No.

IN THE SUPREME COURT OF THE UNITED STATES

ZACHARIAH JAY HISTED,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED FOR REVIEW

Whether a defendant who pleads guilty, admits the substantive elements of the criminal charge, and spares the government the time and expense of a trial, is entitled to a reduction under U.S.S.G. §3E1.1, the Acceptance of Responsibility Sentencing Guideline, even though the sentencing judge disbelieves his claimed motive for committing the offense?

LIST OF PARTIES

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

RELATED CASES

There are no cases related to the case that is the subject of this petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

No.

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Petitioner Zachariah Jay Histed ("Petitioner" or "Histed") respectfully prays that a writ of certiorari will issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in Case No. 22-2080 on February 22, 2024.

OPINION BELOW

On February 22, 2024, a three-judge panel of the United States Court of Appeals for the Sixth Circuit filed an opinion and judgment vacating Petitioner's sentence for possessing methamphetamine with intent to distribute, and remanding his case for resentencing. (App. 1a). The opinion is reported at 93 F.4th 948. The United States District Court entered an unpublished criminal judgment on November 29, 2022. (App. 24a).

JURISDICTION

Petitioner seeks review of the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered on February 22, 2024. Jurisdiction is invoked under 28 U.S.C. §1254(1), which permits a party to petition the Supreme Court of the United States to review any civil or criminal case before or after rendition of judgment or decree.

STATUTES INVOLVED

28 U.S.C. §991:

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

.. ..

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices[.]

28 U.S.C. §994:

(a) The [Sentencing] Commission, ... shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment[.]

STATEMENT OF THE CASE

While fleeing from officers of a Michigan State Police drug task force, Histed dropped a baggy of suspected drugs onto the ground. The officers retrieved the baggy and submitted it to a laboratory for testing. The results revealed the baggy contained 122 grams of methamphetamine (ice).

A federal grand jury indicted Histed for possession with intent to distribute methamphetamine and being a felon in possession of a firearm. Petitioner agreed to resolve the charges by pleading guilty to the drug count in exchange for the government's promise to dismiss the gun count and to recommend that the Sentencing Guideline offense level be reduced by three levels for acceptance of responsibility. After accepting Histed's guilty plea, the district judge ordered a presentence investigation.

During a post-plea interview, Histed told the probation officer that he had accepted the methamphetamine from another person as a payment of a debt related to the sale of a motor vehicle. In a written statement, he emphasized, "I accept full responsibility for my behavior" and "[t]here is no excuse for what I did."

The probation officer issued a presentence report recommending that the court deny a reduction for acceptance of responsibility. Histed's attorney filed a timely written objection to this determination.

During the sentencing hearing, the government reneged on its promise to recommend the reduction. The Assistant United States Attorney argued that Histed forfeited entitlement to the benefit by "minimizing his conduct" and by "making up a story

about how he drove to Detroit [] one time to collect a $1200 cash debt but instead accepted methamphetamine as payment."

The district judge adopted the government's position. He stated that Histed's explanation was "just so contrary to the preponderant evidence of what he was doing that it's offensive, I think, to credit acceptance of responsibility on that record." He sentenced Histed to a 300-month prison term.

Histed timely appealed the acceptance of responsibility issue as well as other Sentencing Guideline determinations. The Sixth Circuit Court of Appeals ruled that "[g]iven this record, the district court did not clearly err" when it refused to give Histed a reduction for acceptance. (App. 15a)

The appellate panel did determine, however, that the district judge had failed to make particularized findings to justify the attribution of additional quantities of methamphetamine to Histed (beyond the actual seizure of the 122 grams of "ice"). It therefore remanded his case for resentencing.

Histed asks this Court to grant a writ of certiorari for the purpose of resolving an inter-Circuit conflict as to the question of whether a sentencing judge's rejection of a defendant's claimed motive for committing an offense is sufficient justification to deny him credit for acceptance of responsibility where he has pled guilty to the offense, has admitted its substantive elements, and has spared the government the time and expense of a trial.

REASONS WHY THE WRIT OF CERTIORARI SHOULD ISSUE

This Court has ruled that the government "may encourage a guilty plea by offering substantial benefits in return for the plea." *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978). It has recognized that this practice is potentially advantageous for both sides.

For the accused, the benefit is "the possibility or certainty ... of a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty." *Id.* (cleaned up). From the government's perspective, the avoidance of a trial conserves "scarce judicial and prosecutorial resources." *Brady v. United States*, 397 U.S. 742, 752 (1969).

The Sentencing Reform Act of 1984 directed the newly-created United States Sentencing Commission to establish a set of guidelines "for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. §994(a)(1). The enabling statute supplied guidance to the Commission by specifying general factors that it should consider in formulating categories of offenses as well as categories of offenders. *Mistretta v. United States*, 488 U.S. 361, 375-76 (1989).

This ground-breaking legislation was surprisingly silent, however, as to the question of whether an incentive should be offered to offenders to plead guilty. Early in the process, the Commission considered a proposal to grant an offender a fixed reduction in his prison term in exchange for his decision to plead guilty. William W. Wilkins, *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 Wake Forest L. Rev. 181, 190 (1988). Its practical effect would have been to codify pre-Guideline sentencing practices. Michael M.

O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility: The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 Northwestern Univ. L. Rev. 1507, 1512 (1997).

The Commission ultimately rejected the idea of an automatic sentencing "discount" for pleading guilty due to a concern that denial of a "discount" to those who stood on their plea of not guilty could be interpreted as a penalty for exercising one's constitutional right to trial. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra Univ. L. Rev. 1, 28 (1988) ("to explicitly write a reduction into the Guidelines based on a guilty plea is to explicitly tell a defendant that a guilty plea means a lower sentence and insistence on a trial means a higher sentence.")

The Commission's solution to this quandary was adoption of a guideline (U.S.S.G. §3E1.1) authorizing a district judge to award an offense level reduction to an offender "who clearly demonstrates acceptance of responsibility" for his offense. Justice Breyer has conceded this is a vague standard. *Id.* at 29.

In practice, implementation of §3E1.1 in the district courts has evolved into a *de facto* "automatic plea discount" for waiving one's right to trial. O'Hear, 91 Northwestern Univ. L. Rev. at 1534-35. A commentator's investigation into the practices of one busy federal district indicated that experienced defense attorneys will prepare a carefully written "acceptance statement" for their clients to sign and submit to the presentence investigator. This script will consist of an admission of the government's version of the facts and an

expression of contrition for becoming involved in the crime. Or in a nutshell, "I did it, and I am sorry." *Id.* at 1536.

The law of unforeseen consequences will occasionally result in a defendant going "off script" and crossing the Rubicon. This is especially true if the defendant is represented by counsel unversed in the peculiarities of federal criminal practice and the personalities of the participants involved in the process. The attorney will allow his client to converse freely with the presentence investigator. The client will say something that offends the sensitivities of a prickly judge. The remark will be viewed as evidencing a lack of contrition for the crime. The consequence will be a denial of the "discount" for pleading guilty, and the addition of months or years to the overall sentence of imprisonment.

This scenario perfectly describes Mr. Histed's predicament. He pled guilty to the most serious count of the indictment. He notified the United States Attorney of his decision to plead well in advance of the trial date. His attorney submitted a written acceptance of responsibility to the probation officer.

Then came the gaffe. During the presentence interview, defense counsel inexplicably allowed his client to digress about the reason why he came into possession of the drugs - to assist a friend in collecting a payment for the sale of a motor vehicle. He did not stop his client from repeating this explanation during the sentencing hearing.

The claimed motive for committing the crime did not contradict Histed's guilty plea in any way. There is no lawful reason for a drug addict to possess a controlled substance without a prescription. It is a crime against the United States regardless of motive.

Nevertheless, the district judge was offended by Histed's explanation of his reason for committing the crime, and denied him a reduction for acceptance of responsibility.

If Histed had been prosecuted in a district within the Ninth Federal Circuit, controlling precedent would have rescued him from his folly. In *United States v. Gonzalez*, the defendant, a customs inspector at a United States/Mexico port of entry, accepted a bribe of cash and drugs in exchange for allowing a shipment of cocaine to enter this country without inspection. *Id.* 16 F.3d 985 (9th Cir. 1993). The transaction was part of a covert sting operation. Gonzalez's girlfriend had helped authorities to set him up.

Following his arrest, Gonzalez confessed and subsequently agreed to plead guilty to conspiracy to accept bribes. The plea agreement included language stating the government would not oppose a reduction under §3E1.1 if he accepted responsibility for his conduct.

Gonzalez told the probation officer that he had agreed to participate in the bribery scheme because his girlfriend "had repeatedly asked him to assist her and that she would lose her life if he did not." *Id.* 16 F.3d at 990. But he also explained that "he feels bad for what he has done, and sorry for the pain he has caused his coworkers, his family, and the community at large." *Id.* at 991. At sentencing, the Assistant United States Attorney argued that "because he had never said this before, he was lying and thus not fully accepting responsibility for his crimes." *Id.* The district judge agreed with the government, and denied the reduction.

Sitting by designation in the Ninth Circuit, Senior Circuit Judge Myron H. Bright of the Eighth Circuit stated that the district judge erred in refusing to grant Gonzalez the

reduction. He emphasized that "Gonzalez was required to recognize and affirmatively accept personal responsibility for his criminal conduct. The record shows he did. He fully admitted his involvement in the crime in his post-arrest statements, during his discussions with the probation officer, and in open court at sentencing." *Id.* at 991.

Writing for a unanimous panel, Judge Bright rejected the government's contention that the defendant's questionable explanation of his motive for accepting the bribe forfeited his entitlement to the reduction:

> Neither § 3E1.1 nor any cases we have found state or otherwise indicate that a defendant's claimed reason or motivation for committing a crime is a dispositive factor in determining whether to grant the adjustment unless the claim was intended as a defense to liability for the charged offense. Even if it were established that Gonzalez at some point in the proceedings lied about why he committed the crimes, this lack of candor, as the probation officer in the Addendum to the PSR points out, should play no part in the district court's § 3E1.1 determination where the explanation was not made to avoid criminal liability.

Id.

Unfortunately for Histed, his case was filed in the Sixth Circuit which had already adopted an opposing view in *United States v. Greene*, 71 F.3d 232 (6th Cir. 1995). Defendant Greene had engaged in a scheme to use false identification and phony credentials to obtain jobs in the health care field. *Id.* After pleading guilty to multiple counts of mail fraud and possession and use of forged documents, Greene told a probation officer that "he frequently changed identities, social security numbers, and employment because he feared his wife's abusive ex-husband who had threatened him." *Id.* 71 F.3d at 234. The probation officer rejected this explanation, and determined that Greene had not clearly

demonstrated acceptance of responsibility. The district judge agreed and denied him the reduction.

On appeal, Greene's attorney cited *Gonzalez* as standing for a principle that a defendant's "lack of candor" about his motive for committing a crime should not deprive him of a reduction for acceptance of responsibility if he does not use the claimed motive as an excuse for avoiding criminal liability. The Sixth Circuit panel was unpersuaded by this position, stating that "[e]ven if the excuse is not a legal justification sufficient to negate criminal liability, it still might demonstrate the defendant's unwillingness to admit his culpability." *Id.* at 235.

Histed's appellate panel followed this line of reasoning in affirming the denial of the acceptance reduction. It stated that "[t]he district court did not believe [Histed's] stories—calling them 'offensive'—and took them as a sign that Histed still had not accepted responsibility for his actions. Given this record, the district court did not clearly err by doing so." (App. 14a) (cleaned up).

One of Congress's objectives in directing the establishment of a guideline-based sentencing scheme was to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct[.]" 28 U.S.C. §991(b)(1)(B). This objective is frustrated if eligibility for the reduction requires "a penetrating judicial examination of the criminal's soul." *United States v. Vance*, 62 F.3d 1152, 1158 (9th Cir. 1995).

Histed could have averted the adverse ruling by simply resting on his written statement and keeping his mouth shut. The fact that he lacked the insight (or the guidance from his attorney) to either say something conciliatory or, better yet, just stay silent does not seem to be a justifiable basis to treat him differently than any other similarly situated offender who receives the reduction in exchange for pleading guilty and expressing contrition.

The denial of a reduction for acceptance of responsibility certainly had a disparate impact on Histed's sentence. The district judge had calculated an un-reduced total offense level of 38 and a criminal history category of V. This corresponded to an advisory imprisonment range of 360 months to life. After granting a variance based on the factors listed in 18 U.SC. §3553(a), he sentenced Histed to a 300 month prison term.

If the total offense level had been reduced by three levels for acceptance of responsibility, the total offense level would have been 35, and the advisory imprisonment range would have been 262 to 327 months. Assuming the judge's willingness to grant a variance based on the same statutory factors, Histed would have been sentenced to a substantially lower prison term.

CONCLUSION

Rule 10(a) of this Court states that one circumstance weighing in favor of granting certiorari is when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." The decision of the Ninth Circuit in *Gonzalez* and the decision of the Sixth Circuit in Histed's

appeal plainly conflict on the question of whether a district judge's rejection of a defendant's stated motive for committing the offense of conviction is a valid basis for denying an acceptance reduction under §3E1.1.

The disparity arising from "varying judicial interpretations of the provision [is] precisely the sort of disparity unrelated to the offense and offender that the Guidelines are meant to eradicate." O'Hear, 91 Northwestern Univ. L. Rev. at 1545.Histed asks the Court to grant a writ of certiorari for the purpose of resolving the conflict and providing the lower federal courts with guidance in applying U.S.S.G. §3E1.1.

Respectfully submitted,

s/Dennis C. Belli
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