No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN ROGELIO LONGORIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas

SCOTT A. MARTIN
Assistant Federal Public Defender
Attorneys for Appellant
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

QUESTION PRESENTED

Under Section 3E1.1(a) of the United States Sentencing Guidelines ("USSG"), courts reduce the Guidelines offense level by two points when defendants accept responsibility for their offenses. And, when the offense level determined prior to the operation of subsection (a) is high enough (16 points or more), the government may move the court to reduce the offense level by a third point, under USSG § 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 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[.]"

A circuit split has long existed on whether the government's having to go through a hearing on a defendant's motion to suppress evidence is a valid basis for refusing to move for the third point under USSG § 3E1.1(b). The Ninth, Tenth and D.C. Circuits have held that the answer is "no," while the Second and Fifth Circuits have held that the answer is "yes." The court below acknowledged the split and observed that the Fifth Circuit's caselaw on the issue is "entrenched." Pet. App. 3a.

The question presented is:

Whether the government, at sentencing, may withhold a motion for a third-level reduction for acceptance of responsibility under USSG § 3E1.1(b) on the ground that the defendant proceeded to a hearing on a motion to suppress evidence.

PARTIES TO THE PROCEEDINGS

All parties to the petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

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SENTENCING GUIDELINES

PRAYER

Petitioner Martin Rogelio Longoria ("Mr. Longoria") prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 958 F.3d 372. The district court did not issue a written opinion on the question presented.

JURISDICTION

The petition is timely filed within 150 days of the June 3, 2020 order of the court of appeals denying Mr. Longoria's petition for rehearing *en banc* (Pet. App. 6a-7a). *See* Sup. Ct. R. 13.3 & Order Regarding Filing Deadlines (Mar. 19, 2020). This Court has jurisdiction under 28 U.S.C. § 1254(1).

DIRECTLY RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

United States v. Longoria, No. 4:18-cr-531-001(Apr. 4, 2019)

United States Court of Appeals (5th Cir.):

United States v. Longoria, No. 19-20201 (May 5, 2020)

UNITED STATES SENTENCING GUIDELINE AND GUIDELINE AMENDMENT INVOLVED

Section 3E1.1 of the United States Sentencing Guidelines, and its commentary, are reprinted in Appendix C (Pet. App. 8a-10a).

Amendment 775 to the United States Sentencing Guidelines is reprinted in Appendix D (Pet. App. 11a-14a).

STATEMENT OF THE CASE

A. The district court proceedings.[1]

1. The indictment, suppression hearing, status conferences, and stipulated bench trial.

On September 5, 2018, a federal grand jury returned a single-count indictment charging Mr. Longoria with being a felon in possession of firearms, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Mr. Longoria moved to suppress all evidence obtained as a result of his warrantless arrest and the FBI's warrantless search of his apartment, where the firearms were found. He argued that his arrest was unconstitutional because the FBI agents had time to, but did not, obtain an arrest warrant, and also because the staleness of the information possessed by the agents meant that they had no probable cause to arrest him at that time. He also argued that his wife's consent to the search of the apartment was invalid because he had denied consent while he was still physically present at the scene, and that there were no exigent circumstances that prevented the agents from obtaining a search warrant.

At the suppression hearing on November 30, 2018, the government presented the testimony of one witness, the arresting agent, who testified about the investigation, arrest, and consent-to-search issues. On December 6, 2018, the court denied the suppression

[1] The facts summarized in this section are described at length, supported by detailed citation to the record, in petitioner's opening brief in the court of appeals. *See* Brief for Appellant at 3-20, *United States v. Longoria*, 958 F.3d 372 (5th Cir. May 5, 2020) (No. 19-20201), 2019 WL 3222195, at *3-*20. No part of that description was ever contested by the government, and it is consistent with the court of appeals' recitation of the facts in the opinion below. *See* Pet. App. 1a-2a.

motion in a written order.

At a status conference on December 17, 2018, the court asked defense counsel, "[W]hat's your thought on trial?" He responded, "I don't anticipate a trial, honestly, your Honor. I came prepared to ask for a little more time for plea purposes. And that's pretty much our focus." The court stated that it would "go ahead and set a trial date as well as a conference date . . . That way everybody knows . . . the schedule."

The court scheduled a status conference for January 7, 2019. The government informed the court that, at a trial, it would present "an ATF person" as an expert witness who could testify about the interstate-nexus element (for the guns), "[a]nd maybe that person would also . . . look at the photo of the guns to say that the similar make and model, or something to that [*sic*]." The government estimated a trial would take two days.

The court scheduled jury selection and opening statements for February 11, 2019, and the trial for February 12-14, 2019. It further set deadlines (in late January and early February) for expert designations and reports, objections to experts, and the government's requested jury charge, voir dire, exhibit list and witness list (and defense objections).

At the status conference on January 7, 2019, the parties requested a bench trial on stipulated facts. Defense counsel explained that Mr. Longoria would "potentially" challenge the adverse suppression ruling on appeal, and that he preferred a stipulated bench trial to a "conditional plea" because "a conditional plea would waive, I believe, his sentencing rights." The court responded, "That's fine."

The government informed the court that it would draft "a stipulation agreement that

we could present to the Court . . . [o]f what we could prove. And then the parties will both agree and sign it . . . for the stipulated bench trial." The court scheduled the stipulated bench trial for January 10, 2019.

On January 10, 2019, Mr. Longoria waived his right to a jury trial, and the parties proceeded to a bench trial.[2] The facts were set forth in a signed "Stipulation Regarding Evidence For Purposes of Trial," which the court accepted. The parties presented no other evidence or witnesses at the bench trial. At its conclusion, the court found Mr. Longoria guilty "as stipulated on the record in open court."

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 ("USSG"), the PSR did not award Mr. Longoria a two-level reduction for acceptance of responsibility under USSG § 3E1.1(a), even though he had already submitted a written apology.

Mr. Longoria filed a set of written objections that included, *inter alia*, an objection to "the withholding of" a three-level reduction for acceptance of responsibility under USSG § 3E1.1(a) and (b). The probation officer responded that his apology was too "vague" to warrant a reduction under USSG § 3E1.1(a), and that the "assigned prosecutor advised that she would not be recommending the third point" under USSG § 3E1.1(b).

[2] Mr. Longoria reserved the right to appeal from the adverse suppression ruling. On appeal, however, he elected to challenge only his sentence.

3. The sentencing hearing.

At sentencing on March 28, 2019, the district court "read [Longoria's apology] as an acknowledgement of acceptance of responsibility" and granted the two-level downward adjustment under USSG § 3E1.1(a). The court asked the government to explain why it was refusing to move for the additional one-level reduction under USSG § 3E1.1(b), and the government responded:

> *The one point the Government is denying is because we had to have a full-blown suppression hearing*. . . . [I]t's our [office] policy that once we start responding to the Defendant's motion to suppress, and once we start that work towards what would be similar to a trial, then we'd deny that extra point.

(Emphasis added.)

The court, frustrated by the government's response, stated:

> I think that . . . *the need of the Defendant to test his rights under the Fourth Amendment is a right that needs to be preserved without penalty*.
>
> And the Government, with due respect, put on an agent . . . but *the reality was the Government didn't do that much work*.
>
> It's not – no offense. You won [on the suppression issue]. I'm simply saying, you proved and satisfied me. But *it was way short of a jury trial*, to which the Defendant was entitled if he wanted to fight the case on all fronts.

(Emphasis added.)

The government replied that the task of responding to a suppression motion "is very time-intensive," and stated: "I am not saying it's the same as a trial; but it's additional stuff that I don't have to do also in trial, where I have to lay out the facts as if everybody in a trial would testify, and what they would say. . . . It's very precise. And then I have to

research the law."

The court did not order the government to move for the one-level reduction under USSG § 3E1.1(b). It ultimately determined that, based on a total offense level of 24 and a criminal history category of III, the advisory Guidelines range of imprisonment was 63 to 78 months. It imposed a within-Guidelines sentence of 78 months' imprisonment and three years' supervised release. Mr. Longoria timely appealed.

B. The appeal.

On appeal Mr. Longoria argued, *inter alia*, that (1) under Amendment 775 to the Guidelines,[3] the district court reversibly erred by allowing the government to withhold a motion for a third-level reduction under USSG § 3E1.1(b) solely on the ground that he proceeded to a hearing on a motion to suppress evidence; and (2) the government could not show that the error was harmless.

The panel affirmed the judgment in a published opinion (Pet. App. 1a-5a). It held, in pertinent part, that "Amendment 775 does not contain the unequivocal override needed to get past our precedent" allowing the government to withhold the third point when it must litigate a suppression motion. Pet. App. 4a. But it also noted:

> If we were writing on a blank slate, Longoria might have a compelling argument. Section 3E1.1(b) speaks of "trial," not pretrial hearings, and preparing for a suppression hearing usually requires less time and resources than trial preparation. Indeed, more circuits agree with Longoria's position

[3] Amendment 775 (effective November 1, 2013) amended the commentary to USSG § 3E1.1 to provide that "[t]he government should not withhold such a motion [for an adjustment under subsection (b)] based on interests not identified in § 3E1.1, such as whether the defendant agrees to waive his or her right to appeal." USSG App. C, amend. 775 (Nov. 1, 2013) (Pet. App. 11a); *see* USSG § 3E1.1, comment. (n.6) (Pet. App. 9a).

than with the one we have taken.

Pet. App. 3a (collecting cases). It did not reach the harmlessness question. Pet. App. 4a-5a (n.1).

Mr. Longoria filed a petition for rehearing *en banc* asking the full court to reconsider its precedents on this issue. The petition was denied on June 3, 2020, without a poll. Pet. App. 6a-7a.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the acknowledged and entrenched circuit split on whether the government's having to go through a hearing on a defendant's motion to suppress evidence is a valid basis for refusing to move for the third point under USSG § 3E1.1(b).

I. The circuits have for a long time been split on whether the government's having to go through a hearing on a defendant's motion to suppress evidence is a valid basis for refusing to move for the third point under USSG § 3E1.1(b).

Under USSG § 3E1.1(a), courts reduce the Guidelines offense level by two points when defendants accept responsibility for their offenses. Pet. App. 8a. And, 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 USSG § 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 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[.]" Pet. App. 8a.

As the panel opinion acknowledged (Pet. App. 4a), a "circuit split . . . has long existed on whether the government's having to go through a suppression hearing is a valid basis for not requesting the third point" under USSG § 3E1.1(b).

The Ninth, Tenth, and D.C. Circuits have all held that the answer is "no." *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).

The Tenth Circuit, in reaching its result, made clear that it agreed with the Ninth Circuit's earlier opinion, in *Kimple*, 27 F.3d at 1413-15, that the denial of the third-level reduction is impermissible if it penalizes a defendant who has brought a non-frivolous motion to suppress in order to protect his constitutional rights. *Marquez*, F.3d at 1211-12. It also explained, in response to the government's argument that denial of the reduction may be justified if it "establishes that it prepared for trial in conjunction with responding to" the motion to suppress, that

> preparation for a motion to suppress is not the same as preparation for a trial. Even where . . . there is substantial overlap between the issues that will be raised at the suppression hearing and those that will be raised at trial, preparation for a motion to suppress would not require the preparation of voir dire questions, opening statements, closing arguments, and proposed jury instructions, to name just a few examples.

Marquez, 337 F.3d at 1212; *see also Kimple*, 27 F.3d at 1414-15 ("Merely opposing a suppression motion is not sufficient to constitute trial preparation.").

In stark contrast, the Fifth Circuit has "for a quarter century . . . 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," Pet. App. 3a (cleaned up), on the

ground that a suppression hearing could be "the substantive equivalent of a full trial." Pet. App. 4a (citing *United States v. Gonzales*, 19 F.3d 982, 984 (5th Cir. 1994)). Under the Fifth Circuit's "entrenched caselaw," it makes no difference that "preparing for a suppression hearing usually requires less time and resources than trial preparation." Pet. App. 3a.

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) (per curiam). In reaching its result, the Second Circuit cited to the Fifth Circuit's opinion in *Gonzales*, *supra*, and explained:

> [I]n terms of preparation by the government and the investment of judicial time, the suppression hearing was the main proceeding in this case. As the district court observed, "the case was effectively tried with the motion to suppress." Once that motion was denied, convicting [the defendant] became child's play for the prosecution.

129 F.3d at 80.[4]

More recently a panel of the Second Circuit, in an opinion holding that a district court erred by denying the government's motion for the third-level reduction without making the factual findings necessary to justify its decision, wrote that it "agree[s] with the Tenth Circuit [in *Marquez*] that where a defendant has filed a non-frivolous motion to

[4] *Cf. United States v. Sanders*, 208 Fed. Appx. 160, 163 (3d Cir. 2006) (unpublished) (noting that the government "essentially tried [the defendant] at the suppression hearing" and, therefore, "reasonably concluded [the defendant] did not permit it or the court 'to allocate their resources efficiently'").

suppress, and there is no evidence that the government engaged in preparation beyond that which was required for the motion, a district court may not rely on the fact that the defendant filed a motion to suppress requiring a lengthy suppression hearing to justify a denial of the third level reduction[.]" *United States v. Vargas*, 961 F.3d 566, 584 (2d Cir. 2020) (cleaned up). 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. Longoria'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). Further percolation would be unhelpful because, as the panel opinion observed (Pet. App. 3a-4a), "the circuit split . . . has long existed" and the Fifth Circuit's minority view on the issue is "entrenched."

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

Whether the government, at sentencing, may withhold a motion for a third-level reduction for acceptance of responsibility under USSG § 3E1.1(b) on the ground that the defendant proceeded to a hearing on a motion to suppress evidence is "an important question of federal law that has not been, but should be, settled by this Court[.]" *See* Sup. Ct. R. 10(c).

As the panel opinion recognized (Pet. App. 3a), the Fifth Circuit has over the years "repeatedly" and "routinely" affirmed the denial of a one-level reduction under USSG § 3E1.1(b) when the government had to prepare for a suppression hearing. This means that, in the Fifth Circuit, defendants are as a matter of course penalized for bringing motions to

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. The panel acknowledged the "circuit split that has long existed" and decided that, even after Amendment 775, it remains bound by the Fifth Circuit's "entrenched caselaw" holding that a suppression hearing may justify withholding a motion for a third-level reduction under USSG § 3E1.1(b) because the hearing could be "the substantive equivalent of a full trial." Pet. App. 3a-4a. There was no alternative basis for its decision affirming the sentence.

The Fifth Circuit also denied Mr. Longoria's petition for rehearing *en banc* without a poll (Pet. App. 6a-7a), thus demonstrating that it has no interest in reconsidering its minority view on the issue.

III. The Fifth Circuit's decision is incorrect.

The language and history of Amendment 775, and the plain language of the Guideline itself, support that the government may not withhold the third point under USSG § 3E1.1(b) simply because it had to litigate a suppression motion. The Fifth Circuit's "entrenched caselaw" (Pet. App. 3a) allowing the government to do so, which the panel opinion relied on to affirm Mr. Longoria's sentence (Pet. App. 4a), is incorrect.

Until recently, the circuits were divided as to whether the government could properly withhold a motion under USSG § 3E1.1(b) for considerations other than trial preparation. On one side of the split, the Second Circuit held that the government could not

properly withhold the motion 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 first 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 (citation omitted; emphasis added by the *Lee* court). Second, said that court,

> [T]he 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. (internal citation omitted; emphasis added by the *Lee* court).

In reaching its result, the Second Circuit drew upon similar reasoning in *United States v. Divens*, 650 F.3d 343, 344-45, 347-48 (4th Cir. 2011), where the Fourth Circuit had held that it was improper for prosecutors to withhold a motion under USSG § 3E1.1(b) on the ground that the defendant had refused to enter into a plea agreement waiving his right to appeal. On the other hand, the First, Third, Fifth, Sixth, Ninth, and Tenth Circuits had held "that interests other than avoiding preparing for trial c[ould] justify the government's refusal to make a § 3E1.1(b) motion." *United States v. Collins*, 683 F.3d 697, 707 (6th Cir. 2012); *see also id.* at 705-08 (discussing the circuit split and taking a side in that split).

Amendment 775 addressed this split and resolved it in favor of the position taken by the Second and Fourth Circuits. *See* USSG App. C, amend. 775 (Nov. 1, 2013) (Pet. App. 11a-14a). "[T]he Commission could discern no congressional intent to allow

decisions under § 3E1.1 to be based on interests not identified in § 3E1.1." *Id.* (Reasons for Amendment) (Pet. App. 13a).[5] The Commission thus amended the Guideline commentary, which is authoritative,[6] 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.* (Pet. App. 11a); *see* USSG § 3E1.1, comment. (n.6) (Pet. App. 9a).

Avoiding preparation for a motion to suppress (or other pretrial motions in general) 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. . . ." [USSG] § 3E1.1(b) (emphasis

[5] Section 3E1.1 had been "directly amended" by Congress in 2003, adding language about efficient allocation of governmental resources, and so the Commission "studied the operation of § 3E1.1 before the PROTECT Act [of 2003], the congressional action to amend § 3E1.1, and the legislative history of that congressional action." USSG App. C. amend. 775 (Reason for Amendment) (Pet. App. 12a).

[6] *Stinson v. United States*, 508 U.S. 36, 38 (1993).

> added). Either Congress or the Sentencing Commission could have amended § 3E1.1(b) to say "thereby permitting the government to avoid litigating *pretrial motions or* preparing for trial," but neither did so.
>
> 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." [USSG] § 3E1.1(b), Application Note 6. Again, either Congress or the Sentencing Commission could have amended Application Note 6 to say: "[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 litigating *pretrial motions or* preparing for trial and the court may schedule its calendar efficiently." Neither did so.

United States v. Villaba, 86 F. Supp. 3d 1252, 1273 (D.N.M. 2015) (Browning, J.) (formatting altered).

It is easy to see why the Sentencing Commission would not identify "litigating suppression motions" (or pretrial motions in general) as a proper basis for withholding the third-level reduction. As the Tenth Circuit has said, "A defendant, of course, is entitled to bring a motion to suppress to protect his or her constitutional rights, and . . . '[t]he Guidelines do not force a defendant to forgo the filing of routine pre-trial motions as the price of receiving a one-step decrease [under the Guideline].'" *Marquez*, 337 F.3d at 1211 (citing *United States v. Marroquin*, 136 F.3d 220, 225 (1st Cir. 1998)); *see also Kimple*, 27 F.3d at 1415 ("[T]he district court may not penalize the defendant for legitimately attempting to protect his constitutional rights.").

Also, even assuming that defeating a suppression motion could "put the government near the goal line" in some felon-in-possession cases, *see* Pet. App. 4a, the "preparation for a motion to suppress is not the same as preparation for a trial." *Marquez*, 337 F.3d at 1212.

In this case, as in others, the government would have been expected to perform many additional tasks in preparation for a jury trial, such as preparing expert designations and witness lists, voir dire questions, opening statements, closing arguments, and proposed jury instructions. *See supra* text, at 5; *cf. Marquez*, 337 F.3d at 1212 ("Even where, as here, there is substantial overlap between the issues that will be raised at the suppression hearing and those that will be raised at trial, preparation for a motion to suppress would not require the preparation of voir dire questions, opening statements, closing arguments, and proposed jury instructions, to name just a few examples."); *Vargas*, 961 F.3d at 583 (same); *Villaba*, 86 F. Supp. 3d at 1274 (same). Indeed, "[a]ny experienced criminal lawyer knows that preparing for a jury trial involves more work than preparing for a suppression hearing, and few federal prosecutors would fail to spend most of the last couple of weeks preceding a short trial honing their [trial] presentation." *Vargas*, 961 F.3d at 583.

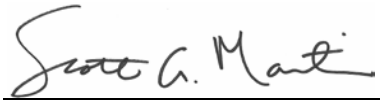
For all of these reasons, the Fifth Circuit's "entrenched caselaw" allowing the government to withhold the third point when it must litigate a suppression motion, which the panel opinion relied on to affirm Mr. Longoria's sentence, is incorrect. This Court should grant review on this important issue, and it should reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas



SCOTT A. MARTIN
Assistant Federal Public Defender
Attorneys for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

Date: September 11, 2020

958 F.3d 372
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff - Appellee
v.
Martin Rogelio LONGORIA, Defendant - Appellant

No. 19-20201
|
FILED May 5, 2020

Synopsis

Background: After denial of defendant's motion to suppress, defendant was convicted at a stipulated bench trial in the United States District Court for the Southern District of Texas, Nancy F. Atlas, Senior District Judge, of being a felon in possession of firearms. Defendant appealed.

The Court of Appeals, Costa, Circuit Judge, held that amendment to commentary for Sentencing Guideline addressing government motions for additional one-level acceptance-of-responsibility reduction of offense level under Sentencing Guidelines did not clearly overrule circuit precedent allowing government to withhold such a motion when government had to litigate a suppression motion.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

***374** Appeal from the United States District Court for the Southern District of Texas, Nancy F. Atlas, U.S. District Judge

Attorneys and Law Firms

Jessica Carol Akins, Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Southern District of Texas, Houston, TX, for Plaintiff - Appellee.

Marjorie A. Meyers, Federal Public Defender, Scott Andrew Martin, Assistant Federal Public Defender, Kathryn Shephard, Federal Public Defender's Office, Southern District of Texas, Houston, TX, for Defendant - Appellant.

Before SOUTHWICK, COSTA, and DUNCAN, Circuit Judges.

Opinion

GREGG COSTA, Circuit Judge:

Courts reduce the Sentencing Guidelines offense level by two points when defendants accept responsibility for their crimes. U.S.S.G. § 3E1.1(a). For offenses that score high enough (16 points or more), the government may ask the court to reduce the offense level by a third point if the defendant "timely" pled guilty so the government could "avoid preparing for trial." *Id.* § 3E1.1(b). We have long allowed the government to do what it did here: withhold the third point when the defendant seeks to suppress evidence, even though the hearing on that request is not a trial. *United States v. Gonzales*, 19 F.3d 982, 984 (5th Cir. 1994) (per curiam). The principal question in this sentencing appeal is whether we must still follow that law after an amendment to the relevant Guidelines commentary.

I.

A grand jury charged Martin Longoria with being a felon in possession of several firearms. Longoria moved to suppress the evidence, challenging the FBI's warrantless search of his apartment where the guns were discovered. The district court denied the motion, concluding that Longoria's wife consented to the search.

Instead of pleading guilty, Longoria asked for a stipulated bench trial to preserve his suppression challenge. The district court found him guilty based on the stipulation.

The presentence investigation report (PSR) calculated Longoria's base offense level at 20 "because the offense involved several semiautomatic firearms with large capacity magazines." U.S.S.G. § 2K2.1(a)(4)(B). The PSR also recommended three enhancements. The PSR did not recommend a reduction for acceptance of responsibility because, according to the report, Longoria offered only a "vague," terse apology.

At sentencing, the district court overruled Longoria's objection to his base offense level, agreeing with the PSR that the offense involved large-capacity magazines. On other issues, however, the court ruled in Longoria's favor. It sustained his objection to a proposed enhancement for using a firearm in connection with another felony. U.S.S.G. § 2K2.1(b)(6)(B). It also sustained, in part, Longoria's objection to the withholding of the three-level reduction

for acceptance of responsibility. Contrary to the PSR, the court "read [Longoria's apology] as an acknowledgement of acceptance of responsibility" and granted the two-level downward adjustment. But the third point requires a motion from the prosecutor. U.S.S.G. § 3E1.1(b). The prosecutor explained she did not file that motion because Longoria forced the government to prepare for "a full-blown suppression hearing."

***375** Those rulings resulted in a Guidelines range of 63 to 78 months' imprisonment. The court sentenced Longoria to a prison term of 78 months. The judge noted this was a "relatively lenient sentence" given the objection she had sustained to the four-point enhancement for use in another felony, and she "would never go lower." [1]

Despite seeking a stipulated bench trial to allow an appeal of the suppression ruling, Longoria now challenges only his base offense level and the government's refusal to move for the third acceptance point.

II.

The base offense level of 20 was proper if Longoria's felon-in-possession crime involved a "semiautomatic firearm that is capable of accepting a large capacity magazine." *Id.* § 2K2.1(a)(4)(B)(i)(I). A firearm meets that definition if it had attached to it, or was in close proximity to, "a magazine or similar device that could accept more than 15 rounds of ammunition." *Id.* § 2K2.1 cmt. n.2.

In applying this elevated base offense level, the district court relied on the FBI agent's statement that five large-capacity magazines were attached to or near the semiautomatic firearms that Longoria possessed. We review the court's finding—like all other factual determinations—for clear error. *United States v. Moton*, 951 F.3d 639, 644 (5th Cir. 2020). A finding is clearly erroneous only if we are "left with the definite and firm conviction that a mistake has been committed." *United States v. Mata*, 624 F.3d 170, 173 (5th Cir. 2010) (per curiam) (quotation omitted).

Longoria asserts that the agent's statement is unreliable because it is "conclusory" and "not capable of evaluation as to reliability." Neither ground is persuasive. A sentencing judge "may properly find sufficient reliability on a [PSR] which is based on the results of a police investigation." *See, e.g.*, *United States v. Vela*, 927 F.2d 197, 201 (5th Cir. 1991); *see also United States v. Rico*, 864 F.3d 381, 386 (5th Cir. 2017). The statement of the FBI agent, who had first-hand knowledge of the search, easily fits that bill. And the statement asserts the concrete fact that the FBI seized "five high-capacity magazines ... either attached to a rifle or nearby to the recovered rifles" during the search.

Contrary to Longoria's suggestion, he could have cross-examined the FBI agent or introduced other evidence to undercut the statement's accuracy. *See* FED. R. CRIM. P. 32(i)(2) (providing that a sentencing judge "may permit the parties to introduce evidence on ... objections" to the PSR); *see also* U.S.S.G. § 6A1.3(a) ("When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor."). Indeed, Longoria tried to rebut the statement by arguing that a photo of his apartment he had taken before the search showed only handgun magazines, not clips that would trigger the elevated base offense level. To the extent this constitutes rebuttal evidence, the district court was entitled to credit the agent's statement instead. *See United States v. Barfield*, 941 F.3d 757, 766 (5th Cir. 2019) ("It is proper for the district court to rely on a presentence report's ***376** construction of evidence to resolve a factual dispute, rather than relying on the defendant's version of the facts." (quotation omitted)).

Longoria fails to show that the district court clearly erred in relying on the FBI's agent statement about what was found in the apartment. The base offense level for firearms that can accept large-capacity magazines was proper.

III.

That brings us to the question we mentioned at the outset: Was the government required to ask the court to award the additional point off for acceptance of responsibility? A defendant is eligible for the extra point if his offense level is at least 16 and the government files a motion:

> stating that the defendant has assisted ... in the investigation or prosecution of his own misconduct by timely [giving notice] 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).

We review the decision to withhold such a motion only for whether the government "considered an interest within [section] 3E1.1." *United States v. Halverson*, 897 F.3d 645, 656 (5th Cir. 2018). As the government's reason for withholding the motion was the "full-blown suppression hearing,"[2] the issue is whether the resources expended litigating a suppression motion are an interest the government can cite in withholding the third-point motion.

If we were writing on a blank slate, Longoria might have a compelling argument. Section 3E1.1(b) speaks of "trial," not pretrial hearings, and preparing for a suppression hearing usually requires less time and resources than trial preparation. Indeed, more circuits agree with Longoria's position than with the one we have taken. *Compare United States v. Rogers*, 129 F.3d 76, 80–81 (2d Cir. 1997) (per curiam) (applying our rule), *with 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, 1414–15 (9th Cir. 1994) (all holding that the government cannot withhold the third point because the defendant sought to suppress evidence).

Even if a minority view, our precedent of course poses a problem for Longoria. One published decision is all it takes for *stare decisis*. Yet it is worth noting that here our precedent also has multiplicity on its side; for a quarter century we have 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." ***377** *United States v. Silva*, 865 F.3d 238, 244 (5th Cir. 2017) (per curiam) (citing *United States v. Delaurier*, 237 F. App'x 996, 998 (5th Cir. 2007) (per curiam); *United States v. Cruz*, 1999 WL 1067627, at *1 (5th Cir. Oct. 19, 1999) (per curiam); *Gonzales*, 19 F.3d at 984).

Longoria believes he has a way around this entrenched caselaw: "an intervening change in law." *See Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) (recognizing such a change as an exception to the rule of orderliness). He cites the following 2013 amendment to the commentary on the acceptance-of-responsibility Guideline: "The 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." U.S.S.G. supp. to app. C, cmt. to amend. 775 (2013). That example resolved a circuit split on whether "a defendant's refusal to sign an appellate waiver is a legitimate reason ... to withhold" the third point. *Id.*; *see also United States v. Palacios*, 756 F.3d 325, 326 n.1 (5th Cir. 2014) (en banc) (abrogating *United States v. Newson*, 515 F.3d 374 (5th Cir. 2008), based on Amendment 775). Longoria reads Amendment 775 as emphasizing that only the interest section 3E1.1 specifies about saving trial resources can support withholding the third point. Two panels of this court have recognized that this is a colorable argument, stating "[i]t is now unclear ... 'to what extent [Amendment 775] was meant to reject our previous rule that a suppression hearing may justify withholding a [s]ection 3E1.1(b) reduction.' " *Silva*, 865 F.3d at 244–45 (quoting *United States v. Pena-Gonzalez*, 618 F. App'x 195, 201 (5th Cir. 2015) (per curiam)).

Today we clarify any confusion and hold that the amendment does not clearly overrule our caselaw allowing the government to withhold the third point when it must litigate a suppression motion.

To be sure, a Sentencing Commission amendment modifying Guidelines commentary can override our precedent because that commentary is, with a few exceptions, "authoritative." *Stinson v. United States*, 508 U.S. 36, 38, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993) ("[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."). So when we interpret a Guidelines section, and the Commission amends the Guidelines Manual commentary to overrule our interpretation, the Commission's reading controls. *See id.*

The Sentencing Commission's amendment, however, must clearly overrule our caselaw to warrant a departure from the rule of orderliness. *See United States v. Fitzhugh*, 954 F.2d 253, 254 (5th Cir. 1992) (concluding that an amendment overruled precedent because it "made clear" that "the Commission ... repudiated" controlling caselaw)[3]; *cf. Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016) (per curiam) ***378** ("For a Supreme Court decision to satisfy this Court's rule of orderliness, it must be unequivocal, not a mere 'hint' of how the Court might rule in the future." (quotation omitted)). If a "mere hint" from the Commission that our caselaw might be wrong were enough to allow a panel to

consider issues anew, judges would have too much leeway to invalidate caselaw they did not like in the first place. *Cf. Jacobs*, 548 F.3d at 378 (explaining that the rule of orderliness aims to prevent a subsequent panel from overriding a prior panel's "flawed" opinion).

Amendment 775 does not contain the unequivocal override needed to get past our precedent. *See United States v. Kuban*, 94 F.3d 971, 974 n.6 (5th Cir. 1996) (refusing to overrule our precedent on section 3A1.1 because the change to the commentary did not address our interpretation of the Guideline). It does not talk about whether the filing of a suppression motion, or other pretrial matters, is a basis for withholding the third point. And while the amendment expressly resolves a circuit split on whether the government can withhold the motion because the defendant refused to sign an appeal waiver, it tellingly does not directly address the circuit split that has long existed on whether the government's having to go through a suppression hearing is a valid basis for not requesting the third point. That silence suggests that the Commission, which keeps track of splits on Guidelines issues, chose not to clarify section 3E1.1 in the suppression context. *Cf. United States v. Vargas-Duran*, 319 F.3d 194, 203 (5th Cir. 2003) (Clement, J., dissenting) (disagreeing with the majority's view that an amendment, which the Commission "intended to render moot an unrelated circuit split," overruled controlling precedent), *on reh'g en banc* 356 F.3d 598, 599 (5th Cir. 2004) (taking the opposite view of the original panel and holding that section 2L1.2's use-of-force requirement "require[d] that a defendant intentionally avail himself of that force"), *overruled in part by United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc).

Longoria points out that we considered Amendment 775 in ruling that a prosecutor could not withhold a motion for the third point merely because the defendant filed objections at sentencing. *See United States v. Castillo*, 779 F.3d 318, 324–26 (5th Cir. 2015). Amendment 775 does not directly address that question, yet we relied on the general point that section 3E1.1 "refers to efficient allocation of governmental resources ... only in the context of preparing for trial." *Id.* at 324. *Castillo*, however, was looking as an original matter at whether saving sentencing resources was a legitimate section 3E1.1 interest. No precedent controlled, so *Castillo* did not have occasion to decide whether the new commentary would be clear enough to overrule a contrary precedent on the question it decided. And there is nothing new about section 3E.1.1's focus on "trial" preparation. That has always been in the Guidelines. *See United States v. Tello*, 9 F.3d 1119, 1128 (5th Cir. 1993).

Indeed, our first case addressing the third point in connection with the suppression issue tried to reconcile its holding with the Guidelines' trial focus, explaining that a "suppression hearing [could be] in effect the substantive equivalent of a full trial." *Gonzales*, 19 F.3d at 984. As is often true in felon-in-possession cases, that was largely the case here. The search Longoria challenged yielded the weapons he was charged with possessing. While defeating the suppression motion may not have fully proved Longoria's unlawful possession, it put the government near the goal line. *United States v. Mudd*, 685 F.3d 473, 477 (5th Cir. 2012); *cf. Rogers*, 129 F.3d at 80 ("[I]n terms of preparation by the government[,] ***379** the suppression hearing was the main proceeding in this case.... Once th[e] [suppression] motion was denied, convicting [the defendant] became child's play for the prosecution.").

Whatever we think about *Gonzales*'s "substantive equivalent of a full trial" reasoning today, we remain bound by it because the Sentencing Commission has not clearly overridden our precedent. *See Kuban*, 94 F.3d at 974 & n.6. Under that longstanding caselaw, the government did not rely on an impermissible interest in withholding the third point for acceptance of responsibility.

* * *

The judgment is AFFIRMED.

All Citations

958 F.3d 372

Footnotes

1 Based on these comments, the government argues any errors in the Guideline calculation would be harmless. Longoria responds that (1) a sentence at the high end of the Guidelines range shows the Guidelines had

an impact and (2) the district court did not consider what the range would have been with the third point for acceptance. Because we find no errors, we need not reach the harmlessness question.

2 There may have been another reason for the government to withhold the motion for the third point: Longoria did not plead guilty. He instead agreed to a stipulated bench trial (to preserve the suppression appeal he never brought). While we recently held that a stipulated bench trial should not preclude a defendant from receiving the first two points for accepting responsibility, *United States v. Najera*, 915 F.3d 997, 1004 (5th Cir. 2019), we have caselaw saying it can justify the government's refusal to seek the third point given that eligibility for the additional point focuses on the defendant's saving prosecutorial and judicial resources, *see, e.g., United States v. Zamarripa*, 1999 WL 642832, at *1 (5th Cir. July 20, 1999) (per curiam); *United States v. Garcia*, 135 F.3d 951, 955–57 & n.7 (5th Cir. 1998); *United States v. Leonard*, 61 F.3d 1181, 1187 (5th Cir. 1995). But because the government justified its nonfiling on the defendant's seeking suppression, we consider only whether that was a proper interest.

3 A number of cases illustrate when that override is clear. *See United States v. Martinez-Ovalle*, 956 F.3d 289, 291 n.6 (5th Cir. 2020) (recognizing that an amendment modified a Guideline's text and commentary to "specifically nullify" precedent); *United States v. Pimpton*, 558 F. App'x 335, 337–38 (5th Cir. 2013) (recognizing that an amendment defining a term abrogated a decision that defined the term differently); *United States v. Setser*, 568 F.3d 482, 497 (5th Cir. 2009) (concluding that an amendment overruled a decision because it resolved a circuit split involving the decision and adopted the other circuit's approach); *United States v. Calverley*, 11 F.3d 505, 511 n.14 (5th Cir. 1993) (calling into doubt precedent that was "based solely" on Guideline language that an amendment deleted).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-20201

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MARTIN ROGELIO LONGORIA,

Defendant - Appellant

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion May 5, 2020, 5 Cir., _____, _____ F.3d _____)

Before SOUTHWICK, COSTA, and DUNCAN, Circuit Judges.

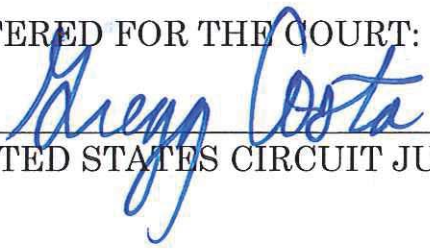
PER CURIAM:

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

USSG, § 3E1.1, 18 U.S.C.A.

§ 3E1.1. Acceptance of Responsibility

Currentness

(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.

CREDIT(S)

(Effective November 1, 1987; amended effective January 15, 1988; November 1, 1989; November 1, 1990; November 1, 1992; Pub.L. 108-21, Title IV, § 401(g), Apr. 30, 2003, 117 Stat. 671; April 30, 2003; November 1, 2010; November 1, 2013; November 1, 2018.)

COMMENTARY

<***Application Notes:***>

<**1.** In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:>

<**(A)** truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous;>

<**(B)** voluntary termination or withdrawal from criminal conduct or associations;>

<**(C)** voluntary payment of restitution prior to adjudication of guilt;>

<**(D)** voluntary surrender to authorities promptly after commission of the offense;>

<**(E)** voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;>

<**(F)** voluntary resignation from the office or position held during the commission of the offense;>

<**(G)** post-offense rehabilitative efforts (e.g., counseling or drug treatment); and>

<**(H)** the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.>

<**2.** This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.>

<**3.** Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.>

<**4.** Conduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply.>

<**5.** The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.>

<**6.** Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the 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.>

<Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. *See* section 401(g)(2)(B) of Pub. L. 108-21. The 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.>

<If the government files such a motion, and the court in deciding whether to grant the motion also determines 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, the court should grant the motion.>

<**Background:** 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.>

<Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.>

<Section 401(g) of Public Law 108-21 directly amended subsection (b), Application Note 6 (including adding the first sentence of the second paragraph of that application note), and the Background Commentary, effective April 30, 2003.>

Notes of Decisions (1232)

Federal Sentencing Guidelines, § 3E1.1, 18 U.S.C.A., FSG § 3E1.1
As amended to 3-16-20.

End of Document

loss. To permit a defendant to optimize his return in this manner would unjustly reward defendants, and could require unjustifiable speculation and complexity at the sentencing hearing.

Second, the otherwise unclaimed credit, deduction, or exemption must be reasonably and practicably ascertainable. Consistent with the instruction in Application Note 1, this condition reaffirms the Commission's position that sentencing courts need only make a reasonable estimate of tax loss. In this regard, the Commission recognized that consideration of some unclaimed credits, deductions, or exemptions could require sentencing courts to make unnecessarily complex tax determinations, and therefore concluded that limiting consideration of unclaimed credits, deductions, or exemptions to those that are reasonably and practicably ascertainable is appropriate.

Third, the defendant must present information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy. Consistent with the principles set forth in §6A1.3 (Resolution of Disputed Factors) (Policy Statement), this condition ensures that the parties have an adequate opportunity to present information relevant to the court's consideration of any unclaimed credits, deductions, or exemptions raised at sentencing.

In addition, the new application note provides that certain categories of credits, deductions, or exemptions shall not be considered by the court in any case. In particular, "the court shall not account for payments to third parties made in a manner that encouraged or facilitated a separate violation of law (e.g., 'under the table' payments to employees or expenses incurred to obstruct justice)." The Commission determined that payments made in this manner result in additional harm to the tax system and the legal system as a whole. Therefore, to use them to reduce the tax loss would unjustifiably benefit the defendant and would result in a tax loss figure that understates the seriousness of the offense and the culpability of the defendant.

Finally, the application note makes clear that the burden is on the defendant to establish any credit, deduction, or exemption permitted under this new application note by a preponderance of the evidence, which is also consistent with the commentary in §6A1.3.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 775

AMENDMENT: The Commentary to §3E1.1 captioned "Application Notes" is amended in Note 6 by adding at the end of the paragraph that begins "Because the Government" the following as the last sentence: "The 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."; and

by adding after the paragraph that begins "Because the Government" the following new paragraph:

"If the government files such a motion, and the court in deciding whether to grant the motion also determines 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, the court should grant the motion.".

The Commentary to §3E1.1 captioned "Background" is amended in the paragraph that begins "Section 401(g)" by striking "the last paragraph" and inserting "the first sentence of the second paragraph".

REASON FOR AMENDMENT: This amendment addresses two circuit conflicts involving the guideline for acceptance of responsibility, §3E1.1 (Acceptance of Responsibility). A defendant who clearly demonstrates acceptance of responsibility for his offense receives a 2-level reduction under subsection (a) of §3E1.1. The two circuit conflicts both involve the circumstances under which the defendant is eligible for a third level of reduction under subsection (b) of §3E1.1. Subsection (b) provides:

> (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.

The first circuit conflict involves the government's discretion under subsection (b) and, in particular, whether the government may withhold a motion based on an interest not identified in §3E1.1, such as the defendant's refusal to waive his right to appeal. The second conflict involves the court's discretion under subsection (b) and, in particular, whether the court may decline to apply the third level of reduction when the government has moved for it.

These circuit conflicts are unusual in that they involve guideline and commentary provisions that Congress directly amended. See section 401(g) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108–21 (the "PROTECT Act"); see also USSG App. C, Amendment 649 (effective April 30, 2003) (implementing amendments to the guidelines made directly by the PROTECT Act). They also implicate a congressional directive to the Commission not to "alter or repeal" the congressional amendments. See section 401(j)(4) of the PROTECT Act. Accordingly, in considering these conflicts, the Commission has not only reviewed public comment, sentencing data, case law, and the other types of information it ordinarily considers, but has also studied the operation of §3E1.1 before the PROTECT Act, the congressional action to amend §3E1.1, and the legislative history of that congressional action.

The Government's Discretion to Withhold the Motion

The first circuit conflict involves the government's discretion under subsection (b) and, in particular, whether the government may withhold a motion based on an interest not identified in §3E1.1, such as the defendant's refusal to waive his right to appeal.

Several circuits have held that a defendant's refusal to sign an appellate waiver is a legitimate reason for the government to withhold a §3E1.1(b) motion. See, e.g., United States v. Johnson, 581 F.3d 994, 1002 (9th Cir. 2009) (holding that "allocation and expenditure of prosecutorial resources for the purposes of defending an appeal is a rational basis" for such refusal); United States v. Deberry, 576 F.3d 708, 711 (7th Cir. 2009) (holding that requiring the defendant to sign an appeal waiver would avoid "expense and uncertainty" on appeal); United States v. Newson, 515 F.3d 374, 378 (5th Cir. 2008) (holding that the government's interests under §3E1.1 encompass not only the government's time and effort at prejudgment stage but also at post-judgment proceedings).

In contrast, the Fourth Circuit has held that a defendant's refusal to sign an appellate waiver is not a legitimate reason for the government to withhold a §3E1.1(b) motion. See United States v. Divens, 650 F.3d 343, 348 (4th Cir. 2011) (stating that "the text of §3E1.1(b) reveals a concern for the efficient allocation of trial resources, not appellate resources" [emphasis in original]); see also United States v. Davis, 714 F.3d 474, 476 (7th Cir. 2013) (Rovner, J., concurring) ("insisting that [the defendant] waive his right to appeal before he may receive the maximum credit under the Guidelines for accepting responsibility serves none of the interests identified in section 3E1.1"). The majority in Davis called for the conflict to be resolved, stating: "Resolution of this conflict is the province of the Supreme Court or the Sentencing Commission." Davis, 714 F.3d at 475 (per curiam). The Second Circuit, stating that the Fourth Circuit's reasoning in Divens applies "with equal force" to the defendant's request for an evidentiary hearing on sentencing issues, held that the government may not withhold a §3E1.1 motion based upon such a request. See United States v. Lee, 653 F.3d 170, 175 (2d Cir. 2011).

The PROTECT Act added Commentary to §3E1.1 stating that "[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing." See §3E1.1, comment. (n.6). The PROTECT Act also amended §3E1.1(b) to provide that the government motion state, among other things, that the defendant's notification of his intention to enter a plea of guilty permitted "the government to avoid preparing for trial and . . . the government and the court to allocate their resources efficiently . . . ."

In its study of the PROTECT Act, the Commission could discern no congressional intent to allow decisions under §3E1.1 to be based on interests not identified in §3E1.1. Furthermore, consistent with Divens and the concurrence in Davis, the Commission determined that the defendant's waiver of his or her right to appeal is an example of an interest not identified in §3E1.1. Accordingly, this amendment adds an additional sentence to the Commentary stating 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."

The Court's Discretion to Deny the Motion

The second conflict involves the court's discretion under subsection (b) and, in particular, whether the court may decline to apply the third level of reduction when the government has moved for it.

The Seventh Circuit has held that if the government makes the motion (and the other two requirements of subsection (b) are met, i.e., the defendant qualifies for the 2-level decrease and the offense level is level 16 or greater), the third level of reduction must be awarded. See United States v. Mount, 675 F.3d 1052 (7th Cir. 2012).

In contrast, the Fifth Circuit has held that the district court retains discretion to deny the motion. See United States v. Williamson, 598 F.3d 227, 230 (5th Cir. 2010). In Williamson, the defendant was convicted after jury trial but successfully appealed. After remand, he pled guilty to a lesser offense. The government moved for the third level of reduction, but the court declined to grant it because "regardless of however much additional trial preparation the government avoided through Williamson's guilty plea following remand, the preparation for the initial trial and the use of the court's resources for that trial meant that the § 3E1.1(b) benefits to the government and the court were not obtained." Id. at 231. The Fifth Circuit affirmed, holding that the decision whether to grant the third level of reduction "is the district court's — not the government's — even though the court may only do so on the government's motion." Id. at 230.

This amendment amends the Commentary to §3E1.1 by adding the following statement: "If the government files such a motion, and the court in deciding whether to grant the motion also determines 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, the court should grant the motion."

In its study of the PROTECT Act, the Commission could discern no congressional intent to take away from the court its responsibility under §3E1.1 to make its own determination of whether the conditions were met. In particular, both the language added to the Commentary by the PROTECT Act and the legislative history of the PROTECT Act speak in terms of allowing the court discretion to "grant" the third level of reduction. See USSG §3E1.1, comment. (n.6) (stating that the third level of reduction "may only be granted upon a formal motion by the Government"); H.R. Rep. No. 108–66, at 59 (2003) (Conf. Rep.) (stating that the PROTECT Act amendment would "only allow courts to grant an additional third point reduction for 'acceptance of responsibility' upon motion of the government."). In addition, the Commission observes that one of the considerations in §3E1.1(b) is whether the defendant's actions permitted the court to allocate its resources efficiently, and the court is in the best position to make that determination. Accordingly, consistent with congressional intent, this amendment recognizes that the court continues to have discretion to decide whether to grant the third level of reduction.

Finally, and as mentioned above, the Commission in its study of the PROTECT Act could discern no congressional intent to allow decisions under §3E1.1 to be based on interests not identified in §3E1.1. For that reason, this amendment indicates that, if the government has filed the motion and the court also determines that the circumstances identified in §3E1.1 are present, the court should grant the motion.

Effective Date: The effective date of this amendment is November 1, 2013.

AMENDMENT 776

AMENDMENT: The Commentary to §5G1.3 captioned "Background" is amended by striking the following: "In a case in which a defendant is subject to an undischarged sentence of imprisonment, the court generally has authority to impose an imprisonment sentence on the current offense to run concurrently with or consecutively to the prior undischarged term. 18 U.S.C. § 3584(a). Exercise of that authority,";

and inserting the following: "Federal courts generally 'have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings.' See Setser v. United States, 132 S. Ct. 1463, 1468 (2012); 18 U.S.C. § 3584(a). Federal courts also generally have discretion to order that the sentences they impose will run concurrently with or consecutively to other state sentences that are anticipated but not yet imposed. See Setser, 132 S. Ct. at 1468. Exercise of that discretion,".

REASON FOR AMENDMENT: This amendment responds to a recent Supreme Court decision that federal courts have discretion to order that the sentence run consecutively to (or concurrently with) an anticipated, but not yet imposed, state sentence. See Setser v. United States, 132 S. Ct. 1463, 1468 (2012).