NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DEUNTA FINCH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Has the Sixth Circuit erred by creating a novel doctrine that says, to avoid plain-error review, a criminal defendant must object after the sentencing court expressly rejects his express argument about the application of the Sentencing Guidelines?

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PRAYER

Petitioner Deunta Finch respectfully petitions for a writ of certiorari issue to review to review the judgment of the U. S. Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion denying relief is unpublished but available at Pet. App. 2. The pertinent excerpt of the sentencing transcript is available at Pet. App. 7.

JURISDICTION

The court of appeals entered its judgment on May 26, 2023, and it denied rehearing on August 7, 2023. This petition is filed within 90 days of that order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISION OF LAW

Federal Rule of Criminal Procedure 51(b) states:

> A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. . . .

INTRODUCTION

Expressly arguing an issue and getting an express, contrary ruling suffices to preserve the issue for appeal. Fed. R. Crim. P. 51(b); *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020). In district court, defendant Deunta Finch expressly argued a sentencing issue: whether he was entitled to a reduction to his offense level under U.S.S.G. § 3E1.1. Finch argued that issue first in writing and second verbally at the hearing. The government counter-argued the issue verbally. At the hearing, the district court, saying it "'agreed with the government,'" expressly rejected Finch's position on the issue and ruled against him, refusing to give him the § 3E1.1 reduction. (Order, Pet. App. at 3 (quoting district court).) Having received an express rejection of his expressly-raised issue, Finch did not object at that time or later in the hearing.

The Sixth Circuit, citing its precedent, held that to preserve that type of sentencing issue for appeal, a defendant "*must* raise a contemporaneous objection or 'object when properly invited at the conclusion of the sentencing hearing.'" (Order, Pet. App. at 4 (quoting *United States v. Price*, 901 F.3d 746, 749 (6th Cir. 2018) (emphasis added).) Applying its must-object rule, the Sixth Circuit held Finch had failed to preserve his argument regarding the application of § 3E1.1 because he did not object after the district court expressly rejected his express argument. (*Id.*) Based on that holding, the Sixth Circuit invoked plain-error review, and it materially relied on that heightened standard to deny Finch the relief he has earned.

Thus, the Sixth Circuit has created a pitfall for criminal defendants. Rule 51(b) makes it clear a defendant preserves any issue—including a Guideline application issue—by expressly arguing the issue and getting an express rejection. Yet the Sixth Circuit requires a post-rejection objection for that type of issue. That pitfall is in stark conflict with Rule 51(b), and it calls for correction, especially here where the Sixth Circuit's arbitrary ruling sets such a bad example for a defendant who has risked his very life to rehabilitate.

STATEMENT

In January 2017, Deunta Finch pleaded guilty to all four crimes charged in this case. (Presentence Report (PSR) at 5.) He did so under a binding plea agreement for 180 months. (*Id.*) But while waiting for sentencing, he got in a fight with a cellmate. (*Id.* at 21.) Due to that jail fight, the government withdrew from the agreement. (*Id.* at 6.) With his rights restored, and now without a plea agreement, Finch pleaded guilty as charged for a second time. (*Id.*)

Despite Finch's guilty plea, the district court denied him a 2-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1 because of the jail fight, and it sentenced him to 290 months, which was 110 months longer than agreed on before the fight. (Sentencing Hr'g Tr., R.89, PageID# 991-92.) The court said the 3E1.1 question was a "close" one. (*Id.*)

The "close" 3E1.1 ruling was sustained on appeal because the jail fight reflected in Finch a failure to voluntarily "'terminat[e] or withdraw[] from criminal conduct or associations.'" *United States v. Finch*, 764 F. App'x 533, 536 (6th Cir. 2019) (quoting U.S.S.G. § 3E1.1 cmt. 1(B)).

In prison, Finch examined his life and decided to attack the root cause of his troubles, namely, his nearly two-decade association with the Bloods gang. (Finch Letter, R.113-1, PageID# 1355.) He left the gang knowing he would be assaulted as a penalty (*id.*), and he was assaulted—violently so—on March 24, 2021. (Medical Records, R.113-2, PageID# 1359.) Records show he suffered a "concussion with loss of consciousness and fracture of face bones," plus that he was "stabbed in the head and chest and face." (*Id.* PageID# 1357-59.)

Free of his "criminal . . . associations," U.S.S.G. § 3E1.1 cmt. 1(B), and with a "clean slate" (Finch Letter, R.113-1, PageID# 1356), Finch has engaged in prison programming with vigor. (BOP Records, R.113-3, PageID# 1373-75; PSR at 7.)

On July 1, 2022, the district court, in light of *United States v. Taylor*, 142 S. Ct. 2015 (2022), vacated Finch's conviction for one count of violating 18 U.S.C. § 924(c), which had carried a mandatory consecutive penalty of 120 months. (Order, R.107, PageID# 1335.) The court reduced Finch's sentence from 290 months to 170 months. (*Id.*) But the government moved for a full resentencing, and Finch joined the motion, which the court granted, ordering "a revised presentence report" and sentencing memoranda. (*Id.* PageID# 1335-36.)

At the resentencing hearing, Finch argued, as supported by his written pleading, for a 2-level reduction under § 3E1.1 for acceptance of responsibility, pointing out that his post-offense rehabilitative efforts were relevant under the express direction of Note 1 to § 3E1.1, which tells the district court to consider, in addition to the fact of pleading guilty, whether the defendant has voluntarily withdrawn from criminal associations and engaged in post-offense rehabilitative efforts. (Def. Sentencing Mem., R.113, PageID# 1349; Holley, Resentencing Hr'g Tr., R.129, PageID# 1429-30.)[1] In response, the government argued: (1) the import of the jail fight remained the same today; and, (2) Finch's post-sentencing rehabilitation should be considered *only* when selecting a sentence under 18 U.S.C. § 3553(e), *not* when assessing eligibility under § 3E1.1:

> Your Honor, the government's position on this is the same that it was at the May 29, 2018, [sentencing] hearing, which is that the assault activity of Darrell Starks, while the defendant was in jail pretrial, should negate acceptance of responsibility here, which the Court, although considered it a close question, ruled on that at Page ID No. 991, Docket Entry 89.

[1] In his sentencing memo, Finch argued that the Court should grant the 3E1.1 reduction based on (1) the fact Finch had pleaded guilty as charged, and (2) a pair of "changed circumstances," namely that at the cost of being violently assaulted he had "voluntarily terminated his association with the Bloods" and that he has "shown substantial post-offense rehabilitation by reassessing his life, taking responsibility for his errors in general and these crimes in particular, and by putting his best foot forward." (Def. Sentencing Mem., R.113, PageID# 1349 (citing U.S.S.G. § 3E1.1 cmt. n.1). At the hearing, counsel reiterated those very same points. (Resentencing Hr'g Tr., R.129, PageID# 1429-30.)

> I understand [defense counsel's] point regarding rehabilitation since that sentence was imposed. I would argue that to the extent the Court considers that rehabilitation while the defendant was serving a sentence that should be considered in the context of other 3553(a) factors *and not in regards to acceptance of responsibility*.

(Dean, Resentencing Hr'g Tr., R.129, PageID# 1430 (emphasis added).) The district court did not ask Finch to respond to the government's off-the-cuff[2] argument.

The district court expressly agreed with both aspects of the government's reasoning: "All right, I *agree with the government*. And for those *reasons* and for the reasons I stated in his prior sentence, the objection [regarding § 3E1.1] will be overruled." (Resentencing Hr'g Tr., R.129, PageID# 1430 (emphasis added).) Defense counsel did not object upon that express overruling of his objection, but rather he proceeded to argue his next Guideline-calculation objection. (*Id.*)

The district court subsequently heard argument on the § 3553(a) sentencing factors, and it listened to Finch's allocution as he described his consequential departure from the gang and his efforts to improve himself. (Resentencing Hr'g Tr., R.129, PageID# 1453-54.) The district court found Finch credible, saying "Thank you, Mr. Finch. As you stand before me, I believe you mean everything you say to me." (*Id.* PageID# 1455.) At the original sentencing, the district court had imposed a sentence at the middle of the guideline range; this time it imposed one at the very bottom, 262 months. But if the district court had granted the 2-level reduction under § 3E1.1, the bottom of the range would have been 210 months.

On appeal, Finch raised a single issue:

> As the district court acknowledged, Deunta Finch presented proof at sentencing of significant post-offense rehabilitative efforts. Application Note 1 to U.S.S.G. § 3E1.1 regarding the 2-level reduction for acceptance of responsibility expressly directs a district court to consider "post-offense rehabilitative efforts" when

[2] The government did not submit any written argument responding to Finch's argument regarding § 3E1.1.

> deciding whether to grant that reduction. But the district court refused to consider those efforts for that purpose. Was that error?

(Appellant Br. at 1.) The answer to that question is "yes" because the district court conducted a full resentencing, because Application Note 1 says "post-offense rehabilitation" is relevant to the 3E1.1 determination, and because precedent holds that "post-*sentence* rehabilitation" is relevant to the 3E1.1 determination *at resentencing* after post-conviction relief. *United States v. Rudolph*, 190 F.3d 720, 725 (6th Cir. 1999) (emphasis added).

To deny relief, the Sixth Circuit invoked the plain-error standard of review.[3] (Order, Pet. App. at 4.) The Court held that, to preserve his issue, Finch had to lodge an objection *after* the district court expressly said it "'agree[d] with the government'" and expressly explained it denied a 3E1.1 reduction for "both the reasons" the government had given. (*Id.* at 3 (quoting district court).) According to the Court, lodging such an objection was necessary because the error Finch raised on appeal was "procedural" in nature. (*Id.* at 4.)

REASON FOR GRANTING THE PETITION

"Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law[.]" *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J. dissenting).

Here, our potent teacher has failed. Rule 51(b) plainly tells a criminal defendant that expressly arguing an issue and getting an express, contrary ruling suffices to preserve the issue for appeal. Fed. R. Crim. P. 51(b). Precedent confirms that plain and simple rule. *Holguin-*

[3] The Sixth Circuit also declined to address Finch's explanation why *Rudolph* dictated relief at least in the form of a remand for reconsideration under the proper legal standard, not even mentioning *Rudolph*.

Hernandez v. United States, 140 S. Ct. 762, 766 (2020). But the Sixth Circuit has broken that rule by announcing a special caveat for certain sentencing issues, including a defendant's objection to the application of a Sentencing Guideline. Under that special caveat, the defendant must lodge an objection even after the district court expressly rejects his express argument. Creating that special exception—that pitfall—has no basis in the law, starkly conflicting with Rule 51(b) and *Holguin-Hernandez*.

Finch acknowledges this Court usually does not accept a case for mere error correction. But consider the "example" set here. *Olmstead*, 277 U.S. at 485. The Court of Appeals certainly erred by holding Finch failed to preserve his sentencing issue. And, when Finch brought that error to its attention in a rehearing petition, it summarily denied the petition. As a result, Finch is being denied the leniency he deserved for having renounced his gang, a courageous step towards a law-abiding life. He will be denied that leniency because the courts are willing to break their own rules. In short, for his principled behavior, Finch should have been rewarded with leniency by a principled court system, but instead he was denied it by one acting arbitrarily. This sets a terrible example for a prisoner whom society wants to reform. This Court should either grant certiorari or summarily grant relief.

CONCLUSION

For the foregoing reasons, petitioner Deunta Finch respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit or that it summarily grant relief.

November 3, 2023

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