

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAMON SEAN BELLIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court held in Kisor v. Wilkie, 139 S. Ct. 2400 (2019), that before a court may defer to an agency's interpretation of its regulation, the court must find that the regulation is genuinely ambiguous. In Stinson v. United States, 508 U.S. 36 (1993), the Court held that district courts must heed the Sentencing Commission's commentary to a sentencing guideline because the commentary provides "concrete guidance as to how even unambiguous guidelines are to be applied in practice." Did Kisor abrogate Stinson's holding, as four circuits have held, or does the holding survive because the Commission is not an executive agency and the guidelines it issues are advisory, as at least two circuits have held?

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Eastern District of Kentucky and the United States Court of Appeals for the Sixth Circuit:

- United States of America v. Damon Sean Bellis, Case No. 23-5407, 2024 U.S. App. LEXIS 6925 (6th Cir. March 21, 2024).
- United States of America v. Damon Sean Bellis, E.D. Kentucky Case No.2:22-cr-40, judgment of sentence entered April 24, 2023.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Damon Sean Bellis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The United States Court of Appeals for the Sixth Circuit affirmed Bellis's sentence in an opinion not recommended for publication filed on March 21, 2024. United States v. Damon Sean Bellis, Case No. 23-5407, 2024 U.S. App. LEXIS 6925 (6th Cir. March 21, 2024). (Pet. App. 1a–6a). The court's order denying rehearing is not published.

JURISDICTION

The Sixth Circuit's opinion was filed on March 21, 2024. Bellis's petition for rehearing was denied on April 16, 2024. (Pet. App. 7a). The Sixth Circuit's mandate issued on April 24, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the level of deference district courts owe to the commentary to a sentencing guideline issued by the United States Sentencing Commission. The statute governing the imposition of a sentence says that when considering if a guideline's sentence range fits the purposes of

sentencing or if the Commission did not adequately consider aggravating or mitigating circumstances in formulating the guidelines the court shall consider “the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.” 18 U.S.C. § 3553(b)(1).¹

The case also involves USSG § 1B1.7 and USSG § 1B1.1(a) and (b)—guidelines that define the role of commentary—and the meaning of the term “bodily injury” in USSG § 2A2.2(b)(3)(A). The commentary to USSG § 2A2.2 refers to another guideline’s commentary that defines bodily injury to mean “any significant injury: e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought. USSG § 2A2.2, comment. n. 1, referring to USSG § 1B1.1, comment. n. 1(B).

STATEMENT OF THE CASE

The government charged Bellis with assaulting two federal officers as they tried to arrest him and that he used a dangerous weapon and inflicted bodily injury. (Indictment, R. 1, Page ID # 1–2).

Bellis pled not guilty and the case was tried before a jury. Bellis was convicted. The evidence at trial showed that the officers went to a home in

¹The Court struck the requirement that courts must impose a sentence within the Guidelines range by severing this provision. United States v. Booker, 543 U.S. 220, 259 (2005). But sentencing courts must still start by properly calculating the Guidelines sentence range. Gall v. United States, 552 U.S. 38, 49–50 (2007).

Independence, Kentucky to arrest Bellis, based on an arrest warrant from Alabama. (Redacted Trial Transcript, Vol. 1, R. 64, Page ID # 590–91, 647).

The officers located Bellis outside near the home. One of the officers told him to stop, but he did not comply. The officers grabbed Bellis. A struggle ensued. The three men fell to the ground. Bellis had a spearfishing tip in his coat pocket and the officers said he refused to surrender it to them. (Id., Page ID # 605–07, 611–13, 624, 663–669, 671, 673). Deputy U.S. Marshal Pugh suffered a bloody lower lip during the encounter. (Id., Page ID # 673–674). The Presentence Investigation Report said that the two officers suffered minor scratches and bruises in addition to Pugh’s bloody lip. (Presentence Investigation Report (“PSR”), R. 51, ¶27, Page ID # 157).

At sentencing, the district court enhanced Bellis’s offense level score under USSG § 2A2.2(b)(3)(A) for a victim sustaining bodily injury, but did not apply the guideline’s three-level increase. Instead, after referring to the commentary to USSG § 1B1.1, the court added two levels because “what happened here was not serious enough to call for the three-level enhancement.” (Sentencing Tr., R. 61, Page ID # 543–44). That made Bellis’s Guidelines sentence range 51–63 months. (Id., Page ID # 545). The district court sentenced Bellis to serve 60 months in prison. (Id., Page ID # 545–46).

On appeal, citing the commentary to the guidelines, Bellis argued that

the bloody lip Pugh suffered did not amount to a significant injury. There was no testimony about the lasting effect of any of the injuries and neither officer required medical attention. Bellis said that his case resembled United States v. Mejia-Canales, 467 F.3d 1280, 1282 (10th Cir. 2006), where a federal inmate resisted a jailer's directions and struck the jailer twice with his fist, once in the mouth and once in the forehead, resulting in a small cut on the inside of the mouth and a red mark on the forehead. The court said the injuries did not meet the definition of bodily injury, since there was no evidence that the injuries were significant, painful, or lasting. United States v. Mejia-Canales, 467 F.3d at 1283–84.

Because Bellis did not object to the enhancement at sentencing, the Sixth Circuit applied the plain error standard of review. The Court held that the term “bodily injury” in the guideline was not ambiguous, and, relying on Kisor v. Wilkie, did not defer to the commentary defining bodily injury in the Guidelines. United States v. Bellis, 2024 U.S. App. LEXIS 6925 at *3–7. Bellis sought rehearing, but his petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

When deciding if it will grant a petition for certiorari, the Court considers if the petition presents an important issue “that has not been but should be settled by [the] Court”. Sup. Ct. R. 10(a).

Here, the Court should grant the petition in order to resolve conflicting decisions of the circuit courts on important issue.

The circuit courts are split over how this Court's decision in Kisor v. Wilkie applies to the commentary to the Sentencing Guidelines. Four circuits have held that Kisor abrogated Stinson, while at least two circuits have held that Kisor does not apply to the commentary to the Guidelines. United States v. Vargas, 74 F.4th 673, 698 (5th Cir. 2023) (en banc) (holding that Kisor did not overrule Stinson), United States v. Maloid, 71 F.4th 795, 804, n. 12 (10th Cir. 2023) (same and describing circuit split), United States v. Rivera, 76 F.4th 1085, 1089 (8th Cir. 2023) (describing circuit split).

In Kisor, the Court held that a reviewing court must first find that an executive agency's rule is genuinely ambiguous before considering the agency's interpretation of the rule. Kisor v. Wilkie, 139 S. Ct. at 2415. In contrast, in Stinson, the Court held that commentary to a sentencing guideline provides "concrete guidance as to how even unambiguous guidelines are to be applied in practice." Stinson v. United States, 506 U.S. at 44. Thus, the commentary binds a district court except when inconsistent with the Constitution, a federal statute, or the guideline. Id., at 45, 47.

The courts that say Kisor abrogated Stinson say that Kisor undercut cases supporting deference to administrative agency regulations, including

Stinson. Stinson said that commentary under the Sentencing Guidelines was more like an agency regulation than a statute, so that deference was due to the commentary, just like deference was due to agency regulations. So, when Kisor cut back on uncritical and broad deference to agency interpretation of rules, it also cut back on deference to commentary. United States v. Nasir, 17 F.4th 439 (3d Cir. 2021) (en banc).

The courts that say that Stinson survived Kisor rely on the differences between the Sentencing Commission and executive agencies. Because of these differences Kisor's holding does not apply to the Sentencing Commission's commentary. United States v. Maloid, 71 F.4th at 807.

One important difference between guidelines and agency rules is that any guideline the Commission issues must be reviewed and approved by Congress, unlike agency rules. Another difference is that guidelines (and their commentary) are advisory and not binding on the district courts. And, unlike executive agencies, the Commission has no reason to issue vague guidelines and commentary. Id., at 810–12.

In addition, the guidelines and the sentencing statute require courts to consider commentary. In USSG § 1B1.7, the Commission said that district courts should follow the commentary because “it may interpret the guideline or explain how it is to be applied.” In order to correctly apply the Guidelines a

sentencing court must consider any applicable commentary. USSG § 1B1.1(a) and (b). And Congress requires district courts to consider “the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission” in imposing a sentence. 18 U.S.C. § 3553(b)(1).

Here, the method the Court adopts determines the outcome. If “bodily injury” is unambiguous, then, following Kisor, the district court’s enhancement for bodily injury was correct. If, however, the commentary’s definition of bodily injury applies, then the bodily injury enhancement was wrong, because Deputy Pugh’s bloody lip, for which he did not seek medical attention, was not a bodily injury under the definition of bodily injury in the commentary to the guideline.

Because the term “bodily injury” is used throughout the Guidelines, the meaning of the term has significance for more than just Bellis’s case. District courts must determine if a bodily injury occurred in cases involving Stalking. USSG § 2A6.2, Extortionate Extension of Credit, USSG § 2E2.1, and Willful Violation of the Migrant and Seasonal Agricultural Worker Protection Act, USSG § 2H4.2, among other guidelines.

The Court should grant the petition in order to settle if Kisor v. Wilkie abrogated Stinson v. United States. The lower courts that say Kisor abrogated Stinson misread Kisor. In Kisor the Court identified Stinson as one

of many precedents applying Auer deference. But the Court declined to overrule Auer on stare decisis grounds. Kisor v. Wilkie, 139 S. Ct. at 2411 n.3 (opinion of Kagan, J.); Id. at 2422 (majority opinion). Moreover, Stinson said commentary was analogous to agency interpretation, not the same. Nor did Kisor concern the Guidelines. See United States v. Riccardi, 989 F.3d 476, 490–92 (6th Cir. 2021) (Nalbandian, J., concurring).

The Court should conclude that courts should follow the commentary to the guidelines, even if the guideline otherwise would not be ambiguous, unless the commentary’s interpretation violates the Constitution, a federal statute, is inconsistent with the guideline, or results in a plainly erroneous reading of the guideline.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Dated: April 2024

Respectfully submitted,

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