DOCKET NO. _____

OCTOBER TERM 2024

IN THE

SUPREME COURT OF THE UNITED STATES

JAMEL MULDREW
Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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*Appointed by the Eleventh Circuit pursuant to the Criminal Justice Act, 18 U.S.C. 3006A

QUESTIONS PRESENTED

1. Whether this court's holding in Kisor v. Wilkie, 588 U.S. 558 (2019), supports the court of appeals' determination that the Sentencing Guidelines are an agency rule, and if so, does this require a sentencing court to apply traditional rules of statutory interpretation including the context of the sentencing provision.

2. Whether Erlinger v. United States, 602 U.S. 821 (2024) and the Fifth and Sixth Amendments to the United States Constitution prohibit a sentencing court from enhancing a defendant's sentence premised on judicial factfinding that a defendant's conduct amounted to a pattern or practice under U.S.S.G. §4B1.5.

LIST OF PARTIES AND RELATED CASES

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

United States District Court (M.D. Fla.):

United States v. Muldrew, Crim. No. 8:21-cr-172-MSS-MRM

United States Court of Appeals (11th Cir.):

United States v. Muldrew, No. 22-13597 (June 18, 2024), rehearing denied, August 23, 2024. (unpublished)

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The order of the Court of Appeals denying Petitioner's direct appeal (App., *infra,* 3a – 14a) is unreported. The order of the three-judge panel denying rehearing (App., *infra,* 15a –16a) is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 18, 2024 and a timely motion for rehearing was denied August 23, 2024. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life [or] liberty . . ., without due process of law[.]"

United States Sentencing Guideline §4B1.5

§4B1.5(b) provides a five-level enhancement "[i]n any case in which the defendant's instant offense of conviction is a covered sex crime, neither §4B1.1

nor subsection (a) of this guideline applies, and the defendant engaged in a *pattern of activity* involving prohibited sexual conduct." (emphasis added). The Commentary to this guideline states in pertinent part:

> 4. Application of Subsection (b)
>
> (A) Definition.--For purposes of subsection (b), "prohibited sexual conduct" means any of the following: (i) any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) the production of child pornography; or (iii) trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography. It does not include receipt or possession of child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8)
>
> **(**B) Determination of Pattern of Activity.
>
> (i) In General.--For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor.
>
> **(**ii) Occasion of Prohibited Sexual Conduct**.**--An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of the instant offense; or (II) resulted in a conviction for the conduct that occurred on that occasion.

USSG § 4B1.5 cmt. n.4 (A)(B)(i) and (ii).

STATEMENT

Facts and Procedural History

(1) District Court Proceedings

On April 22, 2021, the Government arrested Mr. Muldrew based on a criminal complaint (Doc. 1), and on May 19, 2021, the Government returned a four-count Indictment against Mr. Muldrew charging him with: (1) violating 18 U.S.C. §§ 1591(a) and 2, by knowingly transporting a person under the age of 18

for purposes of engaging in a commercial sex act; (2) violating 18 U.S.C. § 2422(b) , by knowingly persuading or enticing a person under the age of 18 to engage in prostitution in violation of Fla. Stat. § 796.07; (3) violating 18 U.S.C. § 1952(a)(3)(A) and (b) by using a facility of interstate and foreign commerce (cellphone and internet) to promote and manage prostitution in violation of Fla. Stat. § 796.07; and (4) violating 18 U.S.C. § 2421 by knowingly transporting a person in interstate commerce to engage in prostitution in violation of Fla. Stat. § 796.07. (Doc. 14)

On March 28, 2022, Mr. Muldrew entered, and the district court accepted a plea of guilty to all four counts of the Indictment. (Doc. 100)

Prior to sentencing, Probation prepared a PreSentence Investigation Report (PSR). (Doc. 141 (Final PSR)) The PSR, and the Sentencing Memorandum (Doc. 133), filed by trial counsel, document the tragic childhood Muldrew experienced.

Muldrew's sentencing range by statutory provisions was a minimum of ten years to a maximum of life. (Doc. 141, p. 26) In calculating Mr. Muldrew's Offense Level and Guidelines' range, Probation applied a Chapter Four Repeat Offender enhancement, finding that Muldrew qualified as a repeat and dangerous sex offender against minors and determined a "five-level enhancement applie[d]." USSG §4B1.5(b)(1) (Doc. 141, p. 11). Muldrew's adjusted offense level was 36, but with the five-level enhancement, and a three-level deduction for acceptance of

responsibility, Muldrew had a total offense level of 38. (Doc. 141, p. 11). Based on his offense level and criminal history category of V, Muldrew's Guidelines' range was 360 months to life. (Doc. 141, p. 26). Probation additionally identified Muldrew's childhood and his history of mental health concerns and substance abuse as facts the district court could consider in imposing a sentence below the Guidelines' range (variance).

Muldrew timely filed objections to the PSR, including arguing that the Sixth Circuit's opinion in United States v. Riccardi, 989 F. 3d 476 (6th Cir. 2021), and the Court of Appeals' then-pending decision in United States v. Dupree, 2023 WL 227633 (11th Cir., Jan. 18. 2023)[1] would support his argument that §4B1.5(b)(1) should not apply. (Doc. 141, p. 5-6) Muldrew further argued that the abuse and neglect he suffered as child, and his exposure to his parents' criminality, warranted a downward variance pursuant to 18 U.S.C. 3553(a). (Doc.133)

The district court conducted a sentencing hearing on October 5, 2022, (DE 145), at which time Muldrew addressed the district court and expressed remorse about how his decisions and actions adversely affected the lives of others. (Doc. 159, p. 81-83) Muldrew also re-raised his objection to the five-level enhancement pursuant to USSG §4B1.5(b)(1). Muldrew argued, through counsel, that the district

[1] At the time of Muldrew's sentencing, the court of appeals had issued United States v. Dupree, 25 F. 4th 1341 (11th Cir. 2022) (granting rehearing *en banc*).

court should look to the plain language of the statute, that Muldrew did not engage in a pattern or practice as interpreted under the plain language of USSG §4B1.5(b)(1) and that, as noted above, the Dupree case would likely support his argument. (Doc. 159, p. 23-24) Relying on USSG §4B1.5(b)(1) [2] and the court of appeals' decision in United States v. Fox, 926 F.3d 1275 (11th Cir. 2019), the district court rejected Muldrew's argument and determined the five-level enhancement applied. (Doc. 159, p. 21) The district court, however, determined Muldrew's childhood of extreme neglect and abuse, the criminality of his parents, and his demonstrated remorse, as described above, warranted imposing a sentence less than 360 months in prison. (Doc. 159, p. 95; Doc. 149, p. 3)

The court sentenced Muldrew to 262 months in prison on Count One, concurrent with Counts Two, Three and Four, followed by120 months supervised release, concurrent with Counts Two, Three and Four; 262 months imprisonment on Count Two, concurrent with Counts One, Three and Four, followed by 120 months supervised release, concurrent with Counts One, Three and four; 60

[2] U.S.S.G. §4B1.5 reads in pertinent part: "In any case in which the defendant's instant offense of conviction is a covered sex crime, neither § 4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct:
(1) The offense level shall be 5 plus the offense level determined under Chapters Two and Three."

months imprisonment on Count Three, concurrent with Counts, One, Two and Four; and, 120 months imprisonment on Count Four, concurrent with Counts, One, Two and Three. (DE 145; Doc. 148) The court entered judgment on October 14, 2022. (Doc. 148) Muldrew timely filed a notice of appeal on October 24, 2022. (Doc. 153)

(2) Court of Appeals

Muldrew argued that the district court erred in applying the §4B1.5 five-level enhancement. Muldrew was not engaged in a "pattern of activity" as envisioned by the plain and unambiguous meaning of that language and by reading the statute in the context of a repeat offender. Muldrew argued that the court of appeals' decision in Fox is now called into doubt by United Staes v. Dupree, 57 F.4th 1269 (11 th Cir. 2023). In Dupree, the court of appeals found the guidelines to be agency regulations which require deference as reemphasized by this Court in Kisor, thus courts must make all efforts to give meaning to the plain language of a regulation before resorting to commentary. Dupree, 57 F. 4th at 1274. The court of appeals in Fox relied on the commentary to the guidelines in finding that the term "pattern of activity" applied to a single victim in the charged offense. Other sister circuits, have relied on this commentary language to apply the five-level enhancement to offenders, like Muldrew, who lack a prior history or pattern of convictions involving a person other than the victim in the instant offense, that would suffice to

justify the five-level enhancement. The Fox court stated, "[t]o interpret the guidelines, we begin with the language of the [g]uidelines, considering both the [g]uidelines and the commentary. . . The guidelines commentary is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, the guidelines." Fox, 926 F.3d at 1278 (quoting United States v. Fulford, 662 F.3d 1174, 1177 (11th Cir. 2011) (internal citations and quotations omitted)).

The court of appeals held that it did not need to resolve Muldrew's argument as to the application of Kisor to the Sentencing Guidelines' commentary. (App., *infra,* 7a) The Court of Appeals held that regardless, Muldrew could not prevail as the plain language of the Guidelines use of "pattern" was unambiguous. (App., *infra,* 8a)

On June 21, 2024, three days after the court of appeal issued its opinion denying Muldrew's appeal, this Court issued Erlinger v. United States, 602 U.S. 821 (2024), holding that judicial factfinding under the "occasions" clause of the sentencing guidelines pursuant to the Armed Career Criminal Act, §924(e)(1) (hereinafter ACCA) to enhance a defendant's minimum sentence violates a defendant's Fifth and Sixth Amendment rights. Muldrew argued that the district court's determination that Muldrew's conduct constituted a "pattern" or practice under U.S.S.G. §4B1.5 is indistinguishable from the judicial fact-finding under

U.S.S.G. §4B1.4 rejected in Erlinger. Muldrew argued he was entitled to have the court of appeals address his Erlinger claim. "[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

The court of appeals denied Muldrew's motion for panel rehearing without issuing a reasoned opinion. (App., *infra,* 14a-15a)

REASONS FOR GRANTING THE WRIT

A. This Court should resolve the circuit split and clarify whether Kisor applies to the United States' Sentencing Guidelines

The courts of appeal are divided on whether Kisor impliedly overruled Stinson v. United States, 508 U.S. 36 (1993). The Seventh Circuit explained the issue as follows:

> It's fair to say that Kisor's refinement of Seminole Rock reduced the level of deference owed to an agency's interpretation of its own regulations. But Kisor's effect on Stinson is unclear. Stinson borrowed from Seminole Rock because the Court viewed the Guidelines commentary as in some respects "akin to an agency's interpretation of its own legislative rules." 508 U.S. at 45, 113 S.Ct. 1913. But [this] Court also cautioned that "the analogy is not precise." *Id.* at 44, 113 S.Ct. 1913. The Sentencing Commission is not an executive agency; it is an independent commission within the judicial branch. *See* 28 U.S.C. § 991(a). And its statutory charge is unique in ways that affect the deference calculus. *See* Stinson, 508 U.S. at 44–45, 113 S.Ct. 1913.
>
> . . .

> Perhaps most importantly, [this] Court said nothing in Kisor to suggest that it was altering Stinson. Indeed, Stinson is cited only in a footnote along with 16 other cases as examples of "decisions applying Seminole Rock deference." *Kisor*, 139 S. Ct. at 2411 n.3. Because Kisor did not address Stinson in any meaningful way, we do not see a compelling reason to reconsider our circuit precedent treating Application Note 1 as authoritative gloss on the career-offender guideline.
>
> Indeed, the Supreme Court has instructed us to resist invitations to find its decisions overruled by implication. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 143 S. Ct. 2028, 2038, 216 L.Ed.2d 815 (2023). Kisor did not purport to modify Stinson (much less overrule it). That's reason enough for us to stay the course. When a Supreme Court decision is directly controlling, our job is to follow it, "leaving to th[e] Court the prerogative of overruling its own decisions." *Id.* (quotation marks omitted). That's true even if "intervening decisions have eroded [its] foundation."

Price v. City of Chicago, 915 F.3d 1107, 1111 (7th Cir. 2019).

Six circuits have held that Application Note 1 of the ACCA impermissibly expands §4B1.2's definition of "controlled substance offense," some of which rely on Kisor. *See* United States v. Castillo, 69 F.4th 648 (9th Cir. 2023); United States v. Dupree, 57 F.4th 1269 (11th Cir. 2023) (en banc); United States v. Campbell, 22 F.4th 438 (4th Cir. 2022); United States v. Nasir, 982 F.3d 144 (3d Cir. 2020) (en banc), *vacated on other grounds*, —— U.S. ——, 142 S. Ct. 56, 211 L.Ed.2d 1 (2021) (mem.); United States v. Havis, 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam); United States v. Winstead, 890 F.3d 1082 (D.C. Cir. 2018).

Six circuits have declined to reconsider circuit precedent deferring to Application Note 1. *See* United States v. Vargas, 74 F.4th 673, 689–90 (5th Cir.

2023) (en banc) (holding that *Stinson* governs and "requires us to defer" to Application Note 1); United States v. Maloid, 71 F.4th 795, 805 (10th Cir. 2023) (affirming precedent upholding the validity of Application Note 1's inclusion of conspiracy in the definition of "crime of violence"); Smith, 989 F.3d at 585 (noting the emerging circuit split but adhering to circuit precedent, seeing "no reason here to diverge from it"); United States v. Jefferson, 975 F.3d 700, 708 (8th Cir. 2020) (acknowledging Winstead and Havis but adhering to circuit precedent holding Application Note 1 valid); United States v. Lewis, 963 F.3d 16, 18, 25 (1st Cir. 2020) (adhering to circuit precedent finding Application Note 1 "authoritative" while acknowledging the "question is close"); United States v. Richardson, 958 F.3d 151, 154 (2d Cir. 2020) ("Application Note 1 is not 'inconsistent with, or a plainly erroneous reading of[,]' § 4B1.2." (quoting Stinson, 508 U.S. at 38, 113 S.Ct. 1913)).

The Seventh Circuit explained that

> It's fair to say that Kisor's refinement of Seminole Rock reduced the level of deference owed to an agency's interpretation of its own regulations. But Kisor's effect on Stinson is unclear. Stinson borrowed from Seminole Rock because the Court viewed the Guidelines commentary as in some respects "akin to an agency's interpretation of its own legislative rules." 508 U.S. at 45, 113 S.Ct. 1913. But the Court also cautioned that "the analogy is not precise." *Id.* at 44, 113 S.Ct. 1913. The Sentencing Commission is not an executive agency; it is an independent commission within the judicial branch. *See* 28 U.S.C. § 991(a). And its statutory charge is unique in ways that affect the deference calculus. *See* Stinson, 508 U.S. at 44–45, 113 S.Ct.

1913.

United States v. White, 97 F.4th 532, 538–39 (7th Cir. 2024), cert. denied sub nom. Keith v. United States, No. 24-5031, 2024 WL 4427289 (U.S. Oct. 7, 2024)

The Eleventh Circuit has held that guidelines commentary should be treated "'as an agency's interpretation of its own legislative rule.'" Dupree, 57 F. 4th at 1274-75 (quoting Stinson, 508 U.S. at 44). The Court then affirmed that, "Kisor's gloss" on Auer v. Robbins, 519 U.S. 452 (1997) and Bowles v. Seminole Rock, 325 U.S. 410 (1945) applies to Stinson. Dupree, 57 F.4th at 1275. Dupree instructs, then, that a court must look to the plain language of the guideline at issue, and apply traditional tools of statutory interpretation, to determine the application of a guideline. Id. Only if a guideline is ambiguous *after applying traditional tools of statutory interpretation*, should a court rely on the commentary.

§4B1.5 does not apply to Muldrew

If Kisor applies to the Sentencing Guidelines, then a court must "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." Richards v. United States, 369 U.S. 1, 9 (1962). This is consistent with a "'textualist' philosophy of statutory interpretation--embraced by Justice Antonin Scalia—[which] focuses on the 'plain meaning' of the language of a statute." Federal Sentencing Guidelines and the Rehnquist Court: Theories of

Statutory Interpretation, 37 Am. Crim. L. Rev. 103, 105 (2000). When neither the applicable statute nor the Sentencing Guidelines define the term "pattern of activity," and the term lacks an established common-law meaning, a court must give the term its "ordinary meaning." Chapman v. United States, 500 U.S. 453, 461–62 (1991).

The Merriam Webster Dictionary defines pattern as "frequent or widespread incidence." https://merriam-webster.com/dictionary/pattern (last visited November 20, 2024) There are a number of definitions of "pattern," creating ambiguity in the text. Muldrew argued based on his proffered definition of "pattern," that there is insufficient evidence of "frequent or widespread incidence" by Muldrew of unlawful sexual conduct involving a minor. Rather the offense involves a single victim, albeit with multiple acts involving the same victim, and Muldrew has no history of sex offenses involving minors. Starting first with the guideline language, as Kisor compels a court to do, it is clear that a "pattern" requires frequent and widespread incidence. The court of appeals applied its own definition of "pattern or practice," as one of "a consistent or characteristic arrangement." (App., *infra*, 8a.) Thus. the ordinary meaning of the word used is ambiguous, and the district court and the court of appeals should have applied all remaining avenues of statutory interpretation prior to applying the five-level enhancement to Muldrew.

Other Traditional Methods of Statutory Interpretation Compel the Same Result that the Enhancement Should Not Apply

To the extent that the court of appeals definition and Muldrew's definition created ambiguity in §4B1.5, two factors in statutory interpretation warrant reading the five-level enhancement does not apply to Muldrew. First, reading the Guidelines in context and a a whole for the purpose of statutory interpretation, the purpose of Chapter Four of the guidelines is to punish the repeat offender. "A defendant's record of *past criminal conduct* is directly relevant to those purposes. A defendant with a *record of prior criminal behavior is more culpable* than a first offender and thus deserving of greater punishment. General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence." U.S.S.G. Ch. FOUR, Pt. A. (emphasis added) Further, Chapter Four fails to provide a definition for "pattern of activity," but it is clear that this section is intended to punish repeat offenders. In finding that the §4B1.5 enhancement applies to offenders who commit multiple acts involving the same victim as part of the underlying offense, the stated purpose of Chapter Four is contorted.

Secondly, the rules of statutory construction favor a more lenient interpretation of a criminal statute "when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." United States v. Shabani, 513 U.S. 10, 17 (1994). "The rule of lenity is a rule of statutory construction which

mandates that criminal statutes, when vague or ambiguous, be 'strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed.' The purpose of this rule is to provide adequate notice to defendants, to satisfy due process requirements, and to reinforce the notion that it is the duty of the legislature--and not the judiciary--to define what conduct is to be considered criminal." Federal Sentencing Guidelines and the Rehnquist Court: Theories of Statutory Interpretation, 37 Am. Crim. L. Rev. 103, 107 (2000). In such a case, the statute should be interpreted in favor of the criminal defendant. Interpreting §4B1.5 in favor of Muldrew warrants a finding that the enhancement should not be applied.

Muldrew did not engage in a pattern of activity of using a minor in sex acts as based on the clear and common meaning of the term "pattern." The only minor involved was the victim in the instant offense, thus, Muldrew's conduct does not entail a pattern based on the plain meaning of the word. Accordingly, Jamel Muldrew is not subject to an enhanced sentence and his guidelines range should be calculated at an Offense Level of 33, with a criminal history category of V, resulting in a sentencing range of 210 to 262 months. This sentence range is sufficient to take into account the nature and circumstances of the offense and Muldrew's tragic history, and, it further reflects the seriousness of the offense, promotes respect for the law, provides for just punishment of the offender and

adequately deters future criminal conduct while protecting the public. 18 U.S.C. § 3553.

Alternatively, the guidelines as a whole, including Chapter Four which is titled "Repeat Offenders," demonstrate that §4B1.5 enhancement is intended to punish repeat offenders. Muldrew is not a repeat offender of engaging in commercial sex acts with a minor, or any sex acts with a minor. And, to the extent that this Court should still find ambiguity in §4B1.5, the Rule of Lenity should apply.

This Court should grant the writ and resolve the circuit split on the application of Kisor to the Sentencing Guidelines.

B. This Court's decision in Erlinger applies to U.S.S.G. §4B1.5

Recognizing that the Fifth and Sixth Amendments guarantee that a guilty verdict "will issue only from a unanimous jury," that the government cannot deprive a criminal defendant of his liberty without "due process of law," and that a "judge's power to punish," necessarily remains controlled by these principles, this Court reiterated the principle that judicial fact-finding that increases a defendant's minimum sentence is constrained by these principles. Erlinger, 602 U.S. 821, at 27-29 (citing Apprendi v. New Jersey, 530 U.S. 506 (2000) and Alleyne v. United States, 570 U.S. 99 (2013)). "Only a jury" may find "'facts that increase the

prescribed range of penalties to which a criminal defendant is exposed.'" Apprendi, 530 U.S. at 490. This principle applies when a judge seeks to increase a defendant's minimum punishment authorized by a guilty plea through a "'sentencing enhancement.'" Erlinger, at 830 (citing Alleyne, 570 U.S., at 103-04.). "Judges may not assume the jury's factfinding function for themselves, let alone purport to perform it using a mere preponderance-of-the evidence standard." *Id*. at 833. This Court held that "Erlinger was entitled to have a jury resolve ACCA's occasions inquiry unanimously and beyond a reasonable doubt." *Id*.

There is no meaningful difference between the ACCA's "occasions" inquiry in U.S.S.G. §4B1.4 (Application Note 1) and the repeat and dangerous sex offender "pattern" inquiry in U.S.S.G. §4B1.5 The ACCA's occasions inquiry clause reads in pertinent part:

> This guideline applies in the case of a defendant subject to an enhanced sentence under 18 U.S.C. § 924(e). Under 18 U.S.C. § 924(e)(1), a defendant is subject to an enhanced sentence if the instant offense of conviction is a violation of 18 U.S.C. § 922(g) and the defendant has at least three prior convictions for a "violent felony" or "serious drug offense," or both, *committed on occasions different from one another*.

U.S.S.G. §4B1.4 (Application Note 1) (emphasis added). U.S.S.G. §4B1.5 reads in pertinent part: "In any case in which the defendant's instant offense of conviction is a covered sex crime, neither § 4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a *pattern of activity* involving prohibited sexual conduct. (1) The offense level shall be 5 plus the offense level determined under

Chapters Two and Three." (emphasis added). Both clauses require judicial factfinding to increase a defendant's minimum sentence in violation of a defendant's Fifth and Sixth Amendment rights. The determination of whether conduct meets the definition of a pattern is necessarily fact intensive.

In Erlinger, the judicial factfinding that the offenses occurred on three separate occasions increased both the maximum and minimum Erlinger faced. Erlinger at 821. In Mr. Muldrew's case, the judicial determination that he engaged in a "pattern" of criminal activity increased his minimum guidelines sentencing range to 30 years, compared to the statutory minimum range of 10 years. While Muldrew did not object below on Fifth and Sixth Amendment grounds, he did sharply contest the court's determination that he engaged in a pattern or practice that would qualify him for the significant sentencing enhancement. "Presented with evidence" about Muldrew's conduct linked solely to the victim in this case, "a jury might have concluded" that Muldrew did not engage in a pattern or practice of sexual offending. Erlinger at 833.

Muldrew's case is strikingly similar to the facts in Enslinger, which prompted this Court's "new rule." *See* Erlinger at 831, n. 3 (Kavanaugh, J. dissenting) ("For any case that is already final, the *Teague* rule will presumably bar the defendant from raising today's *new rule* in collateral proceedings. Edwards. v. Vannoy, 593 U.S. 225 (2021); Teague v. Lane, 489 U.S. 288, 310 (1989)(plurality

opinion).") (emphasis added). This major change in the law is directly applicable to Muldrew's case. Because Muldrew's case remains in the appellate pipeline, the court of appeals should have granted supplemental briefing. Griffith, 479 U.S. at 322 (1987).

This Court should grant the writ and reverse and remand for the court of appeals to allow supplemental briefing in light of this Court's opinion in Erlinger.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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