

No. _____

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

KEVIN LYNN TUCKER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court's failure to give credit in sentencing for state pretrial detention on subsequently *nolle prossed* "related" charges created an issue implicating substantive due process and "substantive reasonableness", such that the Eighth Circuit should have reviewed the issue rather than finding it waived as a procedural issue under petitioner's plea agreement.

LIST OF PARTIES TO PROCEEDING

All parties appear in the caption of the case on the cover page.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. Court: United States District Court, Eastern District of Arkansas
Case Number: 4:20-cr-00155-JM-1
Case Caption: *United States of America v. Kevin Lynn Tucker*
Date of Judgment: May 16, 2022
2. Court: United States Court of Appeals for the Eighth Circuit
Case Number: 22-2024
Case Caption: *United States of America v. Kevin Lynn Tucker*
Date of Judgment: May 25, 2023; rehearing and rehearing *en banc* denied July 7, 2023
1. Court: United States District Court, Eastern District of Arkansas
Case Number: 4:23-cv-00864-JM
Case Caption: Kevin Lynn Tucker v. U.S.A.
Date of Judgment: 09/21/2023; Petition to vacate sentence proceeding terminated. Docket entries are not available

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CITATIONS TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS IN THIS MATTER

The 8th Circuit Opinion in this case is unpublished. Petitioner is unaware of any formal citations in this matter.

In The
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OCTOBER TERM, 2023

KEVIN LYNN TUCKER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

KEVIN LYNN TUCKER respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

This case involves a direct appeal from a criminal conviction in the United States District Court for the Eastern District of Arkansas in case number 4:20-CR-00155. The United States Court of Appeals for the Eighth Circuit rendered its opinion in this matter in *United States v. Tucker*, Case No. 22-2024, ___ F.3d ___ (May 25, 2023). Appendix 3a. The court’s judgment was entered May 25, 2023, and is attached at Appendix 2a. Mr. Tucker’s

Petition for Rehearing and Rehearing *En Banc* was denied by order entered July 7, 2023. Appendix 1a.

JURISDICTION

Jurisdiction in the District Court was conferred pursuant to 18 U.S.C. § 3231 and Fed. R. Crim. Proc. 18. Judgment was entered and became final on May 16, 2022. Appendix 8a. Notice of Appeal was timely filed on May 13, 2022 pursuant to FRAP 4(b). (See FRAP 4(b)(2)).

The final judgment of the United States Court of Appeals for the Eighth Circuit on petitioner's appeal from his conviction and sentence was entered (by Order denying Petitioner's Petition for Rehearing and Rehearing *En Banc*) on July 7, 2023. Appendix 1a, 2a, 3a. Pursuant to United States Supreme Court Rule 13(1) this petition is timely filed on October 5, 2023 within 90 days after entry of the judgment denying petitioner's appeal. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Sentencing Guidelines § 5G1.3 and Comments

[Reproduced at Appendix 15a]

STATEMENT OF THE CASE

A. Mr. Tucker's Plea Agreement, Reservation of Issues and Incarceration History

Kevin Tucker was charged on June 2, 2020 in the United States District Court for the Eastern District of Arkansas with one count of *Felon in Possession of a Firearm* under Title 18, United States Code, Section 922(g)(1). Mr. Tucker had been arrested by Arkansas state authorities on December 10, 2019 on what the PSR described as “related charges.” PSR p1.¹ According to the PSR, those Arkansas state charges included: Aggravated Robbery, Theft of Property, and Possession of

¹ In his executed plea agreement, Kevin Tucker admitted that he was taken into custody pursuant to an aggravated robbery warrant and at that time a search of his bedroom under a parole waiver disclosed a Taurus PT 145 .45-caliber handgun. . Mr. Tucker admitted that he had previously and knowingly been convicted of a crime punishable by a term of imprisonment exceeding one year. *Id.* The PSR stated that the state court charges described above stemmed were related charges to the instant offense. PSR, p. 13 at para. 51 and 52.

By the express language and description of the prior conduct in the PSR, that conduct was “relevant” under the controlling guidelines definitions. U.S.S.G. § 1B1.3 sets out the breadth of the appropriate determination as including all conduct “that occurred **during the commission of the offense of conviction**, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.” [emphasis added]. Here there is no question that the state court charges were **alleged** to have occurred as part of the possession of the relevant firearm. PSR at 13. More specifically, the PSR explicitly stated, with regard to the State court charges, that Mr. Tucker was in violation of the federal firearm statute as part of and in the course of the incident that gave rise to the state court charges (PSR at 13, para. 51, 52) and that the incidents were related to the charged offense here. PSR at 13, para. 51, 52. The government made no objection at trial to this characterization or conclusions per the provisions of Fed R. Crim. P. 32(f)(1).

Firearms by a Certain Person. Per the PSR, all state charges were *nolle prossed*, at the latest, on or before November 8, 2021. PSR, p. 13 at 51-52. Mr. Tucker entered a plea of guilty to the federal firearms charge on February 14, 2022.

After the indictment was filed, but prior to entry of a plea, Mr. Tucker was physically taken into custody by federal marshals pursuant to a detainer. It was agreed at trial that Mr. Tucker served 885 days in incarceration in either state or federal custody between the December 20, 2019 arrest and the date of the sentencing hearing. Sentencing TR 11, 14.

The PSR noted that as a result of the charges, Mr. Tucker's state parole was revoked December 27, 2019. PSR, p.1. No statement was included in the PSR as to the penalty assessed for revocation or the extent of detention associated with that revocation. At hearing, while the government asserted that "a good chunk of that 800 [sic] days was based on his state parole violation" Sentencing TR 15. No proof was presented as to this argument.

In his plea agreement, Mr. Tucker expressly reserved "the limited right to appeal the substantive reasonableness of the sentence of imprisonment if the sentence is above the Guideline range that is established at sentencing and if the defendant makes a contemporaneous objection" as well as any jurisdictional issue relating to sentence imposed. Plea Agreement

The trial court sentenced Mr. Tucker to an upward variance of 60 months, and ruled on time-served credit issue as follows:

I think this is assumed by the Bureau of Prisons, but just for clarification, my sentence is to -- does not reflect any credit for the state court custody as he was being held on the aggravated assault. So it was my intention not to give him credit for that state court time, but that will be up for the Bureau of Prisons to decide. To the extent they need clarification on this record, I'm making it now.

Sentencing TR 24.

The Eighth Circuit panel determined that Mr. Tucker's challenge to the trial court's decision not to consider the provisions of USSG § 5G1.3(b) as a basis to credit state court pre-trial detention time for "related" offenses to those of his federal conviction is a procedural – rather than substantive – issue, subject to waiver, and that the claim was waived under the terms of his plea agreement. *U.S. v. Tucker, supra.*, opinion at 4; Appendix 3a.

However, the Court did not directly address Mr. Tucker's free-standing substantive due process argument on the underlying issue raised here, although this was raised both in Petitioner's appeal and on rehearing.² Petitioner submits in this

² On appeal, on the issue of direct applicability of USSG § 5G1.3, Mr. Tucker conceded that USSG § 5G1.3(a) was not directly applicable by its terms to the case here, as there is no evidence that any federal sentence was imposed such that it would begin during the running of an undischarged term of state imprisonment. However, Mr. Tucker further argued that the 8th Circuit had in its prior case of *U.S. v. White*, 354 F.3d 841 (8th Cir. 2004) supported a reading of the "term of imprisonment" provisions of subsection (b) such that that section implicated the Court's prior determination in *White* that a core purpose of §5G1.3 is that

Petition that the trial court's failure to credit his pretrial detention time in State Court, where the PSR concluded that time was served for "related conduct" is in conflict with the 5th amendment to the U.S. Constitution and with this Court's case law regarding presumption of innocence and a pre-trial detainee's due process right to be free from punishment.

C. Specific Facts Relating to the District Court's Consideration of Mr. Tucker's Pretrial Incarceration

Kevin Tucker was indicted for the offense of felon in possession of a firearm. Mr. Tucker entered a guilty plea, and the District Court applied an "upward variance" to Mr. Tucker's sentence, sentencing him to 60 months in prison. Mr. Tucker was detained for approximately 30 months prior to sentencing, much of that time in the Arkansas Department of Corrections. Although asserting that part of that time served may have been related to revocation of Mr. Tucker's parole in state court, the government presented no information as to the extent of any sentence for parole revocation, and the PSR contained none other than a bare statement that revocation occurred. The District Court found Mr. Tucker's state

"defendants who are already serving a term of imprisonment are not doubly punished for the same conduct, and application note 7 permits the district court to treat defendants who have already finished serving a term of imprisonment in a similar fashion." *White*, 354 F.3d at FN 5. Mr. Tucker argued that per *White*, his situation falls under the "term of imprisonment" provisions of subsection (b) pursuant to note 5 to that provision (previously note 7 referenced in *White*). The 8th Circuit, in its opinion, found this proposition "dubious" but did not address it on the merits. *U.S. v. Tucker, supra.*, at 3; Appendix 3a.

court detention to be attributable to the “aggravated assault” charge. (TR 24) [Appellant believes this in fact refers to the related (to the Federal charge) state court aggravated robbery charge, as the PSR references no “aggravated assault”]. Mr. Tucker was also held pending state charges related to the federal charge for which he was sentenced. PSR p.13 at 51 and 52; *see United States v. Lindsey*, 827 F.3e 733, 738 (8th Cir. 2016)(“District Court may regard as true facts contained in the presentence report to which no specific objection is made”). All of the remaining pending state charges were *nolle prossed* on November 8, 2021.

Appellant argued on appeal, *inter alia*, that the trial court’s affirmative determination not to credit his state court pre-trial detention time for related conduct against his federal sentence violates due process under *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 at FN11 (1979) because the net effect is to penalize the defendant by *de facto* adding his pretrial detention to his full sentence without any credit for that detention. Mr. Tucker argued that while his sentence was related to the same conduct that was *nolle prossed* in state court, the District Court failed to recognize any requirement that it consider the time Mr. Tucker spent in State prison for that conduct.³

³ There is no finding at the District Court level as to whether any specific period of pretrial detention here would be credited by BOP (although the Court recommended and opined that such credit should not be given - “It was my intention not to give him credit for that state court time, but that will be up for the Bureau of Prisons to decide.”) Sentencing TR 24. The Court opined that credit

In deciding this appeal, the panel determined that Mr. Tucker had waived procedural issues related to interpretation of U.S.S.G § 5G1.3(b)(1) as part of his plea agreement. However, Mr. Tucker also argued that, if the Guidelines are interpreted to permit “optional” consideration of state-court-related detention in assessing sentence, such an interpretation is violative of substantive due process – an issue which Mr. Tucker contends he had not waived (he retained the right to challenge the “substantive reasonableness” of his sentence), and which should be addressable in any event under limitations on appeal waivers established by the 8th Circuit in *United States v. Andis*, 333 F.3d 886, 889-90 (8th Cir. 2003) (*en banc*). See *United States v. St. Pierre*, 912 F.3d 1137 (8th Cir. 2019)(“We will not 'enforce an otherwise valid waiver if to do so would result in a miscarriage of justice.'”); citing *Andis*.

would be given for “while you’ve been in federal custody on this charge. You do get credit for that. You don’t get credit for the state time that you were being held for aggravated assault [sic].” Sentencing TR 25. The government also took the position at trial that the only relevant credit was for “the time that he spent in federal custody” which the government argued began July of 2021, and the District Court also limited its analysis of credit from BOP to “federal custody.” This date appears to be the actual date Mr. Tucker was physically taken into custody by the Marshall Service under the detainer filed in this case.

On this record, it is at least an open question as to the extent to which the BOP would consider Mr. Tucker’s pre-“federal custody” detention for credit. See *United States v. Winnick*, 954 F.3d 1103 (8th Cir. 2020) at FN2 (“We assume, because no one has argued otherwise, that the Bureau of Prisons will not give credit for any of the time Winnick previously spent in prison, see U.S.S.G. § 5G1.3(b)(1), but this is an issue for the district court to straighten out on remand.”); See also *LaRue v. United States*, 632 F. App’x 318 (2016).

REASONS FOR GRANTING THE WRIT

Petitioner submits that a writ of certiorari should issue in this case because the action of the United States Court of Appeals is in conflict with minimum requirements for due process previously established in this Court's decisions. Where a defendant is held pretrial in state court for related, relevant conduct, and the state court charges are subsequently dismissed, there is no principled basis for not granting an adjustment for pretrial detention where he would be entitled to such relief if actually convicted of those charges. Where the pretrial detention results from charges subsequently dismissed, as here, making such an offset optional violates substantive due process, as to assert that the time served in state custody is punishment for those offenses is directly violative of the rule discussed in *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law..."); citing *Ingraham v. Wright*, 430 U.S. 651, 671-672 n. 40, 674, 97 S.Ct. 1401, 1412-1413 n. 40 1414, 51 L.Ed.2d 711 (1977); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-167, 186, 83 S.Ct. 554, 565-567, 576, 9 L.Ed.2d 644 (1963); *Wong Wing v. United States*, 163 U.S. 228, 237, 16 S.Ct. 977, 980, 41 L.Ed. 140 (1896).

In *Trambitas, Matter of*, 635 P.2d 122, 96 Wn.2d 329 (Wash. 1981), the Washington Court set out in detail the fundamental nature of this rule:

Petitioners also assert that due process demands that such credit be given because to do otherwise would constitute punishment without an adjudication of guilt. This violation, petitioners argue, occurs when detention time not credited causes the offender to be detained longer than allowable under the standard range guidelines.

The State contends that the holds placed on petitioners were for the purpose of assuring their continued availability, as opposed to the inability to post bail, as discussed in *Reanier*. The State also contends that pretrial detention for juveniles is not "punishment"; rather, the juvenile system stresses rehabilitation and intervention. *State v. Lawley*, 91 Wash.2d 654, 591 P.2d 772 (1979).

It is true that in *Reanier* we discussed fundamental fairness in relation to an accused's inability to post bail and said that it would be a denial of due process to fail to credit pretrial detention in that case. However,[635 P.2d 124] we did not limit our analysis to persons who were detained prior to trial because of indigency. In fact, one of the petitioners before us in that case was held without bail because of the nature of the crime. *Reanier*, 83 Wash.2d at 344, 517 P.2d 949. The distinction raised by the State in the instant case is without merit.

Fundamental fairness ... dictate(s) that an accused person, unable to or precluded from posting bail or otherwise procuring his release from confinement prior to trial should, upon conviction and commitment to a state penal facility, be credited as against a maximum and a mandatory minimum term with all time served in detention prior to trial and sentence. Otherwise, such a person's total time in custody would exceed that of a defendant likewise sentenced but who had been able to obtain pretrial release. Thus, two sets of maximum and mandatory minimum terms would be erected, one for those unable to procure pretrial release from confinement and another for those fortunate enough to obtain such release ... (I)t is clear that the principles of due process ... of the law are breached without rational reason. *Reanier* at 346-47, 517 P.2d 949. (Italics ours.) (Footnote omitted.)

As to the State's argument that pretrial detention does not constitute "punishment", we reiterate what was stated in *In re Erickson*, 24 Wash.App. 808, 810, 604 P.2d 513 (1979) that "the juvenile disposition order did constitute 'punishment for crime' ". The restrictions on a person's liberties

suffered by pretrial detention is no less "punishment" than that imposed by the disposition order. *Reanier*, 83 Wash.2d at 351, 517 P.2d 949.

Trambitas, 635 P.2d at 332-33.

In *North Carolina v. Pearce* *Simpson v. Rice*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989), the Court addressed general Fifth Amendment Guarantees against multiple punishments and made the following clear statement of the fundamental rule that the Fifth Amendment “protects against multiple punishments for the same offense. This last protection is what is necessarily implicated in any consideration of the question whether, in the imposition of sentence for the same offense after retrial, the Constitution requires that credit must be given for punishment already endured.” How much more should the protection extend to pretrial incarceration for “related” offenses for which no conviction was ever even obtained.

While the 8th Circuit here found that challenges to application of the Guidelines are procedural, not substantive, this reasoning should not apply to a free-standing requirement that any sentencing determination should not penalize a defendant by double counting pre-trial detention on related charges. *See U.S. v. Winnick*, 954 F.3d 1103 (8th Cir. 2020).

This outcome has the effect in application of determining that pretrial detention is less worthy of consideration in sentencing than detention under a

conviction. *See U.S. v. White*, 354 F.3d 841 (8th Cir. 2004)(“ core purpose of §5G1.3 that ““defendants who are already serving a term of imprisonment are not doubly punished for the same conduct, and application note 7 permits the district court to treat defendants who have already finished serving a term of imprisonment in a similar fashion.”) To make credit for time served pre-trial for related offenses optional, but mandatory where a sentence is in place will have the net effect of penalizing non-conviction above actual guilt, in direct violation of *Bell* and the Fifth Amendment, as well as the policies of U.S.S.G. § 5G1.3 thereby making any such sentence “substantively unreasonable.”

To find that a pretrial detention is less worthy of consideration in sentencing than detention under a conviction is illogical, and stands the presumption of innocence on its ear. In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 at FN11 (1979) the Supreme Court noted that,

On at least two occasions, this Court has relied upon this presumption as a justification for shielding a person awaiting trial from potentially oppressive governmental actions. *McGinnis v. Royster*, 410 U.S. 263, 273, 93 S.Ct. 1055 1061, 35 L.Ed.2d 282. (“[I]t would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence”); *Stack v. Boyle*, 342 U.S. 1, 4, 72 S.Ct. 1, 3, 96 L.Ed. 3 (“Unless [the] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning”). These cases demonstrate that the presumption—or, as it was called last Term, the “assumption” of innocence that is indulged until evidence has convinced a jury to the contrary beyond a reasonable doubt, see *Taylor v. Kentucky*, 436 U.S. 478, 484 n. 12, 98 S.Ct. 1930, 1934 n.12, 56 L.Ed.2d 468, colors all of the government's actions toward persons not yet convicted. **In sum, although**

there may be some question as to what it means to treat a person as if he were guilty, there can be no dispute that the government may never do so at any point in advance of conviction...

[emphasis added]. To make adjustment optional or not available where the source of pretrial detention is a mere charge because the guidelines do not explicitly address pretrial detention - but mandatory (per *White*) where a sentence was in place - would have the net effect of penalizing non-conviction *above* actual guilt.

CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE AND FOR THE REASONS STATED ABOVE, Petitioner respectfully prays that a writ for certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit. Petitioner requests that the Court at minimum direct that his appeal be considered on the merits of his due process change, and that the Court grant relief, and find that Petitioner should, on the facts presented, be credited against his 60 month sentence for the time spent in pretrial state incarceration.

Dated this 5th day of October, 2023

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