No. _____

In the Supreme Court of the United States

Anderson Duke,
***Petitioner*,**
v.
UNITED STATES OF AMERICA,
***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

Michael L. DuBos
Counsel of Record
CJA-Appointed
BREITHAUPT, DUBOS & WOLLESON, LLC
1811 Tower Dr.
Monroe, LA 71201
(318) 322-1202
(318) 322-1984
michael@bdw.law

February 4, 2022 *Counsel for Petitioner*

QUESTIONS PRESENTED

In *Stinson v. United States*, 508 U.S. 36 (1993), this Court found the Sentencing Guidelines to be "the equivalent of legislative rules adopted by federal agencies." *Id.* at 45. Thus, this Court applied the *Seminole Rock* doctrine, which provides that an agency's interpretation of its own regulations is to be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 47 (citation omitted). In *Kisor v. Wilkie*, 139 S Ct. 2400 (2019), this Court recognized the dangers posed by reflexive judicial deference to an agency's interpretation of its own regulations and ruled that such deference should only be afforded if the underlying regulation is determined to be "genuinely ambiguous," and that a court must first "exhaust all the 'traditional tools of construction'" in analyzing the regulation in question. *Id.* at 2408 and 2415.

The circuits are openly split as to when *Stinson* deference is appropriate, and/or how *Kisor* limits *Stinson* with respect to the Sentencing Guidelines' commentary and how it is to be interpreted and applied, if at all. The Third, Sixth, and D.C. circuits have all applied *Kisor*, and held that courts owe no deference to Guidelines commentary when the underlying Guidelines text is not ambiguous. At least five other circuits disagree. Thus, Mr. Duke presents the following questions:

1. Should courts defer to Sentencing Guidelines commentary when there is no ambiguity in the underlying text?

2. Has the Commission impermissibly expanded the definition of "controlled substance offense" through the commentary by including "attempt" crimes when those crimes are absent from the Guidelines definition found in § 4B1.2(b)?

PARTIES TO THE PROCEEDING BELOW

All parties are listed on the cover page:

Petitioner is Anderson Duke, defendant in the district court and appellant in the court of appeals.

Respondent is the United States of America, plaintiff-appellee in the court of appeals.

RELATED PROCEEDINGS

Proceedings directly related to this case are as follows:

- *United States v. Duke*, No. 3:18-cr-00343-01-DEW-KLH, U.S. District Court for the Western District of Louisiana. Judgment and sentence entered on August 3, 2020.

- *United States v. Duke*, No. 20-30489, U.S. Court of Appeals for the Fifth Circuit. Panel decision issued September 14, 2021. Petition for rehearing en banc denied on November 12, 2021.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Cases cont'd **Page**

Statutes and Regulations

Statutes and Regulations Cont'd **Pages**

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 2a-5a) is unpublished but can be found in 858 Fed.Appx. 770 (Mem). The sentencing order of the district court (App. 6a-12a) is unreported.

JURISDICTION

The court of appeals entered judgment on September 14, 2021. App.1a. The petition for rehearing en banc was denied on November 12, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

SENTENCING GUIDELINES PROVISIONS INVOLVED

Section 4B1.2 of the 2021 U.S. Sentencing Guidelines provides:

> (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Application Note 1 to § 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.

Additional provisions of the U.S. Code and the 2021 U.S. Sentencing Guidelines are reproduced in Appendix D.

INTRODUCTION

Anderson Duke was classified as a career offender pursuant to U.S.S.G. § 4B1.1(a) based in part on a previous state conviction for attempted distribution of marijuana. While §4B1.2 does not include inchoate or attempt offenses, Application Note 1 to §4B1.2 modifies the definition of "controlled substance offense" to include attempt crimes. Because of this, Mr. Duke was classified as a career offender, and he received a Guidelines sentence range of 262 to 327 months and received a sentence of 288 months. Had Anderson Duke been sentenced for his crimes in Washington D.C., Ohio, or South Carolina, he would have faced a guideline range as low as 188 to 235 months. Because Mr. Duke was sentenced in the Fifth Circuit, which unconstitutionally applies "*Stinson* deference" and defers to the Sentencing Commission's interpretation of its own Guidelines, he instead received a significantly greater sentence. By adhering to *Stinson* deference, the Fifth Circuit and others have failed to apply the limitations this Court placed upon such judicial deference in *Kisor*. As a result, these circuits have allowed the Sentencing Commission to unlawfully expand the Guidelines text and have abdicated their duty as an independent check on the Commission's limited authority.

In doing so, these circuits have defeated one of the fundamental purposes of the Sentencing Commission, which was formed by Congress to establish Sentencing Guidelines as well as commentary regarding the applicability of the Guidelines. The purpose of this sentencing scheme, as this Court has stated before, is to achieve uniformity in federal sentencing decisions across the country. *Peugh v. U.S.*, 569 U.S.

530, 531, 133 S. Ct. 2072, 2076, 186 L. Ed. 2d 84 (2013). The disparity in sentencing among the various circuits due to their conflicting interpretations of §4B1.2(b) and its commentary at issue defeat that purpose.

Three circuits have properly held that *Stinson* deference is warranted *only* when an underlying text has been determined to be ambiguous after a court has exhausted all the usual tools of construction to determine in its analysis. These circuits properly afford no deference to the Commission's commentary to §4B1.2, as there is no ambiguity in the underlying text to justify deference.

The current circuit split is deeply entrenched. Tens of thousands of Americans are sentenced every year, and those who, by happenstance, are sentenced in certain geographic areas stand to face significantly harsher prison terms than they would have faced if their crimes were committed in another circuit. Like Mr. Duke, many of these individuals surrender significant portions of their life, while similarly situated defendants in other jurisdictions benefit from their circuit's rightful rejection of the *Stinson* doctrine when interpreting and applying the Sentencing Guidelines commentary.

It is unconscionable that significantly different prison sentences are being imposed upon tens of thousands of people simply based solely on geographic locations. Moreover, continued reflexive judicial deference to the Guidelines' commentary is unjustified when there is no ambiguity in the underlying Guidelines text, or when the court has not exhausted all the tools of textual construction in its analysis of the text. Consequently, this Court must act.

STATEMENT OF THE CASE

I. Legal Background

1. In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), this Court formalized the doctrine of judicial deference to an agency's interpretation of its own regulation, unless that interpretation "is plainly erroneous or inconsistent with the regulation." *Id* at 414. This deferential doctrine later became known as "*Auer* deference" following *Auer v. Robbins*, 519 U.S. 452 (1997), when this Court affirmed the practice of judicial deference to an agency's interpretations of its own regulations.

2. The Sentencing Commission is an independent, federal agency of the Judicial branch. Created by Congress via the Sentencing Reform Act in response to widespread disparity in federal sentencing, the Sentencing Commission has a mandate to "establish sentencing policies and practices for the Federal criminal justice system." 28 U.S.C. 991(a), (b)(1). To that end, the Commission promulgates Sentencing Guidelines as well as "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation." *Id*.

Any amendments made by the Commission are strictly controlled by the Administrative Procedures Act, which, just as it does for federal administrative agencies, requires that notice of a proposed amendment be published in the Federal Register to give the public an opportunity for comment. Furthermore, all proposed amendments must be submitted to Congress, which has six months to review the proposed amendment before it takes effect. 28 U.S.C. § 994(p) and (x); 5 U.S.C. § 553.

3. In 1987, the Commission promulgated the Career Offender Guideline. U.S.S.G. § 4B1.1. An individual is deemed to be a "career offender" when he or she has at least two prior felony convictions of either a crime of violence or a controlled substance offense. *Id.* Career offenders are subjected to significantly increased sentences.

In defining "controlled substance offense," § 4B1.2(b) is modeled after 28 U.S.C. § 994(h) and defines "controlled substance offense" as a felony offense "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b). Just as with 28 U.S.C. § 994(h), this Guideline does not include inchoate offenses, such as attempts to distribute a controlled substance.

Application Note 1 to §4B1.2(b) significantly expands the definition of "controlled substance offense" to "include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."

Passed in 1995, Amendment 528 of the Sentencing Guidelines amends Commentary to §4B1.1 in 1995 to "inser[t] additional background commentary in §4B1.1 (Career Offender)." Amendment 528 to U.S.S.G. §4B1.1. While Amendment 528 served to expand the basis of the Commission's purported authority for broadening the definition of "controlled substance offense," it does not contend that §4B1.2(b) is ambiguous, or that the definitions added via the commentary are interpretative or explanatory. Rather, Amendment 528 unequivocally states that it has expanded the

definition of "career offender" found in the Guidelines text, particularly §4B1.2(b), when it notes that "the Commission has **modified** this definition in several respects . . .." (Emphasis added.) *See* U.S.S.G. 4B1.1, Background. *See also* Amendment 528 to U.S.S.G. §4B1.1. Amendment 528 also repromulgated Application Note 1 of the Commentary to §4B1.2 without change. Application Note 1 of the Commentary to §4B1.2 contains the definition which expanded or "modified" the definitions of "crime of violence" and "controlled substance offense."

4. In *Stinson v. U.S.*, 508 U.S. 36 (1993), this Court applied *Seminole Rock/Auer* deference to determine the weight that should be afforded to the commentary in the Sentencing Guidelines Manual. This Court found that "the guidelines are the equivalent of legislative rules adopted by federal agencies" because both bodies, the Commission and federal administrative agencies, exercise authority expressly delegated to them by Congress. Consequently, this Court determined that the Commission's commentary on its own Guidelines "is akin to an agency's interpretation of its own legislative rules." *Id.* at 45. Thus, by applying similar reasoning to that which it utilized in *Seminole Rock* and *Auer*, this Court gave rise to "*Stinson* deference," ruling that "commentary in 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." *Id* at 38.

Notably, this Court also delineated the roles of the Commission's commentary, which may: interpret or explain how a guideline is to be applied; suggest circumstances where a departure from the guideline may be warranted; and provide background

information, such as factors considered when the guideline was promulgated or the impetus for the guideline. *Id* at 41 (citing U.S.S.G. §1B1.7.).

5. The U.S. Fifth Circuit relied upon commentary to U.S.S.G. §4B1.1 in *United States v. Lightbourn*, 115 F.3d 291 (1997) and held that Application Note 1's inclusion of inchoate offenses for career offender classification is authoritative. Although drug conspiracies were not initially listed as crimes which triggered career offender status, the Fifth Circuit held that the definition of "controlled substance offense" was not limited to offenses enumerated in § 4B1.2(b) and, via commentary, the Commission could include offenses other than those enumerated in the Guidelines text. *Id.* at 293.

The Fifth Circuit readily acknowledged that the Commission had previously acted beyond its scope of authority granted by 28 U.S.C. § 994(h) when it included drug conspiracies in the offenses that trigger career offender status. *Id.* at 293 (citing *U.S. v. Bellazerius*, 24 F.3d 698, 700-02 (5th Cir. 1994)). However, because the Commission passed Amendment 528 after *Bellazerius* and cited to its "general guideline promulgation authority" as set forth in 28 U.S.C. §994(a) – (f) rather than solely the authority granted by 28 U.S.C. § 994(h), the Fifth Circuit reasoned that Application Note 1 to §4B1.2 is authoritative. *Id.*

In *United States v. Kendrick*, 980 F.3d 432 (2020), the Fifth Circuit reaffirmed *Lightbourn* and held that "The Guidelines' commentary explains that a 'controlled substance offense include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.'" *Id.* at 444 (quoting Application Note 1 to §4B1.2) (emphasis added by the court).

Notably, however, the Fifth Circuit's decisions in *Lightbourn* and *Kendrick* make no mention of *Stinson*, nor does the court conduct any analysis of the underlying Guidelines text. Instead, the Fifth Circuit has adopted a reflexive deference to Guidelines commentary, a decision that is at odds with this Court's ruling in *Kisor*.

6. In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), this Court stressed that the *Auer* doctrine had its limits. Specifically, this Court explained that a reflexive application of *Seminole Rock/Auer* deference, that is, an almost automatic deferral to an agency's interpretation without first analyzing the text of the underlying regulation, is inappropriate. *Id*. at 2414-2415. Rather, *Auer* deference should be afforded "*only* when the language of the regulation is ambiguous." *Id*. at 2415 (citing *Christensen*, 529 U.S. at 588) (Emphasis added). Moreover, courts must exhaust all the 'traditional tools' of construction" when analyzing an underlying regulation. *Id*. (quoting *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467, U.S. 837, 843 n.9 (1984)).

This Court recognized the danger posed by reflexive deference to an agency's interpretation of its own regulations, as permitting an agency to freely interpret its own regulations "would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen*, 529, U.S. at 588.

A. Proceedings Below

1. Petitioner, Anderson Duke, was convicted following a jury trial on three (3) counts of possessing with the intent to distribute Schedule I and II controlled substances.

2. Following his conviction, the Presentence Investigation Report classified Mr. Duke as a "career offender" pursuant to U.S.S.G. § 4B1.1(a) based on prior state convictions of Attempted Distribution of Marijuana (2006) and Distribution of Oxycontin (2008). This increased Mr. Duke's offense level and Criminal History Category to 34 and VI, respectively. This resulted in a Guideline range of 262-327 months, with Mr. Duke receiving a sentence of 288 months. Had Mr. Duke not been designated as a "career offender," he would have had an offense level and Criminal History Category of 32 and V, respectively, resulting in a Guideline range of 188-235 months.

Mr. Duke objected to the inclusion of his conviction for Attempted Distribution of Marijuana as a "controlled substance offense" and his ultimate classification as a "career" offender, arguing, as relevant here, that the text of U.S.S.G. § 4B1.2(b) does not include the attempt to commit the enumerated offenses in its definition of a "controlled substance offence." While the attempt to commit the offenses enumerated in U.S.S.G. § 4B1.2(b) is included in the Application Notes and Definitions, this commentary does not interpret or explain the text of §4B1.2(b) and instead conflicts with the plain language of the provision's text by adding an entire category of crimes not included in the actual Guidelines itself.

The district court overruled Mr. Duke's objection and, using the Attempted Distribution of Marijuana conviction, classified Mr. Duke as a career offender.

3. The Fifth Circuit affirmed Mr. Duke's sentence, relying upon on its decisions in *Lightbourn* and *Kendricks* as precedent to defer to Guidelines commentary as authoritative.

In its opposition, to Petitioner's appeal, the government relied on the court's decision in *United States v. Miro*, 29 F.3d 194, 198 (5th Cir. 1994), which, in turn, cites to *Stinson* and states, "We are bound by the commentary when it interprets or explains a guideline unless it violates the Constitution or a federal statute, or is inconsistent with or a plainly erroneous reading of that guideline." *Id*.

The government also asserted that *Lightbourn* controlled the appellate court's decision, and that none of the exceptions provided for in *Stinson* were present to justify not deferring to the Commission's commentary. U.S.S.G. § 4B1.2(b), the government argued, is sweeping in its scope, such that various activities associated with controlled substances are included in the definition of "controlled substance offense" despite not being listed by the Guideline itself.

4. Petitioner moved for leave to file a petition for rehearing en banc out of time, which was granted. As he had before the Fifth Circuit's panel, Petitioner argued that Application Note 1 conflicts with the plain text of § 4B1.2(b) by including crimes which the text does not specifically list. By doing so, Petitioner argued, the Sentencing Commission has unconstitutionally expanded the Guidelines to include inchoate crimes. The court of appeals denied rehearing.

REASONS FOR GRANTING THE PETITION

I. There Is A Deeply Entrenched Circuit Split Regarding How/If *Kisor* Limits *Stinson*, Resulting In Nationwide Disparities in Sentencing

Absent clarification from this Court, sentencing disparities between circuits nationwide will persist, and the Commission's stated purpose of achieving uniformity in sentencing will continue to be defeated. For Petitioner and the tens of thousands of other federal criminal defendants who will be sentenced, this tension has resulted in them facing significantly harsher prison sentences than their peers based solely on the location of their cases. Because courts are unable or unwilling to determine how *Kisor* limits *Stinson*, the Commission cannot possibly fulfill its mandate to achieve federal sentencing uniformity.

A. The Third, Sixth, and D.C. Circuits Have Properly Refused to Defer to Guidelines Commentary

In *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018), the D.C. Circuit determined that prior convictions for attempted drug distribution did not qualify as predicate-controlled substance offenses because "attempts" were not included in the Guideline text. Rather than reflexively deferring to the commentary, the court analyzed the text of the underlying Guideline and noted that § 4B1.2(b) provides a precise list of controlled substance offenses, which does not include inchoate offense. *Id.* at 1091. Invoking the statutory interpretation maxim of "*expressio unius est exclusion alterius*," the court explained that the Commission "showed within § 4B1.2(b) itself that it knows how to include attempted offenses when it attends to do so," pointing out that the Commission expressly included "attempted use" in its definition of a "crime of violence"

in § 4B1.2(a)(1). *Id.* at 1091. In other words, the court concluded, "If the Commission wishes to expand the definition of "controlled substance offenses" to include attempts, it may seek to amend the language of the guidelines by submitting the change for congressional review." *Id.* (citing *Stinson* at 44).

In an *en banc* opinion, the Sixth Circuit unanimously determined that the Commission's use of commentary to broaden the definition of "controlled substance offense" in § 4B1.2(b) was improper. *United States v. Havis*, 927 F.3d 382 (2019). The court underscored the importance of the congressional review, notice and comment requirements for Guideline promulgation or amendments, describing that process as serving to "safeguard the Commission from uniting legislative and judicial authority in violation of the separation of powers." *Id.* at 385-86. Because commentary to the Guidelines is never subjected to these safeguards, accepting such comments as having the same effect as the Guidelines themselves renders those safeguards meaningless. *Id*. at 387.

The court in *Havis* also correctly observed that the Commission's commentary in this instance exceeded its typical role of resolving ambiguity in or offering an interpretation of an underlying text, noting that "the Commission did not interpret a term in the guideline itself—no term in §4B1.2(b) would bear that construction. Rather, the Commission used Application Note 1 to add an offense not listed in the guideline." *Id*. at 386.

As in *553*, the court explained that the Commission could include attempt crimes as part of this definition if it so desired. *Id.* at 386. Furthermore, by using Application

Note 1 to add an offense not listed in the guideline, the Commission renders meaningless the "institutional constraints that make the Guidelines constitutional in the first place—congressional review and comment." *Id.*

Similarly, the Third Circuit issued an *en banc* opinion in *United States v. Nasir*, 17 F.4th 459 (3d Cir. 2021) overruling previous circuit precedent in *United States v. Hightower*, 25 F.3d 182 (3rd Cir. 1994). In *Nasir*, the defendant was sentenced as a career offender under § 4B1.1 based on two prior convictions, one of which was for attempting to possess with intent to distribute cocaine. *Id.* at 156. The court noted that while its prior decision in *Hightower* was guided by the standard set forth in *Stinson*, "after the Supreme Court's decision last year in *Kisor v. Wilkie* (citations omitted), it is clear that such an interpretation is not warranted." *Id.* The court further explained that before a regulation is determined to be "genuinely ambiguous," which would trigger *Auer* deference, it must first "exhaust all traditional tools of construction." *Id.* (citing *Kisor* at 2414-15).

B. Despite *Kisor*, At Least Five Other Circuits Continue To Apply *Stinson* Deference

Despite the limitations that *Kisor* placed on reflexive judicial deference five other circuits find themselves constrained by precedent or simply unwilling to apply this Court's holding in *Kisor* to the Guidelines.

While the Second Circuit has not explicitly explained how, if at all, *Kisor* affects its rulings, it has soundly rejected any argument which would unsettle the deference to Application Note 1 required by circuit precedent. *See United States v. Wynn*, 845 Fed. Appx. 63 (2d Cir. 2021) (citing *United States v. Tabb*, 949 F.3d 81, (2d Cir. 2020) and

(*United States v. Richardson*, 958 F.3d 151 (2d Cir. 2020). Instead, the Second Circuit continues to reflexively defer to Application Note 1 and its broad expansion of the Guidelines, noting that "this Court is 'bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *Id*. (quoting *United States v. Wilkerson*, 361 F.3d 717, 732 (2d. Cir. 2004).

The Eighth Circuit sounds a similar refrain. In *United States v. Broadway*, 815 Fed Appx. 95, 96 (8th Cir. 2020), the Eighth Circuit reaffirmed its deference to commentary on § 4B1.2 and held that Application Note 1 warrants *Auer/Seminole Rock* deference because the comment "is not a 'plainly erroneous reading'" of the text of the Guidelines. *Id*. The panel acknowledged how this ruling could conflict the framework this Court established in *Kisor*, noting that while "*Auer/Seminole Rock* deference is triggered only by 'genuine ambigu[ity],'" it opined that it was in no position to overrule precedent. *Id*. at 96 n.2.

The Ninth Circuit also found itself similarly restricted in *United States v. Crum*, 934 F.3d 963, 966 (9th Cir. 2019) (cleaned up). Despite noting its concern that the Commission "expand[ed] the definition of 'controlled substance offense'... without any grounding in the text of § 4B1.2" and without the safeguard of congressional review, the court felt "compelled by" circuit precedent to defer to the commentary. *Id*.

Meanwhile, the First Circuit has found "no inconsistency" between the Guidelines and its commentary, and thus, Application Note 1 is authoritative. *United States v. Lewis*, 963 F.3d 16, 24 (1st Cir. 2020). Despite the limits this Court placed on judicial deference in *Kisor*, the panel in Lewis outright rejected reviewing its doctrine

of reflexive deference, noting that "we fail to find a sound basis for concluding with sufficient confidence that our prior panels would have found in *Kisor* any reason to "'change [their] collective mind[s].'" *Id.* at 24 (cleaned up). While the court asserted that prior circuit decisions did not stray "beyond the zone of genuine ambiguity in deeming Application Note 1 consistent with § 4B1.2," it also went on to acknowledge the circuit split on this issue and admit that the underlying question "is close." *Id* at 25. Given circuit precedence and the limits of a panel decision, the court further asserted that to overturn precedent would cause the First Circuit to "lose the benefits of stability and invite litigants to regard our law as more unsettled than it should be." *Id*.

For its part, the Seventh Circuit also firmly rejects the argument that Commission commentary cannot expand the Guidelines definition of "controlled substance offense" and instead adheres to its own *Stinson*-guided precedent, without any mention of *Kisor* and the limits this Court has placed upon judicial deference. *United States v. Smith*, 989 F.3d 575, 584 (7th Cir.), cert. denied, 142 S. Ct. 488 (2021).

Thus, at least three circuits have rightfully acknowledged the troubling practice of reflexive judicial deference to Guidelines commentary and have noted that, post-*Kisor*, such deference is improper given the lack of ambiguity in § 4B1.2(b). *Id*., *supra*. Furthermore, at least one circuit has declined to upset precedent for the sake of preserving "stability." *Lewis* at 25. Ironically, by seeking to preserve this supposed stability, the First Circuit has only contributed to instability and discrepancy nationwide in federal sentencing. Absent a ruling from this Court specifically

addressing how *Kisor* limits deference to Guidelines commentary, the circuits will remain split on this important issue and some circuits will continue to improperly afford *Seminole Rock*/*Auer* deference to Guidelines commentary despite the utter lack of any underlying, textual ambiguity to justify such deference.

II. The Decision Below Conflicts With *Kisor*

Review is also necessary because the Fifth Circuit's analysis of Guidelines commentary is still guided by its own precedent, which does little to limit the deference it affords the Commission's commentary without conducting an exhaustive analysis of the underlying text. Indeed, like the aforementioned circuits, the Fifth Circuit has made it abundantly clear that, absent a Supreme Court ruling specifically addressing the limits of judicial deference to the Guidelines' commentary, it will continue to view *Kisor*'s limitations as inapplicable as to Application Note 1.

A. The Fifth Circuit's Reflexive Deference To Guidelines Commentary Conflicts With This Court's Precedence

The Fifth Circuit has held that *Stinson* still controls its reflexive deference to the Guidelines' commentary, and that its decision in *Lightbourn* is the circuit's controlling precedent. *United States v. Goodin*, 835 F. Appx. 771, 782 (5th Cir. 2021). Notably, however, the panel in *Goodin* acknowledged the Third Circuit's decision in *Nasir* and its application of *Kisor*, stating, "If Goodin did not have the other two qualifying offenses and we were not constrained by *Lightbourn*, our panel would be inclined to agree with the Third Circuit." *Id.* at 782 n.1. Unfortunately for Petitioner and other defendants sentenced to longer prison terms than their counterparts in other circuits, the Fifth Circuit has shown that it does not have any intention of overturning *Lightbourn*.

More explicitly, The Fifth Circuit's stance in regard to *Kisor*'s effect on the interpretation of the Guidelines and its commentary is clearly stated in two unpublished opinions, wherein the court stated, "*Kisor* did not discuss the Sentencing Guidelines...Because there is currently no case law form the Supreme Court or this court addressing the effect of Kisor on the Sentencing Guidelines..." *United States v. Cruz-Flores*, 799 F. Appx. 245, 246 (5th Cir. 2020) and *United States v. Vivar-Lopez*, 788 F. App'x 300, 301 (5th Cir. 2019). While the court noted that these unpublished opinions should not be treated as precedent, the Fifth Circuit's actions in readily applying *Kisor* to civil matters while simultaneously disregarding any implication *Kisor* may have for federal sentencing purposes show this to be an accurate description of its stance regarding *Kisor* and its effect on the interpretation of the Sentencing Guidelines.

Indeed, in *Johnson v. BOKF Nat'l Ass'n*, 15 F.4th 356, (5th Cir. 2021), the court tacitly acknowledged the requirements set forth in *Kisor* and conducted a thorough, exhaustive analysis of regulations promulgated by the Office of the Comptroller of the Currency ("OCC"), an agency tasked by Congress to implement the National Bank Act of 1864, in order to determine what deference, if any, it should afford the OCC's interpretation of a certain regulation. *Id*. at 362-65.

While *Kisor* may not have explicitly tackled the issue of deference to the Guidelines' commentary, the Fifth Circuit's selective application of *Kisor* is fundamentally at odds with this Court's analysis in *Stinson*. In no uncertain terms, this Court stated that, "The Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking, and through

the informal rulemaking procedures in 5 U.S.C. § 553. Thus, the guidelines are the equivalent of legislative rules adopted by federal agencies...this type of commentary is akin to an agency's interpretation of its own legislative rules." *Stinson* at 1919 (cleaned up). Thus, by determining that *Kisor* does not apply to the Guidelines and the Commission's commentary, the Fifth Circuit disregards the analysis used by this Court in the very case the circuit relies upon to justify its sidestepping of *Kisor*. *Goodin* at 782 ("...the district court correctly held that we are bound by Supreme Court precedent, [*Stinson*], and our circuit precedent, [*Lightbourn*].")(citations omitted).

B. Application Note 1 Is Invalid

This Court has determined that courts have a duty to conduct an analysis of the "plain meaning" of a given regulation before declaring it ambiguous and therefore deserving of judicial deference to an agency's interpretation of that regulation. *Kisor* at 2419 and 2415. Under this analysis, the judiciary owes no deference to Application Note 1.

Petitioner was classified as a "career offender" pursuant to U.S.S.G. §4B1.1(a) based upon state convictions for "controlled substance offenses." U.S.S.G. §4B1.2(b) enumerates the offenses which constitute "controlled substance offense." This list does not include inchoate crimes or the crime of "attempting to commit" the crimes listed. Rather, Application Note 1 modifies the definition of "controlled substance offense" in §4B1.2(b) by including inchoate offenses such as "attempting to commit such offenses."

Notably, Amendment 528 makes clear that there is no ambiguity in §4B1.2 which Application Note 1 is attempting to clarify, and that the commentary is also neither

interpretative nor explanatory. Instead, Application Note 1 is a clear modification of §4B1.2(b) to expand the text, and the Sentencing Commission has admitted as much in Amendment 528 when it readily declared that it "has modified this definition in several respects..." (Emphasis added). Thus, the Sentencing Commission offers no justification for deference to Application Note 1 of §4B1.2 and instead acknowledges that, via commentary, it has modified the very text of the Guidelines.

As this Court stated in *Kisor*, deference is only necessary where the rule or regulation in question is determined to be "genuinely ambiguous" after "exhaust[ion] of all the traditional tools of construction." *Id*. at 2415 (cleaned up). Consequently, absent that ambiguity, there is nothing to justify deference. *Id*. Here, there is no ambiguity whatsoever in the text of §4B1.2. Inchoate crimes are unequivocally absent from the list which defines "controlled substance offense." As the court noted in *Havis*, "the Commission did not interpret a term in the guideline itself," but instead "used Application Note 1 to modify the text and to add an offense not listed in the guideline." *Havis*, 927 F.3d at 386.

The Commission also cannot be said to simply be unable to amend the Guidelines, or to be otherwise unaware of such an omission. As the court in *Winstead* aptly pointed out, the Commission has otherwise shown that it is willing and able to include inchoate offenses when it intends to do so. *Winstead*, 890 F.3d at 1091. §4B1.2(a)(1), a section of the very same Guideline which defines "controlled substance offense," expressly includes the "*attempted use*" of violence in its definition of a "crime of violence." (Emphasis added). Attempt is also expressly included in other areas of the

Guidelines, such as in §2A2.1, §2D1.1, §2K1.3, and §2X1.1.[1] These Guidelines specifically include "attempt" crimes in their very titles and prescribe sentencing guidelines accordingly. Thus, if the Commission wanted to include inchoate or attempt crimes in its definition of "controlled substance offense," it would have done so by use of the proper procedures. Until the Commission follows proper procedures in order to amend the Guidelines, allowing it to expand the Guidelines via commentary is improper.

Consequently, the judicial deference the Fifth Circuit and other circuits afford Application Note 1 is misplaced. There is no ambiguity in the underlying Guideline to justify this deference, and by expanding the definition of the Guidelines via commentary, the Commission has unlawfully bypassed the rule-making procedures it is otherwise required to follow.

III. Reflexive Judicial Deference To Guidelines Commentary Erodes The Fundamental Principles Of Separation Of Powers And Due Process

The judiciary has a duty to determine the meaning and application of the law. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This duty flows from the need for an independent judiciary, which serves as a check and balance to the executive and legislative branches. The legislature criminalizes conduct and sets statutory penalties, the executive prosecutes crimes and can recommend a sentence, while the judiciary sentences defendants according to applicable statutory framework. *United States v. Bass*, 404 U.S. 336, 348 (1971).

[1] These provisions are reproduced in Appendix D.

Administrative agencies are "intrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the Legislature." *Morgan v. United States*, 304 U.S. 1, 14, 58 S. Ct. 773, 775, 82 L. Ed. 1129 (1938). By exercising delegated legislative power, an administrative agency "wield[s] vast power and touches almost every aspect of daily life." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Given this considerable power and responsibility, the Constitution requires that Congress delineates the "boundaries of [this] delegated authority." *Mistretta v. United* States, 488 U.S. 361, 372-73 (1989). Accordingly, this Court has recognized on numerous occasions the importance of limiting the judiciary's deference to the very same agencies it has an obligation to check, which would necessarily include the Commission. *Kisor*, 139 S. Ct. at 2438 (Gorsuch, J., concurring) ("*Auer* represents no trivial threat to these foundational [separation of power] principles."); *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas J., concurring) ("*Seminole Rock*...represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches"); *Christensen* at 588 (Deferring to an agency's interpretation without proper analysis of an underlying regulation would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

Here, a body this Court has recognized as the equivalent of an administrative agency is being afforded unfettered deference when the very liberty of the people being sentenced is at stake. Because of this, deference "has no role to play when liberty is at stake. Under our Constitution, "[only] the people's elected representatives in the

legislature are authorized to 'make an act a crime.'" *Guedes v. Bureau of Alcohol, Tobacco, Fire- arms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gor- such, J., statement regarding denial of certiorari) (citing *United States v. Davis*, 139 U.S. 2319, 2323 (2019)). The judiciary especially has a crucial role in safeguarding the fundamental principle of liberty. Before a person is deprived of his or her liberty, the judiciary "owe[s] them an independent determination that the law actually forbids their conduct." *Id.*; *see also Abramski v. United States*, 573 U.S. 169, 191 (2014) ("courts bear an 'obligation' to determine *independently* what the law allows and forbids.") emphasis added). Thus, when it comes to matters of sentencing—that is, matters by which the State deprives an individual of his or her liberty, this Court has a heightened duty to independently analyze the underlying laws. This duty flows from the judiciary's fundamental purpose as a check to the other two branches.

This matter concerns the right of due process as well. Due process requires that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). The procedure which typically controls how the Commission promulgates amendments to the Sentencing Guidelines is the means by which this "fair warning" requirement of due process is satisfied, as it provides notice of proposed amendments and affords an opportunity of review and comment. Because it bypasses the "notice and comment" procedure normally required for amendments to the Guidelines, as well as congressional review, allowing commentary without question or

scrutiny to automatically have the full weight of laws carefully prescribed by Congress violates the right of due process, as defendants are never given a "fair warning," regarding commentary.

IV. This Case Presents An Ideal Vehicle

A. This Issue Occurs Frequently Across the Country

Mr. Duke is not alone. By the Commission's own count, over 60,000 people were sentenced in fiscal year 2020. *Fiscal Year 2020 Overview of Federal Criminal Cases*, U.S. Sentencing Commission (Aril 2021).[2] Of those 60,000 people, 1,216 individuals were deemed "career" offenders in 2020 alone. *Id*. at 7.

Drug related offenses were the second most common federal crime, accounting for over 25% of all total federal criminal offenders. *Id*. at pg. 4. Going back to and including the year 2016, almost 100,000 individuals have been sentenced for drug offenses. *Id*. at 5.

This case is an ideal opportunity for this Court to determine when, in light of *Kisor*, *Stinson* deference is appropriate. Mr. Duke has maintained throughout these proceedings that the Fifth Circuit's reliance upon *Lightbourn* is improper. Moreover, the circuit split regarding *Kisor*'s effect on courts' analyses of Guidelines text is now deeply entrenched. As some of the circuits which still adhere to *Stinson* deference have pointed out, only a decision by this Court can address the current nationwide disparity in sentencing.

[2] It should be noted that this figure presents a significant decrease of 15.6% from the number of cases in 2019, much of which is attributable to the ongoing COVID-19 pandemic. For reference, in 2019, over 76,000 people were sentenced in federal court.

CONCLUSION

The issues presented herein are ripe for this Court's consideration and, consequently, this Court should grant Mr. Duke's petition. Alternatively, if the Court grants another petition which presents substantially similar issues and is on a similar filing schedule, the Court should hold this case pending a decision on the merits.

WHEREFORE, Petitioner, Anderson Duke, respectfully prays that this Court grant his petition and that it hold that Application Note 1 to §4B1.2 is an improper modification of the Sentencing Guidelines, and that, consequently, no judicial deference should be afforded to it. Petitioner further prayers that the opinion of the lower court be overturned, and that this case be remanded for further proceedings consistent with this Court's ruling.

Respectfully submitted,

_____

Michael L. DuBos
Counsel of Record
CJA-Appointed
BREITHAUPT, DUBOS
& WOLLESON, LLC
1811 Tower Dr.
Monroe, LA 71201
(318) 322-1202
(318) 322-1984
michael@bdw.law

Counsel for Petitioner

Date: February 4, 2022