No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD LUCAS, JR.,

PETITIONER,

v.

THE UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If a state statue's definition of "cocaine" differs from the federal definition of "cocaine" based on the plain, unambiguous language of the statutes, is the District Court's failure to notice this difference "clear" and "obvious" for the purpose of "plain error" review?

2. Whether an individual who runs away from a police encounter can be arrested when the basis of the arrest is not established?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes & Other Authorities

PETITION FOR WRIT OF CERTIORARI

Richard Lucas, Jr., an inmate currently incarcerated at USP Atlanta, Georgia, by and through his counsel, Robert C. Singer, Esq., of Singer Legal PLLC, and Herbert L. Greenman, Esq., of Lipsitz Green Scime Cambria LLP, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order of the Second Circuit is reported at 2021 U.S. App. LEXIS 24883, __ Fed. Appx. __, 2021 WL 3700944 (2d Cir. Aug. 20, 2021), and is attached at pages 1-8 of the Appendix to this petition. The order of the Second Circuit denying panel rehearing and rehearing *en banc* is attached at page 9 of the Appendix.[1]

JURISDICTION

Mr. Lucas' petition for rehearing/rehearing *en banc* on the "plain error" and suppression issue raised in this petition for writ of certiorari was denied by the Second Circuit on November 9, 2021. Mr. Lucas invokes this Court's jurisdiction under 28 USC § 1254(1). On February 8, 2022, Mr. Lucas moved for a 30-day extension of time to file his petition for certiorari. On February 10, 2022, the Clerk's Office responded to Mr. Lucas' counsel indicating that the motion was due on or before February 7, 2022 (90 days of the Second Circuit's order denying panel

[1] Hereinafter, the "Appendix" will be referred to as "A.__."

rehearing/rehearing *en banc*) and was untimely. A.10. However, the Clerk's Office indicated that Mr. Lucas could nonetheless promptly file an untimely petition. *Id.*

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution reads:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On May 15, 2017, while police officers were surveilling during an unrelated drug investigation, Richard Lucas, Jr. drove into the parking lot of a hotel in Cheektowaga, New York and ultimately parked his vehicle. Two of the surveilling officers, Deputies Day and Milbrandt, claiming that the windows to vehicle were excessively tinted, drove their vehicle toward Mr. Lucas' car and blocked him in from behind. The officers approached the car standing on either side, and one officer, closest to Mr. Lucas, asked for identification. Mr. Lucas, contrary to the orders that were given to him, attempted to exit his vehicle. At one point, he ran away from the officers, ultimately being chased and caught on Genesee Street in Cheektowaga, New York in front of the Buffalo International Airport by being tackled into an oncoming vehicle.

Mr. Lucas was searched. Later, officers learned that he had rented a room (113) at the Comfort Suites Hotel in Cheektowaga, New York and was found with a card key in his pocket. Mr. Lucas was arrested, placed in handcuffs, and transported to the Erie County Sheriff's Office for interrogation while under arrest. He was never advised what he had been arrested for and, throughout the proceedings, no answer was ever provided as to the basis for his arrest.

Mr. Lucas was indicted with Conspiring to Possess with the Intent to Distribute Cocaine. He moved to suppress the fruits of the search of his person, the hotel room which he had rented, statements he made to the arresting officers, and the search of a storage locker. United States District Judge Elizabeth A. Wolford in the United States District Court for the Western District of New York denied all of his motions to suppress, claiming, in essence, that the police had probable cause to arrest Mr. Lucas after he had run from the officers, that his statements were not tainted and were voluntary, and that the two search warrants which Petitioner moved to controvert were legal.

In denying Mr. Lucas' motion to suppress evidence obtained as a result of the search and controvert the warrants, the District Court found that "even though the exact contours of Deputy Day's knowledge concerning Defendant's alleged drug trafficking may be unclear so as to create questions whether that knowledge justified the initial stop, Deputy Day certainly had general knowledge concerning the investigation and Defendants alleged association with Mr. Daniels [Mr. Lucas' alleged co-conspirator]." *United States v. Lucas*, No. 17-CR-129-EAW,

338 F. Supp. 3d 139, 158 (W.D.N.Y. Oct. 5, 2018). The Court found that "thus, while this generalized knowledge may not have justified the initial stop, once a traffic stop lawfully occurred, that generalized knowledge coupled with Defendant's behavior created reasonable suspicion and justified the effort to check for weapons." *Id.* at 159. The Court thereupon also found that probable cause existed to justify the issuance of the search warrant. A trial followed in which the jury returned a verdict of guilty on the sole count in the indictment.

In November 2019, Richard Lucas, Jr. was sentenced to incarceration for 25 years. The District Court adjudged this sentence primarily because it determined that Mr. Lucas was a "career offender" under the sentencing guidelines. The District Court arrived at this determination by using a 2003 felony conviction in New York for illegal possession of the "narcotic drug" "cocaine." Mr. Lucas appealed his conviction and sentence.

A. Mr. Lucas challenges his arrest and the searches conducted by the police on appeal. The Second Circuit denies his challenge.

On appeal, the Second Circuit found that the excessively tinted windows justified a vehicle and traffic stop and when Mr. Lucas appeared nervous, expressed anger at the officers for their conduct, and attempted to exit the vehicle despite the officers' instructions to the contrary, the officers were justified in chasing him when he left the scene. A.5. Even though, contrary to the District Court's determination that the officers' knowledge of Petitioner's drug dealing was less than clear, the Second Circuit opined that the arresting officers' knowledge of his prior involvement in narcotics distributions coupled with his suspicious behavior

justified the officers in undertaking to frisk the defendant for their safety. A.5. The Court held "in short, the district's court did not err in finding that Defendant's Fourth Amendment rights were not violated during the events beginning with the traffic stop and culminating in his arrest." A.5.

As to the search warrant issued for the hotel room, the Second Circuit found that a *Franks v. Delaware*, 438 US 154 (1978) hearing was not necessary and that, in any event, probable cause existed for the issuance of the warrant. A.5-6. The Second Circuit reached this conclusion because of the fact that Mr. Lucas had rented Room 113 at the hotel in his name, when arrested, he was found to have on his person a key card to the room, he was known to multiple law enforcement agencies is a "huge cocaine dealer," and when he was stopped at the hotel parking lot he broke free, knocked an officer to the ground, and fled. The Second Circuit further upheld the denial of other suppression motions based upon the same information. A.6

B. Mr. Lucas challenges his sentence on appeal. The Second Circuit denies this challenge as well.

Mr. Lucas and his defense counsel realized after sentencing that the definition of "cocaine" in New York under New York's controlled substance statute differs from the federal definition of "cocaine" in the federal Controlled Substances Act ("CSA"). More specifically, New York's definition of "cocaine" sweeps more broadly than the federal definition of "cocaine" because New York criminalizes *all* isomers of cocaine (positional, geometric, optical, and others), whereas the CSA criminalizes only *some* isomers of cocaine (geometric and optical, but not positional).

Compare N.Y. Pub. Health Law § 3306, Schedule II(b)(4) (placing no limitation on the definition of the term "isomer" of cocaine) *with* 21 C.F.R. § 1300.01 ("As used in § 1308.12(b)(4) of this chapter [regarding cocaine], the term 'isomer' means any optical or geometric isomer.").

What's more, the definition of "cocaine" in the New York and federal statutes has differed since *before* Mr. Lucas's 2003 conviction in New York was finalized and this difference has *continued to exist* through his federal sentencing in 2019. *See* 62 FR 13938, 13942 (Mar. 24, 1997) (to be codified at 21 CFR § 1300.01(b)(21)) (the federal definition of "cocaine" in 2003); *see also* 21 C.F.R. § 1300.01 (2021) (the federal definition of "cocaine" in 2019 through present). Put another way, it does not matter whether the District Court applied the definition of "cocaine" in 2003 or in 2019 because the result would be the same, to wit: the statutes are not a categorical match because New York's definition of "cocaine" sweeps more broadly than the CSA.

Mr. Lucas raised this issue for the first time on appeal. The Second Circuit (correctly) employed "plain error" review[2], but denied Mr. Lucas relief because of the "unsettled nature of the questions relevant to Defendant's argument." A.8. More specifically, the Second Circuit stated that it was not settled

[2] Appellate review pursuant to FRAP 52(b) – so-called "plain-error review" – involves four prongs. First, there must be an error or defect – some sort of "[d]eviation from a legal rule" – that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant. *See United States* v. *Olano*, 507 U.S. 725, 732-733 (1993). Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. *See id.* at 734. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it "affected the outcome of the district court proceedings." *Id.* Fourth, the error must have "'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 736. (citations omitted).

"whether to adopt a 'time-of-conviction approach' by which we compare the state and federal schedules at the time of Defendant's predicate conviction, or a 'time-of-sentencing' approach by which we compare the state and federal schedules as they existed at the time of the sentence challenged on appeal," so the District Court could not have committed "plain error" on this question. *See id.* Moreover, the Second Circuit stated that the District Court could not have committed "plain error" on the definitional-difference argument raised by Mr. Lucas because there was no published case law on this difference in 2019 even though the plain language of the statutes differed in 2019.[3] *See id.*

Mr. Lucas moved for rehearing/*en banc* review, but the Second Circuit denied his petition. A.9. This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

I. This case presents an opportunity to universally adopt the belief – held in many appellate circuits – that a published judicial opinion is not required to establish "plain error" when the plain language of a statute is unambiguous and establishes "plain error" alone.

The Second Circuit refused to find "plain error" in Mr. Lucas' case because the Second Circuit did not have a published opinion within the circuit or from this Court in 2019 that held that the definition of "cocaine" in New York is

[3] In the proceedings below, the parties agreed that it was appropriate to use the "categorical approach" to determine whether New York's definition of "cocaine" differed from the federal definition because N.Y. Penal Law § 220.16(1) – Mr. Lucas' statute of conviction for the 2003 offense – is an indivisible statute. The Second Circuit did not question this conclusion, so this petition does not discuss whether use of the "hybrid" or "modified-categorical approach" is more appropriate. *See, e.g., Descamps v. United States*, 133 S. Ct. 2276, 2282 (2013) (discussing the application of categorical analysis to indivisible statutes); *see also Mathis v. United States*, 136 S.Ct. 2243, 2255-56 (2016).

different from the federal definition of "cocaine" in the CSA. A.8. The Second Circuit came to this conclusion notwithstanding the clear differences in the statutory language discussed above. This decision was erroneous and conflicts with the view, of numerous other circuits, that clear, unambiguous statutory text can establish "plain error." The Court should grant certiorari to resolve this circuit conflict.

A. Precedent firmly establishes that the plain language of a statue is controlling and a court's failure to recognize and apply the plain language of a statute can constitute "plain error."

This Court's primary cannon of statutory construction has remained consistent for years: the plain and unambiguous language of a statute controls its meaning. *See United States v. James*, 478 U.S. 597, 603 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756 (1975) (Powell, J., concurring)) ("The starting point in statutory interpretation is 'the language of the statute itself.'"); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) ("We assume that the legislative purpose is expressed by the ordinary meaning of the words used."); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Where the language of the statute is plain and not subject to more than one

interpretation, "the sole function of the courts is to enforce it according to its terms." *Caminetti*, 242 U.S. at 484.

Based on this well-established cannon, the Fourth, Fifth, Tenth, Eleventh, and District of Columbia Circuits each have held that an error can be "plain" when a statute provides an unambiguous and clear answer to the question alone. *See, e.g., United States v. Long*, 452 U.S. App. D.C. 167, 182, 997 F.3d 342, 357 (D.C. Cir. 2021) ("Even in the absence of binding precedent, 'an error can be plain if it violates an 'absolutely clear' legal norm, 'for example, because of the clarity of a statutory provision.'") (citations omitted); *United States v. Davis*, 855 F.3d 587, 595-96 (4th Cir. 2017) ("Our cases hold that an error is plain if [] the explicit language of a statute or rule resolves the question . . . ."); *United States v. Maturin*, 488 F.3d 657, 663 (5th Cir. 2007) (finding plain error when the "plain statutory language" makes resolution of issue "indisputably clear"); *United States v. Courtney*, 816 F.3d 681, 686 (10th Cir. 2016) ("In cases like this, where the statutory language is clear and obvious, plain error is apparent despite no case exactly on point. Though the parties should direct a district court to the applicable statutory provision, a district court must apply the correct law.") (internal citation omitted); *United States v. Chau*, 426 F.3d 1318, 1322 (11th Cir. 2005) (holding that "plain error" exists where the "explicit language" of a statute or rule "specifically resolve[s] an issue").

B. Plain language makes the CSA's definition of "cocaine" less comprehensive than New York's definition.

Here, Congress specifically limited the definition of "cocaine" in the CSA to include optical and geometric isomers of cocaine *only*. *See* 21 C.F.R. § 1300.01 ("As used in § 1308.12(b)(4) of this chapter [regarding cocaine], the term 'isomer' means any optical or geometric isomer."). In contrast, the New York Legislature chose *not to limit* the definition of "cocaine" in that fashion and, instead, permitted *any* isomer of cocaine to qualify as "cocaine." *See* N.Y. Pub. Health Law § 3306, Schedule II(b)(4) (including in the definition of cocaine "[c]oca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances *including* . . . isomers") (emphasis added). And while drug chemistry may be a complex subject that some people find difficult to understand, it does not take expertise in chemistry to read and understand the black-and-white language of a statute. A review of the CSA and New York law does not lead to any ambiguity regarding what each sovereign chose to include (and not include) in the definition of "cocaine" – "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole" answers this question decisively – namely, that the definition of "cocaine" is different in each jurisdiction. *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. at 341. As this Court has opined, where the language of the statute is plain and not subject to more than one interpretation, "the sole function of the courts is to enforce it according to its terms." *Caminetti*, 242 U.S. at 484. In this case, the District Court and the Second

Circuit refused to follow this cannon. This choice was unjustified and contrary to long-standing precedent.

C. The error in Mr. Lucas' case was "plain" because of the clear difference in the statutory language chosen by the New York Legislature and Congress.

In *Olano*, this Court opined how an error is not "plain" when the claimed error is "subject to reasonable dispute." *See Olano*, 507 U.S. at 734. As set forth above, there is no "reasonable dispute" regarding whether the federal definition of "cocaine" includes isomers other than "optical or geometric" isomers. A simple reading the CSA reveals how Congress chose to exclude *all* other isomers of cocaine in the federal CSA definition, *see* 21 C.F.R. § 1300.01, whereas the New York Legislature chose not to legislate such limitations, *see* N.Y. Pub. Health Law § 3306, Schedule II(b)(4). This conclusion follows based on the plain and unambiguous language in the statutes.

As for the remaining prongs of plain error review, as Mr. Lucas argued on appeal, miscalculating a defendant's sentencing guideline range satisfies the third and fourth prongs of the *Olano* test because the District Court's starting point for Mr. Lucas' sentence (30 years to life) would have been significantly lower (10-15 years) had the Court not erroneously applied the "career offender" enhancement. This error not only affected his "substantial right" to a properly calculated guideline sentencing range prior to imposition of sentence, but the significantly overstated guideline range seriously affected the fairness and integrity of the proceedings because the District Court's determination of an appropriate sentence was

influenced by the miscalculation of a total offense level that was twice as high as it should have been. This is why the District Court's error was "plain" and should be corrected.

D. It does not matter whether a "time-of-sentencing" or "time-of-conviction" approach is used to analyze whether the New York and federal statues are a categorical match because at both times the federal and state definitions differed.

As the Second Circuit commented, there is a dispute regarding whether a "time-of-sentencing" or "time-of-conviction" approach is best to determine what version of the CSA to use when analyzing this question. At least three circuits –Ninth, First, and Sixth – have opined in favor of a "time-of-sentencing" approach. *See United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021); *United States v. Abdulaziz*, 998 F.3d 519 (1st Cir. 2021); *United States v. Williams*, 850 F. App'x 393 (6th Cir. 2021). This position may conflict with this Court's holding in *McNeill v. United States*, 563 U.S. 816 (2011) which advanced a "time-of-conviction" approach, however, granting certiorari in this case *does not* require the Court to resolve this issue because the federal and New York definitions of "cocaine" differed at the time of Mr. Lucas' 2003 New York conviction *and* at the time of his 2019 federal sentencing. As such, the same result will follow no matter what approach is used.

E. This Court's recent denial of certiorari in *Guerrant* does not suggest a similar denial of certiorari here. The issue in Mr. Lucas' case is different.

The Petitioner is aware of this Court's recent decision denying certiorari in *Guerrant v. United States,* 142 S. Ct. 640 (2022). In *Guerrant*, a

defendant petitioned this Court to resolve a circuit split over how to define the term "controlled substance offense" in the guidelines. *See id.* This split saw the Second, Ninth, First, and Fifth Circuits define "controlled substance offense" by looking to federal law while the Fourth, Seventh, Eighth, and Tenth Circuits define the term by looking at state law. *See id.* In Mr. Lucas' appeal below, this issue was not disputed as the Second Circuit already decided this issue in 2018. *See United States v. Townsend*, 897 F.3d 66, 68, 71 (2d Cir. 2018). Instead, Mr. Lucas' appeal centered upon the existence of "plain error" at sentencing.[4] Since the denial in *Guerrant* concerned this Court's decision not to opine regarding the definition of "controlled substance offense," *Guerrant* is distinguishable.

Finally, in *Guerrant*, Justice Sotomayor, writing for herself and Justice Barrett, concurred in the denial and remarked that "[i]t is the responsibility of the Sentencing Commission to address this division to ensure fair and uniform application of the Guidelines. *See id.* at 640-41 (citing *Braxton* v. *United States*, 500 U. S. 344, 348 (1991)). Justice Sotomayor issued this plea and referenced *Braxton* because the dispute in *Guerrant* concerned the correct interpretation of a sentencing guideline. In Mr. Lucas' case, though, there is nothing for the Sentencing Commission to resolve regarding a guideline. This petition centers upon purely a legal issue; namely, whether the plain, unambiguous language of a statue can

[4] To be fair, the parties also presented opposing views regarding the "time-of-sentencing" versus the "time-of-conviction" approach, but as explained above, Section I(D), *infra*, resolution of this issue is unnecessary and moot based upon the different way that New York and Congress chose to define "cocaine" *prior to* Mr. Lucas' 2003 state conviction *and* his 2019 federal sentencing.

establish error for the purposes of "plain error" review. This is the type of issue that this Court resolves, not the Sentencing Commission, making *Braxton* inapposite.

# # #

For the reasons set forth above, the Court should grant certiorari on this issue.

II. This court should not allow the Second Circuit's determination below to stand because to do so would mean that a person can be "arrested" without probable cause to believe that they have committed an actual crime.

This Court should resolve the issue left open by the Second Circuit Court of Appeals whether even if probable cause existed for Petitioner's seizure, the Court must, in the first instance, determine the issue what Petitioner was arrested for. Merely holding that an arrest may be supported by probable cause is not sufficient in and of itself. Probable cause to arrest must include a component that the individuals arrested for committing a crime, not because he engaged in elusive behavior.

This Court had begun its evaluation of an arrest in *Rodriguez v. United States*, 575 U.S. 348 (2015) and *United States v. Gomez*, 877 F.3d 76 (2d Cir. 2017) because even though a traffic stop may be based upon probable cause, "it is nevertheless clear that a seizure that is lawful at its inception can violate the amendment if its manner of execution unreasonably infringed interest protected by the Constitution." Put another way, the limited knowledge that the officers at the scene possessed, even if they had the right to chase after Petitioner the officers had no knowledge that Petitioner had committed a crime.

Instead of conducting a limited inquiry as to why Mr. Lucas had run away, the officer tackled him on the street into an oncoming car, handcuffed him and took him to police headquarters. Why he was placed into custody and what he had been arrested for were never resolved either in the District Court or the Second Circuit. The mere fact that the windows on his car may have been excessively tinted was not a reason for him to be formally arrested and ultimately questioned at length. In its Decision and Order denying Petitioner's motion to suppress the evidence and statements, the District Court refused to apply the collective knowledge doctrine relative to other aspects of the investigation. Dominic Daniels had been previously arrested and there was no nexus between his arrest and the actions taken by the officers in arresting Petitioner. The District Court made a finding that:

> [T]here is no evidence here that the officers with actual knowledge of the Defendant's alleged drug trafficking activities directed or took actions causing the stop by Deputies Day and Milbrandt. At best, the role played by the officers with knowledge is that they arranged for Deputies Day and Milbrandt to be conducting the surveillance of the Comfort Suites with some information . . . about Defendant. Whether that is sufficient under the circumstances to impute Deputy Day and Milbrandt, the collective knowledge of those involved in the investigation is not an issue that the Court needs to resolve.

Lucas, 338 F. Supp. 3d at 157. The actions by the police went well beyond that which was necessary to effectuate the purposes of the need to give Petitioner a traffic citation for the tinted windows. Petitioner should not have been arrested for his actions.

Those issues create significant issues which this Court should ultimately decide because the issue has never previously determined by this Court. As well, the Court now has the opportunity to determine the extent of a traffic stop where, as here, the police actions extended well beyond the purpose for citing Petitioner for vehicle and traffic violations, an issue which, to Petitioner's knowledge, has never previously been determined by this Court.

A. The Second Circuit's ruling creates a Circuit split as to what evidence must be possessed by the officers to establish probable cause.

Petitioner argued in the Second Circuit that probable cause did not exist sufficient to establish reason to believe that drugs would be found in the hotel room. The Second Circuit found that probable cause existed because Petitioner had rented Room 113 at the hotel in his name; when arrested, he was found to be in possession of a key card to the room which the officers "reasonably assumed to be a key to room 113"; he was known to multiple law enforcement agencies as a "huge cocaine dealer"; and, when stopped by law enforcement when he arrived at the hotel, he broke free from the officers and led them on a chase. A. 6. While the evidence was not as clear as the Second Circuit suggested, it did find, nevertheless, that probable cause existed to support issuance of the search warrant.

This case creates a significant split in the Circuit Courts relative to the quantum of proof necessary to establish probable cause to believe that contraband would be found in a residence. For example, in *United States v. McPhearson*, 469 F.3d 518 (6th Cir. 2006), the Sixth Circuit found that even where a person was

arrested in his home in possession of crack cocaine, those allegations were "insufficient to establish probable cause because they do not establish the requisite nexus between the place to be searched and the evidence to be sought." *McPhearson*, 469 F.3d at 524. The Sixth Circuit further found that "a suspect's mere presence or arrest at a residence is too insignificant a connection with that residence to establish that relationship necessary to a finding of probable cause." *Id.* (quoting *United States v. Flores,* 679 F2d 173, 175 (9th Cir. 1982)). In *McPhearson*, the defendant was arrested outside of his residence based upon a warrant and found to be in possession of crack cocaine. While the Court found that the fact that an individual may be a known drug dealer could support an inference that drugs may be found in the home, and while the officers claimed, without specification, that Petitioner was a known drug dealer, that fact *alone* should not save the search warrant for the hotel room. Thus, in the absence of those facts, as the Court held in *McPhearson,* "the affidavit in this case cannot support the inference that evidence of wrongdoing would be found in McPhearson's home because drugs were found on his person." *Id.* at 525.

Here, no drugs were found on Mr. Lucas' person. In fact, there was no evidence to link the hotel room with the potential for drug dealing or drug possession. In fact, the contrary was the case. Therefore, this case provides an opportunity for this Court to determine whether probable cause exists at the time the search warrant is applied for that when a person is arrested outside his home (or hotel room).

CONCLUSION AND PRAYER FOR RELIEF

This Court should grant certiorari to review the Second Circuit's summary order, summarily reverse the decision below on Mr. Lucas' objections, or grant such other relief as justice requires.

Dated: February 16, 2022
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CERTIFICATE OF COMPLIANCE

The foregoing reply brief contains 4,771 words, including headings, footnotes and quotations and is in accordance with the length restrictions in S. Ct. R. 33. This brief complies with the typeface requirements and the type style requirements of S. Ct. R. 33 because it has been prepared in proportionately spaced typeface using Microsoft Word 2010 in 12-point Century Schoolbook font.

Dated: February 16, 2022
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APPENDIX

United States v. Lucas

United States Court of Appeals for the Second Circuit

August 20, 2021, Decided

No. 19-3937-cr

Reporter
2021 U.S. App. LEXIS 24883 *; __ Fed. Appx. __; 2021 WL 3700944

UNITED STATES OF AMERICA, Appellee, v. RICHARD LUCAS, Defendant-Appellant, DOMINIC DANIELS, Defendant.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Core Terms

district court, probable cause, suppress, cocaine, arrest, indictment, traffic stop, sentence, hotel, narcotics, schedules, controlled substance offense, conspiracy, offender, career, frisk

Case Summary

Overview

HOLDINGS: [1]-The district court's denial of defendant's motion to suppress evidence recovered from his vehicle under Fourth Amendment was proper, because based on the lawfulness of traffic stop, officers knowledge of his prior involvement in narcotics distribution, and his suspicious behavior, the officers were justified in undertaking to frisk him for their safety. Defendant's knocking over one of the officers in escaping from them, and his dangerous flight to prevent officers from conducting a lawful frisk plainly provided probable cause to justify his arrest; [2]-District court did not abuse its discretion in admitting the evidence because the challenged evidence tended to show the understanding or intent with which defendant gave his confession and showed circumstances surrounding his acquisition of cocaine that was the subject of conspiracy charged by indictment.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Suppress

HN1[] **Clearly Erroneous Review, Findings of Fact**

On review of a challenged suppression order, appellate

court examines the district court's findings of fact for clear error, reviewing de novo questions of law and mixed questions of law and fact.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Criminal Law & Procedure > ... > Warrantless Searches > Stop & Frisk > Detention

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigative Stops

Criminal Law & Procedure > Search & Seizure > Seizure of Persons

HN2[] **Search & Seizure, Probable Cause**

Traffic stops in which the police temporarily detain an individual, even if only briefly or for a limited purpose, are seizures, which violate the *Fourth Amendment* if they are unreasonable under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Criminal Law & Procedure > ... > Standards of Review > Deferential Review > Probable Cause Determinations

Criminal Law & Procedure > ... > Search Warrants > Affirmations & Oaths > Sufficiency Challenges

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN3[] **De Novo Review, Conclusions of Law**

To suppress evidence obtained pursuant to a sworn statement containing erroneous information, the defendant must show that: (1) the claimed inaccuracies or omissions are the result of the affiant's deliberate falsehood or reckless disregard for the truth; and (2) the alleged falsehoods or omissions were necessary to the issuing judge's probable cause finding. Applying the second prong of this test requires courts to disregard the allegedly false statements and determine whether the remaining portions of the sworn statements made to the judge would support probable cause to issue the warrant. This inquiry is a legal question, which appellate court reviews de novo, without deference to the issuing judge's probable cause determination because the judge did not have an opportunity to assess the application without the inaccuracies.

Criminal Law & Procedure > ... > Indictments > Amendments & Variances > Constructive Amendments

Criminal Law & Procedure > ... > Common Characteristics > Amendments & Variances > Constructive Amendments

HN4[] **Amendments & Variances, Constructive Amendments**

A constructive amendment to an indictment occurs either where (1) an additional element, sufficient for conviction, is added, or (2) an element essential to the crime charged is altered. Unless an alteration of the indictment affects the core elements of the crime it is not an unlawful constructive amendment.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

HN5[] **Standards of Review, Abuse of Discretion**

Appellate court reviews evidentiary rulings for abuse of discretion.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Criminal Law & Procedure > ... > Appeals > Standards of Review > Plain Error

HN6[] **Plain Error, Definition of Plain Error**

Plain error exists where (1) the district court committed error; (2) the error is plain; (3) the error affects the defendant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Career Offenders

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Prior Felonies

HN7[] **Adjustments & Enhancements, Career Offenders**

A defendant is a career offender if he was at least eighteen years old when he committed the instant offense of conviction, that instant offense is a felony and either a crime of violence or a controlled substance offense, and the defendant has at least two prior felony convictions for either crimes of violence or controlled substance offenses. *U.S. Sentencing Guidelines Manual § 4B1.1(a)*.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Definitions

HN8[] **Controlled Substances, Definitions**

A controlled substance offense is an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance or a counterfeit substance or the possession of a controlled substance or a counterfeit substance with intent to manufacture, import, export, distribute, or dispense. *U.S. Sentencing Guidelines Manual § 4B1.2(b)*. A controlled substance under *U.S. Sentencing Guidelines Manual § 4B1.2(b)* must refer exclusively to those drugs listed under federal law—that is, the Controlled Substances Act. As a result, a state conviction will qualify as a predicate offense under the Guidelines if the state conviction aligns with, or is a categorical match with, federal law's definition of a controlled substance. If a state statute is broader than its federal counterpart—that is, if the state statute criminalizes some conduct that is not criminalized under the analogous federal law—the state conviction cannot support an increase in the base offense level.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN9[] **Plain Error, Definition of Plain Error**

For an error to be plain, it must, at a minimum be clear under current law.

Counsel: **[*1]** FOR APPELLANT: HERBERT L. GREENMAN, Lipsitz Green Schime Cambria LLP, Buffalo, NY; ROBERT C. SINGER, Singer Legal PLLC, Williamsville, NY.

FOR APPELLEES: KATHERINE A. GREGORY, Assistant United States Attorney for JAMES P. KENNEDY, JR., United States Attorney, United States Attorney's Office, Buffalo, NY.

Judges: PRESENT: PIERRE N. LEVAL, JOSÉ A. CABRANES, MICHAEL H. PARK, Circuit Judges.

Opinion

SUMMARY ORDER

Upon Defendant's appeal from a judgment of conviction imposed on him in the United States District Court for the Western District of New York (Elizabeth A. Wolford, *Chief Judge*), ON DUE CONSIDERATION, it is ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Following a jury trial, Defendant Richard Lucas, Jr., was convicted of a conspiracy to distribute more than 500 grams of cocaine and sentenced by the district court to a term of 25 years' imprisonment and a $60,000 fine. On appeal, Defendant raises numerous challenges to his conviction and sentence. These include challenges to (1) denial of his motions to suppress evidence, (2) the striking of the co-defendant's name from the indictment as a constructive amendment of the indictment, (3) the admission of evidence **[*2]** pertaining to Defendant's prior involvement in uncharged narcotics distribution activity, and (4) the application of a "career offender" sentencing enhancement under *U.S.S.G. § 4B1.1(a)*. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, to which we refer only as necessary to explain our decision.

I. Motions to Suppress

HN1[] "On review of a challenged suppression order, we examine the district court's findings of fact for clear error, reviewing *de novo* questions of law and mixed questions of law and fact." *United States v. Santillan, 902 F.3d 49, 56 (2d Cir. 2018)*. Defendant's principal argument on appeal is that his initial seizure (and ultimate arrest) by police in a hotel parking lot violated his *Fourth Amendment* rights, and that all evidence recovered as a result of that arrest should have been suppressed. We disagree.

HN2[] Traffic stops in which the police temporarily detain an individual, even if only briefly or for a limited purpose, are seizures, which violate the *Fourth Amendment* if they are "unreasonable" under the circumstances. *Whren v. United States, 517 U.S. 806, 809-10, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996)*. "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id. at 810*. We hold that the district court **[*3]** did not err in finding that the police had (1) probable cause to conduct the initial traffic stop, (2) reasonable suspicion to frisk Defendant during the initial stop, and (3) probable cause to support Defendant's ultimate arrest.

We find no clear error in the district court's finding that, when Defendant's car arrived in the parking lot of the Comfort Inn and Suites Buffalo Airport Hotel, a police officer observed that the windows of Defendant's vehicle

were darkly tinted to a degree that, in the officer's experience, likely constituted a violation of New York law for which he was authorized to conduct a traffic stop. The district court did not err in concluding that the officer's observations of Defendant's tinted windows furnished probable cause for the initial traffic stop.[1]

The officers' testimony showed that, when the officers approached the vehicle, Defendant appeared nervous, expressed anger at the officers, gave the officers a false name, and attempted to exit the vehicle despite the officers' instructions to the contrary. When Defendant exited the vehicle despite these contrary instructions, the officers told him to place his hands on the vehicle. Defendant initially complied, **[*4]** but repeatedly took his hands off the vehicle and attempted to turn and face the officers. The officers told Defendant two or three times to place his hands on the vehicle so they could frisk him "for everybody's safety." Special App'x 26. We find no error in the district court's conclusion that, based on the lawfulness of the traffic stop, the officers' knowledge of Defendant's prior involvement in narcotics distribution, and "Defendant's suspicious behavior, including his belligerence and failure to comply with the officers' instructions," the officers were justified in undertaking to frisk the Defendant for their safety. Special App'x 46-47.

Before the officers could conduct the frisk, Lucas broke free, knocked one of the officers to the ground, and instructed his son, who was a passenger in the car, to run. Defendant's son attacked one of the officers, allowing Defendant time to get up from the ground and start running from the scene. While fleeing, Defendant unsuccessfully attempted to enter three occupied vehicles before running through traffic on a public roadway. Law enforcement officers eventually caught up to Defendant, tackled him, handcuffed him, and took him into custody. **[*5]** We agree with the district court that this ultimate arrest was supported by probable cause. Defendant's knocking over one of the officers in escaping from them, his dangerous flight through oncoming traffic to prevent the officers from conducting a lawful frisk, and his repeated attempts to open the doors of occupied vehicles plainly provided probable cause to justify his arrest. In short, the district court did not err in finding that Defendant's *Fourth Amendment* rights were not violated during the events beginning with the traffic stop and culminating in his arrest. Accordingly, we affirm the district court's denial of Defendant's motions to suppress evidence recovered from his vehicle and person subsequent to his arrest. Because we find that his seizure was not unlawful, we also reject Defendant's arguments that evidence from additional sources should have been suppressed as the fruit of the challenged traffic stop and arrest.

Nor was there error in the district court's denial of Defendant's motion to suppress evidence recovered in a search, pursuant to a search warrant, of Room 113 of the hotel, nor in the denial of a hearing under *Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)*, by reason of the fact that some of the information given by law **[*6]** enforcement to the judge who issued that warrant was false.

HN3[↑] "To suppress evidence obtained pursuant to [a sworn statement] containing erroneous information, the defendant must show that: (1) the claimed inaccuracies or omissions are the result of the affiant's deliberate falsehood or reckless disregard for the truth; and (2) the alleged falsehoods or omissions were necessary to the [issuing] judge's probable cause finding." *United States*

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[1] Defendant's argument that his tinted windows were not the actual reason he was stopped by the police is irrelevant to determining whether adequate probable cause supported the stop, as whether a traffic stop is "reasonable" under the *Fourth Amendment* does not depend on the "actual motivations of the individual officers involved." *Whren, 517 U.S at 813*.

v. Canfield, 212 F.3d 713, 717-18 (2d Cir. 2020) (quotation marks omitted). Applying the second prong of this test requires courts to "disregard the allegedly false statements and determine whether the remaining portions of the [sworn statements made to the judge] would support probable cause to issue the warrant." *Id. at 718* (internal quotation marks omitted). This inquiry is a legal question, which we review *de novo*, without deference to the issuing judge's probable cause determination "because [the judge] did not have an opportunity to assess the [application] without the inaccuracies." *Id. at 717*.

We need not decide whether Defendant has satisfied the first prong of this test, because the search warrant was adequately supported by probable cause without regard to the allegedly inaccurate statements. The following facts communicated **[*7]** to the issuing judge (and not claimed to be inaccurate) adequately support a finding of probable cause: (1) Defendant had rented Room 113 at the hotel in his name; (2) when arrested, Defendant was found to have on his person a key card to a room in the hotel, reasonably assumed to be a key to Room 113 as that was the room he had rented; (3) Defendant was known to multiple law enforcement agencies as a "huge cocaine dealer"; and (4) when Defendant was stopped by law enforcement upon his arrival at the hotel parking lot, he broke free of the officer's hold and knocked an officer to the ground, then told his son to flee, whereupon his son assaulted an officer. This conduct by a known drug dealer in the parking lot of a hotel where he had rented a room and had a room key in his pocket indicates an intense concerned that his room might be searched, which in the totality of circumstances justifies a finding of probable cause.

Defendant raises several additional challenges to the district court's denials of his numerous suppression motions, including attempts to suppress: (1) his statements to police shortly following his arrest; (2) evidence obtained from a search of his cell phone based **[*8]** on his consent as well as a subsequently obtained search warrant; (3) evidence obtained pursuant to a search warrant for a storage locker in Tonawanda, New York; and (4) evidence related to a 2017 encounter with law enforcement at the Buffalo International Airport. We reject these arguments for substantially the reasons described by the district court in its thorough written decisions.

II. Alleged Constructive Amendment of Indictment

Defendant argues that the district court constructively amended the operative indictment by striking from it the name of his alleged co-conspirator over Defendant's objection. On *de novo* review, *see, e.g., United States v. Banki, 685 F.3d 99, 118 (2d Cir. 2012)*, we disagree.

HN4[↑] A constructive amendment to an indictment occurs either where "(1) an additional element, sufficient for conviction, is added," or "(2) an element essential to the crime charged is altered." *United States v. Dove, 884 F.3d 138, 146 (2d Cir. 2018)*. Unless an alteration of the indictment "affect[s] the core elements of the crime" it "is not [an unlawful] constructive amendment." *Id. at 147*. The identity of Defendant's alleged co-conspirator is not an element of the conspiracy with which Defendant was charged. The removal of the alleged co-conspirator's name did not prejudice Defendant's interests.

III. Admission [*9] of Certain Background Evidence

Defendant further contends that the district court erred in admitting several instances in which he allegedly participated in narcotics conspiracies prior to the time period charged in the indictment. *HN5*[↑] We review evidentiary rulings for abuse of discretion. *See, e.g.,*

United States v. Flores, 945 F.3d 687, 704 (2d Cir. 2019).

The district court admitted the evidence of Defendant's prior involvement in uncharged narcotics conspiracies to (1) corroborate the veracity of Defendant's confession to law enforcement in May 2017 and (2) explain how Defendant came to know the individual from whom he obtained cocaine in May 2017 (during the time period charged by the indictment). Because the challenged evidence tended to show the understanding or intent with which Defendant gave his confession and showed the circumstances surrounding Defendant's acquisition of the cocaine that was the subject of the conspiracy charged by the indictment, we conclude that the district court did not abuse its discretion in admitting the evidence.

IV. Application of "Career Offender" Enhancement

Defendant contends that the district court erred by relying on Defendant's 2003 conviction under *N.Y. Penal Law § 220.16(1)*—which criminalizes possession of a "narcotic drug" with **[*10]** "intent to sell it"—as a predicate conviction supporting application of a "career offender" enhancement at sentencing. Because Defendant did not object to this enhancement before the district court, we review only for plain error. *See, e.g., United States v. Reyes, 691 F.3d 453, 457 (2d Cir. 2012)*. *HN6*[↑] "Plain error exists where (1) the district court committed error; (2) the error is plain; (3) the error affects the defendant's substantial rights; and (4) the error seriously affects the 'fairness, integrity or public reputation of judicial proceedings.'" *Id.* (quoting *United States v. Greer, 631 F.3d 608, 612 (2d Cir. 2011)*).

HN7[↑] A defendant is a "career offender" if he was at least eighteen years old when he committed the instant offense of conviction, that instant offense is a felony and either a crime of violence or a controlled substance offense, and the defendant has at least two prior felony convictions for either crimes of violence or controlled substance offenses. *U.S.S.G. § 4B1.1(a)*. *HN8*[↑] A "controlled substance offense" is:

> an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) **[*11]** with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b). We have held that "a 'controlled substance' under *§ 4B1.2(b)* must refer exclusively to those drugs listed under federal law—that is, the [*Controlled Substances Act*]." *United States v. Townsend, 897 F.3d 66, 71 (2d Cir. 2018)*. As a result, "[a] state conviction will qualify as a predicate offense under [the Guidelines] if the state conviction aligns with, or is a 'categorical match' with, federal law's definition of a controlled substance." *Id. at 72*. "If a state statute is broader than its federal counterpart—that is, if the state statute criminalizes some conduct that is not criminalized under the analogous federal law—the state conviction cannot support an increase in the base offense level." *Id.*

Defendant contends that his 2003 conviction under *N.Y. Penal Law § 220.16(1)* was broader than its federal counterpart in two respects, which, if correct, would demonstrate that the 2003 conviction was not a "controlled substance offense" under *U.S.S.G. § 4B1.2*. First, Defendant argues that in 2015, naloxegol was removed from the federal drug schedule but was still criminalized by New York under the definition of "narcotic drug," meaning that, by the time he was sentenced in 2019, the state and federal schedules

were no longer a categorical [*12] match. Second, Defendant argues—in a *Fed. R. App. P. 28(j)* letter filed subsequent to his opening brief, but approximately three weeks before the Government filed its responsive brief—that the federal drug schedule, which defines "cocaine" as including "geometric" and "optical" cocaine isomers, *21 C.F.R. §§ 1300.01(b)*, *1308.12(b)(4)*, has always diverged from the New York schedule, which defines cocaine as including its isomers without specifying specific isomer categories, *N.Y. Pub. Health L. § 3306*.

We conclude that the district court did not plainly err in failing to consider either of these theories for disqualifying Defendant's 2003 conviction as a predicate offense for "career offender" status. The first argument, relating to the state and federal schedules' different treatment of naloxegol, presents an unsettled question of law: whether to adopt a "time-of-conviction approach" by which we compare the state and federal schedules at the time of Defendant's predicate conviction, or a "time-of-sentencing" approach by which we compare the state and federal schedules as they existed at the time of the sentence challenged on appeal. Because our Circuit has not provided a clear answer to this unsettled question—indeed, this very question, involving the different treatment [*13] of naloxegol between the New York and federal schedules, is currently before this Circuit in other cases, including *United States v. Gibson*, No. 20-3049—we cannot say the district court plainly erred in failing to adopt the "time-of-sentencing" approach that would have here produced a favorable result to Defendant. *See, e.g., United States v. Weintraub, 273 F.3d 139, 152 (2d Cir. 2001)* HN9[↑] ("For an error to be plain, it must, at a minimum be clear under current law." (internal quotation marks omitted)).

Defendant's second argument, relating to the apparently different listing of cocaine isomers between the two schedules, relies entirely on a district court opinion decided *after* Defendant's sentence was imposed in this case. *See* Def.'s Reply Br. at 27-28 (citing *United States v. Fernandez-Taveras, No. 18-cr-455, 511 F. Supp. 3d 367, 2021 U.S. Dist. LEXIS 3451, 2021 WL 66485 (E.D.N.Y. Jan. 7, 2021)*). And, similarly to Defendant's naloxegol argument, how to interpret New York's less specific definition of cocaine (as compared to the federal schedule) presents an unsettled question of law currently pending before this Circuit in other cases, including *United States v. Johnson*, No. 19-4071. Given the unsettled nature of the questions relevant to Defendant's argument, we cannot conclude the district court plainly erred in concluding that Defendant's 2003 conviction was for a "controlled [*14] substance offense," notwithstanding the definition of cocaine in the federal and state drug schedules.

* * *

We have considered Lucas's remaining arguments and conclude that they are without merit. The judgment of the District Court is AFFIRMED.

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of November, two thousand twenty-one.

United States of America,

Appellee,

v.

Dominic Daniels,

Defendant,

Richard Lucas,

Defendant - Appellant.

ORDER

Docket No: 19-3937

Appellant, Richard Lucas, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

February 10, 2022

Robert C. Singer
Singer Legal PLLC
80 East Spring St.
Williamsville, NY 14221

RE: Application for an Extension of Time
Lucas v. United States; USCA2 No. 19-3937

Dear Mr. Singer:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case was postmarked February 8, 2022 and received February 10, 2022. The application is returned for the following reason(s):

The application is out-of-time. The date of the lower court judgment or order denying a timely petition for rehearing was November 9, 2021. Therefore, the application for an extension of time was due on or before February 7, 2022. Rules 13, 30.1 and 30.2. However, you may promptly submit an untimely petition for a writ of certiorari in a criminal case, which will be submitted to the Court with a notation of untimeliness.

Sincerely,
Scott S. Harris, Clerk
By:

Lisa Nesbitt
(202) 479-3038

Enclosures