No: 23-6347

ORIGINAL

In the
Supreme Court of the United States

TRAYONE LEFFERIO BELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Federal Sentencing Guidelines under 2B1.1(b)(1) calculates loss based on actual loss or intended loss. Numerous circuits calculate "loss" within the context of U.S.S.G. § 2B1.1(b)(1) includes intended loss. *United States v. You,* 74 F.4th 378, 396-98 (6th Cir. 2023); *United States v. Gadson*, 77 F.4th 16, 19-22 (1st Cir. 2023); *United States v. Lee*, 77 F.4th 565, 573-74 (7th Cir. 2023); *United States v. Verdeza*, 69 F.4th 780, 793 (11th Cir. 2023).

The Third Circuit, has held otherwise. *United States v. Banks*, 55 F.4th 246, 255-58 (3d Cir. 2022) (holding "loss" in U.S.S.G. § 2B1.1(b)(1) is limited to actual loss).

In light of the split in the circuits, Petitioner presents the following question:

Does the intended loss commentary to the fraud guidelines § 2B1.1(b)(1) violate this court's decision *Kisor v. Wilke,* 139 S.Ct. 2400 (2019).

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Middle District of Florida.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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No:

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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

Trayone Lefferio Bell, ("Bell") Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, whose judgment is herein sought to be reviewed, was entered on September 20, 2023, a published decision in *Bell v. United States,* No. 23-11617, 2023 U.S. App. LEXIS 25384 (11th Cir. Sep. 25, 2023) is reprinted in the separate Appendix A to this Petition.

The opinion of the Southern District of Florida, whose judgment is herein sought to be reviewed, was entered on November 22, 2022, an unpublished decision in *Bell v. United States,* No. 6:20-cv-1848-CEM-EJK, M.D. Fla. November 22, 2022) is reprinted in the separate Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on September 25, 2023. The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1654(a) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> 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 private property be taken for public use, without just compensation.

Id. Fifth Amendment.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id. Sixth Amendment.

STATEMENT OF THE CASE

In the Middle District of Florida's district court, Kevin Proulx represented Bell. Bell was charged on December 21, 2016, with count 1, involving possession of 15 or more access devices, in violation of 18 U.S.C. §§ 1029(a)(3) and 1029(c)(1)(A)(i) (Dkt. 1). Additional charges against

Bell included counts 2, 4, and 7 for aggravated identity theft under Title 18 U.S.C. § 1028(a)(i), and counts 3 and 5 for theft of government money, in violation of 18 U.S.C. § 641. Bell's trial resulted in a guilty verdict (Dkt. 52, 57). On January 9, 2018, Bell received a sentence totaling 174 months with an additional 3 years of supervised release (Dkt. 73). The Eleventh Circuit Court of Appeals upheld Bell's sentence and conviction on October 17, 2018. *United States v. Bell,* 750 F. App'x 941 (11th Cir. 2018). A writ of certiorari was denied on October 7, 2019. *Bell v. United States*, 140 S. Ct. 293 (2019).

STATEMENT OF THE FACTS

An investigation by law enforcement revealed that Bell had submitted false tax returns in other people's names and collected their refunds. *United States v. Bell*, 750 F. App'x 941, 942 (11th Cir. 2018) He used their stolen social security numbers and other identifying information to fill out the returns and requested that the government issue the refunds as debit cards. *Id.* at 942. He was charged with one count of knowing possession of 15 or more counterfeit and unauthorized access devices with the intent to defraud, in violation of 18 U.S.C. § 1029(a)(3), (c)(1)(A)(i); one count of knowing transfer, possession, and use of another

person's identification, in violation of 18 U.S.C. § 1028A(a)(1); two counts of knowing and willful embezzlement, theft, purloin, and conversion of another person's tax refund, in violation of 18 U.S.C. §§ 641 and 2; and two counts of knowing transfer, possession, and use of another person's social security number to steal public money, in violation of 18 U.S.C. § 1028A(a)(1) and (2). *Id.*

At sentencing, the Probation Officer determined that according to the Internal Revenue Service, ("IRS") the loss was calculated at $ 823,797 *actual loss* in payments to fraudulent tax returns. (PSI ¶ 22). However, the Sentencing Guidelines explains in its Commentary Notes to include intended loss as well. Intended loss is not mentioned in Guideline § 2B1.1 loss calculations. Guideline section 2B1.1 Commentary Note provides as follows:

> 3. Loss Under Subsection (b)(1). This application note applies to the determination of loss under subsection (b)(1).
>
> (A) General Rule. Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.
>
> (i) Actual Loss. "Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.
>
> (ii) *Intended Loss. "Intended loss"* (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have

> been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).

Id. Guidelines § 2B1.1

Notwithstanding the *actual loss* as determined by the IRS, the Probation Office determined the intended loss separately:

> Bell possessed more than 100 unauthorized access devices (debit cards). Bell fraudulently obtained and used the personal identification information of R.B., V.A., D.S. to file fraudulent tax returns. In addition, Bell used the social security numbers of at least 150 victims to unlawfully file 218 tax returns and receive tax refunds. Therefore, Bell is responsible for a total intended loss of $1,677,168 based on the fraudulent tax returns.

Id. (PSI ¶ 20).

As a result of the intended loss enhancement, Bell received 16-level sentence enhancement under the Sentencing Guidelines § 2B1.1(b)(1)(I). (PSI ¶ 30). The District Court sentenced Bell to 174 months with an additional 3 years of supervised release. (Dkt. 73).

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides relevant parts as follows:

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

(1) A review of writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons, therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a ... United States court of appeals has decided an important question of federal law which has not been but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.

Id. Supreme Court Rule 10.1(a), (c).

QUESTIONS PRESENTED

I. DOES THE INTENDED LOSS COMMENTARY TO THE FRAUD GUIDELINES § 2B1.1(b)(1) VIOLATE *KISOR v. WILKE*, 139 S. CT. 2400 (2019).

In the landmark decision *Kisor v. Wilke,* 139 S.Ct. 2400 (2019) the Supreme Court limited the deference afforded an agency's interpretation of statutory text. *See Kisor* at 2408 (2019). *Kisor* applies to the Sentencing Guidelines. As this Court held in *United States v. Nasir*, 982 F.3d 144, 156 (3d Cir. 2020) "guidelines commentary can only interpret guidelines text, not expand it." *Id.* at 159 (3d Cir. 2020) (*en banc*). The Commentary must be set aside unless the text is "genuinely ambiguous" and the commentary is a reasonable interpretation of it. *Id.* at 158.

Under *Kisor* the intended loss commentary of the guidelines must fall. While the fraud guideline refers to a monetary "loss" § 2B1.1(b), the commentary expands it to provide that "loss is the greater of the actual loss or *intended loss.*" U.S.S.G. § 2B1.1 cmt. n.3(A). The commentary further defines "intended loss" as "the pecuniary harm that the defendant purposely sought to inflict ... includ[ing] the intended pecuniary harm that would have been impossible or unlikely." *Id.* This commentary fails at both levels of the *Nasir* analysis. "Loss" is not genuinely ambiguous; it

means actual loss. And even if it were ambiguous, the commentary is not a reasonable interpretation of it. For example, no speaker of ordinary English would say "the loss exceeded $ 6,500" when the loss is zero. And certainly, no speaker of ordinary English would say "the loss exceeded $ 6,500" when loss is impossible.

A. The Supreme Court's decision in *Kisor* limits *Auer* deference.

In 2019, the Supreme Court decided *Kisor*, narrowly construing *Auer* deference-the deference given an agency's interpretation of statutory text. *Kisor,* 139 S. Ct. at 2408 (citing *Auer v. Robbins*, 519 U.S. 452 (1997)). As this Supreme Court held, "*Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it." *Id.* at 2414. Rather, for *Auer* deference to apply, an interpretation must survive multiple levels of analysis. At the first level, "the possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it-genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Id.* Before "wav[ing] the ambiguity flag ... 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. Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference." *Id.* at 2415.

At the second level, even if a text is genuinely ambiguous, an agency's interpretation warrants *Auer* deference only if the interpretation is "reasonable." *Id.* Again, this is no mere formality. The interpretation "must come within the zone of ambiguity the court has identified after employing all its interpretative tools. And let there be no mistake: That is a requirement an agency can fail." *Id.* at 2416.[1] *Kisor* changed how Courts review guidelines commentary. By way of background, the Guidelines manual contains two primary types of provisions, which must be distinguished to "protect[] the separation of powers." *Nasir*, 982 F.3d at 159. Most authoritative is the guidelines text, which is submitted to

[1] A court may also consider "whether the character and context of the agency interpretation entitl[e] it to controlling weight." *United States v. Perez*, No. 19-1469, 2021 WL 3087672, *3 (3d Cir. July 22, 2021) (quoting *Kisor*, 139 S. Ct. at 2416). Relevant is whether the interpretation is the agency's official position, implicates its expertise, and is a fair and considered judgment (not a *post hoc* rationalization or convenient litigating position). *See id.*; *see also Ovalle v. Attorney Gen.*, 791 F. App'x 333, 336 (3d Cir. 2019) (not precedential) (declining to extend *Auer* deference where issue fell "more naturally into a judge's bailiwick") (quoting *Kisor*, 139 S. Ct. at 2417).

Congress for review and notice and-comment rulemaking. See *Stinson v. United States,* 508 U.S. 36, 41 (1993) (citing 18 U.S.C. § 994(p)).

Secondary is the commentary, which does not require congressional review or notice-and-comment rulemaking and can be changed at the whim of the Sentencing Commission. *See Stinson v. United States*, 508 U.S. 36, 40 (1993) (citing 18 U.S.C. § 994(p)); see also *Nasir*, 982 F.3d at 159. Guideline's commentary has historically received *Auer* deference. The commentary "is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of" the relevant guideline. *Stinson*, 508 U.S. at 38. But *Kisor* limited *Auer* deference. And so, *Nasir* limited the deference owed to guidelines commentary. Under *Nasir*, commentary cannot expand a guideline's scope. *Nasir*, 982 F.3d at 159. "Because it has not been approved by Congress, 'commentary has no independent legal force-it serves only to interpret the [g]uidelines' text, not to replace or modify it.'" *Id.* at 159 (emphasis and alteration in original) (quoting *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (*en banc*)). The commentary must be disregarded unless the guidelines text is "genuinely ambiguous" and the commentary is a reasonable interpretation of it. *Id.* at 158.

In *Nasir*, for example, this Court considered the career offender guideline's definition of a "controlled substance offense." See *id.* at 159. The guideline text does not mention inchoate offenses, which "alone indicates it does not include them." *Id.* Yet the commentary purported to include inchoates. In doing so, it overstepped the bounds of interpretation. The commentary must therefore be disregarded, and inchoate offenses may no longer be deemed controlled substance offenses. *See id.* at 160.

B. The intended loss commentary impermissibly expands the fraud guideline.

The court in *United States v. Kirschner*, 995 F.3d 327, 333 (3d Cir. 2021) has noted that *Kisor* and *Nasir* may have implications for the intended loss commentary. The same commentary that was utilized in Bell's case. *Kirschner*, the Court observed that "only th[e] comment[ary], not the Guidelines' text, says that defendants can be sentenced based on the losses they intended. By interpreting 'loss' to include *intended loss*, it is possible that the commentary 'sweeps more broadly than the plain text of the Guideline.'" *Kirschner*, at 333. Yet *Kirschner* did not resolve the issue, as it wasn't raised. *See id.* The issue is raised here, and the intended loss commentary must be disregarded. If the Sentencing

Commission wants to increase imprisonment for intended loss it can do so, but only by submitting the text to Congress for inclusion in the guideline itself. There is certainly an argument to be made both ways on whether actual and intended loss should be treated equivalently in setting a Guidelines range-the actual impacts of a crime often factor into what is considered the appropriate punishment. That is why this has to go through rulemaking.

1. "Loss" is not genuinely ambiguous; it means actual loss.

The fraud guideline provides for an offense-level enhancement if the "loss" exceeds various monetary thresholds. U.S.S.G. § 2B1.1(b). The guideline does not define "loss" other than to provide that it is measured in dollars. Accordingly, "loss" is presumed to have its ordinary meaning, and "dictionaries are a good place to start." *Riccardi*, at 488. One dictionary defines "loss" as:

> 1 a: the act of losing possession b: the harm or privation resulting from loss or separation c: an instance of losing 2: a person or thing or an amount that is lost ... 3: a failure to gain, win, obtain, or utilize b: an amount by which the cost of an article or service exceeds the selling price 4: decrease in amount, magnitude, or degree 5: destruction, ruin 6: the amount of an insured's financial detriment by death or damage that the insurer become liable for.

Id. Webster's Ninth New Collegiate Dictionary (1987)

Other dictionary definitions are similar:

> One dictionary defines the word to mean, among other things, the "amount of something lost" or the "harm or suffering caused by losing or being lost." *American Heritage Dictionary of the English Language* 1063 (3d ed. 1992). Another says it can mean "the damage, trouble, disadvantage, [or] deprivation ... caused by losing something" or "the person, thing, or amount lost." *Webster's New World College Dictionary* 799 (3d ed. 1996). A third defines it as "the being deprived of, or the failure to keep (a possession, appurtenance, right, quality, faculty, or the like)," the "[d]imunition of one's possessions or advantages," or the "detriment or disadvantage involved in being deprived of something[.]" *Oxford English Dictionary* 37 (2d ed. 1989).

Id. Riccardi, at 486. All of these definitions refer to actual loss, not a loss that did not occur, but was merely intended. Indeed, this Court has already interpreted the ordinary meaning of "loss" in just this way. In *Singh v. Attorney Gen.*, 677 F.3d 503, 510 (3d Cir. 2012)[2], the Court quoted dictionary definitions for "loss" and observed that "each of these

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[2] In *Singh*, the quoted definitions of "loss" were (a) "the act or fact of losing"; (b) "a person or thing or an amount that is lost"; (c) "the act or fact of failing to gain, win, obtain, or utilize"; (d) a "decrease in amount, magnitude, or degree"; (e) "the state or fact [*62] of being destroyed or placed beyond recovery"; and (f) "the amount of an insured's financial detriment due to the occurrence of a stipulated contingent event." Corresponding examples to illustrate these definitions include: (a) "loss of a leg"; (b) "killed, wounded, or captured soldiers"; (c) "loss of opportunity"; (d) "altitude loss"; (e) "loss of life in war"; and (f) financial detriment caused by "death, injury, destruction, or damage."

definitions, and their corresponding examples, refer to loss that actually occurs." Singh held that it was "unambiguous" that the ordinary meaning of "loss" is actual loss, and that it was unnecessary to look any further for guidance. *Id.* at 512.[3] That is correct. The text of § 2B1.1(b) is not genuinely ambiguous, and so the intended-loss commentary violates *Kisor* and *Nasir* and must be disregarded.

2. Even if "loss" were genuinely ambiguous, the commentary is not a reasonable interpretation of it.

Even if "loss" were genuinely ambiguous, the commentary must still be disregarded because it is not a reasonable interpretation of it. In *Kisor*, the Supreme Court took a hard line on this requirement. "If genuine ambiguity remains, ... the agency's reading must still be 'reasonable.' In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretative tools. And let there be no mistake: That is a requirement an agency can fail." *Kisor*, 139 S. Ct. at

[3] While *Singh* involved a different context-the definition of aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i)-its holding rested on the ordinary meaning of "loss" as set forth in the dictionary, not on the particular context in which it arose.

2415-16. The intended loss commentary fails. Even if there is a zone of ambiguity as to the meaning of "loss" the commentary is outside the zone. The Sixth Circuit recently reached a similar conclusion, applying *Kisor* to another part of the same guideline commentary. In *United States v. Riccardi*, 989 F.3d 476 (6th Cir. 2021), the Sixth Circuit considered commentary to the fraud guideline that defines "loss" for unauthorized access devices (e.g., stolen gift cards) as "not less than $ 500" per card. *See Riccardi*, at 479 (citing U.S.S.G. § 2B1.1 cmt. n.3(F)(i)). The Court disregarded the commentary. As it explained, even if "loss" were genuinely ambiguous-an issue the Court did not need to resolve-interpreting it to mean at least $ 500 per card is not reasonable. *See id.* at 486. The commentary "cannot 'be derived from [§ 2B1.1] by a process reasonably described as interpretation.' The Commission's decision to adopt this minimum loss amount was instead a substantive policy choice," which must be submitted to Congress for inclusion in the guidelines text. *Id.* (alteration in original) (citation omitted).

The same is so here. The fraud guideline provides for a loss enhancement if the "loss" exceeds various thresholds, beginning at $ 6,500. U.S.S.G. § 2B1.1(b). The commentary, in turn, expands the

guideline by providing that "loss is the greater of the actual loss or intended loss." U.S.S.G. § 2B1.1 cmt. n.3(A). The commentary further defines "intended loss" as "the pecuniary harm that the defendant purposely sought to inflict ... includ[ing] intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)." *Id.* This is an unreasonable interpretation of "loss." No speaker of ordinary English would say "the loss exceeded $ 6,500" when the loss is zero. And certainly, no speaker of ordinary English would say "the loss exceeded $ 6,500" when loss is impossible.

An example illustrates the point. In *United States v. Osang*, 618 F. App'x 133 (3d Cir. 2015), a defendant engaged in an implausible "black money" fraud, where he presented black paper, claiming it was money coated in paste; he said the paste could be removed with a cleaning agent to reveal usable bills. *Id.* at 134. The defendant offered the cleaning agent and asked for $ 100,000. The intended victim, however, was a government informant. The defendant received nothing. Yet, under the commentary, we must say of this scenario "the loss was $ 100,000." *See id.* at 135. This is not a reasonable use of the English language, as

required by *Kisor*. To the contrary, the only way this statement makes any sense is by adding the word "intended" to it, thereby saying "the intended loss was $ 100,000." But "intended" appears nowhere in the guideline text. Adding it is literally an expansion of the text, not an interpretation of it. Even a court cannot interpret a text by "read[ing] an absent word into" it. *Riccio v. Sentry Credit, Inc.*, 954 F.3d 582, 589 (3d Cir. 2020) (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004)). Neither can the Sentencing Commission.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand to the Court of Appeals for the Eleventh Circuit.

Done this 10th, day of December 2023.

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