NO. _____

In the Supreme Court of the United States

AVONTAE TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does U.S.S.G. §3E1.1 apply when a defendant has voluntary terminated from the specific conduct he has pleaded guilty to, or does it only apply when the defendant has refrained from all criminal conduct?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner to this Court is Avontae Tucker, who was the defendant-appellant in the proceedings below.

Respondent is the United States of America, who was the plaintiff-appellee below.

There are no corporate parties involved in this case.

RELATED PROCEEDINGS

United States Court of Appeals (8th Cir.):

- *United States v. Tucker*, No. 23-2758 (Aug. 2, 2024) (unreported).

United States District Court (S.D. Iowa):

- *United States v. Tucker*, No. 4:20-CR-00164, Doc. 66 (Jul. 20, 2023).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Sentencing Guidelines

Other Authority

In the Supreme Court of the United States

NO. 24-_____

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PETITION FOR A WRIT OF CERTIORARI

Avontae Tucker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this matter.

OPINIONS BELOW

The Eighth Circuit's opinion is reproduced at Pet. App. ____. The judgment of the United States District Court for the Southern District of Iowa is reproduced at Pet. App. ____.

JURISDICTION

On July 20, 2023, the Honorable Judge Rebecca Goodgame Ebinger entered judgment in the United States District Court for the Southern District of Iowa. On August 2, 2024, the Eighth Circuit affirmed the judgment of the

District Court for the Southern District of Iowa. The Eighth Circuit's jurisdiction was pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.S.G. §3E1.1 provides:

> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
>
> (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

STATEMENT OF THE CASE

A. Legal Background

The Guidelines provide that a district court may apply a two-level reduction where the defendant "clearly demonstrates acceptance of responsibility for his offense."

U.S.S.G. § 3E1.1(a). A further one-level reduction may be granted upon motion of the government stating that the defendant has timely notified the authorities of his intention to enter a plea of guilty. U.S.S.G. § 3E1.1(b). "Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction…will constitute significant evidence of acceptance of responsibility." U.S.S.G. §3E1.1 n. 3. "However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility." *Id.*

In determining whether a defendant qualifies for the two-level reduction under §3E1.1(a), the district court considers several factors:

> (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection ((a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. A defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility, but the fact that a defendant's challenge is unsuccessful does not

> necessarily establish that it was either a false denial or frivolous;
>
> (B) voluntary termination or withdrawal from criminal conduct or associations;
>
> (C) voluntary payment of restitution prior to adjudication of guilt;
>
> (D) voluntary surrender to authorities promptly after commission of the offense;
>
> (E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
>
> (F) voluntary resignation from the office or position held during the commission of the offense;
>
> (G) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and
>
> (H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

U.S.S.G. § 3E1.1 n. 1.

B. Procedural Background

The Government charged Avontae Tucker with Count I: interference with commerce (by) through robbery in violation of 18 U.S.C. § 1951; Count II: possessing and brandishing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 924(c)(1)(A)(ii); and Count III: unlawful user in possession

of a firearm in violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(8). Pet. App. ____. Tucker timely entered a guilty plea. Pet. App. ____. Tucker was not afforded the benefit of plea negotiations. His only option was to plead to all three counts as charged.

After Tucker entered the plea agreement, but prior to sentencing, jail officials moved him into an area containing several members of rival gangs and friends of rival gang members. Tucker feared for his own safety, as he had recently been shot and two of his closest friends had recently been killed in gang-related shootings at a local school. Anticipating violence from the rival members, Tucker approached the jail officials and requested to be transferred to another pod in the jail. His request was denied. Tucker was then involved in several altercations with the rival members or their friends which he participated in because he believed it necessary to defend himself.

The district court refused to apply the guideline reduction for acceptance of responsibility under U.S.S.G. §3E1.1. The district court relied primarily upon the "voluntary termination or withdrawal from criminal conduct or associations" factor within the application notes. The district court observed that the number of violations Tucker incurred at Polk County Jail were a concern "in terms of a demonstration of acceptance of responsibility for criminal conduct." The district court further observed that Mr. Tucker's conduct while at Polk County Jail "demonstrate[d] a disrespect and disregard for the management of the jail."

Tucker did not engage in criminal conduct while awaiting sentencing. He was never charged with a crime as

a result of these altercations. No formal investigation of these incidents was ever undertaken by law enforcement, and the facts surrounding these incidents have never been proved. These were administrative violations, and eleven of the seventeen violations occurred before Tucker entered his plea on March 14, 2023. The district court did not distinguish between incidents that occurred before entering his plea and incidents that occurred after the plea in denying his acceptance of responsibility reduction. Beyond the incident reports, the Government did not put on any additional evidence at sentencing, such as testimony from jail staff, that would establish if the conduct was criminal.

Tucker appealed to the Eighth Circuit Court of Appeals, challenging the district court's denial of the three-level reduction for acceptance of responsibility under U.S.S.G. §3E1.1. Pet. App. ____. The Eighth Circuit conducted a brief analysis, starting with the principle that "[t]he district court may consider a defendant's conduct outside the charges, including noncriminal conduct, to determine whether he is truly sorry for his actions. *United States v. Atlas*, 94 F.3d 447, 451 (8th Cir. 1996)." It concluded Tucker failed to show the district court's consideration of Tucker's misconduct in jail was clearly erroneous. Pet. App. ____.

This petition follows.

REASONS FOR GRANTING THIS PETITION

This Court has not had the opportunity to review and interpret U.S.S.G. §3E1.1, only mentioning the guideline in passing or explicitly refusing comment upon it. *See*, *e.g., Mitchell v. United States*, 526 U.S. 314, 330 (1999).

("Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guidelines (1998), is a separate question. It is not before us, and we express no view on it."); *but see Puckett v. United States*, 556 U.S. 129, 130 (2009) (discussing acceptance of responsibility in the context of whether the government's breach of a plea agreement could be reviewed for plain error).

The court's lack of guidance for applying U.S.S.G. §3E1.1 has led to a 30-year circuit split. The majority of courts view all criminal conduct as necessarily bearing on whether the acceptance of responsibility reduction should be applied. The minority view favors a more rigorous analysis to see if the relevant conduct bears a relationship to the crime(s) to which the defendant pleaded guilty.

This petition is the ideal vehicle for addressing the circuit split. It presents an issue of profound importance, not only for Tucker, but also for the many other criminal defendants in the federal criminal justice system. Tucker was not the first defendant to plead guilty, accept responsibility for his actions, and have his acceptance of responsibility taken away due to circumstances outside of his control. He should be the last.

I. The question presented is worthy of this Court's review.

A. This Court should grant review to resolve the longstanding circuit split regarding the interpretation of U.S.S.G. §3E1.1.

Before 1992, there was a circuit split on the requirements of U.S.S.G. §3E1.1. Matthew Richardson, *Specific Crime vs. Criminal Ways: Criminal Conduct and Responsibility in Rule 3E1.1*, 54 VAND. L. REV. 205 (2001). The Guideline previously stated the court should grant a sentencing reduction "[i]f a defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." U.S. Sentencing Guidelines Manual, app. C (Amendments to the Sentencing Guidelines Manual). Some courts interpreted the guideline as saying that acceptance of responsibility only required individuals to accept responsibility for those crimes with which they had been charged *See*, *e.g.*, *United States v. Perez-Franco*, 873 F.2d 455, 459 (1st Cir. 1989); *United States v. Oliveras*, 905 F.2d 623, 625 (2d Cir. 1990); *United States v. Piper*, 918 F.2d 839 (9th Cir. 1990). Other courts disagreed, holding that U.S.S.G. §3E1.1 required a criminal defendant to accept responsibility for all his criminal conduct, even if he had not been charged with a crime. *See*, *e.g.*, *United States v. Gordon*, 895 F.2d 932, 936 (4th Cir. 1990); *United States v. Mourning*, 914 F.2d 699, 705 (5th Cir. 1990). The Commission was aware of the split. Acceptance of Responsibility Working Group, *United States Sentencing Commission, Acceptance of Responsibility Working Group Report* (1991). To resolve it, it eventually amended the language to the current version, which states there should be a reduction "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense."

It was in the wake of that amendment that the Sixth Circuit decided *United States v. Morrison*, 983 F.2d 730, 734 (6th Cir. 1993). In that case, the defendant had been convicted of felon with a firearm, but was arrested for stealing a pickup truck and tested positive for controlled

substances. *Id.* at 733. The court brought up that this "poses the question whether criminal activity committed after indictment/information but before sentencing, which is wholly distinct from the crime(s) for which a defendant is being sentenced, can be properly considered when determining whether a two-level acceptance of responsibility reduction is in order." *Id.* at 733-34. One view was that "a defendant can recognize and affirm acceptance of personal responsibility for certain criminal activity while engaging in other criminal activity" and the other was that "one who has truly accepted responsibility for a crime against society will not commit further crimes, period." *Id.* at 734.

Application Note 1(B) comes into play next. It says that a factor for acceptance of responsibility is "voluntary termination or withdrawal from criminal conduct or associations." The Sixth Circuit analyzed that language and considered "'voluntary termination or withdrawal from criminal conduct' to refer to that conduct which is related to the underlying offense." *Id.* As such, that conduct may be of the same type as the underlying offense, may be the motivating force behind the underlying offense, may be related to actions toward government witnesses concerning the underlying offense, or may involve an otherwise strong link with the underlying offense. *Id.* Ultimately, the Sixth Circuit was "persuaded by the rationale that an individual may be truly repentant for one crime yet commit other unrelated crimes." *Id.* It held that consideration of "unrelated criminal conduct unfairly penalizes a defendant for a criminal disposition, when true remorse for specific criminal behavior is the issue." *Id.*

Morrison remains good law in the Sixth Circuit. The court has reversed cases as recently as 2014, finding again

that "[a]lthough the great weight of authority from other circuits is to the contrary, we are bound by *Morrison*'s holding that unrelated criminal activity cannot be the basis of refusing acceptance of responsibility." *United States v. Howard*, 570 Fed.Appx. 478, 484 (6th Cir. 2014). However, other circuits have not followed. The majority of the other circuits have found that any subsequent criminal conduct, not just similar criminal conduct, evince a lack of acceptance of responsibility. *See*, *e.g.*, *United States v. O'Neil*, 936 F.2d 599, 600 (1st Cir. 1991); *United States v. Ceccarani*, 98 F.3d 126, 130 (3d Cir. 1996); *United States v. Farley*, No. 94-5624, 1995 WL 298096, at *1 (4th Cir. May 17, 1995) (unpublished table decision); *United States v. Watkins*, 911 F.2d 983, 985 (5th Cir. 1990); *United States v. McDonald*, 22 F.3d 139, 144 (7th Cir.1994); *United States v. Chappell*, 69 F.4th 492, 494 (8th Cir. 2023); *United States v. Prince*, 204 F.3d 1021, 1023-24 (10th Cir. 2000); *United States v. Pace*, 17 F.3d 341 (11th Cir. 1994) (holding that defendant's subsequent drug use indicated failure to accept responsibility for his crime of conspiracy to commit fraud).

The Supreme Court has not resolved the matter. The court's statement in *Puckett v. United States*, 556 U.S. 129, 130 (2009) that "[g]iven that he obviously did not cease his life of crime, receipt of a sentencing reduction for acceptance of responsibility would have been so ludicrous as itself to compromise the public reputation of judicial proceedings." is dicta. First, the defendant in *Puckett* was committing the same type of crime as he pleaded guilty to. *Puckett v. United States*, 556 U.S. 129, 130 (2009) (discussing how the defendant pleaded guilty to robbing a bank but also engaged in a plan to defraud the postal service). Second, the case was not about the acceptance of responsibility reduction at all, but whether the failure of

an objection to a plea agreement could be reviewed for plain error. *Id.* The court was not seriously considering whether specific criminal conduct or general criminal conduct applied to acceptance of responsibility. *Morrison* remains good law in the Sixth Circuit and the courts continue to follow it post-*Puckett*. *See*, *e.g.*, *United States v. Howard*, 570 Fed.Appx. 478, 484 (6th Cir. 2014); *United States v. Harris*, 835 Fed.Appx. 94, 98 (6th Cir. 2020); *United States v. Austin*, 797 Fed.Appx. 233, 236 (6th Cir. 2019).

B. Lower courts need the Supreme Court's guidance.

If the court intended to resolve the split with *Puckett*, it was not sufficiently clear. In the years since *Puckett*, the Sixth Circuit has treated *Morrison* as good law and continued to rule that acceptance of responsibility can be given to defendants who engage in criminal conduct so long as it is not the criminal conduct to which they pleaded guilty. *See*, *e.g.*, *United States v. Howard*, 570 Fed.Appx. 478, 484 (6th Cir. 2014); *United States v. Harris*, 835 Fed.Appx. 94, 98 (6th Cir. 2020); *United States v. Austin*, 797 Fed.Appx. 233, 236 (6th Cir. 2019); *United States. v. Love*, 518 Fed.Appx. 427, 429 (6th Cir. 2013); *United States v. Finch*, 764 Fed.Appx. 533, 536 (6th Cir. 2019). Only the Supreme Court can resolve the split.

II. U.S.S.G. §3E1.1 only applies to specific criminal conduct, and not bad behavior in general.

The better interpretation of U.S.S.G. §3E1.1 is to say that "'voluntary termination or withdrawal from criminal conduct' to refer to that conduct which is related to the underlying offense." *United States v. Morrison*, 983 F.2d 730, 734 (6th Cir. 1993). The court should grant the

petition for writ of certiorari and reverse the judgment of the 8th Circuit for Avontae Tucker.

A. Specific conduct follows the history of the amendments to the Guideline.

The amendment to U.S.S.G. §3E1.1 in 1991 was an attempt to clear up a prior circuit split. "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States,* 500 U.S. 344, 348 (1991). The Guideline previously stated the court should grant a sentencing reduction "[i]f a defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." U.S. Sentencing Guidelines Manual, app. C (Amendments to the Sentencing Guidelines Manual). As mentioned, there was a circuit split on U.S.S.G. §3E1.1, with some courts finding it only applied to specific conduct and others finding it meant any criminal conduct. Matthew Richardson, *Specific Crime vs. Criminal Ways: Criminal Conduct and Responsibility in Rule 3E1.1*, 54 VAND. L. REV. 205 (2001). The Commission was aware of the split and tried resolving it by changing the language to "[i]f the defendant clearly demonstrates acceptance of responsibility for *his offense*." Acceptance of Responsibility Working Group, United States Sentencing Commission, Acceptance of Responsibility Working Group Report (1991).

With the change in wording from "criminal conduct" to "offense," the Sentencing Commission's goal was to resolve the split in favor of specific conduct, not general criminal disposition. The focus should be on whether a criminal

demonstrates true remorse for that specific crime with which he was charged, and not whether the criminal demonstrates contrition for his criminal disposition in general.

This approach is supported by other Application Notes. Application Note 1(a) does not allow inquiry into all criminal conduct, as it states "a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a)." In fact, "[a] defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection." The Commission also includes U.S.S.G. §1B1.3 in Application Note 1(a), which defines relevant conduct as "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, be willfully caused by the defendant.., that occurred during the commission of the offense of conviction." This again focuses on the specific criminal act that the defendant did and not on any criminal acts he might do in the future.

B. The Application Note contradicts the plain meaning of the text of the Guidelines

"When it comes to the interpretation of the guidelines, Commentary and Application Notes of the Sentencing Guidelines are binding on the courts unless they contradict the plain meaning of the text of the Guidelines." *United States v. Wilks*, 464 F.3d 1240, 1245 (11th Cir. 2006). The commentary in the guidelines should be "treated as an agency's interpretation of its own legislative rule." *Stinson v. United States*, 508 U.S. 36, 44 (1993). As such, they

should be given controlling weight "unless it is plainly erroneous or inconsistent with the regulation." *Id.*

The court should not defer to the Sentencing Commission's commentary in Application Note 1(B) that a factor for acceptance of responsibility is "voluntary termination or withdrawal from criminal conduct or associations." It is true that in the past, the court has said that "commentary is binding on the federal courts even though it is not reviewed by Congress, and prior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation that satisfies the standard we set forth today." However, this was before the court overruled *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Now, courts need not and may not defer to an agency interpretation of the law simply because a statute is ambiguous. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024). Guidelines are reviewed and approved by congress, while commentary is not. *Stinson v. United States*, 508 U.S. 36, 44 (1993). The Sentencing Commission's interpretation of the guideline should have no bearing on the court's interpretation.

The plain language of U.S.S.G. §3E1.1 requires that "the defendant clearly demonstrates acceptance of responsibility for *his offense….*" (emphasis added). It says nothing about behavior post-plea. It refers to no other prior offenses, no future offenses, or anything other than the offense in front of the court at the defendant's sentencing. The Application Note is clearly at odds with this plain language.

III. The question at issue in this case is critically important to thousands of Americans.

Of nearly 80,000 defendants facing federal charges in 2018, fewer than 2% went to trial. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty,* PEW RSCH. CTR. (June 11, 2019). Some of this is the result of U.S.S.G. §3E1.1, which sought to ease the burden on the over-taxed criminal justice system by encouraging guilty pleas. *See* 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 NW. U. L. REV. 1507, 1513 (1997); *see also* U.S.S.G. § E1.1, Application Note 2. Guilty pleas have become "central" to today's criminal justice system. *Missouri v. Frye*, 566 U.S. 134, 145 (2012).

With the number of defendants pleading guilty, most are doing it because they are seeking to gain a reduction under U.S.S.G. § 3E1.1. They are giving up fundamental rights to a jury trial in hopes that they will be shown leniency for accepting the wrong that they committed.. But Tucker's acceptance was taken away due to circumstances that were largely out of his control. Despite his requests to jail staff to be placed *away* from other inmates who sought to harm him, he was left in a precarious position. Criminal defendants awaiting sentencing should not have to choose between defending themselves from others in jail and losing their acceptance of responsibility. This two-to-three-point reduction is meaningful and can reduce a defendant's sentence by multiple years. The court should offer clear guidance on such a fundamental part of the criminal justice system.

CONCLUSION

Avontae Tucker respectfully requests that the Supreme Court grant his petition for a writ of certiorari for all the reasons stated herein.

Respectfully submitted,

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TABLE OF APPENDICES