

CASE NO. _____
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER LOVINGS

PETITIONER

V.

UNITED STATES OF AMERICA

RESPONDENT

**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE UNITED STATES**

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QUESTIONS PRESENTED FOR REVIEW

- I. Whether a sentencing court may apply an enhancement pursuant to USSG § 3C1.2 when the record fails to establish the defendant knew or had reason to know he was fleeing from a law enforcement officer?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner/Appellant/Defendant – Christopher Lovings

Respondent/Appellee/Plaintiff – United States of America

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Christopher Lovings, by court-appointed counsel, respectfully requests that a Writ of Certiorari issue to review the unpublished opinion of the United States Court of Appeals for the Sixth Circuit in the case of *United States v. Christopher Lovings*, No. 21-5112, filed on February 4, 2022 and attached to this Petition as Appendix B.

OPINIONS BELOW

Mr. Lovings's appeal to the Sixth Circuit was taken from a Judgment entered following his guilty plea to possession with intent to distribute and being a felon in possession of a firearm. *See* Appendix A. On February 4, 2022, the Sixth Circuit issued an unpublished opinion affirming Mr. Lovings's sentence. *See* Appendix B. This petition for a writ of certiorari now follows.

JURISDICTION

The Sixth Circuit issued an unpublished opinion affirming Mr. Lovings's sentence on February 4, 2022. *See* Appendix B. Mr. Lovings invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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 offense 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 property be taken for public use, without just compensation.”

STATEMENT OF THE CASE

Mr. Lovings was arrested on January 29, 2019 shortly after undercover officers with the Lexington, Kentucky Police Department (LPD) observed him driving a vehicle previously carjacked by Jody Shipman. The record does not establish whether Mr. Lovings was aware the vehicle was stolen. A surveillance camera at the BP gas station where the arrest occurred captured the incident.¹ The video shows an unmarked vehicle pulling in front of Mr. Lovings as he parks at a gas pump. Seconds later, a marked LPD cruiser maneuvers behind Mr. Lovings. The cruiser does not activate its emergency lights or siren. The driver of the

¹ The surveillance video and post-arrest interview recordings are available in both the district court and Sixth Circuit record. See [R. 45: Notice of Filing of Conventional Exhibit, Page ID # 233-34]; [R. 46: Conventional Exhibit]; [App. R. 27: Record Receipt].

unmarked vehicle exits with a firearm drawn, taking aim at Mr. Lovings. The driver is wearing plainclothes—blue jeans and a baseball cap—not a police uniform. The driver’s arms are raised in a shooting posture obstructing Mr. Lovings’s view of any identifying markings that may have been on the driver’s chest.

Mr. Lovings immediately attempts to back his vehicle away. In doing so, Mr. Lovings collides with the LPD cruiser now parked behind him. Mr. Lovings’s vehicle does not move again after the collision. An LPD officer opens the driver’s side door of the vehicle just seconds later. Officers then struggle to remove Mr. Lovings because he is still wearing his seat belt. Once an officer cuts the seat belt, Mr. Lovings is taken into custody without incident. Mr. Lovings was found in possession of narcotics and a firearm.

LPD Sergeant Daniel Burnett interviewed Mr. Lovings after his arrest. Mr. Lovings said he had just arrived at the gas station when a “black car with tinted windows pulled right up in front” of him and people jumped out. The car was not marked, and Mr. Lovings “did not see” anything indicating the men who exited were law enforcement officers. Mr. Lovings thought the driver was “trying to kill” him.

Mr. Lovings ultimately entered a guilty plea to three counts of the Indictment charging him with possession with intent to distribute and being a felon

in possession of a firearm. Paragraph 8 of Mr. Lovings's Plea Agreement noted a disagreement between the parties regarding application of a two-level enhancement pursuant to USSG § 3C1.2 for recklessly creating a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer. The United States Probation Office included the enhancement in Mr. Lovings's Pre-Sentence Investigation Report. Mr. Lovings objected.

At sentencing, the government called two witnesses to testify in support of the enhancement. The first was LPD Detective Steve McCown, the passenger in the unmarked car on the night of Mr. Lovings's arrest. McCown said he and Detective Bill Brislin observed Mr. Lovings driving a car that had been reported stolen five days earlier and then coordinated with other units to stop the vehicle. They tracked Mr. Lovings to the BP gas station and pulled around the gas pumps in front of his vehicle while LPD Detective Matthew Kaper pulled his marked cruiser behind Mr. Lovings "virtually up next to [the] bumper." [R. 74: Transcript, Sentencing, Page ID # 378, Lines 19-24]. Kaper did not activate his emergency lights or siren. *Id.* at Page ID # 398, Lines 15-19.

McCown and Brislin then exited the unmarked car. They were not "wearing...police uniform[s]" and "weren't in a police car with the police markings." *Id.* at Page ID # 384, Lines 12-13. The windows were "tinted" and

“dark” such that an observer “couldn’t really see” inside. *Id.* at Page ID # 397, Lines 10-16. McCown said he and Brislin each drew their weapons as they “exited the vehicle.” *Id.* at Page ID # 383-84, Lines 24-25, 1. After Mr. Lovings struck Kaper’s cruiser, “the vehicle came to a rest” and officers “were able...to make contact[.]” *Id.* at Page ID # 386, Lines 13-15. The encounter lasted mere “seconds.” McCown said he and other officers could not remove Mr. Lovings from the vehicle because he was still wearing a seat belt. *Id.* at Page ID # 380, Lines 6-7. Kaper cut the seat belt, and Mr. Lovings was taken into custody. *Id.*

Given the circumstances, McCown agreed that Mr. Lovings’s attention would have been focused squarely on Brislin as he took aim directly at him with his firearm. *Id.* at Page ID # 399-400, Lines 20-25, 1. McCown also agreed only three to four seconds had passed when Mr. Lovings backed away, and only six seconds by the time Mr. Lovings’s vehicle came to a rest following the collision. *Id.* at Page ID # 400, Lines 3-6; *id.* at Lines 14-20. McCown acknowledged a driver in Mr. Lovings’s position would have been unlikely to recognize Kaper’s vehicle as a marked police cruiser during the incident. *Id.* at Page ID # 405, Lines 3-15. McCown also said he did not make eye contact with Mr. Lovings until he made it to the passenger door following the collision. *Id.* at Page ID #407, Lines 19-22.

The government's second witness was LPD Sergeant Daniel Burnett. Burnett was not present at the time of the incident, but he interviewed Mr. Lovings following his arrest. Burnett recalled Mr. Lovings saying "he thought somebody was trying to harm him and that he was trying to get away from them." *Id.* at Page ID # 413, Lines 13-16.

The district court overruled the objection. *Id.* at Page ID # 442. Despite the video evidence and testimony, the court said there was "sufficient information to conclude" that Mr. Lovings "was aware" that a police car was parked behind him. *Id.* at Page ID # 444, Lines 1-2. The court acknowledged that "there's a question as to whether [Mr. Lovings] actually looked back and looked at the vehicle," but still held it was "clear" that "he would have recognized [it] as a marked Lexington police vehicle" if he had. *Id.* at Lines 3-6.

The district court also found Mr. Lovings had "actual knowledge" that the individuals who "pulled in front of him" were "police officers that were attempting to make an arrest." *Id.* at Lines 15-18. The court acknowledged Mr. Lovings would not have been able to see any markings on Detective Brislin's vest as he aimed. *Id.* at Lines 20-24. But the court concluded that Detective McCown "to the right was wearing a similar vest and would have been observed." *Id.* at Lines 24-25.

Despite the incident taking mere seconds and Brislin aiming directly at him, the court concluded Mr. Lovings would not have been focused “solely” on Brislin and would have heard verbal commands to show his hands. *Id.* at Page ID # 445. The court also said it believed Mr. Lovings continued to attempt to avoid arrest following the collision. *Id.* at Page ID # 445, Lines 15-19. The court entirely disregarded Mr. Lovings’s post-arrest statements as “not credible or believable[.]” *Id.* at Lines 20-21.

The district court emphasized that it was relying on the fact that Mr. Lovings was driving a stolen vehicle to conclude that he was more likely to fear an encounter with law enforcement than a robbery attempt. *Id.* at Page ID # 446. The court did so even though it acknowledged Mr. Lovings may not have known the vehicle was stolen. *Id.* at Page ID # 445, Lines 22-24.

On appeal, the Sixth Circuit affirmed the district court’s application of the enhancement, holding that the court “reasonably concluded that the...information before [Mr.] Lovings was such that he had actual knowledge that he was fleeing from police officers.” *See* Appendix B, Page 4. The Sixth Circuit noted it had reviewed the video and could not conclude the court “erred in finding that there was sufficient time for [Mr.] Lovings to realize that he was being approached by police officers and not drug dealers.” *Id.* at Pages 3-4.

REASONS FOR GRANTING THE WRIT

I. The district court erred by applying a two-level enhancement pursuant to USSG § 3C1.2.

USSG § 3C1.2 authorizes a two-level enhancement “[i]f the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer.” For the enhancement to apply, the government must show that the defendant:

(1) recklessly, (2) created a substantial risk of death or serious bodily injury, (3) to another person, (4) in the course of fleeing from a law enforcement officer; (5) and that this conduct 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.

United States v. Mukes, 980 F.3d 526, 536 (6th Cir.2020) (citing *United States v. Dial*, 524 F.3d 783, 786-87 (6th Cir.2008)).

This enhancement may apply based on conduct occurring “in the course of resisting arrest.” *United States v. Roush*, 527 Fed.Appx. 349, 351 (6th Cir.2013) (citing USSG § 3C1.2, comment (n.3)). But “[t]he defendant must know that the person from whom he is fleeing is a law enforcement officer.” *United States v. Hayes*, 135 F.3d 435, 438 (6th Cir.1998) (citing *United States v. Mills*, 1 F.3d 414, 423 (6th Cir.1993)). *See also United States v. Hayes*, 49 F.3d 178, 183-84 (6th Cir.1995) (“The origins of § 3C1.2 suggest that it requires a defendant to be aware that he is fleeing from a law enforcement officer [behavior that could be viewed as

obstruction of justice] versus fleeing from a person pursuing him for different reasons.”).

“Courts must not speculate concerning the existence of a fact which would permit a more severe sentence under the guidelines.” *United States v. Cataldo*, 171 F.3d 1316, 1321 (11th Cir.1999) (citing *United States v. Wilson*, 993 F.2d 214, 218 (11th Cir.1993)). “Mere speculative inferences are never allowable, and cannot be regarded as evidence.” *United States v. Catching*, 796 Fed.Appx. 535, 539 (6th Cir.2019) (citing *Goodman v. Simonds*, 61 U.S. (20 How.) 343, 360 (1857)).

This is an important case. Every day, sentencing courts across the country are tasked with imposing terms of incarceration for criminal offenses in accordance with 18 U.S.C. § 3553(a). This statute and other constitutional provisions protect all citizens from penalties “greater than necessary” to satisfy the statutory sentencing factors. Here, Mr. Lovings was sentenced in accordance with the United States Sentencing Guidelines. Ultimately, the district court imposed a sentence of 71 months, which was the highest possible sentence within his applicable Guidelines range of 57-71 months. However, Mr. Lovings’s sentencing range would have been significantly lower had the court not applied the two-level enhancement pursuant to USSG § 3C1.2. While reviewing courts give some deference to factual determinations made by lower courts, this case underscores

why appellate review of these issues is essential to protect the due process rights of all criminal defendants.

Here, the district court abused its discretion by applying the reckless endangerment enhancement. While there is no dispute that he attempted to flee by backing away, the record fails to establish Mr. Lovings knew that the individual who exited the unmarked car and immediately aimed a firearm at him was a police officer. The video record, the testimony presented at sentencing, and his post-arrest interview confirm Mr. Lovings was focused on and attempting to flee from Detective Brislin when the collision occurred, and he was unaware Brislin was a law enforcement officer at that time. The court's factual findings and the Sixth Circuit's opinion to the contrary are clearly erroneous. Mr. Lovings respectfully asks this Court to grant his petition for the purpose of vacating his sentence.

The district court offered two theories to explain its finding that Mr. Lovings knew he was fleeing from law enforcement. First, the court said Mr. Lovings had "actual knowledge" that the individuals who "pulled in front of him" were "police officers that were attempting to make an arrest." [R. 74: Transcript, Sentencing, Page ID # 443, Lines 15-18]. The Sixth Circuit found no clear error in the court's determination on this point. *See* Appendix B, Pages 4-5. However, this finding is contradicted by the record.

The record establishes Mr. Lovings attempted to back away from a man wearing blue jeans and a baseball cap who had just exited an unmarked vehicle and aimed a firearm directly at him. Mr. Lovings did so immediately. The unmarked car was a black Toyota Camry with windows tinted so dark no one could see inside. *Id.* at Page ID # 397, Lines 10-16. As such, the unmarked vehicle looked like the kind of car that would be driven by a drug trafficker, not law enforcement. The record also confirms Detective Brislin was in a firing position, thus Mr. Lovings would not have been able to see any markings that may have been present on his chest. *Id.* At Lines 20-24. Sergeant Burnett agreed at sentencing. *Id.* at Page ID # 443, Lines 24-25.

Moreover, Detective McCown's testimony directly contradicts the district court's finding. While the court reasoned Mr. Lovings could have seen McCown as he approached the vehicle from a different direction, the record contains nothing to establish Mr. Lovings ever looked toward McCown, much less that he recognized McCown was a law enforcement officer. In fact, McCown himself testified that Mr. Lovings would have focused solely on Brislin during the 3-4 seconds prior to his attempt to flee because Brislin was aiming a firearm directly at him. *Id.* at Page ID # 399-400, Lines 20-25, 1.

Some deference to a lower court's factual findings is understandable. But the district court's conclusion that the record in this case established Mr. Lovings's

actual knowledge that he was fleeing from law enforcement officers is mere speculation and “cannot be regarded as evidence.” *Catching*, 796 Fed.Appx. at 539 (citing *Goodman*, 61 U.S. at 369). Indeed, McCown’s testimony directly contradicts the court’s conclusion, and the record contains no alternative proof. The district court’s factual finding regarding Mr. Lovings’s actual knowledge was erroneous. *See United States v. Fleisher*, 971 F.3d 559, 567 (6th Cir.2020) (citing *United States v. Yancy*, 725 F.3d 596, 598 (6th Cir.2013)) (district court’s factual findings may be overturned if reviewing court is left with “definite and firm conviction that a mistake has been committed”).

The district court’s second theory was that there was “sufficient information to conclude” Mr. Lovings “was aware” a police car was parked behind him, thus he had reason to know he was fleeing from law enforcement. [R. 74: Transcript, Sentencing, Page ID # 443, Lines 1-2]. The Sixth Circuit did not directly address this issue in its opinion, but the court’s factual finding on this point was also contradicted by the record. As Detective McCown acknowledged, Detective Kaper did not pull his cruiser behind the target vehicle until after Detective Brislin had swept in front of Mr. Lovings in the unmarked Camry. *Id.* at Page ID # 398, Lines 10-12. While the delay was short, it explains why Mr. Lovings was paying closer attention to the unmarked vehicle in front of him rather than Kaper behind. More important, Kaper did not activate his emergency lights or siren, making it

even less likely Mr. Lovings would have noticed the cruiser or identified it as a police vehicle before he backed up.

The district court acknowledged the record failed to establish Mr. Lovings ever “actually looked back and looked at the vehicle[.]” *Id.* at Page ID # 444, Lines 3-4. Despite this, the court said it was “clear” Mr. Lovings “would have recognized [it] as a marked Lexington police vehicle” if he had. *Id.* at Lines 4-6. A sentencing court’s factual findings cannot be based on speculation about what might have happened if the circumstances had been different. *Catching*, 796 Fed.Appx. at 539 (citing *Goodman*, 61 U.S. at 360). The record fails to establish that Mr. Lovings looked back, so it is irrelevant that the court believed he “would have recognized” the vehicle behind him to be “a marked Lexington police vehicle” if he had hypothetically done so. [R. 74: Transcript, Sentencing, Page ID # 444, Lines 3-4]. Courts are not permitted to “speculate concerning the existence of a fact which would permit a more severe sentence under the guidelines.” *Cataldo*, 171 F.3d at 1321 (citing *Wilson*, 993 F.2d at 218). Yet that is precisely what the court did in this instance. This was error.

Likewise, this factual finding was also contradicted by Detective McCown’s testimony. McCown acknowledged that a driver in Mr. Lovings’s position was not likely to recognize or otherwise identify Kaper’s vehicle as a police cruiser. [R. 76: Transcript, Sentencing, Page ID # 405, Lines 3-15]. Despite this testimony and

no proof to the contrary, the court still found that Mr. Lovings had knowledge of this fact.

This is the reason Mr. Lovings's case is important. Sentencing courts are required to make factual determinations by a preponderance of the evidence. *See, e.g., United States v. Howell*, 513 Fed.Appx. 533, 535-36 (6th Cir.2013) (citing *United States v. White*, 492 F.3d 380, 415-16 (6th Cir.2007)). "A preponderance of the evidence simply means that a fact is more likely than not to be true." *Id.* (citing *United States v. Moses*, 289 F.3d 847, 852 (6th Cir.2002)). Detective McCown was an eyewitness to the incident, and he confirmed Mr. Lovings was "not likely" to recognize Kaper's car as a law enforcement vehicle. [R. 76: Transcript, Sentencing, Page ID # 405, Lines 3-15]. Based on this proof, the record established it was more likely than not Mr. Lovings would not have known Kaper's vehicle was a police cruiser. Yet the court found to the contrary, applied the enhancement under USSG § 3C1.2, and imposed a sentence significantly higher than would otherwise have been recommended under the Sentencing Guidelines. This finding was clearly erroneous, and application of the enhancement constituted an abuse of discretion. *Fleisher*, 971 F.3d at 567 (citing *Yancy*, 725 F.3d at 598); *Johnson*, 844 Fed.Appx. at 841.

More troubling, however, is how often similar errors occur and deprive defendants like Mr. Lovings of their liberty for longer than necessary in violation

of 18 U.S.C. § 3553 and the Fifth Amendment. Mr. Lovings asks the Court to use his case to begin to address this issue by granting reviewing courts greater latitude in conducting meaningful review of factual findings that increase a defendant's recommended sentence. Doing so is necessary to protect the due process rights of criminal defendants everywhere.

CONCLUSION

For the foregoing reasons, Mr. Lovings respectfully asks this Court to grant his petition for the issuance of a writ of certiorari for the purpose of vacating his sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jarrod J. Beck, counsel for Petitioner Christopher Lovings, do hereby certify that the original and ten copies of this Petition for Writ of Certiorari were mailed to the Office of the Clerk, Supreme Court of the United States, Washington, DC 20543. I also certify that a true copy of the Petition was served by mail with first-class postage prepaid upon Assistant United States Attorney John Patrick Grant, Assistant United States Attorney, 260 West Vine Street, Suite 300, Lexington, Kentucky 40507-1612.

This 4th day of May, 2022.

JARROD J. BECK

COUNSEL FOR CHRISTOPHER LOVINGS