No. 23-6079

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

KEVIN C. PEARCE, JR.,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe that oral argument is necessary because Pearce's arguments challenging his sentence have been rejected by this Court and the Supreme Court of the United States. The United States, of course, stands ready to participate in any oral argument that the Court may wish to schedule.

STATEMENT OF JURISDICTION

This appeal is from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against Defendant-Appellant Kevin C. Pearce, Jr., on December 6, 2023. (Judgment, R. 217, Page ID # 2540-2546).[1] Pearce filed a timely notice of appeal on December 11, 2023. (Notice of Appeal, R. 222, Page ID # 2620-2621). This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court properly found that a three-level "aggravating role" enhancement under Sentencing Guidelines § 3B1.1(b) applied to Pearce's

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[1] The following facts are drawn from the trial record and the evidence offered at sentencing. "R. __" refers to documents, by number, on the district court docket sheet. "Page ID # __" refers to the page numbers in the consecutively paginated electronic record. "Br. __" refers to the page numbers in Pearce's opening brief. "App. __" refers to page numbers in the Appellee's Appendix filed concurrently with this brief, which includes a selection of trial exhibits that help provide a complete picture of the underlying offenses and disputed factual issues. The United States can also make available copies of any additional government exhibits that the Court may wish to review.

offense level because a preponderance of the evidence showed that Pearce served as a "manager or supervisor" in the unlawful cover-ups of assaults on inmates at a federal prison.

2. Whether Pearce waived his challenge to the district court's denial of a two-level reduction for "certain zero-point offenders" under Sentencing Guidelines § 4C1.1(a)(10). If not, whether the district court properly denied the reduction because Pearce was ineligible for relief based on the court's application of the aggravating role adjustment.

STATEMENT OF THE CASE

Defendant-Appellant Kevin C. Pearce, Jr., is a former corrections officer and supervisor employed by the Federal Bureau of Prisons (BOP). The government alleged that, while Pearce was a lieutenant at a high-security facility, he used unconstitutionally excessive force, engaged in witness tampering, and falsified records in connection with assaults against two inmates and the cover-ups that followed. Pearce was convicted by a jury on two false-records charges and acquitted on the remaining counts. Pearce was sentenced to 66 months' imprisonment on his convictions and now challenges that sentence on appeal.

A. Factual Background

Pearce began his career as a corrections officer in 2005 at a state facility in Virginia. (Def. Sent. Mem. Ex. 1, R. 212-1, Page ID # 2497). He later moved to

BOP, where he worked at two different federal institutions before he was assigned to United States Penitentiary Big Sandy in Inez, Kentucky. (Def. Sent. Mem. Ex. 1, R. 212-1, Page ID # 2497-2499). At Big Sandy, Pearce served as operations lieutenant—a position with significant managerial and supervisory authority that included "run[ning] the prison" in terms of day-to-day operations. (Transcript, R. 160, Page ID # 1485; Transcript, R. 225, Page ID # 2675-2676, 2690-2691).

1. Officers assault inmate E.G. and attempt to cover it up

On March 30, 2021, officers at Big Sandy responded to a fight between inmates in one of the housing units at the prison. (Transcript, R. 159, Page ID # 1211; Transcript, R. 160, Page ID # 1376). As often happens in response to an emergency, officers ordered inmates in the unit to "lockdown"—meaning "get in their cells"—so that the area could be secured. (Transcript, R. 159, Page ID # 1211-1212; Transcript, R. 160, Page ID # 1377-1378, 1478).

a. While inmate E.G. (who had not been involved with the fight) was walking toward the cells, Officer Samuel Patrick approached E.G. and pepper sprayed him. (Transcript, R. 159, Page ID # 1211-1212, 1222-1223; Transcript, R. 160, Page ID # 1315-1319, 1376-1378, 1477-1478; Transcript, R. 161, Page ID # 1688-1689). Patrick later explained that he used pepper spray—even though E.G. was complying with the lockdown order—because E.G. "was walking very

slowly" and Patrick "didn't like that behavior." (Transcript, R. 159, Page ID # 1176, 1212-1213, 1222-1223; *see also* Transcript, R. 160, Page ID # 1378-1379).

After E.G. had been pepper sprayed, Officer Jared Kelly pushed him to the ground, and Officer Clinton Pauley punched and "football kicked" E.G. in the head. (Transcript, R. 159, Page ID # 1216-1218, 1224; Transcript, R. 160, Page ID # 1318-1325, 1377-1380; 1400-1401, 1478-1483, 1611-1612). According to Pauley, E.G. was not threatening or aggressive; Pauley punched and kicked E.G. to convey, in Pauley's own words, that "he was going to listen to me or I was going to keep assaulting him." (Transcript, R. 160, Page ID # 1480-1481). Around the same time, while E.G. was still on the ground, Pearce deployed a "pepperball launcher"—which is "like a paintball gun" that shoots "balls" of pepper spray "in a powder form"—and hit E.G. with "five to eight" pepperballs. (Transcript, R. 159, Page ID # 1179, 1215; Transcript, R. 160, Page ID # 1320-1323, 1483-1485; Transcript, R. 161, Page ID # 1691-1692). As operations lieutenant, Pearce was the ranking supervisor at the scene. (Transcript, R. 160, Page ID # 1320, 1325, 1431, 1485, 1647-1648; Transcript, R. 161, Page ID # 1766.)

Once E.G. had been restrained in handcuffs, he was escorted to the Special Housing Unit (SHU) by Kelly, Pauley, and Pearce. (Transcript, R. 160, Page ID # 1380-1381, 1487-1490). On the way there, Pauley "slammed [E.G.] on the floor" and "drove his head onto the concrete." (Transcript, R. 160, Page ID # 1381,

1487-1488, 1499; Transcript, R. 161, Page ID # 1693-1694). As they approached the SHU, Pauley again "slammed [E.G.] on the ground," this time also kicking him once he was down. (Transcript, R. 160, Page ID # 1381-1382, 1488-1489, 1502; Transcript, R. 161, Page ID # 1695, 1769-1771). Pauley later admitted that these takedowns were not legitimate or necessary, but rather were meant as "punishment" to "make [E.G.] understand he needed to get with the program." (Transcript, R. 160, Page ID # 1488-1489).

These uses of force were unjustified because E.G. never acted aggressively, posed any threat, or failed to comply with officers' orders. (Transcript, R. 159, Page ID # 1176, 1212-1219, 1284-1285; Transcript, R. 160, Page ID # 1312, 1316-1327, 1377-1387, 1431, 1478-1483, 1487-1489, 1493, 1495, 1504, 1593-1594, 1609-1613, 1646; Transcript, R. 161, Page ID # 1688-1691, 1694-1695, 1762-1769). The attacks caused E.G. physical injury, including severe facial irritation from the pepper spray, a lacerated lip, and soreness and swelling in his face. (Transcript, R. 161, Page ID # 1691, 1700-1701). One former officer described the assault against E.G. as "shocking" and "one of the worst uses of force[] that . . . I saw." (Transcript, R. 160, Page ID # 1312, 1324).

b. That same day, officers who had been involved in the incident discussed how they were going to justify the uses of force against E.G. Pearce, Patrick, and

Pauley "agreed to write [their] report[s]" to say that E.G. was threatening violence and might have had a weapon. (Transcript, R. 159, Page ID # 1177, 1222-1226).

All three of their reports stuck closely to the cover story. Pearce falsely wrote that, in the housing unit, E.G. "displayed signs of imminent violence by turning toward staff in a hostile and combative posture, threatening any staff that approached," such that "[s]taff could not approach without being placed in serious danger." (App. 4-5). Patrick similarly claimed that E.G. "refused to lock down," threatened to "kick [Patrick's] ass," "assumed a defensive position," and may have had a "weapon hidden in his coat." (App. 7). As for the takedowns on the way to the SHU, Pearce wrote that E.G. "continued his disruptive behavior by attempting to assault staff with a head strike to the abdominal area." (App. 4-5). Pauley also stated—untruthfully—that E.G. "raised up forcefully attempting to strike [Pauley] with his head," and omitted that he threw E.G. to the floor again and kicked him. (App. 6). When Pauley submitted his report, Pearce reviewed it and responded "That'll work"—which Pauley understood to mean "that's what we're going to tell everybody." (Transcript, R. 160, Page ID # 1505-1506).

Pearce also talked to Officer Brent Ousley, who had witnessed but not participated in the assault against E.G. While Ousley and Kelly were in Ousley's office after the incident, Pearce called to make sure everyone was clear about the "cover story." (Transcript, R. 160, Page ID # 1614-1617). Ousley understood

Pearce to be telling him "to write in the report that [E.G.] was being resistant," even though that was not what Ousley had seen. (Transcript, R. 160, Page ID # 1615-1616). Ousley took away from Pearce's phone call that "it was obvious that . . . the report needed to be written based off what they wanted you to say." (Transcript, R. 160, Page ID # 1615-1619, 1649). Although Kelly could not hear the other end of the phone call, he thought it was either Pearce or Patrick who had called, and Kelly heard Ousley say repeatedly, "Yes, sir. Yes, sir." (Transcript, R. 160, Page ID # 1387-1388, 1391, 1394-1396; Transcript, R. 225, Page ID # 2678-2680).

After Ousley hung up, he told Kelly that they needed to say that E.G. "was threatening and aggressive," because that was what Pearce (and Patrick) "wanted [them] to put" in their reports. (Transcript, R. 160, Page ID #1620-1621). Kelly understood that the point of the call was that Pearce "wanted to cover . . . up" "[t]he assault" on E.G. (Transcript, R. 160, Page ID # 1395-1396; Transcript, R. 225, Page ID # 2678-2680). Ousley then typed a false report—including the cover story Pearce had relayed—and Kelly copied and signed the same report. (Transcript, R. 160, Page ID # 1396, 1621-1622). Ousley testified that he did so out of "[f]ear of retaliation from administration," specifically Pearce and Patrick. (Transcript, R. 160, Page ID # 1621-1623). Kelly likewise felt "pressure[d]" to go along with the cover-up because he was "[s]cared" and did not "want to be

retaliated against" by, among other things, losing out on "[p]romotion potential." (Transcript, R. 160, Page ID # 1396; Transcript, R. 225, Page ID # 2679). Kelly testified that, if not for the phone call, he would not have signed a false report. (Transcript, R. 225, Page ID # 2678-2679).

2. Officers assault inmate C.T. and attempt to cover it up

Almost one month after the assault on E.G., officers assaulted another inmate—C.T.—and again tried to conceal their unlawful actions.

a. On April 29, 2021, Patrick was in the lieutenant's office with (among others) Pearce and Pauley. (Transcript, R. 159, Page ID # 1181). Officer Anthony Carter escorted inmate C.T. to that office because C.T. wanted to request "protective custody," a special status for inmates subject to verified threats against their safety. (Transcript, R. 159, Page ID # 986-989, 1181; Transcript, R. 160, Page ID # 1434-1435). Contrary to BOP policy, Pearce and Patrick denied C.T.'s request without providing the appropriate paperwork or initiating an investigation. (Transcript, R. 159, Page ID # 986-988, 997-999, 1182-1183; Transcript, R. 160, Page ID # 1441-1442).

C.T. was upset that his request had been denied and continued to explain to the officers why he believed that he needed to be in protective custody. (Transcript, R. 159, Page ID # 999-1000, 1089-1090, 1183-1184; Transcript, R. 160, Page ID # 1436-1437). When C.T. (who is white) referred to his prior

involvement with a Black gang, Patrick called C.T. a "race traitor" and "took a swing at him," even though C.T. had not threatened the officers or failed to comply with any orders. (Transcript, R. 159, Page ID # 999-1001, 1089-1091, 1184-1185; Transcript, R. 160, Page ID # 1435-1437). Patrick missed, C.T. fell to the ground, and Patrick "laid" on top of C.T. and elbowed him in the head "[b]etween four and six" times. (Transcript, R. 159, Page ID # 1002-1003, 1091-1093, 1185-1186; Transcript, R. 160, Page ID # 1437-1439). Pauley grabbed C.T.'s feet and then punched him "two or three times in the thighs and the back." (Transcript, R. 159, Page ID # 1004-1005, 1093-1094, 1189; Transcript, R. 160, Page ID # 1438-1439). Only after Patrick and Pauley had both struck C.T. multiple times did Pearce tell them to stop, saying: "[t]hat's enough." (Transcript, R. 159, Page ID # 1003-1005).

Neither Patrick nor Pauley had any justification to use force in this way because C.T. never posed a threat or resisted any orders. (Transcript, R. 159, Page ID # 986, 999-1005, 1090-1097, 1176, 1186, 1191; Transcript, R. 160, Page ID # 1428, 1437-1440). Carter—who had escorted C.T. to the lieutenant's office and witnessed the assault—felt "shock" at what had happened. (Transcript, R. 159, Page ID # 1007). As a result of the beating, C.T. suffered a broken nose, knots on his face and head that were "at least the size of a golf ball," and pain in his head, neck, jaw, and back. (Transcript, R. 159, Page ID # 1100-1101).

Pearce was present throughout the entire incident and, as operations lieutenant, was the highest-ranking officer in the room. (Transcript, R. 159, Page ID # 994, 1006-1007, 1083, 1184-1190; Transcript, R. 160, Page ID # 1431, 1439, 1443). At no point did he respond as though C.T. had threatened any of the officers—such as by activating a body alarm, requesting assistance, or ordering that C.T. be restrained. (Transcript, R. 159, Page ID # 999, 1002, 1006-1007, 1190; Transcript, R. 160, Page ID # 1443-1444).

b. Instead, as with the assault against E.G., Pearce helped orchestrate a cover-up to conceal the C.T. beating. At first, Pearce, Patrick, and Pauley agreed not to write any reports about the incident to avoid questions or scrutiny. (Transcript, R. 159, Page ID # 1191-1192). After other prison staff attempted to report the suspected assault, however, the officers decided to report only that C.T. had requested protective custody—leaving out any mention of the assault. (Transcript, R. 159, Page ID # 1192-1198; 1269-1271; Transcript, R. 160, Page ID # 1462-1466).

Now that they had to write reports, Pearce tried to build a paper trail to support the false narrative that nothing had happened to C.T. Pearce stated in his own report that a fellow lieutenant, Ryan Elliott, had been present in the office at the time, when in reality Elliott was not there. (Transcript, R. 159, Page ID # 1014-1015, 1198-1203; Transcript, R. 160, Page ID # 1465; Transcript, R. 225,

Page ID # 2732-2733; App. 2). To corroborate that story, Pearce recruited Elliott to submit his own false report, "watched over [Elliott]'s shoulder as [he] wrote his false report," and "instructed" Elliott to include certain language—that C.T. had left the lieutenant's office "without incident"—to match what Pearce had written. (Gov't Sent. Mem. Ex. 1, R. 213-1, Page ID # 2534; Transcript, R. 159, Page ID # 1198-1203; Transcript, R. 225, Page ID # 2731-2734; App. 3). Pearce also told Pauley that he and Patrick would leave Pauley's name out of their reports: "Listen, we're going to put it down that you weren't even in the room, so don't even -- don't even worry about it. If you get asked, just say you don't know." (Transcript, R. 160, Page ID # 1462-1464). Pauley understood it would "help cover it up" to leave him out because it was "one less person that has to get their story right." (Transcript, R. 160, Page ID # 1463-1465). Consistent with their plan, Patrick and Pearce submitted reports that said nothing about Pauley being in the lieutenant's office or punching C.T. while he was on the ground. (App. 1-2; Transcript, R. 159, Page ID # 1013-1019; Transcript, R. 160, Page ID # 1464-1465). A few days later, before they spoke to investigators, Pearce, Patrick, and Pauley once again "constructed [their] stories to match," this time to "make it look like the inmate had done something that would give [the officers] reason to use force on him." (Transcript, R. 160, Page ID # 1466-1473; *see also* Transcript, R. 159, Page ID # 1208-1210, 1272-1273).

But that was not all Pearce did to try to conceal the assault: he also attempted—unsuccessfully—to recruit Carter into the cover-up. Carter had been present for the entire incident, and when he went back to the lieutenant's office later that day, Pearce directed another officer who was there "to step out." (Transcript, R. 159, Page ID # 1009, 1207-1208). Once they were alone, Pearce told Carter that Carter needed "to help him" by "do[ing] a memo saying that nothing happened." (Transcript, R. 159, Page ID # 1009, 1016, 1019, 1079). That same afternoon, Patrick asked Carter to call and told him that "Pearce wanted [Patrick] to remind [Carter] to take care of the memo." (Transcript, R. 159, Page ID # 1011-1012, 1206-1208). Carter understood that to mean that Pearce expected him to write a false memo "saying nothing happened," as they had discussed earlier. (Transcript, R. 159, Page ID # 1012). The next day—a Friday—Carter called in sick and did not report to work because "[he] knew [he] was going to be pressured to write a false memorandum." (Transcript, R. 159, Page ID # 1020). Carter ultimately decided not to write a false report or participate in the cover-up. (Transcript, R. 159, Page ID # 1020-1022). On his way to work on Monday morning, Carter felt "[s]ick" and "nervous," and "pulled over and vomited" on the side of the road due to "[n]erves." (Transcript, R. 159, Page ID # 1021). As soon as he arrived at the prison, Carter went to the warden's office and informed the warden about what had happened to C.T. (Transcript, R. 159, Page ID # 1021).

c. Some of the cover-up efforts at Big Sandy also involved senior-level prison officials who outranked even Pearce. In particular, an associate warden and a captain were present for some meetings and gave advice on how to write memos documenting questionable uses of force. (Transcript, R. 159, Page ID # 1012; Transcript, R. 160, Page ID # 1452, 1457-1459, 1466-1472, 1527-1531; Transcript, R. 225, Page ID # 2711-2715, 2724-2729).

B. Procedural History

1. Based on their alleged involvement in these assaults and cover-ups, Pearce, Pauley, and Patrick were indicted on charges of civil rights violations and obstruction offenses. (Superseding Indictment, R. 55, Page ID # 143-154). Pearce was personally charged with five separate counts. (Superseding Indictment, R. 55, Page ID # 145-153). With respect to E.G., Pearce was accused of: (1) depriving E.G. of his constitutional right to be free from cruel and unusual punishment, in violation of 18 U.S.C. 242 (Count 8); (2) witness tampering, in violation of 18 U.S.C. 1512(b)(3) (Count 9); and (3) falsification of records in federal investigations, in violation of 18 U.S.C. 1519 (Count 12). As for C.T., Pearce was charged with: (4) witness tampering, in violation of 18 U.S.C. 1512(b)(3) (Count 2); and (3) falsification of records in federal investigations, in violation of 18 U.S.C. 1519 (Count 3). (Superseding Indictment, R. 55, Page ID # 145-146, 148-150, 152-153).

After a five-day trial, the jury found Pearce guilty on the two charges of falsifying records under 18 U.S.C. 1519 (Counts 3 and 12) and found him not guilty as to the remaining three counts (Counts 2, 8, and 9). (Verdict, R. 141, Page ID # 573-574).

2. At sentencing on the two false-records convictions, the government requested (and the presentence investigation report recommended) a four-level increase to Pearce's offense level under Section 3B1.1(a) of the sentencing guidelines, based on his "aggravating role" as an "organizer or leader" of the schemes to cover up the assaults against E.G. and C.T. (Transcript, R. 225, Page ID # 2739-2741, 2755-2759, 2770). Pearce objected, and the district court granted the objection in part: instead of adding four levels for an "organizer or leader" under Section 3B1.1(a), the court added only three levels under Section 3B1.1(b) for a "manager or supervisor" of the criminal activity. (Transcript, R. 225, Page ID # 2755-2763).

In explaining that decision, the district court noted that, even though Pearce had been acquitted on the witness-tampering charges, the guidelines directed the court to consider "relevant conduct"—which need only be proven by a preponderance of the evidence—in determining the appropriate sentence for the two false-records convictions. (Transcript, R. 225, Page ID # 2751-2752, 2756). The court carefully reviewed the evidentiary record and described its findings that

Pearce had used his authority as operations lieutenant to strengthen the cover-ups by getting Ousley, Kelly, and Elliott to submit false reports. (Transcript, R. 225, Page ID # 2757-2762). "What is significant to me," the district court explained, "is the positional authority that Lieutenant Pearce had at Big Sandy," according to the evidence that, "on a day-to-day matter . . . Pearce had control and authority over just about everybody, excluding of course the captain and the warden's office." (Transcript, R. 225, Page ID # 2757-2758).

At the same time, the district court also found that the "executive team[]" at the prison had "significant involvement in designing a way to minimize accountability." (Transcript, R. 225, Page ID # 2759). The court characterized that involvement as "heavy handed direction from the top" by senior officials (not charged here) who were "clearly above where Defendant Pearce was." (Transcript, R. 225, Page ID # 2759-2760). Putting these pieces together, the district court found that "the scheme was devised and hatched and directed from the highest levels of the prison" and then "went directly through Pearce, to be implemented through Pearce's subordinate[s]." (Transcript, R. 225, Page ID # 2760-2763).

Given these findings, the district court concluded that "an aggravating role is appropriate," but only "as management and supervision rather than organization and leadership." (Transcript, R. 225, Page ID # 2762-2763). The court thus

calculated Pearce's guidelines range by adding three points under Section 3B1.1 rather than four. (Transcript, R. 225, Page ID # 2762-2763, 2770).

As a result of the aggravating-role enhancement, the district court ruled that Pearce was not entitled to a two-level decrease in his offense level as a "zero-point offender" under Section 4C1.1 of the guidelines. (Transcript, R. 225, Page ID # 2769). At the time of sentencing, defense counsel appeared to agree that the aggravating-role enhancement precluded application of the reduction. (Transcript, R. 225, Page ID # 2749, 2798-2799).

Based on these rulings (among others), the district court calculated Pearce's advisory guidelines range to be 57 to 71 months' imprisonment. (Transcript, R. 225, Page ID # 2773). The government requested an upward departure or variance to a sentence of 90 months, which the district court denied. (Transcript, R. 225, Page ID # 2774-2782, 2785-2788, 2792-2795, 2821-2822). Considering all of the sentencing factors, the district court sentenced Pearce to 66 months' imprisonment on each of the two counts of conviction, to be served concurrently. (Transcript, R. 225, Page ID # 2822-2834; Judgment, R. 217, Page ID # 2540-2541).[2]

[2] Patrick and Pauley both pleaded guilty and testified for the government as cooperating witnesses in Pearce's trial. (Judgment, R. 207, Page ID # 2403; Judgment, R. 208, Page ID # 2410; Transcript, R. 159, Page ID # 1174; Transcript, R. 160, Page ID # 1427). Patrick has been sentenced to 36 months' imprisonment (Judgment, R. 207, Page ID # 2404), and Pauley has been sentenced to 40 months' imprisonment (Judgment, R. 208, Page ID # 2411).

SUMMARY OF ARGUMENT

This Court should affirm Pearce's sentence, as neither of his arguments has merit.

1. Pearce first argues that the district court erred in applying a three-level aggravating role enhancement based on the finding that Pearce served as a "manger or supervisor" in the cover-up efforts at Big Sandy. Sentencing Guidelines § 3B1.1(b). As a legal matter, Pearce is wrong that the district court may not consider—for purposes of sentencing—conduct for which he was acquitted by the jury at trial. It is well settled that sentencing courts may consider all "relevant conduct," including acquitted and uncharged conduct, and Pearce's arguments to the contrary are inconsistent with binding precedent.

As a factual matter, Pearce's scattershot challenges to the district court's findings cannot overcome the deference afforded those findings under the clear-error standard. The district court carefully weighed and reviewed the evidentiary record before it and reasonably found that Pearce acted as a "manager or supervisor" in recruiting his subordinates to submit false reports covering up the assaults against E.G. and C.T. That finding is well supported by the testimony and evidence at trial and sentencing.

2. Pearce next contends that the district court was wrong to deny a two-level decrease in his offense level under the "adjustment for certain zero-point

offenders" in Section 4C1.1. According to Pearce, he was eligible for that reduction under subsection (a)(10)—despite the aggravating role adjustment that the district court had applied—because he did not *also* engage in a continuing criminal enterprise. But Pearce waived this argument below by conceding on the record that the aggravating role enhancement was disqualifying, so the Court need not reach or address the issue. Should the Court choose to do so, Pearce's argument fails on the merits because his reading of subsection (a)(10) cannot be reconciled with this Court's precedent or the Supreme Court's recent decision rejecting a similar interpretation in *Pulsifer v. United States*, 144 S. Ct. 718 (2024).

ARGUMENT

I. The district court properly found that an "aggravating role" enhancement applies.

Pearce's first argument on appeal is that the district court should not have increased his offense level by three points based on the court's finding that Pearce served as "a manager or supervisor" of the cover-ups at Big Sandy. Sentencing Guidelines § 3B1.1(b). That argument fails on both the law and the facts. On the law, Pearce is mistaken that the district court may not consider uncharged or acquitted conduct at sentencing: the sentencing guidelines expressly direct courts to consider all "relevant conduct." Sentencing Guidelines § 1B1.3. On the facts, the evidentiary record below provides more than enough support for the district court's factual findings, particularly on deferential clear-error review.

A. Standard of Review

In considering a guidelines calculation on appeal, this Court "review[s] the district court's factual findings for clear error and its legal conclusions de novo." *United States v. Fleischer*, 971 F.3d 559, 567 (6th Cir. 2020) (citation omitted). The clear-error standard "is highly deferential," and a district court's factual findings will not be set aside unless, "on the entire evidence," the Court is left with "the definite and firm conviction that a mistake has been committed." *United States v. Meek*, 32 F.4th 576, 579 (6th Cir. 2022) (citation omitted).

B. The district court was free to consider Pearce's "relevant conduct."

1. Under the sentencing guidelines, district courts calculate the applicable guidelines range based on the offense(s) of conviction and other relevant conduct by the defendant. Sentencing Guidelines § 1B1.3. For purposes of this appeal, relevant conduct includes (A) "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused *by the defendant*[,]" and (B) "all acts and omissions *of others* that were . . . (i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity"—so long as the act or omission (by defendant or someone else) "occurred during the commission of the offense of conviction . . . or in the course of attempting to avoid

detection or responsibility for that offense." *Id.* § 1B1.3(a)(1)(A) and (a)(1)(B) (emphases added).

This standard is purposefully broad, as "[t]he goal of the relevant conduct provision is to allow a court to impose sentences commensurate with the gravity of the offense." *United States v. Kappes*, 936 F.2d 227, 229 (6th Cir. 1991); *see also United States v. Osborn*, 12 F.4th 634, 638 (6th Cir. 2021) (describing relevant conduct provision as "primarily expansive in nature"). To that end, "when a defendant is acting in concert with others, the appropriate conduct to consider for sentencing purposes is far broader than the conduct that drove the original conviction." *United States v. Bradley*, 644 F.3d 1213, 1297 (11th Cir. 2011).

In considering "relevant conduct" for purposes of sentencing, it is well settled that courts may rely on conduct for which a defendant was acquitted by a jury, so long as that conduct is proven by a preponderance of the evidence. *United States v. White*, 551 F.3d 381, 383-386 (6th Cir. 2008) (en banc) (citing *United States v. Watts*, 519 U.S. 148 (1997) (per curiam)); *see also United States v. Hills*, 27 F.4th 1155, 1196 n.24 (6th Cir.) ("[I]t is settled that acquitted conduct may be considered at sentencing if the facts are proven by a preponderance of the evidence."), *cert. denied*, 143 S. Ct. 305 (2022), and 143 S. Ct. 606 (2023). The same is true for uncharged conduct, *United States v. Gill*, 348 F.3d 147, 151 (6th

Cir. 2003) ("[r]elevant conduct need not be charged"), as even Pearce seems to admit. Br. 21 ("sentencing courts may consider uncharged conduct as relevant").

This rule follows from the different burdens of proof that apply to jury verdicts as compared to sentencing findings. Because "[j]ury-found facts in support of the conviction must be found beyond a reasonable doubt, while judge-found facts at sentencing need only be supported by a preponderance of the evidence," considering a defendant's "relevant conduct" at sentencing is not the same as imposing a sentence on a charge for which he has been acquitted. *United States v. McReynolds*, 964 F.3d 555, 564 (6th Cir. 2020). Rather than "sentenc[ing] the defendant based on 'acquitted conduct,'" the district court is instead "appl[ying] a different burden of proof to the record evidence in order to determine whether a certain sentencing enhancement should apply." *Ibid.* (quoting *White*, 551 F.3d at 385).

2. The district court here understood and correctly applied these principles. The court stated that "the counts that the defendant was acquitted on, he's not being sentenced for," and "[h]e's only being sentenced for the counts of conviction." (Transcript, R. 225, Page ID # 2751). The court also recognized that "the current law . . . is that an acquittal is not [a] bar to consideration of the underlying conduct" according to "the lower preponderance standard." (Transcript, R. 225, Page ID # 2751-2752).

More concretely, the district court sentenced Pearce on his two convictions for submitting false reports, in violation of 18 U.S.C. 1519. (Transcript, R. 225, Page ID # 2751, 2770-2771, 2809). In doing so, the district court considered Pearce's "relevant conduct" as directed by the guidelines, specifically "concealment . . . related to the underlying offense." (Transcript, R. 225, Page ID # 2756). That concealment included Pearce's pressure campaign to get his subordinates—specifically, Ousley, Kelly, and Elliott—to participate in the cover-ups by submitting false reports about what happened with E.G. and C.T. (Transcript, R. 225, Page ID # 2758-2762).[3] With respect to the jury's acquittals on the two witness-tampering charges based on the same allegations, the district court explained: "[Y]ou can certainly argue the jury's [re]jection ought to be taken into account -- and I'm not ignoring it, but I'm not bound by that as a way to view the evidence as under the lower standard." (Transcript, R. 225, Page ID # 2761-2762). That is exactly the approach directed by the sentencing guidelines and approved by this Court.

3. Pearce's arguments to the contrary misunderstand relevant conduct principles and lack any support in precedent. Pearce insists that his efforts to

[3] Although not expressly cited by the district court in explaining its findings at sentencing, the record also provides more than enough support to conclude that Pearce tried to recruit Carter into the cover-up as well. *See* p. 12, *supra*.

recruit others into the cover-ups are not sufficiently related to his convictions to be considered relevant conduct because he was found guilty only of "writing his own false memo," which "involved no other participants." Br. 21. This overly simplistic understanding ignores the "logical relationship" between Pearce's falsifying his own reports and convincing others to go along with the cover story, too. *United States v. Hodge*, 805 F.3d 675, 680 (6th Cir. 2015). By making sure everyone stuck to the same party line, Pearce "attempt[ed] to avoid detection or responsibility for" his own false reports, which is sufficient under Section 1B1.3(a)(1)(A). *See United States v. Clark*, No. 22-1109, 2023 WL 4398325, at *2 (6th Cir. July 7, 2023) (affirming relevant conduct analysis where "[t]he district court did not err when it found the necessary connection" between underlying offense and defendant's subsequent efforts to "'avoid detection and responsibility'" for that offense (quoting Sentencing Guidelines § 1B1.3(a)(1)(A)); *see also United States v. Godwin*, No. 21-3085, 2023 WL 2445395, at *4 (7th Cir. Mar. 10, 2023) (holding that "relevant conduct" under the guidelines "includes [defendant]'s instructions to [a co-defendant] to conceal the fraud, in addition to the conduct that formed the basis of the conviction"). The false reports submitted by "others" as a result of Pearce's pressure campaign also may be considered under Section 1B1.3(a)(1)(B) because those "acts and omissions" were "within the scope of the jointly undertaken" cover-up efforts, "in furtherance of" those efforts, and

"reasonably foreseeable in connection with" the cover-ups. As this Court has explained, "the Guidelines expressly contemplate that such post-hoc maneuvering can trigger associational sentencing liability." *United States v. Hernandez*, 721 F. App'x 479, 482 (6th Cir. 2018) (citing Sentencing Guidelines § 1B1.3(a)(1)(B)).[4]

Pearce's remaining arguments effectively ask the Court to depart from its precedent, relying on concurrences and dissents that disagree with the relevant-conduct sentencing regime. Br. 18-20. But the Court is "bound by Sixth Circuit precedent"—including the en banc decision in *White* cited above—"unless it is overruled by either [the] court sitting en banc or the Supreme Court." *Little v. BP Expl. & Oil Co.*, 265 F.3d 357, 362 (6th Cir. 2001). For that reason, the Court in recent years rejected a similar argument challenging the use of acquitted conduct at sentencing, *see McReynolds*, 964 F.3d at 564 n.1, and should do the same here.

C. The district court's factual findings are well supported by the record.

Pearce fares no better disputing the district court's factual finding that he served in the role of a "a manager or supervisor" for purposes of the three-point "aggravating role" enhancement under Section 3B1.1(b). This Court "review[s] a district court's decision to grant a leadership enhancement under § 3B1.1

[4] Pearce's reliance (Br. 21) on *United States v. Hill* is misplaced, as that case involved a different provision of the relevant conduct guideline—Section 1B1.3(a)(2)—not at issue here. *Hill*, 79 F.3d 1477, 1482 (6th Cir. 1996).

deferentially because it raises a fact-intensive question." *United States v. Minter*, 80 F.4th 753, 758 (6th Cir. 2023) (internal quotation marks omitted); *see also United States v. Medlin*, 65 F.4th 326, 331 (6th Cir. 2023) (analysis of whether a sentencing enhancement applies is "highly fact-specific"). Here, the district court's finding is amply supported by the evidence below, and Pearce's arguments fall far short of showing any error—much less clear error—in the court's determinations.

1. The district court methodically reviewed two types of evidence that support applying the "manager or supervisor" enhancement in this case. First, the court described Pearce's role as operations lieutenant in the hierarchy at Big Sandy. The court explained that Pearce was "essentially[] running the prison there," and "on a day-to-day matter . . . had control and authority over just about everybody, excluding of course the captain and the warden's office." (Transcript, R. 225, Page ID # 2758-2759). That finding is solidly grounded in the evidentiary record. Witnesses testified at trial that lieutenants like Pearce are "superiors and supervisors over correctional officers," the ones who give orders in a use-of-force incident, and "over everything . . . and all of the people that are on shift." (Transcript, R. 159, Page ID # 1076, 1210-1211; Transcript, R. 160, Page ID # 1313, 1640, 1647-1648; Transcript, R. 161, Page ID # 1773). Witnesses similarly testified at sentencing that "[t]he operation lieutenant runs the prison, basically,"

"is making the decisions," and "is over the operation of the whole prison." (Transcript, R. 225, Page ID # 2675-2676, 2690-2691). Perhaps most persuasive were the two audio recordings that the government offered at sentencing from Pearce's voluntary interview with federal investigators, where Pearce can be heard saying—in his own words—that his duties as operations lieutenant included "oversee[ing] the correctional officers and the day-to-day activities of the penitentiary," and that the operations lieutenant "is going to be ultimately in charge." (Interview Excerpts, Gov't Sent. Exs. 1a and 1b).[5]

Second, the district court found that Pearce used his authority as operations lieutenant to help cover up the assaults against E.G. and C.T. As the court explained, Pearce's "significant authority" at Big Sandy "bore fruit," in that a "narrative was constructed after the fact . . . as to both incidents" in terms of "how to describe it" and "how to bring that to fruition . . . [with] documentation." (Transcript, R. 225, Page ID # 2758). The court additionally made findings specific to each conviction, which were based on more than sufficient evidence.

As to E.G. (Count 12), the district court found that Pearce pressured two subordinates—Ousley and Kelly—to write false reports (Transcript, R. 225, Page ID # 2760-2762). Ousley and Kelly both testified to these facts. Ousley testified

[5] These audio recordings have been submitted to the Court by way of CDs mailed to the Clerk's Office.

that Pearce called him after the assault, and Ousley understood from their conversation that he needed to include in his report that E.G. "was being resistant and aggressive"—even though he had not been—in order to "go along with . . . their cover story." (Transcript, R. 160, Page ID # 1614-1617, 1649). Ousley shared his understanding with Kelly—who was in his office during the phone call—and then typed up his false report accordingly and left it for Kelly to use. (Transcript, R. 160, Page ID # 1619-1623). Kelly testified similarly that he signed a false report because he understood from Ousley's phone call that Pearce "wanted to cover it up." (Transcript, R. 160, Page ID # 1386-1387, 1394-1396). When asked whether he would have signed a false report "[i]f that phone conversation had not happened," Kelly responded: "No." (Transcript, R. 225, Page ID # 2678-2679). Both officers testified that they submitted false reports out of fear of retaliation, and Ousley specifically named Pearce (among others) when asked who he feared would retaliate against him if he declined to do so. (Transcript, R. 160, Page ID # 1396, 1621-1623; Transcript, R. 225, Page ID # 2679).

As to C.T. (Count 3), the court found that Pearce's management of Elliott's story by standing over his shoulder while he wrote a false report was "the quintessential act of supervision." (Transcript, R. 225, Page ID # 2760-2761). That finding was supported by Patrick's testimony at trial, the case agent's testimony at sentencing, and the false report that Elliott submitted. (Transcript, R.

159, Page ID # 1198-1203; Transcript, R. 225, Page ID # 2731-2734; App. 3). It was also corroborated by the facts that Elliott admitted when he pleaded guilty in his own criminal case, specifically: Pearce asked Elliott to write a false report to help cover up the assault against C.T., Elliott agreed to do so "[b]ased on Lieutenant Pearce's seniority and his supervisory role as the operations lieutenant," and Pearce then "watched over [Elliott]'s shoulder as [he] wrote his false report" and "instructed [Elliott] to put that C.T. had left the Lieutenants' Office 'without incident.'" (Gov't Sent. Mem. Ex. 1, R. 213-1, Page ID # 2534).

2. Pearce quibbles with these findings by pointing to an assortment of excerpts from the record that he claims undermine the "manager or supervisor" enhancement. Br. 16-17, 20-25. But a "finding of fact is not clearly erroneous simply because there is evidence in the record that might support a different finding." *United States v. Vance*, 956 F.3d 846, 853 (6th Cir. 2020) (citation omitted). Under "the deferential clear-error standard," this Court will "defer to the district court's finding" even if the Court "would have made the opposite finding" on the same evidence, "so long as both stories are plausible on the record as a whole." *United States v. Estrada-Gonzalez*, 32 F.4th 607, 614 (6th Cir. 2022).

In any event, none of the evidence on which Pearce relies calls the district court's findings into question. Pearce first mischaracterizes Carter's testimony by suggesting that it described "Patrick's pressure campaign" rather than "Pearce's

involvement." Br. 16-17 (emphasis omitted). But that is not what Carter said. Carter first described a private conversation with Pearce, not Patrick: "Lieutenant Pearce advised me that basically I have to help him. I need to do a memo saying that nothing happened." (Transcript, R. 159, Page ID # 1009). In addition, as Pearce acknowledges (Br. 16), Carter did not refer to Patrick acting alone; instead, Carter testified that Patrick specifically said on the phone that "Pearce wanted [Patrick] to remind [Carter] to take care of the memo." (Transcript, R. 159, Page ID # 1012). As to Ousley, Pearce cites (Br. 17) only two quotations—from counsel's questions on cross-examination—that do not undermine the whole of Ousley's testimony that he understood Pearce to be telling him to write a false report. (Transcript, R. 160, Page ID # 1614-1617). And while Kelly did say that he could not hear who was on the other end of the phone with Ousley, he also testified that Ousley told him after the call that "Lieutenant Pearce" wanted to cover up the assault on E.G. (Transcript, R. 160, Page ID # 1394-1395). On this record, it was more than reasonable for the district court to infer that Pearce had pressured both Ousley and Kelly to join the cover-up. *See United States v. Parrish*, 915 F.3d 1043, 1048 (6th Cir. 2019) ("[T]he district court is free to make reasonable inferences from facts in the record when fashioning a sentence.").

Pearce next (Br. 20-22) points to a timesheet that he claims shows Pearce was not working at Big Sandy on the day Elliott said he was approached about

writing a false report. (Transcript, R. 225, Page ID # 2721-2724). But the district court weighed this piece of evidence against Elliott's plea colloquy and decided to credit Elliott's version of events, explaining that the one "piece of proof" was "not enough to overcome the very strong record indicative of the defendant . . . catalyzing and micromanaging the Elliott statement." (Transcript, R. 225, Page ID # 2761). That finding was also supported by Patrick's testimony that Pearce "[s]p[oke] to Lieutenant Elliott about writing a memorandum that corroborated [their] story." (Transcript, R. 159, Page ID # 1198-1199). "[W]hen, as here, the district court identifies two competing permissible versions of the facts and reasonably explains why it chose to credit one version over the other, such a finding is not clearly erroneous." *United States v. Wellman*, 26 F.4th 339, 355 (6th Cir. 2022) (internal quotation marks omitted).

Finally, Pearce contends that he acted not as a manager or supervisor, but rather as a mere "foot soldier" in the cover-up efforts at Big Sandy. Br. 22-25. According to Pearce, although he had supervisory authority in the "legitimate chain of command" at the prison, his role in the criminal activity was limited to "enacting the directives of those above and parallel to him." Br. 23-24. As with the dispute about Elliott, this argument was presented to and rejected by the district court, and Pearce has failed to show any clear error in that determination.

The district court was well aware of Pearce's view of the record and carefully considered the evidence that senior prison officials (not charged here) had also been involved in the cover-ups. (Transcript, R. 225, Page ID # 2759-2763). Indeed, the court ultimately concluded that the record did not support the four-level increase for "an organizer or leader" that the government had asked for (and the presentence investigation report recommended), finding instead that Pearce acted as "a manager or supervisor"—which adds only three levels to the offense calculation—in light of the evidence that "the scheme was devised and hatched and directed from the highest levels of the prison." (Transcript, R. 225, Page ID # 2755-2756, 2760-2763). But the district court did not agree that executive-level involvement let Pearce off the hook entirely. The court determined that the scheme still "went directly through Pearce," who "used his power and authority to then implement the mechanics through corroborating paperwork from subordinates." (Transcript, R. 225, Page ID # 2760-2763). That conclusion finds ample support in the record, including testimony by Pearce's colleagues as well as the subordinate officers who submitted false reports. *See* pp. 5-8, 10-12, *supra*. Because the finding is "plausible on the record as a whole," *Estrada-Gonzalez*, 32 F.4th at 614, Pearce's factual challenge to the aggravating role enhancement fails.[6]

[6] The district court's decision is also consistent with other cases where this Court has affirmed application of the "manager or supervisor" enhancement. *See,*

II. The district court properly denied a downward adjustment under the new "zero-point" offender provision.

Pearce also contends that the district court incorrectly denied a two-level reduction pursuant to Section 4C1.1, a recently enacted guidelines adjustment that applies to "certain zero-point offenders." Sentencing Guidelines § 4C1.1. Under that provision, a defendant who "meets all of" the criteria enumerated in subsections (1) through (10) is entitled to have his or her offense level decreased by two levels. *Ibid.* As the Sentencing Commission explained in its recent amendments, this provision is designed to reduce offense levels for defendants "who did not receive any criminal history points" and "whose instant offense did not involve specified aggravating factors." Amendments to the Sentencing Guidelines, U.S. Sent'g Comm'n at 79 (Apr. 27, 2023).

At issue here is subsection (10), which states: "the defendant did not receive an adjustment under § 3B1.1 (Aggravating Role) and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848." Sentencing Guidelines § 4C1.1(a)(10). Pearce argues—for the first time on appeal—that this

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e.g., *United States v. Labib*, 38 F. App'x 257, 260 (6th Cir. 2002) (defendant's role was "more than a foot soldier but less than . . . the mastermind"); *United States v. Glover*, 599 F. App'x 254, 255 (6th Cir. 2015) (defendant "might have acted at the direction of her husband; however, she also directed at least one individual"); *United States v. Browning*, 40 F. App'x 873, 880 (6th Cir. 2002) ("[The defendant] need only serve in a management or supervisory position vis-a-vis one other individual in a five-person scheme to justify a court's application of § 3B1.1(b).").

provision should be read to disqualify only those defendants who *both* "receive[d] an adjustment under § 3B1.1," and *also* "engaged in a continuing criminal enterprise." Br. 13, 26, 31. Said differently, although Pearce received an aggravating role adjustment under Section 3B1.1, he insists that he is still entitled to the two-point reduction because he was not also engaged in a continuing criminal enterprise.

The Court need not address this argument because it was expressly waived below. And even if that were not the case, Pearce's creative interpretation was recently rejected by the Supreme Court in a closely related context in *Pulsifer v. United States*, 144 S. Ct. 718 (2024).

A. Pearce waived this argument below.

Although Pearce requested the two-level reduction under Section 4C1.1 at sentencing, defense counsel agreed with the district court (and the government) that Pearce would not be eligible for that reduction if the aggravating role enhancement applied. (Transcript, R. 225, Page ID # 2634-2635, 2749, 2798-2799). During argument on the defense's objections, counsel stated: "in the lack of an aggravating role enhancement, Mr. Pearce has a zero criminal history point . . . [s]o he would be entitled to a two-level reduction." (Transcript, R. 225, Page ID # 2749). Later in the hearing, counsel conceded the point even more clearly, agreeing that Section 4C1.1 did not technically apply: "the Court said, as it did

that, *correctly*, that because of the aggravating role enhancement, [Pearce] also loses the two points under the new amendment." (Transcript, R. 225, Page ID # 2798-2799) (emphasis added).

These concessions on the record waived Pearce's argument on appeal that the aggravating role enhancement by itself does *not* disqualify him from the two-level reduction under Section 4C1.1. Where, as here, a defendant "conced[es]" an argument "in open court" and then "chang[es] positions on appeal," that argument is "waive[d]." *United States v. Clark*, 24 F.4th 565, 577 (6th Cir. 2022); *see also United States v. Aparco-Centeno*, 280 F.3d 1084, 1088 (6th Cir. 2002) ("[A]n attorney cannot agree in open court with a judge's proposed course of conduct and then charge the court with error in following that course." (citation omitted)). Waived arguments—like this one—are not considered on appeal "because the waiving party has conceded that there is no error to review." *United States v. Carter*, 89 F.4th 565, 568 (6th Cir. 2023). Pearce's argument under Section 4C1.1 can therefore be rejected for this reason alone.

B. Pearce cannot satisfy the plain-error standard, particularly in light of the Supreme Court's decision in *Pulsifer*.

At best, Pearce's argument about the meaning of "and" in Section 4C1.1(a)(10) is subject to plain-error review because it was not raised below. *See United States v. Ramer*, 883 F.3d 659, 684 (6th Cir. 2018) ("With regard to arguments not raised at sentencing . . . this Court reviews the application of a

particular provision for plain error."). Under that standard, Pearce must show that the error is "clear or obvious, affects a defendant's substantial rights, and seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 676-677 (alterations omitted). Pearce cannot make this showing in the face of contrary authority.

After Pearce filed his opening brief, the Supreme Court in *Pulsifer v. United States*, 144 S. Ct. 718 (2024), declined in a similar context to read the word "and" the way Pearce urges here. In *Pulsifer*, the Court interpreted the criminal-history requirement of the safety-valve provision in 18 U.S.C. 3553(f), which exempts certain defendants from mandatory minimum sentences. 144 S. Ct. at 723. Under that provision, to qualify for relief, a defendant's criminal history must satisfy three criteria that are joined together in the statutory text by the word "and." Specifically, the safety-valve statute provides that a defendant may not have "more than 4 criminal history points, . . . a prior 3-point offense, . . . *and* . . . a prior 2-point violent offense." 18 U.S.C. 3553(f)(1) (emphasis added). The defendant in *Pulsifer* argued that, by using the word "and" to connect these conditions, Congress intended to exclude only those defendants whose criminal history included "the combination of" *all three* criteria. *Pulsifer*, 144 S. Ct. at 723 (emphasis omitted). In other words, under the defendant's interpretation, the statute's three elements together comprised "a single, amalgamated condition"—

meaning that a defendant who met some, but not all, of the criteria would remain eligible for the safety valve. *Ibid.* By contrast, the government in *Pulsifer* argued that the provision "create[d] a checklist with three distinct conditions," each of which a defendant must meet to be eligible for relief—meaning that a defendant whose criminal history met *any one* of the three criteria would be excluded. *Ibid.* In short, the defendant argued that the statute disqualifies only those defendants who meet *all three* elements, while the government argued that the statute disqualifies every defendant who meets *just one*.

The Supreme Court adopted the government's view, holding that the statute "sets out an eligibility checklist." *Pulsifer*, 144 S. Ct. at 737. Pursuant to that checklist, "[a] defendant is eligible for safety-valve relief only if he satisfies each of the paragraph's three conditions." *Ibid.* In reaching that conclusion, the Court reasoned that grammar alone could not resolve the dispute because "conjunctions are versatile words" that "can work differently depending on context." *Id.* at 736. Once the content of the safety-valve provision is considered in context, however, the "two grammatical possibilities" are reduced "to just one plausible construction." *Id.* at 731.[7]

[7] In adopting the government's view in *Pulsifer*, the Supreme Court took the same side of the circuit split that this Court had joined in *United States v. Haynes*, 55 F.4th 1075, 1079 (6th Cir. 2022), *cert. denied*, No. 22-7059 (Mar. 25, 2024).

So too here. Even if Pearce's reading of subsection (a)(10) as a single condition for relief (rather than an eligibility checklist) may be grammatically sound in the abstract, it is not a plausible interpretation for at least two reasons.

First, the "exclusionary criteria" under Section 4C1.1 were modeled after the safety-valve statute (18 U.S.C. 3553(f)(4)) and corresponding guideline provision (Section 5C1.2(a)(4)). *See* Amendments to the Sentencing Guidelines, U.S. Sent'g Comm'n at 80 (Apr. 27, 2023). Courts—including this one—have read the nearly identical language in those contexts to mean that a defendant who meets *either* criterion will be disqualified. *See, e.g.*, *United States v. Bazel*, 80 F.3d 1140, 1142 (6th Cir. 1996) ("Section 3553(f) and § 5C1.2 thus require the court to make a finding *both* that the defendant was not an 'organizer, leader, manager, or supervisor' *and* that the defendant was not engaged in a CCE in order to open the safety valve."); *United States v. Draheim*, 958 F.3d 651, 658 (7th Cir. 2020) (similar); *United States v. Lynch*, 903 F.3d 1061, 1083 (9th Cir. 2018) (disqualifying defendant from safety-valve relief based only on leadership role).[8]

[8] Pearce's argument (Br. 31-33) that the language in Section 5C1.2(a)(4) is different from subsection (a)(10) lacks merit. Section 5C1.2(a)(4) disqualifies a defendant whose role was "an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines," whereas subsection (a)(10) more simply refers to the guideline where that determination is made—Section 3B1.1. The meaning is the same.

Second, as in *Pulsifer*, the "eligibility checklist" interpretation is far more logical than the "single condition" meaning that Pearce advocates here for the simple reason that both criteria will never be satisfied. Under the continuing criminal enterprise (CCE) statute, for a person to be "engaged in a continuing criminal enterprise," he or she must "occup[y] a position of organizer, a supervisory position, or any other position of management." 21 U.S.C. 848(c)(2)(A). To account for this statutory definition, Application Note 1 for Section 2D1.5—which sets forth the base offense level for CCE offenses—instructs: "Do not apply any adjustment from Chapter Three, Part B (Role in the Offense)." Sentencing Guidelines § 2D1.5, comment. (n.1). The background section explains why:

> Because a conviction under 21 U.S.C. § 848 establishes that a defendant controlled and exercised authority over one of the most serious types of ongoing criminal activity, this guideline provides a minimum base offense level of 38. An adjustment from Chapter Three, Part B is not authorized because the offense level of this guideline already reflects an adjustment for role in the offense.

Id. comment. (backg'd.). The safety-valve provision in the guidelines also acknowledges this overlap between the aggravating role enhancement and the CCE statute. *See* Sentencing Guidelines § 5C1.2, comment. (n.3(B)) ("any defendant who 'engaged in a continuing criminal enterprise' . . . will be an 'organizer, leader,

manager, or supervisor of others in the offense'").[9] Thus, under the Guidelines, both prongs of subsection (a)(10) will never apply together: a defendant engaged in a CCE would not also receive an aggravating role adjustment; and a defendant who receives an aggravating role adjustment will necessarily not have been engaged in a CCE. In these circumstances, it is clear that subsection (a)(10) is designed to exclude defendants who occupied a management role in the offense, whether by operation of Sentencing Guidelines § 3B1.1 or 21 U.S.C. 848.

As a practical matter, Pearce's reading—under which *both* prongs of subsection (a)(10) must be satisfied for a defendant to be ineligible for the sentence reduction—would leave subsection (a)(10) without any meaning, because that interpretation would never disqualify any defendants. This kind of "superfluity" is why *Pulsifer* rejected the defendant's parallel argument under the safety-valve statute. 144 S. Ct. at 731. It also results in the same kind of "gatekeeping" problem the Court identified in *Pulsifer*. *Id.* at 733-735. If subsection (a)(10) has no effect, then defendants who engaged in more serious criminal conduct—by organizing or managing criminal activity—will be entitled to a lower offense level

[9] This relationship is also why Pearce is wrong that the aggravating role adjustment under Section 3B1.1 is "conceptually separate" from the CCE element in subsection (a)(10). Br. 28. To the contrary, including both prongs together ensures that defendants who engaged in more serious criminal conduct (by serving in a leadership or management role) will not be eligible for an offense-level reduction under this provision.

(so long as they aren't disqualified under any of the other criteria listed in Section 4C1.1). As in *Pulsifer*, "the sorting accomplished by" Pearce's proposed reading "does not match" what the provision "call[s] for" because it "fails to divide, at the gate for [sentencing] relief, more from less serious" offenses. *Id.* at 734.

Because Pearce's interpretation of Section 4C1.1 is illogical and implausible, the rest of his arguments also miss the mark. As to the rule of lenity (Br. 33-35), *Pulsifer* explains that when—as here—a provision is not "genuinely ambiguous," there is "no role for lenity to play." 144 S. Ct. at 737. Nor is the proposed amendment that is currently under consideration by the Sentencing Commission any help to Pearce. *See* Br. 33-34. That proposal involves only a "technical" change that is "non-substantive" and would not alter the meaning of subsection (a)(10). Proposed Amendments to the Sentencing Guidelines, U.S. Sent'g Comm'n at 89 (Dec. 26, 2023). If anything, the proposed amendment weighs *against* Pearce's reading, as it confirms that subsection (a)(10) is intended to read as two separate conditions. *See ibid.* ("a defendant is ineligible for the adjustment if the defendant meets either of the disqualifying conditions in the provision").

In sum, should the Court reach the merits of Pearce's argument under the zero-point offender provision, the district court did not make a "clear or obvious"

error by interpreting Section 4C1.1(a)(10) consistent with precedent and in the most logical way. *Ramer*, 883 F.3d at 684.

CONCLUSION

For the foregoing reasons, this Court should affirm Pearce's sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 9757 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

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Date: April 5, 2024

CERTIFICATE OF SERVICE

On April 5, 2024, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS*

Document Description	Record Entry Number	Page ID #s
Superseding Indictment	R. 55	143-155
Transcript (Trial Day 2)	R. 159	976-1288
Transcript (Trial Day 3)	R. 160	1311-1649
Transcript (Trial Day 4)	R. 161	1685-1794
Verdict	R. 141	573-574
Judgment of Acquittal	R. 143	583
Judgment (Patrick)	R. 207	2403-2409
Judgment (Pauley)	R. 208	2410-2416
Def. Sent. Mem. Ex. 1	R. 212-1	2497-2499
Gov't Sent. Mem. Ex. 1	R. 213-1	2534
Transcript (Sentencing)	R. 225	2631-2835
Judgment (Pearce)	R. 217	2540-2546
Notice of Appeal	R. 222	2620-2621

* Also cited in the brief are a handful of exhibits from trial and sentencing that were not filed on the district court docket below. Those exhibits have been submitted to the Court in the Appellee's Appendix filed concurrently with this brief (for the paper documents), and by CD via mail (for the audio recordings).