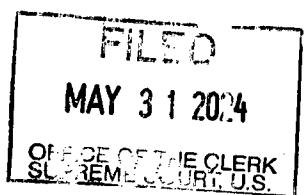


ORIGINAL

24-5235
No. _____



IN THE
SUPREME COURT OF THE
UNITED STATES

NOHMAAN MALIK,

Petitioner,

vs.

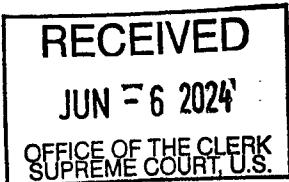
UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Mr. Nohmaan Malik
Pro se Petitioner
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QUESTION PRESENTED

Whether the appellate court should not have dismissed under Anders and allowed Petitioner to challenge the Guideline commentary as violating due process and was ambiguous under the lesser deferential standard in Kisor based on a split in the circuits

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE
SUPREME COURT OF THE
UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix A to this petition and is unpublished

There is no opinion of the United States District Court for the Northern District of Texas given petitioner is appealing on direct review from his conviction and sentence.

JURISDICTION

The date on which the United States Court of Appeals for the Fifth Circuit decided the appeal was March 4, 2024.

No petition for rehearing was timely sought in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

United States Constitution, Amendment V

United States Sentencing Guidelines §2B1.1(b)(1)

STATEMENT OF THE CASE

Petitioner was charged along with several other co-conspirators with Conspiracy to Commit Bank Fraud in violation of Title 18 U.S.C. §1349--Count 1; Passport Fraud in violation of Title 18 U.S.C. §1546--Count 2; and Aggravated Identity Theft in violation of Title 18 U.S.C. §1028A--Count 3. These charges were based on Malik waiving indictment and entering a plea of guilty to an information, in lieu of being indicted with his several co-conspirators in a multi-count indictment which charged several counts of Bank and Passport Fraud offenses, along with Aggravated Identity theft charges.

A Factual Resume was drawn up by the United States which failed to include any specific loss amounts which supported the charged offenses that Malik was entering a plead of guilty to, as he was informed by his counsel that his waiving indictment and entering a guilty plea would cap such loss amount to \$1.5 million. Following entry of the guilty plea, Malik proceeded to sentencing where the loss amount ballooned above the actual loss amounts quoted by his counsel, and included "intended" loss amounts based on guideline commentary.

As part of the plea agreement, Malik waived his right to appeal and stipulated to the forfeiture of cash and a host of jewelry and specific items. Despite the appeal waiver, Malik filed a pro se appeal and sought appointment of counsel which was granted by the district court. In seeking to appeal, Malik sought specific transcripts necessary in effectively raising specific issues on appeal. However, once counsel was appointed none of the

requested transcripts were obtained and appointed counsel filed an Anders brief on appeal.

Malik filed a timely response to counsel's Anders brief based on a circuit split concerning the application of the then Sentencing Guidelines use of commentary to apply "actual" and "intended" loss in determining the amount which should guide a criminal defendant's offense level in fraud cases.

The Fifth Circuit granted counsel request to withdraw and review of the appeal was dismissed premised on the panel's concurrence with counsel's assessment that there was no nonfrivolous issues to be reviewed by the court.

This Pro se Petitioner now seeks timely certiorari review in this Court.

REASON FOR GRANTING THE WRIT

Whether the appellate court should not have dismissed under Anders and allowed Petitioner to challenge the Guideline commentary as violating due process and was ambiguous under the lesser deferential standard in Kisor based on a split in the circuits

Under the Due Process clause of the United States Constitution, a criminal defendant has a right to be sentenced on accurate and reliable information, and the opportunity to be heard when the information available reasonable does not allow for challenging application of the United States Sentencing Guidelines ("U.S.S.G.") commentary. See Mathews v. Eldridge, 424 U.S. 318 (1976)(recognizing due process guarantees an opportunity to be heard in a reasonable time and manner).

Petitioner's appellate counsel effected his right to an opportunity to appeal when counsel filed a request to withdraw under Anders, which the appellate court granted even though he had a viable claim that the Guideline commentary ambiguous and violated his due process rights under Kisor v. Wilkies, 139 S.Ct. 2400 (2019), which implicitly overruled Stinson v. United States, 508 U.S. 36 (1993).

This Court held in Stinson that lower courts should follow authoritative commentary in the U.S.S.G., unless it is violative of constitutional principles, among other things. Stinson, supra at p. 38. However, despite the highly deferential standard applied in Stinson, this Court instituted a less deferential one to be applied to an agency interpretation--a rationale that should

equally be applied to the commentary's interpretation of the U.S.S.G. See United States v. Dupree, 57 F.4th 1269 (11th Cir. 2023)(en banc); United States v. Castillo, 69 F.4th 648 (9th Cir. 2023); United States v. Riccardi, 989 F.3d. 476 (6th Cir. 2021); United States v. Campbell, 22 F.4th 438 (4th Cir. 2022); United States v. Nasir, 17 F.4th 459 (3rd Cir. 2021)(en banc).

In this instance, it is petitioner's position that use of the authoritative commentary in U.S.S.G. §2B1.1(b)(1), that allows for a calculation of the "intended" loss, which in most cases increase the loss suffered in a fraud conviction violated his due process rights as applied to his case. This is because "Loss" is not defined in the guidelines; however, the commentary to §2B1.1, cmt. note 3(A) recognizes that "Actual loss" is defined as the "reasonably foreseeable pecuniary harm that resulted from the offense; id., cmt. 3(A)(i), and views "Intended loss" to mean "the pecuniary harm that the defendant purposefully sought to inflict," and includes intended pecuniary harm that would have been impossible or unlikely to occur, Id., cmt. 3(A)(ii). "Pecuniary harm" means "harm that is monetary or that otherwise is readily measurable in money." Id, cmt. 3(A)(iii).

Notwithstanding the proposed amendment to the which transports these "loss" definitions from the commentary to the guidelines language itself; U.S.S.G. Amendment, April 30, 2024, obvious due process concerns arise in petitioner's case. Especially since, in entering a plea of guilty, petitioner was informed that his approximate loss amount was \$1.2 million.

Thus, for petitioner's loss amount to balloon to over \$4 million, an amount approximately four times that of which he agreed to in pleading guilty raises serious due process concerns implicating both notice and an opportunity to be heard on the matter. This is because it is well established that a person has a due process right to notice and the opportunity to be heard consistent with the U.S. Constitution. Mathews, *supra*. Without these two fundamental elements being present in any proceeding, implicates not only a violation of due process, but also raises the question of the constitutionality of the application of the specific U.S.S.G. §2B1.1(b)(1) as an applied constitutional challenge in petitioner's case.

Moreover, although petitioner's case involved entry of a plea of guilty, and waiver of appeal--due to the unconstitutional implications raised herein, this Court's prior decision in Class v. United States allows for him to mount a challenge to the law which was applied in his case.

Importantly, the principle in Stinson, allows for rejection of any authoritative U.S.S.G commentary that is violative of the Constitution as asserted herein. Thus, following the circuits that recognizes that this Court's "less deferential" standard announced in Kisor equally applies the guidelines, see United States v. Vargas 74 F.4th 673, n. 2 (5th Cir. 2023), this Court should resolve this certiorari question. Especially since, there is a clear split in the appellate courts on whether the holding in Stinson was implicitly overruled is a viable question given this Court's Kisor decision. Id., at Lexis *2 (stating that "[s]ome of

our sister circuits contend the Supreme Court replaced Stinson's highly deferential standard with a less deferential one in Kisor v. Wilkies, 139 S.Ct. 2400, 204 L.ed.2d. 841 (2019)² others disagree and continue to apply Stinson."').

Although, the Vargas dissent reasoned that "the problem with [the government's] theory is that it is belied by the plain text of the Guidelines, which define[d] the term to include" specific instances that controlled the application of the guidelines, it found the language clear. Vargas, supra at Lexis *56-58. To the contrary, in petitioner's case, as the Vargas majority pointed out "[u]nder Kisor before a court may defer to an agency's interpretation of its own regulation, it must exhaust all the traditional tools of construction and found the regulation genuinely ambiguous." Id., at Lexis *8 (internal quotations omitted).

The importance of this statement cannot be overstated in reference to the instance case, because the devil is definitely in the details. And, the relevant U.S.S.G. §2B1.1(b)(1) simply mentions "Loss" then on the commentary it associates "Loss" with "actual or intended" pecuniary harm. However, this creates an "genuine ambiguity" because the term "Loss" is viewed as a "deprivation" which comes from the root word "deprive" defined as "remove, to take something away from; to withhold something from[;]" (Merriam-Webster Collegiate Dictionary, 11th Cir. 2014, p. 335), while the term "intended" (while is an adjective--in this case modifying "Loss"), is defined as "expected to be such in the future." (Id., at p. 650). Thus, if there is no "actual" Loss in