No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES EARL DAVIS,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

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APPENDIX A

United States District Court

NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA

v.

CHARLES EARL DAVIS

JUDGMENT IN A CRIMINAL CASE

Case Number: **3:17-CR-00010-D(1)**
USM Number: **55306-177**
Juan Gabriel Rodriguez
Defendant's Attorney

THE DEFENDANT:

☒	pleaded guilty to count(s)	**1 and 2 of the indictment filed on January 10, 2017.**
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☐	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1) & 924(a)(2) Felon In Possession Of A Firearm	07/29/2016	1
21: U.S.C. § 841(a)(1) & (b)(1)(C) Possession With Intent To Distribute A Controlled Substance	07/29/2016	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 15, 2018
Date of Imposition of Judgment

Signature of Judge

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

June 15, 2018
Date

DEFENDANT: CHARLES EARL DAVIS
CASE NUMBER: 3:17-CR-00010-D(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

fifty-seven (57) months as to counts 1 and 2.

It is ordered that the sentences on counts 1 and 2 shall run concurrently with one another, except as to the mandatory special assessments, which shall run consecutively.

It is ordered that the sentence shall run concurrently with any sentences hereafter imposed in Case Nos. F-1657010 and F-1657011, by the 363rd Judicial District Court of Dallas County, Dallas, Texas, and consecutively to any sentences hereafter imposed in Case No. 31045, pending in the 196th Judicial District Court of Hunt County, Greenville, Texas, Case No. CR1600287, pending in Hunt County Court at Law No. 1, Greenville, Texas, Case No. 0216634, pending in the 8th Judicial District Court of Hopkins County, Sulphur Springs, Texas, Case No. 26766, pending in the 354th Judicial District Court of Hunt County, Greenville, Texas, and Case No. 31,510, pending in the 3rd Judicial District Court of Anderson County, Palestine, Texas.

☒ The court makes the following recommendations to the Bureau of Prisons:

that the defendant be assigned to FCI-Seagoville, if eligible, or FCI-El Reno, Oklahoma, if eligible.

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

DEFENDANT: CHARLES EARL DAVIS
CASE NUMBER: 3:17-CR-00010-D(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **three (3) years on each of count 1 and 2 to run concurrently with each other.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: CHARLES EARL DAVIS
CASE NUMBER: 3:17-CR-00010-D(1)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: CHARLES EARL DAVIS
CASE NUMBER: 3:17-CR-00010-D(1)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $10 per month.

DEFENDANT: CHARLES EARL DAVIS
CASE NUMBER: 3:17-CR-00010-D(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$200.00	$.00	$.00	$.00

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: CHARLES EARL DAVIS
CASE NUMBER: 3:17-CR-00010-D(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

It is ordered pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c) that the defendant shall forfeit to the United States of America a Walther, Model P22, .22 caliber handgun, bearing Serial No. L074866, any ammunition recovered with the weapon and any U.S. Currency recovered.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
April 30, 2019

Lyle W. Cayce
Clerk

No. 18-10748
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CHARLES EARL DAVIS,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CR-10-1

Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*

Charles Earl Davis appeals the sentence imposed following his guilty plea conviction for possession with intent to distribute a mixture and substance containing methamphetamine and being a felon in possession of a firearm. He argues that the district court erred by not ordering his sentence to run concurrently with any sentence imposed for two pending state charges arising from a prior arrest, which he asserts are relevant conduct to his instant offense.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Davis's unpreserved arguments challenging the consecutiveness of his sentence under U.S.S.G. § 5G1.3 raise fact questions pertaining to whether the conduct underlying his previous arrest was sufficiently connected or related to the underlying offense to qualify as relevant conduct under U.S.S.G. § 1B1.3. "Questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error." *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991) (per curiam); *see also United States v. Vital*, 68 F.3d 114, 118-19 (5th Cir. 1995).

Further, Davis's argument that *United States v. Olano*, 507 U.S. 725 (1993), and *United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994) (en banc), *abrogated on other grounds by Johnson v. United States*, 520 U.S. 461, 468 (1997), which addressed legal error, dictate that we not follow *Lopez* is unpersuasive. He effectively asks us to overturn this court's precedent, which we may not do. *See United States v. Walker*, 302 F.3d 322, 324-25 (5th Cir. 2002). To the extent Davis relies on decisions that conflict with *Lopez*, we follow *Lopez* because it is the earlier line of precedent. *See United States v. Wheeler*, 322 F.3d 823, 828 n.1 (5th Cir. 2003).

Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 18-10748

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES EARL DAVIS,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

INITIAL BRIEF OF APPELLANT
CRIMINAL APPEAL

Kevin Joel Page
Assistant Federal Public Defender
525 Griffin Street, Suite 629
Dallas, Texas 75202
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214.767.2886 (Fax)
Texas State Bar No. 24042691
Attorney for Appellant/Defendant

CERTIFICATE OF INTERESTED PERSONS

I certify that the following individuals may have an interest in the outcome of this case. I make these representations in order that the members of this Court may evaluate possible disqualifications or recusal.

District Judge:	Honorable Judge Sidney Fitzwater
Appellant:	Charles Earl Davis
Federal Public Defender:	Jason D. Hawkins
Assistant Federal Public Defender:	Aisha Dennis (Trial)
	Laura Harper (Trial)
	Juan Rodriguez (Trial)
	Kevin Joel Page (Appeal)
United States Attorney for The Northern District of Texas:	Erin Nealy Cox
Assistant U.S. Attorney for The Northern District of Texas:	John Boyle (Trial)
	J. Wesley Hendrix (Appeal)

/s/ Kevin Joel Page
Kevin Joel Page

STATEMENT REGARDING ORAL ARGUMENT

Oral argument may be helpful to address the application of plain error standards to a relevant conduct determination.

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UNITED STATES SENTENCING GUIDELINES

SUBJECT MATTER AND APPELLATE JURISDICTION

1. **Subject Matter Jurisdiction in the District Court**. The district court exercised jurisdiction over this case under 18 U.S.C. § 3231.

2. **Jurisdiction in the Court of Appeals.** This is a direct appeal from a final decision of the U.S. District Court for the Northern District of Texas, Dallas Division. This Court has jurisdiction under 18 U.S.C. §3742(a) and 28 U.S.C. § 1291.

The district court entered written judgment June 15, 2018, and Appellant filed his notice of appeal June 22, 2018, which complies with Fed. R. App. P. 4. *See* (ROA.82, 89).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court plainly erred in its application of USSG §5G1.3?

STATEMENT OF THE CASE

Facts and Proceedings Below

On July 29, 2016, Appellant Charles Earl Davis was approached by police because homeowners complained about his parked car in their neighborhood. *See* (ROA.143). The police ordered him out of his car because they smelled marijuana. *See* (ROA.143). When they did so, they found methamphetamine, ecstacy, and a firearm. *See* (ROA.143).

A similar event had happened about ten months earlier. On October 4, 2015, Mr. Davis was riding in a car stopped for a broken tail light. *See* (ROA.155). The police emptied the vehicle on account of a smell of marijuana, just as they would do again in ten months. *See* (ROA.155). They found marijuana and a firearm on his person, together with other guns and drugs in the car and on other passengers. *See* (ROA.155).

These incidents extended a clear pattern. Mr. Davis was arrested for the possession of controlled substances in 2002, 2008, and 2010, and for gun possession in 2002 and 2003. *See* (ROA.146-154).

The federal government indicted Mr. Davis for the guns and methamphetamine found in his car during the July 19, 2016 stop. *See* (ROA.9-10). He pleaded guilty, and a Presentence Report (PSR) found a Guideline range of 51-63 months

imprisonment. *See* (ROA.49-53, 162). The PSR also noted four pending state charges. *See* (ROA.155-256). Two of these – one for unlawful possession of a firearm, and one for delivery of a controlled substance – arose from the same July 29, 2016 conduct that produced the federal charges. *See* (ROA.156); (PSR ¶54). Two more – one for possession of a firearm, and one for possession of marijuana – arose from the October 4, 2015 traffic stop. *See* (ROA.156); (PSR ¶¶52-53).

The PSR contained no recommendation as to whether these charges should run concurrently or consecutively to the federal sentence. The court sentenced the defendant to two concurrent terms of 57 months imprisonment on the instant federal charges. *See* (ROA.133). It ordered that 57 months served concurrently with any state sentence that might arise from the July 29, 2016 arrest. *See* (ROA.135). But it ordered consecutive service of all other pending charges, including those arising from the October 4, 2015 arrest. *See* (ROA.135).

SUMMARY OF THE ARGUMENT

Barring circumstances not at issue here, the Guidelines recommend concurrent service of anticipated federal sentences that flow from "relevant conduct." *See* USSG §5G1.3. "Relevant conduct" includes acts that comprise a common "course of conduct" when considered with the offense of conviction. USSG §1B1.3(a)(2). The two gun and drug charges accrued in the year prior to the instant offense plainly satisfy that definition.

Accordingly, the Guidelines plainly recommend concurrent service of these anticipated sentences. While the district court is permitted to sentence at variance with these recommendations, it is not presumed to do so from a silent record. *See United States v. Simmons*, 470 F.3d 1115, 1131 (5th Cir. 2006); *United States v. Rangel*, 319 F.3d 710, 715-716 (5th Cir. 2003). Accordingly, this Court should remand so that the court below may either honor the Guideline recommendation as to concurrent or consecutive service of these sentences, or may clarify that it intends to vary or depart therefrom. *See Rangel*, 319 F.3d at 715-716.

ARGUMENT AND AUTHORITIES

I. The district court plainly erred in assessing criminal history points for a conviction it found to arise from relevant conduct.

A. Standard of Review

Unpreserved error requires a showing of: 1) error, 2) that is clear or obvious, 3) that affects substantial rights, and 4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings, meriting discretionary relief. *See United States v. Olano*, 507 U.S. 725, 732 (1993).

B. Discussion

1. Error

A district court is entitled to order its sentences served concurrently or consecutively to anticipated state terms of imprisonment. *See Setser v. United States*, 566 U.S. 231 (2012). The Sentencing Commission has provided guidance for the exercise of such discretion in USSG §5G1.3. When the defendant has an undischarged sentence – a sentence begun but not completed at the time of federal sentencing – the Commission recommends a consecutive sentence if the instant offense was committed while on supervision, incarceration, or escape status for the undischarged sentence. USSG §5G1.3(a). If not, and the sentence stems from "relevant conduct" to the instant offense, the Commission recommends a concurrent

sentence. *See* USSG §5G1.3(b). In USSG §5G1.3(c), the Commission extends this recommendation to anticipated sentences.

As noted above, Mr. Davis accrued a state gun charge and a state drug charge during a vehicle stop on October 4, 2015. Neither charge satisfies USSG §5G1.3(a). As will be shown, both are relevant conduct, and accordingly fall within USSG §5G1.3(b). The Commission therefore recommends a concurrent sentence in each case. *See* USSG §5G1.3(c).

The Commission defines "relevant conduct" to include, "solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction." USSG §1B1.3(a)(2). "Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." USSG §1B1.3, comment. (n. (5)(B)(ii)). The October 4, 2015 charges easily pass this test.

First, drug and gun offenses are "of a character for which § 3D1.2(d) would require grouping of multiple counts." USSG §1B1.3(a)(2). This is clear from the

second table in USSG §3D1.2(d), which expressly names the gun and drug Guidelines as offenses that may be grouped under that Subsection.

Further, the three factors named in the Commentary to USSG §1B1.3 – similarity, regularity, and temporal proximity – all unequivocally support a relevant conduct finding.

Temporal proximity: The October 4, 2015 charges arose from conduct that occurred within one year of the instant federal offenses. "It is well settled in this circuit that offenses which occur within one year of the offense of conviction may be considered relevant conduct for sentencing." *United States v. Ocana*, 204 F.3d 585, 590 (5th Cir. 2000).

Regularity: Mr. Davis's gun and drug offenses were regularly repeated. Specifically, the defendant was arrested for gun and/or drug offenses in 2002 (gun and drugs), 2003 (gun), 2008 (drugs), 2010 (drugs), 2015 (gun and drugs), and 2016 (gun and drugs). *See* (ROA.146-154). Comparable repetition has been held to support a relevant conduct finding. *See Ocana*, 204 F.3d at 591.

Similarity: Finally, the similarity of the offenses is striking. In both the 2015 and 2016 arrests, the defendant was detained in a traffic stop with a handgun and a relatively small quantity of drugs: 1.55 grams of marijuana and a .380 pistol on October 4, 2015, (ROA.155), (PSR, ¶¶52-53), and 6 grams of ecstacy, 4 grams of

methamphetamine mixture, and a .22 caliber revolver on July 29, 2016, (ROA.143),(PSR, ¶¶6-9). Because there was a common means of transportation, and comparable scale of offense, the similarity factor clearly supports a finding of relevant conduct. *See United States v. Bethley*, 973 F.2d 396, 401 (5th Cir. 1992)(affirming "course of conduct" finding where "[t]he quantities involved were similar--ounce quantities[,]" and "the source and type of drug were the same.").

The plain recommendation of the Commission on these facts is for a concurrent sentence as to the October 4, 2015 charges. A district court may depart (or, presumably, vary) from the Commission's recommendations in USSG §5G1.3. *See United States v. Rangel*, 319 F.3d 710, 715-716 (5th Cir. 2003). But it is not presumed to do so on a silent record. *See United States v. Simmons*, 470 F.3d 1115, 1131 (5th Cir. 2006)("Accordingly, a district court should acknowledge such a policy statement and explain why the prohibited or discouraged factor, as it relates to the defendant, is so extraordinary that the policy statement should not apply."); *Rangel*, 319 F.3d at 715-716 (declining to presume that the district court intended to impose a consecutive sentence where Guidelines called for a concurrent sentence). The appropriate response in such a case is to remand. *See id.*

2. Plain or obvious

The error is plain. Certainly, the guidance of USSG §5G1.3 is clear: relevant conduct should result in a concurrent sentence unless the defendant was on supervision, incarcerated, or awaiting sentence for the instant offense. Further, the application of USSG §1B1.3(a)(2) is clear. All three factors noted in the Commentary to USSG §1B1.3 unequivocally support a finding of relevant conduct on a "course of conduct" theory.

This Court sometimes holds that relevant conduct errors are factual in nature and therefore immune from plain error review. *See United States v. McCaskey*, 9 F.3d 368, 376 (5th Cir. 1993); *United States v. Vital*, 68 F.3d 114, 118-119 (5th Cir 1995); *United States v. Pofahl*, 990 F.2d 1456, 1478-1479 (5th Cir. 1993); *United States v. Ables*, 2018 U.S. App. LEXIS 17169 (5th Cir. 2018)(unpublished). In other cases, however, it engages in such review. *See United States v. Ruiz*, 43 F.3d 985, 992 (5th Cir. 1994)(affording such review); *United States v. Garcia*, 588 Fed. Appx. 381, 381 (5th Cir. 2014)(unpublished)(same); *United States v. Buchanan*, 485 F.3d 274, 286-287 (5th Cir. 2007).

In this case, the error should be classed as legal rather than factual. The underlying facts are not in dispute, including the nature and timing of the arrests, the drug quantities, and the presence of firearms. The case concerns only the proper legal

interpretation of these undisputed facts. This is a legal issue, and should accordingly be eligible for plain error review. Further, if this Court is unclear about whether the district court intended to find, as a factual matter, the absence of relevant conduct, it may remand for additional information. *See Molina-Martinez v. United States*, __U.S.__, 136 S.Ct. 1338, 1349 (2016)(authorizing limited remand to determine the third prong of plain error review).

Alternatively, this Court should decline to apply the rule that factual error may never be plain. This rule finds no support in the text of Federal Rule of Criminal Procedure 52, which simply does not distinguish between factual and legal error. Further, it conflicts with Fifth Circuit panel opinions, with this Court's *en banc* decision in *United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994)(*en banc*), and with the Supreme Court's decision in *Olano*, which, like Rule 52, does not distinguish between factual and legal error. As this Court observed in *United States v. Rodriguez*, 15 F.3d 408 (5th Cir. 1994):

> Some of our pre-*Olano* cases seem to imply that factual issues are not subject to review under the plain error standard. *See, e.g., United States v. Garcia-Pillado*, 898 F.2d at 39 (emphasis added) (quoting *Self v. Blackburn*, 751 F.2d 789, 793 (5th Cir. 1985)) ("issues raised for the first time on appeal 'are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice'"). Others imply that a factual issue may be reviewed for plain error, but only if the failure to consider it would constitute a miscarriage of justice. *See, e.g., United States v. Lopez*, 923 F.2d at 50

("when a new factual or legal issue is raised for the first time on appeal, plain error occurs where our failure to consider the question results in 'manifest injustice'"); *Atlantic Mut. Ins. Co. v. Truck Ins. Exch.*, 797 F.2d 1288, 1293 (5th Cir. 1986) ("An issue raised for the first time on appeal generally is not considered unless it involves a purely legal question or failure to consider it would result in a miscarriage of justice"). In *Lopez*, our court stated that "questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error", and that "for a fact issue to be properly asserted, it must be one arising outside of the district court's power to resolve". 923 F.2d at 50. We need not resolve this apparent conflict, including with *Olano*, in light of our decision to exercise our discretion to decline to review Rodriguez's challenge to the fine.

Rodriguez, 15 F.3d at 416.

Tracing the rule's history in this Court, its origins appear to lie in pre-*Olano* civil cases. These cases held that "our rule against considering issues raised for the first time on appeal can give way when a pure question of law is involved and the refusal to consider it will result in a miscarriage of justice." *Holiday Inns, Inc. v. Alberding*, 683 F.2d 931, 933 (5th Cir.1982), cited in *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1364 (5th Cir. 1983), cited in *In re Johnson*, 724 F.2d 1138, 1140 (5th Cir. 1984), cited in *Self*, 751 F.2d at 793, n.18, cited in *United States v. Mourning*, 914 F.2d 699, 703 (5th Cir. 1990), cited in *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991). Recognizing that this way of articulating the plain error rule was displaced by *Olano* and not entirely consistent with the text of Federal Rule of

Criminal Procedure 52(b), this Court overruled it *en banc* in *United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994)(*en banc*):

> on occasion our decisions have abbreviated the plain error inquiry into whether the "issues raised for the first time on appeal are purely legal questions and failure to consider them would result in manifest injustice." Such a shorthand articulation of the plain error standard improvidently suggests that all purely legal questions – not just those with clear answers under current law – are reviewable under the plain error umbrella. As observed by a panel of this court in *U.S. v. Rodriguez*, which foreshadows today's decision, that is an incorrect statement of the law. ... We today disavow all holdings and articulations inconsistent herewith.

Calverley, 37 F.3d at 163-164 (internal citations and footnotes omitted).

Accordingly, the distinction between factual and legal error in plain error cases has been repudiated by both the Supreme Court and this Court's *en banc* opinion in *Calverley*. The rule that factual error may never be plain is well suited to its civil origins. In those cases, the parties rarely dispute a party's very right to remain at liberty, and the consequences of non-preservation have not been codified. But the rule is not well-suited to the criminal context, and should not have been extended thereto. All clear or obvious error that affects the defendant's substantial rights – factual or legal – presents a potential miscarriage of justice, and should be subject to correction in the appropriate case.

This Court rejected these arguments in an unpublished opinion in *United States v. Ables*, 728 Fed. Appx. 394 (5th Cir. 2018)(unpublished). *Ables* reasoned that to remedy plain factual error would "overturn [this C]ourt's precedent." *Ables*, 728 Fed. Appx. at 395. Respectfully, however, *Ables* fails to recognize that this Court's precedent is simply in conflict on this point. ***Compare*** *United States v. Lopez*, 923 F.2d 47 (5th Cir. 1991), ***with*** *United States v. Rodriguez*, 15 F.3d 408 (5th Cir. 1994). In such a case, this Court should recognize the guidance of higher authority in the form of *Olano*, *Calverley* and the text of the Rule itself. In any case, *Ables* itself is unpublished and non-binding. And is distinguishable, because it involved issues that were more clearly factual: "questions pertaining to the type and number of images involved and whether the money he received from extorting other pedophiles accurately reflected his pecuniary gains." *Ables*, 728 Fed. Appx. at 394. Here, by contrast, the issue is the application of USSG §1B1.3(a)(2) to undisputed facts.

3. Substantial rights

The sentencing Guidelines are the starting point and benchmark for federal sentencing. *See Morales-Martinez*, 136 S.Ct. at 1345. Most sentences are accordingly imposed consistent with the Guideline recommendations. *See id.* at 1346. As a result, a sentence that is inadvertently imposed at variance with the Guidelines presumptively affects the defendant's substantial rights. *See id.* Here, there is no

evidence that the district court intended to sentence at variance with the Guidelines. And if there is any question about whether the district court would have imposed a consecutive sentence aware of the Guideline recommendation, this Court need only ask. *See Molina-Martinez*, 136 S.Ct. at 1349.

4. Discretionary remand

A Guideline error that affects the term of imprisonment presumptively affects the fairness, integrity and public reputation of judicial proceedings. *See Rosales-Mireles v. United States*, 138 S.Ct. 1897 (2018). That presumption is fully implicated in this case, as consecutive service of additional criminal sentences would extend the defendant's aggregate term of imprisonment. Further, USSG §5G1.3 is intended to avoid double punishment for the same criminal conduct. This goal is critical to maintain the fairness of judicial proceedings.

CONCLUSION

Appellant respectfully prays that his sentence be vacated and his cause remanded, or for such relief as to which he may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kevin Joel Page, hereby certify that on this the 22nd day of October, 2018, the Appellant's Brief was served via ECF and by separate email to counsel for the Plaintiff-Appellee, Assistant U. S. Attorney J. Wesley Hendrix at Wes. Hendrix@usdoj.gov. I further certify that: 1) all privacy redactions have been made pursuant to 5th Cir. Rule 25.2.13; 2) the electronic submission is an exact copy of the paper documents pursuant to 5th Cir. Rule 25.2.1; and 3) the document has been scanned for viruses with the most recent version of Norton Anti-virus and is free of viruses. Further I certify that I sent a paper copy via regular mail to Mr. Davis.

/s/ Kevin Joel Page
Kevin Joel Page

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Exclusive of the exempted portion in 5th Cir. R. 32.2.7(b)(3), this brief contains no more than 3,116 words.
2. This brief has been prepared in proportionally spaced typeface using Word Perfect X5 in Times New Roman typeface and 14 point font size.
3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

/s/ Kevin Joel Page
Kevin Joel Page

APPENDIX D

18-10748

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

CHARLES EARL DAVIS,
Defendant-Appellant

On Appeal from the United States District Court
For the Northern District of Texas
Dallas Division
District Court No. 3:17-CR-010-D

APPELLEE'S BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

The only issue presented in this appeal is whether the district court plainly erred in its relevant-conduct determination and resulting decision to order Davis's sentence consecutive to an anticipated state sentence from a distinct, unrelated crime committed at a separate time. The Court can easily affirm because fact issues capable of resolution in the district court can never constitute plain error. In any event, the court was well within its discretion in finding the state offense at issue unrelated to the federal offense. The two offenses are separated by nearly ten months and involve different drugs, different guns, and different participants. Thus, the issue is simple, and the record is short. Oral argument would not aid the Court.

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STATEMENT OF JURISDICTION

This is a direct appeal from a sentence in a criminal case. The district court had jurisdiction under 18 U.S.C. § 3231, and this Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The district court entered judgment on June 15, 2017, and Davis timely filed the notice of appeal on June 22, 2018. Fed. R. App. P. 4(b). (ROA.82, 89.)

STATEMENT OF THE ISSUE

Whether the district court committed reversible plain error by (a) finding that Davis's possession of marijuana and a gun in 2015 was not relevant conduct to Davis's federal conviction for possession of ecstasy and a gun in 2016 under USSG § 1B1.3; and (b) ordering Davis's federal sentence for the 2016 offense to run consecutively to an anticipated state sentence for his separate 2015 offense under USSG § 5G1.3(d).

STATEMENT OF THE CASE

1. The facts supporting Davis's conviction are undisputed; Davis pled guilty to possession of a firearm as a felon and possession with intent to distribute ecstasy.

The fundamental facts concerning the criminal offenses underlying this appeal are undisputed. (ROA.52-53.) Davis admits that on or about July 29, 2016 ("the July 2016 offense"), the vehicle Davis was driving was searched by officers of the Dallas, Texas Police Department, and the officers located a .22 caliber handgun in the vehicle. (ROA.52-53.) Davis also admits that at the

time of the July 2016 offense, he was a convicted felon. (ROA.52-53.) Finally, Davis admits that during this same July 2016 offense, he was knowingly and intentionally possessing ecstasy/methamphetamine pills with the intent to distribute them. (ROA.53.)

Davis was promptly arrested after the vehicle search. (ROA.142.) Davis faced state charges of manufacture/delivery of a controlled substance and unlawful possession of a firearm by a felon. (ROA.142.) As of the date of the Presentence Investigation Report ("PSR"), both charges remained pending in the 363rd Judicial District of Dallas County, Dallas, Texas. (ROA.142.)

In January 2017, Davis was indicted on two federal counts for his July 2016 conduct: Count One: felon in possession of a firearm (the .22 caliber handgun); and Count Two: possession with intent to distribute a controlled substance (methamphetamine).[1] (ROA.9-10.) He pled guilty to both counts. (ROA.49-50, 97.)

[1] The PSR and the district court refer to the pills as containing ecstasy. (ROA.132, 143.) Davis's factual resume below and brief on appeal do the same. (Brief at 3; ROA.53.) However, the record reflects that the lab test showed the pills contained bk-DMBDB 1-(1, 3-benzodioxol-5-yl)-2-(dimethylamino)-1-butanone, an MDMA analogue which is a controlled substance under Texas law, and methamphetamine. (ROA.143.) Davis raised no issue in the district court as to the proper name or classification of these pills, and similarly, raises no such issue on appeal. For simplicity, the government refers to the drugs found on Davis's person during the July 2016 traffic stop as "ecstasy."

2. The PSR detailed Davis's extensive criminal history, including pending charges and prior convictions, as well as some mitigating factors.

The PSR detailed the July 2016 offense and Davis's arrest. (ROA.143.) First, the investigation for the July 2016 offense began when officers were investigating the report of a suspicious vehicle driven by Davis and parked outside of a residence. (ROA.143.) When officers encountered Davis, a strong odor of marijuana emitted from the vehicle. (ROA.143.) As Davis was exiting the vehicle, officers observed a black semi-automatic handgun in the driver-side door compartment. (ROA.143.) A subsequent search of Davis revealed a bag containing approximately 30 pills in varying colors and weighing approximately six grams, which Davis admitted were ecstasy. (ROA.143.) A records search revealed Davis had a prior felony conviction and a pending parole violation warrant. (ROA.143.)

The PSR grouped Counts One and Two together, coming to a base offense level of 14. (ROA.145.) The Report added two levels because the firearm at issue was stolen and another four because Davis possessed the firearm in connection with the felony offense of possessing the ecstasy pills. (ROA.145.) After a three-level reduction for acceptance of responsibility, the final total offense level was 17. (ROA.146.)

Davis's adult criminal convictions consisted of: theft of property (2001); possession of a controlled substance (2002); theft (2002); driving while intoxicated (2003); unlawful carrying of a weapon (2003); criminal trespass (2003); bail jumping and failure to appear (2007); possession of a controlled substance (2008); driving while intoxicated (2008); possession of a controlled substance (2010); and possession of a prohibited item at a correctional facility (2013). (ROA.146-53.) These criminal convictions resulted in a subtotal criminal history score of 20. (ROA.153.)

The PSR detailed Davis's pending state charges stemming from two incidents: (1) the above-described July 2016 offense, and (2) an arrest of October 4, 2015. (ROA.155-56.) Again, as of the date of the PSR, Davis was awaiting prosecution for manufacturing/delivery of a controlled substance and unlawful possession of firearm by a felon by the States of Texas for the July 2016 offense. (ROA.156.)

Davis's October 4, 2015 arrest resulted from a traffic stop conducted on a vehicle with a defective brake lamp (the "October 2015 offense"). (ROA.155.) A strong odor of marijuana emitted from the vehicle. (ROA.155.) One of the passengers, Ryheim Gray, was determined to have outstanding warrants and marijuana in his possession, and he was placed under arrest. (ROA.155.) Another passenger in the vehicle, Anthony Alex, was in possession of

synthetic marijuana, and he was placed under arrest. (ROA.155.) Davis was a rear passenger in the vehicle. (ROA.155.) A search of the vehicle revealed a .380 caliber handgun located in the immediate area of Davis. (ROA.155.) Davis was also found to have 1.55 grams of marijuana in his pocket. (ROA.155.) A continued search of the vehicle revealed a second firearm, a 9-millimeter Luger A09 loaded with 10 rounds of ammunition, and additional synthetic marijuana located in a purse belonging to the driver, Carla Thomas. (ROA.155.) As of the date of the PSR, charges by the State of Texas against Davis for this offense remained pending. (ROA.155.)

Based upon a Total Offense Level of 17 and a Criminal History Category of VI, the Guideline Imprisonment Range set forth in the PSR was 51 months to 63 months. (ROA.162.) The PSR made no recommendation as to whether any sentences should run concurrently or consecutively, either with each other or with any anticipated sentences for pending state charges.

The Government did not object to the PSR and adopted it. (ROA.167.) Davis made no written objections to the PSR, but as noted *infra*, did make verbal objections to the PSR at the sentencing hearing. (ROA.122-23). The district court adopted the PSR without change. (ROA.168.)

3. The district court issued a within-guidelines sentence and ordered that it run consecutively to any sentence imposed in the 2015 state case.

The government sought a sentence for Davis at the "high end of the guidelines" at the sentencing hearing and outlined Davis's lengthy criminal history for the district court. (ROA.119-22.)

Davis's counsel acknowledged his criminal history, as outlined in the PSR. (ROA.122.) Davis's counsel also asked the district court to run any sentence for the federal offense of conviction with any sentence for the state charges for the same 2016 offense, pointing to Davis's "two state cases with Dallas County that [Davis] would ask the court—which is the basis for this federal case, [Davis] would ask the court to run concurrent under 5G1.3(c)." (ROA.122-23.) Davis made no other motion or objection as to the issue of concurrent or consecutive sentences.

The district court imposed a within-guidelines sentence of 57 months as to Counts One and Two. (ROA.83.) Addressing whether Davis's sentences for the July 2016 and October 2015 offenses would run concurrently or consecutively, the district court stated:

> It is ordered that the sentences on Counts 1 and 2 shall run concurrently with one another, except as to the mandatory special assessments, which shall run consecutively.
>
> It is also ordered that the sentence shall run concurrently with any sentences hereafter imposed in Case Nos. F-1657010 and F-1657011, by the 363rd Judicial District Court of Dallas County, Dallas, Texas [from the July 2016 offense], and consecutively to

> any sentences hereafter imposed in Case No. 31045, pending in the 196th Judicial District Court of Hunt County, Greenville, Texas[;] Case No. CR1600287, pending in Hunt County Court of Law No. 1, Greenville, Texas, Case No. 0216634, pending in the 8th Judicial District Court of Hopkins County, Sulphur Springs, Texas[;] Case No. 26766, pending in the 354th Judicial District Court of Hunt County, Greenville, Texas[;] and Case No. 31,510, pending in the 3rd Judicial District Court of Anderson County, Palestine, Texas [from the October 2015 offense].

(ROA.83, 135.) Davis did not object to his sentence.

SUMMARY OF THE ARGUMENT

The district court did err, plainly or otherwise, in its sentencing of Davis. Davis argues that the court erred in finding that his 2015 arrest for possession of marijuana and a .38 handgun was not relevant conduct with regard to his conviction for his 2016 possession of ecstasy and a .22 caliber handgun. In this claim, Davis attempts to raise a new fact issue—whether those acts qualify as relevant conduct—that the district court was capable of resolving on proper objection at sentencing, and therefore this fact issue cannot constitute plain error on appeal. Even if this Court were to apply ordinary plain-error analysis, Davis has shown no error because his 2015 offense was clearly not relevant conduct to his 2016 offense of conviction, as they were neither part of a common scheme or plan nor part of the same course of conduct. The two offenses are separated by nearly ten months and involved different drugs, different guns, and different participants. This Court can easily affirm.

ARGUMENT AND AUTHORITIES

The district court did not err, plainly or otherwise, by running the federal sentence consecutively to an anticipated state sentence involving different drugs, a different gun, and different participants.

Standard of Review

Davis readily admits that he did not object to the district court's ruling that his federal sentence would run consecutively to any anticipated state sentences for the October 2015 offense and plain error review is therefore appropriate. (Brief at 6.) To demonstrate plain error, Davis must show that "(1) there is an error or defect; (2) the legal error is clear or obvious, rather than subject to reasonable dispute; and (3) the error affected the appellant's substantial rights." *Puckett v. United States*, 556 U.S. 129, 135 (2009). A clear or obvious error is one that was so plain that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Lucas*, 849 F.3d 638, 645 (5th Cir. 2017) (internal quotation marks omitted). To prove that an error affected substantial rights, the defendant must "demonstrate that it affected the outcome of the district court proceedings." *Puckett*, 556 U.S. at 135.

If the appellant meets these requirements, this Court "has the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation marks omitted; emphasis added); *see also*

Rosales-Mireles v. United States, 138 S. Ct. 1897, 1904-5 (2018). "Meeting all four prongs is difficult, as it should be." *Puckett*, 556 U.S. at 135 (internal quotation marks omitted).

Discussion

1. Davis cannot establish plain error because he is challenging a factual finding.

Davis claims that the district court plainly erred in not considering the facts related to the October 2015 offense as relevant conduct to the July 2016 offense and contends that this Court only "sometimes holds that relevant conduct errors are factual in nature." (Brief at 10.) However, this Court has repeatedly applied the rule that "[q]uestions of fact capable of resolution by the district court on proper objection at sentencing can never constitute plain error." *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991). Indeed, this Court has applied this rule over a hundred times[2]—most recently, in *United States v. Melendez*, ____ F. App'x ____, 2018 WL 4781510 (5th Cir. Oct. 3,

[2] In the interest of brevity, the government will not cite all of the cases that have applied this rule. Rather, it warrants to the Court that its Westlaw search turned up well over 100 cases in which the Court has resolved factual issues by applying the rule. In fact, the Court has applied the rule at least eleven times in the last two years. *See Melendez*, 2018 WL 4781510, at *2; *United States v. Owens*, 738 F. App'x 299, 299 (5th Cir. Sept. 19, 2018); *United States v. Ables*, 728 F. App'x 394, 394 (5th Cir. June 25, 2018); *United States v. Maxey*, 699 F. App'x 435 (5th Cir. Nov. 1, 2017); *United States v. Glaze*, 699 F. App'x 311, 311 (5th Cir. Oct. 16, 2017); *United States v. Oti*, 872 F.3d 678, 694 (5th Cir. Oct. 3, 2017); *United States v. Reynolds*, 703 F. App'x 295, 298 n.6 (5th Cir. Aug. 3, 2017); *United States v. Sphabmisai*, 703 F. App'x 275 (5th Cir. Aug. 1, 2017); *United States v. Bookout*, 693 F. App'x 332, 333 (5th Cir. July 13, 2017); *United States v. McCain-Sims*, 695 F. App'x 762, 766 (5th Cir. Jun. 12, 2017); *United States v. Ramirez-Castro*, 687 F. App'x 400, 400 (5th Cir. Apr. 25, 2017).

2018), when the defendant attempted to attack the district court's "use of violence" enhancement of the defendant's sentence. *Id.* at *2.

This Court has also specifically held that "[a] determination of relevant conduct is a finding of fact." *United States v. Ekanem*, 555 F.3d 172, 175 (5th Cir. 2009) (citing *United States v. Buck*, 324 F.3d 786, 796 (5th Cir. 2003)); *see also United States v. Rhine*, 583 F.3d 878, 884-85 (5th Cir. 2009) (explaining that "[a] finding by the district court that unadjudicated conduct is part of the same course of conduct or common scheme or plan is a factual determination"); *see also United States v. Ocana*, 204 F.3d 585, 589 (5th Cir. 2000) (same).

Davis points to no case from this Court holding that a district court's determination as to whether a prior offense constitutes relevant conduct, therefore demanding concurrent sentencing, is a procedural determination that must be reviewed under the normal plain-error standard. Instead, Davis repeats the nearly verbatim argument made by the appellant in *United States v. Ables* that the rule has purportedly unsound legal support, yet Davis admits this argument was rejected by this Court in *United States v. Ables*, 728 F. App'x 394 (5th Cir. June 25, 2018). (Brief at 10-14.) The *Ables* panel reiterated that "questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error," and the panel rejected Ables' contention that *United States v. Olano*, 507 U.S. 725, 732 (1993), and

United States v. Calverly, 37 F.3d 160 (5th Cir. 1994) (en banc), compelled ordinary plain-error review. *Ables*, 728 F. App'x at 394.

Not only did the *Ables* panel squarely reject this argument, but this argument ignores (1) the regularity and consistency with which this Court has applied the rule in contexts such as this for the past 27 years, and (2) the logic in having such a rule with regard to unpreserved factual questions. As to logic, the rule is simply a shorthand way of acknowledging that, in reality, an appellant could not succeed in raising a new factual question on plain-error review because it would be impossible to show that the district court's failure to resolve the unobjected-to factual question was plainly erroneous. The rule is also logical in that it recognizes that the appellate court is not a fact-finding body and should not be in the business of receiving new evidence or new arguments related to evidence in the record and making factual findings on an issue for the first time. Indeed, "to allow appellate second-guessing when no factual error was pointed out below erodes the distinction between plain error and clear error." *United States v. Claiborne*, 676 F.3d 434, 439 (5th Cir. 2012) (Jones, J., concurring).

This Court has continued to faithfully follow its precedent and apply the rule in the years since *Lopez*. 923 F.2d at 50. It should do the same here and hold that Davis cannot demonstrate plain error with regard to the relevant-

conduct determination because he asks this Court to address previously unraised factual issues and affirm the district court's sentencing order. If the Court declines to apply the rule, it should apply the ordinary plain-error standard to Davis's relevant conduct claim, as set forth *supra*.

2. Even assuming the district court's relevant-conduct determination can be subjected to plain error review, Davis has failed to prove that the district court plainly erred.

A. Davis ignores the discretion district courts have to impose consecutive versus concurrent sentences.

Davis tactically acknowledges that "the district court is permitted to sentence at variance with the[Sentencing Guidelines'] recommendations" and "[a] district court may depart (or, presumably, vary) from the Commission's recommendations in USSG § 5G1.3." (Brief at 5, 9.) However, Davis faults the district court for exercising its discretion, demonstrating Davis's fundamental misunderstanding of the tremendous discretion afforded to district courts in sentencing and the advisory nature of the Sentencing Guidelines.

Sentencing is a "matter of discretion traditionally committed to the Judiciary." *Sester v. United States*, 566 U.S. 213, 236 (2012). "Judges have long been understood to have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state

proceedings." *Id.*; *see also United States v. Olmeda*, 984 F.3d 89, 92 (2d Cir. 2018) (same principle); *United States v. Figueroa-Figueroa*, 791 F.3d 187, 190 (1st Cir. 2015) (same principle); *United States v. Nania*, 724 F.3d 824, 830 (7th Cir. 2013) ("a district court has no obligation to impose a concurrent sentence, even if § 5G1.3[] applies"); *United States v. Brown*, 920 F.2d 1212, 1216-17 (5th Cir. 1991) ("whether a sentence imposed should run consecutively or concurrently is committed to the sound discretion of the district court"), abrogated on other grounds by *United States v. Candia*, 454 F.3d 468, 472-73 (5th Cir. 2006). This Circuit has repeated this principle over 25 times since the Supreme Court's opinion in *Sester v. United States*. *See, e.g.*, *Arreola-Amaya v. Fed. Bureau of Prisons*, 623 F. App'x 710, 711 (5th Cir. Dec. 9, 2015) ("[T]he district court still had the authority to order the federal sentence to run consecutively to the as-yet-unimposed state sentence"); *United States v. Curry*, 466 F. App'x 329, 329-30 (5th Cir. April 4, 2012) (same).[3]

[3] In the interest of brevity, the government will not cite all of the cases that have applied this rule. Rather, it warrants to the Court that its Westlaw search turned up over 25 cases in which the Court has applied the rule. In fact, the Court has applied the rule at least six times in the last five years. *See also, e.g.*, *Arreola-Amaya*, 623 F. App'x at 711; *Potoski v. Fox*, 583 F. App'x 396, 397 (5th Cir. Oct. 30, 2014); *United States v. Serrato*, 582 F. App'x 308, 308 (5th Cir. Sept. 10, 2014); *United States v. Jack*, 566 F. App'x 331, 332 (5th Cir. 2014); *United States v. Nash*, 554 F. App'x 296, 297 (5th Cir. Feb. 11, 2014); *United States v. Garcia*, 517 F. App'x 225, 226 (5th Cir. March 11, 2013).

B. The district court was well within its discretion to determine that Davis's 2015 offense was not relevant conduct to his 2016 offense.

Davis argues that the "state gun charge and [] state drug charge during a vehicle stop on October 4, 2015" are relevant conduct to his July 2016 offense of conviction. (Brief at 7-8.) Davis notes that drug and gun offenses are required to be grouped under Section 3D1.2(d) and therefore must constitute relevant conduct. (Brief at 7-8.) Davis further argues that the factors of similarity, regularity, and temporal proximity all support a relevant conduct finding, particularly noting: the October 2015 and July 2016 offenses occurred less than a year apart; his gun and drug offenses were regularly repeated from 2002 to 2016; and in both the 2015 and 2016 arrests, he was "detained during a traffic stop with a handgun and a relatively small quantity of drugs[.]" (Brief at 8-9.) However, Davis ignores critical facts that show that the October 2015 offense was not relevant conduct to the July 2016 offense of conviction.

Section 1B1.3 of the Sentencing Guidelines governs relevant-conduct determinations. Section 1B1.3 provides that "all acts and omissions committed . . . that 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" constitute relevant conduct. USSG § 1B1.3(a)(1)(A). Section 1B1.3 further provides that, with respect to drug and gun offenses like those charged in Counts One and Two, relevant

conduct also includes "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." USSG § 1B1.3(a)(2).[4]

The commentary to Section 1B1.3 provides that acts that are part of a common scheme or plan are "substantially connected to each other by at least one common factor, such as . . . common purpose[] or similar *modus operandi*." USSG § 1B1.3, comment. (n.5(B)(i)). Relatedly, acts that are part of the "same course of conduct" include acts that "are sufficiently connected or related to each other to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." USSG § 1B1.3, comment. (n.5(B)(ii)). Factors a court should consider in determining whether acts are part of the same course of conduct include "the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." *Id.* "When one of the above factors is absent, a stronger presence of at least one of the other factors is required." *Id.* This Court has repeated and applied these standards verbatim. *See, e.g.*, *Rhine*, 583 F.3d at 886-87; *United States v. Culverhouse*, 507 F.3d 888, 895-96 (5th Cir. 2007); *Ocana*, 204 F.3d at

[4] This provision applies to "offenses of a character for which § 3D1.2(d) would require grouping of multiple counts." USSG § 1B1.3(a)(2). Section 3D1.2(c) requires grouping of multiple counts of offenses when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to the other count. USSG § 3D1.2(c).

589-90. Given these standards, the district court did not err, let alone plainly err, in finding that Davis's October 2015 offense was not relevant conduct to his July 2016 offense of conviction.

i. Davis's 2015 and 2016 offenses do not evidence a common scheme or plan.

"A separate, unadjudicated offense may be part of a common scheme or plan—and thus relevant conduct—if it is substantially connected to the offense of conviction by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*." *Rhine*, 583 F.3d at 885; *see also United States v. Benns*, 740 F.3d 370, 376 (5th Cir. 2014). This Court and other circuits have concluded that for two offenses to be considered part of a common scheme or plan, the acts "must be connected together by common participants or an overall scheme." *Rhine*, 583 F.3d at 885; *see United States v. Hill*, 79 F.3d 1477, 1482 (6th Cir. 1996) (collecting cases). This Court has explicitly rejected "excessively broad or general purposes" and cautioned that "the concept of a 'common scheme of plan,' while expansive, cannot be too broad, otherwise almost any uncharged criminal activity can be painted as similar in at least one respect to the charged criminal conduct." *Benns*, 740 F.3d at 376 (internal citations and quotations omitted).

In *United States v. Wall*, this Court ruled that two offenses were not part of a common scheme or plan because (1) the offenses did not share any common accomplices; (2) there was no common *modus operandi*, as the earlier offense involved a small amount of marijuana and the later offense involved large quantities of marijuana concealed in pick-up trucks; and (3) the only common purpose between the offenses was "importing marijuana for distribution in the United States," which was, by itself, insufficient to establish a common scheme or plan. 180 F.3d 641, 645 (5th Cir. 1999); *see also Culverhouse*, 507 F.3d at 895 (finding two offenses were not part of a common scheme when they could "be connected by only the most general of purposes, in that they both involved methamphetamine").

Similarly, in *United States v. Rhine*, relying on *Wall*, this Court concluded that Rhine's participation in a drug-trafficking ring and his offense of conviction (possession with the intent to distribute cocaine and felon in possession of a firearm) could not be considered part of a common scheme or plan. 583 F.3d at 886. The Court explained

> There is no evidence that Moore, Rhine's only accomplice in his offense of conviction, played any role in the Fish Bowl drug-trafficking ring. Neither is there evidence that any Fish Bowl participant was involved in the instant incident. Further, the offenses do not share a common *modus operandi*: In the Fish Bowl offense, Rhine is alleged to have been a large-scale supplier to mid-level dealers; by contrast, in the offense of conviction, he attempted to sell a small quantity of crack cocaine to an individual

> buyer for five dollars. Finally, the only common purpose linking the two offenses is Rhine's motivation to profit from the distribution of crack cocaine, which—like the marijuana importation in *Wall*—is by itself insufficient to connect the offenses as separate parts of a common scheme or plan.

Id.

Just so here. Even assuming, *arguendo*, Davis's "guns and drugs" charges (widely defined) are "offenses of a character for which Section 3D1.2(d) would require grouping of multiple counts," that alone is not enough to constitute "relevant conduct" for purposes of Section 5G1.3(b). Section 1B1.3(a)(2) further requires groupable offenses to be "part of the same course of conduct or common scheme or plan as the offense of conviction." USSG § 1B1.3(a)(2). Davis addresses the three factors relevant to determining a course of conduct (similarity, regularity, and temporal proximity), but he fails to acknowledge, or even discuss, that his 2015 and 2016 offenses do not evidence a common scheme or plan and therefore cannot satisfy Section 1B1.3(a)(2)'s definition of relevant conduct on that basis. It is simply not enough for Davis to argue general similarities of "guns and drugs" between the two offenses; this Court has squarely rejected similar arguments. *See, e.g.*, *Rhine,* 583 F.3d at 886; *Culverhouse*, 507 F.3d at 895; *Wall*, 180 F.3d at 645.

Instead, the first relevant conduct inquiry is whether the 2015 and 2016 offenses share common victims, accomplices, purpose, or *modus operandi*, and are therefore part of a common scheme or plan. *See id.* The PSR demonstrates

that this is not the case. There are no named "victims" in the PSR to either the 2015 or 2016 offense. There is no evidence of common accomplices; Davis was the driver and only individual in the car during the July 2016 vehicle search, and the PSR does not name any other arrested individuals at the scene, whereas there were at least three other individuals found with different guns and various quantities of drugs in the 2015 vehicle search. (ROA.143, 155.)

There is also no evidence of Davis having a common purpose beyond possession of a gun and drugs, and perhaps to profit from the sale of some kind of drug. The 2016 vehicle search originated when an individual reported a suspicious vehicle parked outside of a house. (ROA.143.) Davis was found in the driver seat of the searched car with a .22 caliber handgun and more than 30 ecstasy pills. (ROA.143.) In contrast, the 2015 vehicle search originated from a traffic stop of a car with a defective lamp, and Davis was a rear seat passenger in the car, not the driver. (ROA.155.) A .380 caliber handgun was found in the immediate vicinity of Davis, and he was found with 1.55 grams of marijuana in his pocket. (ROA.155.) In short, the 2015 and 2016 offenses concerned different drugs and different guns. If a general purpose of importing marijuana (in *Wall*) or methamphetamine (in *Culverhouse*) for distribution was rejected by this Court as "too general" to establish a common scheme or plan, then surely a general purpose of possessing any gun and some quantity of a

drug is too general to establish a common scheme or plan and therefore relevant conduct. *Wall*, 180 F.3d at 645; *see also Culverhouse*, 507 F.3d at 895.

Lastly, similar *modus operandi* is lacking between the 2015 and 2016 offenses, as detailed *supra*. From the PSR, the district court could glean that Davis was part of a larger conspiracy related to drugs or guns in the 2015 offense; Davis was a rear passenger in a car filled with four individuals and multiple weapons and various quantities of drugs. (ROA.155.) In contrast, in 2016, Davis, as the driver, was found with a different handgun—this time a .22 caliber—and more than 30 ecstasy pills, but with no accomplieces. (ROA.143.) The 2015 and 2016 offenses do not share common *modus operandi*.

In sum, because the 2015 and 2016 offenses do not share common victims, accomplices, purpose, or similar *modus operandi*, the district court did not err when it found that the 2015 and 2016 offenses were not part of a common scheme or plan and therefore the 2015 offense was not relevant conduct to the 2016 offense of conviction.

ii. Davis's 2015 and 2016 offenses do not qualify as the same course of conduct.

The Sentencing Guidelines state that "[o]ffenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to [the offense of conviction] as to warrant the conclusion that they are part of a single episode,

spree, or ongoing series of offenses." USSG § 1B1.3, comment. (n.5(B)(ii)); *see also Rhine*, 583 F.3d at 886. Factors to consider in making this determination include temporal proximity, similarity, and regularity. *Id.*

Davis contends that each of these three factors "unequivocally support a relevant conduct finding[,]" (Brief at 8), but a close examination of each of these factors, along with this Court's precedent, make clear that this assertion is false. This Court has "generally used a year as the benchmark for determining temporal proximity," and Davis's October 2015 and July 2016 offenses did occur within the period of one year. *Rhine*, 583 F.3d at 886-87; (ROA.143, 155.) However, temporal proximity is only one of the three relevant factors; similarity and regularity of the offenses must also be considered. *See, e.g., Rhine*, 583 F.3d at 886-88.

To determine whether Davis's 2015 conduct is sufficiently similar to the 2016 offense of conviction, the inquiry is whether "there are distinctive similarities between the offense of conviction and the remote conduct that signal that they are part of a course of conduct rather than isolated, unrelated events that happen only to be similar in kind." *Id.* at 888 (citing *Culverhouse*, 507 F.3d at 896). This Court has repeatedly cautioned that "courts must not conduct this analysis at such a level of generality as to render it meaningless." *Rhine*, 583 F.3d at 886 (citing, e.g., *Wall*, 180 F.3d at 646-47). And again, "the

mere fact that two separate offenses involve the same type of drug is generally not sufficient to support a finding of similarity," and certainly a broad generalization that offenses involved "drugs" is not sufficient either. *Rhine*, 583 F.3d at 889; *see also Culverhouse*, 507 F.3d at 896 ("The fact that [both offenses] involved methamphetamine is not enough."); *Wall*, 180 F.3d at 646-47 ("We do not think that two offenses constitute a single course of conduct because both involve drug distribution."); *United States v. Miller*, 179 F.3d 961, 967 (5th Cir. 1999) (concluding that similarity was lacking because "[t]he only real similarity between the two [offenses] is that they both involved a transaction for the sale of cocaine").[5]

Not only do the 2015 and 2016 offenses involve two different kinds of drugs—marijuana in 2015 and ecstasy in 2016—but they also involved two different kinds of guns—a .22 caliber handgun in 2016 and a .380 caliber handgun in 2015. (ROA.143, 155.) *Rhine*, et al. counsel that the broad generalization of two offenses being only "similar in kind"—drugs and guns—is simply not enough to establish similarity of offenses. *Rhine*, 583 F.3d at 886. Yet, that is exactly what Davis urges, generalizing the 2015 and 2016 offenses as Davis being "detained in a traffic stop with a handgun and a relatively small

[5] Davis relies on *United States v. Bethley*, 973 F.2d 396, 401 (5th Cir. 1992), but that case is easily distinguished. In *Bethley*, the "type of drug" was the same; here, the 2015 offense involved marijuana and the 2016 offense involved ecstasy. (ROA.143, 155.)

quantity of drugs." (Brief at 8.) Davis's implied definition of similarity renders the course of conduct analysis meaningless and must therefore be rejected. *Rhine*, 583 F.3d at 886-88.

Moreover, the two offenses are not sufficiently similar because there is no evidence that the drugs or guns involved in each of the offenses shared a common source, supplier, or destination. Indeed, there is no evidence in the PSR as to the source or supplier of the drugs or their intended destination. The PSR does show that different quantities of drugs were found in 2015 and 2016. (ROA. 143, 155.) The circumstances of each of the 2015 and 2016 offenses are markedly dissimilar, Davis was found alone during the 2016 vehicle search, but during the 2015 vehicle search, Davis was a passenger and one of four individuals in the car, and multiple weapons and quantities of drugs were found amongst the passengers. (ROA.143, 155.) If anything, the evidence suggests that Davis was a part of a larger conspiracy when arrested for the 2015 offense, while Davis was acting alone when arrested for the 2016 offense. (ROA.143, 155.) There is no evidence that the incidents involved any common participants or accomplices. (ROA.143, 155.) In sum, material differences between the two offenses lead to a conclusion that similarity is lacking. *Rhine*, 583 F.3d at 889.

Finally, to determine whether "regularity" is present, the inquiry is "whether there is evidence of a regular, *i.e.* repeated, pattern of similar unlawful conduct directly linking the purported relevant conduct and the offense of conviction." *Id.* Davis argues that his "gun and drug offenses" were regularly repeated by pointing to the following arrests: "2002 (gun and drugs), 2003 (gun), 2008 (drugs), 2015 (gun and drugs), and 2016 (gun and drugs)." (Brief at 8.) Even assuming a label of "gun and drug" offense is not so general as to render the inquiry meaningless, Davis points to only three combination "gun and drug" offenses: 2002, 2015, and 2016. (Brief at 8.) There is a 13-year time gap between 2002 and 2015, well beyond the one-year marker for temporal proximity. This Court has held that three offenses over the course of 13 years or five offenses over the course of 15 years, "separated by [] time and circumstances, cannot be considered repetitious or regular conduct to a degree significant enough to constitute significant connection under the Guidelines." *Rhine*, 583 F.3d at 890; *Wall*, 180 F.3d at 897. The same is true here—Davis's "gun and drug" offenses of 2002, 2015, and 2016 do not establish regularity.

In sum, Davis's 2015 offense cannot be considered part of the same course of conduct as his 2016 offense of conviction because while temporal proximity may be present, similarity and regularity are lacking. This Court can easily conclude that the district court did not err, let alone clearly or

obviously err, in its relevant-conduct determination. The District Court correctly determined that Davis's anticipated sentence for the 2015 offense was not wholly relevant conduct to the new offense and thus exercised its discretion in determining that anticipated state sentences from the 2016 offense would run concurrently with Davis's federal sentence and the anticipated state sentences from the 2015 offense would run consecutively.

C. Even if some part of Davis' 2015 offense can be considered relevant conduct, the district court had discretion in sentencing under USSG § 5G1.3(d).

Even if some part of Davis's 2015 offense can be considered partially relevant conduct to Davis's 2016, which the government does not concede, Davis mistakenly points to USSG § 5G1.3(b) as the relevant guideline recommending a concurrent sentence. (Brief at 6-7.) Subsection 5G1.3(b) provides:

> (b) If . . . a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of . . . §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed as follows
>
> (1) the court shall adjust the sentence for any period of imprisonment already served on the *undischarged term* . . .
> (2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the *undischarged term* of imprisonment.

United States Sentencing Commission, *Guidelines Manual*, §5G1.3(b) (Nov.

2016).[6] However, Subsection 5G1.3(b) is the not the instructive guideline; Subsection 5G1.3(b) only applies when there is an "undischarged term of imprisonment." *Id.*; *see United States v. Hankton*, 875 F.3d 786, 792 (5th Cir. 2017). "Undischarged" in this context is synonymous with "existing." *See, e.g.*, *United States v. Davis*, 859 F.3d 572, 575 (8th Cir. 2017) (explaining that "this subsection only applies to cases where there are currently existing undischarged terms of imprisonment"). Davis had no existing but unserved or "undischarged" sentences at the time the district court sentenced him for the July 2016 offenses. (ROA.155-56.) Thus, Subsection 5G1.3(b) is inapplicable.

Subsection 5G1.3(c) provides:

> If . . . a state term of imprisonment is anticipated to result from another offense that is relevant conduct to the instant offense of conviction under . . . §1B1.3 (Relevant Conduct), the sentence for the instant offense shall be imposed to run concurrently to the anticipated term of imprisonment.

USSG § 5G1.3(c)(1). This Court has defined "anticipated" to encompass sentences for relevant conduct-based state charges that are pending at the time of a defendant's federal sentencing. *See United States v. Looney*, 606 F. App'x 744, 748 (5th Cir. 2015) (per curiam). Other circuits have done the same. *Olmeda*, 894 F.3d at 92-93 (2d Cir.); *United States v. Tysor*, 670 F. App'x 185,

[6] The PSR applied the 2016 version of the Guidelines Manual, (ROA.144), and therefore all citations to the guidelines in this brief are to the 2016 version.

186-87 (4th Cir. 2016). There is no dispute that Davis had anticipated state sentences at the time of his federal sentencing. (ROA.155-56.) Thus, Subsection 5G1.3(c) could be, at least facially, applicable to this case.

However, an application note clarifies that Subsection (d), not any of the prior subsections, governs "[c]ases in which only *part* of the prior offense is relevant conduct to the instant offense[.]" USSG § 5G1.3(c), comment (n.2(A)) (emphasis added). Several circuits, including this one, have noted or applied this important distinction when determining whether Subsection 5G1.3(b) or another subsection within Section 5G1.3 applies. *See, e.g.*, *United States v. Coles*, 721 F. App'x 257, 258-59 (4th Cir. 2018); *United States v. Buswell*, 661 F. App'x 802, 805 (5th Cir. 2016); *Figueroa-Figueroa*, 791 F.3d at 192; *Nania*, 724 F.3d at 832. The application note also provides: "Subsection (b) applies in cases in which *all* of the prior offense is relevant conduct to the instant offense[,]" thus making clear the special purpose of Subsection (d) (emphasis added). USSG § 5G1.3(c). Neither Subsection 5G1.3(c) nor the comment concerning "Application of Subsection (c)" specifically states that Subsection 5G1.3(c) only applies when *all*, not *part*, of the prior offense constitutes relevant conduct, but the application commentary clearly demonstrates an intent that Subsection 5G1.3(d), not Subsections 5G1.3(b) or

(c), is applicable when only part of the prior offense constitutes relevant conduct to the instant offense.

Subsection 5G1.3(d) provides: "the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense." USSG § 5G1.3(d). Subsection 5G1.3(d) effectively mirrors the overarching statutory framework provided in 18 U.S.C. § 3584, which confers broad discretion on district courts to impose sentences concurrently or consecutively, following longstanding judicial practice. The portion of Section 3584(a) relevant here provides that "if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively...." 18 U.S.C. § 3584(a). This Court has recognized the district court's "discretion to decide whether the two sentences should run consecutively or concurrently" when a prior offense is not entirely and wholly relevant to the new offense. *Buswell*, 661 F. App'x at 805.

The fundamental question is thus whether *all* or *part* of Davis's anticipated state sentences constitute "relevant conduct" for the purposes of Section 5G1.3. If *all* of the anticipated state sentences constitute "relevant conduct," then the Sentencing Guidelines proscribe that Subsection (c) applies,

and if only *part* of the anticipated state sentences constitutes "relevant conduct," then Subsection (d) applies. The district court correctly determined that Davis's anticipated sentences were, at minimum, not wholly relevant conduct to the offense of conviction, and thus—as provided by Section 5G1.3(d)—the district court properly exercised its discretion in determining which anticipated state sentences would run concurrently with Davis's federal sentence and which anticipated state sentences would run consecutively.

3. Remand for additional information is unnecessary.

Davis urges the Court to remand to the district court "for additional information" if the Court is "unclear about whether the district court intended to find, as a factual matter, the absence of relevant conduct[.]" (Brief at 11.) First, this a tactic admission by Davis that a relevant-conduct determination is inherently a factual determination, not a legal issue susceptible to plain error review, consistent with this Court's long-standing precedent in *Lopez* and its progeny. *Lopez*, 923 F.2d at 50.

Second, Davis's request for "additional information" to support his belated challenge to the district court's sentencing order is inappropriate on plain-error review. Any unpreserved error that this Court might rectify must, at the very least, be "plain" on the face of the record, which the Supreme Court has characterized as "'clear or obvious, rather than subject to reasonable dispute.'" *United States* v. *Escalante-Reyes*, 689 F.3d 415, 419 (5th Cir. 2012) (en

banc) (quoting *Puckett*, 556 U.S. at 135). That Davis requires additional factual findings by the district court to challenge the district court's relevant-conduct determination alone forecloses his contention that the decision below was plainly erroneous.

Third, no remand is necessary; the Court's sentence, given the sentencing hearing and the PSR, stand for themselves. Where, as here, "[t]he sentencing judge made no express findings to support his relevant conduct conclusion, presumably adopting the PSR," this Court should "evaluate the PSR and the sentencing hearing" to evaluate whether the relevant-conduct determination is supported by the evidence and the Guidelines. *Culverhouse*, 507 F.3d at 895. Given the structure of the sentence, the court clearly determined that the 2015 offense was not relevant conduct, while the 2016 offense was. (ROA.83, 135.) Moreover, there is ample evidence in the PSR to support the district court's finding that the 2015 offense was not relevant conduct to the 2016 offense of conviction.

Finally, the cases cited by Davis to support remand are easily distinguished. In *Molina-Martinez v. United States*, the Supreme Court authorized a limited remand to determine the third prong of plain error review—substantial prejudice. 136 S. Ct. 1338, 1349 (2016). However, in this case, there is simply no need to reach the question of substantial prejudice

because there was no error, plain or otherwise. Similarly, in both *United States v. Rangel*, 319 F.3d 710 (5th Cir. 2003), and *United States v. Simmons*, 470 F.3d 1115 (5th Cir. 2006), this Court issued a limited remand to the district courts for justification for the district courts' departure from the Sentencing Guidelines. Here, however, the district court did not fail to apply the Sentencing Guidelines because the relevant provision— USSG § 5G1.3(d)— provides that the district court *may* impose concurrent or consecutive sentences, in contrast to the guideline sections applicable in *Rangel* and *Simmons*, which included mandatory sentencing provisions.

CONCLUSION

This Court should affirm the judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this document was served on Davis's attorney, Kevin Joel Page, through the Court's ECF system on November 20, 2018, and that: (1) any required privacy redactions have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/ Kristina M. Williams
Kristina M. Williams
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 7,447 words.

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s/ Kristina M. Williams
Kristina M. Williams
Assistant United States Attorney
Date: November 20, 2018

APPENDIX E

Case Information

CR1600287 | THE STATE OF TEXAS VS DAVIS,CHARLES EARL JR

Case Number	Court	Judicial Officer
CR1600287	County Court at Law #1	Linden, Timothy
File Date	Case Type	Case Status
03/15/2016	Adult Misdemeanor	Disposed

Party

State
THE STATE OF TEXAS

Defendant
DAVIS, CHARLES EARL, Jr.

DOB
11/30/1983

Active Attorneys
Lead Attorney
WILLIAMS, RICHARD D
Court Appointed

Work Phone
903-454-1186

Fax Phone
903-455-4747

Charge

Charges
DAVIS, CHARLES EARL, Jr.

	Description	Statute	Level	Date
2	POSS MARIJ <2OZ	481.121(b)(1) HSC	Class B Misdemeanor	10/04/2015

Bond Settings

Setting Date
10/5/2015
4/19/2016

Bond

Bond Type	Bond Number	Bond Amount	Current Bond Status
Surety Bond	CR1600287	$2,000.00	Relieved

Disposition Events

10/29/2018 Plea

Judicial Officer
Linden, Timothy

2	POSS MARIJ <2OZ	Guilty

10/29/2018 Disposition

Judicial Officer
Linden, Timothy

2	POSS MARIJ <2OZ	310 - Convicted

10/29/2018 Sentenced - Local Jail

2	POSS MARIJ <2OZ	Sentenced - Local Jail

Confinement

Confinement to Commence: 10/29/2018

2 Months, 15 Days, County Jail, Hunt County Jail

Jail Credit 2 Months 15 Days

Comment: FINE: $100.00, COURT COST: $297.00, ATTY FEE: $390.00 = CREDITED TO TIME SERVED

Events and Hearings

03/15/2016 CRIMINAL CASE FILED (OCA)

03/15/2016 Event

Comment
COMPLAINT,INFORMATION,STANDING ORDER,BOND/T L
Party: DAVIS,CHARLES EARL JR

03/18/2016 Event

Comment
SET PER NOTICE LETTER 4/18/16 9AM/T L Party: DAVIS,CHARLES EARL JR

04/18/2016 Hearing

Judicial Officer
Linden, Timothy

Hearing Time
9:00 AM

Comment
ARRAIGNMENT

04/18/2016 Converted Event

Comment
ARRAIGNMENT

04/18/2016 Event

Comment
CERTIFICATION OF CALL/M B Party: DAVIS,CHARLES EARL JR

04/19/2016 WARRANT ISSUED

Comment
INACTIVE: WARRANT ISSUED

04/19/2016 Event

Comment
NISI WARRANT TO SO/M B Party: DAVIS,CHARLES EARL JR

04/25/2016 Event

Comment
BOND FORF $1500.00 MARK BASSHAM BAIL BONDS #2 CC1600112/T R Party: DAVIS,CHARLES EARL JR

08/03/2016 Event

Comment
ELECTION OF COUNSEL FROM DALLAS CO. ORDER APPT ATTY W/FAX CONF-C.GUSTIN/M B Party: DAVIS,CHARLES EARL JR

12/01/2016 Event

Comment
AGREED JUDGMENT ON BOND FORFEITURE CC1600112 DISCHARGE OF MARK BASSHAM BAIL BONDS Party: DAVIS,CHARLES EARL JR

08/10/2018 WARRANT RETURNED

Comment
- EXECUTED ON 08/09/2018 - NISI

08/15/2018 Arraignment Hearing

Judicial Officer
Linden, Timothy

Hearing Time
9:00 AM

08/16/2018 Arraignment Hearing

Judicial Officer
Linden, Timothy

Hearing Time
9:00 AM

08/16/2018 Order

Comment
RE-APPT ATTY: R.WILLIAMS W/FAX CONF /REMOVE C.GUSTIN W/FAX CONF

08/16/2018 REQUEST FOR NEXT COURT SETTING/ORDER

Comment
09/12/18 9AM

08/20/2018 NOTICE OF COURT SETTING

Comment
09/12/2018 @ 9AM

09/12/2018 Confirm Discovery

Judicial Officer
Linden, Timothy

Hearing Time
9:00 AM

09/12/2018 REQUEST FOR NEXT COURT SETTING/ORDER ▾

Comment
10/10/18 9AM

09/13/2018 NOTICE OF COURT SETTING ▾

Comment
10/10/2018 @ 9AM

10/10/2018 Announcement ▾

Judicial Officer
Linden, Timothy

Hearing Time
9:00 AM

10/10/2018 REQUEST FOR NEXT COURT SETTING/ORDER ▾

Comment
10/29/18 9AM

10/16/2018 NOTICE OF COURT SETTING ▾

Comment
10/29/2018 @ 9AM

10/29/2018 Plea ▾

Judicial Officer
Linden, Timothy

Hearing Time
9:00 AM

10/29/2018 PAYMENT FEE VOUCHER

10/29/2018 DISPOSITION, JUDGMENT/SENTENCE, SUPPORTING DOCUMENTS