No. _____

In the

Supreme Court of the United States

_____

Phillip Shawn Horton,

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

_____

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QUESTION PRESENTED

I. Should this Court should grant review to determine whether the opinion of the court below conflicts with this Court's decisions in *Witte v. United States*, 515 U.S. 389 (1995), *Stinson v. United States*, 508 U.S. 36, 43 (1993), and *Davis v. United States*, __U.S.__, 140 S. Ct. 1060 (2020), and circumvents this Court's remand order**.**

PARTIES TO THE PROCEEDING

Petitioner is Phillip Shawn Horton, 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 Phillip Shawn Horton. 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 located within the Federal Reporter at *United States v. Phillip Shawn Horton*, 993 F. 3d 370 (5th Cir. 2021). It is reprinted in Appendix C to this Petition. The district court's judgment is attached as Appendix D.

JURISDICTION

The published panel opinion and judgment of the Fifth Circuit were entered on April 6, 2021. On March 19, 2020, this Court extended the 90-day deadline to file a petition for certiorari to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT RULES AND GUIDELINE 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).

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.

Finally, this petition involves USSG §4A1.2, application note 1, which states:

> 1. **Prior Sentence.—**"***Prior sentence***" means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense. *See* §4A1.2(a). A sentence imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense. Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct).

LIST OF RELATED PROCEEDINGS

1. *United States v. Phillip Shawn Horton*, 6:18-CR-00022-C-BL-2. United States District Court, Northern District of Texas. Judgment entered November 28, 2018.

2. *United States v. Phillip Shawn Horton*, CA No. 18-11577, United States Court of Appeals for the Fifth Circuit. Opinion and judgment affirming the sentence entered February 13, 2020. Published at *United States v. Horton*, 950 F.3d 237 (5th Cir. 2020)

3. *Phillip Shawn Horton v. United States*, 141 S. Ct. 224, No. 20-5091 (2020), vacated and remanded for re-consideration, October 5, 2020.

4. *United States v. Horton*, 993 F.3d 370, 376-377 (5th Cir. 2021), opinion entered April 6, 2021.

STATEMENT OF THE CASE

Factual and procedural background

In mid-2016, Mr. Horton became a participant in a conspiracy to obtain and distribute drugs. (ROA.13-15, 52-53,106-13).[1] He acted as a courier and was paid with methamphetamine. (ROA.13-15, 52-53,106-13). That conspiracy continued through the date of the indictment. (ROA.13-15, 52-53,106-13). Prior to this time, Mr. Horton had never been arrested or convicted for any offense. (ROA.115-19. He was 38 years old in 2017 during this conspiracy when he was arrested for his first offense. (ROA.113).

On June 3, 2018, Mr. Horton was charged by indictment with two counts. (ROA.13-15). Count one charged him with being in a conspiracy to distribute and possess with intent to distribute more than 500 grams of methamphetamine. (ROA.13). The conspiracy was alleged to have begun on an unknown date and continued up to the date of the indictment. (ROA.13). Count two alleged that on February 8, 2017, Mr. Horton possessed with intent to distribute more than 500 grams of methamphetamine. (ROA.15). Horton pled guilty to count 2 of the indictment. (ROA.50-56).

Both parties adopted the Presentence Report (PSR), and the district court adopted it as its findings of fact and conclusions of law. (ROA.86,126-27). These findings included the following that, consistent with count one of the indictment, from

[1] For the convenience of the Court and the parties, the Petitioner is citing to the page number of the record on appeal below.

about mid 2016 through at least March 2017, but with no end date other that Mr. Horton's arrest, Mr. Horton acted as a courier for a co-defendant (Martinez) in the case, as was paid for this service in methamphetamine. (ROA.106-13). Martinez was arrested on this case in June of 2018. (Sealed doc. #11). During this period of time, Mr. Horton was arrested and found with methamphetamine three times, twice with firearms: on January 19, 2017, Mr. Horton was in Big Spring, Texas acting as a courier for Mr. Martinez, when he was arrested and found with methamphetamine and firearms, (ROA.108-09,115-16); on February 8, 2017, Mr. Horton was arrested in Colorado City, Texas, with methamphetamine and a firearm, (ROA.108); on April 25, 2017, Mr. Horton was arrested in San Angelo with a gun and methamphetamine (ROA.118); on October 30, 2017, Mr. Horton was arrested in San Angelo with a firearm and a pipe containing methamphetamine residue (ROA.117); and on December 5, 2017, Mr. Horton was arrested in San Angelo with methamphetamine. (ROA.119).

As a result of the arrests Mr. Horton was convicted in state court on May 31, 2017 for possessing the methamphetamine. (ROA.115-16). He received a sentence of probation which was later revoked resulting in a six year sentence. (ROA.115.) On October 30, 2017, Mr. Horton received a fee only for possessing the drug paraphernalia. (ROA.104,117). He was convicted in federal court for possessing with intent to distribute methamphetamine on February 8, 2018. (ROA.104,115). He received 3 criminal history points for the state conviction for possessing methamphetamine, and 1 criminal history point for the state conviction for

paraphernalia. (ROA.104,117).[2] The other charges from Tom Green pending in Tom Green County (San Angelo, Texas). (ROA.118-19).

At sentencing, Defense counsel argued for a sentence at the bottom of the guidelines, and that the sentence be run concurrent with the state court sentence for drug possession. (ROA.87). Counsel argued:

- Mr. Horton's role in the offense was that of a courier or "mule," and thus should be considered for the low end of the guidelines,

- the Court should consider running the time in this case concurrent to the offense that's referenced in paragraph 72 of the presentence investigation report (the six-year sentence resulting from his state arrest on January 19, 2017 for possession of methamphetamine) because the conduct for the federal offense occurred essentially at the same time as the violations that were the basis for the revocation of his probation and the six year state sentence.

(ROA.87).

The court immediately, with no input from the government, sentenced Mr. Horton to 262 months, the very top of the guideline maximum, and ordered the parties to step aside. (ROA.89).

On appeal

On direct appeal, Horton raised six issues. The first four issues involved errors that significantly affected Horton's sentence because the PSR writer, the government,

[2] Mr. Horton also had at least three cases pending in Tom Green County at the time of his federal sentencing. (ROA.118-119) On direct appeal, Green argued those cases were also relevant conduct for which the federal sentence should have been ordered to run concurrently. However, it appears that all of those pending cases were subsequently dismissed in lieu of federal prosecution.

defense counsel and the sentencing court all failed to recognize that most, if not all, of Horton's criminal history points came from methamphetamine related, state court convictions that were clearly relevant conduct of the offense of conviction. As a result, 1) the district court plainly erred by assessing criminal history points that should not have counted because they were for state convictions that were relevant conduct; 2) the district court plainly erred by failing to run the federal sentence concurrent with the state court convictions that were relevant conduct to the offense of conviction; 3) the district court plainly erred by failing to adjust the federal sentence for time served on the state sentence; and 4) the district court plainly erred when it ordered the federal sentence to run consecutively to the state sentences that were based on relevant conduct to the offense of conviction.

Absent these four plain errors, Horton would have received four fewer criminal history points and his imprisonment range would 168 – 210 months, his sentence would have run concurrently with the 6-year state sentence, and he would have received credit for the time he had already served on his state sentence. On appeal, the Court of appeals disposed of the issues regarding relevant conduct, other than his request to run his federal sentence concurrent to his state sentence, as plain error and disposed of the issues by relying on premise 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. Horton*, 950 F.3d at 241-242, relying on *United States v. Lopez*, 923 F.2d 47, 50 (1991).

After the Fifth Circuit decided Horton's case, this Court decided *Davis v. United States*, 140 S. Ct. 1060 (2020) which abrogated *United States v. Lopez,* 923 F.2d 47, 50 (1991). Horton filed a petition for certiorari, and on October 5, 2020, this Court granted the petition for certiorari, vacated the judgment and remanded for reconsideration in light of *Davis*. *Phillip Shawn Horton v. United States*, 141 S. Ct. 224, No. 20-5091 (2020).

On remand, the Fifth Circuit, in a published opinion found that all of the offenses set forth above were not relevant conduct. *See United States v. Horton*, 993 F.3d 370, 376-377 (5th Cir. 2021). There was no dispute that "the underlying conduct for the federal offense was part of a series of trips from October 2016 to February 2017 to procure large amounts of methamphetamine for Martinez." *Horton*, 993 F.3d at 376. However, although it is undisputable that the January 19, 2017 arrest for methamphetamine occurred during the on-going drug trafficking activity, the Fifth Circuit held "Because the district court's implicit finding that these two state offenses were not relevant conduct is plausible in light of the record as a whole, Horton's argument related to his prior convictions must fail." *Id*.

The problem with the Fifth Circuit's holding is twofold. First, there was no finding in the PSR that the January 19, 2017 state offense was not relevant conduct, and, therefore, there was no basis for the Fifth Circuit to conjure an implicit finding to support their conclusion. Second, based on the Fifth Circuit's case law, it is entirely implausible, in light of the record as a whole, to conclude that the January 19, 2017 offense was anything but relevant conduct to the federal offense.

Moreover, it is also beyond dispute that federal drug trafficking conspiracy, which was the basis of the federal prosecution, continued up to the time of the indictment, which was June 3, 2018. *See* (ROA.13-15). Accordingly, with regard to the October 30, 2017, drug paraphernalia offense, the Fifth Circuit's suggestion that there was "no connection" to the federal offense is entirely implausible in light of the record. *See Horton*, 993 F.3d at 376.

REASONS FOR GRANTING THIS PETITION

I. The opinion of the court below conflicts with this Court's decisions in *Witte v. United States*, 515 U.S. 389 (1995), *Stinson v. United States*, 508 U.S. 36, 43 (1993), 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 of imprisonment 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,[3] "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)).

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

Moreover, the sentencing guidelines provide that a prior sentence that resulted from relevant conduct is not to be counted as criminal history points. USSG § 4A1.1, *Commentary, app. n.* 1. In the words of the Sentencing Commission:

> 1. Prior Sentence.—"Prior sentence" means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense. See §4A1.2(a). A sentence imposed after the defendant's commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense. **Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct).**

USSG § 4A2.1, *Commentary, app. n.* 1 (emphasis added). Of course, The Guidelines Manual's commentary which interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline. *Stinson v. United States*, 508 U.S. 36, 43 (1993).

In deciding whether Petitioner's offenses were "part of the same course of conduct … as the offense of conviction," the court failed to follow its own precedent. More particularly, it employed different standards in this case – where a finding of relevant conduct would benefit the defendant – than it 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. 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 Court below ignored its own precedent in which it has applied a broad definition of "common course of conduct" for the purpose of increasing the defendant's sentence, while narrowly defining it for the purpose of determining Horton's access to concurrent sentencing and for the purpose of excluding criminal history points.

The court below acknowledged that Petitioner "correctly points out that the first offense (January 19, 2017 offense) was committed only a few weeks before the federal offense." *United States v. Horton*, 993 F.3d 370, 376 (5th Cir. 2020). The Court went on to acknowledge that the drug trafficking conduct – and the relevant conduct for purposes of calculating the offense level – included at least four trips to Arizona to for a total of almost 20 kilograms of methamphetamine. *See id*. footnote 2. Also, the PSR established that these four trips occurred between October 2016 and the February 8, 2017 trip that was the basis of the count of conviction. *See* (ROA.110). Again, the amount of methamphetamine from all of those trips was considered relevant conduct for the purposes of determining the offense level. *See* (ROA.113-114). However the district court relied on the fact that the amount of methamphetamine seized on January 19, 2017 was only 6.5 grams in order to justify its finding "Because the district court's implicit finding that that these two state offenses were not relevant conduct to the federal offense is plausible in light of the record as a whole, Horton's arguments related to his prior state convictions

must fail." *See Horton*, 993 F.3d 270. The Court of Appeals' findings is untenable for at least two reasons. First, a finding that the January 19, 2017 arrest was not relevant conduct is implausible in light of the record as a whole. Second, there was no finding in the PSR that the January 2017 offense was not relevant conduct, and, therefore, there was no implicit finding by the district court.

The record that was adopted by the district court and relied upon by the Fifth Circuit established without dispute that Horton's January 19, 2017 arrest for methamphetamine possession occurred during the drug trafficking conspiracy that began in October 2016 and continued at least until February 8, 2017 when Horton went to Arizona to pick up another pound of methamphetamine. *See* (ROA.110,113-114). The uncontested record established without a doubt that the January 19, 2017 arrest was relevant conduct to the offense of conviction.[4]

The logic of the Court below that the drug quantity for the January 19, 2017 offense was only 6.5 grams, and possibly a personal use amount, does not establish that this offense was not relevant conduct to the offense of conviction. *See United States v. Clark*, 389 F.3d 141, 142 (2004) ("[E]very other circuit that has considered

[4] Horton continues to argue that the October 30, 2017 drug paraphernalia offense was also relevant conduct and should have resulted in no criminal history points and a concurrent sentence for the same reasons regarding the January 19, 2017 arrest. However, Horton recognizes that the facts weighing in favor relevant conduct are not as overwhelmingly as they are regarding the January 2017 arrest. In any event, he urges this court that any remand should include a re-consideration of whether the October 2017 drug paraphernalia offense was also relevant conduct. *See United States v. Johnson,* No. 18-10061, 2019 WL 211512, at *3 (5th Cir. Jan. 15, 2019): *United States v. Beckway,* 31 F. App'x 839 (5th Cir. 2002); *United States v. Davis*, 859 F.3d 572, 574, n.5 (8th Cir.), cert. denied, 138 S. Ct. 403 (2017); *United States v. Meehwan Ro*, 465 F. App'x 217 (4th Cir. 2012): *United States v. Vongvone*, 341 F. App'x 272, 273 (8th Cir. 2009).Such a finding would reduce Mr. Horton's criminal history score by an additional point and would result in a criminal history category I.

this issue has held that a district court properly considers the amount of drugs intended for personal consumption when calculating the sentence for a conviction involving a drug conspiracy."). More importantly, however, the court below has consistently held 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.").[5]

Here, the court found that the March 19, 2017 offense was not similar to the federal offense because it involved a smaller quantity of methamphetamine. *See Horton*, 993 F.3d at 376. However, it is clear under Fifth Circuit precedent that that has not been a factor weighing against a relevant conduct finding in the past. *See Clark*, 389 F.3d at 142. Moreover, the court below completely ignored the overwhelming factors of temporal proximity and regularity. The January 19, 2017 offense occurred just a little more than two weeks before the February 8, 2017 trip to Phoenix. The court below 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.

Moreover, the January 2017 offense occurred during the heat of the series of trips made between October 2016 and February 8, 2017. The evidence of those trips from October 2016 to February 8, 2017, established a strong regularity of the conduct. 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

[5] 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.").

with July, September, and November. *See Ocana*, 204 F.3d at 591. The present case involved offense conduct that involved several incidents from October 2016 to February 8, 2017 (and allegedly to up to the return of the indictment in June 2018). The evidence of regularity was also robust.

The disparate treatment of the relevant conduct standards by the court below do not merely offend basic notions of even-handedness and fair play. They contravene the plain text of USSG §5G1.3 and USSG §4A1,1, which both cross-reference USSG §1B1.3, thus providing a single, uniform definition of relevant conduct for the determination of offense levels, criminal history calculations 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.

Moreover, the court below justified its holding by identifying an implied finding of the district court that the two previous state case were not relevant conduct that simply did not exist. *See Horton*, 389 F.3d at 376. However, the PSR never made a finding that the two state sentences were not relevant conduct. It simply counted the two sentences with criminal history points. *See* (ROA.115-117). There is no analysis whether this incident was relevant conduct to the federal offense. Accordingly, there was no basis for the court below to find that the district court impliedly found the two offenses were not relevant conduct. The court below has only allowed for "implicit findings" by the district court when the findings in the PSR are so clear that the reviewing court is not left to "second guess" the basis for the sentencing decision. *See United States v. Carreon*, 11 F.3d 1225, 1231 (5th Cir. 1994), citing *United States v. Hooten*, 942 F.2d 878, 881 (5th Cir. 1991). Moreover, the court below "cannot assume that the trial court complied with §1B1.3 by making an implicit finding on the basis of the Addendum PSR's implicit finding. We do not tolerate inferences based on inferences." *United States v. Evbuomwan*, 992 F.3d 70, 74 (5th Cir. 1993).

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.

Certioari 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)). As is argued above in this petition, the conduct resulting in Mr. Horton's arrest on January 19, 2017, and a six year sentence, overwhelmingly satisfies all three of these factors. Yet the court below isolated one factor – a smaller quantity of methamphetamine -- to affirm a district court's finding of no relevant conduct that was never made, either by the district court or the PSR. Moreover, the court found dissimilarity based upon a factor that had previously been rejected by that court. *See Clark*, 389 F.3d at 142

This disparate 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. Horton*, 950 F.3d 237, 241-242 (5th Cir. 2020) (quoting *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991), *cert. granted, judgment vacated*, 141 S. Ct. 224 (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 Horton v. United States*, __U.S.__, 141 S.Ct. 224 (October 5, 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,* vacate 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 3rd day of September, 2020.

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