No. 24-6071

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

REPLY IN SUPPORT FOR PETITION FOR A WRIT OF CERTIORARI

PARRISH KRUIDENIER, L.L.P.
Alfredo Parrish
Counsel of Record
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email:aparrish@parrishlaw.com

COUNSEL FOR PETITIONER

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PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION BRIEF

Petitioner files this Reply brief to address certain legal arguments made in Respondent's Brief in Opposition to Petitioner's Petition for a Writ of Certiorari.

I. Statement of Additional Facts

The Government's Brief in Opposition recites the district court's conclusion that Petitioner was involved in multiple disciplinary incidents while he was incarcerated at the Polk County Jail. Resp. Br. at 5–6. But the Government does not explain the nature of these "offenses," does not explain whether they occurred before or after Petitioner submitted his guilty plea, and does not explain how each offense considered individually or together justifies taking away Petitioner's three-point reduction under U.S.S.G. §3E1.1 for acceptance of responsibility.

The majority of Petitioner's disciplinary infractions at the Polk County Jail occurred before his guilty plea. Between September 28, 2022 and March 14, 2023, the Polk County Jail issued Petitioner 11 different disciplinary violations. On March 14, 2023, Petitioner pled guilty to Count I, Hobbs Act Robbery, Count II, possessing and brandishing a firearm in furtherance of a crime of violence, and Count III, unlawful user in possession of a firearm. Petitioner pled guilty to these counts on March 14, 2023, without the benefit of plea negotiations to potentially reduce his charges and/or sentence. After the court entered his guilty plea, the jail issued Petitioner five additional disciplinary infractions.

On April 9, 2023, Petitioner's cellmate used an extension cord to spark the outlet in the cell he shared with Petitioner. 22-cr-164 Docket entry No. 61-1, at 18 (July 13, 2023). This created a smokey smell, and an officer went to investigate. *Id.* Upon reviewing the CCV footage, the officer saw it was Petitioner's cellmate sparking the electrical outlet in the cell. *Id.* This officer issued discipline to both Petitioner and his cellmate, despite the fact Petitioner had not violated any jail policies. *Id.*

On April 10, 2023, Petitioner walked past a correctional officer and complied with a pat search. *Id.* at 21. Another inmate yelled something at Petitioner about his friends being murdered in a recent gang-related shooting, which upset Petitioner. *Id.* Both Petitioner and the inmate yelling at him were restrained before a fight started. *Id.* Jail staff cited Petitioner for both fighting and "assaulting any person" even though no blows were exchanged. *Id.* While Petitioner was disciplined, the other inmate who made the inflammatory comments was not. *Id.*

On May 9, 2023, jail staff observed the Petitioner and four other inmates in the recreation yard. *Id.* at 22-23. Jail staff caught the other inmates attempting to light a fire and seized contraband. *Id.* These inmates were written up for smoking and charged criminally for their actions. *Id.* Petitioner was not involved in or disciplined for this incident, but this report was introduced as part of the Government's sentencing exhibits to show that Petitioner's disciplinary history at jail was "extensive."

Later on May 9, 2023, Petitioner was assaulted by another inmate, a rival gang member, who was throwing closed-fist punches at Petitioner. *Id.* at 25–28. To avoid serious harm, Petitioner defended himself and punched his

assailant back. *Id.* When a correctional officer intervened, the Petitioner's attacker tried to land more blows on Petitioner and refused to obey the officer's commands. *Id.* Petitioner and his assailant were written up for this incident. *Id.*

Lastly, on May 24, 2023, a correctional officer noticed another inmate attempting to swing at Petitioner and punch him. *Id.* at 29-30. Before the officer could intervene, a third inmate got between Petitioner and his assailant. *Id.* Petitioner did not take any actions towards this assailant or make any attempts to harm his assailant. *Id.* When officers arrived, Petitioner obeyed their commands. *Id.* Jail staff found Petitioner was engaged in fighting and disrupting the orderly operation of the jail. The Petitioner was not found guilty for these citations.

The Petitioner was never charged criminally for any disciplinary incidents. *See United States v. Arellano*, 291 F.3d 1032 (8th Cir. 2002) (affirming the district court's decision not to grant the acceptance of responsibility reduction when the defendant incurred a new charge of assaulting a police officer). And Petitioner was not out on pretrial release committing new crimes like the defendant in *Puckett v. United States*, 556 U.S. 129 (2009).

Petitioner's sentencing hearing was on July 20, 2023. Early in the proceeding, the court considered the enhancements the government was seeking. Sent. Tr. at 10–19. One enhancement the government sought was under U.S.S.G. § 2B3.1(b)(4)(B). The court found that Petitioner's actions towards the victims were not forcible or violent under the meaning of the § 2B3.1(b)(4)(B). Sent. Tr. at 16–19. The court declined to apply this enhancement.

The Petitioner testified during the sentencing hearing. He explained that jail staff placed him in a jail pod near members of rival gangs. Sent. Tr. At 27. Petitioner asked to be placed in solitary confinement, also known as the hole, to stay away from these gang members. *Id.* Petitioner did not dispute that the infractions occurred, but he explained that all the incidents he was involved in occurred with members of rival gangs that were hostile towards him. *Id.* at 27–28, 34. Respondent further stated that he was accepting "full responsibility" for his underlying charges as well as for all of his actions in the Polk County Jail. *Id.* at 28. When Petitioner spoke to the court, he apologized for his actions, reflected on his time being incarcerated, and he discussed the impact losing his friends to gang violence had on him. *Id.* at 48–51.

II. Petitioner Would Receive the Reduction Under a More Just Interpretation of the Guidelines

In its opposition brief, the Government argues that "Petitioner would not be entitled to relief, even in the Sixth Circuit." (Resp. 14-15). But the Government does not apply the same analysis that the Sixth Circuit did in *United State v. Morrison*, 983 F.2d 730, 735 (6th Cir. 1993) to reach that conclusion. Following the comments of U.S.S.G. §3E1.1, the court in *Morrison* laid out factors that must be considered in determining whether a criminal defendant has voluntarily withdrawn from criminal conduct related to the underlying offense. *Id.* at 735. These factors are: (1) whether the subsequent conduct is of the *same type* as the underlying offense; (2) whether the subsequent conduct has the *same motivating force* as the underlying offense; (3) whether the subsequent conduct is related towards *government witnesses* concerning the underlying offense; and (4) whether the subsequent conduct has a *strong link*

to the underlying offense. Under *Morrison*, if these factors on balance do not show the subsequent conduct is related to the underlying offense, then a sentencing court is not supposed to consider these crimes when deciding whether to apply the reduction under U.S.S.G. § 3E1.1. *United States v. Howard*, 570 Fed. Appx. 478, 484 (6th Cir. 2014); *see United States v. Ackerman*, 246 Fed. Appx. 996 (6th Cir. 2007) (finding subsequent marijuana possession "unrelated" to underlying charge of felon in possession of a firearm). This view is correct, and Petitioner would be entitled to the reduction under this interpretation and analysis.

A. Same type

Contrary to the Government's assertion, Petitioner's conduct in the Polk County Jail was not the same type of conduct as his crimes of conviction.

The Government relies in part on *United States v. Finch*, 764 Fed. Appx. 533, 535 (6th Cir. 2019) to argue Petitioner's criminal conduct is identical to his conduct in the Polk County Jail. In *Finch*, a defendant pled guilty to, *inter alia*, committing Hobbs act robbery. *Id.* at 534–35. While awaiting sentencing, the defendant assaulted his cellmate so severely that the victim's jaw was broken in two places. *Id.* at 535. The defendant then stole his cellmate's property after the attack. *Id.* During sentencing, the district court stated: "the assault activity, the theft activity of the defendant so parallels the instant charge in terms of a mindset and in terms of the way the assault was carried out that I think it clearly is indication of not accepting responsibility." *Id.* at 536. In deciding these acts were related criminal conduct, the court highlighted the assault occurred in conjunction with the theft. *Id.*

These facts are markedly different than Petitioner's actions in this case. The fights Petitioner was involved in after he pled guilty were not initiated by him. In some instances, Petitioner fought back in order to protect himself. This shows that his mindset from the underlying criminal acts and these fights are not close to being the same..Petitioner never tried to steal anything from the inmates who attacked him or anyone else in the jail. So contrary to the Government's brief, merely fighting is not enough to establish that Petitioner's actions are related to his crimes.

The government also relies in part on *United States v. Smith*, 74 F.3d 1241, 1996 WL 20501 (6th Cir. 1996) (per curiam). In *Smith*, a defendant pled guilty to assaulting a federal park ranger. *Id.* at *2. Then, while awaiting sentencing, the defendant committed various assaults against multiple victims. *Id.* The Sixth Circuit upheld the decision not to grant the reduction for accepting responsibility because the subsequent assaults were the same conduct the defendant pled guilty to, and they were carried out in a similar manner to the underlying charge. *Id.* Here, the Petitioner did not plead guilty to assault, and many of his jail disciplinary infractions are not violent in nature.

This case is more like *United States v. Banks*, 252 F.3d 801, 807 (6th Cir. 2001). In *Banks*, a defendant pled guilty to drug trafficking and firearm possession offenses. *Id.* After pleading guilty, this defendant was charged with destruction of property—similar to Petitioner's disciplinary infraction when his cellmate sparked the outlet in their cell. *Id.* The Sixth Circuit reiterated that only post-plea conduct that was *related* to the crimes of

conviction were proper considerations when applying the acceptance of responsibility reduction. *Id.*

Therefore, under Sixth Circuit precedent, Petitioner's conduct would not be considered the "same type" of conduct as his crimes, weighing against a finding his actions in the Polk County Jail are "related" to the underlying offenses.

B. Same Motivating Force

Post-plea conduct can be "related to" underlying criminal conduct when both acts have the same motivating force. This factor usually comes into play when a defendant is convicted of a drug crime, then continues to use drugs or commits additional drug crimes while awaiting sentencing. *United States v. Redmond*, 475 Fed. Appx. 603, 613 (6th Cir. 2012). In *Redmond*, a defendant plead guilty to possession of methamphetamine and possession of a listed chemical with knowledge it would be used to manufacture a controlled substance. *Id.* at 606. While in prison, the defendant then attempted to smuggle methamphetamine into the prison. *Id.* at 613. The motivating force for the methamphetamine possession and the attempt to smuggle methamphetamine into the prison were the same—to fuel the defendant's methamphetamine addiction. At sentencing, the district court did not award the acceptance of responsibility reduction, and the Sixth Circuit upheld that decision. *Id.*

In *United States v. Wagers*, a defendant pled guilty to aiding and abetting the manufacturing of counterfeit U.S. currency. 505 Fed. Appx. 541, 542 (6th Cir. 2012). While awaiting sentencing, the defendant violated the terms of pretrial release by testing positive for methamphetamine. *Id.* Uncontested facts in the

presentence report indicated the defendant was addicted to multiple controlled substances, and that the purpose of the counterfeit money scheme was to obtain more drugs. *Id.* Like *Redmond*, the reduction for acceptance of responsibility was not given, because the motivation for counterfeiting money and using methamphetamine was the same—to fuel the defendant's on-going drug addiction.

Petitioner's actions in Polk County Jail do not have the same motivating force as his underlying crimes. The motivation for the fights Petitioner was involved in after he pled guilty was self-defense. When other inmates attacked him, Petitioner fought back only to protect himself. There was no criminal or malicious motivation. And the actions of his fellow inmates (sparking the outlet and lighting a fire) were taken based on their own motivations, not the Petitioner's.

C. Government Witnesses

In the Sixth Circuit, when a defendant threatens government informants or witnesses while awaiting sentencing, the § 3E1.1 reduction can be denied. *Morrison*, 983 F.2d at 734 (citing *United States v. Barrett*, 890 F.2d 855, 868–69 (6th Cir. 1989)). None of the individuals the Petitioner was incarcerated with or that attacked him are government informants or witnesses. The identities of Petitioner's fellow inmates involved in these incidents do not show Petitioner's conduct is related to his underlying crimes at all. This factor does not weigh in favor of finding Petitioner's conduct in Polk County Jail being related to his underlying offenses.

D. Strong Link

When there is a "strong link" between the underlying charges and subsequent conduct, this can support a finding that the subsequent conduct is "related" to the underlying offense. While the cases following *Morrison* restate that the strong link between these actions should be considered, there has been little case law defining what is considered a strong link. The *Morrison* court cited two out-of-circuit cases as examples of when there is a strong link—*United States v. Jordan*, 890 F.2d 968, 973-74 (7th Cir. 1989) and *United States v. Davis*, 878 F.2d 1299, 1300-01 (11th Cir. 1989). Both cases involved defendants who pleaded guilty to drug possession and distribution crimes, who then continued to use and distribute drugs while out on bond awaiting sentencing. *See Morrison*, 983 F.2d at 734-35 (summarizing cases). Regarding *Davis*, the court found a strong link between the underlying crime of cocaine distribution and regularly using cocaine while awaiting sentencing. 878 F.2d at 1300-01. In *Jordan*, the sentencing court found, and the defendant did not dispute, that the defendant was using his status as a defendant awaiting sentencing to pursue additional drug trafficking opportunities. 890 F.2d at 974.

The strong link seen in *Davis* and *Jordan* is missing here. While some of Petitioner's disciplinary infractions involved members of rival gangs, none of these individuals were involved in, targeted by, or otherwise affected by Petitioner's crimes of conviction. Petitioner did not seek out these individuals to assault them because they were rival gang members. The opposite occurred. Petitioner was the target of these fights.

Based on all of the factors set forth in *Morrison*, Petitioner would be entitled to the reduction based on his

acceptance of responsibility. The district court's ruling is plain error under the Sixth Circuit approach.

III. SCOTUS Should grant Certiorari and Resolve a Circuit Split that has Persisted for 30 Years in the Most Widely Applied Reduction in Federal Criminal Cases

According to the Government, this case "does not warrant" review in part because the Sentencing Commission can review and revise the sentencing guidelines and clarify potential circuit splits. Resp. Br. at 15. While it is true the Commission can revise the guidelines in light of caselaw interpreting the guidelines, this does not mean any appeal regarding the guidelines and their application is immune from this Court's review. The Court has reviewed circuit splits regarding competing interpretations of the guidelines post *Booker*. *See*, *e.g., Peugh v. U.S.*, 569 U.S. 530 (2013).

The need to address competing guidelines interpretations is far greater now than following *Booker* because of the Court's decisions in *Kisor v. Wilkie*, 588 U.S. 558, 563-64 (2019) and *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). The circuit courts have just begun to grapple with *Loper Bright*. *See, e.g.*, *United States v. Rutherford*, 120 F.4th 360, 379 (3d Cir. 2024) (citing *Loper Bright* as "instructive" when interpreting guidelines policy statements); *U.S. v. Boler*, 115 F.4th 316 (4th Cir. 2024); *United State v. Chandler*, 114 F.4th 240, 241 (3d Cir. 2024) (Bibas, J., dissenting from denial of rehearing en banc). There is a widening circuit split on how far *Kisor* modifies *Stinson*'s direction to follow commentary unless it is plainly erroneous. Several circuits have said that there is no change to *Stinson*. *United States v. Moses*,

23 F.4th 347, 349 (4th Cir. 2022); *United States v. Vargas*, 74 F.4th 673, 679 (5th Cir. 2023) *cert. denied*, —— U.S. —— —, 144 S.Ct. 828 (2024); *United States v. Broadway*, 815 Fed. Appx. 95, 96 (8th Cir. 2020); *United States v. Maloid*, 71 F.4th 795 (10th Cir. 2023); Other circuits have said that commentary deserves only the limited deference afforded by *Kisor*. *United States v. Nasir*, 17 F.4th 459, 470-71 (3d Cir. 2021) (en banc); *United States v. Campbell*, 22 F.4th 438, 44-45 (4th Cir. 2022); *United States v. Riccardi*, 989 F.3d 476, 485 (6th Cir. 2021); *United States v. Castillo*, 69 F.4th 648 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023) (en banc).

Tension is developing between *Loper Bright* and prior cases requiring deference to the guidelines. If the Court is going to move away from a deferential standard, then the text of the guidelines must control. That is the interpretation used by the Sixth Circuit. *Morrison*, 983 F.2d at 735 ("We hold that acceptance of responsibility, as contemplated by the United States Sentencing Commission, is 'acceptance of responsibility *for his offense,* 'not for illegal 'conduct' generally.").

The split between the Sixth Circuit and the majority circuit view has been allowed to persist for over 30 years. *See Morrison*, 983 F.2d 730; *see also Howard*, 570 Fed. Appx. at 484 ("Although 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.") (collecting cases); *United States v. Mercado*, 81 F.4th 352, 358-59 n.6 (3rd Cir. 2023) (noting the Sixth circuit as the lone exception with how it interprets U.S.S.G. § 3E1.1). Yet the Commission has not clarified this ambiguity in U.S.S.G. § 3E1.1 following

Morrison despite revising this section in 2023. Sentencing Guidelines App. C., Amend. 775 (Nov. 1, 2023). As the Third Circuit stated, "It is the job of the courts to ensure that the [Sentencing] Commission…do[es] not go beyond what Congress intended." *Rutherford*, 120 F.4th at 376. If the Sentencing Commission was closely following precedent and timely following circuit splits, it likely would have decided to clarify this split before now. The Commission has had the opportunity yet declined to resolve this conflict and ambiguity. Only the court can do so.

The government's argument that the Supreme Court does not take up issues that the Sentencing Commission can fix with proposed rules has no basis in the caselaw. At times, when the Sentencing Commission has announced that it will resolve questions around a particular issue, the Supreme Court has chosen to give the Sentencing Commission time to act. *McClinton v. United States*, 143 S. Ct. (June 2023). "If the Commission does not act expeditiously or chooses not to act, however, this Court may need to take up the constitutional issues presented." *Id.* Even if this were a reason not to resolve the conflict, it would recur in every area of the law. Statutes can be changed by Congress; the court takes up cases involving the interpretation of statutes.

The argument that the court does not take up cases regarding the Guidelines post-*Booker* is erroneous on multiple fronts. The court has taken up cases about how courts should generally apply the Guidelines. *Rosales-Mireles v. United States*, 585 U.S. 129 (2018) (effect of miscalculation of the Guidelines on plain error review); *Peugh v. United States*, 569 U.S. 530 (2013) (court should use Guidelines in effect at time of offense rather than

higher Guidelines to avoid ex post facto issues). The Court has also taken up cases about how to apply specific Guidelines. *Dillon v. United States*, 560 U.S. 817 (2010) (interpreting §1B1.10); *Beckles v. United States*, 580 U.S. 256 (2017) (interpreting §4B1.2(a)(2)); *Pulsifer v. United States*, 601 U.S. 124 (2024) (using Guidelines to aid interpretation of statutory provision 18 U.S.C. § 3553(f)(1)).

The government claims that the court resolved the matter in *Puckett*, which if true, would contradict their argument that the court does not take up appeals on Sentencing Guidelines. This claim is not true, however; the Supreme Court has not resolved the matter. *Puckett* 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 opinion therefore had no clarifying effect on the courts below, and the Sixth Circuit continued to accept *Morrison* as good law 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).

CONCLUSION

For the reasons in this Reply Brief, and those in Petitioner's original Petition for a Writ of Certiorari, the Court should grant certiorari in this case.

Respectfully submitted,

PARRISH KRUIDENIER, L.L.P.
Alfredo Parrish
Counsel of Record

2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: aparrish@parrishlaw.com