

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

ROLAND DONELL ROSS,

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

VIRGINIA L. GRADY
Federal Public Defender

HOWARD A. PINCUS
Asst. Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

QUESTION PRESENTED

Where application of a firmly-established test leads inevitably to the conclusion that there was error, is the error “plain” for purposes of Federal Rule of Criminal Procedure 52(b), or is a further showing needed?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED.	i
TABLE OF AUTHORITIES.	iv
PRAYER.	1
OPINIONS BELOW.	1
JURISDICTION.	1
FEDERAL RULE INVOLVED..	2
STATEMENT OF THE CASE.	3
<i>The arguments on appeal.</i>	6
<i>The Tenth Circuit holds the lack of on-point, binding authority specific to the factual scenario here prevented relief..</i>	8
REASONS FOR GRANTING THE WRIT	
The Tenth Circuit applied a far too-restrictive view of what it means for an error to be plain, which strays from the standard that this Court uses..	11
CONCLUSION.	23
APPENDIX	
Decision of the United States of the Court of Appeals for the Tenth Circuit in <u>United States v. Ross</u> , 716 Fed. App'x 778 (10th Cir. 2017)	A1

District court's oral imposition of sentence. A5

Order of Justice Sotomayor extending the time in which to
file a petition for writ of certiorari.. . . . A14

TABLE OF AUTHORITIES

Page

CASES

<u>Gall v. United States</u> , 552 U.S. 38 (2007).....	13, 14, 15
<u>Koon v. United States</u> , 518 U.S. 81 (1996).....	15
<u>Puckett v. United States</u> , 556 U.S. 129 (2009).....	11, 12, 16
<u>United States v. Azure</u> , 536 F.3d 922 (8th Cir. 2008).....	14
<u>United States v. Brown</u> , 352 F.3d 654 (2d Cir. 2003).....	12, 18, 19
<u>United States v. Franklin Brown</u> , 595 F.3d 498 (3d Cir. 2010).....	15
<u>United States v. Carrasco-de-Jesus</u> , 589 F.3d 22 (1st Cir. 2009).....	14
<u>United States v. DeChristopher</u> , 695 F.3d 1082 (10th Cir. 2012).....	10
<u>United States v. Nguyen</u> , 854 F.3d 276 (11th Cir. 2017).....	15
<u>United States v. Olano</u> , 507 U.S. 725 (1993).....	11
<u>United States v. Price</u> , 409 F.3d 456 (D.C. Cir. 2005).....	15
<u>United States v. Ross</u> , 716 Fed. App'x 778 (10th Cir. 2017).....	1, 8, 9, 10, 11, 12, 18, 19
<u>United States v. Thorn</u> , 446 F.3d 378 (2d Cir. 2006).....	15
<u>White v. Woodall</u> , 134 S.Ct.1697 (2014).....	18
<u>Wiggins v. Smith</u> , 539 U.S.510 (2003).....	17

<u>Williams v. Taylor</u> , 529 U.S. 362 (2000).....	17
<u>Woodford v. Garceau</u> , 538 U.S. 202 (2003).....	17

CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 924(c).....	3
18 U.S.C. § 3142.....	8
18 U.S.C. § 3143.....	8
18 U.S.C. § 3144.....	8
18 U.S.C. § 3147.....	7, 8
18 U.S.C. § 3583.....	8
28 U.S.C. § 1254(1).	1
28 U.S.C. § 1291.....	1
28 U.S.C. § 2254(d).	16

OTHER

Fed. R. Crim. P. 52.....	2
Fed. R. Crim. P. 52(b).	11
Sup. Ct. R. 12.7.....	3
U.S.S.G. § 2B3.1.....	3

U.S.S.G. § 2K2.4, comment. (n.4).	4
U.S.S.G. § 3C1.3.	7, 8
U.S.S.G. § 4A1.1(d).	8

PRAYER

Petitioner, Roland Donell Ross, 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 November 29, 2017.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, United States v. Ross, 716 Fed. App'x 778 (10th Cir. 2017), is found in the Appendix at A1. The district court's oral imposition of sentence is found in the Appendix at A5.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction over this criminal action under 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 Sotomayor has extended the time in which to petition for certiorari to, and including, April 30, 2018, see A14, so this petition is timely.

FEDERAL RULE INVOLVED

This petition involves the plain-error standard of Federal Rule of Criminal Procedure 52(b). Rule 52, in its entirety, reads 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

Roland Ross pleaded guilty to violating 18 U.S.C. § 924(c). He admitted brandishing a gun during an attempted robbery of a liquor store. Under a plea agreement, the government agreed to dismiss a charge of attempted Hobbs Act robbery. Vol. 1 at 42-43, 52. It also agreed to recommend a seven-year sentence for the brandishing conviction, id. at 54, the statutory minimum and the guideline sentence.¹

The presentence report, in describing the sentencing options, discussed the effect of the plea agreement. Vol. 2 at 54. It recounted that had Mr. Ross been convicted of the dismissed robbery count (actually, an attempted-robbery count), the total offense level under U.S.S.G. § 2B3.1, with a three-level reduction for acceptance of responsibility, would have been 22. Id. That, said the report, would have yielded a guideline range of 63 to 78 months. Id. And it noted that the § 924(c) sentence would have had to run consecutively to the attempted-robbery sentence. Id.

¹ For this Court's convenience in the event it deems it necessary to review the record to resolve the petition, see Sup. Ct. R. 12.7, this petition will cite to the record on appeal to the Tenth Circuit.

The presentence report evidently proceeded on the assumption that, to the base offense level of 20, there would have been a five-level increase for the brandishing of a weapon. That would have brought the adjusted offense level to 25. After a three-level reduction for acceptance of responsibility, the total offense level would then have been 22.

That assumption was incorrect. Commentary to the guideline for § 924(c) convictions directs that no specific-offense characteristic for possession, brandishing, use or discharge of a firearm is to apply if there is also a conviction for the underlying offense. U.S.S.G. § 2K2.4, comment. (n.4).

At sentencing, the district court decided to vary upward from the guideline-recommended sentence of seven years on the § 924(c) conviction. It said that, in doing so, it “looked at two things.” Vol. 1 at 80. The first was “the conduct in this case.” Id. Mr. Ross and an accomplice had gone into a liquor store with guns drawn, asked the clerk if he was ready to die and demanded money. Vol. 1 at 53 (plea agreement); Vol. 2 at 40-41 (presentence report); Vol. 3 at 38-39 (plea hearing). Instead, the clerk drew a weapon, shot Mr. Ross’s compatriot and then ordered Mr. Ross to the

floor, where he remained until the police arrived. Vol. 1 at 53; Vol. 2 at 41; Vol. 3 at 39. Id.; see also Vol. 3 at 38-39. Noting the threat and the confrontation with guns, the district court said this was “a much more serious situation than a typical brandishing offense.” Vol. 3 at 80.

Turning to the second factor, the court said it “look[ed] at then the fact” that Mr. Ross was also charged with attempted robbery. Id. Although he had not been convicted of that offense, the court deemed it “appropriate to consider” that dismissed charge, as well as the brandishing charge. Id. The court then observed that, had Mr. Ross been convicted of that underlying attempted robbery, he was looking at five or more extra years in prison:

I note that, had he been convicted of the brandishing [sic: attempted robbery] offense, he would have been facing a sentence of at least five years in that case in addition to the seven-year charge for brandishing.

Id.

For the “total conduct that was involved,” id., the court settled on a variant sentence of nine years for the § 924(c) conviction, id. at 81.

The arguments on appeal

On appeal to the United States Court of Appeals for the Tenth Circuit, Mr. Ross argued that the district court committed procedural error, as it based its sentence on an incorrect calculation of the guideline range for the dismissed count. Mr. Ross did not contend that a district court had any duty to calculate the guideline range for dismissed counts. Rather, his position was based on a premise applicable to any fact or legal conclusion on which a sentence is based. It was that having decided to use the guideline range for the dismissed count to select its sentence, the district court had to get that range right.

Mr. Ross noted that, as discussed above, there could not have been a five-level increase in offense level for brandishing a firearm. See supra at 4. Nor, he explained, was there any other adjustment, or combination of adjustments, by which the presentence report could properly have arrived at a five-level increase. And so, the district court was wrong in what it believed the minimum Mr. Ross to be facing had he been convicted of the dismissed count. Because no objection was made on this basis, review was for plain error under Federal Rule of Criminal Procedure 52(b).

The government did not deny that the brandishing increase could not be used in computing the offense level for the attempted robbery. Instead, it proposed what it asserted was a legitimate way to increase the offense level as the report did that “is just an likely and plausible.” In what was presumably its most persuasive case for a five-level increase, the government urged that two adjustments in combination could have yielded an additional five levels.

The government first claimed there could have been a two-level increase for obstruction of justice. But that would have been flatly at odds with what the presentence report said on this point. Under a heading devoted entirely to the possibility of such an increase, the report declared, “The probation officer has no information indicating the defendant impeded or obstructed justice.” Vol. 2 at 43.

The government next asserted there could have been a three-level increase in the offense level under U.S.S.G. § 3C1.3 for having committed the offense while on supervised release. But that guideline comes into play only “[i]f a statutory enhancement under 18 U.S.C. § 3147 applies.” U.S.S.G. § 3C1.3. Section 3147 calls for a mandatory, additional penalty

where a person is “convicted of an offense while released *under this chapter.*” 18 U.S.C. § 3147 (emphasis added). Section 3147 is in Chapter 207 of Title 18. Supervised release is a function of 18 U.S.C. § 3583, which is in Chapter 227 of Title 18.²

So, as Mr. Ross explained in his reply brief in the court of appeals, section 3147 does not by its terms apply and there could not have been an offense-level increase under U.S.S.G. § 3C1.3. The guidelines, of course, do call for two criminal-history points to be added if an offense is committed while on supervised release. U.S.S.G. § 4A1.1(d). The presentence report assessed Mr. Ross the points under that section. Vol. 2 at 46.

The Tenth Circuit holds the lack of on-point, binding authority specific to the factual scenario here prevented relief

The Tenth Circuit rejected Mr. Ross’s arguments. United States v. Ross, 716 Fed. App’x 778 (10th Cir. 2017); A1. The court of appeals began its analysis by reciting the government’s proposed way of adding five

² Chapter 207 covers release or detention pending trial, 18 U.S.C. § 3142, or pending sentence or appeal, *id.*, § 3143, or of a material witness, *id.*, § 3144. Supervised release, of course, is part of the imposition of sentence.

levels. Ross, 716 Fed. App'x at 781; A3. It said Mr. Ross's response was that the government's calculation was "implausible because it contradicts other factual findings within the PSR." Id. The Tenth Circuit continued that it could not review "the appropriateness of any applied enhancements without speculating as to the basis of the PSR's calculations." Id.

In a footnote, the court of appeals noted that Mr. Ross had argued that the error was a legal one, as the facts in the presentence report did not allow for the five-level increase. Id. at 781 n.1; A3. The court of appeals considered it to be otherwise, writing that the issue "ultimately turns on the factual question of how the Probation Officer calculated an offense level of 22." Id. It then noted, while stating that it was not resting its decision on this basis, that the "claim also fails because unpreserved factual disputes -- such as this -- cannot satisfy plain error." Id.

The Tenth Circuit then wrote that it "need not resolve" the conflict "regarding the sentence that would have been available if Mr. Ross had also pleaded guilty to the robbery." Id. at 781; A4. Citing the absence of Tenth Circuit or Supreme Court authority specific to this issue, it concluded that any error would not be plain:

Even if [the guideline range for the attempted robbery] was calculated incorrectly, and the district court erred in relying on that erroneous calculation in fixing Mr. Ross's sentence, any alleged error was not plain. "An error is plain if it is clear or obvious under well-settled law. In general, for an error to be contrary to well-settled law, either the Supreme Court or this court must have addressed the issue." United States v. DeChristopher, 695 F.3d 1082, 1091 (10th Cir. 2012) (citation omitted).

Ross, 716 Fed. App'x at 781-82; A4.

The court of appeals recognized that a sentencing court must correctly calculate the guideline range for the conviction for which the sentence is to be imposed. But it held that no authority required the extension of this "general principle" to require that a sentencing court "correctly calculate the sentences that would be available for any dismissed count considered in arriving at the final sentence." Id. at 782; A4.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit applied a far too-restrictive view of what it means for an error to be plain, which strays from the standard that this Court uses.

Federal Rule of Criminal Procedure 52(b) allows for correction of a “plain” error. In United States v. Olano, 507 U.S. 725 (1993), this Court held that plainness of the error is one of three prerequisites for relief under the rule. The plainness test laid out in Olano is a model of simplicity: “‘Plain’ is synonymous with ‘clear’ or, equivalently, ‘obvious.’” Id. at 734.

The formulation was similar in Puckett v. United States, 556 U.S. 129 (2009), with a counterpoint offered to show what is needed. The error, the Court said in Puckett, must be “clear or obvious, rather than subject to reasonable dispute.” Id. at 135.

The Tenth Circuit in this case did not use this approach. Instead, it required that there be on-point precedent at a very specific level for the error to be plain. It stated the claim here as being that the district court erred in relying on the erroneous calculation of the dismissed count in fixing Mr. Ross’s sentence. Ross, 716 Fed. App’x at 782; A4. It then said that, in general, to be plain “‘either the Supreme Court or this court must have addressed *the issue*.’” Id. at 783; A4 (emphasis added). As the

emphasized language shows, the Tenth Circuit was requiring that there be authority it was bound to follow in the specific context.

This approach distorts what must be shown under Olano and Puckett. Even in the absence of what would be controlling authority at that level of specificity, the right legal conclusion can be “clear or obvious.” Puckett, 556 U.S. at 135. Settled principles can point the way inexorably to a single conclusion. If the right result is compelled by an established test, it is not “subject to reasonable dispute.” Id. It is thus clear or obvious, and satisfies the plainness prong of the Olano test.

The United States Court of Appeals for the Second Circuit has sensibly reached this conclusion. In United States v. Brown, 352 F.3d 654, 664 (2d Cir. 2003), it rejected the notion that there must be a decision “precisely on point” for an error to be plain. Rather, the Second Circuit observed, the plainness test is “considerably more flexible” than that. Id. It allows for “the plainness of an error [to] depend on well-settled legal *principles* as much as well-settled legal *precedents*.” Id. (emphasis in original); see also id. at 667 (same). Brown dealt with the extension of such

principles to a different context. See id. at 665-69. It necessarily permits the use of a test established by precedent to a particular factual scenario.

Under a correct understanding of what it means for an error to be plain, the error in this case assuredly qualifies. There was no dispute in the Tenth Circuit -- and can be no dispute -- that the district court relied on the guideline range of the dismissed count in selecting the variant sentence. The issue thus boiled down to two questions. Is it obvious that, if a district court relies on a particular fact or legal conclusion in selecting a sentence -- like the guideline range for a dismissed count -- it must be right about that fact or legal conclusion? And is it obvious that the guideline range for the dismissed count here was not what the district court thought it to be?

The Tenth Circuit wrongly ended its inquiry at the first question. This Court in Gall v. United States, 552 U.S. 38 (2007), did not define the universe of what could make a sentence procedurally unreasonable. Instead, this Court wrote that a reviewing court must ensure a sentencing court “committed no significant procedural error.” Gall, 552 U.S. at 51. It then noted some such failings, introduced by the phrase “such as.” Id. This marks what then followed as examples only, and not an exhaustive

list. United States v. Carrasco-de-Jesus, 589 F.3d 22, 26 n.2 (1st Cir. 2009); United States v. Azure, 536 F.3d 922, 930 (8th Cir. 2008). With the exception of the failure to provide sufficient explanation, the examples are (not surprisingly) as to matters that can affect the choice of a sentence. The examples are correctly calculating the guideline range (which is to be the initial benchmark for choosing the sentence); not treating the guidelines as mandatory (which allows for a much wider range of choice of sentence); considering the § 3553(a) factors (which aids in selecting the sentence);, and “not selecting a sentence based on clearly erroneous facts.” Gall, 552 U.S. at 51.

This structure leaves no doubt that it is procedurally unreasonable to make an error in law as to a matter that the district court uses to select a sentence. Such a legal conclusion can well affect the sentence selected. The very fact that the district court invokes the conclusion as justification for the sentence -- as the district court did here, by using the guideline range for the dismissed count as a ground for its variant sentence, which added two years to Mr. Ross’s sentence -- makes this so.

The same conclusion follows unavoidably from the nature of review in this context. Review of whether a federal sentence is reasonable, both in procedure and in substance, is for abuse of discretion. Gall, 553 U.S. at 51. And “[a] district court by definition abuses its discretion when it makes an error of law.” Koon v. United States, 518 U.S. 81, 100 (1996).

It is no doubt for these reasons that the courts of appeals have easily held that an incorrect legal determination, just like a mistake of fact in the list of examples in Gall, can make a sentence procedurally flawed. E.g., United States v. Nguyen, 854 F.3d 276, 280 (11th Cir. 2017); United States v. Franklin Brown, 595 F.3d 498, 526 (3d Cir. 2010); United States v. Thorn, 446 F.3d 378, 391 (2d Cir. 2006); United States v. Price, 409 F.3d 456, 442-43 (D.C. Cir. 2005). That is, a district court commits procedural error when it relies on something in choosing a sentence that is incorrect as a matter of fact or as a matter of law.

The application of these well-settled principles establishes that, if the district court was in fact wrong about the guideline range for the dismissed count, it committed procedural error. This suffices under the Puckett formulation to show that the error is plain. A straightforward application

of those established principles shows the error to be “clear or obvious.” Puckett, 556 U.S. at 135. Likewise, the conclusion that there was error is not “subject to reasonable dispute.” Id.

The contrary approach of the Tenth Circuit in this case, which was based on controlling circuit law that it regularly applies, wrongly puts those claiming plain error in a straightjacket. They cannot prevail without favorable authority *on the precise issue that they have raised*. No matter how clearly the application of an established legal test or precedent leads to a conclusion that there was error, it will not matter if there is no such factually on-point authority. It is all the worse if, as the Tenth Circuit said here, the authority must be from either the Tenth Circuit or from this Court.

The defectiveness of the Tenth Circuit’s approach can also be seen by comparing it to the standard of adjudication under the federal habeas statutes. A federal habeas court cannot grant relief as to a legal error, on a claim the state court decided on the merits, unless the state-court decision is contrary to, or an unreasonable application, of this Court’s precedent. 28 U.S.C. § 2254(d). The “contrary to” provision requires that the state court

either used the wrong legal test, or reached a result different than this Court has on a set of materially indistinguishable facts. E.g., Williams v. Taylor, 529 U.S. 362, 405-06 (2000). The “unreasonable application” prong applies where the state court has identified the right legal standard, but has applied it in an unreasonable way. E.g., id. at 407. The standard furthers the strong interests of comity, federalism and finality that are at work where review is of a state conviction. Woodford v. Garceau, 538 U.S. 202, 206 (2003).

Even in that context, there need not be a case at the level of factual identity that the Tenth Circuit. A court may use the wrong legal test on a particular factual iteration of an issue, even if there is no case that has dealt with that factual circumstance. Likewise, a court may identify the right legal test, but apply it unreasonably to a set of facts not before considered. Wiggins v. Smith, 539 U.S. 510, 520 (2003). After all, the unreasonable-application provision presupposes that there is not a case that is factually square-on point and resolved in the petitioner’s favor, for if there were the “contrary to” prong would be met. The plain-error test, in which the interests of federalism and the like are absent, “is even more flexible,”

Brown, 352 F.3d at 664 n.9, and so does not demand the level of factual identity that the Tenth Circuit here required.

Indeed, this Court has held that the “objectively unreasonable” standard for unreasonable-application cases under § 2254(d) requires more than just “clear error.” White v. Woodall, 134 S.Ct.1697, 1702 (2014). Yet the Tenth Circuit requires more for “plain error” -- and of course, an error is plain if it is clear -- than what this Court has said is needed to show an unreasonable application of clearly established law. That just cannot be.

An approach that allows a court so easily to elide *any* inquiry into the merits of arguments that there clearly is error cannot be correct. It unjustifiably shuts off a determination of whether the error is not subject to reasonable dispute. It assumes, wrongly, that a result can be plainly in error only if some court has said as much in the exact same factual circumstance.

That the Tenth Circuit wrote that there must “in general” be on-point authority from that court or this one, Ross, 716 Fed. App’x at 783; A4, does not make its approach any less problematic. The Tenth Circuit has never shown the flexibility that the Second Circuit, in Brown, rightly

applies to the plainness inquiry. It does not -- as it should -- look to the application of well-settled legal *principles*, and not only well-settled legal precedents (much less only such precedents issued in the specific factual context at hand). Brown, 352 F.3d at 664.

The Tenth Circuit's approach wrongly precludes consideration of the ultimate question of plainness under Olano and Puckett. This Court should grant review to decide whether that approach can be squared with the decisions of this Court. Review is all the more appropriate given the few occasions that this Court has had to flesh out the plainness inquiry.

The Tenth Circuit did also say that Mr. Ross's claim was a factual one, and that resolving it would intrude on the district court's function. Ross, 716 Fed. App'x at 781; A3. Without findings by the district court, it continued, it could only speculate as to the basis for the calculation in the PSR. Id. And in a footnote, the court added that, although it did not rest its decision on this basis, plain error does not lie for factual errors. Id. at 781 n.3; A3.

That reasoning is seriously flawed, and is no basis not to accept this case for review. In his opening brief in the Tenth Circuit, Mr. Ross went

through each of the possible enhancements. He explained how they did not apply *on the facts laid out in the presentence report*. That is, he essentially argued that they could not, in this case, be applied *as a matter of law*. As he accepted the factual findings of the presentence report, deciding whether there was a basis for applying any of the enhancements would not intrude on any function of the district court. The issue was a legal question, not a factual one, and no deference is due a district court on questions of law.

To be sure, as to the two-level increase for obstruction, Mr. Ross did rely in good measure on the fact that the presentence report declared there was nothing to indicate Mr. Ross had obstructed or impeded justice. It would have been beyond strange for the district court nevertheless to have used an obstruction increase as part of the five-level increase, especially without mentioning this. The only logical conclusion is that this is not what the district court did.

But even if the Tenth Circuit's position might have some resonance with respect to the two-level increase for obstruction, there would still need to be three more levels added to wind up where the probation officer, and the district court, landed. Put another way, a two-level bump

for obstruction would have left Mr. Ross at a total-offense level of nineteen (an initial offense level under the robbery guideline of twenty, a two-level increase for obstruction, and a three-level decrease for acceptance of responsibility). In combination with his criminal-history category of IV, see Vol. 2 at 47, that would produce a guideline range of 46-57 months. The shorthand of five years that the district court used when it said Mr. Ross was facing “at least five years” had been convicted on the dismissed count, Vol. 3 at 54, for which the presentence report said the guideline range was 63-78 months, Vol. 2 at 54, would not describe the right range. Its minimum was three years and ten months.

Nor does the contention that the basis of the district court’s conclusion cannot be determined permit the side-stepping of the issue. The district court’s actual approach might matter if there were both permissible and impermissible ways to reach a particular conclusion. But here, there is no legitimate way to get to the result that the district court reached. Once that is shown, as Mr. Ross showed in the Tenth Circuit, the district court could only have taken an illegitimate path. It is irrelevant which one the district court in fact took.

Of course, it may take more to make such a showing where there has not been an explanation by the district court of how it reached its result. That is why this Court in Gall required a sentencing court to spell out how it reached its conclusion. It was a procedural requirement in aid of effective appellate review. It was harder for Mr. Ross to show error here, as his lack of objection to the incorrect guideline range for the dismissed count meant the district court did not lay out why it reached the conclusion it did. Mr. Ross therefore had to negate all legitimate bases for the conclusion. But that is no reason at all to conclude that he has not shown plain error where, as here, he in fact showed that there was no possible path to the guideline range the district court used.

In sum, the Tenth Circuit's view of plainness is inconsistent with the articulation of the standard in this Court's precedent. It is also at odds with the approach used by the Second Circuit. This Court should grant review to reach the important issue regarding the plain-error test that this case presents.

CONCLUSION

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

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ Howard A. Pincus
HOWARD A. PINCUS
Assistant Federal Public Defender
Counsel of Record
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002