No. 20-5715

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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REPLY BRIEF FOR PETITIONER

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The federal courts of appeals are divided on 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. Pet. 11-14; BIO 10-13. In Mr. Longoria's case, the court below acknowledged the "circuit split that has long existed" and decided that 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 § 3E1.1(b) because the hearing could be "the substantive equivalent of a full trial." Pet. App. 3a-4a.

As Mr. Longoria has argued (Pet. 14-19), the decision below is incorrect, the issue presented is important, and this case is an ideal vehicle for resolving it.

1. In its brief in opposition (BIO 6-9), the government first argues that the decision below is correct because Congress in 2003 amended USSG § 3E1.1(b) to add the "upon motion of the government" requirement, thus demonstrating its intent that the government possess, under § 3E1.1(b), the same wide discretion that it enjoys under USSG § 5K1.1 and 18 U.S.C. § 3553(e). The government is wrong. As the Fourth Circuit has said,

> nothing in the 2003 reforms evinces such an intent. After all, Congress could have amended the § 3E1.1(b) commentary so that it conformed to the commentary surrounding § 5K1.1. Congress declined to do so; it instead left unchanged § 3E1.1(b)'s mandatory commentary and inserted language suggesting that the Government's newfound discretion applies only to the question of "whether the defendant has assisted authorities in a manner that avoids preparing for trial."

United States v. Divens, 650 F.3d 343, 347 (4th Cir. 2011) (quoting USSG § 3E1.1, comment. (n.6)).

The Sentencing Commission, in 2013, likewise "could discern no congressional intent to allow decisions under § 3E1.1 to be based on interests not identified in § 3E1.1." Pet. App. 13a. The Commission thus amended the Guideline commentary, which is authoritative, [1] 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." Pet. App. 9a, 11a. This was a clear statement by the Commission that the "interests . . . identified in § 3E1.1" are meant to cabin the government's discretion. *See United States v. Knight*, 710 Fed. Appx. 733, 736 (9th Cir. 2017) (unpublished) ("[T]he Government does not have unbounded discretion to refuse to move for the third point; it can only refuse to do so for the reasons articulated in section 3E1.1(b).").

Avoiding preparation for a suppression hearing is not an interest "identified in § 3E1.1." Pet. 17. That makes good sense. A defendant should not be penalized for legitimately attempting to protect his constitutional rights by litigating a motion to suppress, *see* Pet. 18, or be made to trade away those rights as the price of a one-level reduction under § 3E1.1(b) as the government suggests (BIO 11-13).

Moreover, as Mr. Longoria has explained (Pet. 18-19), preparation for a suppression hearing is not the same as preparation for a trial. It "usually requires less time and resources than trial preparation." Pet. App. 3a. The work that goes into preparing for a suppression

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

hearing does not, as the government suggests (BIO 14-15), somehow transform into "trial preparation" simply because that preparation might prove useful at a later time, if and when the case actually goes to trial (which, in federal court, is exceedingly rare).

2. The government acknowledges (BIO 10-13) that the circuits are split on the question presented, with the Fifth and Eleventh Circuits on one side of split, and the Ninth, Tenth, and D.C. Circuits on the other. However, as Mr. Longoria has explained (Pet. 13-14), the Second Circuit has also weighed in on the issue in a 1997 published decision; and, in that decision, it followed the Fifth Circuit's approach. It thus appears that there is an even 3-3 split on the question presented.

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 court below observed (Pet. App. 3a-4a), "the circuit split . . . has long existed" and the Fifth Circuit's view is "entrenched."

3. The government observes (BIO 16) that this Court "ordinarily" does not review decisions interpreting and applying the Guidelines because the Commission can amend the Guidelines or their commentary to correct any error. While that is true, it is also true that most decisions interpreting and applying the Guidelines do not involve an issue, like the one presented here, that the Commission apparently "chose not to clarify" even though it has divided the federal courts of appeals for many years. Pet. App. 4a (observing that the Commission's "silence [on the issue] suggests that the Commission, which keeps track of splits

on Guidelines issues, chose not to clarify section 3E1.1 in the suppression context."). When the Commission chooses not to clarify an issue that has divided the federal courts of appeals for a very long time, it is incumbent upon this Court to step in and resolve the issue.

Moreover, even if the Commission did have an interest in clarifying the issue, it could not do so at this time because it is without a quorum to promulgate and adopt Guideline Amendments—six of seven Commissioner seats are vacant.

4. The government next contends (BIO 16) that this Court's review of the question presented is unwarranted "because the Guidelines are advisory" and "if a district court disagrees with the government's decision not to recommend a third-point reduction, it is free to vary downward." That argument fails because, although the Guidelines are advisory, this Court has made clear that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," and that "the Guidelines should be the starting point and the initial benchmark." *Gall v. United States*, 552 U.S. 38, 49 (2007). The federal courts of appeals are divided on how to correctly interpret and apply USSG § 3E1.1(b) in the suppression context, which is necessary to correctly calculate the applicable Guidelines range as *Gall* instructs. This Court's review is warranted.

5. The government claims (BIO 16-17) that, in any event, this case is an unsuitable vehicle for reviewing the question presented because the error was "harmless" in light of the district court's statement, at sentencing, that it "would never go lower" than the 78-month sentence of imprisonment that it imposed using the incorrect Guidelines range. The government is wrong again.

In his briefing in the court below, Mr. Longoria presented detailed arguments explaining why, under Fifth Circuit caselaw, the government cannot demonstrate that the Guidelines-calculation error was harmless, even though the court stated that it "would never go lower." *See* Def. C.A.5 Br. 35-36 & Reply Br. 10-12. The court below did not reach the harmlessness question because it ruled against Mr. Longoria on the merits of the question presented. Pet. App. 2a n.1 ("Because we find no errors, we need not reach the harmlessness question.").

Mr. Longoria's arguments on harmlessness remain valid. If this Courts grants certiorari on the question presented and rules in favor of Mr. Longoria, it should express no opinion on whether the error was harmless, leaving that question for the court below to decide in the first instance.

6. The government finally suggests (BIO 17) that this case may be an unsuitable vehicle for reviewing the question presented because, in a footnote of its opinion, the court below observed: "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)." Pet. App. 3a n.2.

The issue raised in that footnote is one that was not litigated in the court below. Had the government raised the issue in its briefing, Mr. Longoria likely would have responded that he *did* timely notify authorities of his intent to plead guilty when, at a status conference on December 17, 2018, he alerted the district court and the government: "I don't anticipate a trial . . . I came prepared to ask for a little more time for plea purposes. And that's pretty

much our focus." Pet. 5. Only later did the parties agree to a stipulated bench trial, which Mr. Longoria preferred to a "conditional plea" waiving his right to appeal his sentence. Pet. 5.

In any event, as the government acknowledges, the court below "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)." BIO 17. It had no occasion to decide that question because "the government justified its nonfiling on the defendant's seeking suppression." Pet. App. 3a n.2 ("But because the government justified its nonfiling on the defendant's seeking suppression, we consider only whether that was a proper interest."). Thus, there is no obstacle that would prevent this Court from reaching the question presented.

Mr. Longoria's case squarely presents, and is a suitable vehicle for resolving, the question whether the government, at sentencing, may withhold a motion for a third-level reduction for acceptance of responsibility under § 3E1.1(b) on the ground that the defendant proceeded to a hearing on a motion to suppress evidence. This Court should grant review on this important issue, and it should reverse.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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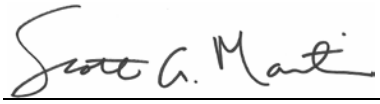

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