No. 22-644

IN THE

Supreme Court of the United States

ANTHONY LOMAX,

Petitioner,

v.

UNITED STATES,

Respondent.

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

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Supreme Court Rule 15.8, Petitioner Anthony Lomax respectfully submits this supplemental brief in support of the petition for a writ of certiorari to bring to the Court's attention a decision entered by the Eleventh Circuit after the petition was filed that is directly relevant to the questions presented in this case. *See United States v. Dupree*, No. 19-13776, --- F.4th ----, 2023 WL 227633 (11th Cir. Jan. 18, 2023) (en banc).

As discussed in the petition, there is a deep split among the circuits regarding whether courts should defer to Application Note 1 to § 4B1.2 of the U.S. Sentencing Guidelines following this Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). At the time the petition was filed, four circuits had refused to follow Application Note 1 because the commentary's assertion that the definitions provided in § 4B1.2 include inchoate offenses is incompatible with the text of the guideline. Eight circuits, including the Eleventh Circuit, had continued to defer to Application Note 1's guidance since *Kisor*.

The Eleventh Circuit has since reversed course, overruling *United States v. Smith*, 54 F.3d 690 (11th Cir. 1995), and other circuit precedent holding that Application Note 1 is binding. *Dupree,* 2023 WL 227633 at *8 n.9. In *Dupree*, the court held that this Court's clarification of *Auer* deference in *Kisor* applies to guidelines commentary, and courts therefore

should not defer to the Sentencing Commission's commentary unless the guideline it purports to interpret is genuinely ambiguous. *Id.* at *4-5. The court further held that the definition of "controlled substance offense" in § 4B1.2(b) unambiguously excludes inchoate offenses because the definition does not mention conspiracy, attempt, or any other inchoate crimes.[1] *Id.* at *6-7.

The Eleventh Circuit agreed with the Sixth Circuit's observation in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019), that "'[t]o make attempt crimes a part of § 4B1.2(b), the Commission did not interpret a term in the guideline itself—no term in

[1] The Eleventh Circuit also noted that § 4B1.2(a)(1), which defines "crime of violence" to include "any offense . . . that has as an element the use, attempted use, or threatened use of physical force against the person of another," demonstrates that the Sentencing Commission understands how to include attempt crimes when it means to do so. *Dupree*, 2023 WL 227633 at *7. The district court did not rely on the definition of "crime of violence" in § 4B1.2(a)(1) to support its designation of Lomax as a career offender at resentencing, nor did the Seventh Circuit rely on § 4B1.2(a)(1) in upholding the district court's decision. Pet. App. 12a-14a, 18a-19a, 43a-44a. Instead, the Seventh Circuit, like the district court, applied Application Note 1 to expand the definition of "crime of violence" found in § 4B1.2(a)(2) to include the offense of attempted murder. Pet. App. 12a-14a. Section 4B1.2(a)(2), like § 4B1.2(b), does not mention conspiracy, attempt, or any other inchoate offenses. *See* U.S.S.G. § 4B1.2(a)(2) (defining "crime of violence" as "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm . . . or explosive material . . . .").

§ 4B1.2(b) would bear that construction.' Instead, the Commission purported 'to *add* an offense not listed in the [G]uideline.'" *Id.* at *7 (citations omitted) (quoting *Havis*, 927 F.3d at 386). The court concluded that, because the guideline is unambiguous, there is "no need to consider, much less defer to, the commentary in Application Note 1" pursuant to *Kisor*. *Id.* at *8. In doing so, the court noted that the question of whether courts may defer to guidelines commentary where the guideline itself is unambiguous "has sharply divided our fellow circuits." *Id.* at *3 n.3.

The Eleventh Circuit's decision in *Dupree* only deepens the current circuit split regarding the deference courts should afford to Application Note 1 and other guidelines commentary following this Court's decision in *Kisor*. The Court should grant review to resolve this fundamental disagreement on a critically important question that impacts criminal sentencing every day across the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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