NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

GONZALO RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the administrative law principles articulated in Kisor v. Wilkie, 139 S. Ct. 2400 (2019), limit the deference owed to the United States Sentencing Commission's commentary on the Sentencing Guidelines?

LIST OF PARTIES

Petitioner: Gonzalo Rodriguez

Respondent: United States of America

STATEMENT OF RELATED CASES

United States v. Rodriguez, No. 20-cr-00101-CMA (D. Colo.)
Judgment entered December 15, 2022

United States v. Rodriguez, No. 22-1435 (10th Cir.)
Judgment entered February 15, 2024

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PRAYER

Petitioner, Gonzalo Rodriguez, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on February 15, 2024.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Tenth Circuit, see United States v. Rodriguez, No. 22-1435, 2024 WL 631601 (10th Cir. Feb. 15, 2024), is found in the Appendix at A1. The relevant portion of the sentencing transcript is found in the Appendix at A3.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). The Tenth Circuit issued its decision affirming the judgment of the district

court on February 15, 2024. A1. Ninety days from February 15, 2024 is May 15, 2025, so this petition is timely.

GUIDELINE PROVISIONS INVOLVED

This case involves a sentence imposed on the revocation of supervised release. The policy statement in Section 7B1.1(a) of the United States Sentencing Guidelines provides that a violation is in Grade A if, as relevant here, it is for conduct that constitutes an offense that is punishable by more than a year in prison and "is a crime of violence." U.S.S.G. § 7B1.1(a)(1).[1] The definition of "crime of violence" used for that section is the one that applies in the career-offender guideline. See U.S.S.G. § 7B1.1, comment. (n.2); see also id., § 4B1.2(a). At the time of Mr. Rodriguez's original and revocation sentencing, § 7B1.1(a)(1) provided as follows:

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[1] Unless otherwise noted, citations to the guidelines in this petition are to the 2016 manual used at Mr. Rodriguez's original sentencing. Those provisions are the same as in the 2020 manual that was in effect at the time of his revocation conduct at issue here. That is, there is no difference no matter which version of the guideline manual should be used. See Johnson v. United States, 529 U.S. 694, 700 (2000) ("postrevocation penalties relate to the original offense" and are "part of the penalty for the original offense"); accord United States v. Haymond, 139 S. Ct. 2369, 2386 (2019) (Breyer, J., concurring in result of plurality opinion) (controlling opinion; quoting Johnson to this effect).

(a) There are three grades of probation and supervised release violations:

(1) Grade A Violations -- conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years[.]

U.S.S.G. § 7B1.1(a)(1).

Application note 2 of § 7B1.1 provided as follows:

2. "**Crime of violence**" is defined in § 4B1.2 (Definition of Terms Used in Section 4B1.1). See § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2.

At that time, Section 4B1.2(a) of the guidelines provided as follows:

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that --

(1) has as en element the use, attempted use, or threatened use of physical force against the person of another; or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2(a).

Application note 1 to § 4B1.2 then provided, in relevant part, as follows:

> 1. **Definitions.** ---- For purposes of this guideline ---
>
> "**Crime of violence**" and "**controlled substance offense**" include the offense of aiding and abetting, conspiring, and attempting to commit such offenses.

U.S.S.G. § 4B1.2, comment. (n.1).

STATEMENT OF THE CASE

a. This petition raises an issue of the deference due to commentary to the United States Sentencing Guidelines after Kisor v. Wilkie, 139 S. Ct. 2400 (2019). The sentencing guidelines and policy statements themselves are promulgated by the United States Sentencing Commission "under an express congressional delegation of authority for rulemaking." Stinson v. United States, 508 U.S. 36, 44 (1993). The Commission's commentary to those provisions, on the other hand, "is not the product" of that rulemaking. Id.

Stinson addressed the deference to be afforded such commentary. This Court held that the commentary to a guideline should "be treated as an agency's interpretation of its own legislative rule." Id. This Court therefore applied the standards of Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), for such interpretations. Stinson, 508 U.S. at 45. Under the Seminole Rock standards, commentary is to "be given 'controlling weight unless it is plainly erroneous or inconsistent with'" the relevant guideline. Id. (quoting Seminole Rock, 325 U.S. at 414).

In Kisor, this Court revisited Seminole Rock deference, which had later came to be known as Auer deference, after Auer v. Robbins, 519 U.S. 452 (1997). Kisor "reinforc[ed] some of the limits inherent in the Auer doctrine." Kisor, 139 S. Ct. at 2415. "First and foremost," there can be no deference "unless the regulation is genuinely ambiguous." Id. If the regulation is indeed genuinely ambiguous, the agency's interpretation must then be a reasonable one that "comes within the zone of ambiguity" of the regulation. Id. at 2616. And the "character and context" of the interpretation must be such that it entitles the interpretation to controlling weight. Id.

The question presented here is whether the principles articulated in Kisor apply to guideline commentary, which this Court in Stinson held is to receive Seminole Rock (or Auer) deference. This question has sharply divided the courts of appeals, including those of the three circuits to have considered the question *en banc*.

b. In the district court, Mr. Rodriguez admitted to five violations of his conditions of supervised release. Vol. III at 16-18. Two of the five violations are Grade B violations and two are Grade C violations. Vol. I at

19-20.[2] In the case on which he was on supervised release, Mr. Rodriguez was determined to be in Criminal History Category IV. Vol. II at 11. If his most serious violation were a Grade B violation and, using the criminal-history category from the underlying case, U.S.S.G. § 7B1.4(a) n.* (2016), the policy statements of Chapter 7 of the federal sentencing guidelines would have recommended a sentence of 12-18 months, id., § 7B1.4(a) (table).

Mr. Rodriguez's fifth violation was for conspiracy to commit the Colorado offense of felony menacing. Vol. I at 18-19. The violation report treated that as a Grade A violation. Id. at 18. For a Grade A violation in Criminal History Category IV, the Chapter 7 policy statements recommend a sentence of 24-30 months. U.S.S.G. § 7B1.4(a) (table) (2016). Because the underlying case involved a Class C felony, Mr. Rodriguez's maximum term of imprisonment for violating his conditions of supervised release was capped at two years. 18 U.S.C. § 3583(e); see Vol. II at 24 & n.1. So, if the revocation report were right in classifying the conspiracy conviction as

[2] Citations to volumes are to the record filed in the Tenth Circuit.

a Grade A violation, his advisory range would be 24 months in prison. Vol. II at 24 n.1.

Mr. Rodriguez objected to this classification. Vol. I at 27-30. He noted that for the violation to be in Grade A, the conspiracy conviction that gave rise to it would have to be a crime of violence. U.S.S.G. § 7B1.1(a)(1) (2016). Section 7B1.1 directs the use of the definition of "crime of violence" for purposes of the career-offender guideline. Id., § 7B1.1, comment. (n.2); see id., § 4B1.2(a) (2016). Mr. Rodriguez argued that his Colorado conspiracy conviction was not a crime of violence under the text of § 4B1.2(a). Conspiracy is not one of the enumerated offenses in U.S.S.G. § 4B1.2(a)(2). Conspiracy also does not have as an element the use, attempted use or threatened use of physical force against the person of another, and so does not meet the definition of a crime of violence in § 4B1.2(a)(1). See Vol. I at 28.

Instead, his conspiracy conviction could only be considered a crime of violence through the use of application note 1 to § 4B1.2. The Tenth Circuit had held that Colorado felony menacing is categorically a crime of violence. See Vol. I at 28-29. And application note 1 to § 4B1.2 provided

that conspiracies to commit crimes of violence are themselves crimes of violence. U.S.S.G. § 4B1.2, comment. (n.1) (2016).

But, Mr. Rodriguez continued, application note 1 could not be used to classify his conspiracy to commit a crime of violence as itself a crime of violence because that would be inconsistent with Kisor v. Wilkie. He explained that ,in Kisor, this Court limited the circumstances under which courts can defer to an agency's interpretation of its own rules. Kisor, Mr. Rodriguez insisted, prevented deference to application note 1 as it expanded the clear definition of "crime of violence" in the guideline text. Vol. I at 29. Mr. Rodriguez also separately argued that even if application note 1 could be used after Kisor, his Colorado conspiracy conviction still was not a crime of violence, because Colorado conspiracy is broader than generic conspiracy, preventing it from being used to support a crime-of-violence determination under the categorical approach. Id. at 30-31.

In rejecting Mr. Rodriguez's objections to his conspiracy conviction being considered a crime of violence, the district court did not directly speak to his argument under Kisor. Vol. III at 6-8. The court expressly held only that, using the modern, generic definition of conspiracy, Mr.

Rodriguez's Colorado conviction for conspiring to commit felony menacing was appropriately treated as a crime of violence. Id. at 7-8.

The district court then used the advisory range of 24 months in prison for a Grade A violation in selecting a sentence, id. at 19, rather than the lower range of 12-18 months for which Mr. Rodriguez had advocated. The court imposed a term of a year and one day in prison, to be followed by two years of supervised release. Id. at 38.

c. Mr. Rodriguez appealed to the United States Court of Appeals for the Tenth Circuit, raising the question presented in this petition. That issue was foreclosed in the Tenth Circuit by its decision in United States v. Maloid, 71 F.4th 795 (10th Cir. 2023), cert. denied, 144 S. Ct. 1035 (2024). The Tenth Circuit rejected Mr. Rodriguez's Kisor-based argument on the authority of Maloid, and affirmed the judgment of the district court. A1-2.

Mr. Rodriguez has been released from the Bureau of Prisons. He is subject to the two-year term of supervised release that the district court imposed, which may be reduced if he prevails here. United States v. Salazar, 987 F.3d 1248, 1252 (10th Cir. 2021).

REASONS FOR GRANTING THE WRIT

This Court should resolve the deep and entrenched split among the courts of appeals on the effect of Kisor v. Wilkie on the deference to be given to commentary to the Sentencing Guidelines.

In Stinson v. United States, 508 U.S. 36 (1993), 44-47, this Court applied the then-existing rules for deference to an agency's interpretation of its own legislative rules to commentary to the Sentencing Guidelines. It thus accorded commentary the deference called for by Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), and what has also come to be known as Auer deference, for Auer v. Robbins, 519 U.S. 452 (1997). This Court held in Stinson that guideline commentary, as long as it "does not violate the Constitution or a federal statute, . . .must be given 'controlling weight unless it is plainly erroneous or inconsistent with'" the relevant guideline. Stinson, 508 U.S. at 45 (quoting Seminole Rock, 525 U.S. at 414).

This is the "classic formulation" of such deference, Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019), that, this Court explained in Kisor,"may suggest a caricature of the doctrine, in which deference is 'reflexive,'" id. (quotation omitted). Kisor makes plain that there are important limits to such deference.

Most importantly, there can be no deference at all unless the agency rule in "genuinely ambiguous." Id. In deciding whether such ambiguity exists, a court must "exhaust all the 'traditional tools' of construction" including analyzing "the text, structure, history, and purpose" of the rule. Id. If the rule is not genuinely ambiguous, it "just mean what it means -- and the court must give it effect." Id. at 2415. Not to do so would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." Id.

That will often lead to the conclusion that the rule must be applied as written. And Kisor also makes clear that even when the rule is determined to be genuinely ambiguous, allowing resort to the agency interpretation, that interpretation must still operate within that "zone of ambiguity," id. at 2416, and also be "reasonable," id. at 2415.

All of this leads to the natural question, at issue here, of whether the administrative law principles articulated in Kisor limit the deference to be accorded commentary to the Sentencing Guidelines. Given that this Court in Stinson held that the Sentencing Commission's commentary "should be treated as an agency's interpretation of its own legislative rule," Stinson,

508 U.S. at 44, one would think the answer would be obvious and easy. The principles Kisor articulated that apply generally in that context would apply to the Sentencing Commission's guidelines and commentary as well. That is the position the Solicitor General has taken in this Court. See Brief for the United States in Opposition in Moses v. United States, No. 22-163, 2022 WL 17155762, **13-15 (U.S. Nov. 21, 2022).

But instead of uniformly reaching this straightforward conclusion, the courts of appeals are deeply divided. The Third, Sixth, Ninth and Eleventh Circuits have held that Kisor does in fact apply to the guidelines and their commentary. United States v. Nasir, 17 F.4th 459, 470-72 (3d Cir. 2021) (en banc); United States v. Riccardi, 989 F.3d 476, 484-85 (6th Cir. 2021); United States v. Castillo, 69 F.4th 648, 655 (9th Cir. 2023); United States v. Dupree, 57 F.4th 1269, 1275-76 (11th Cir. 2023) (en banc). So too does the first panel of the Fourth Circuit to have addressed the issue. United States v. Campbell, 22 F.4th 438, 444-47 & n.3 (4th Cir. 2022). And the D.C. Circuit appears to do so as well. United States v. Jenkins, 50 F.4th 1185, 1197 (D.C. Cir. 2022). These circuits thus require genuine ambiguity of a guideline before there can possibly be deference to its commentary.

On the other hand, the Fifth and the Tenth Circuits have squarely held that Kisor does not apply to the guidelines and their commentary, so that the ambiguity of a guideline (or policy statement) is not a prerequisite to deference to its commentary. United States v. Vargas, 74 F.4th 673, 679, 683 (5th Cir. 2023) (en banc), cert. denied, 144 S. Ct. 828 (2024); United States v. Maloid, 71 F.4th 795 (10th Cir. 2023), cert. denied, 144 S. Ct. 1035 (2024). A panel of the Fourth Circuit -- ruling after and contrary to that court's earlier, published decision in Campbell -- likewise has held that "Stinson continues to apply unaltered by Kisor." United States v. Moses, 23 F.4th 347, 349 (4th Cir. 2022). And four other circuits -- the First, Second, Seventh and Eighth -- have simply continued to apply their pre-Kisor precedent, enshrining the same result. See United States v. Lewis, 963 F.3d 16, 22-25 (1st Cir. 2020), cert. denied, 141 S. Ct. 2826 (2021); United States v. Tabb, 949 F.3d 81, 87-88 (2d Cir. 2020), cert. denied, 141 S. Ct. 2793 (2021); United States v. Smith, 989 F.3d 575, 584-85 (7th Cir.), cert. denied, 142 S. Ct. 488 (2021); United States v. Rivera, 76 F.4th 1085, 1091 (8th Cir. 2023), cert. denied, 144 S. Ct. 841 (2024).

This split will not resolve on its own. The very fact that the three circuits to consider the issue *en banc* have also divided on the issue -- with the Third Circuit in Nasir and the Eleventh Circuit in Dupree holding that Kisor applies in this context, and the Fifth Circuit in Vargas holding that it does not -- powerfully attests to this.

The question presented has not only deeply divided the circuits, but it is also a momentous one. It is a methodological question that determines the use of commentary across the guidelines, which are, of course, the "starting point and initial benchmark for sentencing." Gall v. United States, 552 U.S. 38, 49 (2007). As four judges of the Fourth Circuit have declared, the issue raised here is thus one "of exceptional importance." United States v. Moses, No. 21-4067, slip op. at 13 (4th Cir.) (Mar. 23, 2022) (order) (Wynn, J., joined by Motz, King and Thacker, JJ, voting to grant rehearing en banc). It does not involve just "a single subsection of the Guideline commentary," they wrote, but rather deals with a "meta-rule that would govern our interpretation of the commentary writ large," and so "would impact hundreds, if not thousand, of cases in the Fourth Circuit" alone. Id.

As matters now stand, the deference given -- or not given -- to commentary will produce differing guideline ranges based on whether sentencing takes place in one of the six circuits that enforce Kisor's limitations in this context, or instead in one of the six circuits that do not. As Judge Elrod put it in Vargas, "[w]e should not countenance that kind of disparity in the federal system." Vargas, 74 F.3d at 712 (Elrod, J., dissenting in part and dissenting from the judgment).

By the same token, the question's methodological nature makes it appropriate for this Court to review. It is unlike the issue of the proper interpretation of a particular guideline, which this Court typically leaves to the Sentencing Commission to resolve. E.g., Guerrant v. United States, 142 S. Ct. 640, 640-41 (2022) (statement of Sotomayor, J., joined by Barrett, J., respecting the denial of certiorari). The Sentencing Commission "cannot, on its own, resolve the dispute about what deference courts should give to the commentary." Dupree, 57 F.4th at 1289 n.6 (Grant, J., concurring in the judgment).

Only this Court can clear up the division that now exists in the courts of appeals. Only this Court can provide the definitive resolution to an

important question that implicates the individual liberty of countless federal defendants.

This case is a good vehicle for it to do so. The district court based its finding of a Grade A violation, and the higher advisory range called by the relevant policy statement, on the determination that Mr. Rodriguez's Colorado conviction for conspiracy to commit felony menacing was a crime of violence. The relevant guideline text defines "crime of violence" to be either an enumerated offense or one having particular elements. U.S.S.G. § 4B1.2(a)(1), (2). The enumerated offenses do not include conspiracies. Id., § 4B1.2(a)(2). The elements clause -- which requires an offense have "as an element" the "use, attempted use, or threatened use of physical force against the person of another," id., § 4B1.2(a)(1) -- also does not reach Colorado conspiracy. United States v. Fell, 511 F.3d 1035, 1037 (10th Cir. 2007) (Colorado conspiracy does not satisfy materially identical definition of "violent felony" in elements clause of Armed Career Criminal Act).

It was only by virtue of the expansion of the unambiguous guideline text worked by the commentary that Mr. Rodriguez's conspiracy

conviction qualified as a crime of violence. The Tenth Circuit has held Colorado felony menacing to be a "crime of violence" under the elements clause of § 4B1.2(a)(1). United States v. Armijo, 651 F.3d 1226, 1231-32 (10th Cir. 2011). The commentary that applied at Mr. Rodriguez's revocation sentencing provided that a conspiracy to commit a crime of violence is itself a crime of violence. U.S.S.G. § 4B1.2, comment. (n.1). Under the commentary, then, Mr. Rodriguez's conviction for conspiracy to commit felony menacing became a crime of violence. It is the commentary that increased that conviction to a Grade A violation. And as his most serious violation would otherwise have been for a Grade B violation, it is the commentary that increased his range from 12-18 months to 24 months. See *supra* at 7-8.

To be sure, in a recent amendment, the Sentencing Commission has moved the language of that commentary to the text of the guideline. U.S.S.G. § 4B1.2(d) (2023). The guideline manual now in effect would allow for the higher guideline range used by the district court, as there would be no issue of deference to commentary. But such a higher range could not be used in a resentencing of Mr. Rodriguez. The current range of

24 months from the current manual would be higher than the range of 12-18 months that should have applied at the time of his revocation sentence. The Ex Post Facto Clause requires that the lower range from the manual that would have applied then be used. Peugh v. United States, 569 U.S. 530, 533 (2013); see also U.S.S.G. § 1B1.11(b)(1) (2023) (same).

This case is a good vehicle to resolve the important interpretive question of the deference courts should give to guideline commentary in light of Kisor, a question that transcends any particular guideline (or policy statement) and commentary, and that can have a large impact on countless sentences. This Court should grant review.

CONCLUSION

This Court should grant this petition for writ of certiorari.

Respectfully submitted,

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