

STATEMENT OF THE CASE

A. Facts and Proceedings in District Court

On December 29, 2018, law enforcement observed a social media conversation between Petitioner James David Perryman and another person which featured a firearm. *See* (Record in the Court of Appeals, at 130). About three weeks later, Mr. Perryman suffered arrest with that firearm. *See* (Record in the Court of Appeals, at 130). After a motion to dismiss the indictment on interstate commerce grounds was denied, (Record in the Court of Appeals, at 46-53), he pleaded guilty to a single count of possessing a firearm after a felony, *see* (Record in the Court of Appeals, at 64-67). The factual resume admitted that the firearm had moved in interstate commerce, and that the defendant possessed it "in or affecting" interstate commerce, but did not say that the defendant's actions had caused the firearm so to move, nor that it had moved in the recent past. See (Record in the Court of Appeals, at 64-67); [Appendix C]. A Presentence Report (PSR) calculated a Guideline range of 46-57 months imprisonment, the product of a final offense level of 17, and a criminal history of V. *See* (Record in the Court of Appeals, at 146).

Five days after issuance of the PSR, Mr. Perryman testified as a witness for the defense in the trial of a Mr. Dalka. *See* (Record in the Court of Appeals, at 171). Evidently, law enforcement found guns in a safe at Mr. Dalka's residence, along with methamphetamine in a garbage bag outside the house, and more methamphetamine inside. *See* (Record in the Court of Appeals, at 171-217). Mr. Perryman testified that

he, Mr. Perryman, put these firearms in the safe and that he put the bag of methamphetamine in the yard. *See* (Record in the Court of Appeals, at 176).

The government objected to the PSR, seeking the addition of a two-level enhancement for obstruction of justice due to alleged perjury at Mr. Dalka's trial. *See* (Record in the Court of Appeals, at 155). It also sought the denial of a three-level reduction for acceptance of responsibility on the same grounds, and the addition of a four-level enhancement for using the firearm in connection with drug trafficking under USSG §2K2.1(b)(6). *See* (Record in the Court of Appeals, at 155).

As to the perjury objection, the government asked the court to find that Mr. Perryman had lied when he said that he placed firearms in Mr. Dalka's safe, when he said that he put methamphetamine in a bag outside of Mr. Dalka's home, and when he called Mr. Dalka a drug user rather than a drug dealer. *See* (Record in the Court of Appeals, at 157-158). In support, it attached a transcript of Mr. Perryman's testimony, but no other parts of Mr. Dalka's trial transcript. *See* (Record in the Court of Appeals, at 171-217).

The defense responded with a written filing, urging the court to find that Mr. Perryman had not lied in his testimony. *See* (Record in the Court of Appeals, at 222-229). It objected as well to the four-level adjustment for possessing a firearm in connection with another felony offense. *See* (Record in the Court of Appeals, at 228).

An Addendum to the PSR said simply that it "concur[red] with [the government's] objection." (Record in the Court of Appeals, at 219). It thus increased

the final offense level to 26, and the final Guideline range to 110-120 months imprisonment. *See* (Record in the Court of Appeals, at 220).

After hearing extensive argument from the defense on the perjury objection, (Record in the Court of Appeals, at 109-113), the court sustained the government's objection and expressly adopted the Addendum to the PSR, *see* (Record in the Court of Appeals, at 113). Making no other finding on the perjury question, the court imposed a sentence of 110 months imprisonment, the bottom of the Guideline range it believed applicable. *See* (Record in the Court of Appeals, at 114).

B. Appellate Proceedings

Petitioner appealed, challenging both his conviction and his sentence. As to his conviction, he argued that the Congressional power to regulate interstate commerce did not permit it to criminalize Petitioner's conduct: the mere possession of a firearm that happened to cross state lines at some point in the indefinite past, with no causal connection between the defendant's conduct and the interstate movement of the gun. *See* Initial Brief in *United States v. Perryman*, No. 19-10755, 2019 WL 6271105, at *13-18 (5th Cir. Filed Nov. 21, 2019)("*Perryman* Initial Brief"). He thus argued that to the extent that 18 U.S.C. §922(g) actually reached his conduct, it was facially unconstitutional. *See Perryman* Initial Brief, at *17. Alternatively, he contended that the statute should be construed to require a greater connection to interstate commerce than that admitted in the defendant's "Factual Resume" in support of the plea. *See id*. at *17-18. Petitioner conceded that these claims were foreclosed by

circuit precedent, *see id.* at *18, and the court of appeals agreed, [Appx. A, at 4]; *United States v. Perryman*, 965 F.3d 424, 426 (5th Cir. 2020).

As to the sentence, Petitioner argued that the information in the record did not suffice to show the falsity of his testimony. *See Perryman* Initial Brief, at *12-17. He thus challenged the obstruction enhancement under USSG §3C1.1. *See id.* The court found that the Addendum to the PSR provided sufficient summary of Petitioner's trial testimony to support the enhancement. [Appx. A, at 5-6]; *Perryman*, 965 F.3d at 426-427. It then added the following footnote:

> Importantly, Perryman does not argue that his alleged perjury does not constitute a willful obstruction of justice "with respect to ... *the instant offense of conviction*." *See* U.S.S.G. § 3C1.1. Perryman waived review of this issue by not raising it before the district court or briefing it on appeal. *Brinkmann v. Dallas Cty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987) ("We will not raise and discuss legal issues [the parties have] failed to assert."). Therefore, we only note that, to our knowledge, we have not upheld application of the obstruction of justice enhancement based on the defendant's perjury at the trial of a non-codefendant, and this opinion should not be read to express any opinion on the appropriateness of such an application.

[Appx. A, at 6, n.2][emphasis added by court of appeals]; *Perryman*, 965 F.3d at 427, n.2.

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari to resolve the tension between *Scarborough v. United States*, 431 U.S. 563 (1963), on the one hand, and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and *Bond v. United States*, 572 U.S. 844 (2014), on the other.

A. *Scarborough* stands in tension with more recent precedents regarding the Commerce Clause.

"In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533 (2012). Powers outside those explicitly enumerated by the Constitution are denied to the National Government. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 534 ("The Constitution's express conferral of some powers makes clear that it does not grant others.") There is no general federal police power. *See United States v. Morrison*, 529 U.S. 598, 618-619 (2000). Every exercise of Congressional power must be justified by reference to a particular grant of authority. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 535 ("The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions."). A limited central government promotes accountability and "protects the liberty of the individual from arbitrary power." *Bond v. United States*, 572 U.S. 844, 863 (2011).

The Constitution grants Congress a power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3.

But this power "must be read carefully to avoid creating a general federal authority akin to the police power." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 536

Notwithstanding these limitations, and the text of Article I, Section 8, this Court has held that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," and includes a power to regulate activities that "have a substantial effect on interstate commerce." *United States v. Darby*, 312 U.S. 100, 118-119 (1941). Relying on this expansive vision of Congressional power, this Court held in *Scarborough v. United States*, 431 U.S. 563 (1963), that a predecessor statute to 18 U.S.C. §922(g) reached every case in which a felon possessed firearms that had once moved in interstate commerce. It turned away concerns of lenity and federalism, finding that Congress had intended the interstate nexus requirement only as a means to insure the constitutionality of the statute. *See Scarborough*, 431 U.S. at 577.

It is difficult to square *Scarborough*, and the expansive concept of the commerce power upon which it relies, with more recent holdings of the Court in this area. In *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), five members of this Court found that the individual mandate component of the Affordable Care Act could not be justified by reference to the Commerce Clause. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 557-558 (Roberts., C.J. concurring). Although this Court recognized that the failure to purchase health insurance affects interstate commerce, five Justices did not think that the constitutional phrase "regulate Commerce ... among the several States," could reasonably be construed to include enactments that

compelled individuals to engage in commerce. *See id.* at 550 (Roberts., C.J. concurring). Rather, they understood that phrase to presuppose an existing commercial activity to be regulated. *See id.* (Roberts., C.J. concurring).

The majority of this Court in *NFIB* thus required more than a demonstrable effect on commerce: the majority required that the challenged enactment itself *be* a regulation of commerce – that it affect the legality of pre-existing commercial activity. Possession of firearms, like the refusal to purchase health insurance, may "substantially affect commerce." But such possession is not, without more, a commercial act.

To be sure, *NFIB* does not explicitly repudiate the "substantial effects" test. Indeed, the Chief Justice's opinion quotes *Darby*'s statement that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states..." *Nat'l Fed'n of Indep. Bus.,* 567 U.S. at 549 (Roberts., C.J. concurring); *see also id.* at 552-553 (Roberts., C.J. concurring)(distinguishing *Wickard v. Filburn*, 317 U.S. 111 (1942)). It is therefore perhaps possible to read *NFIB* narrowly: as an isolated prohibition on affirmatively compelling persons to engage in commerce. But it is difficult to understand how this reading of the case would be at all consistent with *NFIB*'s textual reasoning.

This is so because the text of the Commerce Clause does not distinguish between Congress's power to affect commerce by regulating non-commercial activity (like possessing a firearm), and its power to affect commerce by compelling people to join a commercial market (like health insurance). Rather it simply says that Congress

may "regulate ... commerce between the several states." And that phrase either is or is not limited to laws that affect the legality of commercial activity. Five justices in *NFIB* took the text of the Clause seriously and permitted Congress to enact only those laws that were, themselves, regulations of commerce. *NFIB* thus allows Congress only the power "to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. 1, 196, 9 Wheat. 1 (1824).

And indeed, much of the Chief Justice's language in *NFIB* is consistent with this view. This opinion rejects the government's argument that the uninsured were "active in the market for health care" because they were "not currently engaged in any *commercial* activity involving health care..." *id.* at 556 (Roberts., C.J. concurring) (emphasis added). The Chief Justice significantly observed that "[t]he individual mandate's regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing *commercial* activity." *Id.* (Roberts., C.J. concurring)(emphasis added). He reiterated that "[i]f the individual mandate is targeted at a class, it is a class whose *commercial* inactivity rather than activity is its defining feature." *Id.* (Roberts., C.J. concurring)(emphasis added). He agreed that "Congress can anticipate the effects on commerce of an *economic* activity," but did not say that it could anticipate a *non-economic* activity. *Id.* (Roberts., C.J. concurring)(emphasis added). And he finally said that Congress could not anticipate a future activity "in order to regulate individuals not currently engaged *in commerce*." *Id.* (Roberts., C.J. concurring)(emphasis added). Accordingly, *NFIB* provides substantial support for the

proposition that enactments under the Commerce Clause must regulate commercial or economic activity, not merely activity that affects commerce.

Here, the factual resume does not state that Petitioner's possession of the gun was an economic activity. *See* [Appx. C]. Under the reasoning of *NFIB*, this should have been fatal to the conviction. As explained by *NFIB*, the Commerce Clause permits Congress to regulate only activities, *i.e.*, the active participation in a market. But 18 U.S.C. §922(g)(1) criminalizes all possession, *without* reference to economic activity. Accordingly it sweeps too broadly.

Further, the factual resume fails to show that Petitioner was engaged in the relevant market at the time of the regulated conduct. *See* [Appx. C]. The Chief Justice has noted that Congress cannot regulate a person's activity under the Commerce Clause unless the person affected is "currently engaged" in the relevant market. *Id.* at 557. As an illustration, the Chief Justice provided the following example: "An individual who bought a car *two years ago* and may buy another in the future is not 'active in the car market' in any pertinent sense." *Id.* at 556 (emphasis added). As such, *NFIB* brought into serious question the long-standing notion that a firearm which has previously and remotely passed through interstate commerce should be considered to indefinitely affect commerce without "concern for when the [initial] nexus with commerce occurred." *Scarborough*, 431 U.S. at 577.

Scarborough stands in even more direct tension with *Bond v. United States*, 572 U.S. 844 (2014), which shows that §922(g) ought not be construed to reach the possession by felons of every firearm that has ever crossed state lines. Bond was

convicted of violating 18 U.S.C. §229, a statute that criminalized the knowing possession or use of "any chemical weapon." *Bond*, 572 U.S. at 853; 18 U.S.C. §229(a). She placed toxic chemicals – an arsenic compound and potassium dichromate – on the doorknob of a romantic rival. *See id.* This Court reversed her conviction, holding that any construction of the statute capable of reaching such conduct would compromise the chief role of states and localities in the suppression of crime. *See id.* at 865-866. It instead construed the statute to reach only the kinds of weapons and conduct associated with warfare. *See id.* at 859-862.

Notably, §229 defined the critical term "chemical weapon" broadly as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." 18 U.S.C. §229F(8)(A). Further, it criminalized the use or possession of "any" such weapon, not of a named subset. 18 U.S.C. §229(a). This Court nonetheless applied a more limited construction of the statute, reasoning that statutes should not be read in a way that sweeps in purely local activity:

> The Government's reading of section 229 would "'alter sensitive federal-state relationships,'" convert an astonishing amount of "traditionally local criminal conduct" into "a matter for federal enforcement," and "involve a substantial extension of federal police resources." [*United States v.*]*Bass*, 404 U.S. [336] 349-350, 92 S. Ct. 515, 30 L. Ed. 2d 488 [(1971)]. It would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. As the Government reads section 229, "hardly" a poisoning "in the land would fall outside the federal statute's domain." *Jones* [*v. United States*], 529

> U.S. [848,] 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 [(2000)]. Of course Bond's conduct is serious and unacceptable—and against the laws of Pennsylvania. But the background principle that Congress does not normally intrude upon the police power of the States is critically important. In light of that principle, we are reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack.

Bond, 572 U.S. at 863

As in *Bond*, it is possible to read §922(g) to reach the conduct admitted here: possession of an object that once moved across state lines, without proof that the defendant's conduct caused the object to move across state lines, nor even proof that it moved across state lines in the recent past. But to do so would intrude deeply on the traditional state responsibility for crime control. Such a reading would assert the federal government's power to criminalize virtually any conduct anywhere in the country, with little or no relationship to commerce, nor to the interstate movement of commodities.

The better reading of the phrase "possess in or affecting commerce" – which appears in §922(g) – therefore requires a meaningful connection to interstate commerce. Such a reading would require either: 1) proof that the defendant's offense caused the firearm to move in interstate commerce, or, at least, 2) proof that the firearm moved in interstate commerce at a time reasonably near the offense.

B. A certiorari grant in this case is a good way to address the issue.

The present case is an excellent vehicle to resolve these tensions. The defendant moved to dismiss the prosecution on the ground that §922(g) exceeds the Commerce Power. *See* (Record in the Court of Appeals, at 46-53). The motion also

raised the question of how 922(g) ought to be construed to avoid this constitutional question. It argued:

> *Morrison* and *Jones* indicate that 18 U.S.C. § 922(g)'s "possess . . . in or affecting
> commerce" phrase does not reach the situation here, where the sole link to interstate commerce is the fact that the firearm in question was, at some unspecified point in the possibly remote past, manufactured in another state and then transported to Texas.

(Record in the Court of Appeals, at 49). The issue is thus adequately preserved in district court.

It is also well preserved in the court of appeals. Petitioner sought appellate relief from his conviction, raising both the constitutional challenge to the statute and the question of statutory construction discussed herein. *See* Initial Brief in *United States v. Perryman*, No. 19-10755, 2019 WL 6271105, at *13-18 (5th Cir. Filed Nov. 21, 2019).

Finally, and most critically, the factual resume admits no more facts than that the firearm once moved across state lines. *See* [Appx. C]. The case clearly and directly presents the proper interpretation of the statute in light of the limitations on the commerce power, and of its constitutionality.

II. This Court should grant certiorari, vacate the judgment below, and remand in light of decisions of the Third, Fourth, and/or Eighth Circuits relevant to USSG §3C1.1(1) that were issued after the decision below.

Guideline 3C1.1 provides a two level adjustment:

> [i]f (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense…

USSG §3C1.1. We may assume that the prosecution of Mr. Dalka represented "a closely related offense" to Petitioner's offense of conviction. Even so, however, Section 1 of the Guideline separately requires that the defendant obstruct justice "with respect to the investigation, prosecution, or sentencing of the instant offense of conviction." As the opinion below observed, it is hardly clear that Mr. Dalka's trial represents in any sense the investigation, prosecution, or sentencing of the instant offense of conviction. Indeed, the Fifth Circuit observed below that "to our knowledge, we have not upheld application of the obstruction of justice enhancement based on the defendant's perjury at the trial of a non-codefendant, and this opinion should not be read to express any opinion on the appropriateness of such an application." [Appx. A, at 6, n.2]; *United States v. Perryman*, 965 F.3d 424, 427, n.2 (5th Cir. 2020).

Petitioner did not object in the trial court on this ground. Accordingly, any claim to relief premised on this aspect of §3C1.1 would be reviewable only for plain error. *See* Fed. R. Crim. P. 52(b). Since the opinion below, however, three courts of

appeals have released decisions that tend to support the claim of error under USSG §3C1.1(1), and to help establish that it is clear or obvious.

First, the Fourth Circuit said, arguably in *dicta*, that §3C1.1's reference to "offense of conviction" means that the enhancement "does not apply *where the conduct aimed to obstruct prosecution for a different offense* or for the defendant's generalized wrongdoing." *United States v. Wilson*, 2020 WL 6054953, at *9 (4th Cir. Oct. 14, 2020)(unpublished)(emphasis added). Mr. Dalka's state prosecution for drug dealing is for a "different offense" than Petitioner's gun possession. So this standard would exclude the enhancement in the instant case.

Second, the Third Circuit, in probable *dicta*, indicated that perjured testimony will not give rise to the §3C1.1 enhancement if it is "not material to the offense for which [the defendant] was convicted." *United States v. Brodie*, 824 F. App'x 117, 122–23 (3d Cir. August 21, 2020)(unpublished)(citing *United States v. Belletiere*, 971 F.2d 961 (3d Cir. 1992), and *United States v. Powell*, 113 F.3d 464 (3d Cir. 1997)). This standard, too, would defeat the enhancement in Petitioner's case. Petitioner's testimony that he placed guns and drugs in the home of Mr. Dalka is not material to his own prosecution for possessing a different firearm on a different occasion.

Finally, and most significantly, the Eighth Circuit found plain error *in United States v. Crockett*, 819 F. App'x 473 (8th Cir. Sept. 3, 2020)(unpublished), a case where the defendant tried to kill an informant. *See Crockett*, 819 F. App'x at 474. The court of appeals reversed the enhancement "on the ground that there was no evidence that his murder-for-hire scheme had anything to do with 'the investigation, prosecution,

or sentencing of' his drug-conspiracy offense." *Id.* (citing *United States v. Galaviz*, 687 F.3d 1042 (8th Cir. 2012)). Although the court conceded that trying to kill an informant may constitute obstruction, it limited the enhancement to those cases where the conduct was likely to affect the defendant's own legal proceedings. *See id*.

This holding, *issued on plain error*, provides strong support for a reading of §3C1.1(1) that excludes Petitioner's conduct. Like the defendant in *Crockett*, the district court found conduct (perjury) that may constitute obstruction in the appropriate case. But in Petitioner's case, as in *Crockett*, there was simply no evidence that the conduct was calculated to affect proceedings regarding his own offense. Indeed, Petitioner's case is probably much stronger than *Crockett*. In *Crockett*, the informant could have at least provided adverse information to the defendant. Here, the defendant volunteered his own criminal liability in a wholly extraneous proceeding.

Consideration of these authorities – which all followed the decision below and the time for rehearing, *see* Fed. R. App. P. 40 -- may lead the court below to find plain error in the present case. The opinion below noted that had "not upheld application of the obstruction of justice enhancement based on the defendant's perjury at the trial of a non-codefendant…" [Appx. A, at 6, n.2]; *Perryman*, 965 F.3d at 427, n.2. In cases where circuit precedent is not dispositive, the court below has looked to out-of-circuit opinions to help decide whether an error is "plain" under Rule 52. *See United States v. Espinoza*, 677 F.3d 730, 736 (5th Cir. 2012)(citing *United States v. Williams*, 533 F.3d 673, 676–77 (8th Cir.2008), en route to a finding of plain error); *United States v.*

Gordon, 346 F.3d 135, 139 (5th Cir. 2003)(noting that "three circuits have held that home detention does not equal imprisonment for § 4A1.1 purposes" *en route* to a finding of plain error on this point); *see also* Brief for United States in Opposition to Certiorari in *Amaya v. United States*, 06-7863 at 14 (Filed Feb. 2007), *cert. denied* 549 U.S. 1283 (March 19, 2007)(using *Gordon* to argue, in a successful bid to avoid *certiorari*, that the Fifth Circuit will consider out-of-circuit authorities to decide whether error is plain).[1]

In some cases, however, the court below has said that it is "reluctant to find plain error when no binding precedent contradicts the district court's holding," helpful out-of-circuit authorities notwithstanding. *United States v. Alvarado-Martinez*, 713 F. App'x 259, 265 (5th Cir. 2017)(unpublished)(citing *United States v. Gonzalez*, 792 F.3d 534, 538 (5th Cir. 2015)). But careful attention to this "reluctance" shows that it is not likely to affect the disposition of the present case.

The court below has rejected reliance on out-of-circuit precedent where the defendant's "position … is not a 'straightforward application of the Guidelines.'" *United States v. Escobar*, 866 F.3d 333, 338–39 (5th Cir. 2017)(quoting *United States*

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[1] The government argued in that document:

> As petitioner notes (Pet. 9-10), to determine the state of current law the courts of appeals generally consider whether there is any controlling Supreme Court or circuit precedent on the issue; in the absence of such precedent, the courts of appeals ordinarily survey the applicable out-of-circuit precedent and assess the state of the law in order to determine whether there are reasonable arguments supporting the district court's decision. The Fifth Circuit recognized and endorsed this approach in *United States v. Gordon*, 346 F.3d 135 (2003) (per curiam).

Id.

v. Torres, 856 F.3d 1095, 1099 (5th Cir. 2017)). By contrast, the present case involves a very clear application of the Guideline's plain language. Mr. Dalka's trial was simply not "the investigation, prosecution, or sentencing of the instant offense of conviction." USSG §3C1.1(1).

Further, the court below has declined to find plain error based on out-of-circuit authority where that authority did not clearly establish error. *United States v. Evans*, 892 F.3d 692, 704 (5th Cir. 2018), *as revised* (July 6, 2018). But in the present case, the out-of-circuit authorities tend to support Petitioner's position rather directly. And as argued above, to the extent that *Crockett* differs from the instant case, it is in a way that strengthens Petitioner's claim of error.

Most significantly, the court below has recognized a significant difference between out-of-circuit precedent finding analogous cases of *plain error*, and precedent that merely finds preserved error. *Crockett* is a plain error case addressing the independent significance of Section (1)'s restriction to the "instant offense of conviction." *See Crockett*, 819 F. App'x at 474. And, again, Petitioner's case against the enhancement is stronger on those grounds than Crockett's.

To the extent that the "plain-ness" of the error would remain a close question even after consideration of the intervening authorities, one additional consideration tips the balance in Petitioner's favor. Petitioner *did* object to the obstruction enhancement, albeit on different grounds. *See* (Record in the Court of Appeals, at 222-229). And in the court below "[c]loser scrutiny" on plain error "may … be appropriate when the failure to preserve the precise grounds for error is mitigated by an objection

on related grounds." *United States v. Lopez*, 923 F.2d 47, 50 (1991) (per curiam), *abrogated on other grounds by Davis v. United States*, __U.S.__, 140 S.Ct. 1060 (2020)(citing *United States v. Brown*, 555 F.2d 407, 420 (5th Cir.1977)).

A finding of clear or obvious would make relief very likely. Petitioner received a sentence at the low end of the Guideline, and the district court gave no indication that it would have imposed the same sentence under different Guidelines. Further, because the obstruction enhancement typically precludes acceptance of responsibility, *see* USSG § 3E1.1, comment. (n. 4), the court's error likely produced a five level increase in the defendant's total offense level, boosting it from 21 to 26. Given the criminal history category of V, the result was a change in the Guidelines from 70-87 months imprisonment to 110-120 months imprisonment. *See* USSG Ch. 5A. This easily invokes an unrebutted presumption both that the error affected substantial rights and that it affected the fairness, integrity, and public reputation of judicial proceedings. *See Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338 (2016); *Rosales-Mireles*, __U.S.__, 138 S.Ct. 1897 (2018).

Accordingly, this Court should grant certiorari, vacate the judgment below and remand in light of *Wilson*, *Brodie*, and/or *Crockett* above. That is because:

> [w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, 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, a GVR order is, we believe, potentially appropriate.

Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 167 (1996). These intervening events:

> may include a wide range of developments, including our own decisions, State Supreme Court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, and confessions of error or other positions newly taken by the Solicitor General, and state attorneys general.

Lawrence, 516 U.S. at 166–67 (internal citations omitted)(citing *Conner v. Simler*, 367 U.S. 486, (1961); *Schmidt v. Espy*, 513 U.S. 801 (1994); *Sioux Tribe of Indians v. United States*, 329 U.S. 685 (1946); *Louisiana v. Hays*, 512 U.S. 1230 (1994); *NLRB v. Federal Motor Truck Co.*, 325 U.S. 838 (1945); *Wells v. United States*, 511 U.S. 1050 (1994); *Reed v. United States*, 510 U.S. 1188 (1994); *Ramirez v. United States*, 510 U.S. 1103 (1994); *Chappell v. United States*, 494 U.S. 1075 (1990); *Polsky v. Wetherill*, 403 U.S. 916 (1971)).

As the above list makes clear, not all of the events that may give rise to GVR represent binding and dispositive authority. Confessions of error, for example, do not bind the court, yet this Court has issued GVR based on such confessions, even when the confessions were less than total. *See Lawrence*, 516 U.S. at 170-171. It is sufficient, therefore, that Petitioner has identified intervening events that create a reasonable probability of a different outcome. As argued above, this standard is met in the out-of-circuit cases construing USSG §3C1.1(1) that follow the opinion below.

Finally, it is true that Subsection (1)'s restriction to the "instant offense of conviction" was not briefed in the court below. The opinion below declined to address this issue on the grounds that it was waived. *See* [Appx. A, at 6, n.2]; *Perryman*, 965

F.3d at 427, n.2. And it said that it "will not raise and discuss legal issues [the parties have] failed to assert." [Appx. A, at 6, n.2][quoting B*rinkmann v. Dallas Cty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987)].; *Perryman*, 965 F.3d at 427, n.2. Accordingly, the court below had little discretion to issue relief on the basis of the issue it flagged – no party had presented that question at all. Yet after an argument *has been presented*, the court of appeals recognizes discretion to consider it, even though it was not timely raised in the appealing party's first Initial Brief. *See United States v. Peterson*, 977 F.3d 381, 394, n.5 (5th Cir. 2020)(where defendant had overlooked an issue until his Reply Brief "… we exercise our discretion and consider this issue under a plain error standard of review.").

On remand, of course, the issue will be squarely before the court, and it may choose to consider it. Indeed, it has considered issues raised for the first time in a certiorari petition, when the case is returned to it via GVR. *See United States v. Ross*, 708 Fed. Appx. 206 (5th Cir. 2018)(unpublished)(remanding after GVR), *see also* Appellant's Brief in *United States v. Ross*, No. 18-11318, 2019 WL 324502 (5th Cir. Filed Jan. 22, 2019)(showing that the issue giving rise to the GVR was not raised in the first Initial Brief).

The equities in the case favor remand. The court below itself noted that the issue it flagged *sua sponte* may have affected the correctness of a 110-month term of imprisonment. This provides good reason to think that the result might be different if the issue is considered. And the equities bend especially in favor of GVR orders in criminal cases because "our legal traditions reflect a certain solicitude for his rights,

to which the important public interests in judicial efficiency and finality must occasionally be accommodated." *Stutson v. United States*, 516 U.S. 193, 196 (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 11th day of December, 2020.

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