CASE NO. _____
SUPREME COURT OF THE UNITED STATES

JOSHUA PREECE **PETITIONER**

V.

UNITED STATES OF AMERICA **RESPONDENT**

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

I. Do the relevant conduct principles of USSG § 1B1.3 govern application of Chapter Four recidivist enhancements?

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner/Appellant/Defendant – Joshua Preece

Respondent/Appellee/Plaintiff – United States of America

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Joshua Preece, by court-appointed counsel, respectfully requests that a Writ of Certiorari issue to review the unpublished opinion of the United States Court of Appeals for the Sixth Circuit in the case of *United States v. Joshua Preece*, No. 22-5297, filed on January 25, 2023 and attached to this Petition as Appendix B.

OPINIONS BELOW

Mr. Preece's appeal to the Sixth Circuit was taken from a Judgment entered following his guilty plea to one count of persuading a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct in violation of 18 U.S.C. § 2251(a). *See* Appendix A. On January 25, 2023, the Sixth Circuit issued an unpublished opinion affirming Mr. Preece's sentence. *See* Appendix B. The Sixth Circuit denied Mr. Preece's petition for rehearing en banc on March 24, 2023. *See* Appendix C.

JURISDICTION

The Sixth Circuit issued an unpublished opinion affirming Mr. Preece's sentence on January 25, 2023. *See* Appendix B. The Sixth Circuit denied Mr. Preece's petition for rehearing en banc on March 24, 2023. *See* Appendix C. Mr. Preece invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use, without just compensation."

18 U.S.C. § 3553(a)(4)(A)(i): "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—the kinds of sentence and sentencing range established for—the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress[.]"

STATEMENT OF THE CASE

Mr. Preece was named in an eighteen-count Indictment in the Eastern District of Kentucky in April 2021. Counts 1-3 charged Mr. Preece with persuading a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct in violation of 18 U.S.C. § 2251(a). Counts 4-9 alleged Mr. Preece attempted to commit the same offense on other occasions. Counts 10-12 and 18 charged Mr. Preece with receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2). Finally, Counts 13-17 alleged Mr. Preece attempted to receive similar images on different dates in violation of 18 U.S.C. § 2252(a)(2) and (b)(1). [R. 1: Indictment, Page ID # 1-11].

Mr. Preece ultimately entered a guilty plea to Count 1 of the Indictment pursuant to a Plea Agreement. In exchange for his plea, the government agreed to dismiss Counts 2 through 18. *See* [R. 34: Plea Agreement, Page ID # 212]. Paragraph 5 of the Plea Agreement specifically notes the "parties do not agree to the applicability of [USSG] § 4B1.5(b), the 5 level enhancement which applies if the Defendant 'engaged in a pattern of activity involving prohibited sexual conduct.'" *Id*. at Page ID # 214-15.

Following his guilty plea, the United States Probation Office prepared Mr. Preece's Pre-Sentence Investigation Report (PSR) and included the five-level pattern of activity enhancement. Mr. Preece objected prior to sentencing, arguing

that his offense conduct "occurred on a single day and involved only a single minor victim[,]" and that his relevant conduct under the Sentencing Guidelines failed to establish the "pattern of activity" necessary to trigger the enhancement. *See* [R. 53: Sealed PSR, Page 15]. USPO disagreed, insisting the enhancement applied because there were "other minor victims and conduct" that occurred on different occasions and were "not part of the instant offense[,]" but which should be taken into account for purposes of USSG § 4B1.5(b). *Id*. at Pages 15-16.

At sentencing, counsel for Mr. Preece began by noting the importance of "relevant conduct in this case." [R. 56: Transcript, Sentencing, Page ID # 362]. Counsel said the district court and the parties were "familiar with the way relevant conduct typically works[,]" referencing drug quantities that are often far more significant than what a defendant "got caught with" or loss amounts in fraud and money laundering cases not tied directly to the proceeds received by those who committed the offenses. *Id*. This is so because relevant conduct in most cases is typically calculated pursuant to USSG § 1B1.3(a)(2), and the definition is so broad that it essentially incorporates "everything that's remotely related to the offenses" of conviction. *Id*. But counsel noted that the other, narrower definition of relevant conduct discussed at USSG § 1B1.3(a)(1) applied in Mr. Preece's case because his sole count of conviction "did not permit grouping under the guidelines" because it was calculated under USSG § 2G2.1. *Id*. As a result, counsel argued Mr. Preece's

relevant conduct must be "limited to…all acts or omissions that occurred during the commission of the offense of conviction[,]" which was just Count 1. *Id*. at Page ID # 363-64. In its colloquy with the district court, the government agreed with defense counsel's analysis regarding the proper scope of relevant conduct because Mr. Preece's conviction was referenced to USSG § 2G2.1. *Id*. at Page ID # 366.

Regarding the five-level enhancement under USSG § 4B1.5(b)(1), defense counsel reiterated that relevant conduct must be limited to Mr. Preece's offense conduct as to Count 1 alone and noted that his conviction "involved a single victim on a single day." *Id*. at Page ID # 368. Counsel then referenced Sixth Circuit authority requiring proof of prohibited sexual conduct "on at least two separate occasions" to apply the enhancement. *Id*.

Defense counsel also noted USPO relied on an application note to USSG § 4B1.5 in its response to his objection to argue that "an occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of the instant offense; or (II) resulted in a conviction for the conduct that occurred on that occasion." *Id*. at Page ID # 468-59 (citing USSG § 4B1.5, comment. (n.4(B))). Counsel said using the text of an application note to broaden the scope of the Guideline to capture circumstances not included in Mr. Preece's relevant conduct violated Sixth Circuit

precedent. *See id*. at Page ID # 369-72 (citing *United States v. Havis*, 927 F.3d 382 (6th Cir.2019)).

The government argued Application Note 4(B) should control, noting it typically offered guilty pleas to a single count in cases like Mr. Preece's. *Id*. at Page ID # 374-75. The district court responded that perhaps the government "won't do that for anybody else." *Id*. at Page ID # 375. The government then cited a case involving an offense referenced to USSG § 2G2.2 rather than USSG § 2G2.1 to insist the "pattern of activity" enhancement could still apply. The district court ultimately overruled Mr. Preece's objection and noted he could appeal its ruling. *Id*. at Page ID # 383-84.

The district court calculated Mr. Preece's applicable Guidelines range as 292 to 360 months based on an offense level of 40, a criminal history category of I, and a maximum statutory penalty of 30 years of incarceration. *Id*. at Page ID # 384. Without the five-level "pattern of activity" enhancement, Mr. Preece's sentencing range would have been 180-210 months.[1] The court imposed a sentence of 300 months. *Id*. at Page ID # 400-01.

On appeal, the Sixth Circuit recognized that sentencing courts can only rely on application notes to the Guidelines when "the commentary does not add to the

[1] The bottom of the applicable Guidelines range for an offense level of 25 and a criminal history category of I is 168 months, but Mr. Preece was subject to a 15-year mandatory minimum sentence pursuant to 18 U.S.C. § 2251(e). *See* [R. 1: Indictment, Page ID # 11]. As a result, the bottom of his recommended sentencing range became 15 years, or 180 months. *See* [R. 53: Sealed PSR, Page 9, Paragraph 46].

offenses specified in the statutory text or interpret terms in a way that expands the application of the Guidelines beyond what the text supports." Appendix B, Page 5. However, the Court concluded the district court was permitted to consider conduct unrelated to Mr. Preece's count of conviction based on the language included in Application Note 4(B)(i) to USSG § 4B1.5. The Court held that enhancements under Chapters 4 and 5 were driven by their own text and application notes rather than USSG § 1B1.3. *Id*. at Pages 8-10. The Court "[a]dmitted[]" in its opinion that no prior authority had "explicitly addressed the relationship between § 1B1.3 and § 4B1.5." *Id*. at Page 10.

REASONS FOR GRANTING THE WRIT

I. The relevant conduct principles of USSG § 1B1.3 govern application of Chapter Four recidivist enhancements.

Following a federal criminal conviction, a defendant's offense level under the Sentencing Guidelines is determined based on his "relevant conduct" under USSG § 1B1.3. *See, e.g., United States v. Shalash*, 759 Fed.Appx. 387, 389 (6th Cir.2018). § 1B1.3 provides two definitions of "relevant conduct." First, relevant conduct is defined as:

> All acts or omissions committed…or willfully caused by the defendant…that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

USSG § 1B1.3(a)(1). But for those offenses "of a character for which § 3D1.2(d) would require grouping of multiple counts," relevant conduct extends to "all acts and omissions…that were part of the same course of conduct or common scheme or plan as the offense of conviction. USSG § 1B1.3(a)(2). This latter definition is the more common, broader concept of relevant conduct that applies in the majority of federal criminal cases.

Here, Mr. Preece's Count 1 conviction under 18 U.S.C. § 2251(a) triggered a calculation under USSG § 2G2.1 of the Guidelines. As the government acknowledged below, "Section 2G2.1 offenses involving the sexual exploitation of minors are explicitly excluded from § 3D1.2(d)'s multiple-count grouping rule[.]" *United States v. Schock*, 862 F.3d 563, 567 (6th Cir.2017) (citing USSG § 1B1.3(a)(2); USSG § 2G2.1, comment. (n.7); *United States v. Weiner*, 518 Fed.Appx. 358, 364 (6th Cir.2013)). Because Mr. Preece's offense of conviction is not one "for which § 3D1.2(d) would require grouping[,]" USSG § 1B1.3(a)(1)'s narrower definition of relevant conduct applies. As a result, Mr. Preece's relevant conduct for sentencing purposes had to be limited to his actions "during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." USSG § 1B1.3(a)(1).

The five-level enhancement at issue in this case applies under USSG § 4B1.5(b)(1) if a defendant who is not a career offender an who has no prior convictions for a sex offense engaged in a "pattern of activity involving prohibited sexual conduct[.]" The Circuits agree this enhancement requires proof that a defendant abused a minor on at least two separate occasions. *See, e.g., United States v. Fleisher*, 971 F.3d 559, 572 (6th Cir.2020) (citing *United States Peck*, 496 F.3d 885, 891 (8th Cir.2007) (citing *United States v. Schmeilski*, 408 F.3d 917, 920 (7th Cir.2005))).

Despite the parties agreeing that relevant conduct in this case had to be restricted to Mr. Preece's count of conviction, the lower courts concluded the "pattern of activity" enhancement could apply based on Mr. Preece's actions with regard to other counts that were dismissed pursuant to his Plea Agreement. The district court relied on Application Note 4(B)(ii) to USSG § 4B1.5 to consider this dismissed conduct in applying the enhancement. *See* PSR, Pages 15-16. These determinations were erroneous.

Various circuits have now recognized that Guidelines "commentary" like Application Note 4(B)(ii) to USSG § 4B1.5 cannot add to the scope of the sentencing court's inquiry beyond what is permitted under the plain language of the guidelines themselves. *See, e.g., United States v. Winstead*, 890 F.3d 1082, 1091-92 (D.C.Cir. 2018); *United States v. Havis*, 927 F.3d 382, 386 (6th Cir.2019)

(en banc); *United States v. Nasir*, 982 F.3d 144, 156-60 (3d Cir.2020) (en banc), *vacated and remanded on other grounds*, 142 S.Ct. 211 (2021), *affirmed on remand*, 17 F.4th 459 at *6-9 (3d Cir. November 8, 2021); *United States v. Campbell*, 22 F.4th 438, 445-46 (4th Cir.2022); *United States v. Castillo*, 2023 U.S.App.LEXIS 13373 (9th Cir. May 31, 2023). The cited decisions apply this principle primarily in the context of Chapter Four recidivist sentencing enhancements like the career offender designation outlined at USSG § 4B1.1. Mr. Preece is simply asking this Court to apply the same rationale in the context of the Chapter Four recidivist enhancement at issue in his case, the "pattern of activity" enhancement under USSG § 4B1.5.

Mr. Preece's argument is based on the same principles of statutory construction at issue in *Winstead*, *Havis*, and other cited decisions. The Guideline provision at issue reads in pertinent part:

> In any case in which the defendant's instant offense of conviction is a covered sex crime, neither § 4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct:
>
> (1) The offense level shall be 5 plus the offense level determined under Chapters Two and Three. However, if the resulting offense level is less than 22, the offense level shall be 22, decreased by the number of levels corresponding to any applicable adjustment from § 3E1.1.

USSG § 4B1.5(b)(1). The text of the guideline itself does not indicate sentencing courts are permitted to consider information outside the scope of relevant conduct

already calculated pursuant to USSG § 1B1.3 in determining whether the enhancement should apply. Rather, Application Note 4(B)(ii) impermissibly brings other conduct within the scope of the guideline by insisting courts can consider it regardless of whether it "occurred during the course of the instant offense[.]" USSG § 4B1.5, comment. (n.4(B)(ii)).

Put simply, the district court relied on Application Note 4(B) to do what the plain language of USSG § 1B1.3(a)(1) forbids—consider "all acts and omissions…that were part of the same course of conduct or common scheme or plan as the offense of conviction" to determine Mr. Preece's offense level under the Guidelines. This is the same textual interpretation issue addressed by the Circuits in the other cited cases. The result should be the same here.

In its unpublished opinion, the Sixth Circuit admits it could find no controlling authority where this issue was addressed, yet it issued an unpublished decision affirming Mr. Preece's sentence despite the enhancement dramatically increasing his recommended sentencing range. *See* Appendix B, Page 10. The Sixth Circuit offers only two citations to cases from other Circuits in support of its ruling. *See id*. (citing *United States v. Gaffney-Kessell*, 772 F.3d 97, 100 n.6 (1st Cir.2014); *United States v. Schrode*, 839 F.3d 545, 552 (7th Cir.2016)). Both are easily distinguishable.

In *Gaffney*, the defendant received the pattern of activity enhancement under USSG § 4B1.5. Unlik Mr. Preece, however, but he did not object to its application at sentencing. More important, the defendant's only argument on appeal was that the statutory text of the Sentencing Reform Act prohibited the Sentencing Commission from "promulgating guidelines" other than those "responsive to the nature of the offense," not "uncharged, dismissed, or pending offenses beyond the offense of conviction." *Gaffney-Kessell*, 772 F.3d at 100. In other words, Gaffney-Kessell challenged the very existence of the relevant conduct provisions in the Guidelines. The First Circuit easily dismissed this broad, unpreserved argument. The Court's rationale in *Gaffney* has no application here.

The Sixth Circuit's reliance on *Schrode* is similarly misplaced. There, the defendant was convicted in state court for sexually assaulting a four-year-old family member. *Schrode*, 839 F.3d at 548. He "later pled guilty in federal court to videotaping assaults of the same child on two other dates, and receiving and possessing child pornography of other victims." *Id*. The Seventh Circuit dismissed the defendant's challenge to the "pattern of activity" enhancement because he was convicted of contact and child pornography offenses involving different victims on different occasions. *Id*. at 552. The Court noted "Schrode's federal offenses for receipt and possession of child pornography did not involve images" of the identified victim from the contact offense "and occurred almost a

year before the conduct that led to Schrode's state conviction." *Id*. In contrast, Mr. Preece was convicted of only one count involving a single victim. *Schrode* offers no guidance in this case.

Beyond the lack of authority supporting the Sixth Circuit's ruling, the United States Sentencing Commission recently proposed amendments to the Guidelines specifically designed to address the textual interpretation issue at issue in this case. *See* 2023 Sentencing Guidelines Amendments, 88 Fed.Reg. 28275, May 3, 2023 ("The amendment makes several changes to address a circuit conflict regarding the authoritative weight afforded to certain [Guidelines] commentary to § 4B1.2"). Notably, the amendment moves language defining certain predicate crimes from the commentary to the text of the guideline itself. This was the problem various Circuits recently addressed in the cited cases.

If, as the Sixth Circuit's opinion in this case necessarily implies, there was no inherent problem with sentencing courts relying on commentary to determine how to apply the recidivist enhancements included in Chapter Four of the Guidelines, there would be no need for the Sentencing Commission to offer such amendments. The Commission did so because this issue has divided courts across the country and is ripe for review.

Enhancements like the five-level increase under USSG § 4B1.5 applied in Mr. Preece's case have a substantial impact on the recommended sentencing

ranges of all defendants who receive them. Perhaps future defendants will benefit from the Sentencing Commission's clarification through the amendment process, but Mr. Preece's sentence was calculated based on the version of the Guidelines in effect at the time of his sentencing hearing. The only remaining avenue to address the district court's error is for this Court to grant Mr. Preece's petition for certiorari, vacate his sentence, and provide guidance to all federal courts about how to resolve similar interpretation issues.

CONCLUSION

For the foregoing reasons, Mr. Preece respectfully asks this Court to grant his petition for the issuance of a writ of certiorari for the purpose of vacating his sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jarrod J. Beck, counsel for Petitioner Joshua Preece, do hereby certify that the original and ten copies of this Petition for Writ of Certiorari were mailed to the Office of the Clerk, Supreme Court of the United States, Washington, DC 20543. I also certify that a true copy of the Petition was served by mail with first-class postage prepaid upon Assistant United States Attorney Lauren Tanner Bradley, Assistant United States Attorney, 260 West Vine Street, Suite 300, Lexington, Kentucky 40507-1612.

This 14th day of June, 2023.

_____

JARROD J. BECK

COUNSEL FOR JOSHUA PREECE