No. 00-20494

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARK ALBERT MALOOF,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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STATEMENT REGARDING ORAL ARGUMENT

The United States agrees with appellant that oral argument would not materially aid the Court in this case, because the issues raised are controlled by binding Circuit precedent.

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BRIEF FOR APPELLEE UNITED STATES OF AMERICA

ISSUES PRESENTED

1. Whether this Court in *United States v. Okoli*, 20 F.3d 615, 616 (5th Cir. 1994), correctly interpreted U.S.S.G. § 3B1.1(a), as requiring a defendant to organize or lead only one other participant.

2. Whether the argument in the government's resentencing memorandum that the conspiracy at issue was "otherwise extensive" within the meaning of

U.S.S.G. § 3B1.1(a), gave Maloof notice that the court might consider the conspiracy "otherwise extensive."

STATEMENT OF THE CASE

This case is here following resentencing. In its earlier decision, the Court affirmed Maloof's convictions but vacated the original sentence and remanded for further proceedings. *United States v. Maloof*, 205 F.3d 819, 830-31 (5th Cir. 2000).

Maloof was indicted on May 15, 1997, on one count of conspiring to fix the prices of metal building insulation, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and one count of conspiracy to commit wire fraud, 18 U.S.C. §§ 371, 1343. R. 4-5, 7-8.[1] On December 18, 1997, after an 18-day trial, a jury convicted Maloof on both counts. R. 1138. On December 1, 1998, the court sentenced Maloof to 30 months imprisonment on each count, to run concurrently, and to pay a $30,847.01 fine. R. 2246.[2] Maloof's sentence was

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[1]"R" references are to the pages of the original district court record. Because the district court record forwarded to the parties did not include any transcript volumes, references in this brief to the resentencing hearing transcript will be: "June 2, 2000 Tr. at ___."

[2]The court had determined that Maloof's offense level was 19, and that 30 months and $30,847.01 were the minimum imprisonment time and fine allowable under the Sentencing Guidelines. R. 2266.

based in part on the district court's finding that Maloof was an organizer and leader of a conspiracy that involved at least five participants. *See* 205 F.3d at 830.[3]

Maloof thereafter appealed. In an opinion filed March 2, 2000, this Court affirmed Maloof's convictions, but found that the legal and factual bases for the district court's four level enhancement under U.S.S.G. § 3B1.1(a) were inadequately explained and remanded for resentencing. 205 F.3d at 830-31.

On remand the district court again found that the conspiracy involved at least five criminally responsible participants. June 2, 2000 Tr. at 11-12. It also found that the conspiracy was "otherwise extensive." *Id*. at 12-14. It then re-imposed the lowest punishment possible under the Guidelines given Maloof's offense level: a 30-month prison term and a fine of $30,847.01. R. 2323-30. Maloof filed a timely notice of appeal on June 5, 2000. R. 2318.

STATEMENT OF THE FACTS

The facts of this case are detailed in the Court's March 2, 2000, opinion. 205 F.3d at 823-24. We will summarize here only the facts relevant to Maloof's

[3]U.S.S.G. § 3B1.1(a) provides that a defendant's offense level will be increased by four "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive."

current appeal.

1. Maloof, a regional sales manager who worked in the Houston, Texas office of Bay Industries, Inc., was convicted of conspiring to fix the prices of metal building insulation. In addition to Maloof and Bay, the conspiracy involved three of Bay's competitors, Mizell Brothers Company, Brite Insulation Company, and PBI Supply Company, and at least one individual from each company. 205 F.3d at 823. The conspiracy was hatched when Maloof called Wally Rhodes, Mizell's vice president of sales, on January 3, 1994, and convinced Rhodes to adopt "uniform pricing" for Mizell's and Bay's insulation. This was accomplished by Maloof faxing Bay's price list to Rhodes. *Id*.

The following week at a trade show in Kansas City, Maloof and Rhodes "agreed to ask representatives of other insulation suppliers to join in the price fixing agreement." 205 F.3d at 823. After Rhodes had discussed the scheme with Peter Yueh and Jerry Killingsworth of Brite at that show, Killingsworth gave "his agreement for Brite to participate in the price fixing plan" to Rhodes and Maloof during a smoke break. *Id*. A few weeks later Killingsworth recruited PBI into the scheme. *Id*. Over the course of the following year, the competitors uniformly raised prices three times by exchanging price lists. *Id*. Maloof carried out the plan at Bay by insisting that the sales force adhere to the

uniform price list, and by firing one Bay sales representative for failing to do so. *Id*. at 824.[4]

After a jury convicted Maloof on both counts, the court determined that under U.S.S.G. § 3B1.1(a), Maloof's offense level had to be increased by four because he was a leader or organizer of a conspiracy that involved at least five participants. Specifically, the court found the five participant requirement satisfied because three Bay employees -- Janne Smith, Nancy Jensen and Delores Hill -- had participated in the conspiracy in addition to Maloof, Rhodes and Killingsworth. 205 F.3d at 830.

2. In his first appeal to this Court, Maloof raised several issues concerning his conviction, and also challenged the court's imposition of the four level enhancement. After finding that Maloof's "assertions of errors affecting his convictions lack reversible merit", 205 F.3d at 824, the Court turned to Maloof's Guidelines issue. The Court noted that Maloof presented two distinct arguments attacking the four level enhancement: first, Maloof argued "that the conspiracy did not involve 'five or more participants,'" and second, Maloof claimed that, in

[4]Rhodes, Killingsworth and Yueh all pleaded guilty to the price fixing scheme, R. 2306-07 nn. 3 & 4, and Rhodes and Killingsworth testified at trial on behalf of the government. 205 F.3d at 823.

any event, "he was not an organizer or leader" as required by Section 3B1.1(a). *Id*. at 830.

In reviewing whether the conspiracy involved at least five participants, the Court explained that under Section 3B1.1(a), a participant must be "criminally responsible for commission of an offense." 205 F.3d at 830. Because the district court had failed to determine whether "Smith, Jensen or Hill had intentionally or willfully participated in the criminal conspiracy or point to the evidence in the record that would support such a finding," the Court vacated the sentence and remanded for resentencing "with instructions to clearly articulate the legal and evidentiary bases for the punishment to be imposed." *Id*.

The Court then turned to the leader/organizer question. Citing *United States v. Okoli*, 20 F.3d 615 (5th Cir. 1994), the Court first explained that "Section 3B1.1(a) is satisfied if there is proof that the defendant led at least one of the participants in the criminal activity." 205 F.3d at 830. It then found "no merit to Maloof's other challenges to the district court's determination that he was an organizer or leader of the conspiracy." *Id*. Indeed, the Court found the evidence "sufficient" to support the findings that Maloof initiated the conspiracy, recruited Rhodes into the conspiracy, and "encouraged and directed Rhodes' enlistment of additional conspirators." *Id*. at 830-31.

3. On remand, the government filed a resentencing memorandum urging the court to find that the conspiracy involved at least five participants, specifically identifying seven people and the evidence demonstrating that each of them was in fact a "participant" in the conspiracy. R. 2304-09.[5] The memorandum also explained that, in the alternative, the evidence demonstrated that the conspiracy was "otherwise extensive" within the meaning of Section 3B1.1(a). R. 2303-04.[6] In his reply to the government's memorandum, Maloof chose not to respond to the government's "otherwise extensive" argument. R. 2311-16.

At the resentencing hearing, the court agreed that the conspiracy involved at least five criminally responsible participants, and, alternatively, that the conspiracy was "otherwise extensive." June 2, 2000 Tr. at 11-14. It therefore concluded that Maloof's offense level was 19, and again sentenced him to 30

[5]The government named as participants Maloof and Smith from Bay, Rhodes from Mizell, Killingsworth and Yueh from Brite, and Jim Denton and Ron Trevathan from PBI. R. 2304-07. Eventually, the district court agreed that all of the above named individuals except Janne Smith were participants. June 2, 2000 Tr. at 11.

[6]The government had raised the "otherwise extensive" issue in its brief to this Court in the earlier appeal. Brief For Appellee United States at 50-51 (No. 98-21114).

months and a $30,847.01 fine. *Id*. at 15-18.

SUMMARY OF ARGUMENT

Maloof concedes that Circuit precedent dictates affirmance of the district court's sentence. He claims, however, to raise two legal issues that might warrant *en banc* or Supreme Court review. First, that under U.S.S.G. § 3B1.1(a), the district court was required to find that he organized or led at least five other participants. Second, that the district court was required to give him specific notice that it might consider the conspiracy "otherwise extensive." Both claims are specious.

1. As this Court held in *United States v. Okoli, supra,* an amendment added to the Guidelines' Commentary in 1993 explains that Maloof only needed to organize or lead one other participant to be eligible for an enhancement for role in the offense. No court has held to the contrary since adoption of that amendment.

2. In *United States v. Gaitan*, 171 F.3d 222, 223 (5th Cir. 1999), this Court held that specific notice of an enhancement need not be given to a defendant because the Guidelines themselves give all the notice required. Maloof's suggestion that the *Gaitan* Court was wrong is irrelevant for two reasons. First, because Maloof does not challenge the court's finding that the

conspiracy involved at least five participants, this Court need not address the district court's independent and alternative finding that the conspiracy was "otherwise extensive." In any event, because the government's resentencing memorandum argued for a finding that the conspiracy was "otherwise extensive," that pleading gave Maloof the specific notice he claims he did not receive.

ARGUMENT

AS APPELLANT EXPRESSLY CONCEDES THIS CIRCUIT'S PRECEDENT REQUIRES THE COURT TO AFFIRM THE DISTRICT COURT'S SENTENCE

U.S.S.G. § 3B1.1(a) provides that a defendant's offense level will be increased by four "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." In its earlier opinion, this Court upheld the district court's finding that Maloof was an organizer or leader, but remanded for further proceedings concerning the size of the conspiracy. 205 F.3d at 830-31. On remand, the district court found both that the conspiracy involved at least five participants and, alternatively, that it was "otherwise extensive."

Maloof does not challenge those specific findings. Rather, he contends first, that this Court's earlier finding that he was a leader or organizer was based on an incorrect legal standard, and second, that he was never given notice that

the district court would consider the "otherwise extensive" language of the Guidelines during resentencing. Nonetheless, Maloof expressly concedes that these two issues raised on brief are controlled by established Circuit precedent that requires affirmance of the district court's sentence. (Br. 11, 13). He claims, instead, to raise the issues merely "to preserve the same for possible *en banc* reconsideration and/or review by way of certiorari to the United States Supreme Court." *Ibid*. However, not only does this Circuit's precedent dictate affirmance in this case, but the "split in the circuits" suggested by Maloof (*id*. at 11) simply does not exist.[7]

1. The Sentencing Guidelines Expressly Provide That When The Defendant Was An Organizer Or Leader Of At Least One Other Criminally Culpable Participant The Defendant Is Eligible For The Enhancement In Section 3B1.1(a)

Maloof concedes that at least five people participated in the conspiracy at issue. He argues, instead, that the court was required to find that he led or organized at least five other participants, notwithstanding this Court's contrary holding in *United States v. Okoli*, *supra*, where the Court specifically addressed the leader/organizer provision in Section 3B1.1(a). In *Okoli*, the Court noted a

[7]This Court reviews a district court's interpretation and application of the Guidelines *de novo*, and its factual findings for clear error. *E.g., United States v. Huerta,* 182 F.3d 361, 364 (5th Cir. 1999).

"conflict between circuits," with the Sixth and Ninth Circuits holding that the defendant needed to lead only one or more participants, while the Seventh and Tenth Circuits required the defendant to lead at least five participants. 20 F.3d at 616 (citations omitted). In resolving the conflict, the Court followed "a recent amendment to the commentary to the guidelines, which addresses this precise issue, presumably to clarify the meaning of language that has been subject to divergent interpretations." *Id*. That Commentary, which was added to the Guidelines in November 1993, provides:

> To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants.

U.S.S.G. § 3B1.1, comment. n.2, quoted in *Okoli*, 20 F.3d at 616. Following that Commentary, the *Okoli* Court held that it was sufficient if the government showed that the defendant lead or organized only one other participant. 20 F.3d at 616.[8] *See Stinson v. United States*, 508 U.S. 36, 42, 44-45 (1993) (Commentary that "'interpret[s a] guideline or explain[s] how it is to be applied', U.S.S.G. § 1B1.7, controls," and is binding on the courts unless it violates the

[8]*Accord United States v. Washington*, 44 F.3d 1271, 1281 (5th Cir. 1995); *United States v. Valencia*, 44 F.3d 269, 272 (5th Cir. 1995); *United States v. Gross*, 26 F.3d 552, 554-55 (5th Cir. 1994).

Constitution or a federal statute, or otherwise is plainly erroneous or inconsistent with the Guidelines); *United States v. Huerta* 182 F.3d 361, 364 (5th Cir. 1999) (same).

Although this Court "recognize[d] that [its] holding conflicts with decisions in at least two circuits," it opined that the "conflict should be short-lived inasmuch as the contrary decisions were rendered before the November 1993 amendment" to the Commentary. *Okoli,* 20 F.3d at 616 n.1. In fact, the Tenth Circuit has since held that, based on the 1993 amendment, its prior decision requiring the defendant to organize or control at least five other participants "is no longer good law." *United States v. Cruz Camacho*, 137 F.3d 1220, 1224 n.3 (10th Cir. 1998). And we are aware of no decision since the amendment was adopted that interpreted the Guidelines as requiring control of more than one participant.[9]

Thus, Maloof relies solely on the Seventh Circuit's pre-1993 decision in *United States v. Schweihs*, 971 F.2d 1302, 1318 (7th Cir. 1992) (Br. 11), where the court concluded that "[o]nce five participants have been identified, the district court must also determine whether Schweihs exhibited leadership of or control over all of the five participants." But the Seventh Circuit has not yet addressed

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[9]In *United States v. Rodriquez*, 112 F.3d 374, 377 (8th Cir. 1997), the Eighth Circuit held that the defendant needs to control only one other participant.

how the 1993 amendment affects its holding in *Schweihs*.[10] Given the clarity of that amendment, there is no reason to believe the Seventh Circuit would continue to endorse *Schweihs* if and when it does revisit the issue. *See United States v. Fones*, 51 F.3d 663, 669 (7th Cir. 1995) (while addressing effect of 1993 amendment to an enhancement imposed under § 3B1.1(b), court concludes that "where a defendant controls at least one other participant in the criminal activity, he can be classified as a leader, organizer, supervisor or manager for the purposes of an adjustment under § 3B1.1"); *United States v. Mustread*, 42 F.3d 1097, 1103 (7th Cir. 1994).

2. The Government's Resentencing Memorandum Gave Defendant Adequate Notice That The Guidelines' "Otherwise Extensive" Provision Was In Issue

As an alternative and independent reason for imposing Section 3B1.1(a)'s four level increase in Maloof's offense level, the district court found that the conspiracy was "otherwise extensive." June 2, 2000 Tr. at 12-13. Maloof claims

[10]Although in *United States v. Zaragoza*, 123 F.3d 472 (7th Cir. 1997), cited by Maloof (Br. 11), the Seventh Circuit quoted the *Schweihs* language set out above, the government there never raised -- and thus the court never addressed -- the 1993 amendment, since "the record plainly support[ed] the conclusion that there were at least six participants in the scheme," and that the defendant "exercised control . . . over the other participants." 123 F.3d at 482-85.

that he was not given notice "that the district court was contemplating an adjustment on this basis" because "the presentence report and the several addenda did not address the 'otherwise extensive' language, nor had the district court previously relied on the 'otherwise extensive' rationale at the original sentencing." (Br. 12).

Even assuming that this argument has merit, and it does not, there is no reason why this Court should even consider it because Maloof was not prejudiced by any lack of notice. Specifically, because the district court correctly held that the conspiracy included at least five criminally responsible participants -- a finding that Maloof does not challenge -- its decision can be affirmed solely on that basis. Accordingly, Maloof could not have been prejudiced by the court's alternative reliance on the "otherwise extensive" nature of the conspiracy.

In any event, Maloof did receive adequate notice. What Maloof fails to mention is that the government raised the "otherwise extensive" issue in its resentencing memorandum filed May 24, 2000. R. 2303-04.[11] That government pleading gave Maloof all the notice to which he was entitled. *Burns v. United States*, 501 U.S. 129, 138 (1991) (a district court is not required to give specific

[11]*See* note 6, *supra*.

notice of intent to depart upward if the ground for departure is "identified . . . either in the presentence report *or in a prehearing submission by the Government*") (emphasis added); *accord*, *United States v. Knight*, 76 F.3d 86, 87-88 (5th Cir. 1996) (holding that sufficient notice is given when enhancement grounds are raised "'in a prehearing submission by the Government'"), quoting *Burns*, *supra*. Even the authority Maloof relies on recognizes that: "*Advance notice means that prior to the sentencing hearing the defense must be informed via the PSR, the prosecutor's recommendation or the court that a specific sentencing enhancement is being contemplated*." *United States v. Jackson*, 32 F.3d 1101, 1108 (7th Cir. 1994) (italics original; emphasis added), cited by Maloof (Br. 13).[12] Because the government's resentencing memorandum provided the defendant with adequate notice, there is no reason for this Court to consider whether the notice requirement is any different for an upward adjustment than it is for an upward departure. *See United States v. Gaitan*, 171 F.3d 222, 223 (5th Cir. 1999).

[12]In *United States v. Zapatka*, 44 F.3d 112, 115-16 (2d Cir. 1994), and *United States v. Brady*, 928 F.2d 844, 847 (9th Cir. 1991), also cited by Maloof (Br. 13), no notice whatsoever was given prior to the district court's imposition of a sentence enhancement.

CONCLUSION

For the foregoing reasons the district court's sentence should be affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2000, I served true copies (on floppy disk and in printed form) of the foregoing Brief for Appellee The United States of America by Federal Express on:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2.7(b)(3), the brief contains 3446 words as counted by Word Perfect 7.0.

2. The brief has been prepared in monospaced (nonproportionally spaced) typeface using CG Times Regular 14 pt and 12 cpi.

3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

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