NO. 20-10438-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

DENIS GRUSHKO,

Defendant/Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

MOTION TO RECALL THE MANDATE AND TO PERMIT APPELLANT TO FILE SUPPLEMENTAL PETITION FOR REHEARING AND REHEARING *EN BANC* BASED ON INTERVENING CASE, *UNITED STATES V. DUPREE*, __ F.4th __, 2023 WL 227633 (11th Cir. 2023)

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Denis Grushko
Case No. 20-10438-FF

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Becerra, Honorable Jacqueline, United States Magistrate Judge

Bhat, Kiran Narayan, Assistant United States Attorney

Caruso, Michael, Federal Public Defender

Clay, William Alexander, Esquire

Cohen, Eric Martin, Esquire

Dion, Scott I., Assistant United States Attorney

Fajardo Orshan, Ariana, Former United States Attorney

Ferrer, Wifredo, Former United States Attorney

Foldes, Margaret Y., Assistant Federal Public Defender

Friedman, Jonathan S., Esquire

Gayles, Honorable Darrin, United States District Judge

Goodman, Honorable Jonathan, United States Magistrate Judge

Greenberg, Benjamin G., Former United States Attorney

Grosnoff, Nicole, Assistant United States Attorney

Grushko, Denis, Defendant/Appellant

Grushko, Igor, Co-defendant

Homer, Michael B., Assistant United States Attorney

Lapointe, Markenzy, United States Attorney

Louis, Honorable Lauren, United States Magistrate Judge

McAliley, Honorable Chris M., United States Magistrate Judge

Mesnekoff, Faith, Esquire

Mirer, Michael Perry, Esquire

Otazo-Reyes, Honorable Alicia M., United States Magistrate Judge

Roth, Martin L., Esquire

Rubio, Lisa Tobin, Chief of Appellate, United States Attorney

Smith, Honorable Rodney, United States District Judge

Stratton, Jonathan Douglas, Assistant United States Attorney

United States of America, Plaintiff/Appellee

Vozniuk, Vadym, Co-defendant

White, Charles Garrett, Esquire

s/Margaret Y. Foldes
Margaret Y. Foldes

MOTION TO RECALL THE MANDATE AND TO PERMIT APPELLANT TO FILE SUPPLEMENTAL PETITION FOR REHEARING AND REHEARING *EN BANC* BASED ON INTERVENING CASE, *UNITED STATES V. DUPREE*, __ F.4th __, 2023 WL 227633 (11th Cir. 2023).

Appellant, Denis Grushko, through undersigned counsel, respectfully requests that this court recall the mandate issued January 30, 2023, and permit him to file a supplemental Petition for Rehearing and Rehearing *En Banc* based on the intervening case of *United States v. Dupree*, __ F.4th __, 2023 WL 227633 (11th Cir 2023). In support of this motion, Mr. Grushko states:

Mr. Grushko was convicted of access device fraud and aggravated identity theft after a jury trial. He is currently incarcerated, serving a sentence of 145 months imprisonment.

Before sentencing, the Presentence Investigation Report (PSI) calculated the loss amount under U.S.S.G. §2B1.1 and its commentary, notes 3(A) and 3(F). The text of §2B1.1(b)(1) states:

> (1) If the loss exceeded $6,500, increase the offense level as follows:
>
> **Loss (apply the greatest)**
>
> ***** ***** *****
>
> (E) More than $95,000 . . . . . add 8
> (F) More than $150,000 . . . . . add 10

(G) More than $250,000 . . . . . add 12
(H) More than $550,000 . . . . . add 14
(I) More than $1,500,000 . . . . . add 16

Commentary under §2B1.1 sets out further rules. In particular, note 3(A) states, "**General Rule.** — . . . . loss is the greater of actual loss or intended loss." And note 3(F) states:

> **Special Rules.** – . . . . the following special rules shall be used to assist in determining loss in the cases indicated: . . . . (i) Stolen or Counterfeit Credit Cards and Access Devices; . . . In a case involving any . . . counterfeit . . . or unauthorized access device, loss includes any unauthorized charges made with the counterfeit . . . or unauthorized access device and shall be not less than $500 per access device.

U.S.S.G. §2B1.1, comment n.3(F).

Under §2B1.1 and its commentary, the PSI and the district court calculated loss to be $625,883, which was the total of actual loss ($122,383) and the loss created by the Special Rule in note 3(F) ($503,500) based on the government's proffer that there were 1,007 unauthorized access devices subject to valuation ($500 each) through note 3(F). (DE 246:21). Using this figure from the Special Rule, the guideline calculation included a +14 level increase in the base offense level. (PSI ¶20). Had note 3(F) been eliminated from the equation, the loss amount would have been $122,383, which would have resulted in an

+8 increase to the base offense level. Thus, the total guideline level would have been 6 levels lower than the PSI and the district court calculated. This would have reduced the guideline range from Level 30, CHC I, 97-121 months down to Level 24, CHC I, 51-63 months. Thus, the sentencing range would have been 46 months lower at the low end and 58 months lower at the high end. An additional consecutive 24 months was required to be added based on the aggravated identity theft convictions.

On appeal, Mr. Grushko challenged his loss amount. In pertinent part, he argued that the government's proof at sentencing did not establish that the proffered number of access devices subject to U.S.S.G. §2B1.1, note 3(F) was 1,007. The government conceded that the proof at sentencing did not establish the proffered number of access devices. *United States v. Grushko*, 11th Cir. No. 20-10438 (DE 58:45) (Gov't br.). Nonetheless, the government defended the sentence as constituting "harmless error," under *United States v. Keene*, 470 F.3d 1347 (11th Cir. 2006). *Id.* The Court held oral argument, and it subsequently affirmed the judgment and sentence. *United States v. Grushko*, 50 F.4th 1 (2022). Mr. Grushko filed a Petition for Rehearing and Rehearing *En Banc*. He

requested, in pertinent part, a rehearing with respect to the defective loss guideline.

On January 18, 2023, this Court issued its opinion in *United States v. Dupree*, __ F.4th __, 2023 WL 227633 (2023) (*en banc*). The *Dupree* case changed the law in this Circuit with respect to the operation of the Guidelines as interpreted by the guideline commentary. *Dupree,* 2023 WL 227633 at *4. Specifically, *Dupree* recognized that the Supreme Court had limited the deference given to the guideline commentary through analogous cases in the field of administrative law, equating the guideline commentary to administrative agencies' interpretations of their own regulations. *Id*. at *4. Such comparison had carried through the Supreme Court cases of *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410, 414, 65 S.Ct. 1215 (1945); *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905 (1997), and *Stinson v. United States*, 508 U.S. 36, 113 S.Ct. 1913 (1993). Under these cases, however, the deference doctrine had become "a caricature" of proper deference, as deference to agency interpretations/guideline commentary had become "reflexive." *Dupree*, 2023 WL 227633 at *4, *citing Kisor v. Wilkie,* __ U.S. __, 139 S.Ct. 2400, 2415 (2019).

The Supreme Court changed this practice of reflexive deference in *Kisor,* __ U.S. __, 139 S.Ct. 2400. *Kisor* made clear that deference to agency interpretations of regulations should not be granted unless the regulation at issue was genuinely ambiguous. To make that determination, "a court must exhaust all the 'traditional tools' of construction." *Kisor*, __ U.S. at __, 139 S.Ct. at 2415, citing *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). "[A] court must 'carefully consider[]' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Id.* (citation omitted). If after employing these tools, "uncertainty d[id] not exist, there [wa]s no plausible reason for deference. The regulation then just mean[t] what it mean[t] – and the court must give it effect, as the court would any law." *Kisor*, __ U.S. at __, 139 S.Ct. at 2415.

If the court found a regulation to be genuinely ambiguous, the court had to employ additional tests to determine if deference was appropriate under those circumstances. The *Kisor* court found that this was a broad-searching inquiry, and thus it gave "markers" as guidance. *Kisor*, __ U.S. at __, 139 S.Ct. at 2416. *Kisor* stated that if the regulation was

ambiguous, the agency's interpretation still had to be "reasonable," given the character and the context of the regulation. *Kisor*, __ U.S. at __, 139 S.Ct. at 2415-16. This meant it had to "come within the zone of ambiguity the court ha[d] identified after employing all its interpretive tools." Further, even if an agency's interpretation could be classified as "reasonable," there were still other considerations before deference could be given. *Kisor*, __ U.S. at __, 139 S.Ct. at 2416. The interpretation had to "be the agency's 'authoritative' or 'official position,'" it had to "in some way implicate [the agency's] substantive expertise," and it had to "reflect [the] fair and considered judgment" of the agency. *Id*. at 2416-17. If all these tests were met, then deference was appropriate.

This Court in *Dupree* determined that the limitations set out in *Kisor* applied to *Stinson* and the federal sentencing guidelines. *Dupree*, 2023 WL 227633 at *5-*6. This resulted in *Dupree*'s abrogating prior Eleventh Circuit authority *United States v. Weir*, 51 F.3d 1031 (11th Cir. 1995), and *United States v. Smith*, 54 F.3d 690 (11th Cir. 1995), which had previously given the reflexive-type of deference to U.S.S.G. §4B1.2's commentary. *Dupree*, 2023 WL 227633 at *8 n.9. That commentary purported to define a "controlled substance offense" to include inchoate

offenses, although the text of §4B1.2 did not itself include inchoate offenses.

Dupree's holding applying *Kisor* to *Stinson* and the federal sentencing guidelines is not limited to U.S.S.G. §4B1.2. Rather, *Dupree* is an intervening case of this Court that also substantially impacts Mr. Grushko's case under U.S.S.G. §2B1.1. *Dupree* makes clear that there was error in Mr. Grushko's case because the intended loss and $500 Special Rule set out in §2B1.1, notes 3(A) and 3(F) should never have been utilized as part of Mr. Grushko's guideline calculation in the first place. *See Dupree*, 2023 WL 227633 *at *8-*9 & n.9*; *see also United States v. Banks*, 55 F.4th 246, 257-58 (3d Cir. 2022) (applying *Kisor* to §2B1.1 note (3)(A), the court found, "The Guideline does not mention 'actual' versus 'intended' loss; that distinction appears only in the commentary. . . . The ordinary meaning of loss in the context of §2B1.1 [an enhancement for basic economic offenses] is 'actual loss.' This result is confirmed by dictionary definitions of 'loss.'"); *United States v. Riccardi*, 989 F.3d 476,486 (6th Cir. 2021) (applying *Kisor* to §2B1.1 note (3)(F) where gift cards averaging $35 each were deemed to cause a $500 loss each, the court found, "Commentary may only interpret the guideline. And a $500

mandatory minimum cannot be described as an interpretation of the word 'loss.' Rather, it is a substantive legislative rule that belongs in the guideline itself to have force.").

Similar to *Dupree*, Mr. Grushko's case involves an unambiguous guideline, U.S.S.G. §2B1.1. The text of §2B1.1 simply instructs the court to calculate monetary loss and then select the corresponding enhancement level on a loss table that consists of graduated penalties based on increasing loss amounts. The text of §2B1.1 does not hint at the expansive concept of "intended loss" or a rule that deems loss for access devices to be $500 per device, regardless of the actual loss. Notes 3(A) and 3(F), therefore, are illegal expansions of the §2B1.1 guideline, and thus under *Dupree*, they could not be utilized to calculate loss under §2B1.1.

This Court denied Mr. Grushko's Petition for Rehearing on January 20, 2023, and it issued the mandate on January 30, 2023. This Court provides that a mandate may be recalled to prevent injustice. 11th Cir. R. 41-1(b) ("A mandate once issued shall not be recalled except to prevent injustice."). Further, this Court has found that intervening caselaw can qualify as such grounds under Rule 41-1(b). *See Judkins v. Beech Aircraft*

Corporation, 745 F.2d 1330 (11th Cir. 1984) ("[T]his court has the power to recall its mandate if . . . there has been a supervening change in the law."); *cf.*, *United States v. Campbell*, 26 F.4th 860 (11th Cir. 2022) (*en banc*) (*sua sponte* requesting supplemental briefs during *en banc* proceedings to address issue impacted by intervening caselaw that had not been raised by parties); *United States v. Durham*, 795 F.3d 1329 (11th Cir. 2015) (*en banc*) (permitting defendant to file supplemental brief to address intervening caselaw).

Neither the parties nor the courts had the benefit of *Dupree's* intervening decision at the sentencing or during his appeal up to this point. *Dupree's* legal changes would have reshaped the district court's entire process for calculating loss. This complete shifting of the legal landscape and the framework for the sentencing would have impacted the district court's exercise of its discretion. Under *Dupree*, the "benchmark" and "anchor" would have been approximately 46-58 months *lower* than the probation officer's framing through a presumptive (incorrect) guideline range at the outset of the hearing. (DE 246:2); *see Gall v. United States*, 552 U.S. 38, 49, 128 S.Ct. 586 (2007) (initial benchmark); *Peugh v. United States*, 569 U.S. __, 133 S.Ct. 2072, 2083

(2013) (anchor). Dupree's legal changes made it reasonably probable that Mr. Grushko's sentence would have reflected the lower guideline anchor through a lower ultimate sentence. Thus in light of *Dupree*, this Court should recall the mandate to prevent injustice. This issue also implicates questions of great impact in this District concerning the guidelines generally and the fraud guideline specifically. For that reason as well, this Court should recall the mandate and allow supplemental briefing based on *Dupree*.

After *Dupree*, the panel opinion in Mr. Grushko's case conflicts with the Supreme Court's and this Court's authority: *Kisor v. Wilkie*, __ S.Ct. __, 139 S.Ct. 2400, 2415 (2019) and *United States v. Dupree*, __ F.4th __, 2023 WL 227633 (11th Cir 2023). It further conflicts with other circuits that have addressed the issue. *United States v. Banks*, 55 F.4th 246, 258 (3d Cir. 2022); *United States v. Riccardi*, 989 F.3d 476,486 (6th Cir. 2021).

CONCLUSION

In light of the above, Mr. Grushko respectfully requests that this Court recall the mandate and permit him to file a Supplemental Petition for Rehearing and Rehearing *En Banc* within 21 days of the Court's order on this motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this pleading complies with the type-volume limitation and typeface requirements of FED. R. APP. P. 27(d)(2)(A), because it contains 2,095 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

This pleading also complies with the requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Century Schoolbook.

s/Margaret Y. Foldes
Margaret Y. Foldes
Attorney for Appellant Grushko
Dated: February 6, 2023

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was served via CM/ECF this 6th day of February, 2023, upon Scott Dion, United States Attorney's Office, 99 N.E. 4th Street, Miami, Florida 33132-2111 and mailed via U.S. Mail to Mr. Denis Grushko, Reg. No. 19352-104, FCI Otisville, P.O. Box 1000, Otisville, NY 10963.

s/Margaret Y. Foldes
Margaret Y. Foldes