No. 20-5715

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN ROGELIO LONGORIA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

KELLEY BROOKE HOSTETLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the government has discretion to decline to file a motion for an additional one-level acceptance-of-responsibility reduction under Section 3E1.1(b) of the advisory Sentencing Guidelines based on the defendant's efforts to suppress evidence establishing his guilt.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Longoria, No. 18-cr-531 (Apr. 2, 2019)

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

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

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-5715

MARTIN ROGELIO LONGORIA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 958 F.3d 372.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2020. A petition for rehearing was denied on June 3, 2020 (Pet. App. 6a-7a). The petition for a writ of certiorari was filed on September 11, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a stipulated bench trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 78 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-5a.

1. On July 27, 2018, a woman identifying herself as petitioner's girlfriend reported to the Federal Bureau of Investigation (FBI) that she had been the victim of an extortion scheme carried out by petitioner. Presentence Investigation Report (PSR) ¶ 5. She explained that, on multiple occasions, petitioner had told her that he was in danger and needed her to buy him a firearm. PSR ¶¶ 10-13, 15, 17-18. Fearing for her safety, she bought him guns on at least six different occasions. PSR ¶¶ 11-13, 15, 17-18.

FBI agents subsequently located petitioner and took him into custody in the parking lot of an apartment building. PSR ¶ 23. The agents then contacted the leaseholder of the apartment where petitioner lived, a woman who identified herself as his wife. Ibid. She consented to a search of the apartment, during which the FBI found eight firearms. PSR ¶¶ 24-25.

A federal grand jury in the Southern District of Texas indicted petitioner -- who had previously been convicted of a Texas felony -- for possessing a firearm as a felon, in violation of 18

U.S.C. 922(g)(1). Indictment 1; see PSR ¶ 21. Petitioner moved to suppress items taken from the apartment, including the firearms, arguing that his wife's consent to the search was invalid. See Pet. App. 1a. The district court denied the motion, and petitioner agreed to a stipulated bench trial to preserve his right to appeal the denial of his suppression motion. See ibid. The court found petitioner guilty. Ibid.

2. In preparation for sentencing, the Probation Office assigned petitioner a base offense level of 20 and added ten levels under various provisions of the advisory Sentencing Guidelines. See PSR ¶¶ 35-38, 46. Over petitioner's objection, the Probation Office declined to recommend a two-level reduction for acceptance of responsibility under Section 3E1.1(a). PSR ¶¶ 31-32, 43. While petitioner had stated that he was "sorry for committing the offense," PSR ¶ 30 (emphasis omitted), the Probation Office did not find his "vague statement" sufficient to recommend any reduction for acceptance of responsibility, see PSR Addendum 2; PSR ¶¶ 31, 43.

The Probation Office also determined, over petitioner's objection, that petitioner was not entitled to a one-level reduction for acceptance of responsibility under Sentencing Guidelines § 3E1.1(b). PSR ¶¶ 32, 43. As relevant here, Section 3E1.1(b) provides for a one-level reduction "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." The Probation Office explained that petitioner could not receive the reduction because the government had declined to submit the required motion recommending it. PSR ¶¶ 32, 43.

The advisory Guidelines range produced by the Probation Office's calculations was 121 to 151 months of imprisonment, which was reduced to the statutory maximum term of imprisonment of 120 months. PSR ¶ 99; see Sentencing Guidelines § 5G1.1(a).

3. At the sentencing hearing, the district court concluded that petitioner was entitled to a two-level reduction for acceptance of responsibility under Section 3E1.1(a), but agreed with the Probation Office that he was not entitled to a further one-level reduction under Section 3E1.1(b) because the government had not filed the requisite motion. Sent. Tr. 7-8, 12, 38; Statement of Reasons 1. The court rejected a separate four-level enhancement recommended by the Probation Office, resulting in an advisory sentencing range of 63 to 78 months of imprisonment. Statement of Reasons 1. The court sentenced petitioner to 78 months of imprisonment. Sent. Tr. 50; Judgment 2. The court stated that it would have imposed a sentence at "approximately this level" even if it had applied the four-level enhancement, but that the court "would never go lower." Sent. Tr. 51.

4. The court of appeals affirmed. Pet. App. 4a. The court explained that it had "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." Id. at 1a. The court rejected petitioner's reliance on a 2013 amendment to the Guidelines commentary indicating that a defendant's refusal to agree to an appeal waiver was not a proper basis for denying a third-point reduction. See id. at 3a. The court explained that the amendment does not "contain the unequivocal override needed to get past [existing circuit] precedent" because it "does not talk about whether the filing of a suppression motion, or other pretrial matters, is a basis for withholding the third point." Id. at 4a.

The court further explained that the 2013 amendment "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," and that "silence suggests that the [Sentencing] Commission * * * chose not to clarify section 3E1.1 in the suppression context." Pet. App. 4a. The court added that a suppression hearing could be "in effect the substantive equivalent of a full trial," as "was largely the case here." Ibid. (citation and internal quotation marks omitted). "While defeating the suppression motion may not have fully proved [petitioner's]

unlawful possession," the court observed, "it put the government near the goal line" in establishing his guilt. Ibid.

ARGUMENT

Petitioner contends (Pet. 15-19) that the government may not decline to file a motion for a third-point reduction for acceptance of responsibility under Sentencing Guidelines § 3E1.1(b) on the ground that he sought to suppress evidence establishing his guilt. The decision below is correct, and the narrow conflict among the courts of appeals on the question presented in the petition does not warrant this Court's review. The Sentencing Guidelines are not binding, and, in any event, the Sentencing Commission is capable of resolving the existing conflict. See, e.g., Braxton v. United States, 500 U.S. 344, 348 (1991). Moreover, petitioner cannot show that the question presented is outcome-determinative in this case.

1. Petitioner contends (Pet. 15-19) that the government is prohibited from declining to request a third-point reduction for acceptance of responsibility on the ground that he sought to suppress the evidence of his guilt. That contention is incorrect.

a. Under the advisory Sentencing Guidelines, a defendant who "clearly demonstrates acceptance of responsibility for his offense" is entitled to a two-level decrease in offense level. Sentencing Guidelines § 3E1.1(a). A defendant may receive an additional one-level reduction "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." Id. § 3E1.1(b).

The requirement that the government file a motion before a defendant may receive the third-point reduction was inserted by Congress in 2003. See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(g), 117 Stat. 671-672; see, e.g., United States v. Beatty, 538 F.3d 8, 14 (1st Cir. 2008) (explaining that the PROTECT Act made "the award of a § 3E1.1(b) reduction contingent on the government's decision to file a motion requesting the reduction"), cert. denied, 555 U.S. 1193 (2009). The application notes to Section 3E1.1 further explain 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." Sentencing Guidelines § 3E1.1, comment. (n.6) (emphasis added).

Section 3E1.1(b) confers on the government discretion to move for an additional third-point reduction in the defendant's offense level if the stated criteria are satisfied, but it does not require the government to file such a motion. That interpretation of

Section 3E1.1(b) follows from Wade v. United States, 504 U.S. 181 (1992), in which this Court held that the government may decline to move for a downward departure for substantial assistance to law enforcement under 18 U.S.C. 3553(e) or Sentencing Guidelines § 5K1.1 -- provisions that similarly require a "motion of the government," ibid. -- even if the defendant has in fact provided substantial assistance. The Court explained that "although a showing of assistance is a necessary condition for relief, it is not a sufficient one" because the government could validly base its decision not to move "on its rational assessment of the cost and benefit that would flow from moving." Wade, 504 U.S. at 187. Rather, the Court held that a defendant is not "entitled to relief" unless "the prosecutor's refusal to move was not rationally related to any legitimate Government end," for instance, if it was "based on an unconstitutional motive" such as "the defendant's race or religion." Id. at 185-186.

In keeping with that direction from this Court in a parallel sentencing context, the substantial majority of circuits that have interpreted Section 3E1.1(b) after the 2003 PROTECT Act amendment have determined that, in deciding whether to exercise its discretion to move for a third-point reduction, the government may consider whether the defendant's acceptance of responsibility was not only timely but also permitted the government to effectively allocate its resources. See, e.g., United States v. Jordan, 877 F.3d 391, 396 (8th Cir. 2017) (holding that a defendant's denial

of relevant conduct at sentencing "did not allow the government and the court to allocate their resources efficiently" and thus was appropriate basis for government to decline to recommend the third point); United States v. Collins, 683 F.3d 697, 706 (6th Cir.) (explaining that amended Section 3E1.1(b) is not limited solely to the "government interest in avoiding preparing for trial," but instead "explicitly identifies a broader government interest in allocating its resources efficiently"), cert. denied, 568 U.S. 988 (2012); United States v. Sainz-Preciado, 566 F.3d 708, 715 (7th Cir. 2009) (explaining that amended Section 3E1.1(b) reflects "Congress's intent to leave third-point reductions to the government's discretion"); Beatty, 538 F.3d at 16 ("As amended, the touchstone of § 3E1.1 is no longer trial preparation, but rather the presence of a government motion for the third-level reduction."); United States v. Drennon, 516 F.3d 160, 163 (3d Cir.) (upholding government's decision not to file a third-point reduction motion where the court found "no basis for concluding that [the decision] was motivated by anything other than a concern for the efficient allocation of the government's litigating resources"), cert. denied, 555 U.S. 978 (2008).

b. The Second and Fourth Circuits have taken a more restrictive view of the government's discretion under Section 3E1.1(b) in the context of a defendant's refusal to sign an appeal waiver, holding that such a refusal does not in itself justify a government decision not to file a third-point reduction motion.

See United States v. Lee, 653 F.3d 170, 174 (2d Cir. 2011); United States v. Divens, 650 F.3d 343, 348 (4th Cir. 2011). In 2013, the Sentencing Commission ratified those decisions. Sentencing Guidelines App. C. Supp., Amend. 775 (Nov. 1, 2013). The Commission amended the commentary to the Guidelines to state that "[t]he government should not withhold * * * a motion [under Section 3E1.1(b)] based on interests not identified in § 3E1.1, such as whether the defendant agrees to waive his or her right to appeal." Sentencing Guidelines § 3E1.1, comment. (n.6). The Commission did not address the scope of the government's authority to refuse to recommend a third-point reduction for reasons related to trial-level activities, such as litigating a suppression motion.

Since the 2013 amendment to the Guidelines commentary, four circuits have addressed whether the government may decline to recommend a third-point reduction on the ground that the defendant pressed litigation seeking to suppress evidence showing his guilt. In addition to the Fifth Circuit decision at issue here, the Eleventh Circuit has determined in an unpublished decision that the government may decline to make such a motion. United States v. Membrides, 570 Fed. Appx. 859, 860-861 (11th Cir.) (per curiam), cert. denied, 574 U.S. 918 (2014).

In contrast, the Ninth and Tenth Circuits have indicated in unpublished decisions that litigating a suppression motion alone is an inadequate basis for the government's refusal to move for a

third-point reduction. United States v. Knight, 710 Fed. Appx. 733, 736-737 (9th Cir. 2017); United States v. Johnson, 749 Fed. Appx. 750, 752 (10th Cir. 2019). Both courts, however, relied substantially on decisions that predate the 2003 amendment making a Section 3E1.1(b) reduction contingent on a government recommendation, and the government did not contest the issue in the Tenth Circuit. See Knight, 710 Fed. Appx. at 736 (citing United States v. Vance, 62 F.3d 1152, 1157 (9th Cir. 1995)); Johnson, 749 Fed. Appx. at 752 (citing United States v. Marquez, 337 F.3d 1203, 1211 (10th Cir. 2003)).*

The approach reflected in the Ninth and Tenth Circuit decisions, pressed by petitioner here (Pet. 15-19), lacks merit. Those decisions rest on the premise that a defendant is improperly "penalize[d]" for exercising his Fourth Amendment rights when the government withholds a Section 3E1.1(b) motion based on the defendant's decision to file a suppression motion. Marquez, 337 F.3d at 1211; see Vance, 62 F.3d at 1157. But while "the

* In United States v. Vargas, 961 F.3d 566 (2020), the Second Circuit recently stated that it agreed with the Tenth Circuit's view that "'where a defendant has filed a non-frivolous motion to 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 under § 3E1.1(b)(2).'" Id. at 584 (quoting Marquez, 337 F.3d at 1212). Vargas, however, involved a circumstance in which the government had moved for a third-point reduction and the district court itself refused to apply it. Id. at 570. A future Second Circuit panel accordingly may not treat it as binding precedent in a case like this one.

government's ability to withhold a section 3E1.1(b) motion * * * may disincentivize a defendant" from proceeding with suppression litigation, "such a disincentive is not improper." United States v. Rivera-Morales, 961 F.3d 1, 18 (1st Cir. 2020). It instead reflects that "a defendant can exercise his Fourth Amendment rights by either moving to suppress evidence" or "by waiving those rights" in order to maximize the likelihood of "a lower sentence under § 3E1.1(b)." Collins, 683 F.3d at 708.

Such a choice is familiar and "permissible" in a system that "tolerates and encourages the negotiation of pleas." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (citation omitted); see, e.g., Corbitt v. New Jersey, 439 U.S. 212, 218 (1978) ("[N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid."). Under Section 3E1.1(b), "[t]he defendant is free to weigh the disincentive against the benefit that may result" from litigating a suppression motion, "just as the government, in exercising its discretionary authority, may rationally weigh 'the cost and benefit that would flow from moving' for the third-point reduction." Beatty, 538 F.3d at 16-17 (quoting Wade, 504 U.S. at 187). When a defendant opts to preference a reduced sentence over exercising pretrial or trial rights, "this does not mean the government has 'interfered' with the right. Rather, it means that he has exercised the right in a particular way: namely, by exchanging it for valuable consideration. Were this not so, the

practice of plea bargaining itself would be unconstitutional." United States v. Blanco, 466 F.3d 916, 919 (10th Cir. 2006), cert. denied, 549 U.S. 1327 (2007).

c. Separately, the D.C. Circuit concluded, after the 2003 amendment to the Guidelines but before the 2013 amendment to the commentary, that the government could not decline to recommend a third-point reduction solely because the defendant moved to suppress evidence. United States v. Price, 409 F.3d 436, 443-444 (2005). That court read Section 3E1.1(b) as limited to the government's interest in avoiding trial preparation, which it viewed not to include litigating a pretrial suppression motion. Ibid. That rationale for constraining the government's discretion under Section 3E1.1(b) likewise lacks merit.

Nothing in that provision or its commentary suggests that Congress, despite its use of the same language interpreted to confer broad discretion on the government in Wade, intended to permit the government to consider only activities unique to trial. Indeed, Section 3E1.1(b) as amended by the PROTECT Act does not focus exclusively on the government's interest in avoiding "preparing for trial" but more generally recognizes its interest in "allocat[ing its] resources efficiently." Sentencing Guidelines § 3E1.1(b); see, e.g., Collins, 683 F.3d at 706 (explaining that Section 3E1.1(b) as amended in 2003 "explicitly identifies a broader government interest in allocating its

resources efficiently" distinct from the interest in avoiding trial preparation).

The 2013 amendment to the Guidelines commentary did not alter that understanding. While the amendment clarified that appellate resources were not an appropriate consideration in determining whether to file a motion under Section 3E1.1(b), it did not prohibit consideration of any activities at the trial level. See Pet. App. 4a (explaining that "silence [on this issue] suggests that the Commission, which keeps track of splits on Guidelines issues, chose not to clarify Section 3E1.1 in the suppression context"). Accordingly, most circuits have rejected the view that the interests encompassed by Section 3E1.1(b) are limited to those unique to trial preparation. See pp. 8-9, supra.

In any event, even if the Guidelines are intended to reach only trial preparation, litigation of suppression motions is part of that preparation. In many cases, as here, litigation of a suppression motion resolves virtually all contested issues and effectively substitutes for the trial. See, e.g., Pet App. 4a (explaining that defeating the suppression motion "put the government near the goal line" in establishing petitioner's guilt); Collins, 683 F.3d at 707 (observing that litigating "the motion to suppress required [the government] to undertake trial-like preparations"); Drennon, 516 F.3d at 161-163 (noting that the government's response to the suppression motion constituted the "large majority" of trial preparation); Membrides, 570 Fed. Appx.

at 860 (explaining that preparation for suppression hearing "included preparing law enforcement witnesses to testify about facts similar to those they would testify about at a trial"); United States v. Sanders, 208 Fed. Appx. 160, 163 (3d Cir. 2006) (observing that the government "essentially tried" defendant at suppression hearing).

Although some aspects of trial preparation (e.g., jury selection) are not implicated by litigation of a suppression motion, many of the steps required to litigate a suppression motion (e.g., researching legal issues and preparing witnesses) are also critical steps in preparation for trial. No sound basis exists to construe Section 3E1.1(b)'s reference to avoiding trial preparation as limited to activities undertaken solely in connection with trial. See, e.g., Sanders, 208 Fed. Appx. at 163 (upholding government's refusal to recommend third point where, although the plea "allowed the government to avoid voir dire, jury instructions and jury selection," the suppression motion "forced the government to litigate the essential element of a § 922(g)(1) offense -- [the defendant's] possession of a firearm -- and his only arguable defense"). A defendant who has required the government to spend substantial resources to preserve the evidence that it would introduce at trial has no basis to insist that he "timely" allowed the government to avoid the significant burdens of trial preparation. Sentencing Guidelines § 3E1.1(b).

2. The narrow conflict among the courts of appeals on the question of Guidelines interpretation presented in the petition for a writ of certiorari does not warrant this Court's review. This Court ordinarily does not review decisions interpreting and applying the Sentencing Guidelines because the Sentencing Commission can amend the Guidelines or their commentary to correct any error. See Braxton, 500 U.S. at 348 ("[I]n charging the Commission 'periodically [to] review and revise' the Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest.") (brackets in original); see also United States v. Booker, 543 U.S. 220, 263 (2005) (similar).

Reviewing the court of appeals' Guidelines interpretation in this case would also be unwarranted because the Guidelines are advisory. See Booker, 543 U.S. at 245. Thus, if a district court disagrees with the government's decision not to recommend a third-point reduction, it is free to vary downward. See, e.g., Blanco, 466 F.3d at 918 (varying downward after government declined to recommend third point); cf. Sent. Tr. 51 (explaining that the court would have imposed the same sentence if it had ruled differently on objections).

3. In any event, this case would be an unsuitable vehicle for reviewing the question presented for two additional reasons. First, petitioner would not be entitled to appellate relief even

if he prevailed on the question presented. Although a one-point reduction in petitioner's offense level would have reduced his advisory Guidelines sentence to 57 to 71 months, the district court stated that it "would never go lower" than the 78-month sentence that it imposed. Sent. Tr. 51. Thus, even if petitioner were to prevail on the question presented, any error was harmless and does not merit resentencing. See Williams v. United States, 503 U.S. 193, 203 (1992) (sentencing error is harmless if it "did not affect the district court's selection of the sentence imposed").

Second, as the court of appeals observed in a footnote, this case arguably does not even fit within the text of Section 3E1.1(b) because petitioner did not "timely notify[] authorities of his intention to enter a plea of guilty," but instead proceeded to a stipulated bench trial. See Pet. App. 3a n.2. Although the court of appeals did not definitely determine whether that aspect of the case alone would justify the government's decision not to seek a third-point reduction under Section 3E1.1(b), see ibid., the presence of such a potential alternative ground for declining a third-point reduction counsels against further review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

NICHOLAS L. MCQUAID
Acting Assistant Attorney General

KELLEY BROOKE HOSTETLER
Attorney

JANUARY 2021