No. _____

IN THE

Supreme Court of the United States

JAMEL MULDREW,

Petitioner,

v.

UNITED STATES,

Respondent.

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

APPENDIX

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[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13597

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMEL MULDREW,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:21-cr-00172-MSS-MRM-1

Before ROSENBAUM, NEWSOM, and ABUDU, Circuit Judges.

PER CURIAM:

Defendant-Appellant Jamel Muldrew claims that his repeated interstate sex trafficking of a minor does not qualify as a "pattern of activity" for purposes of the Sentencing Guidelines' repeat-offender enhancement. We disagree. So after careful consideration, we affirm Muldrew's sentence.

I. BACKGROUND

Muldrew arranged transportation for a 17-year-old girl ("Victim 1") from Texas to New Jersey so he could sex-traffic her. Between February and April 2021, Muldrew and Victim 1 traveled through Maryland, North Carolina, Georgia, and Florida. On at least 46 days, Muldrew instructed Victim 1 to advertise sex work online, rented motel rooms for her use, communicated with Victim 1 before and after her sex work, and took a portion of her earnings. Muldrew earned at least $27,740 from Victim 1's commercial sex acts. Through an undercover operation, the Hillsborough County Sheriff's Office in Tampa, Florida, rescued Victim 1 and arrested Muldrew.

A federal grand jury indicted Muldrew on four counts: (1) knowingly transporting a person under the age of 18 for purposes of engaging in a commercial sex act, in violation of 18 U.S.C. §§ 1591(a) and 2; (2) knowingly persuading or enticing a person under

the age of 18 to engage in prostitution,[1] in violation of 18 U.S.C. § 2422(b); (3) using a facility of interstate and foreign commerce to promote and manage prostitution, in violation of 18 U.S.C. § 1952(a)(3)(A) and (b); and (4) knowingly transporting a person in interstate commerce with the intent that she engage in prostitution, in violation of 18 U.S.C. § 2421. On March 28, 2022, Muldrew pled guilty to all four counts of the indictment without the benefit of a plea agreement.

Muldrew's Presentence Investigation Report ("PSI") set the total offense level at 38 and the Guidelines custodial range at 360 months to life. That recommendation included a five-level repeat-offender enhancement under U.S.S.G. § 4B1.5(b)(1). It also included a two-level inducement enhancement, a two-level computer-use enhancement, a two-level commercial-sex-act enhancement, and a three-level acceptance-of-responsibility reduction.

At sentencing, Muldrew objected to the § 4B1.5(b)(1) repeat-offender enhancement (among other enhancements) and argued that a downward variance was warranted based on the 18 U.S.C. § 3553(a) factors. Specifically, Muldrew pointed to his difficult childhood, which included physical and emotional abuse, extreme poverty, and constant exposure to sex work, as his mother was a sex worker and his father was a pimp. Muldrew also cited his history of mental-health challenges.

[1] The indictment defined "prostitution" by citation to Fla. Stat. § 796.07.

The district court rejected Muldrew's argument as to the § 4B1.5(b)(1) repeat-offender enhancement. It found that Muldrew's "multiple acts . . . with respect to one individual minor" qualified as a "pattern of activity" under *United States v. Fox*, 926 F.3d 1275 (11th Cir. 2019). And it stated that it did not "rely simply on the [Guidelines] commentary but on the fact that this is a pattern in the classic sense of the word, the continued use of a minor, a victim, in the course of this conduct over a period of time repeatedly in the same fashion."

Still, the district court determined that a downward variance was warranted. The district court sentenced Muldrew to 262 months of incarceration on each of Counts One and Two, to be served concurrently; 60 months of incarceration on Count Three, to be served concurrently with his sentences on the other counts; and 120 months of incarceration on Count Four, to be served concurrently with his sentences on the other counts. It also imposed 120 months of supervised release and a $27,740 restitution judgment. Muldrew timely appealed.

II. STANDARD OF REVIEW

We review a district court's interpretation and application of the Sentencing Guidelines to the facts *de novo*. *United States v. Moran*, 778 F.3d 942, 959 (11th Cir. 2015).

III. DISCUSSION

On appeal, Muldrew challenges only the district court's imposition of the five-level repeat-offender enhancement. *See*

U.S.S.G. § 4B1.5(b)(1). That enhancement applies "[i]n any case in which the defendant's instant offense of conviction is a covered sex crime . . . and the defendant engaged in a *pattern of activity* involving prohibited sexual conduct." *Id.* (emphasis added).

The guideline itself does not define "pattern of activity." But the accompanying commentary provides that "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*." U.S.S.G. § 4B1.5 cmt. n.4(B)(i) (emphasis added). We relied on the singular noun form of "a minor" to conclude that "repeated prohibited sexual conduct with a single victim may qualify as a 'pattern of activity' for purposes of § 4B1.5(b)(1)." *Fox*, 926 F.3d at 1279. *Fox* rested its holding on the commentary rather than the text of § 4B1.5(b)(1) itself. *See id.*; *see also United States v. Isaac*, 987 F.3d 980, 993–94 (11th Cir. 2021) (applying commentary to affirm § 4B1.5(b)(1) enhancement where the defendant stipulated to "two separate occasions of sexual abuse" involving the same minor).

But after *Fox*, we held, sitting en banc, that we defer to Guidelines commentary only when a Guideline is "genuinely ambiguous," after "exhaust[ing] all the 'traditional tools' of construction." *United States v. Dupree*, 57 F.4th 1269, 1274–75 (11th Cir. 2023) (en banc) (quoting *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019)). We do so because Guidelines commentary "is akin to an agency's interpretation of its own legislative rules," so we apply the standard that *Kisor* clarified. *Id.* (quoting *Stinson v. United States*, 508 U.S. 36, 45

(1993)). And under our prior-panel-precedent rule, *Fox* is no longer binding if *Kisor* and *Dupree* "overruled or undermined [it] to the point of abrogation." *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

Muldrew argues that *Kisor* and *Dupree* abrogated *Fox*, so *Fox* no longer controls application of the § 4B1.5(b)(1) enhancement. The Government disagrees, contending that *Dupree* did not "silently overrule" every decision in which we deferred to Guidelines commentary.

As it turns out, we don't need to resolve this question to decide this case. That's because Muldrew's conduct qualifies either way. That is, if *Fox* controls, its rule requires the conclusion that Muldrew's "repeated" sex-trafficking of Victim 1[2] qualifies as a "pattern of activity." *Fox*, 926 F.3d at 1279. And if *Fox* doesn't control, Muldrew's conduct qualifies as a "pattern of activity" under the guideline's plain meaning. So we assume without deciding that *Kisor* and *Dupree* undermined *Fox* to the point of abrogation. *See Archer*, 531 F.3d at 1352.[3]

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[2] Muldrew's argument rises and falls on the fact that he sex-trafficked one individual. We note references in the record to "Victim 2," "Victim 3," and "Victim 4," for whom Muldrew apparently also served as a "pimp." Yet the district court disclaimed reliance on Muldrew's other alleged victims, finding the Government had not proven their allegations were "relevant conduct" for sentencing purposes. So the district court imposed the § 4B1.5(b)(1) enhancement based on Victim 1 alone, and we must review that application here.

[3] We recently relied on *Fox* for the proposition that the § 4B1.5(b)(1) "enhancement applies if the defendant engaged in prohibited sexual conduct on at least

If *Fox* no longer binds us, we return to first principles. "When interpreting the [G]uidelines, we apply the traditional rules of statutory construction." *United States v. Stines*, 34 F.4th 1315, 1318 (11th Cir. 2022) (citation and internal quotation marks omitted). And "in every statutory-interpretation case, we start with the text—and, if we find it clear, we end there as well." *Heyman v. Cooper*, 31 F.4th 1315, 1318 (11th Cir. 2022) (citation and internal quotation marks omitted). Here, the text is clear.

We consult the plain meaning of "pattern" in 2001, the year § 4B1.5(b)(1) was adopted. *See* U.S.S.G. amend. 615 (Nov. 2001). And under any contemporaneous definition of "pattern," including those that the parties offer, Muldrew's conduct qualifies.

Muldrew and Victim 1 had a "consistent or characteristic arrangement." *See Pattern*, Webster's Encyclopedic Unabridged Dictionary of the English Language (2001). Muldrew would assist Victim 1 in advertising sex work online, rent motel rooms for her use, communicate with Victim 1 before and after each commercial sex transaction, and otherwise hold himself out as her "pimp." And Muldrew's "behavior" was "recognizably consistent." *See Pattern*, Black's Law Dictionary (7th ed. 1999). Even under Muldrew's

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two separate occasions, regardless of whether the crimes were committed against the same victim or different victims." *United States v. Boone*, 97 F.4th 1331, 1340–41 (11th Cir. 2024) (citing *Fox*, 926 F.3d at 1280–81; and then citing *Isaac*, 987 F.3d at 994). But that statement was dictum, as we found that the defendant had invited any error by conceding in the district court that the enhancement applied. *Id.* at 1339–40. And we did not consider whether *Kisor* and *Dupree* abrogated *Fox*.

preferred definition, his conduct was "frequent or widespread"—it occurred daily for nearly two months, across at least four states, and enough times to generate more than $27,000 for Muldrew. *See Pattern*, Merriam-Webster's Collegiate Dictionary (10th ed. 2000). Indeed, as the district court found, Muldrew's conduct was "a pattern in the classic sense of the word, the continued use of a minor, a victim . . . over a period of time repeatedly in the same fashion." The guideline's plain text does not require that Muldrew sex-traffic multiple victims for it to apply. So even if Muldrew is right that we don't get to the commentary, the district court did not err in imposing the enhancement.

In so holding, we join the Sixth Circuit, which has a similar rule to our *Dupree* rule. *See United States v. Riccardi*, 989 F.3d 476, 485 (6th Cir. 2021). The Sixth Circuit found that § 4B1.5(b)(1)'s application to repeated conduct involving one victim "follows from the plain terms of the Guideline itself." *United State v. Paauwe*, 968 F.3d 614, 615 (6th Cir. 2020).[4] Namely, it reasoned, "[t]he essence of a 'pattern of activity' is conduct that is both repeated and related." *Id.* at 617 (quoting U.S.S.G. § 4B1.5(b)(1)). To illustrate that proposition, it posited two hypothetical robbers. The first robber

[4] Other sister circuits have upheld application of the § 4B1.5(b)(1) enhancement to conduct involving one victim, but most of those decisions predate *Kisor* and rely on the commentary. *See, e.g.*, *United States v. Phillips*, 431 F.3d 86, 90 n.5 (2d Cir. 2005); *United States v. Von Loh*, 417 F.3d 710, 711, 714 (7th Cir. 2005); *United States v. Pappas*, 715 F.3d 225, 229 (8th Cir. 2013); *United States v. Cifuentes-Lopez*, 40 F.4th 1215, 1217 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 467 (2022).

"rob[s] multiple banks over a course of time," while the second commits "multiple robberies of the same bank over time." *Id.* "The latter" course of conduct, the Sixth Circuit reasoned, "is just as much a pattern as the former." *Id.*

We agree. And here, Muldrew's repeated sex-trafficking of Victim 1 is "just as much a pattern," *see id.*, as if he trafficked multiple victims. The § 4B1.5(b)(1) enhancement contemplates that conduct, and the district court properly imposed it here.

As a final matter, we briefly address Muldrew's two remaining arguments. Both lack merit.

First, Muldrew relies on the Guidelines' statement of purpose with respect to repeat offenders—namely, that "a defendant with a record of *prior criminal behavior* is more culpable than a first offender and thus deserving of greater punishment." U.S.S.G. ch. 4, pt. A, introductory cmt. (emphasis added). But § 4B1.5 is in Part B, not Part A (where the statement of purpose that Muldrew invokes appears). So the excerpt Muldrew cites is of limited relevance to the § 4B1.5(b)(1) enhancement. And the general proposition that a defendant with a criminal record may be more blameworthy than a first-time offender does not mandate the specific reading of § 4B1.5(b)(1) that Muldrew advances. That's especially true because Muldrew is not a first-time criminal offender—though this is his first conviction for a sex offense—and he engaged in a pattern of sex-offender conduct on a more-than-daily basis for nearly two months, in four different states. Nor does an introductory provision eclipse the guideline's plain text. *Cf. Paauwe*, 968 F.3d

at 618 (reasoning that § 4B1.5's title heading, "Repeat and Dangerous Sex Offender Against Minors," did not require multiple victims, because courts "defer to the Guideline's text, rather than its heading" if the two conflict).

Second, Muldrew invokes the rule of lenity. But the rule of lenity "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute," or here, an ambiguous Guideline. *Shular v. United States*, 589 U.S. 154, 165 (2020) (citation and internal quotation marks omitted); *see also Barber v. Thomas*, 560 U.S. 474, 488 (2010) ("[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." (citations and internal quotation marks omitted)). Here, there is "no ambiguity for the rule of lenity to resolve." *Shular*, 589 U.S. at 165. Muldrew's lenity-related argument, then, falls flat.

In sum, we conclude that under the guideline's plain meaning, Muldrew engaged in a "pattern of activity" with Victim 1 that made application of the five-level repeat-offender enhancement proper. We affirm Muldrew's sentence.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

June 18, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 22-13597-DD
Case Style: USA v. Jamel Muldrew
District Court Docket No: 8:21-cr-00172-MSS-MRM-1

Opinion Issued
Enclosed is a copy of the Court's decision issued today in this case. Judgment has been entered today pursuant to FRAP 36. The Court's mandate will issue at a later date pursuant to FRAP 41(b).

Petitions for Rehearing
The time for filing a petition for panel rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing is timely only if received in the clerk's office within the time specified in the rules. **A petition for rehearing must include a Certificate of Interested Persons and a copy of the opinion sought to be reheard.** See 11th Cir. R. 35-5(k) and 40-1.

Costs
No costs are taxed.

Bill of Costs
If costs are taxed, please use the most recent version of the Bill of Costs form available on the Court's website at www.ca11.uscourts.gov. For more information regarding costs, see FRAP 39 and 11th Cir. R. 39-1.

Attorney's Fees
The time to file and required documentation for an application for attorney's fees and any objection to the application are governed by 11th Cir. R. 39-2 and 39-3.

Appointed Counsel
Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation via the eVoucher system no later than 45 days after issuance of the mandate or the filing of a petition for writ of certiorari. Please contact the CJA Team at (404) 335-6167 or

cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

OPIN-1 Ntc of Issuance of Opinion

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13597

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMEL MULDREW,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:21-cr-00172-MSS-MRM-1

Before ROSENBAUM, NEWSOM, and ABUDU, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellant Jamel Muldrew is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
APPEAL NO. 22-13597

JAMEL MULDREW,
Appellant/Defendant,

v.

UNITED STATES OF AMERICA,
Appellee/Plaintiff.
_____/

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION
Case No.:21-cr-00172-MSS-MRM
Hon. Mary S. Scriven

PETITION FOR PANEL REHEARING AND SUPPLEMENTAL BRIEFING REGARDING *ERLINGER V. UNITED STATES*, 2024 WL 3074427 (JUNE 21, 2024)

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July 9, 2024

***Muldrew v. United States,* Case No. 22-13597**
CERTIFICATE OF INTERESTED PERSONS
C-1 of 1

Burden, Adrian (Assistant Federal Public Defender)

Campbell, Tyler Thomas (U.S. Probation Officer)

Casciola, Jessica (Assistant Federal Public Defender)

Gammons, Carlton Curtis (Assistant United States Attorney)

Gershow, Holly Lynn (Assistant United States Attorney)

Maddux, Michael P. (Former CJA Counsel)

McCoy, Honorable Mac R. (Federal Magistrate Judge)

Muldrew, Jamel (Defendant)

Nebesky, Suzanne C. (Assistant United States Attorney)

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Sansone, Honorable Amanda Arnold (Federal Magistrate Judge)

Scriven, Honorable Mary S. (Federal District Judge)

Sneed, Honorable Julie (United States Magistrate Judge)

Spergel, Ilyssa (Assistant United States Attorney)

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STATEMENT OF THE ISSUE FOR PANEL CONSIDERATION

1. Whether *Erlinger v. United States*, 2024 WL 3074427, 602 U.S. ___, (June 21, 2024) and the Fifth and Sixth Amendments to the United States Constitution prohibit a sentencing court from enhancing a defendant's sentence pursuant to U.S.S.G. §4B1.5 premised on judicial factfinding that a defendant's conduct amounted to a "pattern" or practice.

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

PRELIMINARY STATEMENT

Subsequent to this Court's opinion affirming the district court's decision, *United States v. Muldrew*, No. 22-13597, slip op. (11th Cir., June 18, 2024) (Attachment A), the Supreme Court of the United States issued *Erlinger v. United States*, 2024 WL 3074427 (June 21, 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. Because Muldrew's case is not yet final, he falls within the "pipeline" of *Erlinger.* Fed. R. App. Pro. 40(a)(4)(c) permits an appellate court, upon timely filing of a petition for rehearing, to "issue any other appropriate order," that justice may require. Muldrew hereby petitions this Court to grant supplemental briefing on the application of *Erlinger* to the district court's finding of a "pattern" or practice as a basis to enhance Muldrew's sentence under USSG §4B1.5(b)(1). Muldrew argues that *Erlinger* establishes that he was entitled to a jury determination of whether his conduct amounted to a "pattern" or practice.

STATEMENT OF THE FACTS

A. Proceedings Below

Jamel Muldrew is incarcerated at FCI Talladega.

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 8, 2022, the Government filed a Notice of Maximum Penalties, Elements of Offense, Personalization and Factual Basis. (Doc. 93) (Attachment B). This document set out the essential elements of the charged crimes, the applicable penalties and the factual basis. Muldrew was not required to admit that he engaged in a pattern or practice.

On March 28, 2022, Muldrew entered, and the district court accepted, a plea of guilty to all four counts of the Indictment. (Doc. 100) 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 became 360 months to life. (Doc. 141, p. 26).

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 this Court's 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 because he was not engaged in a pattern or practice. (Doc. 141, p. 5-6) Muldrew did not argue below that application of the USSG §4B1.5(b)(1) premised on judicial fact-finding of whether his behavior was a "pattern" violated his Fifth and Sixth Amendment rights to have a jury determine any fact which enhanced or increased his sentence.

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

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), but did not, as noted *supra*, argue that the judicial determination of whether his conduct amounted to a pattern or practice violated his Fifth and Sixth Amendment rights. Muldrew raises this argument for the first time in this petition for panel rehearing and request for supplemental briefing.

Muldrew did argue below that he did not engage in a pattern or practice as interpreted under the plain language of USSG §4B1.5(b)(1). (Doc. 159, p. 23-24) Relying on USSG §4B1.5(b)(1) [2] and this Court's decision in *United States v. Fox*, 926 F.3d 1275 (11th Cir. 2019), the district court rejected Muldrew's argument, made a factual finding that Muldrew's conduct amounted to a pattern or practice, 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

[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."

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 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).

B. Proceedings in this Court

On June 18, 2024, this Court entered its opinion affirming the district court's ruling. (Attachment A). Three days later, on June 21, 2024, the Supreme Court of the United States issued *Erlinger* ruling that a district court's factual determination that a defendant's prior convictions occurred on the same "occasion" pursuant to the sentencing enhancement clause of the Armed Career Criminal Act (ACCA) violated Erlinger's Fifth and Sixth Amendment rights to a jury determination of the

facts for which he could be punished. "Virtually any fact that increase[s] the prescribed range of penalties to which a criminal defendant is exposed must be resolved by a unanimous jury beyond a reasonable doubt (or freely admitted in a guilty plea)." *Erlinger,* 2024 WL 3074427, at *8 (internal quotations omitted). Because *Erlinger* announces a new rule[3] that marks a sea change in the application of sentencing enhancements, Mr. Muldrew, whose case is not yet final and appears before this Court on direct review, files the instant Petition, asking this Court to grant rehearing and allow supplemental briefing.

ARGUMENT AND CITATIONS OF AUTHORITY

Erlinger announced a new constitutional rule establishing that judicial fact finding of any fact used to increase a defendant's sentence, other than a prior conviction, violates a defendant's Fifth and Sixth Amendment rights. Because Muldrew is in the pipeline, this Court should grant supplemental briefing as to whether _Erlinger_ establishes that judicial fact-finding of whether a defendant's conduct amounts to a "pattern" as a basis to increase a defendant's minimum sentence violates a criminal defendant's Fifth and Sixth Amendment rights.

[3] "It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane*, 489 U.S. 288, 301 (1989); *see also Edwards v. Vannoy,* 593 U.S. 255 (2021).

This Court should grant supplemental briefing on the application of *Erlinger* to Mr. Muldrew's case. 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*. "[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).

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, the Court reiterated the principle that judicial fact-finding that increases a defendant's minimum sentence is constrained by these principles. *Erlinger,* 2024 WL 3074427, at *6-9 (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 *9 (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 *11. The Court decided 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 of an "occasion" or a "pattern" to increase a defendant's minimum sentence in violation of a defendant's Fifth and Sixth Amendment rights. The determination of whether criminal conduct meets the definition of an occasion or a pattern is inherently 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 *11. 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 *12.

Muldrew's case is strikingly similar to the facts in *Erlinger,* which prompted the Court's "new rule." *See Erlinger* *10, 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, this Court should grant supplemental briefing. *Griffith,* 479 U.S. at 322 (1987).

Conclusion

Mr. Muldrew respectfully requests that this Court grant this motion for rehearing and allow supplemental briefing on the application of *Erlinger* to his case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 40(b)(1) because, excluding the parts of the documents exempted by 11th Cir. 35-1, this document contains 2,155 words and has been prepared in a proportionally spaced typeface using Times New Roman 14 Point Font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of the Court on July 9, 2024, by using the CM/ECF Appellate Filing System which will send notice of electronic filing to, Assistant United States Attorney. I further certify that I mailed the foregoing document by first class mail to the following non-CM/ECF participant: Jamal Muldrew, Register No.: 41851-509, Talladega FCI, 565 East Renfroe Road, Talladega, AL 35160.

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