NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JERRY LEE QUINN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FIFTH CIRCUIT'S MISAPPLICATION OF THE PLAIN ERROR DOCTRINE TO BAR REVIEW OF QUINN'S CLAIM THAT THE PROSECUTION WRONGLY RELIED ON A HEARSAY STATEMENT OF HIS CODEFENDANT MADE AFTER THE CODEFENDANT'S ARREST IN ORDER TO SECURE LENIENCY. SPECIICALLY, IN APPLYING PLAIN ERROR REVIEW, THE COURT ERRONEOUSLY OVERRULED A FACTUAL CONCESSION MADE BY THE GOVERNMENT IN ITS BRIEFS THAT QUINN PRESERVED THE ERROR BY OBJECTING TO THE STATEMENT AS HEARSAY, THE SAME GROUND HE RAISED IN HIS APPELLATE BRIEF.

II. EVEN IF PLAIN ERROR IS THE APPROPRIATE STANDARD OF REVIEW, THE FIFTH CIRCUIT IGNORED THE PURPOSE OF THIS COURT'S DECISION IN *TOME* AND CASE LAW FROM OTHER CIRCUITS THAT HAVE EXCLUDED PRIOR CONSISTENT STATEMENTS GIVEN AT THE TIME OF ARREST EVEN WHERE FOLLOWED BY PLEA AGREEMENTS. THIS COURT, THEREFORE, SHOULD GRANT THE PETITION BECAUSE THE FIFTH CIRCUIT'S DECISION IS INCONSISTENT WITH *TOME* AND CASE LAW FROM OTHER CIRCUITS.

LIST OF ALL PARTIES

The undersigned counsel of record certifies that all parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal: Jerry Lee Quinn, defendant.

LIST OF ALL RELATED PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS

1. USDC ND MS; NO. 3:18CR-49-1; United States of America v. Jerry Lee Quinn; Judgment entered May 22, 2019.

2. CTA5; NO. #19-60370; United States of America v. Jerry Lee Quinn; affirmed September 03, 2020.

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Mr. Quinn was convicted after a jury trial in the Northern District of Mississippi in three counts of a four-count indictment charging him with possession of controlled substances and with being a convicted felon in possession of firearms. [*United States v. Jerry Lee Quinn,* USDC ND MS Case No. 3:18CR-49-1].

On September 3, 2020, a three-judge panel of the Fifth Circuit in an unpublished opinion affirmed Quinn's conviction. *United States v. Quinn,* #19-60370 (5th Cir. Decided 09/3/2020) [unpublished]. *See,* Opinion attached as Appendix A. On October 6, 2020, the Court by summary order denied Quinn's petition for panel rehearing. *See,* Order attached as Appendix C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C., §1254(1), providing this Court may grant a petition for writ of certiorari by any party to a criminal case after rendition of judgment by a Court of Appeals. This petition is timely, the order of the Fifth Circuit denying panel rehearing was rendered on October 6, 2020. *See,* Appendix C. *See* Order 03/19/20 extending time to file to 150 days.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const., Amendment V (in part):

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

2. Rule 51, Federal Rules of Criminal Procedure:

> (a) **Exceptions Unnecessary**. Exceptions to rulings or orders of the court are unnecessary.
>
> (b) **Preserving a Claim of Error**. A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

3. Rule 52(b), Federal Rules of Criminal Procedure:

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

4. Rule 103, Federal Rules of Evidence:

> (a) **Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
>
> (1) if the ruling admits evidence, a party, on the record:
>
> (A) timely objects or moves to strike; and
>
> (B) states the specific ground, unless it was apparent from the context . . . .

5. Rule 802(d)(1)(B)(i), Federal Rules of Evidence:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

> **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
>
> > **(B)** is consistent with the declarant's testimony and is offered:
> >
> > > (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; . . . .

6. U.S. Const., Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

In April of 2018, Jerry Lee Quinn was indicted in the Northern District of Mississippi in a four-count indictment. Count one charged him with on September 11, 2013, after having been convicted of a felony, possessing two firearms in violation of 18 U.S.C. §§922(g)(1) and 924(a)(2). ROA.8-9.

Count Two charged him with on September 11, 3013, possessing with intent to distribute marijuana in an amount less than 50 kilograms in violation of 21 U.S.C. §§841(a) and (b)(1)(D). ROA. 8-9.

Count Three charged him with on September 11, 2013, distributing marijuana in an amount. Less than 50 kilograms I violation of 21 U.S.C. §§841(a) and (B)(1)(D). ROA.8-9.

Count Four charged him with on September 11, 2013, with using, carrying and possessing one or more firearms during and in relation to and in furtherance of a drug trafficking crime as set out in Counts Two and Three in violation of 18 U.S.C. §924(c)(1)(A)(i). ROA.8-9.

After a jury trial held on April 1-2, 2019, Judge Neal B. Bigger, Jr., Senior U.S. District Judge presiding, Quinn was found guilty of Counts One, Two and Three and not guilty of Count 4. ROA.8-9.

Quinn was sentenced to sixty-five months on each of the three counts to be served concurrently but consecutively to a sentence from a Mississippi conviction. ROA.88.

On appeal, Quinn argued that the trial court erred in admitting a prior consistent statement by Randy Buckingham, the prosecution's main witness. Buckingham was arrested in possession of a backpack containing a small quantity of drugs and the two guns after running out the back of his home with the backpack when law enforcement approached it to serve a warrant on Quinn who was also at the house. The guns and drugs were found on top of the other items in the backpack which also contained items identified as belonging to Quinn. Both Quinn and Buckingham were arrested for illegal possession of the guns and drugs[1]

[1] The facts are taken from the court's opinion.

The issue at trial, therefore, was whether the contraband belonged to Quinn or whether Buckingham had thrown the guns and drugs into Quinn's backpack as he flew through the house on his way outside in an attempt to flee officers. At the time, Buckingham was a convicted felon who would have been subject to prosecution if found in possession of the guns and drugs.

Immediately after his arrest, Buckingham told law enforcement that the drugs and guns belonged to Quinn. Prior to trial, he entered into a plea agreement whereby charges would be dropped against him in return for his testimony. At trial, he testified that the contraband belonged to Quinn and not him. Quinn then cross-examined Buckingham suggesting that he had a reason to lie at the time of his arrest and the trial because he wanted to escape criminal liability he might have.

Over Quinn's objection, Buckingham's prior statement was admitted to rebut the charge that Buckingham was testifying to exculpate himself and obtain favorable treatment on his own charges. *See,* Objection and trial court's ruling at Appendix B. After the trial judge admitted the statement, the prosecution in closing argument claimed that Buckingham's statement proved he had been consistent throughout in laying the blame for the contraband on Quinn and therefore, the jury should believe the contraband was Quinn's and find him guilty.

In other words, Buckingham's testimony was the critical piece of evidence the prosecution used to demonstrate that the contraband was Quinn's and not Buckingham's who was the person who was actually found in possession of the guns and drugs at the time.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE FIFTH CIRCUIT'S MISAPPLICATION OF THE PLAIN ERROR DOCTRINE TO BAR REVIEW OF QUINN'S CLAIM THAT THE PROSECUTION WRONGLY RELIED ON A HEARSAY STATEMENT OF HIS CODEFENDANT MADE AFTER THE CODEFENDANT'S ARREST IN ORDER TO SECURE LENIENCY. SPECIICALLY, IN APPLYING PLAIN ERROR REVIEW, THE COURT ERRONEOUSLY OVERRULED A FACTUAL CONCESSION MADE BY THE GOVERNMENT IN ITS BRIEFS THAT QUINN PRESERVED THE ERROR BY OBJECTING TO THE STATEMENT AS HEARSAY, THE SAME GROUND HE RAISED IN HIS APPELLATE BRIEF.

On appeal, Quinn argued in his initial and reply briefs that Buckingham's statement made to officers at the time of his arrest was hearsay and, as such, was inadmissible. Although Rule 801(d)(1)(B), *Fed. R. Evid.,* provides for admission of prior consistent statements to rebut a charge of recent fabrication, admission is subject to the requirement that the statement precede any motive of the witness to fabricate his testimony. *Tome v. United*

States, 513 U.S. 150, 156-67 (1995). This requirement has become known as the pre-motive requirement.

At oral argument, the Court *sua sponte* raised the question of whether Quinn's trial attorney had forfeited the issue and, therefore, whether plain error was the appropriate standard of review. At the Court's suggestion, the government, in direct contravention of the position it had taken in its brief, then argued that Quinn's argument was subject to plain error review because he had failed to specifically object to hearsay in the lower court.

In its decision, the Court found that Quinn had indeed failed to object to the admission of the statement on hearsay grounds, making the issue subject to plain error review. The Court determined that it, not the parties, determined the standard of review. Opinion, p. 4. The Court, however, did not explain its rationale for ignoring the government's initial concession that, although inartful, the context in which Quinn made his objection meant that he had adequately raised the issue below. *See, e.g., Fed.R.Evid,* Rule 103(a)(1)(B); 802(d)(1)(B)(i) [an objection is sufficiently specific to preserve error if the ground "was apparent from the context . . . "]; *see also, Holguin-Hernandez v. United States,* #18-7739 at *6 (USSCt decided 02/26/2020) [party

preserved error pursuant to Fed.R.Crim.P., Rule 51(b) by "informing the court" of the "action" he "wishes the court to take"][2].

The major problem with that holding, however, is that the question was not whether the Court is the appropriate arbiter of the standard of review. The issue is the extent to which the Court can overlook concessions by the Government of the facts that control the standard appropriately applied by the Court and whether the Fifth Circuit abused any discretion it might have by doing so in this case. In other words, can the Court overrule a government's concession of facts, particularly where, as here, the Government was in a far better position to know the context of what occurred in the trial court than the appellate court which does not sit as a fact finder.

Specifically, the government made the following concessions of fact in its brief:

"Quinn objected at trial to the government's use of the statements on the grounds of hearsay." [Govt Brief, p. 21].

"Although Quinn's counsel stated that Buckingham's statement was not hearsay, he obviously meant that it was hearsay, otherwise, he would not have objected to the statement." [Govt Brief, p. 23]. *See, e.g., United States v.*

[2] In this case, Quinn's attorney informed the court that he wanted the statement excluded, making his objection sufficiently specific because of the context and requested action.

Auch, 187 F.3d 125, 129 (1st Cir. 1999) [the grounds for an objection can be obvious from the context even though lacking in specificity].

Moreover, the trial court's attention was specifically directed to Rule 802(d)(1)(B)(i), Federal Rules of Evidence so that there can be no doubt that the lower court was aware of the hearsay rule at issue. ROA.277 found at Appendix B.

In short, the government explicitly conceded that Quinn's attorney was understood at trial to be making a hearsay objection pursuant to the applicable hearsay rule concerning the admission of prior consistent statements. Assuming for the sake of argument only that the Fifth Circuit panel was correct that it determines what standard of review applies once the facts are established, it was error for it to determine the standard on facts that were contrary to those conceded to by the government .[3]

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[3] It should be noted, however, that even some Fifth Circuit precedent would counsel otherwise. In *United States v. Menesses,* 962 F.3d 420, 425-26 (5th Cir. 1992), the government belatedly contended for the first time, as here in oral argument, that a more restrictive standard of review applied because the defendant failed to specifically object in the court below. Noting that "in fairness to the defendant [the issue] should have been briefed," the Court found that "[t]he government cannot at this late date, alter its proposed standard of review." *Id.*

Similarly, other circuits who have found that the government can either waive or forfeit plain error review by not asserting it or expressly conceding it did not apply. *See, United States v. Webster.* 775 F.3d 897, 902 (7th Cir, 2015) [accepting government's concession on standard of review]; *United States v.* Abbas, 560 F.3d 660, 667 (7th Cir. 2009) [government's failure on appeal to argue defendant failed to object waived plain error review]; *United States v. Obak,* 884 F.3d 934 (9th Cir. 2018) [by responding to defendant's brief on the merits, government waived defendant's failure to object in the lower court to

This Court, for example, has ruled that lower courts should be reluctant to override the parties' presentations. *E.g., Arizona v. California,* 530 U.S. 392 , 412-13 (2000) ["courts must be cautious about raising a preclusion bar *sua sponte*, thereby eroding the principal of party presentation so basic to our system of adjudication"]; *accord, United States v. Sineneng-Smith,* #19-67 (USSCt decided 05/07/2020) ["[i]n criminal cases, departures from the party presentation principle have usually occurred to protect a *pro se* litigant's rights [internal citation and quotation marks omitted"]. [*See also, Castro v. United States,* 540 U.S. 375, 386, 124 S.Ct. 786, 157 L.Ed.2d 728 (2003) (Scalia, J., concurring) ["our adversary system is designed around the premises that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief"].

Similarly, this Court has found that ordinarily nonjurisdictional defects not raised until respondent's brief in opposition are waived. *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 816, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). The

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venue]; *United States v. Williams,* 641 F.3d 758, 763-64 (6th Cir. 2011) [government's failure to request plain error review forfeited any argument the appellate court should apply that standard]; *United States v. Tapia-Escalera,* 356 F.3d 181, 183 (1st Cir. 2004) [hearing case on the merits where the government did not raise defendant's failure to object in the lower court].

same would apply to positions not taken by the government until oral argument.

Moreover, concessions of fact made in briefs are frequently given the force of judicial admissions that are binding on the party making the admission. *See, e.g., Postscript Enters. V. City of Bridgeton,* 905 F.2d 223, 227-28 (8th Cir. 1990); *Parilla v. IAP Worldwide Serv., VI, Inc.,* 368 F.3d 269, 275 (3d Cir. 2004) [judicial admissions are concessions in pleadings or briefs that bind the party who makes them]; *Karkoukli's, Inc. v. Dohany,* 409 F.3d 279, 283 (6th Cir. 2005) [admissions in briefs estopping contrary argument]; *Gospel Missions of America v. City of Los Angeles,* 328 F.3d 548, 557 (9th Cir. 2003) [appellate court has discretion to treat concession in brief as binding judicial admission]; *United States v. One Heckler-Koch Rifle,* 629 F.2d 1250, 1253 (7th Cir. 1980).

Ironically, in a prior case, the Fifth Circuit eschewed excusing the government's contention raised for the first time at oral argument that the defendant had waived his objection to the sufficiency of the evidence by failing to raise sufficiency in the lower court and not arguing for plain error review. According to the Court,

> We do not believe that we can limit our review to search for manifest injustice where the government raises such an argument, which in fairness to the defendant should have been

> briefed, for the first time in oral argument. *** The government cannot, at this late date, alter its proposed standard of review.

United States v. Menesses, 962 F.2d 420, 426 (5th Cir. 1992).

In summary, the government effectively stipulated to facts that removed plain error as the appropriate standard of review, and the Fifth Circuit abused its discretion by *sua sponte* suggesting at oral argument that the government reject those facts. This Court has opined that

> Stipulations must be binding. See 9 J. Wigmore, Evidence § 2588, p. 821 (J. Chadbourn rev.1981) (defining a "judicial admission or stipulation" as an "express waiver made . . . by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact" (emphasis deleted)); Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez, 561 U.S. ——, ——, 130 S.Ct. 2971 2983, 177 L.Ed.2d 838 (2010) (describing a stipulation as " 'binding and conclusive' " and " 'not subject to subsequent variation' " (quoting 83 C.J. S., Stipulations § 93 (2000))); 9 Wigmore, supra, § 2590, at 822 (the "vital feature" of a judicial admission is "universally conceded to be its conclusiveness upon the party making it").

Standard Fire Ins. Co. v. Knowles, 568 U.S. 588,133 S. Ct. 1345, 185 L. Ed. 2d 439 (2013).

The government in this case stipulated to facts, not to the legal standard ultimately to be applied; therefore, it was error for the Fifth Circuit panel to make a finding of fact contrary to facts stipulated to by the government that required defendant's issue to be subjected to the less favorable standard of review of plain error.

Where, as here, the government has waived any complaint that Quinn's attorney failed to specifically object on hearsay grounds by stipulating that he did, the appellate Court was without a sufficient basis to overrule what the government admits the parties understood to be the objection.[4] Assuming arguendo that it is within a court's discretion to raise a defaulted issue *sua sponte*, it can do so only where the "government has not manifested, implicitly or explicitly, a decision to forego the argument." *Varela v. United States,* 481 F.3d 932, 936 (7th Cir. 2007); *United States v. Bonilla-Mungia,* 422 F.3d 316 (5th Cir. 2005) [finding government had waived waiver by not timely raising it]. It was manifestly unfair the Government at oral argument to "take back" its prior admission.

Because the Fifth Circuit's decision misapprehends its authority to reject stipulations of fact, this Court should grant certiorari and reverse Quinn's conviction for reasons Quinn will discuss in proposition II.

II. EVEN IF PLAIN ERROR IS THE APPROPRIATE STANDARD OF REVIEW, THE FIFTH CIRCUIT IGNORED THE PURPOSE OF THIS COURT'S DECISION IN *TOME* AND CASE LAW FROM OTHER CIRCUITS THAT HAVE EXCLUDED PRIOR CONSISTENT STATEMENTS GIVEN AT THE TIME OF ARREST EVEN WHERE FOLLOWED BY PLEA AGREEMENTS. THIS COURT, THEREFORE, SHOULD

[4] Here the government did not forfeit the error, it affirmatively manifested an intent to waive it by stipulating that Quinn's objection adequately raised a hearsay objection sufficient to cover his argument on appeal.

GRANT THE PETITION BECAUSE THE FIFTH CIRCUIT'S DECISION IS INCONSISTENT WITH *TOME* AND CASE LAW FROM OTHER CIRCUITS.

Once again, the Fifth Circuit has misapplied the plain error rule to the disadvantage of a criminal defendant. In recent years, this Court has on several occasions reversed the Fifth Circuit's attempts to narrow the applicability of the plain error rule. *See, e.g., Holguin-Hernandez v. United States, supra,* [party preserved error pursuant to Fed.R.Crim.P., Rule 51(b) by "informing the court" of the "action" he "wishes the court to take"];[5] *Davis v. United States,* 19-5421 (USSCt decided 03/23/2020) (per curiam) [plain error applies to factual errors not just legal error]; *Rosales-Mireles v. United States,* 138 S.Ct. 1897, 1906, 194 L.Ed.2d 376 (2018) [defendant need not show error "would shock the conscience" to show error seriously affects the fairness, integrity or public reputation of the judicial proceedings]; *Molina-Martinez v. United States,*136 S.Ct. 1338, 1341, 194 L.Ed.2d 444 (2016) [need not show "additional evidence" to show that use of incorrect Guideline range affected defendant's sentence]; *Henderson v. United States,* 133 S.Ct. 1121, 1127, 185

[5] F.R.Crim.P. Rule 51(b):

> A party may preserve a claim of error **by informing the court**—when the court ruling or order is made or sought—**of the action the party wishes the court to take, or** the party's objection to the court's action and the grounds for that objection [emphasis added].

L.Ed. 85 (2013) [error is plain if the trial court's decision was plainly incorrect at the time of the appeal].

Because of its erroneous conclusion that plain error review applied, the panel then held that because the Fifth Circuit had not explicitly spoken to whether the "two-motive" rule applied to determine the admissibility of prior consistent statements, Quinn could not prevail because he could not show any error was "plain" under the test for plain error[6] Opinion, p. 6. The two-motive rule holds that a prior consistent statement is admissible to bolster a witness's credibility whenever it predates *any* motive to lie. Opinion, p. 6.

The Court erroneously concluded that Buckingham had two separate motives to falsify his testimony because his motive to exculpate himself at the time of his arrest is somehow distinct from his motive to exculpate himself at the time of the trial. The Court concluded that Buckingham did not have a formal plea agreement at the time he made the initial arrest statement. Because he later entered into a formal plea agreement, the Court reasoned that this gave him a different motive from the one at the time of arrest, making the statement arguably admissible under the two-motive rule. Although the Court did not decide that the two-motive doctrine actually applied to Quinn's case, it found

[6] To constitute plain error, the error must be clear under existing law. *United States v. Olano,* 507 U.S. 725, 734 (1993).

that the possibility that it might meant that the law was unclear, and Quinn, therefore could not show plain error.

The problem is that the Court erred in determining that Buckingham had a different and second motive for testifying after he entered into the plea agreement when in fact his motive for making the exculpatory arrest statement and his trial testimony were the same. In both cases, Buckingham's motive was to obtain leniency by currying favor with the government. All the plea agreement did was give Buckingham an additional reason for believing inculpating Quinn would gain him leniency, not an additional motive.

In *United States v. Awon,* 135 F.3d 96, 100-101 (1st Cir. 1997), the First Circuit distinguished between different motives and motives that are what it described as subsets of the same motive. In that case two brothers who had committed the crimes at the direction of the defendant testified for the government. After the defense suggested they were fabricating their testimony, the trial court permitted the prosecution to introduce certain prior consistent statements made implicating the defendant. Each statement was made after the witness had a reason to curry favor with the government and in order to exculpate himself. Those witnesses had each acquired additional reasons for testifying after their initial statements, such, as in this case, obtaining a plea agreement. Other reasons for testifying to curry favor with

the government included a desire to escape liability for other charges or, in the case of one witness, to obtain release from custody as a material witness. *Id.* at 100.

The Court found that "[b]ecause all the defense allegations of motive to fabricate grew from the same foundation—a pursuit of leniency—the brothers' out-of-court statements were erroneously admitted under Rule 801(d)(1)(B)." *Id.* at 101. According to the Court because the "'new' motives amount to no more than smaller subsets of the larger theme," leniency, there were not multiple motives, rather the "overarching motive alleged by the defense always was hope of leniency." *Id.* at 100.

Similarly, in *United States v. Albers,* 93 F.3d 1469, 1482-1484 (10th Cir.1996), the Court found that although circumstances underlying a motive to fabricate may have changed, such as entry into a plea agreement after the statement was originally made, a prior statement is inadmissible where the motive remains essentially the same.

In Quinn's case, Buckingham's entry into a plea agreement after he made his arrest statement did not make his motive in testifying different; nor did it make his trial testimony more reliable. In fact, it was less so. As in *Awon* and *Albers,* Buckingham's motive when he made the arrest statement, entered into the plea agreement and testified was the same—leniency. As the Eighth

Circuit described statements made at the time of arrest, when "incriminating evidence is discovered in one's possession, it requires only the briefest refection to conclude that a denial and plea of ignorance is the best strategy [internal citation and quotation marks omitted]." *United States v. Esparza* 291 F.3d 1052, 1054-55 (8th Cir. 2002).

Other circuits have likewise determined that prior consistent statements made at or near the time of arrest are inadmissible even though the statements were followed by plea agreements. *See, United States v. Moreno*, 94 F.3d 1453, 1455-56 (10th Cir. 1996); *United States v. Forrester,* 60 F.3d 52 (2nd Cir. 1995) [pled guilty and testified pursuant to plea agreement]; *United States v. Trujilio,* 376 F.3d 593, 611 (6th Cir. 2004) [testified after entering into plea agreement]. In each of those three cases, the courts found error in admitting statements made near the time of arrest even though the witness entered into a subsequent plea agreement.

In short, then, neither the First, Second, Sixth nor Tenth Circuits have found that the two-motive rule permits the admission of statements made at or near the time of arrest even though they were followed by plea agreements. This is so because, as the *Awon* court put it, the witness's motive in testifying is the same as when he made the initial statement in order to exculpate himself and when he entered into a plea bargain.

Such a situation is a far cry from that of cases such as *United States v. Kootswatswa,* 893 F.3d 1127 (8th Cir. 2016) and *United States v. Allison,* 49 M.J. 54, 57 (C.A.A.F. 1998), cited by the panel for the notion that the two-motive rule might apply to permit introduction of the statements in Quinn's case. In those two cases, however, the witnesses' prior statements did in fact precede an alleged motive that was different.

In *Kootswatswa,* an officer testified to statements made by a child abuse victim shortly after the abuse. The defense claimed the child had fabricated her story to avoid being disciplined for wandering from home and having contact with the Defendant. The defense also suggested the child was complying with her mother's instructions about what to say. *Kootswatswa,* 893 F.3d at 1134-35. The Court found that the statements were admissible because the child did not have an opportunity to speak to the mother prior to the statement, making coaching impossible; thereby refuting that motive to lie. *Id.* at 1135.

In *Kootswatswa,* the motives, to escape punishment and coaching, were decidedly distinct. Because the prior statement clearly rebutted the coaching motive, it was admissible. That situation, however, is plainly different from Quinn's case where the prior statement did not refute the claim that Buckingham was testifying to gain leniency.

The same is true in *Allison, supra.* That case was also a child abuse case where the defense claimed the child's statement was the product of the mother's manipulation or alternatively because he did not want to leave the country with his father.. Because the statement occurred prior to the alleged improper manipulation, the court held the statement was admissible because it rebutted that motive. *Id.* at 57. Plainly, in that case, unlike here, the two motives were distinct.

In *United States v. Londondio,* 420 F.3d 777 (8th Cir. 2005), one of the other cases cited by the panel in support of the idea of a two-motive rule, did not actually discuss that issue. Although the declarant there made a statement at the time of his arrest that was admitted as a prior consistent statement, the defendant in that case apparently never argued at trial or on appeal that he had a motive to falsify at the time of his arrest but argued only that the motive arose because of his plea agreements. *Id.* at 785.

The cases cited by the panel in this case, therefore, lend scant support to the notion that the two-motive rule applies to the statements in Quinn's case either because they are factually distinguishable or because the two-motive rule was not discussed.

Consequently, it was error to find that Quinn could not show plain error because the law regarding the issue of the admissibility of Buckingham's

statements is not clear. In general, for an error to be contrary to well-settled law, either the Supreme Court or the Circuit must have addressed the issue. "The absence of such precedent will not, however, prevent a finding of plain error if the district court's interpretation was 'clearly erroneous.'" *United States v. Salas*, 889 F.3d 681, 687 (10th Cir. 2018). *See also, United States v. Stinson,* No. 12-2012 at *9 (3rd Cir. Decided 08/21/2013) [neither absence of circuit precedent nor the lack of consideration of the issue by another court prevents court from finding novel issue to be plain error]; *United States v. Tann,* 577 F.3d 533, 538 (3rd Cir. 2009) [plain error in absence of circuit precedent where courts of appeal addressing an issue were unanimous]; *United States v. Smith,* 816 F.3d 671, 675 (10th Cir. 2016) [error may be plain where consensus exists in other circuits]; *United States v. Gore,* 154 F.3d 34, 42043 (2nd Cir. 1998) [error so egregious as to make judge and prosecutor derelict in permitting it].

Quinn has found no federal appellate cases that have allowed admission of a statement made at the time of arrest under the theory that a plea agreement gave the witness a separate, additional motive to lie. In fact, such a ruling would be contrary to the rationale behind this Court's adoption of the pre-motive rule in *Tome*. The *Tome* Court reasoned that the purpose behind the admission of the prior statement is to rebut an inference that the witness was

making up the story. The Court, however, noted that a prior consistent statement cannot logically refute a charge of prior fabrication unless it "was made before the source of the bias, interest, influence or capacity originated." *Id.,* 513 U.S. at 156, 115 S.Ct. at 700. The prior statement in this case in no way refuted the notion that at the time it was made, Buckingham was motivated to make it in order to exculpate himself.

There were not two different motives in this case, and any interpretation to the contrary is not supported by the facts or law. The consensus among other circuits is that a prior statement made following an arrest is not admissible as a prior consistent statement even if there is a subsequent formal plea agreement. This is so because when a witness is under investigation or has been arrested for the same offense as the defendant when the statements were made, the witness has an obvious motive to fabricate a story shifting the blame away from himself and onto his codefendant. As one court has opined, "[t]rustworthiness is not enhanced by the declarant gaining motives to fabricate, and there should be no reward granted a witness who has multiple motives" to fabricate statements. To do so would "eviscerate" any motive the declarant had to fabricate when he made the statement. *Thomas v. State,* 429 Md. 85, 103-07, 55 A.3d 10, 20-23 (2012) [citation and internal quotation marks omitted].

Because the law in other circuits is clear and because the Fifth Circuit's decision would "eviscerate" the holding in *Tome,* this Court should grant certiorari, notwithstanding any lack of an exact explicit holding in the Fifth Circuit.

CONCLUSION

This Court should grant certiorari and reverse because the Fifth Circuit has once again strained to apply plain error review to a case where a defendant's guilt is in doubt. Here, Quinn was clearly prejudiced by the introduction of a prior consistent statement of a co-arrestee made at the time of his arrest in an obvious attempt to exculpate himself after being found in actual physical possession of the contraband at issue.

Despite Quinn's argument at trial that Buckingham was motivated both in making the prior statement and in testifying at trial by a desire to direct blame onto Quinn and away from himself, the government repeatedly argued that the consistency between the two statements meant Buckingham was truthful that the contraband was Quinn's. Because Buckingham's statements and their consistency formed the key to conviction, this Court should grant certiorari to correct an obvious injustice.

Respectfully submitted,
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