UNITED STATES v. CASEY DAVID CROWTHER
No. 21-12255

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

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McCoy, Hon. Mac – United States Magistrate Judge

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April 8, 2022

Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., N.W.
Atlanta, Georgia 30303

Re: United States v. Casey David Crowther
Appeal Number 21-12255
Supplemental Letter Brief

Dear Sir:

This Court granted rehearing *en banc* in *United States v. Brandon Romel Dupree*, Case Number 19-13776, Friday, February 18, 2022. The questions presented in the petition for rehearing *en banc* which was granted were:

> 1. Whether Application Note 1 to § 4B1.2—which renders certain conspiracy offenses "controlled substance offense[s]"—is unenforceable because it adds to, and does not interpret, § 4B1.2's text; and
>
> 2. Whether a § 846 conspiracy covers more conduct than a generic conspiracy and is thus not a "controlled substance offense."

In the argument in support of granting *en banc* rehearing Dupree argued:

> A § 846 conspiracy does not qualify as a "controlled substance offense" because Application Note 1 to § 4B1.2, the commentary that purportedly renders a drug conspiracy a "controlled substance offense," is unenforceable. The only way a drug conspiracy may qualify as a "controlled substance offense" is through Application Note 1. But a court cannot defer to the guidelines' commentary unless a guideline

itself is genuinely ambiguous after exhausting all traditional tools of statutory construction. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). And even then, the guidelines' commentary can serve only as interpretations of the guidelines' text, not additions to the text. *See United States v. Stinson*, 508 U.S. 36, 45 (1993).[1]

Under the plain text of § 4B1.2, conspiracy to commit a drug offense is not a "controlled substance offense." USSG § 4B1.2(b). Indeed, the text does not mention any inchoate offenses, so the provision is unambiguous and there is no occasion to resort to the commentary. *See Kisor*, 139 S. Ct. at 2415. Thus, under § 4B1.2's plain text, a conspiracy offense does not qualify as a "controlled substances offense." Moreover, when the Commission included conspiracy offenses in Application Note 1, the Commission was not interpreting § 4B1.2's text; it was adding to the text. Application Note 1 is, therefore, also unenforceable for that reason. *See Stinson*, 508 U.S. at 45. Accordingly, the district court erred when it sentenced Mr. Dupree as a career offender.

In holding to the contrary, the panel relied on Smith, in which this Court concluded—without any reasoning—that Application Note 1 "does not run afoul of the Constitution . . . nor is it inconsistent with, or a plainly erroneous reading of, sections 4B1.1 or 4B1.2." 54 F.3d at 693.

But recent out-of-circuit cases show that this Court decided Smith incorrectly and that the Eleventh Circuit's current rule thus creates a circuit split on this issue. Specifically, the en banc Third Circuit, the en banc Sixth Circuit, and the D.C. Circuit have held that Application Note 1 is unenforceable because it adds to § 4B1.2's text. *United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020) (*en banc*); *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019) (*en banc*); *United States v. Winstead*, 890 F.3d 1082, 1092 (D.C. Cir. 2018).[2] The Third Circuit's *en banc*

[1] Crowther's appellate counsel was counsel in *Stinson* both at this Court and at the Supreme Court.

[2] And judges in other circuits have agreed. *See United States v. Crum*, 934 F.3d 963, 966 (9th Cir. 2019) ("If we were free to do so, we would follow the Sixth and

decision in *Nasir* is particularly instructive.

> In *Nasir*, the Third Circuit explained that Application Note 1 expanded the definition of "controlled substance offense," and that in light of the Supreme Court's recent decision in *Kisor*, the court had to reconsider whether to give Application Note 1 binding effect after considering all the traditional tools of statutory construction. 982 F.3d at 157–59; *see id*. at 159 ("In short, the degree of deference to be given an agency's interpretation of its own regulations is now context dependent."); see *also id*. at 178–79 (Bibas, J., concurring in part) (explaining that in light of *Kisor*, courts cannot simply defer to the Commission's reading of its own guideline and must first exhaust traditional tools of statutory construction).

The grant of rehearing *en banc* suggests that this Court may likely follow the lead of the cases noted above and revisit its body of law interpreting this and similar guideline commentary in light of *Kisor*.

Were that to occur, then the sentencing in Crowther's case would be subject to reversal, because Crowther was sentenced based on a guideline loss amount which was unreasonably determined under guideline commentary based on so called "intended loss" not actual loss. A salient feature in Crowther's so-called loan fraud was that the loan remained in good standing after indictment and through the trial of his case. The bank suffered no loss whatsoever, yet based on guideline commentary, Crowther's loss amount was determined based on a fictitious and unreasonable concept of "intended loss," grafted onto an unambiguous guideline which only spoke of loss.

That rehearing *en banc* in *Dupree* may also affect the Crowther guideline issue is clear from the Sixth Circuit decision in *United States v. Ricardi*, 989 F.3d 476 (6th Cir. 2021):

D.C. Circuits' lead."); *United States v. Lewis*, 963 F.3d 16, 27 (1st Cir. 2020) (Torruella and Thompson, JJ., concurring) (stating the court should go *en banc* and follow the lead of the Sixth and D.C. Circuits); *United States v. Sorenson*, 818 F. App'x 668, 670 (9th Cir. 2020) (Paez, J., concurring).

Although § 2B1.1 directs district courts to increase the offense level based on the amount of the "loss," the guideline itself leaves this critical word undefined. U.S.S.G. § 2B1.1(b)(1). The Sentencing Commission instead added guidance over how to determine the "loss" in commentary accompanying § 2B1.1. Application Note 3 provides a detailed code for "the determination of loss under subsection (b)(1)." Id. § 2B1.1 cmt. n.3. This application note sets a general rule that "loss" means "the greater of actual loss or intended loss." Id. § 2B1.1 cmt. n.3(A). It defines "actual loss" to mean "the reasonably foreseeable pecuniary harm that resulted from the offense" and "intended loss" to mean "the pecuniary harm that the defendant purposely sought to inflict[.]" Id. § 2B1.1 cmt. n.3(A)(i)-(ii).

. . .

Since the beginning, the Commission has also included "application notes" in "commentary" that accompanies the guidelines. See, *e.g.*, U.S.S.G. § 2B1.1 cmt. nn.1-8 (1987). An original guideline explained that this "commentary" "may serve a number of purposes." *Id*. § 1B1.7. Among other things, "it may interpret the guideline or explain how it is to be applied." *Id.* Yet the Sentencing Reform Act did not mention the "commentary," and later amendments have made only passing reference to it. Sentencing Reform Act, 98 Stat. at 1987-2040; *Stinson*, 508 U.S. at 41 (citing 18 U.S.C. § 3553(b)). To amend the commentary, then, the Commission need not follow the same procedures that govern changes to the substantive rules in the guidelines themselves (congressional review and notice-and-comment rulemaking). *Havis*, 927 F.3d at 386. That fact led some circuit courts to hold originally that they were not bound by the commentary's interpretation of the guidelines. *See Stinson*, 508 U.S. at 39-40 & 40 n.2.

The Supreme Court rejected this view in *Stinson*. Analogizing to administrative law, the Court viewed the guidelines as the "equivalent of legislative rules adopted by federal agencies." *Id*. at 45. And it viewed the commentary as "akin to an agency's interpretation of its own legislative rules." *Id.* It thus found that the commentary deserved the deference given to an agency's interpretation of its regulations—what was then known as *Seminole Rock* deference but now goes by *Auer*

deference. *Id*.; *see Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945). Applying *Auer*'s test, *Stinson* held that the commentary's interpretation of a guideline "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the" guideline. 508 U.S. at 38 (quoting *Seminole Rock*, 325 U.S. at 414). *Stinson* added that the Commission could effectively amend a guideline by amending the commentary so long as "the guideline which the commentary interprets will bear the [amended] construction." *Id*. at 46.

On its face, *Stinson*'s plain-error test seemed to require courts to give great deference to the commentary. By way of analogy, the plain-error test that applies to unpreserved arguments on appeal requires a legal error to "be clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009). Unsurprisingly, then, we have previously been quick to give "controlling weight" to the commentary without asking whether a guideline could bear the construction that the commentary gave it. *See*, *e.g*., *United States v. Ednie*, 707 F. App'x 366, 371-72 (6th Cir. 2017); *United States v. Jarman*, 144 F.3d 912, 914 (6th Cir. 1998). Perhaps for this reason, defendants have not previously "challenge[d] the general validity" of the $500 minimum loss amount at issue here. *Gilmore*, 431 F. App'x at 430; *see Moon*, 808 F.3d at 1091.

Recently, however, the Supreme Court clarified *Auer*'s narrow scope in the related context of an agency's interpretation of its regulations. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-18, 204 L. Ed. 2d 841 (2019). *Kisor* acknowledged that the Court's "classic" plain-error phrasing of *Auer*'s test "suggest[ed] a caricature of the doctrine, in which deference is 'reflexive.'" *Id.* at 2415 (citation omitted). Yet *Kisor* cautioned that a court should not reflexively defer to an agency's interpretation. Before doing so, a court must find that the regulation is "genuinely ambiguous, even after [the] court has resorted to all the standard tools of interpretation" to eliminate that ambiguity. Id. at 2414. The agency's interpretation also "must come within the zone of ambiguity the court has identified after employing all its interpretive tools." *Id*. at 2416.

Should *Kisor* affect our approach to the commentary? We think so for both a simple reason and a more complicated one. As a simple matter, *Stinson* analogized to agency interpretations of regulations when adopting *Seminole Rock*'s plain-error test for the commentary. 508 U.S. at 45. *Stinson* thus told courts to follow basic administrative-law concepts despite Congress's decision to locate the relevant agency (the Commission) in the judicial branch rather than the executive branch. *See id.*; *cf. Mistretta v. United States*, 488 U.S. 361, 384-85, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). So *Kisor*'s clarification of the plain-error test applies just as much to *Stinson* (and the Commission's guidelines) as it does to Auer (and an agency's regulations). Indeed, *Kisor* itself cited *Stinson* as a decision applying *Seminole Rock* deference before *Auer*. *Kisor*, 139 S. Ct. at 2411 n.3.

The more complex reason follows from *Kisor*'s response to a notice-and-comment concern raised by the challenger in that case. When asking the Court to overrule *Auer*, the challenger argued that *Auer* allowed an agency to freely change a legislative rule (a change that otherwise requires notice-and-comment rulemaking) simply by changing its interpretation of the rule without using that type of rulemaking. Id. at 2420. *Kisor* rejected the challenger's premise—that an agency could willy-nilly change a legislative rule simply by changing its interpretation. Why? Precisely because of the limits that *Kisor* imposed: Before deferring to the changed reading of the rule, a court must "first decide whether the rule is clear; if it is not, whether the agency's reading falls within its zone of ambiguity; and even if the reading does so, whether it should receive deference." Id. In other words, *Kisor*'s limitations on *Auer* deference restrict an agency's power to adopt a new legislative rule under the guise of reinterpreting an old one.

The same concern applies here, so *Kisor*'s response should too. *See Havis*, 927 F.3d at 386. Only the guidelines (not the commentary) must go through notice-and-comment rulemaking. 28 U.S.C. § 994(x). So if the Commission could freely amend the guidelines by amending the commentary, it could avoid these notice-and-comment obligations. The healthy judicial review that *Kisor* contemplates thus will restrict the Commission's ability to do so.

We are not alone in this conclusion.

United States v. Riccardi, 989 F.3d 476, 481-482, 484-85 (6th Cir. 2021).

Accordingly, Crowther argues that the guideline definition of loss means what it says, *loss*, and it was error to apply the commentary which enhanced the guideline level based on so-called *intended loss*, and therefore his case must be remanded for resentencing based on actual *loss* alone.

Sincerely,

s/William Mallory Kent

William Mallory Kent