No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

CRISTIAN MENDOZA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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Issues Presented

1. A defendant who enters a guilty plea pursuant to a plea agreement that includes a purported inducement that he will receive an acceptance of responsibility reduction to his total offense level under U.S.S.G. § 3E1.1, but which (unbeknownst to him) cannot reduce his advisory sentencing range to anything other than "life," has not entered knowing, voluntary plea.

2. The United States Sentencing Guidelines are unconstitutional to the extent that they provide for the possibility that a defendant can enter a timely guilty plea instead of going to trial, and yet not receive any benefit for acceptance of responsibility when he is otherwise deserving of the reduction.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Cristian Mendoza respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Mendoza's conviction and sentence is styled: *United States v. Mendoza,* 811 F. App'x 270 (5th Cir. 2020).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the Mendoza's conviction and sentence was announced on June 29, 2020 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the date of the judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions

U.S. Const. amend. V.

No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

U.S.S.G. Provisions

U.S.S.G. § 3E1.1 Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.

U.S.S.G. § 1B1.1 Application Instructions

(a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines . . . by applying the provisions of this manual in the following order, except as specifically directed:

(1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction.

(2) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

(3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(4) If there are multiple counts of conviction, repeat steps (1) through (3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

U.S.S.G. § 1B1.1 cmt. n.4 (A) Cumulative Application of Multiple Adjustments within One Guideline

The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used.

Statement of the Case

Mendoza has an eighth grade education and speaks only Spanish. At the time he entered his guilty plea, the magistrate judge informed him that his advisory guideline range would not be able to be determined until the presentence investigation report (PSR) was prepared. That was not actually true – at least not from the Government's perspective. The plea agreement and factual basis, both presumably drafted by the Government, established Mendoza's base offense level at 38 (45 kilograms of a mixture or substance containing a detectable amount of methamphetamine or 4.5 kilograms or more of methamphetamine (actual)). The plea agreement also included stipulations that (1) Mendoza qualified for a 2-level increase under U.S.S.G. § 2D1.1(b)(12) for maintaining a premises for purpose of manufacturing or distributing a controlled substance, and (2) Mendoza did not qualify for a mitigating role reduction. This moved Mendoza to an offense level of 40. The factual basis stated that the methamphetamine was imported from Mexico, implicitly resulting in a 2-level increase under U.S.S.G. § 2D1.1(b)(5). This moved Mendoza to an offense level of 42. The factual basis, as originally drafted, also included stipulations that Mendoza was a

leader/organizer and that he possessed firearms during the offense. ROA.65. Although the Government agreed to delete these two stipulations for purposes of rearraignment, the Government proved them up at sentencing, thereby adding an additional five levels to Mendoza's offense level (3 levels for leadership, U.S.S.G. § 3B1.1(b), ROA.293, 308; and 2 levels for possessing a firearm, leaving him with a total offense level of 47. It is obvious from the sentencing testimony that the evidence relied upon by the Government to obtain these five additional levels was known to the Government at the time the Government drafted the plea agreement and factual basis.

The plea agreement also provided for the possibility that Mendoza could receive a 3-level reduction from his total offense level for acceptance of responsibility under U.S.S.G. § 3E1.1. The Sentencing Guideline Application Instructions (U.S.S.G. § 1B1.1) however, in setting forth the order that provisions therein are to be applied, direct that an adjustment for acceptance of responsibility is to be subtracted only *after the total offense level has been determined*. U.S.S.G. § 1B1.1(a)(5). And The Fifth Circuit has held that this is the procedure is to be applied *no matter how*

high that total level is. See e.g. United States v. Pittsinger, 874 F.3d 446, 454 (5th Cir. 2017).

Had Mendoza received the acceptance of responsibility reduction[1], this would have left him at a total offense level of 44. Under the sentencing guidelines, the highest possible total offense level is 43, which carries a sentencing "range" of *life* for all six criminal history categories.

Mendoza argued on appeal (among other things) that his guilty plea was not voluntarily and knowingly entered; more specifically he argued that he would not have pled guilty had he known that his advisory sentencing range would still have been "life."

[1] The PSR initially granted Mendoza an acceptance of responsibility reduction. The Government however convinced the district court that Mendoza was not deserving of the reduction because a cell phone was found under his mattress in jail. Mendoza denied knowledge of the cell phone. After Mendoza was sentenced herein, the Government indicted Mendoza in a separate cause number for possessing the phone. The Government prosecutor who filed the charge later moved (successfully) to have the charge dismissed "in the interest of justice."

<u>First Reason for Granting the Writ</u>: A defendant who enters a timely guilty plea instead of going to trial has a constitutional right to at least the possibility of a more lenient sentence than if he had gone to trial and been found guilty.

The Sentencing Guidelines are authoritative unless they violate the U.S. Constitution. *Stinson v. United States*, 508 U.S. 36, 38 (1993). In *Corbitt v. New Jersey,* 439 U.S. 212 (1978), the Supreme Court noted that the constitutional propriety of extending leniency in exchange for a plea of guilty is "unequivocally recognize[d]." *Id.* at 224. Plea bargaining systems throughout the country "inherently extend to defendants who plead guilty the probability or the certainty of leniency that will not be available if they go to trial." *Id.* at 224 n.4. In *Brady v. United States,* 397 U.S. 742 (1970), the Court noted:

> For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious – *his exposure is reduced*[.] (Emphasis added.)

Id. at 752.

<u>Second Reason for Granting the Writ</u>: Rigid application of U.S.S.G. § 1B1.1(a) in a circumstance where the defendant's total offense level is above 43 is at odds with the express purpose of U.S.S.G. § 3E1.1.

The Third Circuit has noted that the underlying rationale for § 3E1.1 is consistent with the Supreme Court's *Corbitt* opinion:

> We believe that *Corbitt* controls our decision. In *Corbitt*, the Supreme Court held that a New Jersey murder statute that provided the potential for a shorter sentence to defendants who pleaded *non vult* was constitutional and did not violate the defendant's Sixth Amendment right to trial. . . . To the extent that *Corbitt* is in tension with our decision in *Frierson*, we must follow the Supreme Court. *Sentencing Guideline 3E1.1 creates an analogous incentive for defendants to plead guilty, and under Corbitt, this incentive is constitutional.* (Emphasis added.)

United States v. Cohen, 171 F.3d 796, 805 (3d Cir. 1999); *see also United States v. Velez,* 46 F.3d 688, 694 (7th Cir. 1995) ("The acceptance of responsibility reduction codifies the tradition of offering lenience to defendants in exchange for their entering a guilty plea.") The commentary to § 3E1.1 provides:

> The reduction of offense level provided by this section *recognizes legitimate societal interests*. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, the actions listed above (or some equivalent action) is

> appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility. (Emphasis added.)

U.S.S.G. § 3E1.1, comment. (backg'd).

In *United States v. Rodriguez,* 64 F.3d 638 (11th Cir. 1995), the Eleventh Circuit addressed a situation similar to Mendoza's (statutory maximum sentence was below adjusted guideline range whether defendant accepted responsibility or didn't accept responsibility) in that even when the defendant's acceptance of responsibility reduction was applied, it would not have affected his sentencing range. *Id.* at 640. The Court made the following observations regarding this anomaly:

> A defendant's acceptance of responsibility is a circumstance that the guidelines clearly and explicitly consider. The § 3E1.1 adjustment *entitles* a defendant who demonstrates acceptance of responsibility to a two- or three-level reduction in his offense level. (Emphasis added)
>
> . . .
>
> Had Rodriguez not accepted responsibility, his sentence would have been the same. Thus, we must determine whether, in drafting the guidelines, the Sentencing Commission adequately considered the interaction of § 5G1.1(a) and § 3E1.1 in cases such as this.
>
> . . .
>
> As the commentary to § 3E1.1 explains, "the reduction of offense level … *recognizes legitimate societal interests*. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense … *is appropriately*

> *given a lower offense level than a defendant who has not demonstrated acceptance of responsibility*." U.S.S.G. § 3E1.1, comment. (backg'd). We think that the Commission failed to consider that § 5G1.1(a) might operate to negate the § 3E1.1 adjustment and undermine the "legitimate societal interests" [**14] served by the adjustment. (Emphasis added)
>
> . . .
>
> As discussed above, the guidelines contemplate that a defendant's acceptance of responsibility will be recognized at sentencing. Moreover, one of the "legitimate societal interests" served by rewarding a defendant's acceptance of responsibility is *providing an incentive to engage in plea bargaining.* Plea bargaining is "an essential component of the administration of justice" that should be encouraged because it keeps the justice system from becoming overburdened with full-scale trials. (Emphasis added)
>
> . . .
>
> A defendant evaluating whether to plead guilty or go to trial rationally considers how his decision will affect his sentence. If a defendant knows that, under § 5G1.1(a), he will receive the same sentence regardless of whether he accepts responsibility, he will be more likely to shun plea bargaining and go to trial. A chance of acquittal is always present; there is less incentive to forego this chance if a guilty plea will not be rewarded with sentencing leniency. Allowing a departure based on acceptance of responsibility in such circumstances preserves the possibility of some sentencing leniency and thus serves society's legitimate interest in guilty pleas and plea bargaining.

Id. at 643; *see also United States v. Gomez,* 24 F.3d 924, 926 (7th Cir. 1994) (Section 3E1.1 "is designed as a reward for a guilty plea, which saves the judicial system the burden of trial[.]").

Prior to 1989, a defendant deemed to be a Career Offender under the Sentencing Guidelines was not entitled to the possibility of an acceptance of responsibility reduction. The Sentencing Commission subsequently amended the guidelines "to provide an incentive for the acceptance of responsibility by defendants subject to the career offender provision." U.S.S.G. App. C, amend. 266.

"[T]he sentencing guidelines need to be consistently interpreted to serve their purpose[.]" *Cohen,* 171 F.3d at 805.

Third Reason for Granting the Writ: ***Rigid application of U.S.S.G. § 1B1.1(a), when it leads to denying an otherwise deserving defendant a reduced sentence based on acceptance of responsibility, violates due process. There is no rational basis for rewarding a defendant with a reduced sentence based on acceptance of responsibility when his total offense level is 43 or below but denying him a reduced sentence on that basis when his total offense level is above 43.***

The Sentencing Guidelines are generally possessed of statutory authority. *Stinson*, 508 U.S. at 38. A penalty (including a sentencing guidelines penalty) based on an arbitrary distinction violates the Due

Process Clause of the Fifth Amendment. *See Chapman v. United States,* 500 U.S. 453, 465 (1991). Due process is not violated if a challenged law has "a reasonable relation to a proper legislative purpose" and is "neither arbitrary nor discriminatory". *See Nebbia v. New York*, 291 U.S. 502, 537 (1934).

In *United States v. Jiles,* 259 F.3d 477 (6th Cir. 2001), the appellant argued that application of § 3E1.1 to his situation violated his rights to equal protection[2] and due process in that the Sentencing Commission acted irrationally and arbitrarily in determining that a defendant with a total offense level of 16 or higher could receive a 3-level reduction for acceptance of responsibility but a defendant with a total offense level of 15 or below could receive only a 2-level reduction. *Id.* at 478. The Sixth Circuit disagreed, noting the need for incentive to defendants with higher offense levels to plead guilty:

> Because a criminal defendant's potential term of imprisonment increases as his adjusted offense level increases, it was clearly rational for the Sentencing Commission to use a higher potential reduction for acceptance of responsibility as a means of encouraging criminal defendants with high adjusted offense levels to plead guilty instead of pursuing needless litigation.

[2] "[A]n argument based on equal protection essentially duplicates an argument based on due process." *Chapman*, 500 U.S. at 465.

Id. at 481.

Additionally, "for the large number of defendants who cannot qualify for the 'potentially limitless downward departure' under § 5K1.1, accepting responsibility under *§ 3E1.1 becomes the only action they have the power to take in order to reduce their sentence."* (Emphasis added.) Alexa Chu Clinton, *Taming the Hydra: Prosecutorial Discretion under the Acceptance of Responsibility Provision of the US Sentencing Guidelines*, 79 U. Chi. L. Rev. 1467, 1497-1498 (2012).

In light of the facts that (1) oftentimes a § 3E1.1 reduction is the only incentive a defendant has to potentially reduce his sentence, and (2) defendants with higher total offense levels need extra incentive to enter guilty pleas, it makes no sense whatsoever to interpret the sentencing guidelines in a way where the folks with the highest total offense levels cannot qualify for a reduced sentence based on acceptance of responsibility.

Fourth Reason for Granting the Writ: ***Rigid application of U.S.S.G. § 1B1.1(a) in a circumstance where the defendant's total offense level is above 43 denies the defendant the benefit of his bargain.***

In *Mabry Johnson,* 467 U.S. 504 (1984), the Supreme Court noted "plea agreements are consistent with the requirements of voluntariness and intelligence -- because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions[.]" *Id.* at 508. "It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty[.]" *Id.* at 508 n. 8. In *Puckett v. United States,* 556 U.S. 129 (2009), the Court stated: "[P]lea bargains are essentially contracts. . . . When the consideration for a contract fails . . . we say that the contract was broken." *Id. at 137; see also Hughey v. United States,* 495 U.S. 411, 421 (1990) ("The essence of a plea agreement is that both the prosecution and the defense make concessions to avoid potential losses.").

As noted above, under Mendoza's plea agreement his sentencing range was life. Without the plea agreement, the range would have been life plus five years. There is no practical difference between life and life

+ 5 years. *See United States v. Charniak,* 607 F. App'x 936, 943 (11th Cir. 2015) (District court committed an error when it imposed consecutive term of supervised release but error did not affect defendant's substantial rights because, "even absent the error, his total term of supervised release – life – would remain the same."). The only real potential benefit in the plea agreement was a sentence reduction for acceptance of responsibility. Yet because Mendoza's total offense level was 47, he could not actually get a reduced sentence based on acceptance of responsibility.

Fifth Reason for Granting the Writ: Under similar circumstances, the Second Circuit held the defendant's guilty plea was not knowing and voluntary.

In *United States v. Johnson,* the defendant sought to withdraw his guilty plea and replace his attorney after he discovered that his plea would necessarily entail a mandatory life sentence, 850 F.3d 515, 517 (2d Cir. 2017). The request was denied. *Id.* at 521. The Second Circuit held the plea was not entered voluntarily, knowingly and intelligently, given that at the time the defendant entered his plea, the court had given the impression that there were a range of sentencing options:

> We conclude that Johnson's plea was not entered voluntarily, knowingly, and intelligently. In the plea hearing, the impression was given that there was a range of sentencing options: the judge spoke of "the potential sentences"; the prosecutor gave an account of multiple maximum and minimum sentences, discussed supervised release, and warned of the forfeiture of rights (including the right to hold public office); and the court and prosecutor discussed Sentencing Guidelines ranges and judicial discretion to weigh the facts and circumstances. . . . And Johnson's assertion that he would have gone to trial if he knew that a life sentence was foreordained is rendered plausible by the arresting fact that *he derived absolutely no benefit or advantage from the plea.* Accordingly, we vacate the district court's judgment and Johnson's plea, direct that the case be reassigned, and remand for further proceedings consistent with this opinion. (Emphasis added)

Id. at 518.

> The most significant fact for Johnson at his plea hearing—a fact that he had to understand for his plea to be voluntary, knowing, and intelligent—was that *life imprisonment was the certain consequence of pleading guilty.* This was not merely a potential sentence, or one possible maximum among other possibilities, but his certain and inevitable sentence upon conviction. *By pleading guilty, he was effectively sentencing himself to spend the rest of his life in prison;* yet this fact was not conspicuous at his plea hearing, which included discussion of many other "possible" (though actually impossible) sentences and robotic references to (inapplicable) calculations and judicial discretion. (Emphasis added)

Id. at 522.

> *The district court should have avoided confusion by clearly and unambiguously telling the defendant that, notwithstanding everything else being said, the consequence*

> *of his guilty plea would be a life sentence, period.* (Emphasis added)

Id. at 523.

> Johnson's letter seeking to withdraw his plea states that he would not have pleaded guilty if he had understood the mandatory sentencing consequence because he had "everything to gain going to trial versus just accepting a life sentence." And of course he is correct. *In light of the circumstances, and absent any explanation, the plea appears on its face irrational.* There might be some motive for a knowing and intelligent waiver in this situation, but none is obvious, and the district judge did not attempt to elicit one. The district court erred by failing to determine that the waiver was knowing and intelligent, "with sufficient awareness of the relevant circumstances and likely consequences." *Brady*, 397 U.S. at 748. (Emphasis added)

Id. at 524.

Just as the defendant in *Johnson* was misled by the judge's and the prosecutor's multiple references to differing ranges of punishment (including supervised release which assumes a release from prison), Mendoza was likewise misled, to-wit:

> Mag. Court: Now it's also my obligation today here to make sure and to ensure that you understand the *full range of penalties* and consequences you could be subjected to following entry of this plea. And so, I'm also going to ask the Government to advise you of that at this time. Listen very carefully.
>
> AUSA: The maximum penalties the Court can impose include if 500 grams or more of a mixture of substance containing a detectable

amount of Methamphetamine, or 50 grams or more of Methamphetamine actual, *not less than 10 years and not more than life imprisonment*, a fine not to exceed $10 million or both, *Supervised Release of at least 5 years*. There's also a mandatory special assessment of $100.

Mag. Court: Thank you. Mr. Mendoza, sir, do you understand that if you enter a plea of guilty here today and the District Court accepts it, you will be subject to that *range of penalties* and consequences that was just read to you?

Mendoza: Yes, ma'am.

. . .

Mag. Court: And following all of your communications with your counsel, do you fully understand that the Sentencing Guidelines are not mandatory, they are merely discretionary?

Mendoza: Yes, ma'am.

Mag. Court: And that because of that, the district judge *could depart* from the Guidelines and she could sentence you *all the way up to the statutory maximum.* Do you fully understand that?

Mendoza: Yes, ma'am.

. . .

Mag. Court: Do you also understand that the Guideline range for your particular case is *not able to be determined* until after completion of your written pre-sentence report? And so for that reason, any estimate that you've been given to date by your lawyer, or by the Government, by pre-trial, by anybody, that's all that it is, an estimate. Do you also understand that?

Mendoza: Yes, ma'am.

. . .

AUSA: [Summarizing the plea agreement] There's further language that the parties understand the Court is not bound by these stipulations and that the parties specifically agree other specific offense characteristics or Guideline adjustments *may increase or decrease the appropriate sentencing range.*

The Fifth Circuit held that Mendoza's plea was voluntary nonetheless:

> The record of Mendoza's rearraignment reflects that he acknowledged that he understood the consequences of his plea – including the maximum sentence that could be imposed and the operation of the Sentencing Guidelines – and that he was pleading voluntarily[.]

Conclusion

For the foregoing reasons, Petitioner Mendoza respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 4th day of September 2020.

/s/ John A. Kuchera
John A. Kuchera, Attorney for
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