No. 24-6071

IN THE SUPREME COURT OF THE UNITED STATES

AVONTAE LAMAR TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in considering petitioner's post-offense misconduct while incarcerated at sentencing in determining whether he accepted responsibility under Sentencing Guidelines § 3E1.1.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. Tucker, 22-CR-164 (July 20, 2023)*

* The docket number in the petition (at iii) is incorrect.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 44a-48a) is not published in the Federal Reporter but is available at 2024 WL 3634232.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2024. A petition for rehearing was denied on September 3, 2024. Pet. App. 64a. The petition for a writ of certiorari was filed on November 27, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Iowa, petitioner was convicted on one count of obstructing commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951; one count of possessing and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A); and one count of possessing a firearm as an unlawful user of a controlled substance, in violation of 18 U.S.C. 922(g)(3) and 924(a)(8). Pet. App. 36a-37a. He was sentenced to 192 months of imprisonment, to be followed by five years of supervised release. Id. at 38a-39a. The court of appeals affirmed. Id. at 44a-48a.

1. On September 23, 2022, petitioner entered a convenience store in Des Moines, Iowa, pointed an AR-15 style rifle at the clerk, and demanded the money from the register and safe. Presentence Investigation Report (PSR) ¶¶ 8, 9. Petitioner also forced a customer, at gunpoint, to join the clerk behind the counter. PSR ¶ 9. Petitioner then directed the clerk and the customer to put money, cigarillos, and vape pens into his bag, to which petitioner then added various items that he himself grabbed. PSR ¶ 10. Petitioner left the store, having stolen more than $700 in cash along with other items. Ibid.

A few days later, on September 28, 2022, a law-enforcement officer in Des Moines attempted to stop petitioner while he was driving a vehicle with a suspended license. PSR ¶ 12. Although petitioner initially stopped briefly, he then accelerated his vehicle and fled at high speed. Ibid. The officer pursued petitioner in a fully marked patrol vehicle with the lights and sirens activated. Ibid. Petitioner, however, kept driving. Ibid.

Petitioner subsequently collided with two vehicles, which caused his car to stop running. PSR ¶ 13. Petitioner then fled on foot but was apprehended by officers. Ibid. In the roadway next to petitioner's disabled car, officers found a stolen Glock, model 19, nine-millimeter pistol. PSR ¶ 14. It was loaded with a round in the chamber and 31 rounds in the attached magazine. Ibid. In petitioner's pocket, officers found 35 fentanyl pills. Ibid.

After he was arrested, petitioner agreed to speak with law enforcement. PSR ¶ 16. Petitioner told officers he was a regular drug user, including daily use of marijuana and fentanyl pills. Ibid. Petitioner further admitted to selling drugs. Ibid. He claimed, however, that one of his drug customers actually robbed the convenience store, and that he had been at work at the time. Ibid. But employment records collected by law enforcement refuted petitioner's claim. Ibid.

2. Petitioner was charged in Southern District of Iowa with one count of obstructing commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951; one count of possessing and brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A); and one count of possessing a firearm as an unlawful user of a controlled substance, in violation of 18 U.S.C. 922(g)(3) and 924(a)(8). Pet. App. 1a-4a. He pleaded guilty to the charges without a plea agreement. 22-cr-164 Docket entry No. 42 (Mar. 14, 2023).

During the pendency of the district court proceedings, petitioner was held in the Polk County Jail. PSR ¶ 5. Both before and after pleading guilty, he was cited repeatedly for misconduct, including for fighting and/or physically assaulting other people on five separate occasions. Ibid.

3. The Probation Office prepared a presentence report in which it recommended no reduction for acceptance of responsibility under Sentencing Guidelines § 3E1.1. PSR ¶ 22. The Probation Office noted that during petitioner's post-arrest interview, "he falsely stated he was at work at the time of the [convenience store] robbery[and] that the robbery was committed by one of his drug customers." Ibid. The Probation Office then acknowledged that petitioner "demonstrated acceptance of responsibility" because "he entered a plea of guilty, without the benefit of a

written plea agreement" and "cooperated with the presentence investigation process." Ibid. But it additionally observed that "while detained at the Polk County Jail, [petitioner] incurred several violations both pre- and post-plea involving violence (fights and assaults)." Ibid. And it explained that, "considering the nature of the conviction for a crime of violence and his continued propensity for violence post-arrest," petitioner had "not clearly demonstrated acceptance of responsibility, pursuant to USSG §3E1.1(a)." Ibid.

Petitioner maintained that he deserved a reduction for acceptance of responsibility. D. Ct. Doc. 62 at 5-6 (July 14, 2023). Petitioner acknowledged that he had engaged in the altercations described in the presentence report, including instigating at least some of the fights. Sent. Tr. at 10, 36 (Aug. 22, 2023). He nevertheless argued that his post-offense conduct was not sufficiently "egregious" to warrant a denial of the adjustment, D. Ct. Doc. 62 at 5-6, asserting (inter alia) that he was detained with "rival gang members" despite his request for separate housing, Sent. Tr. 27.

4. At sentencing, the district court adopted the unobjected-to factual information in the presentence report and found that petitioner had failed to show that he merited a reduction for acceptance of responsibility. See Sent. Tr. 19-42.

The court observed that petitioner had "consistently engaged in aggressive behavior, in assaultive behavior, and in other disruptive conduct while in the Polk County Jail" that "is inconsistent with acceptance of responsibility." Id. at 10, 36. And it explained that the "number" and "type of violations [wa]s significant" and "demonstrate[d] a disrespect and disregard for the management of the jail." Id. at 38.

Without a reduction for acceptance of responsibility, petitioner's total offense level was 30, which when combined with his criminal-history category of II resulted in a guidelines range of 108 to 135 months of imprisonment, with an additional 84-month term of imprisonment on the Section 924(c) count to be served consecutively to the sentence imposed on the other counts. Sent. Tr. at 40. The court sentenced petitioner to 192 months of imprisonment, to be followed by five years of supervised release. Pet. App. 38a-39a.

5. The court of appeals affirmed petitioner's conviction and sentence. Pet. App. 44a-48a.

On appeal, petitioner contended that his conduct at the Polk County Jail should not preclude an acceptance-of-responsibility reduction because that conduct was not "criminal." Pet. C.A. Br. 17-21. The court of appeals rejected that argument. Pet. App. 47a-48a.

The court of appeals observed that a defendant carries the burden of proof "to show he is entitled to the reduction" for acceptance of responsibility and that "[a] defendant who enters a guilty plea is not entitled to credit for acceptance of responsibility as a matter of right." Pet. App. 47a-48a (citations omitted). And it reasoned that the district court could properly consider petitioner's "conduct outside the charges, including noncriminal conduct, to determine whether he is truly sorry for his actions," and saw no clear error in the district court's finding that petitioner's misconduct "demonstrated 'a disrespect and disregard for the management of the jail.'" Id. at 48a.

ARGUMENT

Petitioner contends (Pet. 7-15) that the district court erred in denying an acceptance-of-responsibility reduction under Sentencing Guidelines § 3E1.1 based on criminal activity that was not directly related to the crime of conviction. That contention lacks merit. The district court correctly found that petitioner's repeated misconduct in jail, including instigating violent fights, was inconsistent with acceptance of responsibility, and no court of appeals to have addressed the issue would have reached a different result in these circumstances. No further review is warranted.

1. Under the Sentencing Guidelines, a defendant who "clearly demonstrates acceptance of responsibility for his offense" is entitled to a two-level decrease in his offense level. Sentencing Guidelines § 3E1.1(a); see also Puckett v. United States, 556 U.S. 129, 131 (2009) (explaining that Section 3E1.1(a) "directs sentencing courts to decrease a defendant's offense level under the Guidelines by two levels if he 'clearly demonstrates acceptance of responsibility for his offense'"). Entering a guilty plea does not automatically entitle a defendant to an acceptance-of-responsibility adjustment. Sentencing Guidelines § 3E1.1(a) comment. (n.3). While it is evidence of acceptance, "this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility." Ibid.

Here, the district court permissibly considered petitioner's violent conduct at the Polk County Jail when determining whether an acceptance-of-responsibility reduction was warranted. Section 3E1.1(a) imposes no limit on what evidence a district court may consider in determining whether a defendant "clearly demonstrate[d] acceptance of responsibility for his offense," Sentencing Guidelines § 3E1.1(a). To make that determination, a court may properly consider a defendant's post-offense conduct, including whether the defendant has engaged in a "voluntary

termination or withdrawal from criminal conduct or associations," id. comment. (n.1(B)), as well as any "post-offense rehabilitative efforts (e.g., counseling or drug treatment)," id. comment. (n.1(G)).

Courts of appeals regularly treat "post-offense conduct" as "bear[ing] on the 'sincerity of a defendant's professed acceptance of responsibility.'" United States v. McCarthy, 32 F.4th 59, 63-64 (1st Cir. 2022) (citation omitted); accord United States v. O'Neil, 936 F.2d 599, 600 (1st Cir. 1991) (recognizing that a defendant's "later, undesirable, behavior * * * certainly could shed light on the sincerity of a defendant's claims of remorse"). That is because "whether a person has 'demonstrated' acceptance of responsibility turns on both words and deeds." United States v. Mercado, 81 F.4th 352, 357 (3d Cir. 2023) (emphasis added). And "demonstrating one's acceptance of responsibility for a particular offense might include refraining from additional criminal activity." Ibid.

This Court has itself indicated that post-offense conduct can bear on whether a defendant accepted responsibility for his actions. In Puckett, 556 U.S. 129, the defendant engaged in "additional criminal behavior" (a scheme to defraud the post office) while awaiting sentencing for unrelated offenses (armed bank robbery and using a firearm during and in relation to a crime

of violence). Id. at 131-132. The district court found an acceptance-of-responsibility reduction to be unwarranted in light of that post-offense conduct. Id. at 133. On appeal, petitioner argued for the first time that the government had breached a term of its plea agreement by arguing at sentencing against the acceptance-of-responsibility reduction. Ibid. In discussing the fourth element of the plain error standard -- whether the error seriously affected the fairness, integrity, or public reputation of judicial proceedings -- this Court observed that when a defendant "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." Id. at 143 (emphasis omitted).

2. Petitioner contends (Pet. 11-14) that courts may not consider conduct, including criminal conduct, that is unrelated to the underlying offense. But as courts of appeals have recognized, the text of Section 3E1.1(a) includes no such limitation. See, e.g., United States v. Berry, 2024 WL 2206502, at *5 (4th Cir. May 16, 2024) (per curiam) ("[T]he text of § 3E1.1(a) does not preclude district courts from considering criminal conduct that is unrelated to the offense of conviction."), cert. denied, 145 S. Ct. 342 (2024); United States v. Mara, 523 F.3d 1036, 1038 (9th Cir. 2008) ("[N]either the text of U.S.S.G. § 3E1.1(a) nor the

Application Notes restrict consideration of criminal conduct to 'related' criminal conduct or even to conduct of the same nature as the offense."); United States v. Ceccarani, 98 F.3d 126, 129 (3d Cir. 1996) (recognizing that "§ 3E1.1 does not contain any restriction against considering criminal conduct unrelated to the specific crime charged"), cert denied, 519 U.S. 1155 (1997).

Petitioner primarily bases his contrary contention on Section 3E1.1(a)'s requirement that "the defendant clearly demonstrate[] acceptance of responsibility for his offense." Sentencing Guidelines § 3E1.1(a) (emphasis added). But "demonstrating one's acceptance of responsibility for a particular offense might include refraining from additional criminal activity" beyond activity identical to the offense of conviction. Mercado, 81 F.4th at 357. "Criminal conduct, whatever its nature, is a powerful indicium of a lack of contrition." United States v. Jordan, 549 F.3d 57, 61 (1st Cir. 2008). And in Puckett, this Court viewed it "ludicrous" to suggest that that a defendant who continued to engage in criminal activity had accepted responsibility for his offense, even though the defendant's post-offense conduct, which involved a scheme to defraud, differed in kind from the violent offenses for which he was convicted. See 556 U.S. at 143.

Petitioner does not dispute that aspects of the application notes to Section 3E1.1(a) -- which highlights considerations such

as a defendant's "voluntary termination or withdrawal from criminal conduct or associations" and "post-offense rehabilitative efforts," Sentencing Guidelines § 3E1.1(a), comment. (n.1(B) and (G)) -- cut against his position because they would naturally encompass postconviction conduct. And contrary to his assertion (Pet. 14), nothing in the text of the Guideline precludes courts from taking such considerations into account. To the contrary, a defendant's acceptance of responsibility "for his offense," Sentencing Guidelines § 3E1.1(a), would naturally take account of his commitment to cleaning up his act by disassociating from criminal behavior and embracing rehabilitation. And here, petitioner's "disrespect and disregard for the management of the jail" showed his lack of such a commitment. Pet. App. 48a (citation omitted).

3. The vast majority of the courts of appeals agree that a defendant's post-offense conduct, even if unrelated to the crime of conviction, can be relevant to determining whether the defendant has accepted responsibility under Section 3E1.1(a). See, e.g., Jordan, 549 F.3d at 60-61 (1st Cir.); United States v. Fernandez, 127 F.3d 277, 285 (2d Cir. 1997); Ceccarani, 98 F.3d at 129-130 (3d Cir.); 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. Arellano, 291 F.3d 1032, 1035 (8th Cir. 2002);

Mara, 523 F.3d at 1038-1039 (9th Cir.); United States v. Prince, 204 F.3d 1021, 1023-1024 (10th Cir. 2000), cert. denied, 529 U.S. 1121 (2000); United States v. Pace, 17 F.3d 341, 343-344 (11th Cir. 1994), cert. denied, 522 U.S. 822 (1997); see also Berry, 2024 WL 2206502, at *5 (4th Cir.).

The Sixth Circuit, in turn, agrees that a district court may consider whether the defendant "had voluntarily terminated or withdrawn from criminal conduct" under Section 3E1.1. United States v. Lawson, 266 F.3d 462, 466 (2001), cert. denied, 534 U.S. 1147 (2002). It has stated, however, that such conduct must be "related to the underlying offense." United States v. Morrison, 983 F.2d 730, 735 (6th Cir. 1993). But it broadly considers conduct to be related to the offense -- and thus properly considered in the district court's acceptance-of-responsibility determination -- if it is "of the same type as the underlying offense," "the motivating force behind the underlying offense," "related to actions toward government witnesses concerning the underlying offense," or "involve[s] an otherwise strong link with the underlying offense." Id. at 735 (emphases omitted).

This case does not implicate any narrow disagreement between the Sixth Circuit and others, because petitioner's post-offense conduct was "of the same type as the underlying offense." Morrison, 983 F.2d at 735 (emphasis omitted). Petitioner was

convicted of, among other things, Hobbs Act robbery and brandishing a firearm in furtherance of a crime of violence in which he pointed his rifle at multiple people. PSR ¶¶ 8-10. Petitioner then continued his violent behavior while incarcerated by committing numerous assaults -- both before and after his plea agreement -- including multiple fights that he himself instigated. See p. 4, supra. And the district court accordingly adopted the presentence report's finding that petitioner was not entitled to a reduction for acceptance of responsibility given "the nature of the conviction," which was "a crime of violence," and "his continued propensity for violence post-arrest." PSR ¶ 22; see Sent. Tr. at 10, 36.

Petitioner, therefore, would not be entitled to relief even in the Sixth Circuit, as his post-offense conduct "was evidence that [he] 'had not turned away from the lifestyle that had motivated his offense.'" United States v. Redmond, 475 F. Appx. 603, 613 (2012) (quoting Morrison, 983 F.3d at 734); see, e.g., United States v. Finch, 764 Fed. Appx. 533, 535 (6th Cir. 2019) (unpublished) (finding no clear error in the denial of an acceptance-of-responsibility reduction where the district court found that a defendant's "violent attack on a fellow inmate" and theft of "some of his cellmate's property during or shortly after the attack" was "'of the same type as the underlying offense'" of

Hobbs Act robbery (citation omitted)); United States v. Smith, 74 F.3d 1241, 1996 WL 20501, at *2 (6th Cir. 1996) (Tbl.) (per curiam) (treating "[r]epeated assaults" as sufficiently similar, even when they involved different persons and circumstances).

3. At all events, even if this case did implicate a lopsided circuit conflict, it nevertheless would not warrant this Court's review. This Court ordinarily does not review disagreements in the courts of appeals about Guidelines issues because the Sentencing Commission can amend the Guidelines to eliminate any conflict or correct any error. See Braxton v. United States, 500 U.S. 344, 347-349 (1991). Congress has charged the Commission with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Id. at 348 (citing 28 U.S.C. 994(o) and (u)); see United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."). Review by this Court of Guidelines decisions is particularly unwarranted in light of Booker, which rendered the Guidelines advisory only. 543 U.S. at 243.

No sound reason exists to depart from that practice here. The Commission has carefully attended to Section 3E1.1, including through a recent amendment to resolve a separate disagreement in the circuits. See Sentencing Guidelines App. C, Amend. 775 (Nov. 1, 2023); see also Sentencing Guidelines App. C, Amend. 459 (Nov. 1, 1992); United States Sentencing Guidelines, Acceptance of Responsibility Working Group (1991). And to the extent petitioner criticizes (Pet. 14) courts for relying on the Guidelines commentary in determining what conduct may be considered in the acceptance-of-responsibility determination, the Commission has announced that one of its policy priorities is the "[c]ontinuation of its multiyear study of the Guidelines Manual to address case law concerning the validity and enforceability of guideline commentary." 88 Fed. Reg. 60,536, 60,537 (Sept. 1, 2023) (emphasis omitted). This Court's intervention is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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