NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY LOZADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX B
TO
PETITION FOR WRIT OF CERTIORARI

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defendant can point to any cases where that actually happened.

So here the statute itself isn't as clear. I think the statute itself can be read to permit this prosecution, but it's not as clearly permitted in that prosecution as the Oklahoma pointing a gun statute. But what makes our case different is we have a prosecution of somebody who is engaging in that conduct for purposes of whimsy, humor or prank. So in light of *Titties* and in light of the Fortnite scenario, it's now clear that there is a realistic probability of a Colorado felony menacing conviction being based on nonviolent conduct, and for that reason we believe that this offense can no longer be counted as a crime of violence.

Thank you.

THE COURT: All right. Thank you, Ms. Shen.

First of all, I am going to decline to even address this issue under the case law that's cited by the United States in Docket No. 175 on Page 2 because on appeal as the 10th Circuit opinion in this case indicates, the defendant conceded that felony menacing was a crime of violence, and therefore, it's beyond the scope of the remand, so I am not going to consider it.

Moreover, in the alternative even if I did consider it, I would reject the defendant's argument in any event. For one thing, the Oklahoma statute that is discussed in the *Titties* case is distinguishable. That particular -- you know,

of course, the issue came up in the course of that decision whether or not the argument that was being made by the defendant was mere legal imagination. And the 10th Circuit rejected that in part because of the fact that the statute itself specifically referred to whimsy, humor or prank. The 10th Circuit looked at that particular language in order to get over the hurdle of whether or not there was some possibility that you could be convicted of it without it involving some type of threat of force.

That's not the case here at all. As Ms. Shen said, this statute is different. And there is nothing that would suggest in looking at Colorado menacing of a similar possibility of a prosecution because of some type of whimsy, prank or humor. And what Mr. Lozado is relying upon is a hearsay article from the Washington Post. And I am not going to rely upon hearsay, first of all, in order to get past the legal imagination point.

There is no indication in the article whatsoever what exactly the juvenile was adjudicated for. For all we know, he could have been adjudicated for the misdemeanor of menacing. But even though Ms. Shen claims that he didn't have any intent whatsoever to scare anyone, the article doesn't say anything about that whatsoever. It doesn't indicate what exactly his intent was. Instead, there is just this inference that, you know, he wasn't intending to scare anyone.

But No. 1, that inference I don't think is -- you can make it just simply based upon the article because, of course, you had spokespersons from the El Paso County Sheriff's Office who are talking about the fact that there would be times when it would be appropriate to charge menacing when a toy gun is used. There is no doubt about that because, of course, toy guns can be used to commit real violent felonies and have the defendant intend to be putting people in fear.

So despite the fact that the spokesperson, despite the fact that people from the sheriff's office were talking about there are times, not every time you'll note, but where there are times when it would be appropriate to charge menacing, even if we assume that this juvenile was charged with the felony, he was adjudicated for the felony, apparently they thought that the time might be appropriate here. And as far as we know, we can't tell, the time that it would be appropriate to charge it was if the person had the intent to actually scare someone. So if that were the situation here, then this particular adjudication is completely distinguishable.

In fact, it's even more likely that that was the situation here because when you talk about the juvenile's intent, the only quote that you really see on that is where apparently the juvenile gets quoted by saying, "I knew I did something wrong." Well, if he knew he did something wrong, then it seems as if or at least it could be that what he

thought he did wrong was scaring people, intending to scare people by pointing these toy guns at them.

So the bottom line is that the defendant has not demonstrated, gotten over the hurdle. And this is discussed in *Gonzales v. Duenas-Alvarez*, a Supreme Court case from 2007, the defendant "must at least point to his own case and other cases in which the state courts did, in fact, apply the statute in the special (non-generic) manner for which he argues."

Mr. Lozado has presented no evidence whatsoever of that. And as a result, even if the Court did not exercise its discretion not to consider it, I would nonetheless deny or overrule the objection. So that particular objection is overruled.

And the Court will find that the probation office's calculation of the guideline range is correct, that Mr. Lozado's total offense level is 24. His Criminal History Category is VI. And that results in an imprisonment range of between 100 and 120 months, a fine range of between $10,000 and $100,000, and a supervised release range of between one and three years.

All right. Then why don't we shift our attention to what the appropriate sentence should be. First of all, I will hear from either Mr. Johnson or Ms. Shen, whoever wishes to address the Court. After that I will hear from Ms. Edgar regarding her recommendation of a sentence on behalf of the