No. 21-6403

IN THE

Supreme Court of the United States

GARLAND GUILLORY,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF OF PETITIONER

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ARGUMENT

The government's response in opposition to certiorari focuses exclusively on the narrow question of whether Application Note 1 to the career offender Guideline is invalid, as stated in the second question presented. Opp. at 1–3. While acknowledging that there is "disagreement in the courts of appeals" over this question, the government asserts that there is "[n]o sound basis" for departing from the usual practice of leaving it to the Sentencing Commission to address this issue in the first instance. Opp. at 3. The government is incorrect, as discussed briefly below. But more importantly, the first question presented in Mr. Guillory's petition—which raises a broader but equally divisive issue regarding the nature and legal force of the Sentencing Guideline commentary as a whole—will not and cannot be resolved by any Commission action. Only this Court can resolve the conflict among U.S. Courts of Appeals regarding when and to what extent courts should rely on commentary to calculate a defendant's Guidelines range.

I. The Sentencing Commission cannot resolve the circuit split over the first question presented—only this Court can.

Even if this Court decides that specific Guideline disputes are better left to the Sentencing Commission to resolve, no matter how long that might take, it still should grant certiorari on the first question presented. The circuit split over Application Note 1 arises from, at base, a fundamental disagreement among the U.S. Courts of Appeals over the proper application of this Court's precedent to the Sentencing Guideline commentary. For example, the Fourth Circuit recently noted disagreement among Courts of Appeals regarding whether *Kisor* is applicable to the Guideline

commentary at all. *See United States v. Moses*, 23 F.4th 347, 349 (4th Cir. 2022). In *Moses*, the Fourth Circuit determined that the *Kisor* framework is inapplicable to the Guideline commentary and that *Stinson* articulated a unique "standard for the deference owed to Guidelines commentary." *Id.* In doing so, the court recognized that its holding conflicted with the positions taken by "at least two circuits"—the Third and Sixth. *Compare id.*, *with United States v. Riccardi*, 989 F.3d 476, 486–89 (6th Cir. 2021) (applying *Kisor*'s framework to invalidate certain commentary to U.S.S.G. § 2B1.1), *and United States v. Nasir*, 17 F.4th 459, 472 (3d Cir. 2021) (en banc) (relying on *Kisor* to invalidate Application Note 1 to the career offender Guideline).

Notably, in issuing the *Moses* decision, the Fourth Circuit created *intra-circuit* conflict over the applicability of *Kisor* to the Guideline commentary. As one judge noted in a dissent, "[t]he legal analysis of the panel majority in this case conflicts with" the Fourth Circuit precedent set forth in *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022). *Moses*, 23 F.4th at 359 (King, J., dissenting in part and concurring in the judgment). This further illustrates the confusion and inconsistency among federal courts about the proper application of *Stinson*, *Kisor*, and their predecessors to the Sentencing Guidelines.

This conflict among U.S. Courts of Appeals will not and cannot be resolved by any action by the Commission because it requires legal determinations about the meaning and scope of this Court's precedent, the nature of the Sentencing Guidelines, and the legal force of the commentary. Unless the Commission does away with its commentary entirely, the continued disagreement and confusion about its

intersection with agency deference principles and the impact of *Kisor* will create further sentencing disparities among criminal defendants, undermining the very purpose of the Commission and Guidelines—to promote uniformity, proportionality, and fairness in federal sentencing. *See Rita v. United States*, 551 U.S. 338, 348–49 (2007); U.S.S.G. Ch. 1 Pt. A.1(3). Accordingly, regardless of this Court's position on the second question presented, it should grant certiorari on the first question to finally resolve the overarching circuit conflict over how the commentary should be viewed and applied.

II. The circuit split over Application Note 1's validity has deepened, and the Sentencing Commission continues to lack a quorum.

With respect to the specific question of Application Note 1's validity, the inextricable divide among U.S. Courts of Appeals has deepened since the filing of Mr. Guillory's petition. In the *Campbell* case cited above, the Fourth Circuit joined the Third, Sixth, and D.C. Circuits in holding that Application Note 1's addition of inchoate offenses to the definition of "controlled substance offense" is inconsistent with the plain text of U.S.S.G. § 4B1.2(b) and thus warrants no deference from courts. *Campbell*, 22 F.4th at 447. The *Campbell* court expressly stated that it was "guide[d]" by this Court's decision in *Stinson v. United States*, 508 U.S. 36 (1993) but that, "if there were any doubt that under *Stinson* the plain text requires this result, the Supreme Court's recent decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), renders this conclusion indisputable." *Id.* at 443–44.

Importantly, this circuit split is not likely to be resolved by the Sentencing Commission anytime soon, if at all. As this Court is well aware, the Commission has

lacked the necessary quorum to introduce any Guideline amendments for over three years, spanning two different presidential administrations. *See Guerrant v. United States*, 142 S. Ct. 640, 641 (2022) (Sotomayor, J., and Barrett, J., respecting the denial of cert.). The U.S. Judicial Conference recommended six judges for potential nominations in April 2021—nearly a year ago—but President Biden still has not nominated anyone, despite the urging of the lone remaining member, Congressional representatives, and even Justices of this Court. *See id.*; *News Advisory: Comment of Honorable Charles R. Breyer Acting Chair, U.S. Sentencing Commission, on Statement of Justices Sotomayor and Barrett*, U.S. SENTENCING COMM'N (Jan. 12, 2022)[1]; Nate Raymond, *U.S. sentencing panel's last member Breyer urges Biden to revive commission,* Reuters (Nov. 11, 2021)[2]; Sarah Martinson, *Biden's Inaction Keeps Justice Reform Group Sidelined*, Law360 (Dec. 5, 2021)[3]. Moreover, even if the Commission does regain a quorum, there are countless other Guideline changes that require urgent attention, including those necessary to implement aspects of the First Step Act of 2018, which will likely be prioritized over the dispute at issue. In the meantime, criminal defendants will continue to face severe sentencing disparities resulting from the inconsistent application of the career offender enhancement. These circumstances present a sound basis for this Court to intervene to resolve the dispute.

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[1] Available at https://www.ussc.gov/about/news/press-releases/january-12-2022.

[2] Available at https://www.reuters.com/legal/government/us-sentencing-panels-last-member-breyer-urges-biden-revive-commission-2021-11-11/.

[3] Available at https://www.law360.com/articles/1441489/biden-s-inaction-keeps-justice-reform-group-sidelined.

III. This petition presents a good vehicle to address these issues.

Finally, the government's opposition briefly argues that Mr. Guillory's case presents "an unsuitable vehicle" to address these issues because his plea agreement contained a sweeping appeal waiver and his challenge is subject to plain error review. Neither argument is persuasive.

As this Court has held, "even a waived appellate claim can still go forward if the prosecution forfeits or waives the waiver." *Garza v. Idaho*, 139 S. Ct. 738, 744–45 (2019). The government does not dispute that it did not seek to enforce the waiver in the proceedings below. Opp. at 4. Instead, it attacks a strawman argument, asserting that Mr. Guillory "does not explain why the government's decision not to oppose" the motion for summary affirmance "would constitute waiver of its rights under the plea agreement"—an argument Mr. Guillory did not make. *Id.* Notably, though, the government *still* has not sought to enforce the waiver in its opposition to certiorari. Accordingly, there is no reason for this Court to deny certiorari based on the existence of the appeal waiver. Nothing bars this Court from hearing the case, and if the case is ultimately remanded to the Fifth Circuit, the government will have to decide whether it should seek to enforce the waiver. And, if it does, the Fifth Circuit will need to decide whether the waiver should be enforced given the posture of the case at that time.

The standard of review likewise should have no bearing on this Court's decision. The central issues in this case are whether *Kisor*'s framework applies to the Guideline commentary and whether Application Note 1 is invalid under this Court's precedent. As Mr. Guillory asserted in his motion for summary affirmance, the proper

ruling on these issues is dictated by this Court's precedent in *Kisor* and *Stinson*, as well as earlier cases addressing the constitutionality of the Sentencing Commission and Guidelines, and therefore is not subject to "reasonable dispute." *See United States v. Fields*, 777 F.3d 799, 802 (5th Cir. 2015).

Additionally, because this petition for writ of certiorari is a continuation of the "direct review" of Mr. Guillory's case, *see Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009), a favorable ruling by this Court would satisfy the clear or obvious standard. *See Johnson v. United States*, 520 U.S. 461, 467 (1997) (explaining that new holdings apply to all cases pending on direct review).

And, in the event this Court does find error, the third and fourth prongs of plain error review would easily be satisfied by the very nature of this error, because the application of the career offender Guideline dramatically increased Mr. Guillory's Guidelines range by more than six years. *See, e.g.*, *Rosales-Mireles v. United States,* 138 S. Ct. 1897, 1907 (2018) ("[A]n error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than 'necessary' to fulfill the purposes of incarceration."); *id.* at 1908 ("The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because of the role the district court plays in calculating the range and the relative ease of correcting the error."); *United States v. Sanchez-Arvizu*, 893 F.3d 312, 317 (5th Cir. 2018) (explaining that

"an incorrect application of the Sentencing Guidelines" generally satisfies the fourth prong of plain error review).

Accordingly, for the reasons discussed in Mr. Guillory's petition, *see* Pet. at 31, his case presents a good vehicle to address the questions presented.

CONCLUSION

For the foregoing reasons and those discussed in his petition, Mr. Guillory respectfully requests that the Court grant certiorari in this case on one or both of the questions presented.

Respectfully submitted,

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FEBRUARY 2022