No. 20-6640

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
(214) 767-2746
Joel_page@fd.org

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

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 *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), and *Bond v. United States*, 572 U.S. 844 (2014), on the other.

Article I, Section 8 of the U.S. Constitution permits Congress "[t]o regulate Commerce … among the several States…" This provision either requires that Congressional action *be* a regulation of commerce – that is, that it make commercial activity unlawful in more or fewer circumstances – or it does not so require. If Congressional action need not actually *be* a regulation of commerce, but may simply affect commerce, or carry some other nexus or association with commerce, then it is difficult to see why it would not authorize an individual mandate in health care. After all, the failure of individuals to purchase insurance surely affects the interstate insurance market, and is closely related to their (and the government's) purchase of health care.

But if Congressional action validated by the commerce clause must actually, itself, regulate commerce, then it is difficult to see why Congress may prohibit the simple possession of a firearm that crossed state lines years prior. Possession is not a commercial act, but a solitary one. And as the government reads the statute, the defendant need not have acquired the firearm through commerce, nor use it in a commercial manner. If the commerce clause does not authorize the federal

government to compel commercial activity, neither does it authorize the government to forbid non-commercial activity. Neither is the regulation of commerce.

As can be seen, there is a basic tension between *Bass v. United States*, 404 U.S. 336 (1971) ,which accepts the constitutionality of a prohibition on firearm ownership whenever a gun has crossed state lines, *see Bass*, 404 U.S. at 351, and *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012)(and perhaps *California v. Texas*, No. 19-840, 140 S.Ct. 1262 (March 2, 2020), in which five Justices found an individual health insurance mandate outside the commerce power, *see NFIB*, 567 U.S. at 552 (Roberts,. J)(concurring), 656 (joint dissent). And this tension is echoed in authorities that pertain to statutory construction and constitutional avoidance. *Scarborough v. United States*, 431 U.S. 563 (1977), construes 18 U.S.C. §922(g) to require only some prior movement of a firearm in interstate commerce. *See Scarborough*, 431 U.S. at 571. But *Bond v. United States*, 572 U.S. 844 (2014), emphasizes the need to construe state statutes in deference to the limits of the commerce clause, *see Bond*, 572 U.S. at 860. This Court should grant certiorari to rectify this tension.

The government emphasizes that *Scarborough* and *Bass* authorize the prosecution at issue here. *See* (BIO, at 6-10). But if this is so, they should be reconsidered in light of *NFIB* and *Bond*. Ultimately, the government cannot assert a coherent theory of the commerce clause that explains all four of these authorities. As discussed above, this is not possible.

The government alternatively contends that the Court should deny certiorari because Petitioner carried the firearm during a commercial activity. *See* (BIO, at 10). But under our Constitution, facts essential to criminal punishment must be placed in the indictment, and either admitted by the defendant or proven to a jury beyond a reasonable doubt. *See Alleyne v. United States*, 570 U.S. 99, 109-110 (2013). Here, the indictment and factual resume contain no mention of alleged drug trafficking. If either the constitution or the statute (or, hopefully, both) require the defendant to engage in commercial activity, that fact may not be found by an appellate court. *See Ring v. Arizona*, 536 U.S. 584, 606-607 (2002)("In various settings, we have interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope. If a legislature responded to one of these decisions by adding the element we held constitutionally required, surely the Sixth Amendment guarantee would apply to that element.")(internal citations omitted, citing *United States v. Lopez*, 514 U.S. 549 (1995), *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam), and *Lambert v. California*, 355 U.S. 225 (1957)). Certainly, if §922(g) can be construed to avoid the constitutional difficulty by requiring commercial activity, the indictment and factual resume are missing an element.

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 for an offense level adjustment when the defendant engages in obstructive conduct "with respect to the investigation, prosecution, or sentencing of the instant offense of conviction." USSG 3C1.1(1). Three circuits issued decisions after the opinion below that tend to show the defendant's conduct does not qualify for this adjustment. The Fourth Circuit held that an obstruction enhancement ought not be applied "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). The Third Circuit 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)(dicta). And the Eighth Circuit *found plain error* in the application of an obstruction enhancement to a murder-for-hire scheme "on the ground that there was no evidence that [the defendant's] murder-for-hire scheme had anything to do with 'the investigation, prosecution, or sentencing of' his drug-conspiracy offense." *United States v. Crockett*, 819 F. App'x 473 (8th Cir. Sept. 3, 2020)(unpublished)(citing *United States v. Galaviz*, 687 F.3d 1042 (8th Cir. 2012)).

These authorities all add significantly to a case that the district court plainly erred in assessing the obstruction adjustment here. The defendant's alleged perjury

pertained to the "prosecution for a different offense," namely the drug offenses of Mr. Dalka, who was not even a codefendant (as the court below observed). His perjury was not material to the instant offense. And as in *Brodie*, it had nothing to do with "the investigation, prosecution, or sentencing of' [the defendant's] drug-conspiracy offense."

The government resists relief on three grounds. First, it says that the issue pertains to the Sentencing Guidelines. *See* (BIO, at 11). Second, it correctly notes that the issue was not raised below. *See* (BIO, at 11-12). Third, it says that three supervening authorities did not involve materially identical facts. *See* (BIO, at 11-12).

The government's first two arguments (this Court's disinclination to grant certiorari on Guideline issues, and its "pressed or passed" requirement) would certainly be valid reasons to deny a plenary grant of certiorari. But the government offers no authority for the proposition that these considerations should preclude a mere vacatur and remand. In the GVR context, this Court has required only that relevant events follow the decision below and create a reasonable probability of a different result. *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996). That standard is met, as the Petition argued. *See* (Petition, at 15-19).

The government's third argument represents an unnecessarily cramped view of precedent. All three cases following the decision below show that obstructive conduct must pertain to, and be material to, the defendant's own prosecution. That they are not, in the government's words, cases "involving a prosecution for illegal

firearm possession and testimony in the case of a non-codefendant that included admissions about petitioner's history of possessing firearms," does not mean they lack persuasive value in construing the scope of USSG §3C1.1(1).

Most significantly, the government does not defend the accuracy of the obstruction enhancement in these circumstances. GVR depends heavily on equitable considerations, and those considerations are at their zenith when a criminal defendant has suffered an uncontested sentencing error. *See Stutson v. United States*, 516 U.S. 193, 196 (1996). The sentence is clearly wrong, and ought to be corrected.

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 24th day of March, 2021.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Kevin Joel Page
Kevin Joel Page
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: joel_page@fd.org

Attorney for Petitioner