

No. _____

**In the
Supreme Court of the United States**

TONY BIDDLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petition for Writ of Certiorari

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Questions Presented

1. This case asked the Ninth Circuit “to decide, *for the first time*, whether the inclusion of robbery in the Commentary [to the career offender Guideline] is binding” after *Johnson v. United States*, 135 S. Ct. 2551 (2015). App. 8a (Reinhardt, J., dubitante in part and concurring in part, emphasis added).¹

Three Circuits have decided that it is not, in lengthy, published opinions. Yet two of three Ninth Circuit judges disposed of Mr. Biddles’s argument that the Commentary is ultra vires after *Johnson* in a single sentence of an unpublished Memorandum disposition. App. 3a-4a. This Court should grant a writ to resolve a Circuit split on this question of exceptional importance, one that stands to impact all persons sentenced as a career offender in reliance upon an offense’s inclusion *only* in the Commentary, by answering the following question:

¹ “App.” refers to the attached appendix. “ER” refers to the appellant’s excerpts of record electronically filed in the Ninth Circuit on March 29, 2016 (Docket No. 7).

“AOB” refers to the appellant’s opening brief electronically filed in the Ninth Circuit on March 29, 2016 (Docket No. 6). “GAB” refers to the government’s answering brief electronically filed in the Ninth Circuit on May 31, 2016 (Docket No. 15).

“PFR” refers to the appellant’s petition for panel rehearing and suggestion for rehearing en banc, electronically filed in the Ninth Circuit on September 20, 2017 (Docket No. 44).

Whether, consistent with longstanding principles of administrative law, the career offender Guideline's Commentary is ultra vires after *Johnson* because it cannot "interpret" the inscrutable residual clause, and is inconsistent with any remaining textual provision?

2. In denying Mr. Biddles relief, the Ninth Circuit also determined that the 2016 amendments to the Sentencing Guidelines which, *inter alia*, moved the Commentary offense of robbery into the Guideline's text and provided a definition of extortion ("Amendment 798") constituted a substantive amendment that does not have retroactive application. This decision places the Ninth Circuit on the wrong side of an ongoing Circuit split. This Court should grant review to resolve the following question:

Whether the Sentencing Commission's provision of a definition for the term "extortion" in the career offender Guideline constitutes a "clarifying" amendment that applies retroactively?

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

Tony Biddles petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The Ninth Circuit's memorandum decision in *United States v. Tony Biddles*, Case No. 15-50463, --- Fed. Appx. ---, 2017 WL 3912737 (9th Cir. 2017), was not published. App. 2a-9a. The district court addressed the relevant issue orally, in the course of Mr. Biddles's sentencing for a violation of the terms and conditions of his supervised release. App. 17a-19a.

Jurisdiction

The Ninth Circuit issued its Memorandum decision on September 7, 2017. App. 2a. The court denied Mr. Biddles's petition for panel rehearing and suggestion for rehearing en banc on October 18, 2017. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

U.S.S.G. § 4B1.1(a) (2014 ed.) provides:

Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.2(a) (2014 ed.) provides:

Definitions of Terms Used in Section 4B1.1

(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 an element the use, attempted use, or threatened use of physical force against the person of another [hereinafter “the force clause”], or
2. is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious

potential risk of physical injury to another [hereinafter “the residual clause”]

Application Notes:

1. For purposes of this guideline -

“Crime of violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling [hereinafter “the Commentary”]. . . .

U.S.S.G. § 7B1.1 (2014 ed.) provides:

Classification of Violations (Policy Statement)

- (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 ...

Application Notes:

...

2. “Crime of violence” is defined by § 4B1.2 (Definitions of Terms Used in Section 4B1.1.). See § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2.

U.S.S.G. § 4B1.2(a) (2016 ed.) (effective August 1, 2016)² provides:

Definitions of Terms Used in Section 4B1.1

(b) 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 an 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).

Application Notes:

1. Definitions. - For purposes of this guideline-

“Extortion” is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

California Penal Code § 211 provides:

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

² A full text of the pertinent Amendments to the Sentencing Guidelines effective August 1, 2016, is reproduced in the attached Appendix. App. 3a.

Statement of the Case

On June 1, 2010, the United States Probation Office filed a petition to revoke the 5-year term of supervised release Mr. Tony Biddles began serving approximately three years prior. ER 1. The petition, as amended on September 28, 2015, alleged, *inter alia*, that Mr. Biddles committed the crime of robbery, in violation of California Penal Code § 211 (“CPC 211”), on April 18, 2010. ER 2. The primary point of contention before the district court was whether Mr. Biddles’s CPC 211 conviction was a crime of violence for the purposes of U.S.S.G. § 7B1.1(a)(1). The district court concluded that it was. ER 59, 72.

Mr. Biddles timely appealed. ER 87. Before the Ninth Circuit he argued, *inter alia*, that the career offender Guideline’s Commentary only ever served to interpret the residual clause, and was inconsistent with any other portion of the Guideline’s text. Following *Johnson*, therefore, he asserted, the Commentary was ultra vires in that it did not interpret *any* valid textual provision. AOB at 12-20. Alternatively, he contended that the amended Guidelines should apply retroactively to his case because the Commission’s definition of extortion was clarifying □ the Commission made clear that the federal courts had selected a generic definition of extortion that strayed from the Commission’s goal of focusing the career-offender enhancement on the “most dangerous offenders,” because it was not premised on threats of physical injury, and amended the definition to serve that longstanding purpose. AOB at 31-

35; App. 111a. The government disagreed, contending that the Commentary functions as a freestanding fourth provision of the career offender Guideline, GAB at 18-24, and alternatively, that the Commission substantively changed the Guideline in defining extortion because it narrowed the class of extortioners the Guideline would punish. GAB at 37-39.

The Ninth Circuit stayed proceedings pending *Beckles v. United States*, 137 S. Ct. 886 (2017). Once the stay was lifted, Mr. Biddles addressed the impact of *Beckles* in a 28(j) letter. CA9 No. 15-50463, Dkt. No. 33. Therein, Mr. Biddles explained that *Beckles* had little impact upon his Commentary argument because the decision did not retreat from *Johnson's* assessment of the residual clause as utterly inscrutable, and because an uninterpretable textual provision (and commentary that purports to define it) is not entitled to deference under longstanding principles of administrative law.

In an unpublished Memorandum, the Ninth Circuit concluded that “there is no inconsistency between the Commentary and the Guideline itself,” and, alternatively, that “the amendment was substantive in character” because it “narrowed the definition of extortion[.]” App. 4a-5a. Judge Reinhardt, dubitante in part and concurring in part, wrote separately that he harbored “serious doubts as to the validity of the Commission’s inclusion of robbery in the definition of crime of violence by means of the Commentary when the only possible basis for its doing so appears to have been its reliance on a clause in the Guideline that it itself has now

removed, apparently because it cannot properly serve as the basis for such an interpretation.” App. 8a. He commented that a “strong argument can be made that under *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Commentary cannot be treated as an interpretation of the residual clause in the Guideline,” and, “[s]ince there is no other language in the text of the Guideline that the Commentary could be interpreting, this would mean that [CPC 211] is overbroad and not a crime of violence under the Guideline.” App. 8a-9a.

In a petition for panel rehearing and suggestion for rehearing en banc, Mr. Biddles urged the Ninth Circuit to join its sister Circuits in finding that the Commentary has no freestanding force, and does not provide an authoritative interpretation of any portion of the career offender Guideline’s text after *Johnson*. PFR at 3-10. As to his alternative argument, Mr. Biddles argued that the Ninth Circuit’s decision conflicted with a published opinion of the Sixth Circuit (the only other Circuit then to have weighed in on the issue), holding that the Commission made only clarifying changes to the career offender Guideline in moving certain generic offenses previously listed in the Guideline’s Commentary into the text. PFR at 10-14.

Mr. Biddles’s petition for rehearing was denied. App. 1a. The Ninth Circuit now stands on one side of an ongoing Circuit split as to both issues addressed herein. Absent this Court’s guidance, that split will only widen, creating unjust

consequences for those who serve prison time while their similarly situated peers in other Circuits go free.

Reasons for Granting the Writ

After *Johnson*, the Commentary to the Career Offender Guideline Is Ultra Vires, and Cannot Support a Crime of Violence Finding

The Ninth Circuit found that the Commentary's inclusion of "robbery" is consistent with the career offender Guideline's text. This conclusion is not only erroneous but creates a split with decisions of the Seventh, First, and Eighth Circuits.³

³ *United States v. Bell*, 840 F.3d 963, 967-69 (8th Cir. 2016), *abrogated on other grounds by Beckles v. United States*, 137 S. Ct. 886 (2017); *United States v. Rollins*, 836 F.3d 737, 739, 741-43 (7th Cir. 2016) (en banc), *abrogated on other grounds by Beckles v. United States*, 137 S. Ct. 886 (2017); *United States v. Soto-Rivera*, 811 F.3d 53, 59-62 (1st Cir. 2016), *abrogated on other grounds by Beckles v. United States*, 137 S. Ct. 886 (2017). As discussed further herein, although these cases involved the advisory Guidelines, the question of whether "the Commentary can[] be treated as an interpretation of the residual clause in the [career offender] Guideline . . . does not depend on the Due Process Clause and is therefore unaffected by *Beckles v. United States*, 137 S. Ct. 886 (2017)." App. 8a (Reinhardt, J., dubitante in part and concurring in part).

1. Only Commentary that Interprets or Explains a Textual Provision Is

Authoritative

The Sentencing Reform Act of 1984 created the Sentencing Commission and authorized it to create “guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case.” 28 U.S.C. § 994(a)(1). Those Guidelines are submitted to Congress in advance, *id.* § 994(p), making the Sentencing Commission “fully accountable to Congress[.]” *Mistretta v. United States*, 488 U.S. 361, 393 (1989). Commentary, by comparison, does not receive the same treatment as the Guidelines. The Sentencing Reform Act does not explicitly authorize the creation of commentary. 28 U.S.C. § 994(a) (authorizing “guidelines” and “policy statements”); *see also Stinson*, 508 U.S. at 41. Nor does the Sentencing Reform Act require that commentary be submitted to Congress for approval. *See* 28 U.S.C. § 994(p) (requiring only that amendments to guidelines be submitted to Congress); *Stinson v. United States*, 508 U.S. 36, 46 (1993) (commentary “is not reviewed by Congress”).⁴

⁴ The Sentencing Commission itself has relegated commentary to a secondary, interpretative role. *See* U.S.S.G. § 1B1.7 (explaining that the purpose of the commentary is to “interpret [a] guideline or explain how it is to be applied”); *United States v. Anderson*, 942 F.2d 606, 611 (9th Cir. 1991), *abrogated on other grounds by Stinson*, 508 U.S. 36 (noting the Sentencing Commission’s belief that

This Court has explained that only commentary “that interprets or explains a guideline” is authoritative. *Stinson*, 508 U.S. at 38. Commentary is subordinated to the text of the Guidelines precisely because, *Stinson* says, the text of the Guidelines receives Congressional approval where the Commentary does not. *Id.* at 41, 45-46. Congressional approval saves the Guidelines from a separation of powers problem. *Mistretta*, 488 U.S. at 393-94. Were the commentary to have freestanding definitional power, it would risk “expanding the powers of the Judiciary beyond constitutional bounds by uniting within the Branch the political or quasi-legislative power of the Commission with the judicial power of the courts,” — the precise separation of powers issue that *Mistretta* avoided. *Id.* at 393.

2. The Commentary Cannot “Interpret” the Inscrutable Residual Clause

While the advisory Guidelines’ residual clause is not void-for-vagueness because constitutional vagueness principles do not apply to purely advisory sentencing provisions, *Beckles*, 137 S. Ct. at 895, it is nonetheless unintelligible. *See id.* at 897 (Kennedy, J., concurring) (noting that while the advisory Guidelines may not be void-for-vagueness “within the well-established legal meaning of the term,” the “formulation of a sentencing provision” may nonetheless be so “vague in a general sense” as to create a “pattern of sentence . . . so arbitrary that it implicates constitutional concerns”). *Johnson* made plain that the Armed Career Criminal Act commentary “is an aid to correct interpretation of the guidelines, not a guideline itself or on a par with the guidelines themselves”).

(“ACCA”)’s identical residual clause suffers from “hopeless indeterminacy,” 135 S. Ct at 2558, calls for “guesswork and intuition,” *id.* at 2559, is “a ‘judicial morass that defies systemic solution,’ ‘a black hole of confusion and uncertainty’ that frustrates any effort to impart ‘some sense of order and direction,’” *id.* at 2562 (citations omitted), and yields “anything but evenhanded, predictable, or consistent” results. *Id.* at 2563.⁵

⁵ Not only are the residual clauses of the ACCA and the career offender Guideline textually identical, but the Circuits uniformly employ an identical mode of analysis (the “ordinary case” test) in analyzing both clauses. *See United States v. Park*, 649 F.3d 1175, 1177-78 (9th Cir. 2011); *United States v. Jones*, 689 F.3d 83, 87 (1st Cir. 2012); *United States v. Van Mead*, 773 F.3d 429, 432-33 (2d Cir. 2014); *United States v. Hopkins*, 577 F.3d 507, 510 (3d Cir. 2009); *United States v. Carthorne*, 726 F.3d 503, 513-14 (4th Cir. 2013); *United States v. Stoker*, 706 F.3d 643, 649 (5th Cir. 2013); *United States v. Gonzalez-Longoria*, 831 F.3d 670, 675 n. 4 (5th Cir. 2016) (en banc); *United States v. Rogers*, 549 F.3d 517, 521 (6th Cir. 2010), *vacated on other grounds sub nom. Rogers v. United States*, 131 S. Ct. 3018 (2011); *United States v. Scanlan*, 667 F.3d 896, 899 (7th Cir. 2012); *United States v. Ross*, 613 F.3d 805, 807 (8th Cir. 2010); *United States v. Williams*, 559 F.3d 1143, 1148 (10th Cir. 2009); *United States v. Alexander*, 609 F.3d 1250, 1253-1257 (11th Cir. 2010); *United States v. Thomas*, 361 F.3d 653, 660 (D.C. Cir. 2004), *vacated on other grounds sub nom. Thomas v. United States*, 543 U.S. 1111 (2005).

Consistent with well-established principles of administrative law, Commentary that purports to interpret a plainly uninterpretable textual clause is ultra vires, or, otherwise stated, it is not entitled to deference. In holding in *Stinson* that courts must defer to commentary that “interprets or explains a guideline,” 508 U.S. at 38, this Court applied the doctrine originating in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), which is usually called “Auer deference” today, see *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Seminole Rock/Auer* deference is not without limits.

An agency’s interpretation of its own regulation is not entitled to deference when the regulation is so vague it “really says nothing at all.” See Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 Geo. Wash. L. Rev. 1449, 1467-71 (2011) (explaining the structural underpinnings of these two limits on *Seminole Rock/Auer* deference). Otherwise stated, the Commission has no power “to promulgate mush” and then “interpret” that mush through commentary to which courts must defer. *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) (“A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking.”), *abrogated on other grounds by Perez v. Mortgage Bankers Assoc.*, 135 S. Ct. 1199 (2015); see also *Mission Group Kansas v. Riley*, 146 F.3d 775, 781-83 (10th Cir. 1998) (refusing to defer to agency interpretation of rule so open-ended it was

“entirely unrestrictive”). As *Johnson* makes plain, in promulgating the residual clause, the Commission did just that.

This limit on the Commission’s power applies with special force where a criminal provision is at issue. This Court made clear long ago that in the criminal context, “not even [an agency’s] interpretation of [its] own regulations can cure an omission or add certainty and definiteness to otherwise vague language.” *M. Kraus & Bros., Inc. v. United States*, 327 U.S. 614, 622 (1946). Rather, the “prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which [the agency] is authorized to promulgate under the act. Congress has warned the public to look to *that source alone* to discover what conduct” creates criminal liability. *Id.* (emphasis added); *id.* at 625 (“We must look solely to the language actually used” in the regulation itself). In other words, criminal liability must turn solely on the “inexorable command” of the language set forth in the Guidelines’ text. *See id.* at 623-24, 626 (reversing regulatory conviction where agency failed to “clearly and unmistakably prohibit [the conduct at issue] by virtue of the language he used in [the regulation]”).

These principles are particularly apt here, since the Guidelines are exempt from judicial review under the Administrative Procedures Act. *See* 28 U.S.C. § 994(x) (subjecting Guidelines only to the notice-and-comment procedures at 5 U.S.C. § 553). Unlike the Guidelines, other agency regulations are subject to judicial review by which the court “shall decide all relevant questions of law, interpret

constitutional and statutory provisions, and determine the meaning or applicability of the terms of [the regulation].” 5 U.S.C. § 706(2). And, the court “shall [] hold unlawful and set aside” any regulation found to be” *inter alia*, “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “contrary to constitutional right [or] power.” *Id.*

To require criminal liability based on a vague Guideline that is itself unchecked by judicial review and whose meaning is purportedly revealed only in the Commentary — also unchecked by notice-and-comment, congressional review, or judicial review — would surely violate the separation of powers. *See Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1213-21 (2015) (Thomas, J., concurring in the judgment) (deferring to any agency’s interpretation of its own regulation “effects a transfer of the judicial power to an executive agency” and “undermines the judicial ‘check’ on the political branches,” with resulting “accumulation of governmental power” “subject[ing] regulated parties to precisely the abuses that the Framers sought to prevent”).

At base, it is a dubious proposition that the Commission’s is able to “interpret” the residual clause where this Court has failed. When it comes to interpreting an agency’s regulation, the “relevant inquiry . . . is not what the best policy choice might be, but what the regulation means,” and courts “are at least as well suited as administrative agencies to engage in this task.” *See Perez*, 135 S. Ct. at 1222-23 (Thomas, J., concurring in the judgment); *cf. Marbury v. Madison*, 5 U.S. (1 Cranch)

137, 177 (1803) (“It is emphatically the province of the judicial department to say what the law is.”). And where, as here, the language of the agency’s rule is “entirely unrestricted,” the agency’s interpretation of its rule “is no interpretation at all.” *Mission Group Kansas*, 146 F.3d at 782-83.⁶

For all of these reasons, the Commentary cannot “interpret” the inscrutable Guidelines’ residual clause, absent grave separation of powers concerns, and this Court must correct the Ninth Circuit’s misguided conclusion to the contrary.

3. The Commentary Does Not Interpret Any Remaining Textual Provision

The Commentary’s validity hinges upon its interpretation of a textual provision. Quite plainly, it does not interpret the four enumerated offenses. Nor does it serve to interpret the force clause. In fact, the offenses listed in the Commentary are

⁶ The Commentary is not entitled to deference for yet another reason. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase. . . statutory language.” *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006) (“*Auer* and the standard of deference it accords to an agency are inapplicable here. . . . The language the Interpretive Rule addresses comes from Congress, not the Attorney General, and the near equivalence of the statute and regulation belies the Government’s argument for *Auer* deference.”). But the Guidelines’ residual clause is not the Commission’s own language — it parrots the language of the ACCA.

inconsistent with the force clause. For example, robbery under CPC 211 can be committed through the accidental use of force, which falls short of the force clause’s requirements. *See United States v. Dixon*, 805 F.3d 1193, 1197 (9th Cir. 2015) (describing, per this Court’s jurisprudence, that the force clause requires “intentional” and “*violent*” physical force and noting that, under California law, accidental uses of force suffice for CPC 211) (citation omitted, emphasis in original). *See also Quijada-Aguilar v. Lynch*, 799 F.3d 1303, 1306-07 (9th Cir. 2015) (California voluntary manslaughter does not have an element of the intentional use of force); *Delgado-Hernandez v. Holder*, 697 F.3d 1125, 1127 (9th Cir. 2012) (California kidnapping does not require an element of force); *United States v. Armijo*, 651 F.3d 1226, 1234-37 (10th Cir. 2011) (Colorado manslaughter does not satisfy the force clause because it requires mere reckless conduct).

Because the Commentary cannot “interpret” the residual clause, and does not interpret any other textual provision, it is *ultra vires*.

4. The Ninth Circuit’s Decision Widens an Ongoing Circuit Split

Consistent with the foregoing principles, prior to *Beckles*, three Courts of Appeal concluded that *Johnson* required the excision of the Commentary.⁷

⁷ Though these Courts also found that *Johnson* required excision of the residual clause — a conclusion that does not survive *Beckles* — *Beckles* undermines neither their analysis nor ultimate conclusion because, for all of the reasons stated above, the Commentary cannot “interpret” the residual clause. In other words, in

The First Circuit explained that a listed Commentary offense that neither interprets nor explains either the force clause or the enumerated offenses is not a “crime of violence.” *Soto-Rivera*, 811 F.3d at 60 (“There is simply no mechanism or textual hook in the Guideline that allows us to import offenses not specifically listed therein into § 4B1.2(a)’s definition of ‘crime of violence.’ With no such path available to us, doing so would be inconsistent with the text of the Guideline.”) (internal citation omitted).

Sitting en banc, the Seventh Circuit said that *Soto-Rivera* “ha[d] it exactly right.” *Rollins*, 836 F.3d at 743. The Court further explained:

Under § 4B1.2(a), “crime of violence” means subpart 1 (the elements clause) and subpart 2 (the four specific crimes followed by the residual clause). If the application note’s list is not interpreting one of those two subparts . . . then it is in effect *adding* to the definition. And that’s *necessarily* inconsistent with the text of the guideline itself.

Id. at 742 (emphasis in original) (“[A]pplication notes are *interpretations of*, not *additions to*, the guidelines themselves.”) (emphasis in original); *id.* at 739 (commentary has “no legal force independent of the guideline”).

The Eighth Circuit has similarly held that a state robbery conviction did not qualify as a crime of violence simply because it was listed in commentary, stating:

assessing the Commentary’s viability post-*Johnson*, it is immaterial whether the residual clause is void for vagueness or merely unintelligible.

Prior to *Johnson*, the residual clause may have served as an anchor for the commentary's inclusion of "robbery" as a crime of violence because it "otherwise involve[d] conduct that presents a serious potential risk of physical injury to another." . . . Post-*Johnson*, however, § 4B1.2's commentary, standing alone, cannot serve as an independent basis for a conviction to qualify as a crime of violence because "doing so would be inconsistent with the post-*Johnson* text of the Guideline itself."

Bell, 840 F.3d at 968 (quoting *Soto-Rivera*, 811 F.3d at 60).

The Fifth Circuit reached the opposite conclusion, though with minimal analysis. *United States v. Jeffries*, 822 F.3d 192, 193-94 (5th Cir. 2016) (per curium) (holding that defendant's prior conviction for aggravated assault was a crime of violence under the Commentary, even assuming that *Johnson* extended to the career offender Guideline's residual clause).⁸

⁸ Two other Circuits concluded, pre-*Johnson*, that the Commentary had freestanding legal force, irrespective of whether it interpreted a valid textual provision. *See United States v. Marrero*, 743 F.3d 389, 397-401 (3d Cir. 2014) (holding Pennsylvania third-degree murder was a "crime of violence" because "murder" was listed in the Commentary and the Pennsylvania offense corresponded to the third prong of the generic definition of murder); *United States v. Walker*, 595 F.3d 441, 445-46 (2d Cir. 2010) (holding that South Carolina's strong arm robbery offense was a "crime of violence" under the Commentary, and reasoning that the

The Ninth Circuit’s decision thus widens a Circuit split on the question of the Commentary’s validity after *Johnson*. This Court should grant review to resolve this question of exceptional importance, one that has wide-ranging implications for offenders sentenced under the advisory Guidelines and found to be career offenders solely under the Commentary. This Court should not permit their sentences to remain intact, when to do so violates the fundamental separation of power principles delineated in *Stinson* and *Mistretta*.

The 2016 Amendment to the Guidelines’ Definition of Extortion Is Clarifying and Applies Retroactively

In denying Mr. Biddles relief, the Ninth Circuit reached a second erroneous conclusion that also widens an ongoing Circuit split. The panel concluded that Amendment 798, which, *inter alia*, added a definition of extortion to the Commentary,⁹ was “substantive in character,” reasoning that the Commission did not “dub it retroactive, did not say it was a clarification, and did not resolve a circuit conflict, but simply chose to focus on a subset of extortioners by narrowing the long-standing definition of extortion for Guideline purposes.” App. 5a. The Sixth Circuit has reached the opposite conclusion.

Commentary interprets the general term “crime of violence,” rather than any specific textual provision of the Guidelines’ text).

⁹ See U.S.S.G. Supp. App. C, amend. 798, at 131 (Nov. 1, 2016); U.S.S.G. § 4B1.2, comment. (n.1) (2016). See also App. 47a et seq.

In *Yates*, the Sixth Circuit considered whether the defendant's prior Ohio robbery offense was a crime of violence under the career offender Guideline. 866 F.3d at 732. Mr. Yates's case, like Mr. Biddles's, was pending on appeal when the 2016 Amendments took effect. *Id.* The Sixth Circuit concluded that it should consider "robbery" to be part of the *text* of the Guideline (per the amendment), rather than the Commentary, because the amendment "applies retroactively." *Id.*

In reaching this conclusion, the court relied upon *United States v. Kennedy*, No. 15-1456, 683 Fed. Appx. 409, 418-19 (6th Cir. Mar. 22, 2017). *Kennedy*, in turn, reasoned that the 2016 amendment was clarifying for two key reasons. First, the Commission itself characterized the amendment as clarifying:

When the Sentencing Commission amended § 4B1.2, it noted that it "received extensive comment ... expressing a view that the definition of 'crime of violence' is complex and unclear." With respect to crimes previously enumerated in the commentary, the Sentencing Commission stated that "[f]or easier application, all enumerated offenses are now included in the guideline at § 4B1.2," and noted that "prior to the amendment, the list was set forth in both § 4B1.2(a)(2) and the commentary at Application Note 1."

Id. at 418 (citations omitted, emphasis in original); *see also id.* (noting that the Commission characterized moving certain offenses from the Commentary to the text as "*maintain[ing] the status quo*") (quotation marks and citation omitted, emphasis

in original). “This demonstrates,” the Sixth Circuit stated, “that the Sentencing Commission was merely seeking to simplify and clarify the language of § 4B1.2 with respect to enumerated offenses.” *Id.* at 418-19. Second, the amendment “merely ... consolidate[d]” the text and Commentary of the career offender Guideline, but did not “make substantive revisions to either.” *Id.* at 419. The court therefore concluded that the “amendment is clarifying, and may be applied retroactively to discern the Sentencing Commission’s intent regarding the application of a pre-amendment guideline.” *Id.* (quotation marks and citation omitted).

The same logic applies to the portion of Amendment 798 at issue in Mr. Biddles’s case. The Commission’s statements make quite plain that the amendment was intended to “simplify” the crime of violence definition and “clarify” its application in the career offender context – not to alter its substance. As for the definition of extortion, the Commission originally provided no definition whatsoever, and the courts filled this vacuum by importing a definition from the *civil* context. This strayed from the Commission’s intent that the career offender Guideline punish only the most dangerous offenders:

Under case law existing at the time of this amendment, courts generally defined extortion as “obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats” based on the Supreme Court’s holding in *United States v. Nardello*, 393 U.S. 286, 290 (1969) (defining “extortion” for purposes of

the Hobbs Act). Consistent with the Commission's goal of focusing the career offender and related enhancements on the most dangerous offenders, the amendment narrows the generic definition of extortion by limiting the offense to those having an element of force or an element of fear or threats 'of physical injury,' as opposed to non-violent threats such as injury to reputation.

U.S.S.G. App. C, Amend. 798; App. 53a. Since applying the career offender Guideline to the most dangerous offenders was *always* the Commission's intent, the amendment to the definition of extortion "clarifies, rather than alters, existing law." *United States v. Catalan*, 701 F.3d 331, 333 (9th Cir. 2012). Such clarifications apply retroactively.¹⁰

¹⁰ The Ninth Circuit, unlike its sister Circuits, does not consider whether an amendment merely alters the Commentary, rather than the Guideline's text, in its retroactivity analysis. *Compare United States v. Morgan*, 376 F.3d 1002, 1011 (9th Cir. 2004) (listing Ninth Circuit's 3-factor retroactivity test as: "(1) whether the amendment is included on the list of retroactive amendments found in U.S.S.G. § 1B1.10(c); (2) whether the Commission itself characterized the amendment as a clarification; and (3) whether the amendment resolves a circuit conflict.") *with United States v. Jerchow*, 631 F.3d 1181, 1185 (11th Cir. 2011) ("An amendment that alters the text of the Guideline itself suggests a substantive change, while an amendment that alters only the commentary suggests a clarification.") (citations

The Eleventh Circuit, in a series of unpublished decisions, has reached the opposite conclusion, though relying largely upon Amendment 798's deletion of the residual clause, which is unquestionably a substantive change. *United States v. Craig*, --- Fed. Appx. ----, 2017 WL 3700898, *5 (11th Cir. Aug. 28, 2017) (“Amendment 798 significantly changed the guideline’s language, which strongly suggests that a substantive change was being made. Further, the Sentencing Commission’s statements in its commentary to Amendment 798 reflect that it sought to substantively change the guideline. Finally, the amendment is not listed as retroactive in U.S.S.G. § 1B1.10(d).”) (citation and quotation marks omitted); *United States v. McCalop*, 699 Fed.Appx. 851, 854 (11th Cir. 2017) (“Amendment 798 was substantive, rather than clarifying, so we do not consider it on appeal. In

omitted); *United States v. Huff*, 370 F.3d 454, 466 (5th Cir. 2004) (“That an amendment alters the language of commentary to a guideline rather than the language of the guideline itself may be some indication that it is not substantive.”); *United States v. Hartz*, 296 F.3d 595, 599 (7th Cir. 2002) (considering “whether the amendment changes the language of the guideline itself or changes only the commentary for the guideline” in determining whether an amendment is substantive or clarifying); *see also United States v. Armstrong*, 347 F.3d 905, 908 n.6 (11th Cir. 2003) (“Amendments to the commentary are clarifying amendments.”). In granting a writ, this Court can resolve this additional issue upon which the Circuits differ.

promulgating the Amendment, the Sentencing Commission deleted an entire provision of the text of the guideline, stated that it was doing so as a matter of policy, removed burglary from the list of enumerated offenses, and declined to include the amendment in the list of retroactive amendments. These are hallmarks of a substantive amendment, not a clarifying one.”) (citation omitted); *United States v. Johnson*, 665 Fed. Appx. 788, 793 (11th Cir. 2016) (“Amendment 798 to the career offender enhancement is a substantive change to the Guideline. Among other things, Amendment 798 deleted the residual clause and eliminated a class of offenses that previously predicated the enhancement. And the commentary to the amendment does not say that it is intended to be a clarifying amendment.”) (citation omitted).

As the foregoing makes plain, the Ninth Circuit’s decision is both incorrect, and places it on the wrong side of an ongoing Circuit split. This Court should grant a writ to decide this issue of exceptional importance, one that affects all those whose cases were pending on appeal when Amendment 798 took effect, and one that could save years of unjustified prison time for those similarly situated to Mr. Biddles.

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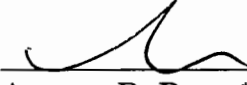
Conclusion

For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition for writ of certiorari.

DATE: January 8, 2018

Respectfully submitted,

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