No. _____

In The
Supreme Court of the United States

DAVID LOPEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the First Circuit

---

PETITION FOR WRIT OF CERTIORARI

Michael M. Brownlee
The Brownlee Law Firm, P.A.
Attorney for Petitioner
390 N. Orange Ave. Suite 2200
Orlando, Florida 32801
407-843-2111
mbrownlee@brownleelawfirmpa.com

Counsel of Record for Petitioner

July 24, 2020

QUESTION PRESENTED

David Lopez pled guilty to Conspiracy to Conduct Enterprise Affairs through a Pattern of Racketeering Activity in violation of 18 U.S.C. §1962(d). USSG § 2E1.1 applies to RICO sentencing. Application Note One to USSG § 2E1.1 provides that when there is more than one underlying offense, and the offenses are discrete RICO violations, each underlying offense is treated as if contained in a separate count of conviction when determining the base offense level for each predicate RICO violation.

At sentencing, it was undisputed Mr. Lopez deserved a leadership enhancement for one of the predicate crimes, but not the other. Accordingly, Probation recommended that Mr. Lopez receive a leadership enhancement in determining the base offense level for one of the underlying crimes, but not the other. The district court rejected Probation's text-based interpretation of Application Note One because it did not "make sense." The First Circuit affirmed because holding otherwise would lead to "incongruous results."

Did the district court and the First Circuit err by declining to apply Application Note One as written?

PARTIES TO THE PROCEEDING

Petitioner, David Lopez, was the appellant in the United States Court of Appeals for the First Circuit. Respondent, the United States, was the appellee.

TABLE OF CONTENTS

INDEX OF APPENDICES

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

SENTENCING GUIDELINES

PETITION FOR WRIT OF CERTIORARI

Petitioner, David Lopez, respectfully petitions this Court for a writ of certiorari to review the opinion of the First Circuit Court of Appeals.

DECISIONS BELOW

Petitioner, David Lopez, pled guilty without a plea agreement to Conspiracy to Conduct Enterprise Affairs through a Pattern of Racketeering Activity in violation of 18 U.S.C. §1962(d). Probation correctly applied USSG §2E1.1 and calculated the offense level. The United States District Court for the District of Massachusetts applied its own calculation and imposed a maximum sentence of 240 months, which Petitioner appealed. The First Circuit issued a written opinion affirming this sentencing. *United States v. Lopez*, 957 F.3d 302 (1st Cir. 2020). App. 1-18.

BASIS FOR JURISDICTION

On April 30, 2020, the First Circuit issued a written opinion affirming the district court's sentencing order. App. 1-18. This timely petition follows. Jurisdiction lies in this Honorable Court. *See* 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

1. 18 U.S.C. § 1962. App. 63.

2. USSG §2E1.1:

(a) Base Offense Level (Apply the greater):
(1) 19; or
(2) the offense level applicable to the underlying racketeering activity.

3. USSG § 2E1.1, Cmt., n.1:

> Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.

4. USSG § 3B1.1:

> Based on the defendant's role in the offense, increase the offense level as follows:
> **(a)** If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
> **(b)** If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
> **(c)** If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

STATEMENT OF THE CASE

I. Introduction

On October 27, 2017, Mr. Lopez, a member of the MS-13 gang, pled guilty without a plea agreement to Conspiracy to Conduct Enterprise Affairs through a Pattern of Racketeering Activity, in violation of 18 U.S.C. § 1962(d).

According to the Presentence Investigation Report (PSR), the racketeering activity included two underlying, predicate RICO acts. The first underlying racketeering act was the attempted murder of a member of a rival gang, Denys Perdomo Rodriguez, on May 29, 2014. App. 4-5. The second was a subsequent conspiracy during April of 2015 to murder a witness ("CW-2") who agreed to cooperate with the Government's investigation. App. 4-5.

It was undisputed Mr. Lopez was only "promoted" to a leadership role after the attempted murder of Rodriguez.

II. Probation's calculation of Mr. Lopez's offense level.

On October 27, 2017, Mr. Lopez pled guilty without a plea agreement to Conspiracy to Conduct Enterprise Affairs through a Pattern of Racketeering Activity, in violation of 18 U.S.C. § 1962(d). As a result, the U.S. Probation and Pretrial Services System (Probation) applied USSG §2E1.1, which provides a base offense level of the greater of 19, or the offense level applicable to the underlying racketeering activity.

In calculating the offense level, Probation noted that the Guidelines instruct that when there is more than one underlying offense, each underlying offense is treated as if contained in a separate count of conviction. *See* USSG § 2E1.1, Cmt., n.1. Since the two crimes could not be grouped together, Probation determined the offense level by calculating the greater of the offense level of the attempted murder of Mr. Perdomo Rodriguez ("Group One") and the conspiracy to murder CW-2 ("Group Two").

For Group One, Probation found that the base offense level was 33 because the object of the offense would have constituted first degree murder. *See* USSG § 2A2.1(a)(1). Since the victim sustained a life-threatening bodily injury, it applied a four-level increase to reach an adjusted offense level of 37. *See* USSG § 2A2.1(b)(1).

For Group Two, Probation found that the base offense level was 33. *See* USSG § 2Al.5(a). According to Probation, an upward adjustment of three levels was

warranted based on Mr. Lopez's role as a manager or supervisor of a RICO enterprise involving five or more participants. *See* USSG § 3Bl.l(b). Probation added an additional two-level enhancement for obstruction of justice because CW-2 was believed to be cooperating with law enforcement officials. *See* USSG § 3C1.1. Accordingly, Probation scored the adjusted offense level for Group Two as a 38.

In the Addendum to the PSR, Probation advised the district court that in reaching its conclusion that a separate analysis on the aggravated role enhancement was required for each group, Probation solicited guidance from the United States Sentencing Commissions' Office of Education (OEP). OEP is "tasked with teaching guideline application to judges, probation officers, attorneys, and other criminal justice professionals," on whether the "blanket" application of a role enhancement was intended by the Guidelines. *Id.* According to Probation, OEP "confirmed that it is the intention of the Guidelines that each group for the underlying offenses should be distinctly examined for the applicability of an increase for aggravating role (and any other Chapter Three adjustments)." *Id.* Based on this guidance, Probation recommended that Mr. Lopez not receive a § 3Bl.l(b) role enhancement for the conduct underlying Group One. *Id.*

In light of this analysis, the offense level of Group Two constituted the higher of the two groupings. Probation accordingly used Group Two's adjusted offense level of 38, which was increased by two levels for a combined adjusted offense level of 40. *See* USSG § 3D1.4. Probation found that Mr. Lopez should be entitled to a three-

level decrease for acceptance of responsibility. Therefore, in the view of Probation, Mr. Lopez's total offense level should be 37.

Mr. Lopez had a criminal history score of zero. Thus, under Probation's calculation, the Guidelines called for an imprisonment range of 210 to 262 months. However, since the conviction under 18 U.S.C. § 1962(d) carried a statutory twenty-year maximum term of imprisonment, the top end of the guidelines recommendation was reduced to 240 months of incarceration. *See* USSG § 5G1.1(c).

III. The district court rejects Probation's and OEP's text-based calculation of Mr. Lopez's offense level because the result it yielded did not "make sense" to the district court.

During the sentencing hearing, the district court disagreed with Probation and OEP that a separate analysis on the aggravating role enhancement was required for each group. Relying on *United States v. Ivezaj*, 568 F.3d 88 (2d Cir. 2009) and *United States v. Damico*, 99 F.3d 1431 (7th Cir. 1996), the district court concluded that the three-level enhancement under USSG §3Bl.l(b) for Mr. Lopez's role in the offense "should apply across the board." App. 30. According to the district court:

> There's a tricky issue under the guidelines, which I have avoided reaching in the past, but I think I need to reach now as to how that three-level enhancement is applied in a RICO circumstance, such as this, a RICO conviction.
>
> Basically I agree with the Second and Seventh Circuits' application in [*Ivezaj*] and [*Damico*], that the three-level enhancement should apply across the board. It seems to me otherwise it doesn't make sense. It would actually put a person in a better position if you were a leader of a racketeering conspiracy but didn't personally participate in the individual acts or each of those acts involved five or fewer people, you

> wind up with a lower guideline range than you otherwise would, and it doesn't seem to make any sense to me.
>
> The way probation applied it, they applied it to one offense but not the other. I think it was applied in Group 2 but not Group 1. I don't think – my take on this is that the right way to do it is to count it only once, to do the calculation of the underlying offenses first, and then apply then three-level enhancement. It's a Section 3 enhancement, and I think that's a more sensible way to do it …

App. 30.

The district court acknowledged that there was "considerable ambiguity" on the point and recognized that Probation "checked with the Sentencing Commission staff, who indicated that the way probation did it was right." *Id.* at 31.

As recommended by Probation, the district court granted the three-level decrease in the offense level for Mr. Lopez's acceptance of responsibility. Yet, unlike Probation, which calculated the total offense level to be 37, the district court concluded that the total offense level was 39, which yielded a guideline range of 262 to 327 months. App. 32.

Even though his co-defendant, another MS-13 member who participated in the attempted murder of Perdomo Rodriguez, received a sentence of only 156 months, the Government recommended that Mr. Lopez receive the statutory maximum sentence of 240 months of incarceration. App. 34, 46. The district court ultimately acquiesced to the Government's recommendation. But the district court recognized its sentence was anomalous for two reasons. First, it was "highly unusual for anyone who pleads guilty to receive a maximum sentence." App. 54. Second, Mr. Lopez's sentence reflected a sharp deviation from the sentence of a co-

defendant, who "stabbed Mr. Perdomo Rodriguez multiple times" and "bragged about it afterwards" yet only received a 156-month sentence. *Id.* Notwithstanding these concerns, the district court imposed a sentence of 240 months. *Id.* at 58.

IV. The First Circuit affirms.

On appeal, Mr. Lopez argued the district court's reliance on *Ivezaj* and *Damico* was improper because both cases were wrongly decided. Specifically, Mr. Lopez argued that both decisions failed to apply the plain language of USSG § 2E1.1 and Application Note One. Mr. Lopez also argued that under *Stinson v. United States*, 508 U.S. 36 (1993), the district court was bound to apply Application Note One as written. *See Stinson*, 508 U.S. at 38 (Instructing that commentary "interpret[ing] or explain[ing] a [G]uideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that [G]uideline.").

The First Circuit rejected Mr. Lopez's text-based argument in favor of the reasoning espoused in *Damico*. App. 12. According to the First Circuit's opinion, the *Damico* "approach" to interpreting the Guidelines and Application Note One "fits seamlessly with an important policy concern undergirding the RICO statute." App. 12. The First Circuit also rejected Mr. Lopez's text-based interpretation because it "would lead to incongruous results," explaining:

> If, say, the application of a role-in-the-offense enhancement depended upon assessing individual predicate acts in a vacuum, a defendant who served as the kingpin of even the most sprawling criminal enterprise could nonetheless escape a role-in the-offense enhancement simply because each of the predicate acts underlying his conviction involved fewer than five participants and was not otherwise extensive. *See*

> *Ivezaj*, 568 F.3d at 99; *Damico*, 99 F.3d at 1437. We agree with the Second Circuit that "it makes little sense to allow a defendant who acts in a leadership capacity in a wide-ranging criminal enterprise to have his offense level adjusted on the basis of his participation in discrete racketeering acts." *Ivezaj*, 568 F.3d at 99.

App. 14.

> The First Circuit summarized its holding as follows:
>
> We hold that when a defendant is convicted of racketeering conspiracy under 18 U.S.C. § 1962(d), the imposition of a role-in-the-offense enhancement under USSG §3B1.1 depends upon his role in the racketeering enterprise as a whole, not upon his role in the discrete predicate acts that underpin the charged conspiracy.

App. 14.

REASON FOR GRANTING THE WRIT

I. This Court should exercise its supervisory power, reverse the First Circuit's opinion, and remind courts that controlling text must be applied as written.

This Court should reverse the First Circuit's decision in this case because instead of applying the law as it is written and accepting the result, the First Circuit achieved the result it wanted based on its view of the "right" outcome. This Court made clear in *Stinson v. United States*, 508 U.S. 36, 38 (1993) that commentary such as Application Note One that "interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that [G]uideline."

Application Note One clearly explains the process for factoring Chapter 3 enhancements into a RICO sentence where a defendant like Mr. Lopez has more than one underlying RICO offense. Application Note One provides:

> Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.

USSG § 2E1.1, Cmt., n.1.

The language requiring application of "Chapter Three, Parts A, B, C, and D" when determining whether "subsection (a)(1) or (a)(2) results in the greater offense level" makes crystal clear that Chapter 3 enhancements—such as the role enhancement provided in USSG § 3B1.1(b)—must be considered when evaluating the offense level associated with an underlying racketeering act. Once each underlying racketeering act is assessed independently and assigned an offense level, which necessarily must include any applicable Chapter 3 enhancements, the underlying act with the highest offense level becomes the (a)(2) value. If the (a)(2) value is higher than the (a)(1) value—19—subsection (a)(2) applies.

That's it. The plain language of Application Note One establishes that Chapter 3 enhancements are part of the (a)(1) versus (a)(2) inquiry if a defendant has more than one underlying racketeering offense. But Application Note One is clear that Chapter 3 enhancements are meant to play a limited role in the inquiry. A Chapter 3 enhancement only factors into the analysis if the enhancement is properly applied to an underlying racketeering act, and only for purposes of determining the total offense level for the underlying act.

In this case, there was no dispute that the role-in-the-offense enhancement was inapplicable to Group One. As a result, Probation—with the blessing of OEP—

only applied the enhancement to Group Two. And because Group Two constituted the higher of the two groupings, Probation correctly used Group Two's adjusted offense level of 38. After the adjusted offense level of 38 was increased by two levels for a combined adjusted offense level of 40, *see* USSG § 3D1.4, and then decreased three levels due to Mr. Lopez's acceptance of responsibility, Mr. Lopez's total offense level should have been 37, not 39, as found by the district court.

The First Circuit's concern about "incongruous results" should not have trumped the plain language of Application Note One. Likewise, *Damico* and its progeny are wrongly decided because they overlook the circumscribed role Application Note One establishes for Chapter 3 enhancements in the USSG § 2E1.1 framework. Each case deals with the same question: can a defendant be subject to a Chapter 3 enhancement under USSG § 2E1.1, even though the underlying racketeering act used to derive the defendant's (a)(2) offense level does not support a Chapter 3 enhancement? Each of the Courts answered in the affirmative, holding that even if the defendant did not have a leadership role in the underlying racketeering activity, a Chapter 3 enhancement is nonetheless appropriate if the record supports a finding by the district court that the defendant's overall role in the racketeering enterprise supports an enhancement.

For instance, in *Damico*, the defendant admitted—"in a detailed plea agreement" —that "he headed a criminal enterprise" for "approximately 15 years." *Damico*, 99 F.3d at 1432. The underlying racketeering activity used to calculate the defendant's (a)(2) offense level was extortion. Id. at 1436. The defendant argued he

should not be subject to an enhancement because his extortion-related conduct only involved one other person, rather than the requisite "five or more participants" under USSG § 3B1.1(a). *Id.* at 1436-37. At the same time, the defendant conceded that given his lengthy tenure as head of a large criminal enterprise, he would qualify for enhancement under USSG § 3B1.1(a) if the district court was correct to assess his "role in the overall conspiracy," rather than his role in the predicate offense. *Id.*

The Seventh Circuit rejected the defendant's argument that the district court was not permitted to apply a Chapter 3 enhancement in a manner contrary to the approach described in Application Note One. Specifically, the *Damico* Court explained: "We hold, therefore, that the predicate-by-predicate approach of Application Note 1 applies, as the note states, only for the purpose of establishing a RICO defendant's base offense level, and not for the purpose of applying the Chapter Three adjustments." *Id.* at 1438. But that is not what Application Note One states. To the contrary, the Note specifically requires that Chapter 3 enhancements be factored into the RICO offense level calculation when there are multiple underlying acts.

Application Note One provides in clear language instructions for the use of Chapter 3 enhancements in fashioning a sentence under USSG § 2E1.1. Rather than confining its analysis to the language of Application Note One, the *Damico* Court held that a defendant's "overall role" in the RICO enterprise can support a Chapter 3 enhancement even when the underlying racketeering act cannot. The

holding is not based on the language of Application Note One, and in fact contradicts it. Instead, the holding in *Damico* stems from policy considerations and assumptions about the goals of the USSG § 2E1.1 sentencing framework. But the policy considerations and purported goals of USSG § 2E1.1 that drove the *Damico* decision are not expressed in the language of USSG § 2E1.1 or Application Note One. Even if the Seventh Circuit's approach makes sense, it is not based on the guideline language, and cannot supplant the approach mandated by the plain language of Application Note One.

Another of the *Damico*-progeny cases the district court and the First Circuit relied on—*United States v. Ivezaj*, 568 F.3d 88 (2d Cir. 2009)—reveals the extent to which the *Damico* rationale is divorced from the language of Application Note One. The *Ivezaj* Court notes that it finds *Damico* persuasive, because "analyzing a defendant's role in the overall RICO enterprise makes a good deal more sense than considering his role in each underlying predicate." *Id.* at 99. Likewise, the *Ivezaj* Court opined "it makes little sense to allow a defendant who acts in a leadership capacity in a wide-ranging criminal enterprise to have his offense level adjusted on the basis of his participation in discrete racketeering acts." *Id.* Even if it makes "little sense," the approach the *Ivezaj* Court decries is precisely the approach required by the language of Application Note One. The only substantive comment the Court makes about the language of Application Note One parrots the flawed reading advanced in *Damico*: that the language "is clear that the requirement to

look at each individual act in a RICO offense is only for the purpose of establishing the base level offense, not for applying the Chapter Three adjustments." *Id.*

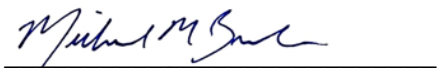
Finally, the remaining *Damico*-progeny cases relied on by the First Circuit (App. 12) adopt *Damico*'s rationale without independent analysis. *See, e.g.*, *United States v. Coon*, 187 F.3d 888, 889 (8th Cir. 1999) ("We agree with the Seventh Circuit that the §3B1.1 adjustment is applied to a RICO offense by looking at the overall RICO conspiracy and all its relevant conduct."); *United States v. Yeager*, 210 F.3d 1315, 1317 (11th Cir. 2000) (Rejecting defendant's argument without elaboration because "we agree with the Seventh Circuit in *Damico* that it is appropriate to judge a RICO defendant's role in the offense with respect to the overall RICO conspiracy for the purpose of applying an enhancement").

This Court should reverse the First Circuit in this case and explain that *Damico* and its progeny are wrongly decided because they fail to apply the plain language of Application Note One. As this Court recently stated: "Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1754 (2020).

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Lopez's petition and reverse the First Circuit's opinion.

Respectfully submitted on this 28th day of July, 2020,



Michael M. Brownlee
The Brownlee Law Firm, P.A.
Attorney for Petitioner
390 N. Orange Ave.
Suite 2200
Orlando, Florida 32801
407-843-2111
mbrownlee@brownleelawfirmpa.com
Counsel of Record for Petitioner