No. _____

In the

Supreme Court of the United States

_____

Dominic Lindsey,

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

_____

Kevin Joel Page
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Fort Worth, TX 76102
(817) 978-2753
Joel_pagenmjjjjjj3weh2m, ker4df@fd.org

QUESTIONS PRESENTED

Whether the opinion below conflicts with this Court's decisions in *Witte v. United States*, 515 U.S. 389 (1995), and *Davis v. United States*, __U.S.__, 140 S. Ct. 1060 (2020), and whether it adequately complies with this Court's order?

PARTIES TO THE PROCEEDING

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

OPINIONS BELOW

The opinion of the Court of Appeals is published at *United States v. Lindsey*, 969 F.3d 136 (5th Cir. August 5, 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 August 5, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT RULES AND GUIDELINES PROVISIONS

This Petition involves Federal Rule of Criminal Procedure 52(b), which states:

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

The Petition also involves Federal Sentencing Guideline 1B1.3, which states in relevant part:

> (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:
>
> (1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in

concert with others, whether or not charged as a conspiracy), all acts and omissions of others that were--

(i) within the scope of the jointly undertaken criminal activity,

(ii) in furtherance of that criminal activity, and

(iii) reasonably foreseeable in connection with that criminal activity;

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction…

The Petition also involves Application Note 5 to Guideline 1B1.3, which provides in relevant part:

(B) "Same Course of Conduct or Common Scheme or Plan."--"Common scheme or plan" and "same course of conduct" are two closely related concepts.

(i) Common scheme or plan. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; i.e., the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of modus operandi (the same or similar computer manipulations were used to execute the scheme).

(ii) Same course of conduct. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct

include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. The nature of the offenses may also be a relevant consideration (e.g., a defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).

(C) Conduct Associated with a Prior Sentence.--For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction. Examples: (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and modus operandi. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as a prior sentence; see § 4A1.2(a)(1).

Note, however, in certain cases, offense conduct associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2).

Finally, the Petition involves USSG §5G1.3, which provides:

(a) If the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status) or after sentencing for, but before commencing service of, such term of imprisonment, the sentence for the instant offense shall be imposed to run consecutively to the undischarged term of imprisonment.
(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows:
(1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.
(c) If subsection (a) does not apply, and a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.
(d) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

STATEMENT OF THE CASE

A. Offense

On July 18, 2017, police stopped Petitioner Dominic Lindsey for a traffic offense and found a firearm and marijuana in his car. He pleaded guilty to one count of possessing a firearm after a felony conviction, and one count of possessing a marijuana with intent to distribute it. The remaining aspects of this litigation relate to the relationship of these federal offenses to several other state charges. The opinion below summarizes the facts:

> First, on November 2, 2016, Lindsey was arrested by a Lewisville, Texas, police officer after Lindsey was found asleep in the front passenger seat of a vehicle idling in a parking lot, with a 9mm pistol on the vehicle floor and a backpack containing five small bags of marijuana and $1330 cash. Lindsey was charged in state court with possession of marijuana between two and four ounces and unlawful possession of a firearm by a felon.
>
> Second, on April 6, 2017, Lindsey was arrested by a Mesquite, Texas, police officer after Lindsey was again found asleep in a vehicle idling in a parking lot, and with 139.7 grams of marijuana, two pills marked "Xanax," and $1565 cash. When he awoke, he appeared intoxicated. Lindsey was charged in state court based on that arrest with possession of marijuana between four ounces and five pounds, driving while intoxicated ("DWI"), and possession of a controlled substance. After appellate briefing but before oral argument, Lindsey was sentenced in state court to six months on the marijuana charge and ninety days on the DWI charge. The controlled substance charge was dismissed.
>
> Third, on June 16, 2017, approximately two months later, Lindsey was arrested by an Irving, Texas, police officer after a traffic stop of a vehicle Lindsey was driving. A vehicle search revealed a small bag containing 27.3 grams of marijuana. Lindsey was charged in state court after this arrest with possession of marijuana less than two ounces. After briefing but before oral argument, this charge was dismissed.
>
> Finally, on July 18, 2017, Lindsey was arrested by a Dallas, Texas, police officer after a traffic stop and search of his vehicle revealed a Glock Model 26 9mm pistol with an extended magazine, bags

> containing 233.3 grams of marijuana, and another small bag containing acetaminophen and hydrocodone. There were three passengers in the vehicle with Lindsey, one woman and two minors. This is the conduct underlying the offense here and the sentence under review.

United States v. Lindsey, 969 F.3d 136, 138–39 (5th Cir. 2020).

B. Proceedings in District Court

After Petitioner pleaded guilty, he asked the court to impose his sentences concurrently to pending state charges that replicated the offense of conviction. But he did not discuss the other pending charges, which related to the prior arrests. The court imposed 78 months imprisonment, run concurrently to the charges stemming from the July arrest but consecutively to all others.

C. Appeal and Certiorari

Petitioner appealed, contending that the November, April, and June charges stemmed from "relevant conduct" to the instant offense under USSG §1B1.3. He thus contended that the district court plainly erred in failing to recognize that USSG §5G1.3(c) called for a concurrent sentence.

The court of appeals affirmed on the sole ground that "Lindsey's unpreserved arguments challenging the consecutiveness of his sentence under U.S.S.G. § 5G1.3 raise fact questions …" and 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. Lindsey*, 774 F. App'x 261 (5th Cir. 2019)(quoting *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991), *cert. granted, judgment vacated*, 140 S. Ct. 2801 (2020). Petitioner moved for rehearing *en banc*, urging the court below to

reconsider its prohibition on finding plain factual error. The court below ordered a response from the government, but then reconsidered and denied rehearing.

Petitioner then sought and received certiorari, contending that this Court should overrule the Fifth Circuit's categorical prohibition on finding plain factual error. This Court unanimously and summarily overruled this prohibition in *Davis v. United States*, __U.S.__, 140 S. Ct. 1060 (2020). This Court granted certiorari, vacated the judgment below and remanded for reconsideration in light of *Davis*. *See Lindsey v. United States*, __U.S.__, 140 S.Ct. 2801 (May 26, 2020).

D. The Opinion Below Following Remand

On remand, the court below affirmed without additional briefing. In a published opinion, it held that Petitioner's November and April offenses (the June charges having been dismissed) did not constitute relevant conduct to the instant offense under USSG §1B1.3. It recited the three part test for a "common course of conduct" found in USSG §1B1.3 – similarity, regularity, and temporal proximity -- and proceeded to apply it to the state charges pending at sentencing. See *Lindsey*, 969 F.3d at 141.

The court first addressed similarity, expressly rejecting a broad definition of this concept. *See id*. at 142 ("It is important that the analysis of similarity not be performed 'at such a level of generality as to render it meaningless.'")(quoting *United States v. Rhine*, 583 F.3d 878, 888 (5th Cir. 2009)). It described the marijuana quantities present in each case as "widely variant" and thus found that the drug quantities involved did not support a similarity finding. *Id.* Finally, it agreed with

the government that the absence of record evidence regarding Petitioner's drug suppliers, in combination with differing minor details in the offenses, defeated any showing of similarity. It said that:

> while Lindsey was discovered alone and asleep in his vehicle on the occasions underlying the first two state charges, the offense of conviction was the result of a traffic stop with passengers in the vehicle. Although all of his offenses took place in the Dallas metropolitan area, none of them were in the same location. Finally, there was no evidence of other possible similarities, such as a common source, supplier, or destination of the drugs, and there was no evidence of any accomplices, much less common accomplices. These differences, as well as the absence of evidence of possible similarities, suggest that the "similarity" factor does not weigh in Lindsey's favor. See *United States v. Wall*, 180 F.3d 641, 646 (5th Cir. 1999). Thus, to conclude that the offenses were unrelated was not clearly or obviously an error on the basis of potential similarities.

Id.

Turning to regularity, it found that this factor "does not weigh for either party." *Id.* at 142. In support, it repeated its finding as to similarity and held that the offenses – repeated November, April, June, and July – did not occur at sufficiently uniform intervals. It said:

> There may have been a faint pattern connecting Lindsey's conduct; he possessed marijuana in his vehicle in every offense, and he had a firearm in the vehicle in one of the state offenses as well as the offense of conviction. His offenses occurred over the course of several months, but the time intervals varied, and as we recognized in our similarity analysis, so did the details of the conduct, suggesting that while Lindsey may have regularly committed comparable crimes, the earlier offenses were not "directly link[ed]" to his offense of conviction. In the end, any potential "regularity" of Lindsey's conduct is not enough to say that the district court's conclusion that the offenses were "unrelated" was clearly and obviously erroneous.

Id. at 142–43.

Finally, the court agreed with the defense that the offenses – the instant offense and all putative relevant conduct – were temporally proximate. But it held that this factor was insufficient to show relevant conduct given the weakness of similarity and regularity:

> In the end, the offenses (1) were not sufficiently similar, (2) displayed at most a weak pattern of "regularity," and (3) did indeed take place within a one-year window, sometimes only a few months apart. We conclude the offenses were not part of the "same course of conduct" such that the district court clearly and obviously erred in finding the offenses were unrelated.

Id. at 143.

Finding no reversible error, the court affirmed.

REASONS FOR GRANTING THIS PETITION

The opinion of the court below conflicts with this Court's decisions in *Witte v. United States*, 515 U.S. 389 (1995), and *Davis v. United States*, __U.S.__, 140 S. Ct. 1060 (2020), and circumvents this Court's remand order.

Provided the defendant is not under a criminal justice sentence at the time of the instant offense, Guideline 5G1.3 recommends a concurrent sentence whenever "relevant conduct" to the instant offense gives rise to another charge. *See* USSG §§5G1.3(b), (c). The Guideline defines "relevant conduct" by reference to USSG §1B1.3, the same provision that decides whether other criminal conduct may increase the defendant's base offense level and hence his or her Guideline range. *See* USSG §§5G1.3(b), (c). Under this provision, "relevant conduct" includes, as respects offenses like Petitioner's,[1] "all acts and omissions … that were part of the same course of conduct or common scheme or plan as the offense of conviction." USSG §1B1.3(a)(2). The Commentary to this Guideline directs the sentencing court to consider "the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." USSG §1B1.3, comment. (n. (5)(B)(ii)).

In deciding whether Petitioner's offenses were "part of the same course of conduct … as the offense of conviction," the court below employed an irregular and indefensible set of standards. More particularly, it employed different standards in this case – where a finding of relevant conduct would benefit the defendant – than it

[1] That is, "offenses of a character for which § 3D1.2(d) would require grouping of multiple counts." USSG §1B1.3(a)(2). Gun possession and drug trafficking offenses are expressly included within this category. *See* USSG §3D1.2(d)(enumerating USSG §2K2.1 and USSG §2D1.1).

has previously enunciated in cases where a finding of relevant conduct increased the defendant's sentence. As a result, the decision below conflicts with *Witte v. United States*, 515 U.S. 389 (1995), which stresses the "reciprocal" structure of USSG §§1B1.3 and 5G1.3. And because the reasoning of the decision below is indefensible in terms of either Fifth Circuit precedent or the language of the Guideline, the court below has effectively circumvented *Davis v. United States*, __U.S.__, 140 S. Ct. 1060 (2020), and this Court's remand order. This Court should summarily reverse.

The opinion below used a double-standard as it applied USSG §1B1.3, broadly defining a "common course of conduct" for the purpose of increasing the defendant's sentence, while narrowly defining it for the purpose of determining the defendant's access to concurrent sentencing. This is evident in four ways.

First, the court below acknowledged that Petitioner made a strong showing of temporal proximity between the offense of conviction and the putatively relevant conduct. *See United States v. Lindsey*, 969 F.3d 136, 143 (5th Cir. 2020)("The Government concedes that all the offenses occurred within a one-year period and that this court has 'generally used a year as the benchmark for determining temporal proximity.'")(quoting *United States v. Rhine*, 583 F.3d 878, 886-887 (5th Cir. 2009)). But it declined to find relevant conduct because the defendant made, in its view, only weak showings as to similarity and regularity. *See Lindsey*, 969 F.3d at 143.

As will be shown below, this conclusion regarding similarity and regularity is itself contrary to settled law. More importantly, however, the clear position of the court below has been that a weak showing on one factor may be overcome by a strong

showing on another. *See United States v. Ocana*, 204 F.3d 585, 589–91 (5th Cir. 2000)("When one of the factors is absent, a stronger presence of at least one of the other factors is required.")(citing USSG 1B1.3); *id*. ("Based on all of these factors the April 1997 offense and the Cervantes/Flores offenses are not sufficiently similar. Therefore, one of the other factors in determining same course of conduct; temporal proximity of the offenses, or regularity of the offenses must be stronger…*"); United States v. Bethley*, 973 F.2d 396, 401 (5th Cir. 1992)("When one component is absent, ... courts must look for a stronger presence of at least one of the other components.")(quoting *Hahn*, 960 F.2d at 910); *United States v. Wall*, 180 F.3d 641, 646 (5th Cir. 1999) (citing USSG §1B1.3); *United States v. Nava*, 957 F.3d 581, 586–87 (5th Cir. 2020)(same); *Rhine*, 583 F.3d at 886 ("A weak showing as to any one of these factors will not preclude a finding of relevant conduct; rather, '[w]hen one of the above factors is absent, a stronger presence of at least one of the other factors is required.")(quoting USSG §1B.3); *United States v. Culverhouse*, 507 F.3d 888, 896 (5th Cir. 2007)("…a failure in temporal proximity does not, by itself, prevent a finding of relevant conduct. The guidelines state that a stronger presence of regularity or similarity can compensate for the absence of temporal proximity.").[2] Here, the court found that the putatively weak showing of similarity could not be overcome by a strong showing of temporal proximity. *See Lindsey*, 969 F.3d at 143.

[2] This standard tracks the language of the Guideline Commentary. USSG §1B1.3, comment. (n. (5)(B)(ii))("When one of the above factors is absent, a stronger presence of at least one of the other factors is required.").

The court below has held specifically that strong regularity and similarity showings are necessary "[w]here the temporal proximity of the offenses is nonexistent…" *Wall*, 180 F.3d at 646. But that is not the case here, where all parties recognize that the offenses occurred close in time. *See Lindsey*, 969 F.3d at 143.

Conversely, the court has held that "robust temporal proximity," may support a relevant conduct finding even where "there is an absence of evidence supporting regularity," *id.*, and where evidence of similarity, while present, was "not overwhelming." *Nava*, 957 F.3d at 587. Here, the court discounted robust temporal proximity because it thought similarity absent and regularity merely neutral. *See Lindsey*, 969 F.3d at 143. Those conclusions as to similarity and regularity were at odds with the circuit's own law. But even if they were accurate, the outcome would have been wrong.

Second, the opinion below applied a strict standard of similarity, emphasizing that "it is important that the analysis of similarity not be performed 'at such a level of generality as to render it meaningless.'" *Rhine*, 583 F.3d at 888. But just three months and five days before it issued the opinion below, it held that "[p]articularly in drug cases, this circuit has broadly defined what constitutes 'the same course of conduct' or 'common scheme or plan.'" *Nava*, 957 F.3d 585 (quoting *Rhine*, 583 F.3d at 885 (quoting *United States v. Bryant*, 991 F.2d 171, 177 (5th Cir. 1993)). *Nava* affirmed a district court's relevant conduct finding over the defendant's objection.

These opposite approaches to the similarity prong are clearly evident when the Court compares *Nava* to the opinion below. In *Nava*, decided just before the opinion

below, the court found some "evidence of similarity across the offenses." *Nava*, 957 F.3d at 587-588. In that case, the court sentenced the defendant on the basis of two seizures of two entirely different drugs, conducted as far apart as Mississippi and far West Texas, where two completely different people drove the cars. *See id.* at 583-585. Here, the defendant was personally caught with two to eight ounces of the same drug (marijuana) during traffic stops. *See Lindsey*, 969 F.3d at 138-139. Yet the court found similarity absent because the quantities varied within this narrow range, because he was caught *in different suburbs* of Dallas, because he *only sometimes* carried a firearm, and because on only one occasion did his family accompanied him in the car. *See Lindsey*, 969 F.3d at 142. This is simply not the consistent application of a uniform standard. Different time zones, different drugs: reasonably similar. *Nava*, 957 F.3d at 583-565. Same drug, different suburbs: wholly dissimilar. *Lindsey*, 969 F.3d at 142.

Third, and more particularly, the opinion's characterization of the drug quantities involved as "widely variant" does not comport with its previous treatment of this issue. In *United States v. Bethley*, 973 F.2d 396 (5th Cir. 1992), the court below treated quantities ranging from one to three ounces (about 28 to 85 grams) as similar to a transaction in 139.9 grams. *See Bethley*, 973 F.2d at 398. Before the decision below, the court found dissimilarity only where the quantities involved were orders of magnitude apart. *See Wall*, 180 F.3d at 645 (.1 kilogram seizure found dissimilar from seizures involving 20.8 and 50 kilograms); *Rhine*, 583 F.3d at 881–82 (1.89 grams found in defendant's body cavity, bound for sale to transient people at a

convenience store, held dissimilar from massive multi-kilo distributions in city wide methamphetamine conspiracy). Here a difference of two to eight ounces worked against similarity.

Fourth, the opinion below concluded that the offenses lacked regularity because "the time intervals varied, and as … recognized in our similarity analysis, so did the details of the conduct." *See Lindsey*, 969 F.3d at 143. This is plainly contrary to both precedent and the Guidelines. Similarity and regularity are distinct factors set forth in the Guideline Commentary and precedent. Consequently, a weak showing of similarity does not show that regularity is also weak.

Further, the court's use of minimally variant time intervals at issue here – five months between the November and April offenses, two months between April and June, and one between June and July – to defeat a finding of regularity is plainly indefensible. Most criminal offenses (and certainly traffic stops revealing drug and gun possession) do not follow the beats of a metronome – they are choreographed instead by fate and exigency. *See* USSG §1B1.3, comment. (n. (5)(B)(ii))("The nature of the offenses may also be a relevant consideration (e.g., a defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).")

The case is not distinguishable, at least as to regularity, from *United States v. Ocana*, 204 F.3d 585 (5th Cir. 2000). In that case, the court below held an offense committed in April exhibited regularity when considered in combination with July,

September, and November. *See Ocana*, 204 F.3d at 591. The present case involved offenses in November, April, June, and July. The strained effort of the court below to distinguish these cases shows that relevant conduct means one thing in the court below when the defendant benefits, and another when he or she is harmed.

These opposite standards do not merely offend basic notions of even-handedness and fair play. They contravene the plain text of USSG §5G1.3, which cross-references USSG §1B1.3, thus providing a single, uniform definition of relevant conduct for the determination of both offense levels and concurrent sentencing recommendations. More importantly, for present purposes, these double standards are contrary to this Court's holding in *Witte v. United States*, 515 U.S. 389 (1995). This Court in *Witte* explained that the Guidelines employ a "reciprocal" structure for USSG §5G1.3(b) and USSG §1B1.3 in order to minimize the risk that the defendant will suffer double punishment for the same conduct. It held that:

> [b]ecause the concept of relevant conduct under the Guidelines is reciprocal, § 5G1.3 operates to mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence. If a defendant is serving an undischarged term of imprisonment "result[ing] from offense(s) that have been fully taken into account [as relevant conduct] in the determination of the offense level for the instant offense," § 5G1.3(b) provides that "the sentence for the instant offense shall be imposed to run concurrently to the undischarged term of imprisonment." And where § 5G1.3(b) does not apply, an accompanying policy statement provides, "the sentence for the instant offense shall be imposed to run consecutively to the prior undischarged term of imprisonment to the extent necessary to achieve a reasonable incremental punishment for the instant offense." USSG § 5G1.3(c) (policy statement). Significant safeguards built into the Sentencing Guidelines therefore protect petitioner against having the length of his sentence multiplied by duplicative consideration of the same criminal conduct; he would be able to vindicate his interests

> through appropriate appeals should the Guidelines be misapplied in any future sentencing proceeding.

Witte, 515 U.S. at 405.

As they were applied below, USSG §1B1.3 and §5G1.3 are anything but reciprocal. When relevant conduct stands to increase the defendant's offense level, temporal proximity may carry the day even if similarity and regularity do not weigh strongly. *See Nava*, 957 F.3d at 587. But when relevant conduct stands to produce a concurrent sentence, a single factor is insufficient, even if one more "does not weigh for either party." *Lindsey*, 969 F.3d at 142-143.

When relevant conduct stands to increase the sentence, offenses can be at least roughly similar even if they occur half-a-continent apart and involve different drugs. *See Nava*, 957 F.3d at 583-585. Certainly, the quantities involved may vary by a few ounces. *See Bethley*, 973 F.2d at 398. But when relevant conduct stands to generate a concurrent sentence, a different part of the same city, the presence of the defendant's family, or a few ounces more or less of marijuana can all defeat similarity. *Lindsey*, 969 F.3d at 142-143.

And when relevant conduct increases the sentence, four offenses in eight months are regular. *See Ocana*, 204 F.3d at 591. When it might give rise to a concurrent sentence, four offenses in nine months are irregular, because they did not occur every two months. See *Lindsey*, 969 F.3d at 142-143.

This Court does not typically grant certiorari to decide Guideline issues, *Buford v. United States*, 539 U.S. 59, 66 (2001), nor to enforce circuit precedent, but

it may do so to enforce its own precedent, *see* Sup. Ct. R. 10. *Witte* has been flouted and should be vindicated by summary reversal.

Certiorari and summary reversal are also necessary to vindicate this Court's decision in *Davis v. United States*, __U.S.__, 140 S. Ct. 1060 (2020), and its GVR order in this case. Respectfully, the decision below is not defensible on the merits. The Guidelines call for consideration of similarity, regularity, and temporal proximity. *See* USSG §1B1.3, comment. (n. (5)(B)(ii)). The putative relevant conduct here occurred within eight months of the instant offense (some of it more recently than that). All concede this represents a strong showing of temporal proximity. The offenses were repeated four times in nine months, hardly isolated instances of criminality. And the facts referenced below to defeat a finding of similarity were mere quibbles. The defendant kept getting caught in his car with a few – between two and eight – ounces of marijuana, in the Dallas Metroplex. Twice he had a gun; twice he had a small quantity of illegal prescription drugs; once his family was present. But these hardly defeat the clear and repeated pattern. No one can seriously maintain that these activities would have remained unconsidered if they had increased the offense level.

In the context of the litigation, this treatment of the relevant conduct issue acts to circumvent this Court's decision in *Davis*, and its GVR order. In its first opinion, the court below relied exclusively on its rule that factual error may never be plain to resolve the case. *See United States v. Lindsey*, 774 F. App'x 261 (5th Cir. 2019)(quoting *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991), *cert. granted,*

judgment vacated, 140 S. Ct. 2801 (2020). This Court held that rule invalid as an application of Federal Rule of Criminal Procedure 52(b) in *Davis*. *See Davis v. United States*, __U.S.__, 140 S. Ct. 1060 (2020). It remanded this case and ordered the court below to reconsider in light of *Davis*. *See Lindsey v. United States*, __U.S.__, 140 S.Ct. 2801 (May 26, 2020).

The decision below makes no reference to its prohibition on finding plain errors of fact. Yet the reasoning and outcome are reasonable applications of neither the Guideline nor the precedent that construed it. As surely as if the court below had simply reaffirmed its categorical prohibition on plain factual error, Petitioner has been denied the meaningful relief that should have flowed from this Court's precedent and its direct order.

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, and that it should summarily reverse the judgment below. He requests in the alternative such relief as to which he may be justly entitled.

Respectfully submitted this 4th day of January, 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