NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN BRUCE FIFIELD, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Mr. Fifield's criminal history score under the U.S. Sentencing Guidelines turned on whether he was "arrested" for a traffic violation or merely issued a ticket. The presentence report indicated that he had been arrested, Mr. Fifield did not object, and the district court sentenced him accordingly.

On appeal, Mr. Fifield presented state court documents conclusively establishing the now-undisputed fact that he was ticketed for the violation, not arrested, and thus the guidelines calculation was plainly erroneous. The Tenth Circuit rejected his claim, holding that any error was not plain based on the record presented to the district court.

The question presented is:

Whether a court of appeals may consider judicially noticeable facts presented for the first time on appeal in deciding whether an error is plain?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, John Bruce Fifield, Jr., respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Fifield*, 19-1440, is found in the Appendix at A1. The order denying rehearing is found in the Appendix at A8.

JURISDICTION

The Tenth Circuit entered judgment on December 9, 2020. (*See* App. at A1.) It denied rehearing on February 1, 2021. (*See* App. at A8.) This Court's general order of March 19, 2020, extends the deadline in 28 U.S.C. § 2101(c) to file a petition for a writ of certiorari in this case by 60 days, creating a deadline of July 1, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Federal Rule of Criminal Procedure 52(b): **Plain Error.** A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

In computing a defendant's criminal history score under the United States Sentencing Guidelines, multiple prior sentences are treated as a single sentence if there was no intervening "arrest" and the sentences were imposed on the same day. U.S.S.G. § 4A1.2(a)(2). Here, the presentence report (PSR) indicated that Mr. Fifield had been arrested on different dates for failing to display proof of insurance, and then concurrent 30-day sentences were imposed on the same day. *United States v. Fifield*, 836 F. App'x 715, 717 (10th Cir. 2020). The PSR assigned one criminal history point for each 30-day sentence, which increased Mr. Fifield's criminal history category from V to VI. *Id.* at 716-17. Mr. Fifield did not object to the PSR, and the district court sentenced Mr. Fifield based on criminal history category VI. *Id.* at 716.[1]

On appeal to the Tenth Circuit, Mr. Fifield asserted that counting his two traffic violations separately was plainly erroneous because there was no intervening *arrest*—he was merely issued a traffic ticket. *Id.* at 716-17. Mr. Fifield asked the Tenth Circuit to take judicial notice of the fact that he was not arrested based on state court records attached to his opening brief. *Id.* at 717-18.

The Tenth Circuit rejected Mr. Fifield's argument, concluding that "the error was not plain on the record before the district court." *United States v. Fifield*, 836 F.

[1] The district court had jurisdiction under 18 U.S.C. § 3231.

App'x 715, 718 (10th Cir. 2020). According to the Tenth Circuit, an error is not plain "if the record before the district court would not make the error clear or obvious." *Id.* It concluded that "the factual error (i.e., the fact Defendant was cited rather than arrested for his failure to display proof of insurance) . . . is not 'internally contradictory, wildly implausible, or in direct conflict' with the record [before the district court]. The factual error, *a fortiori*, is not obvious enough to satisfy plain-error review." *Id.* at 719 (quoting *United States v. Cristerna-Gonzalez*, 962 F.3d 1253, 1263 (10th Cir. 2020)).

The Tenth Circuit denied rehearing. Mr. Fifield now seeks this Court's review.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's categorical refusal to consider an undisputed, judicially noticeable fact in support of plainness because it was not presented to the district court conflicts with this Court's precedent that an error need only be plain at the time of appellate review, and that Rule 52(b) does not discriminate between legal and factual errors.

The Tenth Circuit's practice that a factual error can be plain only if it was clear or obvious based on the facts presented to the district court conflicts with two decisions of this Court: *Henderson v. United States*, 568 U.S. 266 (2013), and *Davis v. United States*, 140 S. Ct. 1060 (2020). In *Henderson*, this Court held that a legal error need only be "plain at the time of appellate consideration." 568 U.S. at 279. And in *Davis*, this Court rejected the Fifth Circuit's refusal to consider plain *factual* errors. 140 S. Ct. at 1061. Together, these decisions indicate that *any* error, whether legal or

factual, need only be plain at the time of appellate consideration. Thus, the Tenth Circuit's refusal to find an undisputed factual error plain on appeal because it was not plain before the district court conflicts with this Court's precedent. Accordingly, this Court should grant review of Mr. Fifield's case.

In *Henderson*, this Court made clear that the appropriate plainness inquiry is *not* whether "the trial court should have known about [the error] regardless" of any objection. 568 U.S. at 278. Instead, "it is enough that the error be plain at the time of appellate consideration." *Id.* at 279. The Tenth Circuit's decision that a factual error can be plain only if it was obvious to the district court on the record then-before it is clearly inconsistent with that precedent. Since the relevant inquiry is whether the error is plain at the time of review, an appellate court should be permitted to consider an undisputed, judicially noticeable fact in determining whether an error is plain, regardless of whether that fact was presented to the district court.

To be sure, in *Henderson*, this Court was specifically referring to plainness of a legal error when there is a change in the law. But the overarching principle—that plainness is determined from the appellate court's perspective—indicates that an appellate court can consider undisputed, judicially noticeable facts in determining plainness.

The Tenth Circuit rejected Mr. Fifield's claim because "the district court lacked the necessary information." *Fifield*, 836 F. App'x at 718. But that is looking at it from

the wrong perspective. In *Henderson*, this Court rejected the notion that a plain error must be "so clear-cut, so obvious, a competent district judge should be able to avoid it without benefit of objection." *Henderson*, 568 U.S. at 279. That's because "plain-error review is not a grading system for judges." *Id.*

The proper inquiry on plain error review is not whether the district court had everything it needed to catch the error sua sponte. It is whether the *appellate court* determines that an error is "plain at the time of appellate consideration." Because the plainness of the factual error here was readily apparent to the Tenth Circuit—indeed, it was undisputed—the Tenth Circuit should have been permitted to consider it in determining whether the error was plain.

None of the policies underlying the Tenth Circuit's refusal to find plain factual error are implicated where, as here, the fact is undisputed and judicially noticeable. The Tenth Circuit reasons that "it would be hard to determine" plain factual error "when there was no challenge to the [fact] and the party proffering [it] therefore had no notice of the need to establish [it]. For this reason," the Tenth Circuit is "disinclined to find plain error where the determinative facts are missing from the record due to the defendant's failure to make a timely objection." *Cristerna-Gonzalez*, 962 F.3d at 1261. Here, the Tenth Circuit was concerned that by "failing to present the claims to the district court, [the defendant] effectively prevented the court from

making factual findings that would be germane to the disposition." *Fifield*, 836 F. App'x at 718.

However, these concerns are simply not at issue where, as here, the factual basis of the claim is judicially noticeable and undisputed. The government is not at any disadvantage due to the failure to object, nor is there a reasonable possibility the district court could have made a contrary factual finding. It is not "impossible to know" whether there was a factual error, and there is no risk the appellate court "could reverse and remand because of plain error even though it may ultimately be resolved that there was no error at all." *Cristerna-Gonzalez*, 962 F.3d at 1261. Thus, there is no reason for the Tenth Circuit to refuse to find a factual error plain when that fact is undisputed and judicially noticeable on appeal.

This Court's recent decision in *Davis* strongly suggests that the time-of-review rule should apply to factual errors as well as legal ones. In *Davis*, this Court recently rejected the "Fifth Circuit's outlier practice of refusing to review certain unpreserved factual arguments for plain error." *Davis v. United States*, 140 S. Ct. 1060, 1061 (2020)). "[U]nder Fifth Circuit precedent, '[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing [could] never constitute plain error.'" *Id.* (quoting *United States v. Davis*, 769 F. App'x 129 (5th Cir. 2019)). This Court rejected the Fifth Circuit's practice because "the text of Rule 52(b) does not immunize factual errors from plain-error review. [This Court's] cases likewise do not

purport to shield any category of errors from plain-error review." *Id.* In other words, neither Rule 52(b) nor this Court's precedent supports distinguishing between plain legal errors and plain factual errors as a matter of procedure. Likewise, neither Rule 52(b) nor this Court's precedent suggests that while legal errors are subject to the time-of-review plainness rule, factual errors must have been plain to the district court.

That is not to say that legal and factual errors are equal in all respects. Given the limitations on factual development on appeal (contrasted with the availability of the entire universe of legal authorities), the likelihood of overcoming plain error on a factual issue is significantly less likely than on a legal one. However, that does not justify applying different procedural rules to their analysis. That was the Fifth Circuit's mistake in *Davis*. A defendant's failure to object to a fact and to develop a record below does not mean the defendant can *never* demonstrate plain factual error on appeal.

The Tenth Circuit has made a similar miscalculation. That a factual error was not plain on the district court record does not mean it can *never* be plain on appeal. While a court of appeals has a very limited authority to develop facts on appeal, it is not proscribed absolutely. As relevant here, courts of appeal "may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see id.* 201(d) ("The court may take judicial notice at any stage of

the proceeding."). Where, as here, a court of appeal can judicially notice an undisputed fact establishing the plainness of a factual error on appeal, it cannot refuse to do so, instead analyzing only whether the factual error was plain to the district court. To do so would be to arbitrarily apply different standards to the review of plain factual and legal errors, a practice *Davis* cautions against.

Read together, *Henderson* and *Davis* indicate that the relevant plainness inquiry is whether an error—legal or factual—is plain to the appellate court. The Tenth Circuit's decision reviewing plainness only through the lens of the district court conflicts with this precedent.

The question presented here is an important one that this Court should decide as it stands at the intersection of two significant issues that the circuit courts of appeal and this Court frequently wrestle with: the scope of plain-error review and evidence of prior convictions. *See, e.g.*, *Greer v. United States*, 141 S. Ct. 2090 (2021). This Court has already held that the time-of-review rule applies in determining the plainness of legal error and that factual errors are also subject to plain error review. This Court should take the next logical step and consider whether the Tenth Circuit incorrectly decided that the time-of-review rule does *not* apply in determining the plainness of factual errors.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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