NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

CLIFFORD RAYMOND SALAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Tenth Circuit wrongly hold that the district court did not plainly err, where (a) the prosecutor argued that a factually untrue reason supported a variant sentence, and (b) the district court said it imposed that variant sentence in part for the reasons given by the government?

STATEMENT OF RELATED CASES

United States v. Salas, No. 12-cr-03183-RB
Amended judgment entered October 15, 2020 (on resentencing)

United States v. Salas, No. 20-2158 (10th Cir.)
Judgment entered March 15, 2022

United States v. Salas, No. 16-2170 (10th Cir.)
Judgment entered May 4, 2018 (prior appeal)

United States v. Salas, No. 18-428 (U.S.)
Order entered June 28, 2019, denying petition for writ of certiorari

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PRAYER

Petitioner, Clifford Raymond Salas, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on March 15, 2022.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, see United States v. Salas, No. 20-2158, 2022 WL 782629 (10th Cir. Mar. 15, 2022), is found in the Appendix at A1. The decision of the United States District Court for the District of New Mexico imposing sentence is found in the Appendix at A5.

JURISDICTION

The United States District Court for the District of New Mexico had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). Justice Gorsuch has extended the time in which to file a petition for writ of certiorari until July 13, see A11, so this petition is timely.

FEDERAL RULE INVOLVED

This petition implicates Federal Rule of Criminal Procedure 52(b), which governs review of errors as to which no objection was raised in the district court. Federal Rule of Criminal Procedure 52 provides as follows:

> **Rule 52. Harmless and Plain Error**
>
> **(a) Harmless Error.** Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> **(b). Plain Error.** A plain error that affects substantial rights may be considered, even though it was not brought to the court's attention.

Fed. R. Crim. P. 52.

STATEMENT OF THE CASE

Clifford Salas was convicted in January 2015 of the arson of a tattoo parlor in a strip mall and an associated violation of 18 U.S.C. § 924(c), as well as conspiracy to commit the arson and possessing an incendiary device as a felon. The arson took place in the middle of the night, around 2:00 a.m. A call center was located next to the tattoo parlor.

A call-center employee testified regarding the camera system that recorded video introduced at trial. He explained that nobody was in the call center at the time of the arson. There is nothing in the record to the contrary.

In his first appeal, Mr. Salas argued that arson did not qualify as the crime of violence necessary for his § 924(c) conviction. The Tenth Circuit agreed. It vacated the § 924(c) conviction and remanded for resentencing. United States v. Salas, 889 F.3d 681 (10th Cir. 2018), cert. denied, 139 S. Ct. 2773 (2019).

The district court did not resentence Mr. Salas until October 2020. By then, it was four and one-third years after the court had initially sentenced Mr. Salas. It was some five and one-half years after the trial.

At resentencing, the probation department calculated the advisory guideline range as 110-135 months. The prosecution sought instead a variant sentence of 180 months.

In urging a variance, the prosecution made statements about people being in the call center at the time of the arson. In a memorandum in support of the requested variance, the prosecution invoked not only the property damage from the arson, but also what it termed the "great potential" for harm to people. "Although no one was physically harmed at the time," the prosecution wrote, "there was great potential for harm based on the fact that Irish Ink [tattoo parlor] was next door to a call center that employed dozens of people."

At resentencing, the prosecution reiterated the potential for injury or loss of life. The prosecution urged it was merely fortuitous that nobody was killed or injured in the fire. In doing so, the prosecution referred to people who were *actually working* in the strip mall, and then specifically mentioned the call center. One of the trial prosecutors declared that Mr. Salas had

> "endangered everybody that *was working* in that strip mall. That strip mall had a call center in it. And thank God, it resulted in no loss of life, no injury."

A2 (quoting record on appeal) (emphasis added).

The district court imposed the variant sentence of 180 months that the prosecution requested. The court announced it was imposing that sentence in part for "the reasons stated by the Government." A6.

Mr. Salas argued on appeal that the district court had erred by basing its sentence in part on the mistaken proposition that there were people working in the call center at the time of the arson, when the record showed this was not so. With no objection in the district court on this basis, he sought plain-error relief, under Federal Rule of Criminal Procedure 52(b), for this procedural error. See Gall v. United States, 552 U.S. 38, 51 (2007) ("selecting a sentence based on clearly erroneous facts" is procedural error).

The United States Court of Appeals for the Tenth Circuit affirmed the variant sentence as procedurally reasonable. A1-3. It did so on the theory that the record was ambiguous in two respects, each of which it considered fatal to Mr. Salas's claim that the district court plainly erred as a factual

matter in relying on the prosecution's representation of people actually being present in the call center.

The court of appeals first thought there was ambiguity in the prosecution's statement at sentencing that the arson endangered everyone who "'*was working* in that strip mall,'" A2 (quoting record) (emphasis added), followed immediately by a reference to the fact that the "'strip mall had a call center in it,'" id., (quoting record). The Tenth Circuit thought this did not mean anybody was working in the call center. Rather, the court said, it could have been only a suggestion that "the number of call center employees created a risk that someone might have been on duty at any given time." Id.

The Tenth Circuit also thought ambiguity could be found in the district court's statement that it imposed a variant sentence in part for "'the reasons stated by the Government.'" A3 (quoting record). This was so, the court of appeals reasoned, because the prosecution offered more than one reason for a variant sentence. Id. So, the Tenth Circuit continued, "[t]he district court might have been adopting either *some or all* of these arguments." Id. (emphasis in original).

REASONS FOR GRANTING THE WRIT

This Court should grant review to ensure that, after its recent holding that there is no exception to plain-error review for factual errors, appellate review of such errors is meaningful.

This Court recently -- and unanimously -- held that review for plain-error under Federal Rule of Criminal Procedure 52(b) applies to factual errors, and not just to legal ones. Davis v. United States, 140 S. Ct. 1060, 1061-62 (2020) (per curiam). It explained that the rule contains no carve-out for factual errors and neither do this Court's cases. Id. at 1061. "Put simply," this Court wrote, "there is no legal basis for the Fifth Circuit's practice of declining to review certain unpreserved factual arguments for plain error." Id. at 1062.

In Davis, this Court treated the Fifth Circuit as a virtual outlier. It noted that, unlike the Fifth Circuit, "almost every other Court of Appeals conducts plain-error review of unpreserved arguments, including factual arguments." Id. at 1061. It supported this statement with citations to nine other circuits. Id. The Tenth Circuit was not among them. Id.

Of course, the Tenth Circuit did follow Davis here, in the sense that it examined whether the claimed factual mistake was "plain." But it did so

by hypothesizing ambiguity where there is none. Its approach is at odds with true plain-error review. Just as this Court granted review in Davis to make clear that plain-error review applies to factual mistakes, it should grant review here to ensure that the plain-error test is applied meaningfully to such mistakes.

The problem with the Tenth Circuit's approach is its willingness to read ambiguity into statements that do not admit of such a possibility. That the Tenth Circuit did so *twice* in this case is good indication that its missteps are not of a factual nature, which would not ordinarily be reason to grant certiorari. Sup. Ct. R. 10. To the contrary, the error in this case is in the rule applied. The Tenth Circuit's approach demands far too much for a factual error to be plain. It allows a factual error to be dismissed as not plain based on a reading that can only be indulged by ignoring the clear meaning of the record.

Take the Tenth Circuit's contention that prosecutor at sentencing may not have been saying that anybody was working in the strip mall. A2. But he actually said precisely that. The prosecutor declared that the arson "'endangered everybody that *was working* in that strip mall.'" Id. (quoting

record) (emphasis added). Everybody that "was working" in the strip mall means, by its terms, that people were in fact working there at that time. Id. On its face, it does not and cannot mean, as the Tenth Circuit hypothesized, only that people "might have been on duty." Id.

If the prosecutor had meant to say there was a possible risk because somebody from the call center *might have been working* there at the time of the arson, he could (and presumably would) have said so. He did not. And even if that were what he meant to say, it is not a plausible reading of what he did say.

The Tenth Circuit acted in a similar way with respect to what the district court said. The district court was clear. It gave as one basis for its variant sentence -- the first one that it listed, A6 -- the "reasons given by the Government." Id. There is no way to parse this as perhaps meaning only "*some*" of those reasons, as the Tenth Circuit claimed. A3 (emphasis in original). The notion that the district court might have meant that, when it did not differentiate at all among the reasons the prosecutor gave, is pure conjecture.

The Tenth Circuit's approach disregards what the prosecutor and the district court said. It allows a reviewing court to hypothesize possible meaning that the language of the record cannot bear. This cannot be what plain-error review for factual errors means. If it is, then such review will be of the most toothless kind.

This case gives this Court the opportunity to ensure Davis has real meaning by defining the contours, and limits, of holding factual mistakes not to be plain. This is an important issue deserving of this Court's attention. Accordingly, this Court should grant review.

CONCLUSION

This Court should grant Mr. Salas a writ of certiorari.

Respectfully submitted,

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