
No. _____

In the

Supreme Court of the United States

TIGRAN ZMRUKHTYAN, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

Petition for a Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

United States Sentencing Guidelines (“U.S.S.G.”) § 3C1.2 provides that the district court may apply a two-level enhancement “[i]f the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer[.]” U.S.S.G. § 3C1.2.

Tigran Zmrukhtyan received a § 3C1.2 enhancement, where he engaged in a brief physical struggle with law enforcement while they were trying to arrest him. Zmrukhtyan had a firearm in his waistband, but did not use, brandish, display, or reach for the firearm during his brief resistance of arrest. The officers did not know Zmrukhtyan had the firearm until after he was arrested and searched.

The question presented is:

Does mere possession of a firearm, even during a brief physical struggle with law enforcement, support a § 3C1.2 enhancement?

Statement of Related Proceedings

- *United States v. Tigran Zmrukhtyan*,
No. 22-50043 (9th Cir. July 26, 2023)
- *United States v. Tigran Zmrukhtyan*,
No. 2:21-cr-00047-MCS-1 (C.D. Cal. Feb. 28, 2022)

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

Tigran Zmrukhtyan petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming his sentence.

I. OPINIONS BELOW

The Ninth Circuit issued an unpublished order affirming Mr. Zmrukhtyan's sentence. (App. 1a) The district court sentenced Mr. Zmrukhtyan on February 28, 2022. (App. 5a)

II. JURISDICTION

The Ninth Circuit issued its order affirming the district court's sentence on July 26, 2023. (App. 1a) Zmrukhtyan did not seek rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

**III. CONSTITUTIONAL, STATUTORY, AND SENTENCING
GUIDELINES PROVISIONS INVOLVED**

U.S.S.G. § 3C1.2. — Reckless Endangerment During Flight

If the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer, increase by 2 levels.

Commentary — Application Notes

1. Do not apply this enhancement where the offense guideline in Chapter Two, or another adjustment in Chapter Three, results in an equivalent or greater increase in offense level solely on the basis of the same conduct.
2. “**Reckless**” is defined in the Commentary to section § 2A1.4 (Involuntary Manslaughter). For the purposes of this guideline, “reckless” means that the conduct was at least reckless and includes any higher level of culpability. However, where a higher degree of culpability was involved, an upward departure above the 2-level increase provided in this section may be warranted.
3. “**During flight**” is to be construed broadly and includes preparation for flight. Therefore, this adjustment also is applicable where the conduct occurs in the course of resisting arrest.
4. “**Another person**” includes any person, except a participant in the offense who willingly participated in the flight.
5. Under this section, the defendant is accountable for the defendant’s own conduct and for conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.
6. If death or bodily injury results or the conduct posed a substantial risk of death or bodily injury to more than one person, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).

IV. INTRODUCTION

This case presents an opportunity to resolve a circuit split on what is required to support a § 3C1.2 enhancement when a firearm is present. Other circuits that have considered this issue have affirmed the application of the enhancement where the defendant does *something* with a firearm. The Ninth Circuit’s decision here—sanctioning application of the § 3C1.2 enhancement

where Zmrukhtyan did *nothing* with the firearm—represents a significant departure from the other cases.

This case also presents an important question with potentially troubling consequences. The Ninth Circuit essentially found that an individual who briefly resists arrest is subject to a two-level enhancement under U.S.S.G. § 3C1.2 simply because he possessed a firearm during the struggle. It did not matter to the panel that Zmrukhtyan did not use, brandish, display, reach for, or otherwise do anything with the firearm in his waistband. Indeed, according to the panel, Zmrukhtyan’s simple possession of a firearm in his waistband while resisting arrest was sufficient to “recklessly create[] a substantial risk of death or serious bodily injury[.]” U.S.S.G. § 3C1.2.

The Ninth Circuit’s position on this issue may lead to troubling consequences. If individuals who use their firearms and those who do not are punished the same, there is no incentive for individuals to forego using firearms against law enforcement. And, if mere possession of a firearm while resisting arrest is all that is needed to qualify for a § 3C1.2 enhancement, even lawful gun-owners who exercise their Second Amendment right to possess a firearm in public may be subject to a two-level increase if they resist arrest—simply because of their constitutionally protected behavior.

Review, therefore, is warranted to resolve the circuit split and address these important issues.

V. STATEMENT OF THE CASE

Zmrukhtyan pleaded guilty to being a felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1). (2-ER-34–66)¹ According to the stipulated factual basis, on December 18, 2020, Zmrukhtyan entered a Macy’s department store at the Galleria Mall in Glendale, California, carrying firearms, ammunition, and other items in a duffel bag and on his person. (2-ER-37) Surveillance cameras tracked Zmrukhtyan throughout the store as he tried on clothing. (2-ER-37) Three Macy’s loss prevention staff members and a Glendale police officer followed Zmrukhtyan out of the store and eventually detained him. (2-ER-37)

Glendale police officers searched Zmrukhtyan and found a loaded firearm tucked into his waistband. (2-ER-37) He also had a bolt cutter, a used methamphetamine pipe, small bags with heroin and methamphetamine, and two paperclips with black tar heroin residue on them. (2-ER-37) The officers determined that Zmrukhtyan was on probation with search conditions, so they searched his duffel bag and found four additional firearms and more

¹ Citations to “ER” refer to the Excerpts of Record filed in Zmrukhtyan’s appeal to the Ninth Circuit Court of Appeals, case number 22-50043. “PSR” refers to the Presentence Report Volume.

than 300 rounds of ammunition, which were manufactured outside of California and thus had been transported to the state. (2-ER-37–38) Zmrukhtyan had also previously been convicted of eighteen felonies, consisting mostly of theft-related crimes and a few firearm possession offenses. (2-ER-38–40)

In calculating Zmrukhtyan’s sentencing guidelines range, the probation officer applied a two-level enhancement under U.S.S.G. § 3C1.2. (PSR-8–9) The probation officer provided the following justification for this enhancement:

Zmrukhtyan recklessly created a substantial risk of death or serious bodily injury to another person when he attempted to flee from Glendale Police officers. Zmrukhtyan was eventually detained and while on the ground, he resisted arrest by trying to stand up, refusing to put his hands behind his back, moving his arms around, and kicking. Zmrukhtyan had to be carried into the police vehicle by two officers. One of the officers sustained an injury to his wrist while attempting to detain Zmrukhtyan. Based on the foregoing, there is sufficient information to support that Zmrukhtyan created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer and resisting arrest. Accordingly, a two-level increase has been applied.

(PSR-9)

The defense objected to this enhancement, but the probation officer maintained her position. Defense counsel noted that Zmrukhtyan was first approached by three plain-clothed Macy’s loss prevention employees and believed that he was not being stopped lawfully. (2-ER-72) After a brief

confrontation, Zmrukhtyan was quickly detained by police. (2-ER-72) The probation officer acknowledged the objection, but maintained that Zmrukhtyan had created a substantial risk of death or serious bodily injury to a Glendale police officer, who sustained an injury to his wrist while attempting to arrest Zmrukhtyan. (PSR-58)

The district court held a sentencing hearing on February 28, 2022. (App. 5a) The court adopted the probation officer's guidelines calculations, including the § 3C1.2 enhancement. (App. 14a–15a) As to the enhancement, the court stated: “I do believe the record is clear that there was a substantial risk of bodily injury as a result of the fleeing from law enforcement. So, I’m going to apply that two-level increase[.]” (App. 15a) Zmrukhtyan’s total offense level was 21, and he was in criminal history category VI, resulting in a guidelines range of 77–96 months. (App. 15a) The court sentenced Zmrukhtyan to 84 months in prison, followed by 3 years of supervised release. (App. 16a–17a)

On appeal, Zmrukhtyan argued, *inter alia*, that the district court erroneously applied the reckless endangerment enhancement. First, Zmrukhtyan asserted that the court applied the wrong legal standard, where it found that Zmrukhtyan had recklessly created a substantial risk of “bodily injury,” as opposed to “severe bodily injury,” as § 3C1.2 requires. (App. 2a) Second, Zmrukhtyan argued that the court failed to adequately explain the

basis for its decision to apply the § 3C1.2 enhancement. (App. 2a) Third, Zmrukhtyan averred that the court abused its discretion in applying the enhancement, where Zmrukhtyan did nothing more than engage in a brief struggle with several officers while resisting arrest. (App. 3a) Although Zmrukhtyan had a firearm in his waistband, he did not use, brandish, display, reach for, or even indicate that he had a firearm in his possession.

The Ninth Circuit issued an unpublished memorandum disposition affirming the district court's sentence. (App. 1a) First, the Ninth Circuit determined that, although the district court referred to the wrong legal standard in announcing its decision, it considered the correct standard in applying the § 3C1.2 enhancement. (App. 2a) The district court adopted the probation officer's presentence report and guidelines calculations, which relied on the correct standard. (App. 2a) Second, the Ninth Circuit found that, although the district court's reasons for applying the § 3C1.2 enhancement were "succinct," they were adequate. (App. 2a–3a)

Finally, the Ninth Circuit held that the district court did not abuse its discretion in applying the § 3C1.2 enhancement to the facts of this case. (App. 3a) The appellate court noted that "[n]ot every instance of fleeing from law enforcement, even with a loaded firearm, will necessarily trigger the § 3C1.2 enhancement." (App. 3a) The court nevertheless found that the enhancement "was warranted because Zmrukhtyan carried a loaded handgun in his

waistband in a shopping mall during a holiday season, and actively resisted arrest to the extent of injuring an officer.” (App. 3a) Even though Zmrukhtyan did not use or display the firearm, and the officers did not know Zmrukhtyan had a firearm until after he was arrested, the court found Zmrukhtyan’s mere possession of the firearm during his brief struggle with law enforcement was sufficient to recklessly create a substantial risk of death or severe bodily injury. (App. 3a)

VI. REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit created a circuit split on the application of a § 3C1.2 enhancement when a firearm is present.

Section 3C1.2 allows for a two-level increase “[i]f the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer[.]” U.S.S.G. § 3C1.2. According to the plain language of § 3C1.2, the defendant must have “recklessly created” the risk, implying some level of *action*. Other circuits that have considered the applicability of a § 3C1.2 enhancement when a firearm is present have noted the role the firearm played in creating the requisite risk under § 3C1.2. Those circuits have required something more than mere possession. The Ninth Circuit does not. This Court should grant review to resolve this circuit split.

A review of several other circuits that have considered the § 3C1.2 enhancement where a firearm is present reveals that something beyond simple possession is needed to warrant the enhancement. For instance, in *United States v. Matchett*, 802 F.3d 1185, 1197–98 (11th Cir. 2015), the defendant, who had a loaded gun in his pocket, wrestled with police officers for more than three minutes, and that entire time, an officer had his hand on the defendant’s gun, which he could have unintentionally fired, thus creating the necessary risk. In *United States v. Dennings*, 922 F.3d 232, 238 (4th Cir. 2019), the defendant had already fired a gun, and the officers suspected he was reaching for it in his pocket while he was fleeing on foot. Then, after the officers subdued the defendant, he would not relinquish control of his right arm, the same one he had previously used to attempt to reach in his pocket. *Id.* In *United States v. Williams*, 278 F. App’x 279, 280–81 (4th Cir. 2008) (per curiam) (unpublished), the officers, who stopped the defendant on suspicion of murder, were conducting a pat-down search for weapons, at which point the defendant resisted. In *United States v. Bates*, 561 F.3d 754, 757 (8th Cir. 2009), the defendant jumped out of a moving vehicle in the middle of the night while being pursued by officers in a police car. The defendant ignored the commands of the officers and fled on foot. *Id.* Then, when the officers tried to physically subdue the defendant, he “continually reached toward his waistband,” where he was carrying a loaded firearm. *Id.*

As these cases demonstrate, courts examine *what happened* with the firearm to determine whether the § 3C1.2 enhancement is justified.

The First Circuit's decision in *United States v. Bell*, 953 F.2d 6 (1st Cir. 1992), where it found the § 3C1.2 enhancement was not warranted, makes the same point. In *Bell*, seven police officers approached Bell and four other individuals at an auto body shop to effectuate their arrest. *Id.* at 7. The officers ordered the individuals to the ground, and all but Bell complied. *Id.* Bell, whose hands had been on the hood of a truck, lifted his hands, surveyed the area, and briefly moved his hands out of sight before dropping to the ground. *Id.* After the officers detained Bell, they found a loaded firearm and extra ammunition on his person. *Id.* The district court applied a 2-level enhancement. *Id.*

The appellate court, however, found that the enhancement was not justified under § 3C1.2, and thus vacated the sentence and remanded for resentencing. *Id.* at 9–10. The court considered Bell's mere "possession of the loaded firearm and ammunition and his momentary hesitation upon arrest," but found that even if Bell had intended to use the firearm to resist arrest, his failure to do so meant that his conduct could not be punished under § 3C1.2. *Id.* at 9–10. The court concluded:

Even were it possible to infer that Bell obtained the gun for the purpose of resisting arrest and contemplated its use for a few critical seconds, he did not use the gun. Nor did he make any

clear attempt to draw it. Although Bell’s conduct came close to the line, something more—reaching for the gun, for example—would be required for a finding that Bell recklessly created a “risk of death or serious bodily injury.” Section 3C1.2 punishes the act of creating a risk of death, not merely the intent to create such a risk. Here, Bell’s overt conduct fell short, if not by much.

Id. at 10.

The Ninth Circuit’s decision here conflicts with the First, Fourth, Eighth, and Eleventh Circuits—for the Ninth Circuit, mere possession is enough. The presence of the firearm in Zmrukhtyan’s waistband featured prominently in the Ninth Circuit’s decision, (App. 3a), though it did not factor at all into the probation officer’s justification for the enhancement or the district court’s oral ruling, (PSR-9, 58; 1-ER-12). In reaching its decision, the Ninth Circuit first noted that “[n]ot every instance of fleeing from law enforcement, even with a loaded firearm, will necessarily trigger the § 3C1.2 enhancement.” (App. 3a) The court then found that “[t]he application in this case was warranted because Zmrukhtyan carried a loaded handgun in his waistband in a shopping mall during a holiday season, and actively resisted arrest to the extent of injuring an officer.” (App. 3a)

To be clear, the arrest occurred outside of the mall away from mall patrons, and the officer sustained a wrist injury unrelated to the firearm. (2-ER-37; PSR-9, 58) Thus, the only part of the Ninth Circuit’s holding that related specifically to the requisite risk of death or serious bodily injury in §

3C1.2 was Zmrukhtyan’s simple possession of a firearm in his waistband. Zmrukhtyan did nothing with that firearm, and the officers did not even know about the firearm until after Zmrukhtyan was arrested and searched. Against this backdrop, the Ninth Circuit essentially found Zmrukhtyan’s possession alone during the brief struggle was sufficient to warrant the § 3C1.2 enhancement, without explaining how mere possession “recklessly create[s] a substantial risk of death or serious bodily injury[.]” U.S.S.G. § 3C1.2. This represents a significant departure from the other circuits that have considered this issue. This Court, thus, should grant review to resolve this circuit split.

B. The Ninth Circuit’s decision is incorrect and may have troubling consequences, requiring this Court to intervene.

The Ninth Circuit’s decision here may have troubling consequences, requiring this Court to step in to avoid them. First, the decision creates the perverse situation in which an individual has no incentive to forego using a firearm against law enforcement. Indeed, had Zmrukhtyan taken out his firearm and pointed it at the officers, tossed it near bystanders, or done anything else with it, he would have gotten the same § 3C1.2 enhancement that he actually received for doing nothing with it. *See Bell*, 953 F.2d at 10 (“[S]omething more—reaching for the gun, for example—would be required for a finding that [defendant] recklessly created a ‘risk of death or serious

bodily injury.’ Section 3C1.2 punishes the act of *creating* a risk of death, not merely the intent to create such a risk.”) (emphasis added). According to the Ninth Circuit, there is no difference between an individual subject to arrest who brandishes his gun at police officers, and someone like Zmrukhtyan, who merely has a firearm in his waistband, but does absolutely nothing with it—to the point where the officers do not know it exists until after the arrest is effectuated. So, if an individual who uses or attempts to use their firearm receives the same enhancement as they would for not using it, they would have no incentive to choose inaction. That would lead to potentially dangerous consequences.

Second, the Ninth Circuit’s decision has implications for the Second Amendment. This Court recently held that the Second Amendment guarantees the right to carry a firearm in public. *See New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2122 (2022). Under the Ninth Circuit’s decision here, an individual exercising their Second Amendment right to carry a firearm in public may be subject to a § 3C1.2 enhancement if they briefly resist arrest, simply because of their constitutionally protected conduct of possessing a firearm, regardless of whether they use that firearm against law enforcement. This is not to say individuals should be free to resist arrest. But, they should not be punished more severely just because they happen to exercise their Second Amendment rights before resisting. In

light of the possible consequences of the Ninth Circuit's decision here, this Court should grant review.

C. This case presents a strong vehicle for the question presented.

This case presents a strong vehicle for this Court to address whether an individual's possession of a firearm while resisting arrest supports a § 3C1.2 enhancement. Although the probation officer justified the enhancement based solely on Zmrukhtyan's brief physical struggle with the Glendale police officers, and not the firearm in his waistband, (PSR-9, 58), the appellate court did not, (App. 3a). In fact, the court did not discuss or mention any of the circumstances of Zmrukhtyan's resistance. (App. 3a) Rather, the court focused mostly on his possession of a firearm while resisting arrest and the location of the arrest. (App. 3a) Importantly, the firearm was the only factor that could have created the requisite risk under § 3C1.2, and there is no dispute that Zmrukhtyan did nothing with the firearm in his waistband. The Ninth Circuit's decision, therefore, presents a clear question on the applicability of the § 3C1.2 enhancement where a firearm is simply present. It likewise presents a perfect opportunity for this Court to resolve a circuit split and decide an issue of great importance with potentially dangerous consequences.

VII. CONCLUSION

For the foregoing reasons, Mr. Zmrukhtyan respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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DATED: October 24, 2023

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