No. 21-20-1808

In The

Supreme Court of the United States

ADAM BILLINGS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner in *Pro Se*

QUESTIONS PRESENTED

1. Whether the Sentencing Guidelines §2D1.1 Application Note 4 violates procedural due process.

2. Whether the Eighth Circuit's decision in *United States v. Roach* conflict with this Court's holdings in *United States v. Booker* and *Kisor v. Wilkie.*

PARTIES TO THE PROCEEDING

Adam Billings, petitioner on review, was the petitioner-appellant below.

The United States of America, respondent on review, was the respondent-appellee below.

RELATED PROCEEDINGS

To petitioner's knowledge, all proceedings directly related to this petition include:

Billings v. United States, No. 6:20-CV-03064 (W.D. Missouri August 4, 2020); *Billings v. United States,* No 20-2693 (8th Cir. Dec. 7, 2020)

United States v. Billings, No 18-1872 (8th Cir. 2019); *United States v. Billings,* No. 6:17-CR-03020 (W.D. Missouri Apr. 11, 2018)

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I, Adam Billings respectfully petitions for a writ of certiorari to review the judgment of the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's opinion is not reported. Pet. App. 1a-2a. The District Court's opinion is not reported. *Id.* at 3a-9a.

JURISDICTION

The Eighth Circuit entered judgment on December 7, 2020. On March 19, 2020 this Court by general order extended the deadline to petition for a writ of certiorari to 150 days from the date of the lower court's judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. *See* Pet. App. [10a-19a]

INTRODUCTION

This Court has stated and re-stated that evidence which increases the penalties of a crime of conviction beyond the standard range must be presented to a jury. *Blakely v. Washington*, 542 U.S. 296 (2004). This applies directly to the Sentencing Guidelines. *United States v. Booker*, 543 U.S. 220 (2005).

When crafting a sentence, the district court should start with a correctly calculated Guidelines range. *Gall v. United States,* 552 U.S. 38 (2007).

However, the "correctness" of an initial calculation of the Guidelines range traces back to the Presentence Report (PSR). The calculations in this case extrapolated drug quantities and purity far beyond a preponderance of the evidence.

The Eighth Circuit has held that a sentencing court "may make a specific numeric determination of quantity based on imprecise evidence." *United States v. Roach,* 164 F.3d 403 (8th Cir. 1998). However, imprecise evidence and data extrapolation can explore too far outside the realm of a preponderance of the evidence and violate due process.

In consideration of *Seminole Rock* deference, when the Guidelines Manual application notes expand outside of the scope of the guideline it interprets, the application note should not be considered.

Such is the case here, as U.S.S.G. §2D1.1 App. N. 5 expands too much on the Guideline it interprets to such a degree that it infringes upon due process.

From a coerced statement in a park after midnight, to the PSR, to the sentencing hearing in this case, there is insufficient evidence to support a finding of the amount of drugs for which I was sentenced.

STATEMENT

In April of 2018 I was sentenced to 292 months in prison for Possession with Intent to Distribute 50 grams or More of Methamphetamine. This, in violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §841(b)(1)(A).

I was arrested by the Lake Area Narcotics Enforcement Group (LANEG) in 2016 for receiving 110.01 grams of methamphetamine through the United States Postal Mail. While released, I was interrogated by a LANEG officer while high on methamphetamine, inside a non-governmental vehicle, in a park, well passed midnight one night.

In that interrogation, I intimated that I had received more than one package of methamphetamine through the mail in the past. I estimated a range of both the number of packages

that I had received, and the approximate size of those packages.

The commentary to the drug quantity guideline requires a court to "approximate the quantity of the controlled substance." U.S.S.G. §2D1.1 App n. 5, *infra.*

Either the PSR, or the report of the interrogating officer, omitted the 'ranges' expressed and simply misstated the frequency and size of the packages I admitted to receiving. Whether this was derived from the report of the interrogating officer, or was over-simplified by the PSR writer, I (as a *pro se* inmate) have no way of determining.

The result was a bald assertion that I received 10 packages in the mail that contained an average of 227 grams of methamphetamine each.[1]

The PSR writer extrapolated the drug quantities I would be held responsible for according to that interview statement. This resulted in the assumed responsibility of 2.27 kilograms of

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1 Here, at the least, the PSR writer acknowledges that I admitted that each package contained anywhere from a few ounces to a full pound.

methamphetamine over the course of the criminal activity charged.

Adding to this, the entirety of the narcotics I was charged with possessing (with intent to Distribute) was assumed to be of the same quality as the 110 grams actually seized from my residence.

Somewhere along the way, due process was offended. I was arrested with just over 110 grams of narcotics and sentenced for possessing twenty times this amount based on a statement given after midnight in a strange car, while I was high on methamphetamine.

REASON FOR GRANTING THIS PETITION

A) The Eighth Circuit's holding in *Roach* and its progeny conflict with *Booker* and *Kisor*

Beginning with *United States v. Roach,* 164 F.3d 403 (8th Cir. 1998), the Eighth Circuit has held that "[t]he trial court is entitled to estimate drug quantities where the amount actually seized fails to represent the scale of the offense if the preponderance of the evidence supports the quantities." *Id.* at 413.

Roach then cites U.S.S.G. §2D1.1, cmt. (n.12) as a basis for this. Using that guideline as a basis, "[t]he Court may make a specific numeric determination of quantity based on imprecise evidence." *Roach* at 413.

This holding has been echoed by the Eighth Circuit in many cases following *Roach.* See, *inter alia, United States v. Colton*, 742 F.3d 345, 349 (8th Cir. 2014), *United States v. Johnson,* 641 Fed.Appx. 654, 659 (8th Cir. 2016); *United States v. Denson,* 967 F.3d 699, 704 (8th Cir. 2020).

This Court decided in *Stinson v. United States,* 508 U.S. 113 (1993) that the district courts were bound by the Guidelines Manual. That decision was partially reversed in *Booker,* where the ranges established by the Guidelines Manual were not, in fact, binding on the Court, but were advisory as one of several sentencing factors from 18 U.S.C. §3553(a) used to determine a final sentence.

The Guidelines themselves, however, "are not advisory; they are mandatory and binding on all judges." *Id.* at 234.

Commentary within the Guidelines manual that "interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of that guideline." *Stinson* at 38.

Commentary that does not interpret or explain the guideline it comments on is, thus, not consistent with the reading of that guideline. Commentary that expands on a guideline is overreach and therefore void.

> "Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level.

> See [U.S.S.G.] §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved." U.S.S.G. §2D1.1 App. n. 5.

The instructions of the Guidelines Manual commentary here expand the guideline, which is impermissible because it runs afoul of this Court's decision in *Kisor v. Wilkie,* 139 S.Ct. 2400 (2019). *Kisor* cabined the *Seminole Rock,*[2] or *Auer,*[3] deference, whose decisions gave broad deference to agency interpretations of their own regulations.

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2 *Bowles v. Seminole Rock & Sand Co.*, 325 US 410, 414 (1945).

3 *Auer v. Robbins,* 519 U.S. 452, 472 (1997).

Stinson determined that the Sentencing Guidelines were more akin to a regulation than a statute, and should be treated as such. *Id.* at 44.

"[*Kisor*] cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations and explained that *Auer,* or *Seminole Rock*, deference should only be applied when a regulation is genuinely ambiguous." *United States v. Nasir*, 982 F.3d 144, (3rd Cir. 2020).

Nasir changed the Third Circuit's course from their previous binding deference to commentary which expanded a guideline. That deference that reached back 27 years. See *United States v. Hightower.* 45 F.3d 182 (3rd Cir. 1994).

> "If we accept that the commentary can do more than interpret the guidelines, that it can add to their scope, we allow circumvention of the checks Congress put on the Sentencing Commission, a body that exercises considerable authority in setting rules that can deprive citizens of their liberty. Unlike the guidelines, the commentary 'never passes through the gauntlets of congressional review or notice

> and comment.'" *Nasir,* at *25 (quoting *United States v. Havis,* 927 F.3d 382, 386 (6th Cir. 2019)(en banc)).

The Eighth Circuit, for its part, has recognized the impact on the binding nature of guidelines commentary. *United States v. Broadway,* No. 19-2979, at n. 2 (8th Cir. 2020). [20a-23a].

However, the Eighth Circuit here declined to abandon their binding deference standard.[4]

The resulting conflict is clear.

The commentary to §2D1.1 impermissibly expands the guideline to permit a sentencing Court to estimate and extrapolate drug quantities by a preponderance of the evidence.

Booker, rendered the guidelines as advisory in ultimate sentencing decisions in 2005.

Kisor cut back the *Auer* (or *Standing Rock*) deference to a point where sister Circuits have concluded that commentary which expands the scope of the guidelines should not be followed (or considered binding).

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4 *United States v. Mendoza-Figueroa,* 65 F.3d 691 (8th Cir. 1995).

The Eighth Circuit refuses to rule similarly, and that refusal conflicts with this Courts holdings in *Booker* and *Kisor*.

This commentary should be ruled as an improper expansion on the guideline and ruled unenforceable. It deprives defendants of liberty without "passing through the gauntlets of congressional review or notice and comment." For this reason, due process is offended.

B) Due Process is Violated by the Commentary to U.S.S.G. §2D1.1

> "No person shall be ... deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

The Sentencing Guidelines, and the commentary to those Guidelines, are very different in their genesis. Whereas each guideline passes through the "gauntlet" as described in *Havis*, the commentary does not.

This, however, has not stopped the commentary from expanding on §2D1.1 to allow sentencing courts to make findings on drug

quantities and purity which can have massive impacts on their eventual sentences. Such is the case here.

I was arrested and found to be in possession of just over 110 grams of methamphetamine (actual), which results in a base offense level of 30. The sentencing court, through the use of the PSR and §2D1.1 App. n. 5 (note 4 at the time of sentencing), increased the drug quantity to 2,270 grams. This resulted in a base offense level 6-point higher: 36.

Because I was assessed at a Criminal History Category of VI, those 6 points (notwithstanding other enhancements and mitigation) effectively doubled my sentencing exposure.

In practical matters, I was assessed as a career offender under a different guideline (U.S.S.G. §4B1.1(b)(1)), which set the floor of my base offense level at 37. With the quantity and purity found by a preponderance of the evidence, my base offense level was 38 (36 points plus 2 points for a leadership role).

This created a 1-point discrepancy caused by the drug quantity findings. However, even a one-point-difference causes liberty to be impermissibly infringed. *Rosales-Mireles v. United States,* 138 S.Ct.

1897 (2018). A miscalculation of the guidelines ranges is a "significant procedural error." *Gall* at 51.

Here, the difference between the drug quantity and purity found on my person at the scene of my arrest, and the quantity/purity I was sentenced for, created a 6-point difference in base offense levels.

When *decades* of a defendant's live is contingent upon a hand-waiving calculation of drugs based on an interview with law enforcement that was (1) not in a police station, but a park, (2) after midnight, and (3) conducted while I was high on methamphetamine ... due process is not preserved.

It is of note that the commentary to §2D1.1 does *not* provide for a sentencing court to extrapolate purity of a drug from a preponderance of the evidence on the record. For Methamphetamine, the drug quantity table in §2D1.1(c) shows a 10:1 ratio from Methamphetamine to Methamphetamine (actual).

For instance, 50 grams of Methamphetamine (actual)[5] results in the same base offense level (30) as 500 grams of Methamphetamine.

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5 Or "Ice"

To determine through authority given only by the commentary of the Guidelines Manual that the purity of the drugs I had received in other transactions was Methamphetamine (actual) was a gross trampling of due process.

The assumption about purity cannot withstand the scrutiny of this Court. The drug quantity calculus already crosses the line of procedural due process, but the purity assumption makes a huge difference in the guidelines calculation.

Federal courts "*must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Peugh v. United States,* 133 S.Ct. 2072 (2013).

This Court held that guidelines are not subject to due process challenges under the "void for vagueness" doctrine, *Beckles v. United States,* 137 S.Ct. 886 (2017). However, that holding was careful to clarify that it, "does not render the advisory Guidelines immune from constitutional scrutiny." *Id.* at 889.

Thus, this Court should now decide if this type of calculation violates the due process protections of the Constitution.

C) There is a Circuit split on this issue

As is detailed in section (A), the Eighth Circuit has elected not to revisit the issue of guidelines commentary in the wake of *Kisor.*

> "We are not in a position to overrule [*United States v. Mendoza-Figueroa*, 65 F.3d 691, 693 (8th Cir. 1995)], as Broadway urges us to do, even if there have been some major developments since 1995. See *Kisor v. Wilkie,* 139 S.Ct. 2400, 2414 (2019) (emphasizing that *Auer/Seminole Rock* deference is triggered only by "genuine[] ambigu[ity]"); *United States v. Booker,* 543 U.S. 220, 259-61 (2005)" *United States v. Broadway,* No. 19-2979 (8th Cir. 2020). [20a-23a]

Discussed in short above, the Third Circuit found that *Kisor* required a change of course.

> "Our interpretation of the commentary at issue in *Hightower* ... was informed by the then-prevailing understanding of the deference that should be given to agency interpretations of their own regulations. Thus, although we recognized that the

> commentary expanded and did not merely interpret the [guideline], we nevertheless gave it binding effect. In doing so, we may have gone too far in affording deference to the guidelines' commentary under the standard set forth in *Stinson*. *Indeed, after the Supreme Court's decision last year in* [*Kisor v. Wilkie*], it is clear that such interpretation is not warranted." *Nasir* at 158.

Partially concurring with the conclusion in *Nasir*, the Sixth, and D.C. Circuits have both concluded that the expansion of the guideline in commentary to U.S.S.G. §4B1.2 was impermissible. See *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) and *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018).

Very recently, the Seventh Circuit has reaffirmed its agreement with the several other Circuits that allow the commentary to expand on the language of the guideline. Regarding the *Nasir* decision from the Third Circuit:

> "Our court's precedent holds otherwise, and we see no reason here to diverge from

> it. In *United States v. Adams*, we held that the term 'controlled substance offense' encompasses incohate offenses." *United States v. Smith,* No. 20-1117 (7th Cir. March 3, 2021) [24a-46a](Citing *United States v. Adams,* 934 F.3d 720, 729-30 (7th Cir. 2019).

In concluding so, the Seventh Circuit concludes that the First, Eighth, Tenth, and Eleventh Circuits agree. (Citing *United States v. Lange*, 862 F.3d 1290, 1294-96 (11th Cir. 2017); *United States v. Nieves-Borrero*, 856 F.3d 5, 9 (1st Cir. 2017); *United States v. Chavez*, 660 F.3d 1215, 1228 (10th Cir. 2011); and *United States v. Mendoza-Figueroa*, 65 F.3d 691, 694 (8th Cir. 1995) (en banc).

This shows five Circuit Courts of appeal splitting from three. The issue of whether commentary to U.S.S.G. §4B1.2(b) expands on the text of the guideline to include incohate offenses takes a backseat here to whether or not guidelines commentary can, at all, expand rather than simply interpret the guideline it references.

This Court should resolve the disagreement here.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

/s/Adam Billings
Adam Billings
Pro Se Petitioner

May 2021