No. _____

IN THE SUPREME COURT OF THE UNITED STATES

═══════════

ROBERT WILLIAM KNOPPING,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

═══════════

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

═══════════

Marisa L. D. Conroy
Law Office of Marisa L. D. Conroy
P.O. Box 232726
Encinitas, CA 92023
Telephone: (858) 449-8375
Mdersey@hotmail.com
Attorney for Petitioner
Robert William Knopping

QUESTION PRESENTED

Under what circumstances can the district court at sentencing deny the government's motion for a third-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b)?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

LIST OF DIRECTLY RELATED PROCEEDINGS

1. United States District Court for the Southern District of California, *United States v. Knopping,* 18-cr-4451-LAB. The district court entered the judgment on October 4, 2019. *See* Appendix B.

2. United States Court of Appeals for the Ninth Circuit, *United States v. Knopping,* No. 19-50322. *See* Appendix A. The Ninth Circuit entered judgment on May 24, 2021.

3. No other proceedings in state or federal trial or appellate courts, or in this Court, are directly related to this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Sentencing Guidelines

Rules

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

═══════════

ROBERT WILLIAM KNOPPING,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

═══════════

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

═══════════

Petitioner, Robert William Knopping, asks for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered May 24, 2021.

OPINION BELOW

The memorandum decision of the court of appeals, *United States v. Knopping*, No. 19-50322, 848 Fed.Appx. 353 (9th Cir. 2021), appears at Appendix A to this petition and is unpublished.

JURISDICTION

The Ninth Circuit entered judgment on May 4, 2021. This petition is being filed within the 150-day time limit for certiorari petitions arising during the coronavirus pandemic.[1] The Court has jurisdiction under 28 U.S.C. § 1254(1).

UNITED STATES SENTENCING GUIDELINE INVOLVED

Section 3E1.1 of the United States Sentencing Guidelines, and its commentary, are reprinted in Appendix C.

Amendment 775 to the United States Sentencing Guidelines is reprinted in Appendix D.

STATEMENT OF THE CASE

A. The district court proceedings.

1. The Information and guilty plea.

On October 15, 2018, Mr. Knopping signed a waiver of indictment and the government filed a one count information charging him with importation of a

[1] https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf

controlled substance in violation of 21 U.S.C. §§ 952, 960. [ER 77.][2] Mr. Knopping promptly pleaded guilty to the information after signing a "fast track" plea agreement. [ER 62.] Under the terms of the agreement, the government promised to recommend a four-level fast-track departure under U.S.S.G. § 5K3.1 and a three-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. [ER 69.] Those reductions resulted in an adjusted offense level of 31. [ER 69.]

2. The presentence report.

The probation officer prepared a presentence report ("PSR") to assist the district court at sentencing. In calculating the total offense level under the United States Sentencing Guidelines, the PSR awarded Mr. Knopping a two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a), and an additional one-level reduction under U.S.S.G. § 3E1.1(b). (PSR 7.)

3. The sentencing hearing.

The sentencing hearing was scheduled for March 18, 2019. [CR 37.] On that day, Mr. Knopping arrived at the courthouse steps, but (as his attorney later explained) he was "shaking, emotional, and too scared to come in." [ER 14-15.] For almost two hours, he talked with his parents, but ultimately he was too frightened at the prospect of spending at least five years in prison to walk through the courthouse door. [ER 15.] So he didn't.

[2] "CR" refers to the Clerk's Record, and "ER" refers to the Excerpts of Record, all of which were filed with the Court of Appeals.

The district court held the sentencing hearing on September 30, 2019. Counsel on behalf of Mr. Knopping requested the court impose a five-year sentence. [ER 21.] Counsel emphasized Mr. Knopping's young age and his difficult childhood. [ER 19-21.] She also explained that Mr. Knopping's immaturity and "limited life experiences" led him to make the poor choice to smuggle drugs for what he thought would be "easy money." [ER 14.] Counsel also explained Mr. Knopping's fears and panic surrounding the day of his original sentencing. [ER 14-15.] She explained how he was "so terrified of what was going to happen that he just couldn't bring himself to enter the courtroom." [ER 14-15.] She noted, though, that his flight was substantially mitigated by the fact that he later self surrendered. [ER 15.]

The district court then inquired if the government was still recommending all three points for acceptance of responsibility, and the government responded it was "because [Mr. Knopping] did resolve the case early." [ER 28.] The prosecutor noted that "the resources expended between the time that he absconded and the time he pled, there really wasn't much[.]" [ER 28.] At that point, the court cut off the prosecutor and stated that the "third point" is typically called "super-acceptance." [ER 29.] The court noted that it could not "think of a situation where someone failed to appear, and willfully remained out and got super-acceptance[.]" [ER 29.]

Defense counsel noted that the full three-points for acceptance of responsibility were warranted because "he did plead guilty quickly." [ER 30.] The court stated that it was "charged with correctly and honestly calculating these guidelines" and did not think the government's calculation was correct. [ER 31.] The court then conducted its Guidelines calculation and granted a two level adjustment for acceptance of responsibility, but rejected the third point. [ER 31.] The court noted the government could "make" the request for the third point for acceptance, but that the court was not "bound to give" it. [ER 31.] According to the court, this was not "a super-acceptance case, given the circumstances that I've talked about"—that is, Mr. Knopping's flight. [ER 31.]

Defense counsel objected to the sentence imposed and the fact that the court "denied the third level of acceptance[.]" [ER 48-49.] In response, the court stated that it "explained clearly why" it was being denied because Mr. Knopping had "failed to appear for sentencing." [ER 48.] After defense counsel restated her objection, the court claimed that, "[i]f it applies under these circumstances, then it has no meaning at all." [ER 48.] Defense counsel reiterated that the only consideration in granting the third point was the time line in which Mr. Knopping pled guilty. [ER 49.]

B. The Appeal.

On appeal Mr. Knopping argued, *inter alia*, that the district court reversibly erred by denying the government's motion for a third point for acceptance of responsibility under U.S.S.G. § 3E1.1(b) solely on the ground that Mr. Knopping failed to appear at his initial sentencing hearing and (2) the government could not show that the error was harmless. The panel affirmed the judgment in an unpublished opinion (See Appendix A.) The panel held that "the district court did not abuse its discretion by concluding that Knopping's failure to appear at the initial sentencing and subsequent decision to abscond for several months were inconsistent with complete acceptance of responsibility." *United States v. Knopping*, 848 Fed.Appx. 353, 354 (9th Cir. 2021).

This Petition for Writ of Certiorari follows.

REASONS TO GRANT THE WRIT

This Court should grant certiorari to resolve the acknowledged and entrenched circuit split on what conduct constitutes a legitimate basis, such as failing to appear at sentencing, for a district court's refusal to grant a government motion for the third point of acceptance of responsibility under U.S.S.G. § 3E1.1(b)?

I. There is a long standing split among the circuits as to what conduct constitutes a legitimate basis for the district court's denial of a government motion for a third point for acceptance of responsibility under U.S.S.G. § 3E1.1(b).

Under U.S.S.G. § 3E1.1(a), courts reduce the Guidelines offense level by two points when defendants accept responsibility for their offenses. When the offense level determined prior to the operation of subsection (a) is high enough (16 points or more), the government may ask the court to reduce the offense level by a third point, under U.S.S.G. § 3E1.1(b), if the defendant "has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently[.]"

A circuit split has long existed as to what conduct constitutes a valid basis for the district court to deny the government's motion for a third point for acceptance of responsibility under U.S.S.G. § 3E1.1(b). For example, the Ninth,

Tenth, and D.C. Circuits have all held that the government and subsequently the district court cannot deny a third point for acceptance of responsibility based on the filing of a suppression motion. *See United States v. Price*, 409 F.3d 436, 443-44 (D.C. Cir. 2005); *United States v. Marquez*, 337 F.3d 1203, 1212 (10th Cir. 2003); *United States v. Kimple*, 27 F.3d 1409, 1413-15 (9th Cir. 1994), *as amended on denial of reh'g* (Sept. 19, 1994). In reaching its result, the D.C. Circuit pointed to the "plain language" of the Guideline stating that a defendant is eligible for a third-level reduction if he timely notifies "authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing *for trial*," and the government's concession that its preparation for a suppression hearing was not trial preparation. *Price*, 409 F.3d at 443-44 (emphasis in original).

In contrast, the Fifth Circuit has repeatedly and routinely affirmed the denial of a one-level reduction under section 3E1.1(b) when the government had to prepare for a suppression hearing on the ground that a suppression hearing could be "the substantive equivalent of a full trial." *United States v. Gonzales*, 19 F.3d 982, 984 (5th Cir. 1994)). Similarly, the Second Circuit, like the Fifth, has affirmed the denial of the third-level reduction on the ground that the government had to go through a suppression hearing. *See United States v. Rogers*, 129 F.3d 76, 80-81 (2d Cir. 1997). More recently, a panel of the Second Circuit held that the district court erred in denying the government's motion for the third-level reduction

without making the factual findings necessary to justify its decision. *United States v. Vargas*, 961 F.3d 566, 584 (2d Cir. 2020). That panel did not, however, discuss the earlier opinion in *Rogers*, much less hold that *Rogers* is no longer good law in the Second Circuit.

This Court should grant Mr. Knoppings's petition for a writ of certiorari to resolve these divergent and inconsistent opinions of the federal courts of appeals on the same important matter. *See* Sup. Ct. R. 10(a).

II. The issue is important and this case is an ideal vehicle for resolving it.

Under what circumstances the district court at sentencing may refuse to grant the government's motion for a third-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b) is "an important question of federal law that has not been, but should be, settled by this Court[.]" *See* Sup. Ct. R. 10(c). The Fifth Circuit has repeatedly and routinely affirmed the denial of a one-level reduction under U.S.S.G. § 3E1.1(b) when the government had to prepare for a suppression hearing. Thus, in the Fifth Circuit, defendants are as a matter of course penalized for bringing motions suppress evidence, even though they are entitled to bring such motions to protect their constitutional rights. *See generally Marquez*, 337 F.3d at 1212; *Kimple*, 27 F.3d at 1413-15. This case is an ideal vehicle for resolving the question presented.

III. The Ninth Circuit's decision is incorrect.

The plain language of the Guideline itself supports the conclusion that the district court cannot deny the government's motion for a third point under U.S.S.G. § 3E1.1(b) simply because a defendant failed to appear at his initial sentencing hearing. The Ninth Circuit's reliance on this factor as the sole reason for denying the government's motion is error.

For example, the Second Circuit held that the government could not withhold a motion for the third point on the ground that the defendant had filed objections to findings in his PSR, thereby requiring an evidentiary hearing. *See United States v. Lee*, 653 F.3d 170, 174-75 (2d Cir. 2011). The Second Circuit noted that "the plain language of § 3E1.1(b) refers only to the prosecution resources saved when the defendant's timely guilty plea 'permit[s] the government to avoid preparing ***for trial***." *Lee*, 653 F.3d at 174. Second, the Second Circuit observed that the Application Notes for § 3E1.1 similarly refer only to the government's ability "to determine whether the defendant has assisted authorities in a manner that avoids preparing ***for trial***." The Notes do not refer to resources saved by avoiding preparation for . . . any other proceeding. *Id.*

Similarly, in *United States v. Divens*, 650 F.3d 343, 344-45, 347-48 (4th Cir. 2011), the Fourth Circuit held it was improper for prosecutors to withhold a motion under U.S.S.G. § 3E1.1(b) on the ground that the defendant had refused to

enter into a plea agreement waiving his right to appeal. Amendment 775 addressed a circuit split and resolved it in favor of the position taken by the Second and Fourth Circuits. *See* U.S.S.G. amend. 775 (Nov. 1, 2013). The Commission thus amended the Guideline commentary, which is authoritative, to provide that "[t]he government should not withhold such a motion based on interests not identified in § 3E1.1, such as whether the defendant agrees to waive his or her right to appeal." *Id.*; *see* U.S.S.G. § 3E1.1, comment (n.6).

Failing to appear at the initial sentencing hearing is ***not*** an interest "identified in § 3E1.1." Although the Guideline "refers to the efficient allocation of governmental resources, it does so only in the context of preparing *for trial*." *United States v. Castillo*, 779 F.3d 318, 324 (5th Cir. 2015) (emphasis added) (holding, for this reason, that the government may not "withhold a § 3E1.1(b) motion simply because it has had to use its resources to litigate a sentencing issue"); *see also Price*, 409 F.3d at 443-44.

As one judge has explained, [j]ust as § 3E1.1(b) and its Application Notes do not identify conserving appellate resources as a proper basis for withholding a § 3E1.1(b) adjustment, they also do not identify litigating suppression motions—or pretrial motions in general—as a proper basis for withholding such an adjustment. Section 3E1.1(b)'s language is clear: "[T]he 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. . . ." [U.S.S.G.] § 3E1.1(b) (emphasis added). Similarly, Application Note 6 to § 3E1.1 states: "[T]he defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process *so that the government may avoid preparing for trial* and the court may schedule its calendar efficiently." [U.S.S.G.] § 3E1.1(b), Application Note 6.

Here, the district court failed to adequately explain its conclusion that the conditions set by § 3E1.1(b) were not met. Thus, the district court lacked a sufficient factual basis to justify its decision to deny the government's motion. The district court made *no* factual findings about whether the plea was sufficiently timely to allow it to allocate its resources efficiently. Nor did the court rest its decision on a finding that the plea came too late for the court to pivot to a more efficient use of the time previously budgeted for trial. In fact, the district court did not identify any inconvenience or inefficiency inflicted on the court itself.

Moreover, although the district court is not bound by the government's motion, it must grant substantial deference to the government's claim that the timing of the plea allowed it to avoid trial preparation because, as Congress recognized, the government "is in the best position" to make that determination.

See U.S.S.G. § 3E1.1 cmt. n.6. The focus is on the work that the government is *spared* by the guilty plea, and the more efficient use of law enforcement resources that is enabled when the government does not have to devote time to trial preparation.

Here, the district court erred in denying the government's motion without making the factual findings necessary to justify its decision to do so. The Ninth Circuit's affirmation of Mr. Knopping's sentence is in error as failing to appear for sentencing is not a legitimate ground for the denial of a third point for acceptance of responsibility under U.S.S.G. § 3E1.1. Review by this Court is necessary to resolve the circuit split on what conduct constitutes a legitimate basis for a district court's refusal to grant a government motion for the third point of acceptance of responsibility under U.S.S.G. § 3E1.1(b)

CONCLUSION

A writ of certiorari is warranted to resolve this conflict in the circuits.

Respectfully submitted,

Dated: October 19, 2021

s/Marisa L. D. Conroy
Law Office of Marisa L. D. Conroy
P.O. Box 232726
Encinitas, CA 92023
Tel: (858) 449-8375
Email: mdersey@hotmail.com
Attorney for Robert William Knopping