

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERRICK BISHOFF,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Christine DeMaso
Federal Defender Office
51 Sleeper Street, 5th Floor
Boston, MA 02210
Tel: 617-223-8061
Attorney for Petitioner

QUESTION PRESENTED

1. Whether the First Circuit erred in concluding that the enhancement for trafficking in firearms set out in U.S.S.G. §2K2.1(b)(5) applies to someone who transferred two or more guns but only had reason to believe that one of those guns would be used or possessed unlawfully?

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF CONTENTS.....	ii
INDEX TO APPENDICES	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION.....	1
UNITED STATES SENTENCING GUIDELINES PROVISION INVOLVED	2
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE PETITION.....	5
I. The First Circuit adopted an erroneous reading of U.S.S.G. §2K2.1(b)(5). This Court should grant certiorari to correct this error and ensure fair application of this enhancement across the Circuits. Doing so would also permit this Court to resolve an important question about the deference given to the Application Notes to the Guidelines.....	5
CONCLUSION.....	10

INDEX TO APPENDICES

Appendix A

Judgment—*United States v. Bishoff*, United States Court of Appeals for the First Circuit, January 19, 2023. Reported at 58 F.4th 18 (1st Cir. 2023).

Appendix B

Judgment—*United State v. Bishoff*, United States District Court for the District of Massachusetts, 19-cr-40047, June 4, 2021. Unreported.

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<i>Auer v. Robbins</i> , 519 U.S. 452 (1997)	6, 7
<i>Bowles v. Seminole Rock & Sand Co.</i> , 325 U.S. 410 (1945)	6, 7
<i>Kisor v. Wilkie</i> , --- U.S. ---, 139 S. Ct. 2400 (2019).....	6, 7
<i>Stinson v. United States</i> , 508 U.S. 36 (1993).....	6, 7
<i>United States v. Campbell</i> , 22 F.4th 438 (4th Cir. 2022)	8
<i>United States v. Dupree</i> , 57 F.4th 1269 (11th Cir. 2023) (en banc)	7
<i>United States v. Miller</i> , 857 Fed. App'x 877 (8th Cir. 2021) (unpublished).....	7, 8
<i>United States v. Molloy</i> , 324 F.3d 35 (1st Cir. 2003)	9
<i>United States v. Moses</i> , 23 F.4th 347 (4th Cir. 2022)	8
<i>United States v. Nasir</i> , 17 F.4th 459 (3d Cir. 2021) (en banc)	7
<i>United States v. Pawlak</i> , 822 F.3d 902 (6th Cir. 2016)	8
<i>United States v. Pratt</i> , 2021 WL 5918003 (9th Cir.) (unpublished).....	8
<i>United States v. Riccardi</i> , 989 F.3d 476 (6th Cir. 2021)	7

STATUTES AND RULES

18 U.S.C. §922.....	4
26 U.S.C. §5861.....	4
28 U.S.C. §1254.....	1

SENTENCING GUIDELINES

U.S.S.G. §2K2.1	<i>passim</i>
-----------------------	---------------

**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

The petitioner, Terrick Bishoff, respectfully seeks a writ of certiorari to review the judgment the United States Court of Appeals for the First Circuit entered in this case.

OPINIONS BELOW

The reported opinion of the Court of Appeals is found at Appendix A. The district court's judgment is found at Appendix B.

JURISDICTION

The Court of Appeals entered judgment on January 19, 2023. This petition is being filed within ninety days of that opinion. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

UNITED STATES SENTENCING GUIDELINES PROVISION INVOLVED

U.S.S.G. §2K2.1(b)(5)

UNLAWFUL RECEIPT, POSSESSION, OR TRANSPORTATION OF FIREARMS OR AMMUNITION; PROHIBITED TRANSACTIONS INVOLVING FIREARMS OR AMMUNITION

(b) Specific Offense Characteristics

(5) If the defendant engaged in the trafficking of firearms, increase by 4 levels.

Application Notes:

13. Application of Subsection (b)(5).—

(A) **In General.**—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—

- (i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and
- (ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—
 - (I) whose possession or receipt of the firearm would be unlawful; or
 - (II) who intended to use or dispose of the firearm unlawfully.

(B) **Definitions.**—For purposes of this subsection:

“Individual whose possession or receipt of the firearm would be unlawful” means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. “Crime of violence” and “controlled

substance offense" have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"Misdemeanor crime of domestic violence" has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term "**defendant**", consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant's own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

- (C) **Upward Departure Provision.**—If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted.
- (D) **Interaction with Other Subsections.**—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or transferred one of such firearms in connection with another felony offense (*i.e.*, an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply.

STATEMENT OF THE CASE¹

In 2018, Terrick Bishoff met John Shaw. Mr. Shaw was a felon with a passion for guns who built guns in his home. App. A 4, 16. Mr. Bishoff began buying guns from Mr. Shaw. App. A 6. A confidential source (CS) told the Massachusetts State Police and the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that Mr. Bishoff offered to sell him a gun. App. A 2. Working with the CS, ATF sent an undercover agent (UC) to buy a gun from Mr. Bishoff. *Id.* Over the course of a few months, Mr. Bishoff sold the UC three guns: two unserialized Glock-style pistols and one unserialized Uzi-style gun. App. A 2-5.

Mr. Bishoff was charged in a three-count indictment with possessing or transferring a machine gun in violation of 18 U.S.C. §922(o), dealing firearms without a license in violation of 18 U.S.C. §922(g)(a)(1)(A), and possession of a firearm (machine gun) without a serial number in violation of 26 U.S.C. §5861(i). App. A 5-6. He pled guilty. *Id.*

At sentencing, the district court applied a 4-point enhancement under U.S.S.G. §2K2.1(b)(5) because Mr. Bishoff transferred two or more firearms, with the knowledge or reason to believe that his conduct would result in the transfer of a firearm to someone who could not lawfully possess it or who planned to use it unlawfully. App. A 6-8. Finding a total offense level of 27 and a criminal history category of I, the court sentenced Mr. Bishoff to 60 months of imprisonment. *Id.*

¹ Throughout this petition, App. A refers to Appendix A.

On appeal, Mr. Bishoff argued that the district court abused its discretion by imposing this enhancement. App. A 9-12. He argued that he did not know or have reason to believe that the UC's possession of two or more of the guns was unlawful or that he intended to use two or more of the guns unlawfully.² App. A 9. The First Circuit affirmed the district court. It held that the district court properly applied the §2K2.1(b)(5) enhancement. In reaching this conclusion, the First Circuit wrote: "Plainly read, the enhancement applies if Bishoff transferred two or more guns while having reason to believe that at least one of them would be used or possessed unlawfully." App. A 10.

REASONS FOR GRANTING THE PETITION

- I. The First Circuit adopted an erroneous reading of U.S.S.G. §2K2.1(b)(5). This Court should grant certiorari to correct this error and ensure fair application of this enhancement across the Circuits. Doing so would also permit this Court to resolve an important question about the deference given to the Application Notes to the Guidelines.**

Section 2K2.1(b)(5) provides for a four-point enhancement "[i]f the defendant engaged in the trafficking of firearms...." U.S.S.G. §2K2.1(b)(5). The Guidelines do not define trafficking. The Application Notes state that this enhancement applies when the defendant transferred "two or more firearms" and "knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual" "whose possession or receipt of the firearm would be unlawful" or "who intended to use or dispose of the firearm

² Mr. Bishoff also argued that the district court erroneously imposed a 4-point enhancement under §2K2.1(b)(6)(B) for using guns in connection with another felony. App. A 13-14. This claim is not raised here.

unlawfully.” U.S.S.G. §2K2.1, App. Note 13. The First Circuit concluded, without citation: “Plainly read, the enhancement applies if Bishoff transferred two or more guns while having reason to believe that at least one of them would be used or possessed unlawfully.” App. A 10. This is a misreading of the Guidelines and the related commentary.

The enhancement applies when “the defendant engaged in the trafficking of firearms....” U.S.S.G. §2K2.1(b)(5). The enhancement does not define “trafficking.” Based on the text of the enhancement, which refers to plural firearms and not a single firearm, it applies when the defendant took a particular action with respect to more than one gun.

The First Circuit’s opinion relies on language from the Application Notes, not the Guideline itself. App. A 9-10. There is a difference among the Circuits as to what deference should be given to the commentary in the Guidelines Manual after *Kisor v. Wilkie*, --- U.S. ---, 139 S. Ct. 2400, 2408 (2019). In *Stinson v. United States*, 508 U.S. 36 (1993), this Court held 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. In reaching this result, this Court applied the level of deference described in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). *Stinson*, 508 U.S. at 45. This Court rearticulated the *Seminole Rock* standard in *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

In *Kisor*, this Court “reinforce[d]” the limits of *Seminole Rock/Auer* deference. 139 S. Ct. at 2408. It explained that *Auer* deference only arises in certain circumstances. *Id.* at 2414-18. It listed the following conditions that must be met before *Auer* deference applies: 1. “the regulation is genuinely ambiguous”; 2. this ambiguity exists even after “exhaust[ing] all the ‘traditional tools’ of construction”; 3. the agency’s reading “must come within the zone of ambiguity the court has identified after employing all its interpretative tools”; and 4. “a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight.” *Id.* at 2414-16. This Court described “especially important markers for identifying when *Auer* deference is and is not appropriate.” *Id.* at 2416. Specifically, “the regulatory interpretation must be one actually made by the agency”; “the agency’s interpretation must in some way implicate its substantive expertise”; and “an agency’s reading of a rule must reflect ‘fair and considered judgment’ to receive *Auer* deference.” *Id.* at 2416-18.

This Court has not applied the *Kisor* framework to review of the Guidelines commentary. However, because *Stinson* applied *Seminole Rock/Auer* deference to the commentary, and *Kisor* builds on *Auer* deference, *Kisor* should apply when courts interpret the commentary to the Guidelines. Some Circuits have already reached this conclusion. See *United States v. Dupree*, 57 F.4th 1269, 1275-77 (11th Cir. 2023) (en banc); *United States v. Nasir*, 17 F.4th 459, 470-71 (3d Cir. 2021) (en banc); *United States v. Riccardi*, 989 F.3d 476, 484-85 (6th Cir. 2021). Other Circuits have disagreed. See *United States v. Miller*, 857 Fed. App’x 877, 878

(8th Cir. 2021) (unpublished) (“*Kisor* reaffirmed existing law on the legal force of guideline commentary.”); *United States v. Pratt*, 2021 WL 5918003, at *2 (9th Cir.) (unpublished) (“We have continued to follow *Stinson* after *Kisor*....”). There is internal disagreement within one Circuit. *Compare United States v. Campbell*, 22 F.4th 438, 444-45 (4th Cir. 2022) *with United States v. Moses*, 23 F.4th 347, 349 (4th Cir. 2022) (holding that “*Kisor* did not overrule *Stinson*’s standard for the deference owed to Guidelines commentary but instead applies in the context of an executive agency’s interpretation of its own legislative rules”).

Even if the *Kisor* framework does not apply to the Guidelines, the First Circuit’s interpretation of the commentary to §2K2.1(b)(5) is inconsistent with and is a plainly erroneous reading of the Guideline. The enhancement refers to trafficking firearms and to taking this type of action with respect to more than one gun. Under the First Circuit’s interpretation, a licensed gun dealer who sold many guns legally and then knowingly sold one gun to a felon would receive this enhancement based on the earlier, licit sales. This result is inconsistent with the language in the Guidelines which requires that the person trafficked multiple firearms. *See United States v. Pawlak*, 822 F.3d 902, 912 (6th Cir. 2016) (finding that undercover’s comment about possibly needing to “dash” was made at final sale which “involved two firearms, so it would support application of the enhancement without reference to the three previous sales”).

Nor does the application note support the First Circuit’s interpretation. The note says that the enhancement applies if the defendant “transported,

transferred, or otherwise disposed of two or more firearms to another individual...*and* ...knew or had reason to believe that *such conduct* would result in the transport, transfer, or disposal of a firearm to an individual” whose possession or intended use of “the firearm” would be unlawful. §2K2.1, App. Note 13 (emphasis added). The phrase “such conduct” links the multiple-sale and knowledge requirements. The government must show that the defendant transferred two or more guns at a time he had a reason to believe those guns would be used or possessed unlawfully. *See United States v. Molloy*, 324 F.3d 35, 41 (1st Cir. 2003) (“As the government observes, ‘the [2K2.1(b)(5)] enhancement focuses on the defendant’s state of mind at the time he possessed or transferred the [weapons.]’”).

The First Circuit’s holding that this enhancement applies when someone transfers more than one gun with reason to believe that *one* of those guns would be used or possessed unlawfully is inconsistent with the Guidelines text and the Application Note. The First Circuit’s interpretation of the Application Note conflicts with the text of the Guidelines and is improper under any form of deference.

CONCLUSION

For the foregoing reasons, petitioner asks this Court to grant this petition, to determine that the First Circuit erred in concluding that the §2K2.1(b)(5) enhancement applies when someone transferred multiple guns but only had reason to believe that one would be used or possessed unlawfully and to remand this case for further proceedings.

Respectfully submitted,

Christine DeMaso

Christine DeMaso
Federal Public Defender Office
51 Sleeper Street, 5th Floor
Boston, MA 02210
(617) 223-8061

Date: April 11, 2023