

No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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TONY RAY PLEDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED FOR REVIEW**

- I. WHETHER PRINCIPLES OF DUE PROCESS PERMIT A SENTENCING COURT TO APPLY CRIMINAL HISTORY POINTS FOR A CONVICTION THAT OCCURRED SUBSEQUENT TO THE ORIGINAL SENTENCE BUT PRIOR TO RESENTENCING ON REMAND.

*United States v. Booker*, 543 U.S. 220 (2005)

*United States v. Tidwell*, No. 15-1161 (8<sup>th</sup> Cir. July 1, 2016)

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### **CITATION TO OPINION BELOW**

The Opinion of the United States Eighth Circuit Court of Appeals in the case of *United States v. Pledge*, No. 16-4149 (8<sup>th</sup> Cir. 02/09/2018) is attached as Appendix A. The Amended Judgment in a Criminal Case by the Honorable Judge Linda R. Reade of the United States District Court for the Northern District of Iowa (10/27/2016) is attached as Appendix B. The Sentencing Hearing Minutes (10/26/2016) is attached as Appendix C.

### **JURISDICTIONAL STATEMENT**

The Eight Circuit Court of Appeals entered its ruling and opinion affirming the ruling of the United States District Court for the Northern District of Iowa on February 9, 2018. This Court's jurisdiction is appropriate under 28 U.S.C. § 1254(1), Mr. Pledge having asserted below and asserting in this Petition the deprivation of rights secured by the United States Constitution.

Jurisdiction of the United States Supreme Court is invoked under Supreme Court Rules 10 and 11 (hereinafter, "Rule 10" and "Rule 11"). Rule 10 provides that "a review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore." Jurisdiction of the United States Supreme Court is appropriate in this case pursuant to Rule 10(c) because the United States Court of Appeals has decided an important question of law that has not been, but should be, settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

The issues presented by this appeal involve the constitutional provisions of the Fifth Amendment to the United States Constitution. The Fifth Amendment provides:

Fifth Amendment:

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.

## **STATEMENT OF THE CASE**

In 2015, Tony Ray Pledge pleaded guilty to unlawful possession a firearm in violation of 18 U.S.C. §922(g)(1). The United States Probation Office determined that Pledge qualified for an enhanced sentence under the Armed Career Criminal Act (“ACCA”) due to prior drug convictions and a prior burglary conviction. With that classification, Pledge was subject to an advisory sentencing guidelines range of 188 to 235 months and a mandatory minimum sentence of 15 years’ imprisonment. On June 3, 2015, the district court sentenced Pledge to 188 months’ imprisonment. Pledge appealed his sentence to the 8<sup>th</sup> Circuit Court of Appeals, arguing that his prior conviction for burglary did not qualify as a violent felony under the ACCA. In light of the Supreme Court’s decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), which supported Pledge’s position that the district court erred in relying on

his burglary conviction to classify him as an armed career criminal, the appellate court vacated Pledge's sentence and remanded the case for resentencing.

Shortly after Pledge's original sentencing in 2015, but before his resentencing, Pledge was convicted of contempt of court for violation of the terms and conditions of his probation related to a 2013 conviction for driving while intoxicated. This contempt conviction resulted in a ninety-day jail sentence. In light of these events, the Probation Office added two additional points to Pledge's total criminal history score in the amended presentence investigation report prepared for Pledge's resentencing. After this adjustment, the amended PSR recommended an offense level of 21, a criminal history category of V, and a guidelines range of 70 to 87 months' imprisonment.

Pledge objected to the reliance on the contempt conviction in the criminal history calculation, arguing that because that conviction occurred after his initial sentencing, it could not be included. Excluding the 2015 conviction, Pledge argued that he should have a criminal history category of IV and a guidelines range of 57 to 71 months. The Government in turn argued that the amended PSR calculated Pledge's criminal history correctly because (1) the contempt conviction was not a new conviction for sentencing purposes but rather part of the total sentence applied to the criminal history scoring of the original 2013 conviction, and (2) the district court is permitted to consider new convictions on resentencing. Additionally, the Government asked the court to depart upward to criminal history category VI no matter how it resolved Pledge's underlying objection.

The district court determined that the PSR accurately calculated Pledge's offense level as 21 and his criminal history category as V, but it ultimately found that the resulting guidelines range of 70 to 87 months was insufficient. The court found that Pledge's criminal history was underrepresented and stated that it "would give the very same sentence, and it would be variance at that point, computing, and taking into account the guidelines, but ultimately finding that the other 3553(a) factors weighed more heavily." The court then sentenced Pledge to 96 months' imprisonment. Pledge filed a timely notice of appeal

In his appeal to the Eighth Circuit Court of Appeals, Pledge argued that because his State of Iowa conviction for contempt occurred after his original sentencing on the instant offense, it was not a "prior sentence" for purposes of his criminal history calculation. To rule otherwise is a violation of Pledge's right to due process of law guaranteed by the Fifth Amendment.

In its ruling of February 9, 2018, the Eighth Circuit Court of Appeals affirmed the sentence imposed by the district court. The Eighth Circuit reasoned that, even if there was an error, the error was harmless because the district court would have arrived at the 96-month sentence regardless of whether Pledge had a criminal history category of V or VI. Mr. Pledge now timely petitions the United States Supreme Court for a Writ of Certiorari.

## REASONS FOR GRANTING THE PETITION

- I. THE SUPREME COURT SHOULD REVIEW THIS MATTER IN ORDER TO DETERMINE WHETHER PRINCIPLES OF DUE PROCESS PERMIT A SENTENCING COURT TO APPLY CRIMINAL HISTORY POINTS FOR A CONVICTION THAT OCCURRED SUBSEQUENT TO THE ORIGINAL SENTENCE BUT PRIOR TO RESENTENCING ON REMAND.

This case presents an issue of legal importance that transcends the facts and the parties involved. Pledge asks the Honorable Court to recognize and resolve the fact that the circuits are split on the question of whether a sentencing court should add criminal history points for any unrelated sentences imposed after the initial sentencing but before resentencing.

### **1. Circuit Split: “Prior Sentence” at Resentencing on Remand**

The Eighth, Ninth, and Eleventh Circuits have held that the subsequent points should be added. *United States v. Tidwell*, 827 F.3d 761, 764 (8th Cir. 2016) (“At that time, Tidwell's [intervening] conviction was plainly a ‘prior sentence,’ that is, ‘a sentence imposed prior to sentencing on the instant offense.’” (quoting U.S.S.G. § 4A1.2 cmt. 1)); *United States v. Klump*, 57 F.3d 801, 803 (9th Cir. 1995) (“[T]he general rule that resentencing is de novo applies and the court correctly found that the state sentence was a ‘prior sentence.’”); *United States v. Burke*, 863 F.3d 1355 (11<sup>th</sup> Cir. 2017) (“[That a] vacated sentence is void and resentencing occurs de novo establishes that a “prior sentence” under section 4A1.1(a) is any sentence imposed before resentencing.”)

In contrast, the First Circuit, has held that “the most sensible reading is that the [G]uidelines' reference to ‘prior sentence’ means, in this context, a sentence

which is prior to the original sentence which was vacated and remanded only for resentencing.” *United States v. Ticchiarelli*, 171 F.3d 24, 35 (11<sup>th</sup> Cir. 1998). The First Circuit based its decision on its mandate rule, which limits resentencing on remand to only those portions of the sentence subject to the mandate of the First Circuit. *Id.* The First Circuit ruling recognizes the difference between a *de novo* resentencing and simply correcting a sentence on remand. *Id.* This is an important distinction and should have affected the result in this case as well as similar cases in differing jurisdictions.

Given the fundamental right to due process at stake, and the right to liberty that it protects, the issue is an important and recurring one. This case presents a vehicle for the Court to resolve the Circuit split. The guidance of the Supreme Court on sentencing matters is especially important in light of the district court’s decision-making ability post-*Booker*. *United States v. Booker*, 543 U.S. 220 (2005).

## **2. A Subsequent Conviction is Not a “Prior Sentence”**

The Eighth Circuit erred by failing to rule that Pledge’s contempt conviction was not a prior sentence. The USSG defines Prior Sentence under §4A1.2(a): A “prior sentence” is “any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.” A conviction counts as a sentence even if it was for conduct that occurred after the offense of conviction. *United States v. Lopez*, 349 F.3d 39, 41 (2d Cir. 2003).

As explained above, the Circuit Courts are divided over whether to consider a sentence imposed after the original sentencing but before re-sentencing. *Compare United States v. Klump*, 57 F.3d 801 (9th Cir. 1995) (can consider), and *United States v. Bleike*, 950 F.2d 214 (5th Cir. 1991) (not plain error to consider), with *United States v. Ticchiarelli*, 171 F.3d 24 (1<sup>st</sup> Cir. 1999) (improper to consider intervening sentence under law of the case doctrine).

The 8<sup>th</sup> Circuit recently addressed this issue- whether a conviction that occurred after the original sentence but prior to resentencing can be considered at resentencing. *See United States v. Tidwell*, No. 15-1161 (8<sup>th</sup> Cir. July 1, 2016). However, while the 8<sup>th</sup> Circuit acknowledged the issue, they declined to answer it because the sentencing was *de novo* in that case. The resentencing in Pledge's case however is not *de novo*. The 8<sup>th</sup> Circuit discussion of this issue in *Tidwell* is directly applicable to Mr. Pledge's case.

In *Tidwell*, the 8<sup>th</sup> Circuit Court of Appeals stated that it had not previously considered whether a district court could properly include a conviction imposed after initial sentencing in determining a defendant's criminal history category at his resentencing. *Id.* The appellant urged the court to follow the First Circuit court's reasoning in *United States v. Ticchiarelli*, 171 F.3d 24 (1st Cir.), cert. denied, 528 U.S. 850 (1999). In *Ticchiarelli*, the First Circuit vacated the initial sentence and remanded for resentencing. *Id.* On remand, the district court considered a conviction imposed during the intervening period to be a "prior sentence" under U.S.S.G. § 4A1.2(a)(1). *Id.* The First Circuit reversed the lower court on that issue.

*Id.* The First Circuit Court of Appeals found that “the most sensible reading is that the guidelines’ reference to ‘prior sentence’ means, in this context, a sentence which is prior to the original sentence which was vacated and remanded only for resentencing.” *Id.* at 35.

The Eighth Circuit Court of Appeals declined to follow the First Circuit’s reasoning in *Ticchiarelli* because the context of the *Tidwell* case was distinguishable. The Eighth Circuit states, “Tidwell was not sentenced on remand from this court. Rather, the district court granted him a *de novo* resentencing as post-conviction relief under 28 U.S.C. § 2255.” *United States v. Tidwell*, No. 15-1161 (8<sup>th</sup> Cir. July 1, 2016).

The Eighth Circuit went on to reference its less restrictive approach in construing the scope of mandates when remanding for resentencing. *Id.* (citing *United States v. Pepper*, 570 F.3d 958, 963-64 (8th Cir. 2009), *aff’d* on this ground, *rev’d* on other grounds, *Pepper*, 562 U.S. at 506-07). The Eighth Circuit then states that when “a resentencing is *not* the result of an appellate court remand, ‘a district court proceeding under § 2255 may vacate the entire sentence so that the district court can reconfigure the sentencing plan to satisfy the sentencing factors in 18 U.S.C. § 3553(a).’” *Id.* (citing *United States v. Parker*, 762 F.3d 801, 806 (8th Cir. 2014) (quotation and alterations omitted). Therefore, the rule appears to be that upon a *de novo* resentencing a subsequent sentence may be counted as a prior sentence. However, when the sentence is simply the result of an appellate court

remand to correct an error sentencing, then a subsequent sentence may not be counted as a prior sentence.

In the present case, Mr. Pledge was resentenced on remand to correct the district court's error in applying the ACCA. Thus, Pledge should have simply been resentenced without the application of the ACCA. Pledge's sentence was remanded on direct appeal, not vacated under §2255. This is not a wholesale *de novo* resentencing in which the entire criminal history should be recalculated. Because his sentence was on remand it is a violation of fundamental fairness to count a conviction that took place after his original sentence. Counting the contempt conviction as a prior sentence not only violates due process but impermissibly convolutes the interpretation of the words "prior sentence."

Thus, Pledge argues that he should have received only 1 point for the original OWI under §4A1.1(c) and that point does not count in the total because only 4 points can be added under §4A1.1(c). There should be no points added for the contempt because it is not a prior sentence.

This is a significant and important issue for Mr. Pledge because the addition of the two points under 4A1.1(b) boosts him from 9 criminal history points to 11 criminal history points and results in a criminal history category of V instead of criminal history category IV. The guideline range then changes from 70-87 months (base 21, V) to 57-71 months (base 21, IV).

### 3. Issue of Exceptional Importance

Not only is this a significant issue for Mr. Pledge as explained above, but this is also a significant and important issue for other similarly situated defendants, because depending on which district is deciding their sentencing calculation, they will end up with a differing result. Due to the significant changes caused by the decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), many defendants may find themselves being sentenced on remand and in a virtually identical situation to Pledge. Fundamental fairness, due process, and the protection of the right to liberty demands that the Honorable Court address this circuit court split and grant Mr. Pledge's request for a Writ of Certiorari.

### CONCLUSION

For the foregoing reasons it is respectfully requested that the Supreme Court grant this Petition for Writ of Certiorari.

Respectfully submitted this 5th day of March 2018.

/s/ Dennis E. McKelvie

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## **APPENDIX A**

Opinion of the United States Eighth Circuit Court of Appeals, *United States v. Pledge*, No. 16-4149 (8<sup>th</sup> Cir. 02/09/2018).

## **APPENDIX B**

Amended Judgment in a Criminal Case by the Honorable Judge Linda R. Reade of the United States District Court for the Northern District of Iowa (10/27/2016).

## APPENDIX C

Sentencing Hearing Minutes (10/26/2016)