

No. _____

In the Supreme Court of the United States

ROBINSON MENDOZA-GOMEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

SHANE O'NEAL
O'NEAL LAW
101 E. Avenue B
Alpine, Texas 79830
(713) 516-3505
shane@shaneoneallaw.com

Attorney for Defendant-Appellant

QUESTION PRESENTED FOR REVIEW

Robinson Mendoza-Gomez was convicted of assaulting and impeding an officer, in violation of 18 U.S.C. § 111. He tackled a Border Patrol agent when the officer was attempting to apprehend Mendoza and his brother, preventing the apprehension of his brother. The district court sentenced Mendoza under a guideline for obstructing or impeding officers, U.S.S.G. § 2A2.4, that specifically states it “incorporates the fact that the victim was a governmental officer performing official duties.” Based solely on Mendoza’s commission of the offense, the district court applied the obstruction of justice enhancement, U.S.S.G. § 3C1.1, and the district court affirmed that application.

This case presents two issues for review:

Whether the guidelines’ enhancement for obstruction of justice requires some conduct above and beyond the conduct comprising the offense of conviction.

and

Whether impermissible double counting under the guidelines occurs when it punishes the same conduct twice for the same reason or whether the double counting must be prohibited explicitly by the language of the guidelines.

TABLE OF CONTENTS

Question Presented for Review	i
Appendix <i>United States v. Mendoza-Gomez</i>	ii
Table of Authorities	iii
Parties to the Proceeding	1
Opinion Below	1
Jurisdiction of the Supreme Court of the United States	1
Constitutional Provision Involved	1
Statement of the Case	2
Reasons for Granting Cert	5
Every Circuit, prior to this opinion, to address the application of § 3C1.1 in the context of assaulting or impeding an officer has required some obstructive conduct over and beyond the offense itself.	5
The Circuits are split over whether the same aspect of a defendant’s conduct can factor into his sentence in two separate ways.	8
Conclusion	11
Appendix <i>United States v. Mendoza-Gomez</i> (5th Cir. June 1, 2023)	

TABLE OF AUTHORITIES

Cases

<i>In re Terrorist Bombings of U.S. Embassies in E. Africa</i> , 552 F.3d 93 (2d Cir. 2008)	9
<i>United States v. Battaglia</i> , 624 F.3d 248 (6th Cir. 2010)	9
<i>United States v. Calbat</i> , 266 F.3d 358 (5th Cir. 2001)	8
<i>United States v. Coldren</i> , 359 F.3d 1253 (10th Cir. 2004)	10
<i>United States v. De La Cruz Suarez</i> , 601 F.3d 1202 (11th Cir. 2010)	10
<i>United States v. Fisher</i> , 502 F.3d 293 (3d Cir. 2007)	8
<i>United States v. Francis</i> , 196 F. App'x 808 (11th Cir. 2006)	6
<i>United States v. Gallegos</i> , 613 F.3d 1211 (9th Cir. 2010)	9
<i>United States v. Hight</i> , 695 F. App'x 532 (11th Cir. 2017)	6
<i>United States v. Hitch</i> , 58 F.4th 262 (6th Cir. 2023)	9
<i>United States v. Ivory</i> , 2022 WL 4586142 (M.D. Penn. September 28, 2022)	6
<i>United States v. Jones</i> , 254 F. App'x 711 (10th Cir. 2007)	6
<i>United States v. McCarty</i> , 475 F.3d 39 (1st Cir. 2007)	9

<i>United States v. Palomar-Santiago</i> , 141 S. Ct. 1615 (2021)	7
<i>United States v. Prosise</i> , 367 F. App'x 423 (4th Cir. 2010).....	6
<i>United States v. Reevey</i> , 364 F.3d 151 (4th Cir. 2004).....	8
<i>United States v. Roulhac</i> , 763 F. App'x 168 (3d Cir. 2019)	6
<i>United States v. Williams</i> , 627 F.3d 839 (11th Cir. 2010)	6
<i>United States v. Yarrington</i> , 634 F.3d 440 (8th Cir. 2011).....	9

Statutes

18 U.S.C. § 111.....	2, 5, 6
28 U.S.C. § 1254(1)	1

Rules

Supreme Court Rule 13.1	1
-------------------------------	---

Constitutional Provisions

U.S. Const. amend. V.	1
----------------------------	---

United States Sentencing Guidelines

U.S.S.G. § 2A2.4.....	7, 10
U.S.S.G. § 3A1.2.....	10

U.S.S.G. § 3C1.1.....	3, 4, 5
U.S.S.G. 2A2.4 cmt. 2	10

PETITION FOR WRIT OF CERTIORARI

Robinson Mendoza-Gomez asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on June 1, 2023.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINION BELOW

The published opinion of the court of appeals is appended to this petition.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on June 1, 2023. This petition is filed within 90 days after entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that “no person shall be ... deprived of ... liberty ... without due process of law.” U.S. Const. amend. V.

STATEMENT OF THE CASE

Petitioner Robinson Mendoza-Gomez was found guilty after a guilty plea of assaulting, resisting, or impeding a U.S. Border Patrol agent, who was injured while engaging in his official duties, in violation of 18 U.S.C. § 111.

On December 14, 2021, U.S. Border Patrol agents attempted to apprehend Mendoza and his brother, as part of a large group, while they were walking in the desert near Highway 90 in Van Horn, Texas. As Border Patrol agent Valles attempted to apprehend Mendoza's brother, Mendoza stopped fleeing, turned around, and rushed agent Valles. He yelled for Valles to release his brother, tackled him, and began striking him in the face and head; this caused him to fall to the ground. Valles used his flashlight in self-defense, striking Mendoza twice in the head. Valles was eventually able to pull his firearm and with the assistance of two other Border Patrol agents, subdued Mendoza. Mendoza continued to resist until he yelled, "ok ok," allowing himself to be arrested without further incident.

The presentence report calculated Mendoza's base offense level as 10. It increased that level: (1) by three-levels because the of-

fense involved physical contact, (2) by two-levels because the victim was injured, and (3) by two-levels for obstruction of justice. His offense level was also decreased by three for acceptance of responsibility.

Mendoza objected to the two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1. He argued that Mendoza's conduct did not constitute obstruction of justice; the enhancement should not have applied automatically because Mendoza assaulted a federal officer; and the application of the enhancement constituted impermissible double counting. The district court overruled that objection and sentenced Mendoza to the top of the recommended sentence: 21 months' imprisonment.

Mendoza appealed. On appeal Mendoza urged the same objection for the same reasons that he had made below: he argued that a two-level enhancement for obstruction of justice should not apply to his offense of impeding an officer.

The Fifth Circuit did not engage with Mendoza's argument that the enhancement was impermissible double counting because its precedent precluded an argument against double counting that is not specifically prohibited by the guidelines. The Fifth Circuit held that it is temporally possible for a person to obstruct justice

with conduct leading up to and during an arrest because the arrest is part of the administration of justice. *Appendix* at 6-7. The Fifth Circuit found that the record did not support that Mendoza specifically intended to obstruct his own arrest. *Appendix* at 8-9. Finally, the Fifth Circuit found that Mendoza intended to obstruct the apprehension of his brother, which had “a sufficient nexus” to his conviction to justify application of the obstruction of justice enhancement under § 3C1.1. *Appendix* at 9-12.

REASONS FOR GRANTING CERT

Mendoza-Gomez assaulted an agent to impede the apprehension of himself and his brother. The Fifth Circuit's application of the obstruction of justice enhancement based solely on his commission of 18 U.S.C. § 111 (a) creates a split with the requirements of other federal courts that the obstruction of justice enhancement requires something beyond the commission of the offense and (b) furthers a split with other federal courts that the guidelines impermissibly double count conduct when they punish the same conduct for the same reasons.

Every Circuit, prior to this opinion, to address the application of § 3C1.1 in the context of assaulting or impeding an officer has required some obstructive conduct over and beyond the offense itself.

The obstruction of justice enhancement requires a two-level increase in an offense level:

If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct, or (B) a closely related offense.

U.S.S.G. § 3C1.1.

Every federal court to address the applicability of the obstruction of justice enhancement to a person who has obstructed an officer, violating 18 U.S.C. § 111, has required some conduct beyond that necessary to commit the offense. For example, in *United States v. Prosise*, the Fourth Circuit affirmed the application of the § 3C1.1 enhancement because the defendant, who had been arrested for a drug crime, directed his co-conspirators to sell off drugs before law enforcement found them. 367 F. App'x 423 (4th Cir. 2010). More commonly, courts affirm the application of the enhancement when the defendant gives material, false testimony denying the underlying facts of the offense.¹

Here, the Fifth Circuit applied the enhancement solely for the conduct that formed the basis of the offense: Mendoza's assault of the officer to impede the officer's apprehension of his brother. The Fifth Circuit found the application justified because, "when Mendoza assaulted agent Valles, he violated § 111 and triggered the

¹ See *United States v. Roulhac*, 763 F. App'x 168 (3d Cir. 2019); *United States v. Hight*, 695 F. App'x 532 (11th Cir. 2017); *United States v. Williams*, 627 F.3d 839 (11th Cir. 2010); *United States v. Jones*, 254 F. App'x 711 (10th Cir. 2007); *United States v. Francis*, 196 F. App'x 808 (11th Cir. 2006); *United States v. Ivory*, 2022 WL 4586142 (M.D. Penn. September 28, 2022).

base offense level in U.S.S.G. § 2A2.4. Then, when Mendoza physically prevented agent Valles from arresting another member of Mendoza's group, he obstructed the administration of justice in an offense that was closely related to his instant offense of conviction." There were not two separate acts, as implied by the use of the word "then." It would be more accurate to say that Mendoza physically prevented agent Valles from arresting his brother by assaulting him.

Further, the Fifth Circuit's reliance on Mendoza's obstruction of the administration of justice in an offense that was closely related to his offense of conviction ignores the function of the conjunctive, "and." The enhancement requires that the defendant obstruct justice with respect to "the instant offense of conviction *and* ... the obstructive conduct related to ... a closely related offense. U.S.S.G. § 3C1.1 (emphasis added). This Court has repeatedly held that when "requirements are connected by the conjunctive "and," the party with the burden to meet the requirements must meet all of them. *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1620-21 (2021).

This Case represents an opportunity for the Court to bring the Fifth Circuit’s jurisprudence on both the application of the obstruction of justice enhancement and the plain meaning of the conjunctive “and” in line with this Court’s jurisprudence as well as that of other federal courts.

The Circuits are split over whether the same aspect of a defendant’s conduct can factor into his sentence in two separate ways.

There is a deep split among the circuits about when double counting is permitted by the guidelines:

- The Third, Fourth, and Fifth Circuits allow double counting in the absence of an explicit textual bar.²

² See, e.g., *United States v. Fisher*, 502 F.3d 293, 309 (3d Cir. 2007) (“Only when the Guidelines explicitly prohibit double counting will it be impermissible to raise a defendant’s offense level under one provision when another offense Guideline already takes into account the same conduct.”); *United States v. Reevey*, 364 F.3d 151, 158 (4th Cir. 2004) (“Double counting is generally authorized unless the Guidelines expressly prohibit it.”); *United States v. Calbat*, 266 F.3d 358, 364 (5th Cir. 2001) (“Double-counting is prohibited only if it is specifically forbidden by the particular guideline at issue The prohibition must be in express language.”).

- The Second and Eighth Circuits allow double counting if Congress or the Sentencing Commission intended it.³
- The First Circuit allows double counting absent an explicit textual bar or a compelling basis to recognize one.⁴
- The Sixth, Ninth, Tenth, and Eleventh Circuits allow double counting unless the competing guidelines address identical harms caused by the defendant's conduct.⁵

³ See, e.g., *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 152 (2d Cir. 2008) (“A district court calculating a Guidelines sentence may apply multiple Guidelines provisions based on the same underlying conduct where that is the result clearly intended by Congress and the Sentencing Commission. While such calculations may involve ‘double counting’ in a literal sense, they do not involve *impermissible* double counting.”); *United States v. Battaglia*, 624 F.3d 248, 351 (6th Cir. 2010) (“Double counting is allowed where it appears that Congress or the Sentencing Commission intended to attach multiple penalties to the same conduct.”). *United States v. Yarrington*, 634 F.3d 440, 451 (8th Cir. 2011) (“Even if the court finds double-counting, it is permissible where (1) the Sentencing Commission intended the result and (2) each statutory section concerns conceptually separate notions related to sentencing.”).

⁴ See, e.g., *United States v. McCarty*, 475 F.3d 39, 46 (1st Cir. 2007) (stating that double counting is allowed when “neither an explicit prohibition against double counting nor a compelling basis for implying such a prohibition exists.”).

⁵ See, e.g., *United States v. Hitch*, 58 F.4th 262, 263-64 (6th Cir. 2023) (“If precisely the same aspect of a defendant’s conduct results in an increase to a sentence in two ways, the impermissible double counting occurs.”); *United States v. Gallegos*, 613 F.3d 1211, 1216 (9th Cir. 2010)

Here, the application of the obstruction of justice enhancement, U.S.S.G. § 3C1.1, punishes the exact same conduct as the base offense level, U.S.S.G. § 2A2.4. The commentary to the guidelines makes this fact explicit. “The base offense level incorporates the fact that the victim was a governmental officer performing official duties.” U.S.S.G. 2A2.4 cmt. 2.

The commentary makes it explicit that the official victim enhancement, U.S.S.G. § 3A1.2, should not be applied but is silent as to whether the obstruction of justice enhancement, U.S.S.G. § 3C1.1, may also apply. This case, therefore, represents the ideal vehicle for the Court to resolve whether impermissible double counting is double counting explicitly disallowed by the guidelines

(“Impermissible double counting occurs when one part of the Guidelines is applied to increase a defendant’s punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines.”); *United States v. Coldren*, 359 F.3d 1253, 1256 (10th Cir. 2004) (“We have endorsed the general rule that double counting is ordinarily impermissible when the same conduct is used to support separate increases under separate enhancement provisions which: 1) necessarily overlap, 2) are indistinct, and 3) serve identical purposes.”). *United States v. De La Cruz Suarez*, 601 F.3d 1202, 1220 (11th Cir. 2010) (“Impermissible double counting occurs only when one part of the Guidelines is applied to increase a defendant’s punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines.”).

or double counting that punishes the same conduct for the same reason.

CONCLUSION

For these reasons, Petitioner asks that this Court grant a writ of certiorari and review the judgment of the court of appeals.

s/ Shane O'Neal
Counsel of Record for Petitioner
Dated: August 29, 2023