No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RODRIGO CRUZ PEREZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

(CA4 No. 19-4060)

Petition for *Writ of Certiorari*

Howard W. Anderson III
LAW OFFICE OF
HOWARD W. ANDERSON III, LLC
P.O. Box 661
Pendleton, SC 29670
(864) 643-5790 (P)
(864)332-9798 (F)
howard@hwalawfirm.com
CJA Counsel for Petitioner

QUESTION PRESENTED

Under the U.S. Sentencing Guidelines, a defendant who accepts responsibility for an offense receives a two-point reduction on the offense level. U.S.S.G. § 3E1.1. But "[a] difficult [constitutional] problem...exist[s] in a case where a defendant…attempts to accept responsibility and the district court purports to weigh against this acceptance the defendant's earlier, constitutionally protected conduct, such as her exercise of her right to remain silent or to put the government to its proof at trial." *United States v. De Jongh*, 937 F.2d 1, 5 n.8 (1st Cir. 1991) (acknowledging but not resolving the problem). *See also Kinder v. United States*, 504 U.S. 946, 951 (1992) (White, J., dissenting from denial of *certiorari*) (noting that the interplay between the constitutional right to remain silent and U.S.S.G. § 3E1.1 is "a recurring issue of constitutional dimension, where the varying conclusions of the Courts of Appeals determines the length of sentence actually imposed").

The U.S.S.G. § 3E1.1 calculus has created a profound split among the federal courts of appeal. The Ninth and Eleventh Circuits prohibit weighing the invocation of Fifth and Sixth Amendment rights when considering entitlement to acceptance-of-responsibility credit. On the other hand, the D.C., Third, Fourth, Seventh, and Tenth Circuits count such constitutionally protected conduct against the defendant—and, in some

instances, hold that it categorically precludes credit for acceptance of responsibility.

This Court previously reserved consideration of the interplay between U.S.S.G. § 3E1.1 and constitutionally protected conduct. *Mitchell v. United States*, 526 U.S. 314, 330 (1999) ("Whether silence bears upon the determination of… acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guidelines… is not before us, and we express no view on it."). The lower courts are now ready for the Court to resolve their disagreement. The question in this Petition is, therefore, the following:

1. Can a court count a defendant's constitutionally protected conduct against the defendant when determining whether the defendant qualifies for a 2-point reduction under U.S.S.G. § 3E1.1 for acceptance of responsibility?

LIST OF PARTIES

All parties to this Petition appear on the cover.

LIST OF RELATED PROCEEDINGS

U.S. District Court for the Western District of North Carolina:

United States v. Rodrigo Cruz Perez, No. 1:17-cr-00149-MR-WCM-3. Judgment entered January 28, 2019.

U.S. Court of Appeals for the Fourth Circuit:

United States v. Rodrigo Cruz Perez, No. 19-4060. Judgment entered August 30, 2019. Rehearing denied November 12, 2019.

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TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Rules

Statutes

Rodrigo Cruz Perez respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

On August 30, 2019, the U.S. Court of Appeals for the Fourth Circuit issued an unpublished opinion affirming Mr. Cruz Perez's conviction. On November 12, 2019, the court of appeals issued an unpublished order denying a timely motion for rehearing. Both items appear in the appendix.

The district court did not prepare a published opinion explaining its sentence. But relevant portions of the sentencing hearing transcript appear in the appendix. Additionally, the district court entered an unpublished order adopting a magistrate judge's report and recommendation, both of which appear in the appendix.

JURISDICTION

The district court had jurisdiction over the federal crimes charged. 18 U.S.C. § 3231.

This Court has jurisdiction to review the judgment of the Fourth Circuit. 28 U.S.C. § 1254(1). Judgment below was entered on August 30, 2019, and rehearing *en banc* was denied November 12, 2019.

CONSTITUTIONAL PROVISIONS INVOLVED

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V.

* * *

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

STATEMENT OF THE CASE

I. The Superseding Indictment

Count I of a Superseding Indictment charged that Mr. Cruz Perez—"[b]eginning in or around August of 2017, and ending in or around October of 2017,"—conspired with Ignacio Luna Cruz, Geraldo Luna Cruz, and Jesus Plasencia, to possess with intent to distribute more than 500 grams of a mixture or substance containing methamphetamine and/or

cocaine. [App. 43]. Count III alleged that, on October 26, 2017, Mr. Cruz Perez and Ignacio Luna Cruz distributed and possessed with intent to distribute more than 500 grams of a mixture or substance containing methamphetamine. [App. 44].

II. The Motion to Suppress

Before trial, Mr. Cruz Perez filed a motion to suppress.

The motion evidence showed that law enforcement conducted a traffic stop of the car that Geraldo Luna Cruz was driving and in which Mr. Ignacio Luna Cruz was a passenger. Inside the car, law enforcement found cocaine. Concerned that Mr. Ignacio Luna Cruz might have alerted the occupants of the house that he had left, law enforcement sent a team to secure the residence pending receipt of a search warrant from a state-court judge.

Special Agents Allen and Herrera, among others, entered the home and interrogated Mr. Cruz Perez. [App. 38]. During that interrogation, Mr. Cruz Perez, "was told, 'If you are honest with us you will not be arrested. If you don't tell us where the drugs are you will be arrested.' [He] then told the officers there were in fact drugs in the house, and he advised the officers where they were located." [App. 37 (citation omitted)].

Special Agent Allen testified that he "was surprised that [Mr. Cruz Perez] was so willing to give us the information. In [the agent's] experience, generally people don't want to tell [law enforcement], you know, where the drugs could be found or other information, but Mr. Cruz Perez was willing to do so."

But Mr. Cruz Perez did not simply show law enforcement where the drugs were. He also "told [law enforcement] that Ignacio Luna Cruz had been at the residence earlier that evening to retrieve some drugs. He told [them] that he watched the drugs for Ignacio Luna Cruz." [App. 26 (citation omitted)].

Law enforcement was sufficiently satisfied with Mr. Cruz Perez's cooperation to let him leave that evening, despite him having shown them significant quantities of drugs hidden in his bedroom.

The magistrate judge recommended suppression of Mr. Cruz Perez's statements pursuant to *Miranda*. [App. 38]. Because the statements were excluded, the magistrate judge had no cause to consider an analysis of the potential involuntariness that would otherwise be statutorily required before the statements could come into evidence. 18 U.S.C. § 3501. The magistrate judge denied the remainder of Mr. Cruz Perez's motion to suppress, which argued that the pre-warrant seizure, the execution of

the warrant, and the collection of certain physical evidence were improper. [App. 39].

Although Mr. Cruz Perez objected to those parts of the magistrate judge's order concerning the execution of the warrant and the collection of certain evidence, the district judge affirmed the magistrate judge's order. [App. 20].

III. The Jury Trial

Before the trial began, the district court gave Mr. Cruz Perez a standing objection to the evidence that he had unsuccessfully sought to suppress. Thereafter, the Government offered testimony from law enforcement and from two of Mr. Cruz Perez's co-conspirators: Ignacio Luna Cruz and Geraldo Cruz.

At the jury trial, Mr. Cruz Perez did not testify in his defense. He only called two witnesses. One was Ignacio Luna Cruz. The purpose of the testimony—three pages—was to allow counsel to inquire about the Government's recently obtained jail phone calls that counsel could not completely review before trial.

The second brief defense witness was the case agent, who was called to allow the admission of a few exhibits[1] and to impeach-by-contradiction a statement that Ignacio Luna Cruz made.

IV. The Sentencing Hearing

A. The Guideline Calculations

Over objection, the Presentence Report ("PSR") did not award any credit for acceptance of responsibility, even though Mr. Cruz Perez told the probation officer, in part, during his interview: "I apologize to the Court for my misconduct, and I accept responsibility for participating in a conspiracy to possess and then actually possessing drugs. It was wrong to help Ignacio Luna Cruz and Geraldo Luna Cruz sell drugs, including by allowing Ignacio to store drugs in my home." His statement also noted that he could not plead guilty out of fear for his life and that of his family back in Mexico.

With a Total Offense Level of 40 and Criminal History Category I, Mr. Cruz Perez's guideline sentence was 292-365 months. *See* [App. 16]. If Mr. Cruz Perez had received a two-point reduction for acceptance of responsibility, his guideline sentence would have fallen to 235-293 months.

[1] The district judge does not permit defense counsel to introduce exhibits during cross examination.

B. The Sentencing Hearing

1. Denial of a Reduction for Acceptance of Responsibility

The district court heard argument on Mr. Cruz Perez's objection to the PSR's denial of credit for acceptance of responsibility. Mr. Cruz Perez explained at the hearing and in his pre-hearing brief that he had cooperated with law enforcement in the search of his residence, did not testify at the suppression hearing or at trial, had made an inculpatory statement in the PSR interview, and had personal safety and suppression-motion-preservation reasons for not pleading guilty. Further, Mr. Cruz Perez did not object to any relevant conduct in the PSR.

The Government disputed the applicability of the reduction, in part, because Mr. Cruz Perez had not stipulated to the facts at a bench trial. According to the Government, that approach—not a jury trial—was the correct way to accept responsibility but preserve suppression issues.

The district court overruled the objection, ruling in part as follows:

> Likewise, there was the issue raised in the brief – even though I don't believe was really any more than mentioned just now – was the cooperation of the defendant during the search of his residence. However, simple co-operation at that very early stage without then accepting responsibility for the criminal activity does not rise to the level of acceptance of responsibility to warrant the reduction in the offense level.

> With regard to the main – what I perceive to be the main thrust of the defendant's argument, that taking the case to trial was necessary to preserve certain issues for appeal. As pointed out by the assistant United States attorney in the sentencing memorandum there are ways to preserve those issues for appeal while still accepting the criminal responsibility in the event that the appeal is unsuccessful.
>
> The defense argument seems – the center of the defense argument seems to be that the defendant never actually denied his responsibility but simply a failure to or an absence of denial does not constitute acceptance. And what has not been expressed by the defendant in any way that the Court can perceive is an actual acceptance of responsibility for the criminal conduct. Therefore, the court will overrule the objection to paragraph 46 where no reduction in the offense level is allowed for acceptance of responsibility.

[App. 13-14].

2. The Sentence

The district court imposed a sentence at the low end of the Guideline range that it had calculated: 292 months' imprisonment, plus 5 years of supervised release and a $200 special assessment. *See* [App. 2].

C. The Panel Decision

A panel at the Fourth Circuit affirmed. [App. 2-6]. With respect to the issue of acceptance of responsibility, the Panel held as follows:

> We conclude that this case is not one of the "rare situations" in which a defendant who proceeds to trial may still be entitled to an acceptance of responsibility reduction. While Cruz Perez rejected the Government's offer of a guilty plea allegedly in order to preserve issues for appeal and based upon

> his alleged fear of reprisal, he did not stipulate to the facts at trial, thereby requiring the Government to be fully prepared and have its witnesses and evidence present. In fact, Cruz Perez cross-examined the Government's witnesses, seeking to undermine their credibility, and moved for a judgment of acquittal. *See United States v. Dickerson*, 114 F.3d 464, 469-70 (4th Cir. 1997) (concluding that acceptance-of-responsibility reduction not warranted where defendant put the Government to its burden of proof at trial by denying an essential factual element of his guilt). Moreover, Cruz Perez did not admit his guilt until he met with the probation officer regarding the presentence report (PSR). Finally, Cruz Perez's statement to the probation officer did not cover the full criminal behavior proven at trial and described in the PSR, which included personally selling drugs and teaching his co-conspirators about the drug trade; instead, Cruz Perez merely stated that he possessed drugs and assisted others by storing drugs.
>
> The district court had the opportunity to assess Cruz Perez's demeanor and credibility and evaluate his acceptance of responsibility, including his allegations of threats to his and his family's safety, in the context of the case as a whole. Due to its assessment of these factors, the district court concluded that appellant did not fully accept responsibility. This conclusion is bolstered by the PSR, which expressly found that Cruz Perez was not eligible for the reduction because he made no pre-trial admissions. Given these facts and the deference to which the district court's decision is entitled in this regard, we conclude that the district court did not clearly err in finding that Cruz Perez was not entitled to a two-level reduction for acceptance of responsibility.

[App. 3-4].

REASONS FOR GRANTING THE PETITION

As this Court has explained, the Fifth Amendment's prohibition on compelled self-incrimination means that a criminal defendant cannot be

"required to disclose any knowledge he might have, or to speak his guilt. It is the extortion of information from the accused, the attempt to force him to disclose the contents of his own mind, that implicates the Self-Incrimination Clause." *Doe v. United States*, 487 U.S. 201, 211 (1988) (citations and quotations omitted). *See also, e.g.*, *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977) (holding that public official cannot be deprived of office for invocation of Fifth Amendment because the "government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized").

The Self-Incrimination Clause applies even at sentencing. *Mitchell v. United States*, 526 U.S. 314, 326 (1999) ("Where a sentence has yet to be imposed…, this Court has already rejected the proposition that 'incrimination is complete once guilt has been adjudicated,' *Estelle v. Smith*, 451 U.S. 454, 462, (1981), and we reject it again today."). Accordingly, this Court has held that a sentencing court may not draw adverse inferences from a defendant's silence at sentencing when determining sentencing facts, for doing so would impose "an impermissible burden on the exercise of the constitutional right against compelled self-incrimination." *Id.*

The U.S. Sentencing Guidelines provide for a two-point reduction for those defendants who "clearly demonstrate[] acceptance of responsibility for [their] offense." U.S.S.G. § 3E1.1(a).[2] Particularly at higher offense levels, that reduction can significantly lower the recommended term of imprisonment. For example, in the case at bar, the provision would have reduced the lower end of the Guideline range by 57 months.

In *Mitchell*, this Court specifically reserved the question of what limits, if any, the Fifth Amendment places on a district court's ability to consider the defendant's silence at sentencing when assessing acceptance of responsibility. *See Mitchell*, 526 U.S. at 330 ("Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guidelines (1998), is a separate question. It is not before us, and we express no view on it."). As explained below, a deep circuit split exists on the answer to that question.

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[2] This Court has approved lower sentences for those defendants who plead guilty than for those who do not. *E.g.*, *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978) ("[A] State may encourage a guilty plea by offering substantial benefits in return for the plea."). Thus, only the evidentiary record relevant to U.S.S.G. § 3E1.1 is at issue here—not its constitutionality.

I. Two Circuits Prohibit Counting Constitutionally Protected Conduct Against a Defendant Under U.S.S.G. § 3E1.1.

The Eleventh Circuit has explicitly joined the Ninth Circuit in holding that no constitutionally protected conduct can ever count against a defendant in the acceptance-of-responsibility calculus under U.S.S.G. § 3E1.1:

> The court's comments during sentencing demonstrate that it balanced the evidence of acceptance of responsibility against the Appellants' exercise of their Fifth Amendment rights and their intent to exercise their right to appeal; this was improper. "The sentencing court cannot consider against a defendant any constitutionally protected conduct. . . ." *United States v. Watt*, 910 F.2d 587, 592 (9th Cir.1990); *United States v. Gonzalez*, 897 F.2d 1018 (9th Cir.1990). The sentencing court is justified in considering the defendant's conduct prior to, during, and after the trial to determine if the defendant has shown any remorse through his actions or statements. If the defendant has exercised all of his rights during the entire process, including sentencing, then the chances of his receiving the two level reduction for acceptance of responsibility may well be diminished. For example, if the defendant has refused to make a statement to police, has exercised his right to a trial, has exercised his Fifth Amendment privilege and refused to testify, or testified and denied guilt, has refused to make any statement of remorse to the probation officer or the court, and has refused to do any of the things set out in the commentary to section 3E1.1, then it is likely there is no sign of remorse and the sentencing judge is justified in denying the reduction. However, if a defendant has shown some sign of remorse but has also exercised constitutional or statutory rights, the sentencing judge

> may not balance the exercise of those rights against the defendant's expression of remorse to determine whether the "acceptance" is adequate.
>
> Stated another way, the sentencing court may consider all of the criteria set out in the commentary to section 3E1.1 as well as any other indications of acceptance of responsibility and weigh these in the defendant's favor. However, section 3E1.1 does not allow the judge to weigh against the defendant the defendant's exercise of constitutional or statutory rights. The exercise of these rights may diminish the defendant's chances of being granted the two level reduction, not because it is weighed against him but because it is likely that there is less evidence of acceptance to weigh in his favor. The sentencing court, however, may not weigh the exercise of these rights against the defendant.

United States v. Rodriguez, 959 F.2d 193, 197 (11th Cir. 1992).

The Ninth Circuit has recently re-affirmed that position, noting that the rule also has Sixth Amendment and Due Process underpinnings, too:

> The Supreme Court has repeatedly emphasized that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *United States v. Goodwin*, 457 U.S. 368 (1982)…. We have consistently echoed this principle, including in the context where a district court withholds a reduction for acceptance of responsibility…. A defendant's right to contest his guilt before a jury is protected by the Constitution, and his decision to do so cannot be held against him.

United States v. Hernandez, 894 F.3d 1104, 1109-10 (9th Cir. 2018) (some quotations and citations omitted).[3]

II. Five Circuits Allow Constitutionally Protected Conduct to Count Against a Defendant Under U.S.S.G. § 3E1.1.

In contrast to the Ninth and Eleventh Circuits, five other circuits (including the circuit below) do allow a district court to deny credit for ac-

[3] Several state supreme courts hold similarly with respect to the evidentiary record available for their state sentencing schemes. *See, e.g.*, *State v. Knight*, 701 N.W.2d 83, 87 (Iowa 2005) ("[A] trial court must carefully avoid any suggestions in its comments at the sentencing stage that it was taking into account the fact defendant had not pleaded guilty but had put the prosecution to its proof. But this prohibition does not preclude a sentencing court from finding a lack of remorse based on facts other than the defendant's failure to plead guilty." (quotation omitted)); *State v. Shreves*, 60 P.3d 991, 996-97 (Mont. 2002) ("To allow sentencing courts to [infer lack of remorse from silence] would force upon the defendant the Hobson's choice… condemned by the Fifth Amendment…[,] specifically, that the defendant must either incriminate himself at the sentencing hearing and show remorse… (or, in the alternative, stand on his right to remain silent and suffer the imposition of a greater sentence."); *Dzul v. State*, 56 P.3d 875, 880 (Nev. 2002) ("[I]imposition of a harsher sentence based upon the defendant's exercise of his constitutional rights is an abuse of discretion. A sentencing court may not draw any adverse inference from a defendant's silence during sentencing." (footnote and quotation omitted)); *State v. Burgess*, 943 A.2d 727, 737-38 (N.H. 2008) ("[D]enying a defendant leniency simply because he fails to speak and express remorse is equivalent to penalizing him for exercising his right to remain silent.").

ceptance of responsibility for a defendant's decision to go to trial or engage in other otherwise protected trial conduct.[4] *See, e.g.*, *United States v. Sims*, 428 F.3d 945, 961 (10th Cir. 2005) ("[If] the defendant argue[s at trial] there was insufficient evidence to prove the factual element, the right to claim an acceptance of responsibility adjustment is forfeited." (citation omitted)); *United States v. Warren*, 338 F.3d 258, 266 (3d Cir. 2003) (rejecting as dicta prior circuit authority that Fifth-Amendment penalty jurisprudence applies to U.S.S.G. § 3E1.1 and holding that it does not);[5] *United States v. Jones*, 997 F.2d 1475, 1480 (D.C. Cir. 1993) (*en banc*, 7-3 majority) (allowing a district judge to "consider the defendant's decision to go to trial as evidence that the defendant's ultimate acceptance may have been half-hearted" because the Fifth Amendment's

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[4] Several states appear to fully embrace the position of the five circuits described above. *See, e.g.*, *Christian v. State*, 513 P.2d 664, 670 (Alaska 1973) ("Certainly the offender's unwillingness to accept criminal responsibility can and should be taken into account by the sentencing court."); *High v. Zant*, 2300 S.E.2d 654, 661 (Ga. 1983) ("This is not a comment [from the prosecutor] which asked the jury to infer guilt from the defendant's failure to testify; rather, it asked the jury to infer a lack of remorse. We find no error." (citation omitted)); *Commonwealth v. Frazier*, 500 A.2d 158, 160 (Pa. Super 1985) ("A sentencing court is given broad discretion to inquire into the personal character of the defendant. Among those factors used to determine a defendant's potential for rehabilitation is his or her manifestation of social conscience and responsibility through contrition, repentance, and cooperation with law enforcement agencies." (citations omitted)).

[5] The prior panel did not consider it dicta. *See United States v. Frierson,* 945 F.2d 650, 659-60 (3d Cir. 1991) ("[A]n increase in sentence or a denied reduction in sentence is a penalty in the context of Fifth Amendment jurisprudence.").

penalty-jurisprudence is not implicated); *United States v. Frazier*, 971 F.2d 1076, 1084 (4th Cir. 1992) (holding that U.S.S.G. is "conditioned upon" a waiver of constitutional rights); *United States v. Beal*, 960 F.2d 629, 632 (7th Cir. 1992) ("The defendant maintains initially that the district court erred when it concluded that his refusal to be interviewed by the probation officer preparing his presentence report was evidence of his failure to accept responsibility. We disagree with the defendant's argument that this is not a proper reason for refusing to grant the two-level reduction." (quotation omitted)).[6]

III. Review of the Judgment Below Is Especially Important.

A circuit split is itself sufficient to merit *certiorari*, U.S. Sup. Ct. R. 10(a). The judgment below, however, also merits *certiorari* because the judgment below has "decided an important question of federal law

[6] Some states split the difference in their sentencing schemes between the position of the Ninth and Eleventh Circuits on the one hand and, on the other, the position on the five circuits described above. In Maryland and Virginia, for example, the decision to go to trial cannot be held against the defendant but a refusal to affirmatively express remorse at sentencing can count against the defendant. *See Jennings v. State*, 664 A.2d 903, 908, 910 (Md. 1995) (holding 3-2 that while "a trial court may not punish a defendant for invoking his right to plead not guilty and putting the State to its burden of proof for protesting his innocence," a trial court can consider a failure to admit guilt by the time of sentencing); *Lawlor v. Commonwealth*, 738 S.E.2d 847, 892 (Va. 2013) (same).

that…should be settled by this Court." U.S. Sup. Ct. R. 10(c). Specifically, the judgment below holds that a reduction under U.S.S.G. § 3E1.1 was categorically not available to Mr. Cruz Perez because he "cross-examined the Government's witnesses, seeking to undermine their credibility, and moved for a judgment of acquittal." [App. 3]. In other words, because Mr. Cruz Perez, through counsel, actually participated in the trial, he cannot obtain credit for acceptance of responsibility. *See also Sims*, 428 F.3d at 961 (holding that arguments at trial as to evidentiary insufficiency preclude a reduction for acceptance).

As this Court has recognized, however, a lawyer provided to a defendant that does not actually participate in the trial is no lawyer at all for Sixth-Amendment purposes: "If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated. To hold otherwise could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *United States v. Cronic*, 466 U.S. 648, 654 (1984) (quotation omitted).

The judgment below, if allowed to stand, precludes counsel from engaging in core conduct expected of the defense on pain of forfeiting the

defendant's chance, in appropriate cases, from seeking credit for acceptance of responsibility. Defense counsel serve critically important functions in the criminal justice system. *See, e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) ("[The right to counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty… The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done." (quotation omitted)). This Court ought to ensure that U.S.S.G. § 3E1.1 is interpreted consistent with that constitutional guarantee—and hold that constitutionally protected conduct does not count against a defendant, so as not to chill counsel's ability to offer assistance at trial.

IV. This Case Is an Appropriate Vehicle.

While Mr. Cruz Perez did proceed to trial, he also manifested acceptance of responsibility in many ways.

When law enforcement executed a search warrant at Mr. Cruz Perez's home, they interrogated him about the drugs in the house. According to law enforcement testimony at the suppression hearing, "[h]e was very forthcoming with the information [that law enforcement sought]. He didn't hesitate, he didn't give any indication he was trying to deceive us

in any way…." That is strong evidence of acceptance of responsibility. *See, e.g., United States v. LaPierre*, 998 F.2d 1460, 1468 (9th Cir. 1993) (remanding for reconsideration of denial of acceptance where, despite his jury trial, the defendant "made statements immediately upon his arrest, including accepting full responsibility for the crimes, and showed the officers where the money from the robbery was hidden").

Further, he did not testify at his trial against the charges and thus did not affirmatively deny his actions. His defense to the jury was simply that the Government had failed to carry its constitutional burden of proof (an issue that was not repeated on appeal below).

In his interview with the PSR writer after trial, Mr. Cruz Perez unequivocally accepted his role in the charged offenses—affirmatively admitting the indicted charges. To the extent that the statement did not encompass all relevant conduct that the later-written PSR would include, his non-objection to that conduct allowed the district court to accept that conduct as true. *See* Fed. R. Crim. Pro. 32(h)(3)(A) ("At sentencing, the court… may accept any undisputed portion of the presentence report as a finding of fact[.]").

In conducting the U.S.S.G. § 3E1.1 calculus, however, the district court expressly agreed with the prosecutor that the decision to proceed

to trial—despite the need to potentially preserve suppression issues (that ultimately became moot for appeal in light of the total evidence adduced at trial)—would count against Mr. Cruz Perez because he did not stipulate to the facts at a bench trial. [App. 14]. Stipulating to facts would, however, require affirmative admissions of fact—admissions that may be admissible in a later prosecution under state or federal law.

This case thus squarely presents the Court with the chance to decide whether constitutionally protected conduct—including going to trial and maintaining silence at trial—ought to be considered against a defendant under U.S.S.G. § 3E1.1. As the Ninth and Eleventh Circuits have already held, such protected conduct should not count against the defendant.

CONCLUSION

For the forgoing reasons, this Court should grant the petition, reverse the judgment below, and remand for resentencing.

Dated: February 7, 2020

Respectfully submitted,

Rodrigo Cruz Perez

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Howard W. Anderson III
CJA Counsel for Petitioner

LAW OFFICE OF
HOWARD W. ANDERSON III, LLC
P.O. Box 661
Pendleton, SC 29670
(864) 643-5790 (P)
(864)332-9798 (F)
howard@hwalawfirm.com