No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LUIS ENRIQUE LARIO-RIOS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney for Appellant
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600

QUESTION PRESENTED

Whether the Sentencing Commission can use commentary to expand an unambiguous Guideline that applies to enhancements for prior convictions for crimes of violence to include attempts to commit one of the offenses enumerated in USSG § 4B1.2.

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

RELATED CASES

- *United States v. Lario-Rios*, No. 7:20-CR-1286-1, U.S. District Court for the Southern District of Texas. Judgment entered January 21, 2021.
- *United States v. Lario-Rios*, No. 21-40052, U.S. Court of Appeals for the Fifth Circuit. Judgment entered August 11, 2021.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS – (cont'd)

Page

TABLE OF CITATIONS

Page

CASES

TABLE OF CITATIONS – (cont'd)

Page

CASES – (cont'd)

STATUTES AND RULES

TABLE OF CITATIONS – (cont'd)

Page

STATUTES AND RULES – (cont'd)

SENTENCING GUIDELINES

TABLE OF CITATIONS – (cont'd)

Page

SENTENCING GUIDELINES – (cont'd)

MISCELLANEOUS

PRAYER

Petitioner Luis Enrique Lario-Rios prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in petitioner's case is attached to this petition as Appendix A. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit's judgment was entered on August 11, 2021. *See* Appendix A. This petition is filed within 90 days of that date. *See* Sup. Ct. Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

GUIDELINES PROVISIONS INVOLVED

Guideline 4B1.2 of the 2018 U.S. Sentencing Guidelines provides:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession a firearm described in 28 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

Application Note 1 to USSG § 4B1.2 provides:

> **1. Definitions.** – For purposes of this guideline –
>
> "**Crime of violence**" and **controlled substance offense**" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

STATEMENT OF THE CASE

The petitioner, Luis Enrique Lario-Rios, was charged by indictment with being an alien found unlawfully in the United States after deportation, in violation of 8 U.S.C. § 1326(a) & (b). ROA.11.[1] He pleaded guilty to the indictment. ROA.71.

A presentence report ("PSR") was prepared prior to sentencing using the 2018 edition of the United States Sentencing Guidelines manual. ROA.97 (PSR ¶ 11). In addition to the base offense level of eight, USSG § 2L1.2(a), Mr. Lario-Rios received an eight-level enhancement because he had engaged in criminal conduct that resulted in a conviction for a felony, for which the sentence imposed was two years. *See* ROA.97 (PSR ¶ 15); USSG § 2L1.2(b)(2)(B). With a three-level reduction for acceptance of responsibility, USSG § 3E1.1(a), (b), his total offense level was 13. ROA.81, 98, 103 (PSR ¶¶ 20, 50).

Mr. Lario-Rios had previously been sentenced to serve concurrent two-year prison terms for three convictions for attempted kidnapping. He was assessed three criminal history points for the first sentence, and received an additional point for each of the two other convictions, pursuant to USSG § 4A1.2(a)(2)(B) & 4A1.1(e), because the convictions were treated as crimes of violence. ROA.100 (PSR ¶¶ 26-27). He received two more points because he had been under a criminal justice sentence when he returned illegally. ROA.100 (PSR ¶ 29). With a total of seven criminal history points, Mr. Lario-Rios's criminal history category was IV. ROA.100 (PSR ¶ 30). His advisory guideline range was 24 to 30 months.

[1] The citations are to the electronic record on appeal ("ROA") filed in the Fifth Circuit.

Mr. Lario-Rios did not object to the guideline calculations but requested a sentence below the advisory range. ROA.91. The district court imposed a sentence above the range of 45 months because the attempted kidnappings of young girls were very serious and because Mr. Lario-Rios had shown no respect for the immigration laws. ROA.87-89.

On appeal, the petitioner contended that the district court had committed reversible plain error by assessing additional criminal history points based on the treatment of his prior attempted kidnapping convictions as crimes of violence because the Commission had included inchoate offenses in the definition of crimes of violence only in the commentary but not the Guideline itself. The Fifth Circuit affirmed, emphasizing that no circuit precedent supported petitioner's claim. *See* Appendix A.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's opinion is in conflict with the decision of this Court in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), regarding deference to an agency's interpretation of its regulations, as well as the decisions of other circuit courts regarding *Kisor*'s applicability to the Sentencing Guidelines and commentary.

In determining the petitioner's Guideline range, the district court assessed additional criminal history points for two of his three Texas convictions for attempted kidnapping. Although the sentences had been imposed on the same day and all three sentences would normally be treated as a single sentence and assessed a total of three points, USSG §§ 4A1.1(a)(1), 4A1.2(a)(2), the district court treated these offenses as crimes of violence warranting assessment of additional points pursuant to USSG § 4A1.1(e). For purposes of § 4A1.1(e), "crimes of violence" are defined in USSG § 4B1.2.[2] This Guideline lists kidnapping as an enumerated crime of violence, USSG § 4B1.2(a)(2), but lists inchoate offenses such as attempt only in the commentary. USSG § 4B1.2, comment. (n.1).[3]

The issue in this case is whether the lower courts inappropriately deferred to the commentary to an unambiguous Guideline when determining that the petitioner's prior convictions for attempted kidnapping were crimes of violence. In light of this Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), such deference was unwarranted.

---

[2] USSG § 4A1.1, comment. n.5.

[3] Kidnapping is not considered to be a crime of violence under the use-of-force prong of the definition because the offense does not require the use, attempted use or threatened use of physical force. *See, e.g. United States v. Moreno-Florean*, 542 F.3d 445, 450 (5th Cir. 2008); *United States v. Cervantes-Blanco*, 504 F.3d 576, 580 (5th Cir. 2007); *see also United States v. Garcia-Gonzalez*, 168 Fed. Appx. 564, 565 (5th Cir. 2006) (unpublished) (Texas kidnapping).

A. This Court Has Disapproved of Reflexive Deference to an Agency's Interpretation of an Unambiguous Regulation.

Applying the standard announced in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), this Court decades ago held that the United States Sentencing Commission's "commentary in the Guidelines manual that interprets or explains a [sentencing] guideline is authoritative unless it . . . is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993). Relying on *Stinson*, the lower courts have treated the commentary to the guidelines, including USSG § 4B1.2, as authoritative. *See, e.g., United States v. Lightbourn*, 115 F.3d 291, 294 (5th Cir. 1997).

In *Kisor*, this Court recognized that "this classic formulation of the [Seminole Rock] test" governing agency interpretive rules "may suggest a caricature of the doctrine, in which deference is 'reflexive.'" *Id.* at 2415. The Court then clarified that deference to an agency's interpretation of its own regulations is only appropriate if a court finds two things: (1) that the regulation's text is "genuinely ambiguous," *after* "exhaust[ing] all the 'traditional tools' of construction," *id.*; and (2) that the agency's construction "fall[s] within the bounds of [a] reasonable interpretation" of that text. *Id.* at 2415–16.

B. The Courts of Appeal Are Divided Over *Kisor*'s Impact on Commentary Interpreting the Sentencing Guidelines.

The courts of appeals are divided over whether to defer to Guidelines commentary only after finding the underlying Guideline ambiguous, or whether to continue to be reflexively deferential. Three circuits have held that the Commission cannot use commentary to expand the scope of unambiguous Guidelines language. *See United States v. Nasir*, 982 F.3d 144, 156-59 (3d Cir. 2020) (*en banc*), *cert. granted, vacated and remanded on other grounds*, 2021 WL 4507560 (U.S. Oct. 4, 2021); *United States v. Havis*, 927 F.3d 382, 386-87 (6th Cir. 2019) (*en banc*) (per curiam); *United States v. Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018). Each of these decisions addressed the question presented here, whether the expansion of the definition of the qualifying predicate offenses in USSG § 4B1.2 within the commentary to include inchoate offenses is entitled to judicial deference.

While recognizing that it was creating a split in the circuits, the D.C. Circuit held that the commentary set forth in Application note 1 "adds a crime, 'attempted distribution,' that is not included in the guideline." *Winstead*, 890 F.3d at 1090-91. The court of appeals noted that "Section 4B1.2(b) presents a very detailed 'definition' of a controlled substance offense that clearly excludes inchoate offenses." *Id.* Applying the familiar canon of statutory construction, *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of the other, the court reasoned that the omission of inchoate offenses from the controlled-substance list demonstrated that such offense are not included. *Id.* The Third

and Sixth Circuits have followed suit. *Nasir*, 982 F.3d at 159; *Havis*, 927 F.3d at 386.[4]

These courts have also recognized the serious constitutional implications in allowing an agency to establish what are effectively Sentencing Guidelines without Congressional review. *Havis*, 927 F.3d at 386; *see also Nasir*, 982 F.3d at 159; *Winstead*, 890 F.3d at 405. The Sentencing Commission is an "unusual hybrid" with both quasi-legislative and quasi-judicial power. *Mistretta v. United States*, 488 U.S. 361, 412 (1989). As the Sixth Circuit noted in *Havis,* the Commission "functions in this dual role without disrupting the balance of authority in our constitutional structure," first, because the Guidelines are subject to Congressional review before they take effect,[5] and second, because the promulgation of these guidelines is subject to the notice and comment requirements of the Administrative Procedure Act (APA).[6] *Havis*, 927 F.3d at 386 (citing *Mistretta*, 488 U.S. at 393-94). "These two constraints–congressional review and notice and comment–stand to safeguard the Commission from uniting legislative and judicial authority in violation of the separation of powers." *Id.* at 386-87.

But the commentary is different. Unlike the Guidelines themselves, the commentary to the Guidelines "never passes through the gauntlets of congressional review or notice and comment." *Havis*, 927 F.3d at 387. To allow the Commission to expand the Guidelines

---

[4] These decisions determined that an inchoate offense should not be considered to be a "controlled substance offense" under USSG § 4B1.2(b). While the Guideline definition of crimes of violence includes offenses that have as an element of the offense the attempted use of force, USSG § 4B1.2(a)(1), the list of enumerated offenses does not include inchoate offenses. USSG § 4B1.2(a)(2).

[5] 28 U.S.C. § 994(p)

[6] 28 U.S.C. § 994(x).

through the use of this commentary threatens to undermine the careful hybrid structure approved by this Court in *Mistretta*.

In contrast to the D.C., Third and Sixth Circuits, seven circuits have deferred to the commentary without making any determination that the guideline is ambiguous. For example, the Eighth Circuit recently reaffirmed circuit precedent deferring to the § 4B1.2 commentary because it was "not a 'plainly erroneous reading' of it." *United States v. Broadway*, 815 Fed. Appx. 95, 96 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2792 (2021). Significantly, the panel bemoaned the fact that it was "not in a position to overrule" circuit precedent, even though there had been some major developments, including *Kisor*. *Id.* at 96. n.2. Likewise, the Ninth Circuit stated that if it were "free to do so, [it] would follow the Sixth and D.C. Circuits' lead." *United States v. Crum*, 934, F.3d 963, 966 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2629 (2020). But, while the court was "troubled that the Sentencing Commission ha[d] exercised its interpretive authority to expand the definition of 'controlled substance offense' . . . without any grounding in the text of § 4B1.2," it was "compelled by" circuit precedent to defer to the commentary. *Id. See*; *also United States v. Lewis*, 963 F.3d 16, 22-24 (1st Cir. 2020); *United States v. Tabb*, 949 F.3d 81, 87-88 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2793 (2021): *United States v. Adams*, 934 F.3d 720, 729 (7th Cir. 2019); *United States v. Lovelace*, 794 Fed. Appx. 793, 795 (10th Cir. 2020) (unpublished) (relying on *United States v. Martinez,* 602 F.3d 1166, 1174 (10th Cir. 2010)); *United States v. Bass*, 830 Fed. Appx 283, 286 (11th Cir. 2020) (unpublished).

The Fifth Circuit has likewise, as it did in this case, relied on circuit precedent in assuming that the § 4B1.2 commentary on inchoate offenses is authoritative and therefore

that reliance on that commentary is not plain error. *See Lario-Rios*, slip op. at 2 (citing *United States v. Kendrick*, 980 F.3d 432, 444 (5th Cir. 2020), *cert. denied*, 2021 WL 2637919 (U.S. June 28, 2021)) (other citations omitted). But this has been with some misgivings. In *United States v. Goodin*, 835 Fed. Appx. 771, 781 (5th Cir. Feb. 10, 2021) (unpublished), the Fifth Circuit rejected a defendant's claim that his drug conspiracy conviction no longer qualified under the career offender guideline because he had two convictions that did qualify. In a footnote, the court indicated that it would be "inclined to agree with the Third Circuit," but deemed itself constrained by *Lightbourn. Goodin*, 835 Fed. Appx. at 781 n.1.

In summary, the Sentencing Guidelines are promulgated after notice and comment and they are subject to Congressional review. The commentary to the Guidelines is not. The definition of crimes of violence in USSG § 4B1.2(a)(2) is unambiguous and it enumerates kidnapping as a violent offense but inchoate offenses such as attempt are not included in the list. Accordingly, sentencing courts should not defer to this commentary in determining whether an attempted offense is a crime of violence.

C. This Court Should Grant Certiorari to Resolve a Circuit Split that Impacts Federal Sentencing.

The guidelines play a "central role in sentencing'" and frequently are determinative of the actual sentence. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1341 (2016). And the work of the Sentencing Commission touches the lives of tens of thousands of individuals every year. Over 76,000 federal defendants were sentenced in 2019 alone. *See* U.S. Sentencing Comm'n, 2019 Sourcebook of Federal Sentencing Statistics,

https://ussc.gov/research/sourcebook/archive/sourcebook-2019.[7] In all of those cases, a federal district court was required to calculate the guideline range on the basis of the guidelines and commentary, and, in many instances, the applicable range was determined, at least in part, by deference to the agency's interpretation of the language and the reach of the applicable guideline.

The career offender guideline is an especially stark example of the dramatic effect that misapplying basic principles of agency deference has on individual criminal defendants. A career offender designation automatically increases a defendant's offense level and criminal history category. *See* USSG § 4B1.1. Even in this case, the crime-of-violence determination increased the assessment of criminal history points and therefore the advisory guideline range.

This Court should grant certiorari to resolve a split in the circuits over the deference to be shown to Guideline commentary, an issue that impacts a substantial number of individuals sentenced in federal court every year.

---

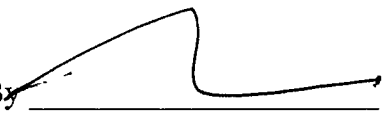
[7] The Sentencing Commission reports a reduction of individuals sentenced for felonies in 2020 - 64, 565 - in 2020 during the COVID-19 pandemic. https://ussc.gov/research/sourcebook -2020.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: October 26, 2021

Respectfully submitted,



By _____
MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney for Petitioner
440 Louisiana Street, Suite 1350
Houston, Texas 77002-1056
Telephone: (713) 718-4600