23-6440 No: _____

In the

Supreme Court of the United States

Ismael DeJesus-Flores

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Ismael DeJesus-Flores

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QUESTIONS PRESENTED FOR REVIEW

CAN THE U.S.S.G COMMENTARY DEFINITION OF A MINOR IN § 2L1.1 COMMENTARY NOTE 1 BE CONSIDERED UNCONSTITUTIONALLY VAGUE WHEN IT WAS NEVER SUBJECTED TO NOTICE AND COMMENT TO THE PUBLIC, AND PRECEDENT DEFINES VAGUENESS AS A STATUTE THAT FAILS TO GIVE ORDINARY PEOPLE FAIR NOTICE.

THE COMMENTARY CANNOT EXPAND THE DEFINITION OF "MINOR" BROADER THAN THE ORDINARY EXCEPTED FEDERAL DEFINITION BY THIS COURT IN UNITED STATES v Esquivel-Quintana, 137 S. Ct. _____

PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

In addition to 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 Fifth Circuit and the United States District Court for the Southern District of Texas Brownsville Division.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATUTES

TABLE OF AUTHORITIES

GUIDELINE PROVISIONS

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit whose judgement is herein sought to be reviewed was entered on September 25, 2023 in an unpublished decision in United States of America v Ismael DeJesus-Flores No. 23-40291 (5th Cir Sept. 25, 2023)

The opinion of United States District Court for the Southern District of Texas Brownsville division was entered on February 1, 2023, in an unpublished decision in Ismael DeJesus-Flores v United States of America, No. 1:22-CV-161, (S. D.T. May 22, 2023)

STATEMENT OF JURISDICTION

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

CONSTITUTIONAL PROVISIONS, TREATIES, STATUES AND RULES INVOLVED

This case invokes the Sixth Amendment and Right to Effective Assistance of Counsel.

This Case also invokes the Due Process Clause that prohibits the Government from "taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary punishment".

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Ismael DeJesus-Flores Petitioner herein, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause.

STATEMENT OF THE CASE

On April 16th, 2019, a grand jury in the Southern District of Texas, in an eighteen-count superseding indictment, charged Flores with: one count of conspiracy to transport and harbor illegal aliens, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(v)(I), 1324(a)(1)(A)(ii and iii), and 1324(a)(1)(B)(i) (Count One); two counts of transporting illegal aliens, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(ii) and 1324(a)(1)(B)(i) (Counts Two) and Three); one count of conspiracy to launder money, in violation of 18 U.S.C. §§ 1956(h) and 1956(a)(1)(B)(i) (Count Four); nine counts of money laundering by concealment of disquise, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (Counts Five through Thirteen); and five counts of operation of an unlicensed money transmitting business, in violation of 18 U.S.C. § 1960 (Counts Fourteen through Eighteen). A notice of forfeiture was included in the indictment, calling for the forfeiture $922,351.00 pursuant to 18 U.S.C. § 928(a)(1) and 31 U.S.C. § 5217(c).

On March 2nd, 2020, Flores pleaded guilty to Counts One and Four of the superseding indictment (conspiracy to transport and harbor illegal aliens and conspiracy to launder money), with a written plea agreement in which he waived his right to appeal or collaterally attack his conviction and sentence (reserving the right to raise issues of ineffective assistance of counsel). On April 26th, 2021, this Court sentenced Flores to 120 months' incarceration on the conspiracy to transport and harbor illegal aliens charge and 160 months' incarceration on the conspiracy to launder money charge, with the sentences to run concurrently. The Court also sentenced Flores to two concurrent 3-year

terms of supervised release. The district clerk entered the judgment of April 30th, 2021.

Flores appealed his sentence. Flores's appellate counsel[2] filed an Anders Brief, Flores did not file a response, and the Fifth Circuit Court of Appeals reviewed the Anders brief and the record and determined there were no nonfrivolous issues for appellate review. United States v. DeJesus-Flores, 2021 WL 5985048*1 (5th Cir. December 16. 2021) (unpublished).[3]

Flores did not file a petition for writ of certiorari, and his judgment and sentence became final 90 days later on March 16th, 2022. Flores filed his timely § 2255 motion and memorandum no later than November 29th, 2022. Court ordered the Government to respond by January 30th, 2023. (Case No. 1:22-CV-161).

On February 1, 2023 a Magistrate Judge recommended that the Court deny the petition for failure to sign in the correct place. Flores filed a motion to reconsider. Denial of Certificate of Appealability. The District Court Denied the Certificate of Appealability at the District Court on April 14, 2023

Flores timely Filed a Notice of Appeal, and ultimately a Certificate of appealability that the Fifth Circuit Court of Appeals denied on September 25, 2023.

STATEMENT OF FACTS

Homeland Security Investigation (HSI) agents began investigating Flores in Mid-2016 after receiving information that he was involved in alien smuggling and harboring using the nickname "Mago". Agents were able to connect Flores to

numerous alien smuggling events through the post-arrest statements of several people that he recruited and paid to participate in the smuggling activity. Cell phones showed communication between Flores and some of his co-defendants.

Flores also smuggled, transported and harbored hundreds of displaced aliens that were mostly family units fleeing poverty and persecution from cartel controlled areas of Mexico. On Mar 17, 2017 agents executed arrest and Search Warrants at Flores home and Seized numerous phones, a laptop, $7,500 and vehicles connected to the ASO smuggling ring. Mancha, a individual at Flores's residence made statements about her involvement in the smuggling ring, and her knowledge of numerous individual smuggling events.

Flores ultimately plead guilty where he admitted he had worked in an ASO previously, and that he operated on ASO himself where he would transport 15-20 aliens twice per week.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS HAS INCORRECTLY DECIDED THAT THE COMMENTARY'S DEFINITION OF MINOR IN U.S.S.G. § 2L1.1 Cmt. N. 1. IS NOT SUBJECT TO UNCONSTITUTIONALLY VAGUE CHALLENGES, IS NOT BROADER THAN THE GUIDELINE UNAMBIGUOUS DEFINITION

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 court 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. IN LIGHT OF THE FACTS OF THIS CASE WAS THE DEFENSE COUNSEL INEFFECTIVE IN LIGHT OF THIS COURTS PRECEDENT IN UNITED STATES v ESQUIVEL-QUINTANA, 137 AND UNITED STATES v BECKLES, 580 U.S. 256, 265 (2017).

Ismael DeJesus-Flores requested a certificate of appealability from the Fifth Circuit Court of Appeals in line with 28 U.S.C. § 2253(c)(1)(B) and Fed. R. App. P. 22(b)(1). This is because the District Courts' decision regarding the claim of ineffective counsel is arguably "debatable" among rational jurists. See, Buck v. Davis, 137 S.Ct. 749 (2017), which re-emphasizes the standard for granting a COA. See, Tennard v, Dretke, 543 U.S. 274 (2004); MillerEl v. Cockrell, 537 U.S. 322 (2003); and Slack v. McDaniel, 529 U.S. 473 (2000). Sorto v. Davis, 672 F. App'x 342 (5th Cir. 2016) suggests that a defendant needs to show that the issues at hand are "worthy of further exploration". Additionally, Rosales v Dretake, 133 F. App'x 135 (5th Cir. 2005) and Fuller v Johnson, 114 F.3d 491 (5th Cir. 1997), emphasize that any uncertainty about granting a COA should lean in favor of the petitioner. Brooker v. United States, 2014 U.S. Dist. LEXIS 176778 (W.D.N.C. Dec. 22, 2014) (any doubts about issuing a COA should be resolved to benefit the petitioner).

To secure a COA, one doesn't need to provide definitive proof of an error. Quite the opposite. As articulated in Miller-El, even if every rational jurist

might concur that the petitioner won't succeed after a full review, the claim can still be considered "debatable" (537 U.S. at 338). Succinctly, § 2253(c) sets a relatively low bar for the issuance of a COA, as highlighted in Buck v. Davis, 137 S.Ct. at 773-75. The court emphasized: "At the COA stage, the appellate court should primarily focus on a preliminary examination of the claim's underlying merit, questioning merely whether the District Court's ruling was open to debate". Id. at 774, Miller-El, 537 U.S at 327, 348. Flores provides that it does.

A. Demonstrating a Significant Indication of a Constitutional Right Violation – the § 2255 Motion Adequately Presented Constitutional Allegations

1. The defense Attorney was ignorant of a point of Supreme Court precedent that set the generic federal definition of minor at 16 as opposed to the commentary's unpublished 18.

Generally, a "counsels ignorance of a point of law that is fundamental to his case, combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance" Hinton v Alabama, 571 U.S. 263, 274 (2004).

When a defendant complains that a counselor was ineffective he must meet this courts two-part (Strickland v Washington, 446 U.S. 668 (1984)) test. That test requires a criminal defendant in a Habeas proceeding to prove that counsels representation was unreasonable and fell below an objective standard of reasonableness. id., 466 U.S. at 687-88. The defendant must also show that there "is a reasonable probability of the proceeding being different" id., at 698, or the prejudice requirement.

For Flores had he known that, he would have received an additional 4 points for the enhancement of § 2L1.1(b)(4) which defers to a definition of minor in the commentary he would not have plead guilty. Kisor v Wilkie 139 S. Ct. 2400 (June 26, 2019) and Esiquivel-Quintana 137 S. C.t 1562, 198 L.Ed. 2d 22 (2017) was decided well before his sentence, calling into question the deference owed to agency's own rules and the definition of a minor. The Sixth Amendment gives criminal defendants the right to effective assistance of counsel, U.S. Const., Amend. IV.

As to the first prong, deficient performance is performance that falls "below an objective standard of reasonableness". Strickland, 466 at 688. That is actions that "no competent counsel would have taken" Grayson v Thompson, 257 F. 3d 1194, 1216 (11th Cir. 2001). Was it reasonable for Flores counsel to not challenge the Guideline commentary definition of a "minor" when this court had already called into question an agency's practice of deference to that commentary in an unambiguous statute? This court set the federal generic definition of "minor" at 16. United States v Esiquivel-Quintana, 137 S.Ct. (2017). Further, no sound counselor would fail to address the practice of deference by that agency to it's own rules, when to do so prejudices the client. This unprofessional error, is a failure of such magnitude that "but for counsel's errors, the result of the proceeding would have been different. United States v Pease, 240 F. 3d 938, 941 (11th Cir. 2000).

When determining whether the outcome of the proceeding would have been different this court need only consider how a lower court should apply this courts decisions, they are to be construed "neither narrowly nor liberally - only faithfully" United States v Johnson, 921 F. 3d 991, 1001 (11th Cir.

2019). If the lower court's duty is to apply precedent faithfully it is equally the duty of counsel to be aware of developing Supreme Court decisions and apply them to a defendants case. In Kisor, this court reiterated that deference is only afforded when a regulation was genuinely ambiguous. U.S.S.G. § 2L.1.(b)(4) simply seeks to define :minor" as 18, in § 2L.1. Cmt. N. 1. This deference to the guideline commentary when Kisor, clearly sets a criteria that forbids such deference gives rise to the Sixth Amendment violation for counsels failure to contest this deference.

B. DEMONSTRATING A SIGNIFICANT INDICATION OF A CONSTITUTIONAL RIGHT VIOLATION _ THE § 2255 MOTION ADEQUATELY PRESENTED CONSTITUTIONAL ALLEGATIONS.

1. Counsel was ineffective when he failed to argue that the Guidelines are unconstitutionally vague in the commentary as they fail to give an ordinary person fair notice of the conduct the prosecute.

Flores made the claim that the U.S.S.G commentary definition of a minor is § 2L.1. Cmt. N. 1 is unconstitutionally vague for several reasons.

1. The Supreme Court generic federal definition of a "minor" is 16.
2. An unconstitutionally vague claim can be made on statutes that fail to give an ordinary person fair notice of the law or rule it promulgates.

The commentary never was subjected to the notice and comment period of the Federal Register, thus fair notice was never given to ordinary people about the promulgated changes.

Thus the commentary deference should not be given the protection of United States v Beckles, 580 U.S. 256, 265 (2017).

3. There is a general push to question the practice of an agency defering to its own rules. Kisor v Wilkie, 139 S. Ct. 2400 204 L Ed. 2d 841 (2019). Even when those rules are in direct contradiction to established precedent. Looper Bright Enterprises v Raimonds, Case No. 22-451 (Cert Granted May 1, 2023).

In Beckles, the Supreme Court held that the guidelines manual was not subject to a vagueness challenge as they did not fix the permissible range of sentences, but merely guided the exercise of discretion in choosing a sentence within the statutory range, and thus the residual clause in U.S. Sentencing Guidelines Manual § 4B1.2.(a)(2) was not void for vagueness, as the Court noted in a Defendant's claim of a due process against a Federal law for vagueness. Judicial precedent has held that the due process clause prohibits the Government from taking away someone's life, liberty or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes or so standardless that it incites arbitrary enforcement. Applying this standard, case law invalidates two kinds of criminal laws as void for vagueness: laws that define criminal offenses and laws that fix permissible sentences for criminal offenses. Mr. Flores' due process claim asserts that U.S.S.G. § 2L.1.(b)(4) had defined the definition of a "minor" in 2L1.1 Cmt. N. 1 such a standardless way that it invited arbitrary enforcement. The generic Federal definition of a minor is 16, yet embedded within on of the most complicated complied legal works known in human history is an alternate definition of the term minor. In the real world the only individuals who are aware of the Guideline's differing definitions are in fact the Government who

made them, the prosecution who uses them and the always unknowing Defendant who has them applied to him. An ordinary American citizen is quite often surprised to find that his conduct under the United States Code is not Constitutionally illegal, but then finds that the advisory Guidelines permits the government to bypass nearly all Constitutional scrutiny under the guise of the Guidelines merely being advisory. But the Guidelines are not "advisory" in any way. Every Federal Defendant since the inception of the Sentencing Guidelines has had the Guidelines applied to them. The only aspect of the Guidelines that are advisory is that they "advise" a range. But that ends the advisory aspect of the Guidelines. The Guidelines always mandate a range. What that range is is what becomes advisory, every criminal defendant since the Sentencing Reform Act has had the Guidelines applied. Meaning they are not advisory.

A Defendant must always have a criminal history, which is derived from the Guidelines. Whether that history is (0) or (6) is derived from the facts at hand., Whether the Government chooses to charge some history or none is at their discretion, but what is not at their discretion is that a Defendant must have a score. In like manner, a criminal offense level must be decided. What that offense level is, is derived from the Guidelines. When that offense level is determined, it becomes the benchmark for all further proceedings. Whether the Court decides to differ from it is in the Court's discretion. But the fact remains that the guidelines have to be applied, and in that mandatory application in every Defendant's case, the only advisory aspect of the guidelines is that they place a sign on the path to point a direction that the Judge could heed if they so choose.

In Beckles, the Supreme Court noted that "our holding today also does not render 'sentencing procedure' entirely 'immune from scrutiny under the due process clause'". Williams, 337 U.S. at 252, n.18, 69 S. Ct. 1079, 93 L. Ed. 1337; See e.g., Towsend v. Burke, 334 U.S. 736, 741 68 S. Ct. 1252, 92 L. Ed. 1960 (1948). The Beckles Court specifically states that "we hold only that the advisory Sentencing Guidelines, including § 4B1.2(a)'s residual clause, are not subject to a challenge under the void-for-vagueness doctrine".

When the Guidelines "defined" what the definition of a minor is by departing from the Federal definition of a minor, they failed to give fair warning to a transgressor that their definition departs from other Federal definitions of the same subject matter. If the Guidelines are exempt from void-for-vagueness challenges under due process, and (the due process clause prohibits the Government from taking away someone's life, liberty or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement, and that standard applies to invalidating two kinds of criminal laws as void for vagueness: laws that define criminal offenses and laws that fix permissible sentences), then it would follow that in order for the Guidelines to be exempt, they would need to be at no point defining a criminal offense.

The Court has found that because the Guidelines do not fix a permissible sentence individually, then they are exempt from a void-for-vagueness challenge. But a wholistic approach reveals that the Guidelines are indeed "fixed" to every Federal Defendant since their inception.

Further, in order fro the Guidelines to be applied, they must define the criminal offense for which they seek to enhance. In fact, the Guidelines must go further in defining criminal offenses that the United States Code or the Code of Federal Regulations or any other Government entity, because they encompass them all and at many points differ their definition (as is the case here) then that of standard generic Federal definitions.

To qualify as a void-for-vagueness challenge, it must be a law that "defines" criminal offenses. U.S.S.G. § 2L1.1 Cmt. n. 1 has a list of "Definitions" where "minor" is defined as "an individual who had not attained the age of (18) years". So to be exempt from such a challenge, several would have to be true:

1) The word "definition" does not mean "define" in U.S.S.G. § 2L1.1 Cmt. n. 1.

2) The Guidelines at no point are ever describing any criminal offense.

3) The Guidelines are exempt from common sense interpretation and Constitutional scrutiny.

The object of the generic Federal definition of a minor is to set a standard that guides the public and gives fair warning to any would be transgressors. The commentary states that the reason for redefining minor and changing it from under (16) to those under (18) is to protect these minors from sexual abuse. But what sense would it make if the same individual the Guidelines determines is a minor (16 or 17 years of age) once they got to America could then legally engage in sex, because the Federal definition of a minor is (16)? The plain meaning of the text in U.S.S.G. § 2L1.1(b)(4) simply states "if the offense involved the smuggling, transporting or harboring of a

minor who was unaccompanied by the minor's parent, adult relative or legal guardian, increase by (4) levels".

At one point the commentary itself rendered the term "minor" in accord with the generic Federal definition. Simply as one under the age of (16). The change in the guidelines was not to the Guideline itself, but rather to the application note in the commentary, to which deference should not be given absent an ambiguous statute.

C. SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT - THE § 2255 AND COA SUFFICIENTLY ALLEGED CONSTITUTIONAL CLAIMS

1. Counsel was ineffective for failing to raise as a claim that the commentary cannot expand the interpretation of unambiguous Sentencing Guidelines.

Flores is entitled to competent representation during the pivotal phases of the criminal proceedings as established in Caruso v Zelinsky, F. 2d 435, (3rd Cir. 1982). Furthermore, he possesses the right to make an informed decision on whether to accept a plea deal or advance to trial, as articulated in United States v Day, 969 F. 2d 39, 43 (3rd Cir. 1992), referencing Hill v Lockhart, 474 U.S. 52, 56-57. This holds true even if the plea in question is a direct plea. Had Flores known that there was a question as to whether the commentary could expand the definition of an already defined statute he would not have plead guilty. Flores only must show that there is a "reasonable probability" that the results of the decision to proceed to trial would have been different. Williams v Taylor, 529 U.S. 362, 386 (2000), and based on the difference in

sentencing guideline ranges, there could be no doubt that a different outcome is evident.

The Supreme Court examined whether Courts are bound by the commentary's interpretation of the Guidelines in Stinson v United States, 508 U.S. 36 (1993). They found that the Guidelines are the equivalent of legislative rules adopted by Federal agencies, and the commentary is akin to an agency's interpretation of its own legislative rules. Guided by this analogy, the Court determined that the commentary should receive the same level of deference given to an agency's interpretation of its own rules, deference the court first described in Bowles v Seminole Rock & Sand Co., 325 U.S. at 414. If the meaning of the regulation is in doubt, the Court can then consider the issuing agency's own interpretation, and give it "controlling weight".

Four years after Stinson, the Supreme Court reaffirmed Seminole Rock in Auer v Robbins, 519 U.S. 452 (1997). In Auer, the Court concluded that the secretary of labor's interpretation of a regulation issued by the Dept. of Labor was "controlling" because it was not plainly erroneous or inconsistent with the regulation". Id., at 461. A few year ago, the Supreme Court revisited Auer deference and clarified the proper application of the doctrine. In Kisor v Wilkie, the Supreme Court examined Auer deference in the context of an agency's interpretation of one of its regulations. 139 s. Ct. 2400, 2408-09 (2019). The Court reaffirmed Auer's "important role in construing 'agency regulations' while also 'reinforcing its limits' and 'cabining ... its scope'". Id., at 2408. It explained that Auer was "rooted in a presumption ... that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities". Id., at 2412. Therefore, the Court clarified, "only if

a regulation is genuinely ambiguous" should Auer difference be applied. Id., at 2414. To determine whether ambiguity exists, Courts first "must exhaust all the 'traditional tools of construction'". Id., at 2415 (citing Chevron US.A. Inc. v Nat. Res. Council Ins., 467 U.S. 837, 843 n.9 (1984). "If uncertainty does not exist" after applying these tools, "there is no plausible reason for deference".

U.S.S.G. § 2L1.1(b)(4) simply states "minor" and gives no further guidance in the Guidelines themselves, except in the commentary. "Minor" was previously held to be someone under the age of 16. The Commission however changed this definition and did so in the commentary at 2L1.1. Cmt. N. 1, and not in the Guideline text itself.

Most Courts and commentators justify treating commentary as less authoritative than the Guidelines in part on the ground that "unlike the Guidelines themselves, ... commentary to the Guidelines never passes through the gauntlets of Congressional review or notice and comment". United States v Havis, 927 F. 3d 382, 386 (6th Cir. 2019). Administrative agencies usually issue their "legislative rules" through a notice-and-comment procedure but need not use that procedure for issuing interpretive rules. See US.C. § 553(b); Id., § 553(b)(A). Likewise, the Sentencing Commission must follow the notice-and-comment procedure before amending the Guidelines and must present the Amendments to Congress for review. See 28 U.S.C. § 994(p), (x). But there is no similar statutory requirement for commentary on the Guidelines: The Commission can modify the commentary without the procedural safeguards congress requires for Guideline changes. The conventional wisdom reasons that, an agency cannot modify a legislative rule without notice and comment by adopting an

unreasonable "interpretation" of an unambiguous existing rule. Kisor, 139 S. Ct. at 2415. The Commission cannot dodge the notice-and-comment and Congressional review safeguards by creating "unreasonable" commentary on its own unambiguous guidelines. See Havis, 927 F. 3d at 385, 87 (11th Cir.). Concerns about the way the Commission does an end-run around notice and comment have led critics to question whether any deference to agency interpretation is appropriate. See., e.g., Kisor, 139 S. Ct. at 2434 (Gorsuch). The Commission's own rules of procedure do not require that commentary revisions undergo the same process as Guideline recisions. See 28 U.S.C. § 994(x); U.S. SENTENCING COMM'N RULES OF PRACTICE & PROCEDURE 4.3 (2016). This means that commentary can expand the scope of criminal statutes by defining it according to its own consideration, and can fix a sentence (albeit perhaps (2) months or (100), to a Defendant (because the Guidelines always fix some type of sentence to a Defendant) and never give fair notice to ordinary people.

The District Court states that the definition of a minor is U.S.S.G. § 2L.1.1 is generally consistent with Federal law. However, in Esquivel-Quintana v Sessions, the Supreme Court Rejected the Government's definition". The usage of the word "minor" refers not to the age of legal competence (when a person is legally capable of agreeing to a contract for example), but to the age of consent". Furthermore, the Court noted under the Government's approach that there is no "generic" definition of "minor" at all. See Taylor, 495 U.S. at 591, 110 S. Ct. 2143, 109 L. Ed. 2d 607, in reference to having uniform definitions.

The Fifth Circuit has deployed this definition of a minor in Shroff v Sessions, 890 F. 3d 542 (5th Cir. 2018), as well as Gonzalez-Arparicio, 663 F. 3d 419, 432 (9th Cir. 2011); Rodriguez-Guzman, 506 F. 3d at 743, 46.

U.S.S.G. § 2L1.1(b)(4) simply states minor and gives no further instruction as to its definition when considering how to treat an agency's interpretation of a regulation, a court should consider whether the meaning is in doubt. If the meaning is in doubt, then the regulation is ambiguous and the court can consider the agency's interpretation of the regulation.

This requires the court to deploy all its tools of construction, to determine if uncertainty exists about the definition of the regulation in question. There is no question that the definition of "minor" is established in the context of federal law. Esquivel-Quintana, 581 U.S. __ (2017.

The court addressed similar questions that arose when considering the definition of minor in section 1101(a)(43)(A), that also did not define minor, and so the court deployed the use of normal tools of statutory interpretation. This court should deploy the same tools and come to the same conclusion.

When considering whether to decide that the generic federal definition of 16 comports to other statutes the court in. Esguivel-Quintana applied the definition to 18 U.S.C. § 2243. Which "provides further evidence that the generic federal definition of ... a minor incorporates an age of consent of 16".Id at 31. "Minor" as it is federally defined is not ambiguous and has an established age in this court. To refer to the commentary in § 2L1.1 Cmt. n. 1 is to expand the commentary definition and acts it criminalizes more broad then the law allows. Counsel's failure to argue this fact was ineffective and prejudiced Flores.

CONCLUSION

Flores counsel failed to argue this courts precedent. The Guidelines are not advisory and could only be so if there was a scenario where they were not applied to ever criminal defendants criminal history and offense conduct at sentencing. Further, the commentaries failure to be subjected to fair notice and comment means ordinary citizens are not notified of the conduct criminalized. Finally, referring to an unambiguous definition of minor in the commentary when this court has already defined minor, illegally broadens criminal conduct it applies to. This court should vacate and remand with instructions.

Done this 22nd day of December 2023.

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