QUESTIONS PRESENTED

A. THE DISTRICT COURT ERRED WHEN IT INCORRECTLY APPLIED A THREE LEVEL ENHANCEMENT TO U.S.S.G. § 2A2.4(b)(1)(B) FOR USE OF A DANGEROUS WEAPON DURING THE IMPEDING OF A FEDERAL OFFICER IN THE COURSE OF THEIR DUTIES

B. THE DISTRICT COURT ERRED INCORRECTLY CALCULATING MR. MILLIRON'S GUIDELINE RANGE BY APPLYING AN ENHANCEMENT IN USSG §§ 2A2.4(b)(1)(B), 2D1.1(b)(1) AND 2D1.1(b)(2) INCLUDED IN THE FINAL PRE-SENTENCE REPORT THAT THE COURT HAD PREVIOUSLY DETERMINED WAS INAPPLICABLE

TABLE OF AUTHORITIES

APPENDICES

I. OPINIONS BELOW

The reported opinion of the Court of Appeals for the Sixth Circuit and the judgment of conviction in the United States District Court for the Northern District of Ohio are attached to this petition as the Appendix.

II. JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on January 11, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), the petitioner having asserted below and asserting in this petition the deprivation of rights secured by the United States Constitution.

III. STATUTORY PROVISIONS INVOLVED

This matter involves violations of the United States Code, specifically, 21 U.S.C. § 843(a)(6) and (d)(2), 21 U.S.C. § 841(a)(1) and (b)(1)(C), and 18 U.S.C. § 922(g)(1).

IV. STATEMENT OF THE CASE

A. Procedural Background

The matter was briefed for the Sixth Circuit Court of Appeals and, after considering the matter on the briefs submitted, the Court issued an Opinion dated January 11, 2021, denying all relief, which has been appended to this Petition below. Mr. Milliron now makes this timely application.

B. Statement of Facts

Mr. Milliron was charged with various offenses related to a car chase in which he fled from various state and federal authorities throughout Ohio. On February 23rd, 2017, United States Marshall Christopher Hodge had been made aware of a

federal warrant from Florida that he was attempting to serve on Mr. Milliron and, after he and authorities in Ohio located Mr. Milliron, a car chase ensued as they attempted to detain him. (R. 109, Sentencing Hearing June 6th, 2019, Page ID#721-723) During the course of the chase, which lasted approximately thirty-five miles throughout Ohio, Mr. Milliron threw various items from his moving vehicle at various pursuing officers. (R. 109, Sentencing Hearing June 6th, 2019, Page ID#723) Of those items thrown, some of them were bottles which contained burning rags in them and a liquid substance. (R. 109, Sentencing Hearing June 6th, 2019, Page ID#723) At least one of the bottles struck one of the officer's vehicles impairing his ability to see and operate the vehicle safely. (R. 110, Sentencing Hearing June 19th, 2019, Page ID#795-796)

Eventually, Mr. Milliron was stopped and detained and, in a subsequent search of his vehicle, authorities recovered approximately 4.7 grams of methamphetamine, various items used in the process of manufacturing methamphetamine and thirteen lives round of 9-millimeter ammunition. (R. 92, Presentence Report, Page ID#595-597) Further analysis of the contents of the bottles thrown at the officers during the chase revealed that each of the bottles tested contained "a quantity of flammable liquid identified by the laboratory analysis as a light petroleum distillate". (R. 92, Presentence Report, Page ID#596) In a subsequent hearing, the substance was described as containing petroleum products as well as water, ammonium nitrate and

other substances without detail as to the quantity of each chemical in the substance. (R. 65, Transcript of Suppression hearing, Page ID#237-240)[1]

Mr. Milliron was interviewed by law enforcement after he was hospitalized with injuries related to the car chase and, in that interview, Mr. Milliron stated that fled from the authorities to avoid being served with the warrant he knew to be outstanding. (R. 70, Suppression Motion, Page ID#295-296) Mr. Milliron further admitted that he used methamphetamine and that he had thrown various items at pursuing officers during the chase. (R. 70, Suppression Motion, Page ID#295-296)

STANDARDS OF REVIEW

A district court's sentencing decisions are reviewed for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 49 (2007). The sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. See *Gall*, 552 U.S. at 46; *Rita v. United States*, 551 U.S. 338, 351 (2007). A sentence is procedurally unreasonable if the district court "failed to calculate the Guidelines range properly; treated the Guidelines as mandatory; failed to consider the factors prescribed at 18 U.S.C. § 3553(a); based the sentence on clearly erroneous facts; or failed to adequately explain the sentence." *United States v. Coppenger*, 775 F.3d 799, 803 (6th Cir. 2015). The substantive reasonableness of a sentence is reviewed under an abuse-of-discretion standard. *United States v. Curry*,

[1] Record entry 65 is the transcript of a hearing to suppress evidence of the Government's expert relating to the destruction of evidence related to the substance in the bottles thrown by Mr. Milliron. Record entry 70 is the transcript from a hearing to suppress Mr. Milliron's post-arrest statement to law enforcement.

536 F.3d 571, 573 (6th Cir. 2008). "A district court abuses its discretion when it applies the incorrect legal standard, misapplies the correct legal standard, or relies upon clearly erroneous findings of fact." *United States v. Fowler*, 819 F.3d 298, 303–04, (6th Cir. 2016). A sentence may be substantively unreasonable if the sentencing court "imposed a sentence arbitrarily, based on impermissible factors, or unreasonably weighed a pertinent factor." *Coppenger*, 775 F.3d at 803. "Sentences within a defendant's Guidelines range are presumptively substantively reasonable[.]" *United States v. Pirosko*, 787 F.3d 358, 374 (6th Cir. 2015).

The determination of whether the district court properly applied a sentence enhancement under the Guidelines is also a matter of procedural reasonableness. *United States v. Battaglia,* 624 F.3d 348, 351 (6th Cir.2010) (citing *United States v. Flack,* 392 Fed.Appx. 467, 470 (6th Cir.2010). Once a sentence is selected, the district court must sufficiently explain the sentence to permit meaningful appellate review. *United States v. Carty*, 520 F.3d 984, 992(9th Cir. 2008) (en banc).

SUMMARY OF ARGUMENT

Under Section A, the District Court erred when it applied an enhancement to Mr. Milliron's offense level pursuant U.S.S.G. § 2A2.4(b)(1)(B) for use of a dangerous weapon during the process of impeding federal officers. There was insufficient proof presented that the vehicle he was driving was a "dangerous weapon" within the meaning of the definition provided in U.S.S.G. § 1B1.1 and there was no proof presented where he threatened the use of the vehicle as required for the enhancement to apply.

Under Section B, the District Court erred when it calculated the guidelines for Mr. Milliron. The District Court determined that his conduct did not warrant an enhancement for use of an incendiary device during the course of the offensive conduct. Nonetheless, in its final guideline calculation, the District Court included an enhancement for use of an incendiary device in the adjusted offense level for Mr. Milliron that it used as the basis for sentencing him. The District Court, by its own prior rulings, erroneously calculated the guideline range thereby committing procedural error. Mr. Milliron is entitled to relief in the form of a new sentencing with a correctly calculated guideline range as its starting point.

ARGUMENT

A. THE DISTRICT COURT ERRED WHEN IT INCORRECTLY APPLIED A THREE LEVEL ENHANCEMENT TO U.S.S.G. § 2A2.4(b)(1)(B) FOR USE OF A DANGEROUS WEAPON DURING THE IMPEDING OF A FEDERAL OFFICER IN THE COURSE OF THEIR DUTIES AND THE CIRCUIT COURT FAILED TO ADDRESS THIS ISSUE ON ITS MERITS

The District Court erred when it determined that the Mr. Milliron had used a dangerous weapon in the commission of the offense of obstructing or impeding a federal officer in the course of his duties, a decision that added three offense levels to his adjusted offense level. The District Court, after a lengthy hearing, determined that Mr. Milliron had not committed an Aggravated Assault and U.S.S.G. §2A2.2 should not apply to him because the District Court agreed with his argument that his conduct did not constitute a "felonious assault" as required by that guideline stating:

> My difficulty defense counsel has touched on is the sentencing guidelines which reference both of these enhancements, and also the difficulty getting ahold of felonious assault, what does it mean. And, frankly, the struggle that we've had supports the difficulty. Defense counsel uses the word "vagueness". I don't know if it's vagueness that's the problem, the lack of definition, the lack of precedent, but there is some doubt in my mind. And if it's a 50/50 stand off, so to speak, I'm going to err on the side of caution.
>
> And even though I made some comments that obviously would reflect the unique circumstances and facts of this case that might well support a felonious assault application – the high-speed vehicle driven recklessly over a long period of time – because of the legal uncertainty, I'm going to apply the lower guideline enhancement, about which there is clearly no doubt or dispute in this case that that also applies. And I'm going to find the application of 2A2.4 is appropriate.

(R. 113, Sentencing Hearing, Page ID#881:5-23) The District Court instead applied U.S.S.G. § 2A2.4, titled Obstructing or Impeding Officers, to his conduct and conviction. Mr. Milliron made the argument, through his counsel in his Sentencing Memorandum that was drafted to address this specific issue, that he ever used "a dangerous weapon … with intent to cause bodily injury" rather than merely to frighten. (R. 90, Defendant's Sentencing Memorandum re: Application of 2A2.2, 2A2.4, and "Felonious Assault", PageID#585)

The Circuit Court focused its analysis around the issue of specific intent as it related to 18 U.S.C. §111(b) and Mr. Milliron's intent rather than the previous determination by the District Court that he had not engaged in a felonious assault nor had he used a deadly weapon but enhancing his sentencing notwithstanding that determination. (Document 67-2, Opinion, Pp. 6-8) This misconstrues Mr. Milliron's argument and fails to address his points warranting this Court's review of the issue.

U.S.S.G. § 2A2.4(b)(1)(B) states "a dangerous weapon (including a firearm) was possessed and its use was threatened" during the commission of the offense in order for the enhancement to apply. Application Note #1 to §2A2.2 advises that the term "Aggravated Assault" means "a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon". By determining that Mr. Milliron's conduct was not an Aggravated Assault, the District Court had determined that Mr. Milliron did not have any intent to cause bodily injury when he engaged in the offense conduct. (R. 113, Sentencing Hearing, Page ID#881:5-23) When the District Court made that determination, it undermined its own later finding that Mr. Milliron had "threatened" the use of the dangerous weapon as required for applying the enhancement under §2A2.4(b)(1)(B). *Black's Law Dictionary* defines the term "threat" as "[a] menace; a declaration of one's purpose or intention to work injury to the person, property, or rights of another." Based on these various definitions, the District Court could not logically have found that Mr. Milliron "threatened" the use of an item or instrument that was determined to be a dangerous weapon, manifesting his "intent to work injury to a person", but lacked the intent to cause bodily injury with the same object that was deemed a dangerous weapon thereby excluding that 2A2.2 applied to him.

Even if the District Court determined that the car was a dangerous weapon, the dangerous weapon still had to be possessed and its use threatened by the defendant in order to apply the enhancement under 2A2.4(b)(1)(B). The District Court applied the enhancement, but was silent as to how Mr. Milliron specifically

threatened a federal officer with the use of the car as a dangerous weapon if Mr. Milliron did not intend to cause them injury. The District Court noted in several places that Mr. Milliron's conduct was reckless, but did not determine that he intentionally attempted to cause bodily injury to officers during the course of the chase. More critically, there is no middle ground where the District Court could find that he had intentionally threatened an officer with the use of the car when the Court had already determined that he did not intend to cause bodily injury with the car when it determined §2A2.2 was not applicable to Mr. Milliron. The District Court found that Mr. Milliron's conduct was "intentional and reckless", but this cuts to the heart of the discrepancy. (R. 113, Sentencing Hearing, Page ID#895:10) The District Court, in the same hearing, determined that it could not find that a felonious assault occurred and it had "difficulty getting ahold of" what constituted felonious assault, but Application Note 1 of §2A2.2 makes clear that what makes the assault felonious, in the context of Mr. Milliron's conduct, was that he used a "dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon".[2]

This Court has recently reviewed the differing culpable mental states, albeit in a different context, but it serves to put Mr. Milliron's argument and conduct in the proper context:

> To commit an assault recklessly is to take that action with a certain state of mind (or mens rea)—in the dominant formulation, to "consciously disregard[ ]" a substantial risk that the conduct will cause harm to another. ALI, Model Penal Code § 2.02(2)(c) (1962); Me. Rev. Stat. Ann., Tit. 17–A, § 35(3) (Supp. 2015)

[2] The Government also grappled with this distinct in their Supplemental Sentencing Memorandum. Simultaneously, it stated Mr. Milliron "recklessly" drove "his vehicle in a way that endangered lives" while also asserting he had "the intent to cause serious bodily injury". (R., 89, Supplemental Sentencing Memorandum, PageID# 583)

(adopting that definition); see *Farmer v. Brennan*, 511 U.S. 825, 836–837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (noting that a person acts recklessly only when he disregards a substantial risk of harm "of which he is aware"). For purposes of comparison, to commit an assault knowingly or intentionally (the latter, to add yet another adverb, sometimes called "purposefully") is to act with another state of mind respecting that act's consequences—in the first case, to be "aware that [harm] is practically certain" and, in the second, to have that result as a "conscious object." Model Penal Code §§ 2.02(2)(a)-(b) ; Me. Rev. Stat. Ann., Tit. 17–A, §§ 35(1)-(2).

Voisine v. United States, 136 S. Ct. 2272, 2278 195 L.Ed.2d 736 (2016)

By determining that Mr. Milliron had not intended to cause bodily injury and stating that he had been acting recklessly, the District Court foreclosed the factual basis for finding that he had threatened the car as a dangerous weapon. Threatening requires that Mr. Milliron intended to use the car to cause bodily injury, not that he was merely acting in a reckless manner that may well cause injury. When it found that Mr. Milliron had "threatened" the use of the car, pursuant to §2A2.4(b)(1)(B), the District Court abused its discretion under *Fowler* as it reached a factual conclusion that was clearly erroneous as it was self-contradictory. Mr. Milliron is entitled to relief in the form of a correct calculation of the guidelines.

B. THE DISTRICT COURT ERRED INCORRECTLY CALCULATING MR. MILLIRON'S GUIDELINE RANGE BY APPLYING AN ENHANCEMENT IN USSG §§ 2A2.4(b)(1)(B), 2D1.1(b)(1) AND 2D1.1(b)(2) INCLUDED IN THE FINAL PRE-SENTENCE REPORT THAT THE COURT HAD PREVIOUSLY DETERMINED WAS INAPPLICABLE

In a portion of Mr. Milliron's sentencing hearing, the District Court was asked to determine if the items from his mobile methamphetamine lab that he threw towards the pursuing officers constituted a dangerous weapon within the meaning of the U.S.S.G. This was pursuant to an objection by Mr. Milliron through his counsel

to the inclusion of various enhancements for use of an "incendiary device" in the initial presentence report.[3] (R.92, Pre-sentence Report, Page ID#627) The presentence writer noted the objection, but did not agree with the defense's position leaving the matter to be resolved by the District Court. (R.92, Pre-sentence Report, Page ID#628)

The District Court ruled on the issue stating that "I'm going to find ….. that the device does not satisfy the definition in 26 U.S. § 5845(f). That would be subsection (f) for destructive device". (R.107, Sentencing Hearing, Page ID#699:10-13) Despite having made that determination, at the completion of the sentencing hearing for Mr. Milliron, the District Court accepted the final, amended pre-sentence report and, in that report, Mr. Milliron received enhancements in three different places under three separate guidelines for possession and use of an incendiary device during the possession and manufacture of methamphetamine as well as use of an incendiary device in his violation of 18 U.S. 111(a), impeding, or obstructing a federal officer.[4] (R.92, Pre-sentence Report, Page ID#600) This erroneous calculation effected the grouping of Mr. Milliron's offenses which, in turn, negatively impacted his overall adjusted offense level. Mr. Milliron's counts of conviction four and five grouped together as both related to the possession and manufacture of the same

[3] The initial PSR was prepared on March 13th, 2019, with four revised versions. The PSR cited in the record was the final version submitted on July 17th, 2019, the date of final sentencing, but it includes the objections by the parties and responses by the pre-sentence writer that were resolved through various rulings by the District Court prior to and on July 17th, 2019.

[4] The pre-sentence report, in Section 37, states that Mr. Milliron was guilty of Assault of a Federal Officer despite referencing 2A2.4 in the same section. Mr. Milliron was determined under 2A2.4 to be Obstructing or Impeding a Federal Officer by the District Court. (R. 92, Pre-Sentence Report, PageID# 600)

methamphetamine and, based on the final pre-sentence report adjustments, resulted in an adjusted offense level of 20, whereas count one had the adjusted offense level of 15 and count seven had the adjusted offense level of 22. (R.92, Pre-sentence Report, Page ID#602) Applying the USSG §3D1.4(a), the presentence writer added 2.5 levels to Mr. Milliron's adjusted offense level giving him an ultimate adjusted offense level of 25 which was reduced to 22 after he was credited with acceptance of responsibility for a total offense level of 22 from which the District Court then used as a basis for its sentencing determinations. (R.92, Pre-sentence Report, Page ID#602)

If the District Court had not committed this procedural error in the guideline calculation and excluded the above referenced enhancements based on its own determinations related to the enhancements, the grouped counts of four and five would have received an adjusted offense level of 16 and count one would have received the adjusted offense level of 12. Applying U.S.S.G. §3D1.4(a), (b), and (c), Mr. Milliron would have had only one-half point added pursuant to subsection (b) as the adjusted offense level in group one is seven levels below the offense level of count seven and he would receive no additional points for count one pursuant to subsection (c) as it is more than 9 offense levels below count seven. This proper application of the guidelines would have resulted in .5 additional units in addition to receiving one unit for count seven for a total of 1.5 additional units which in turn would result in only an increase of 1 offense level to his adjusted offense level pursuant to §3D1.4. Correctly calculated, Mr. Milliron's adjusted offense level, prior to any acceptance of responsibility, should have been 23 rather than the 25 the District Court applied.

Without any other changes to any part of the sentencing, the resulting total offense level for Mr. Milliron would have been 20 and his advisory guideline range should have been 63-78 months rather than the 77-96 months that the District Court applied when sentencing him as it was agreed that he was criminal history category V by the parties and the Court.

When the District Court miscalculates the advisory guideline range, this constitutes procedural error. *Coppenger*, 775 F.3d at 803. The applicability of an enhancement to the guideline range is also the subject of procedural error when incorrectly determined. *Battaglia,* 624 F.3d at 351. In Mr. Milliron's case, the District Court incorrectly applied multiple enhancement leading to an erroneous guideline calculation. The District Court committed reversible procedural error in the calculation of Mr. Milliron's advisory guideline range and he is entitled to relief.

CONCLUSION

For the aforementioned reasons, Mr. Milliron prays that this Honorable Court will grant his request for a writ of certiorari in order to review the questions of presented relating the various erroneous and prejudicial evidentiary and legal rulings by the District Court, affirmed by the Circuit Court, that created reversible error.

Respectfully submitted,

/s/ Manuel B. Russ
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CERTIFICATE OF SERVICE

I certify that the foregoing writ of certiorari and the accompanying appendix has been served via electronic mail upon counsel for the Respondent, Assistant United States Attorney, Ms. Ashely Futrell, United States Attorney's Office for the Northern District of Ohio at Toledo, Four Seagate, Third Floor, Toledo, OH 43604, and Ms. Elizabeth Prelogar, Acting Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington D.C. 20530-0001, this 7th day of April, 2021.

/s/ Manuel B. Russ
Manuel B. Russ