

No. 21-

IN THE
Supreme Court of the United States

KYLE LEROY MYERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”)—which affirmed the District Court’s decision to increase Mr. Myers’ sentencing Guidelines base offense level by converting cash to narcotics—conflicts with decisions of this Court on an important matter and thus the decision calls for an exercise of this Court’s supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Kyle Leroy Myers:	Petitioner (Defendant-Appellant in the lower Courts)
United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, KYLE LEROY MYERS, requests that this Honorable Court grant this petition and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit. Mr. Myers submits the District Court and the Fifth Circuit did not apply the correct standard for determining whether money could be connected to narcotics when determining the amount of narcotics for which Mr. Myers was held responsible under the Guidelines. Respectfully, the decision by the Fifth Circuit is in conflict with decisions of this Court and therefore a compelling reason is presented in support of discretionary review.

CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Kyle Leroy Myers*, No. 20-50570 (5th Cir. Aug. 27, 2021), appears at Appendix A to this Petition and is unreported.

The Judgment in a Criminal Case of the United States District Court for the Western District of Texas, Midland-Odessa Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

GROUND FOR JURISDICTION

This Petition arises from a direct appeal of a sentence concerning an upward departure and the resulting final judgment entered by the District Court. A copy of the Judgment appears at Appendix B. A copy of the decision by the Appellate Court appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Overview

Mr. Myers pleaded guilty to conspiracy to possess with intent to distribute 50 grams or more of methamphetamine and possession with intent to distribute 50 grams or more of methamphetamine. A factual basis for the guilty plea provided that, on December 12, 2019, Ector County sheriff's officers were conducting surveillance at a residence in Odessa, Texas. ROA.69.

The officers observed a vehicle arrive, and then depart, the residence. ROA.69. The officers followed the vehicle. ROA.70. Eventually, one of the officers activated his lights and the driver of the vehicle pulled-over. ROA.70. The officers found a nine-millimeter pistol on

the backseat passenger floorboard. ROA.70. The occupants of the vehicle, Jordan Tavarez, Tiffany Rene Sutton and a “Mr. Davidson,” were detained. ROA.70, 150.

Ms. Sutton’s purse was located in the front seat and she claimed ownership of the handbag. ROA.71-72. However, she did not claim ownership of the approximately 18.5 grams of heroin and approximately 15.6 grams of methamphetamine in her purse. ROA.71-72.

According to the Government, the following events then took place:

Law enforcement conducted additional investigation and learned that Sutton received her heroin and methamphetamine from her friend and roommate, Kyle Myers, who resides at 2500 West Yukon, Odessa, Texas. On December 13, 2019, Ector County Sheriff’s Office Special Investigations Unit applied for, received and executed a state search warrant at 2500 West Yukon in Odessa, Texas, Ector County, Texas.

ROA.72. There was no mention of why the Government believed Ms. Sutton despite the fact she claimed no ownership of the drugs in her purse.

When officers executed the warrant, Mr. Myers was taken into custody at the residence without incident. ROA.72. The residence was owned by a man named Adrian Chavez. ROA.150. One unnamed female was present and she was also taken into custody. ROA.72.

The search of the residence yielded 1,364 grams of methamphetamine, 529 grams of heroin, a nine millimeter pistol with three magazines of live ammunition, and U.S. currency which the officers “believed to be proceeds from the sale and distribution of narcotics.” ROA.72-73. The search also yielded packing material, digital scales, ledgers containing information of transactions related to narcotics trafficking and “additional

ammunition.” ROA.73. The prosecution concluded that the Government did not believe Mr. Myers gave a statement. ROA.73.

Mr. Myers’ Agreement on the Facts

When the guilty plea was taken, the Court asked Mr. Myers if he disagreed with any of those facts, to which Mr. Myers said he did, in fact, disagree. ROA.73. There was then an initial discussion about the correct address of the residence which was searched. ROA.73-74. Mr. Myers was clear he believed the residence was on Katherine Street rather than West Yukon, as the Government had claimed. ROA.73-74.

Upon further questioning by the Court, Mr. Myers stated he did not know anything about “1300 grams of meth,” but rather “confessed” that he “had approximately 8 ounces of meth.” ROA.75. At that point, the Court clarified that Mr. Myers was pleading guilty to conspiracy to possess with intent to distribute 50 grams or more of drugs, and the actual possession with intent to distribute those drugs. ROA.76.

The Court then explained what these facts meant:

Now, the government gives facts, the factual basis a lot of times that cover when there’s multiple defendants, they cover not only you but other defendants, as well. Sometimes the defendant will tell me, I don’t know that they have against somebody else, okay? I can’t disprove it, I don’t know if it’s true or not true. I just don’t have enough information. But the information about me, about the methamphetamine, that’s true, that’s what I’m pleading guilty to. That’s what I want to know today.

ROA.76.

The Court explained there will be a presentence report that will include “relevant conduct.” ROA.77. This caused the Court to conclude:

And to the extent that probation can attribute that stuff to you, they're going to do that. They're going to put that in a presentence report.

ROA.77.

All of this led the Court to summarize to Mr. Myers:

Now, it doesn't mean it will. I mean, it's going to be in there, and if that happens, your lawyer is going to make objections or request for corrections and will make arguments to the district judge about why that should not be considered for sentencing purposes. An then, the government will make counter arguments, and then, it will be up to the judge to either overrule or sustain those objections. But those are sentencing issues, not guilty plea issues.

ROA.77-78.

The Government agreed with the Court's legal observations on these issues. ROA.78-79. Indeed, the prosecutor added: "the defendant has preserved the right to contest these issues at sentencing." ROA.79.

The PSR

The Presentence Investigation Report ("PSR" or "the report") established that the residence which was searched was owned by one Adrian Chavez. ROA.150. The PSR further included a list of items seized from the residence:

- * 1,290 grams of actual methamphetamine
- * 521 grams of heroin
- * A Glock 17, Gen 4, 9mm pistol bearing serial number BMBB353
- * 3 magazines with live ammunition
- * \$21,456 of United States currency, believed to be the proceeds from the sales and distribution of narcotics

- * Packaging material
- * Digital scales
- * Drug ledgers

ROA.151. However, there is no mention of where the listed items were located within the home. *See* ROA.151.

Contrary to the facts at the guilty plea, the PSR also establishes that Mr. Myers did in fact agree to talk with investigators. ROA.151. The report provides that Mr. Myers “admitted he picked up the drugs located and placed them in his RV.” ROA.151. This statement from the PSR was the first mention of an RV. The report further establishes that Mr. Myers was specific when he spoke with investigators and admitted that he sold the methamphetamine, but nothing else. ROA.151. To this end, the PSR explains, Mr. Myers added that Ms. “Sutton sells drugs but not for him.” ROA.151.

The Probation Officer believed that Mr. Myers should be held accountable for “76,600.26 kg of converted drug weight.” ROA.151. The Officer notes this weight was “converted from monies and narcotics seized.” ROA.151 n.6.

PSR Calculations

The PSR initially provided the Probation Officer’s calculation of drug quantity and the corresponding base offense level. ROA.152. The PSR cites U.S.S.G. § 2D1.1(a)(5), and provides the following table:

<u>Drug Name</u>	<u>Drug Quantity</u>	<u>Converted Drug Weight</u>
Methamphetamine (actual)	2.5 kg	50,000.00 kg
Heroin	536.66 gm	536.66 kg
Methamphetamine	1303.18 gm	26,063.60 kg
Total		76,600.26 kg

ROA.152 (emphases in original). Based on these observations, the PSR sets Mr. Myers' base offense level at 36. ROA.152. Without explanation and without legal authority, the Probation Officer added 2 levels based on firearm possession. ROA.152. After deducting 3 levels for acceptance of responsibility, the Officer set Mr. Myers' total offense level at 35.

Mr. Myers' criminal history category was set at VI. ROA.156. In light of a total offense level of 35 and a criminal history category of VI, the Officer concluded that Mr. Myers' guidelines imprisonment range was 292 months to 362 months in the custody of the Bureau of Prisons. ROA.159.

Objections to the PSR

Mr. Myers filed objections to the PSR. ROA.164-67. Mr. Myers argued, as was established at the guilty plea hearing, he only possessed one half pound, or 226.5 grams, of methamphetamine. ROA.169-170. More specifically, the objection provided:

Defendant further OBJECTS to the portion of Paragraph 6 of the PSR which maintains that 'the investigation revealed' that Ms. Tiffany Sutton obtained heroin and methamphetamine from Defendant Myers. Defendant Myers denies such allegations and assertions. Further, there are no Reports of Interview with Ms. Sutton in the discovery materials provided to Defendant's undersigned Counsel that support such assertion in the PSR. At

least, there are no Reports of Interview with Ms. Sutton which Defendant's undersigned counsel has found in those materials from the DEA and the Ector County Sheriff's Office that support such assertion.

ROA.169.

Additionally, Mr. Myers' attorney objected to "Paragraph 7 of the PSR wherein same reflects that Defendant admitted that he had handled or picked up 'the drugs located and placed them in his RV.'" ROA.169. Counsel for Mr. Myers further noted that the discovery "did not reflect that Defendant had any knowledge of" other than approximately one-half pound of methamphetamine. ROA.169.

The Sentencing Hearing

Mr. Myers was sentenced on July 8, 2020. ROA.85. The Court first considered Mr. Myers' objections to the PSR. ROA.88. Specifically, the C whether Mr. Myers could be held accountable for the 76,600 kilograms of converted drug weight. ROA.93. Mr. Myers' attorney expanded on his argument:

There is—my calculation is 226 grams of methamphetamine to which he admitted that's in the trailer and not the total amount which is essentially based, Your Honor, solely upon—or primarily upon Ms. Sutton's self-serving statements, Your Honor, which are second and third level hearsay, Your Honor. It's not sufficiently reliable to find by a preponderance of the evidence that it was reasonably foreseeable that Mr. Myers would understand everything that—and know—or know what Ms. Sutton was up to, Your Honor. We're looking at and submit to the Court that, just to be sure it is clear for the record, approximately 8 ounces of methamphetamine, Your Honor, and nothing more.

ROA.94. The Court nonetheless overruled the objection to the converted drug weight. ROA.94.

The Court next adopted the PSR as accurate. ROA.100. The Court found the total

base offense level “for this 28 year old man to be a total of 35.” ROA.100. The Court set Mr. Myers’ criminal history category at VI. ROA.160. Thus, Mr. Myers’ guidelines range of punishment was 292 to 365 in the custody of the Bureau of Prisons. ROA.160.

The Court then concluded the Guidelines range set forth in the PSR was fair and reasonable per the factors set forth in 18 U.S.C. § 3553(a). ROA.107. The Judge sentenced Mr. Myers to 365 months in the custody of the Bureau of Prisons on each count, which was at the top end of the Guidelines. ROA.107. The Court concluded that the 365 months for each count was to be run concurrently. ROA.107.

The Appeal

Mr. Myers timely filed a Notice of Appeal. ROA.38. Before the Fifth Circuit, Mr. Myers argued the District Court committed reversible error by denying his objection to the increasing of the base offense level by converting currency to narcotics. After the Court received Mr. Myers’ opening brief, the Government’s response, and Mr. Myers’ reply brief, the case was submitted without oral argument. On August 27, 2021, the Fifth Circuit affirmed the District Court’s decision. (Exhibit A, page 1). Mr. Myers now files this Petition with this Honorable Court.

**ARGUMENT AMPLIFYING REASONS RELIED
ON FOR ALLOWANCE OF THE WRIT**

I.

Converting Money to Drugs

A.

Legal Overview

The base offense level for a defendant convicted of a drug trafficking crime is determined by the quantity and type of drugs involved in the offense. *United States v. Rhine*, 583 F.3d 878, 885 (5th Cir. 2009). This base offense level can be increased beyond the amount in the count of convictions if they are shown to be relevant conduct. *Id.* “The base offense level can reflect quantities of drugs not specified in the count of conviction if they were” derived from relevant conduct, *id.*, meaning they were “part of the same course of conduct or common scheme or plan as the offense of conviction.” U.S.S.G. § 1B1.3(a)(1)-(2). Specifically, “where there is no drug seizure or the amount seized does not reflect the scale of the offense,” the Court can approximate a drug quantity. *United States v. Barry*, 978 F.3d 214, 217 (5th Cir. 2020) (citing U.S.S.G. § 2D1.1 cmt. n.5). In this regard, the District Court may convert cash into drug quantities. *Id.*

However, “the *only* authority for converting money into a drug quantity is U.S.S.G. § 2D1.1 cmt. n.5.” *Id.* (emphasis added). As noted above, the conversion is permissible only “[w]here there is no drug seizure or the amount seized does not reflect the scale of the offense.” *Id.* To this end, the District Judge “must find that one of the two situations contemplated by § 2D1.1 cmt. n.5 is present before doing so.” *Id.*

There was a drug seizure in this case and therefore the Rule applicable to cases where no drugs were seized is not applicable. Thus, per this Guideline, it must first be determined whether the District Court found the “amount seized did not reflect the scale of the offense.” *Barry*, 978 F.3d at 217. However, the Fifth Circuit has observed this finding may be implicit. *Id.* In this regard, “adopting a PSR and overruling an objection can constitute a sufficient finding where the facts in the PSR support such a finding. *Id.* The second determination which must be made is whether the evidence was sufficient to convert the money to drug sales. *Id.*

B.
The Factual Implication of the Conversion

The PSR declared that Mr. Myers would be “held accountable for 76,600.26 kilograms of converted drug weight.” ROA.151. The first 50,000 kilograms of this total was calculated by converting money into drug quantity. ROA.151-52. The Probation Officer observed that the search of the residence yielded “\$21,456 of United States currency, believed to be the proceeds from the sales and distribution of narcotics.” ROA.151. The Probation Officer added “the case agent in this case advised 2.5 kilograms of methamphetamine could be purchased for \$21.456.” ROA.151 n.6. Thus, the Probation Officer opined that the drug weight for the money seized was 50,000 kilograms of marijuana. ROA.152.

A more specific review of the PSR and the Guidelines explain the apparent calculations made by the Probation Officer and why they are relevant and important. As noted above, the Probation Officer first used the agent’s opinion to convert the \$21,456 which was seized in the residence to 2.5 kilograms of methamphetamine. ROA.150-51. Next,

pursuant to the drug equivalency table, which provided that 1 gram of methamphetamine (actual) was the equivalent of 20 kilograms of marijuana, the Probation Officer concluded that the converted drug weight for the currency was 50,000 kilograms of marijuana. ROA.152 (citing U.S.S.G. § 2D1.1 n.8(D)). These 50,000 kilograms of marijuana were added to the 26,063.60 kilograms of marijuana for the drugs seized for a total converted drug weight of 76,000.22 kilograms of marijuana. ROA.152.

The Guidelines establish why this conversion alone changes the Guidelines range in this case. The PSR set Mr. Myers' base offense level at 36. ROA.115 (citing U.S.S.G. § 2D1.1(a)(5)). The offense level is 36 if the offense involved "at least 30,000 [kilograms] but less than 90,000 [kilograms] of marijuana." U.S.S.G. § 2D1.1(c)(2). Thus, 76,000 kilograms of marijuana means Mr. Myers' offense level is 36. If the offense involved "at least 10,000 [kilograms] but less than 30,000 [kilograms] of marijuana," the offense level is 34. *Id.* Therefore, if there were no conversion of cash to drugs in this case, the offense would have involved 27,000 kilograms of marijuana, and the offense level would have been 34. Indeed, the 50,000 kilograms alone put the base offense level at 36. After all final calculations under the Guidelines, with a base offense level 36, Mr. Myers Guidelines' punishment range was a prison term of 292 months to 365 months. ROA.122. If the base offense level had been set at 34, Mr. Myers' punishment range would have been a term of only 235 months to 293 months in the custody of the Bureau of Prisons. (Sentencing Table).

II.
The Findings of Fact Necessary to Support the Conviction

In cases where narcotics are seized, the Guidelines unambiguously require that the District Court find “the amount seized does not reflect the scale of the offense” before converting seized cash to narcotics. *Barry*, 978 F.3d at 217-18. In *Barry*, the Fifth Circuit was clear that this finding does not have to be explicit, and that an implicit finding that the amount of drugs seized did not reflect the scale of the offense would suffice. *Id.* Thus, the initial issue in this case was whether the District Court had implicitly found that the amount of narcotics seized did not reflect the scale of the offense. *See id.*

The Fifth Circuit determined that the Court made such an implicit finding in this case based on the PSR. (Exhibit A, pages 7-8). Nonetheless, such a finding will suffice only if “the facts in the PSR support such a finding.” *Barry*, 978 F.3d at 217. Respectfully, the Fifth Circuit’s review shows the report in this case did not suffice to support such a finding.

Despite the fact the conversion was based on the price of methamphetamine, the Fifth Circuit relied on an observation that Mr. Myers was supplying both methamphetamine and heroin. (Exhibit A, page 8). The Court then used co-defendant Sutton’s factual resume, which was not part of the record in this case, and thus could not be part of the District Court’s proposed basis for the conversion, explicitly or implicitly, for sustaining the conversion. Indeed, the Fifth Circuit’s citation to a case that shows a co-conspirator’s statement could be used to justify the conversion, is irrelevant to this appeal because there was no evidence in this case that the conversion was based on a co-conspirator’s statement. (Exhibit A, pages 7-8) (citing and quoting *United States v. Rico*, 864 F.3d 381, 384-86 (5th

Cir. 2017)). Moreover, the Fifth Circuit’s claim that Mr. Myers could not overcome Ms. Sutton’s sworn testimony is based on an observation that is not part of the record in this case. There is no mention in the record on this issue that the officer was relying on sworn testimony.

Furthermore, Mr. Myers respectfully submits that the Fifth Circuit’s affirmance in this case on this issue was not only based on evidence which was not part of the record, but evidence that first appeared in the Government’s brief. At the District Court level, the Government prepared a factual basis for the plea wherein the Government described the place where the methamphetamine, heroin, and currency were found as a “residence.” ROA.72-73. There was no mention of an “RV” or a “trailer.” *See* ROA.72-73. When the Magistrate Judge was taking Mr. Myer’s guilty plea discussed the specifics of the place where the contraband was found with Mr. Myer, there was a discussion about the location of the “residence,” but no mention of an RV or a trailer. ROA.77-79.

The PSR, which is relied-upon heavily in this case, stated that Kyle Myers resided at 2500 West Yukon, and that the warrant was executed at that “residence.” ROA.114. It was the search of the “residence” which yielded the \$21,456.00. ROA.136. Moreover, the PSR mentions the word “RV” for the first time. ROA.136. The PSR states that Mr. Myers “admitted he picked up the drugs located and placed them in his RV.” ROA.136. The PSR makes no connection between the “residence” and an “RV,” which only appears once in this important PSR. There was some mention of a “trailer” at the sentencing hearing. ROA.89.

However, the Government in its briefing to the Fifth Circuit brought new evidence before the Court. The Government decided that the residence was now a “fifth wheel RV.” (Government’s Brief, page 16). In support of its argument, the Government stated:

A fifth wheel RV is not a large structure; Myers offered no evidence suggesting he did not have access to certain areas or control of the entire space. Nor was there any information suggesting Brandy Dean [referring to the person present when Mr. Myers was arrested] resided in this RV

(Government’s Brief, page 16).

The Fifth Circuit clearly endorsed this new significant allegation in its conclusion that the money was proceeds from drug sales. (Exhibit A, page 7). The Appellate Court noted it was an observation that supported the conversion of case to drugs. (Exhibit A, page 7). Furthermore, the Fifth Circuit observed that Mr. Myers did not argue the “residence” was not an RV. (Exhibit A, page 7). Respectfully, it was the Government in its brief that endorsed the conclusion that what was called a residence was not proven to be an RV.

More importantly, the Fifth Circuit’s use of the record from the case against Tiffany Sutton is irrelevant here because it was not part of the record in this case. The Appellate Court predicated its decision on the observation that “at Myers’s rearraignment, the Government orally set forth his factual basis using the factual resume that Sutton had previously signed and submitted in support of her guilty plea.” (Exhibit A, page 3). The factual resume for Ms. Sutton was not part of the record in Mr. Myers’ case and Ms. Sutton did not provide any sworn testimony that is part of the record in this case. The Fifth Circuit also observed Mr. Myers’ PSR “aligned with the information that was set forth in Sutton’s factual resume.” (Exhibit A, page 3). Again, this was not part of the record in this case.

It should be noted that the Fifth Circuit concluded that Mr. Myers' relevant conduct was determined by Ms. Sutton's factual resume. (Exhibit A, page 4). The only portion of the record where there is a mention of Ms. "Sutton's factual resume" was by the Probation Officer in response to an objection by Mr. Myers that Ms. Sutton obtained heroin and methamphetamine from Mr. Myers. ROA.162-63.

Mr. Myers submits that the evidence cited by the Fifth Circuit only appears in Ms. Sutton's case on appeal, and that was addressed by the Appellate Court as a separate matter. *United States v. Sutton*, No. 20-50597, 2021 WL 3276524 (5th Cir. July 30, 2021). The opinion includes numerous references with respect to the evidence in her case and her admission about her opinions on the evidence in both of their cases. *Id.* Based on the above discussion, there is no evidence that this information was part of the record in Mr. Myers' case at the District Court level or that it was considered by the Magistrate Judge, the District Court or the Probation Officer as evidence in this case.

III.

The Decision is Contrary to Recent Supreme Court Precedent

The Fifth Circuit's standard of review in this case permitted the Circuit Court to step outside this record to affirm of the District Court. Such a ruling is in violation of Mr. Myers' constitutional rights and this Court's precedent. In this regard, the opinion placed no meaningful reliance on the evidence before the District Court in Mr. Myers' case. Indeed, the Fifth Circuit affirmed the lower court by relying on facts developed and submitted to the District Court in a completely separate criminal prosecution. Respectfully, putting such a

burden of proof on Mr. Myers violates his constitutional right and is contrary to this Court's holding in *Davis v. United States*, 140 S. Ct. 1060 (2020).

In *Davis*, 140 S. Ct. at 1061, this Court explained that, even if an argument was not raised in the District Court, the Appellate Court must at least review for plain error. (citing FED. R. CRIM. P. 52(b)). This Court observed:

[T]he Fifth Circuit refused to entertain Davis' argument at all. The Fifth Circuit did not employ plain-error review because the court characterized Davis' argument as raising factual issues, and under Fifth Circuit precedent, “[q]uestions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error.

Id. (quoting *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991) (per curiam)). This Court further observed “[b] contrast, almost every other Court of Appeals conducts plain-error review of un-preserved arguments, including un-preserved factual arguments. *Id.* (collecting cases). Thus, this Court concluded, there is no legal precedent “to shield any category of errors from plain-error review.” *Id.* at 1061-62.

Here, Mr. Myers was not provided a review of his case based on the record before the Court. Rather, the Fifth Circuit used a standard of review that put the burden on Mr. Myers to prove the record in a separate case was false. In other words, the Fifth Circuit did not provide Mr. Myers a standard of review that would permit the Court to entertain a ruling based on the record in his case, which constitutes a violation of his due process rights and the explicit holding in *Davis*.

CONCLUSION

Mr. Myers respectfully submits that the decision of the United States Court of Appeals for the Fifth Circuit which affirmed the decision of the District Court conflicts with decisions of this Court. Therefore the decision by the Fifth Circuit calls for an exercise of this Court's supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner, KYLE LEROY MYERS, respectfully requests that this Court grant this petition and issue a Writ of Certiorari.

Respectfully Submitted,

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