No. 22-6264

In the
Supreme Court of the United States

RANDALL EDDIE MELLON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY ARGUMENT

I. *Kisor* Should Apply to the Guidelines, which are agency rules, and the Circuit Split Should Be Resolved

Contrary to the government's argument, the circuit split remains on whether this Court's opinion in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019), applies to the Guidelines and its commentary at all, or whether deference to the commentary under *Stinson v. United States*, 508 U.S. 36 (1993), should still apply even if the text of the Guideline is not ambiguous. Too late for Mr. Mellon, the Eleventh Circuit has now joined the Third and Sixth Circuits to say *Kisor* applies. *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2022). *See also United States v. Nasir*, 17 F.4th 459, 470-71 (3d Cir. 2021); *United States v. Riccardi*, 989 F.3d 476, 483-85 (6th Cir. 2021). E*n banc* review remains pending in the Fifth Circuit. *United States v. Vargas*, 35 F.4th 936, 940 (5th Cir.), *reh'g en banc granted, opinion vacated*, 45 F.4th 1083 (5th Cir. 2022).

But the Fourth Circuit has an intra-circuit split. *Compare United States v. Moses*, 23 F.4th 347, 349 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 640 (2023) (declining to apply *Kisor*), with *United States v. Campbell*, 22 F.4th 438, 445-46 (4th Cir. 2022) (applying *Kisor* to find the text of the career offender Guideline unambiguous). The Ninth Circuit has attempted to avoid deepening the split by continuing to apply *Stinson* to analysis of the commentary. *United States v. Kirilyuk*, 29 F.4th 1128, 1138-39 (9th Cir. 2022). And the D.C. Circuit cited *Kisor* without discussion but nevertheless stated that generally the court defers to the commentary because it is analogous to an agency's interpretation of its own regulations. *United States v.*

Jenkins, 50 F.4th 1185, 1197 (D.C. Cir. 2022). The First, Second, Seventh, Eighth and Tenth Circuits have not spoken.

This question is too important to remain unanswered as thousands of defendants face sentencing across the country with inconsistent application of *Kisor* and *Stinson* to analyze the Guidelines and their commentary. *See* 18 U.S.C. § 3553(a)(6) (providing that an important factor for judges to consider in sentencing is the need to avoid unwarranted disparity among similarly situated defendants).

II. The text of U.S.S.G. § 2K2.1(b)(4)(A) is not ambiguous when read in concert with § 1B1.3, which defines relevant conduct

The government is correct that every circuit uniformly holds that there is no mens rea requirement for imposition of the stolen gun enhancement under U.S.S.G. § 2K2.1(b)(4)(A). *See e.g., United States v. Schnell*, 982 F.2d 216, 219 (7th Cir. 1992) (citing opinions from the Third, Fifth, Eighth, Ninth and D.C. Circuits). However, that is a reason to grant the writ, to correct the lower courts' error.

This court has "repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read "as dispensing with it." *Morissette v. United States,* 342 U.S. 246, 250, 72 S.Ct. 240, 96 L.Ed. 288 (1952). This rule of construction reflects the basic principle that 'wrongdoing must be conscious to be criminal.' *Id.,* at 252, 72 S.Ct. 240.*" Elonis v. United States*, 575 U.S. 723, 734 (2015).

The courts of appeal have relied on the commentary to § 2K2.1(b)(4)(A) to find that no scienter requirement exists. Application Note 8(B) provides that the enhancement applies "regardless of whether the defendant knew or had reason to believe" that the gun was stolen. U.S.S.G. § 2K2.1(b)(4)(A), Application Note 8(B) (2018). However, after *Kisor*, deference to the commentary is unwarranted if the text is unambiguous. And as argued in Mr. Mellon's petition, the Guideline is not ambiguous, particularly when read in concert with § 1B1.3, defining relevant conduct.

The courts of appeal erroneously omit a scienter requirement in deference to commentary that conflicts with the unambiguous text of the Guidelines and this Court's long tradition of statutory interpretation that is rightly skeptical of strict liability and criminalizing conduct which has no ill intent. *Elonis*, 575 U.S. at 734; *Ruan v. United States*, 142 S.Ct. 2370, 2375 (2022) (applying mens rea requirement to authorization prong). *See also Carter v. United States*, 530 U.S. 255, 269 (2000); *Staples v. United States*, 511 U.S. 600, 619 (1994). The two-level strict liability enhancement for a stolen firearm here resulted in an increase in the advisory Guideline range of an extra 20 months of imprisonment, from 100 to 125 months at level 25 to 120 to 150 months (capped at 120 months) at level 27. Mr. Mellon's sentence was increased by two levels for a fact that the government did not prove that he knew. That strict liability standard is applied nationwide, and it is wrong. The court should grant the writ.

CONCLUSION

To avoid unwarranted sentencing disparity and to ensure uniform rules for the over 57,000 people sentenced

each year in federal court, the Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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