

Wiley Files *Amicus* Brief in U.S. Supreme Court Case Opposing Deference to Agency in Criminal Sentencing

January 21, 2021

Washington, DC – Wiley today filed an *amicus* brief in the U.S. Supreme Court on behalf of the Due Process Institute, supporting a petition for certiorari in *Broadway v. United States*. The petition seeks to reverse a U.S. Court of Appeals for the Eighth Circuit opinion that impermissibly expanded the scope of the U.S. Sentencing Guidelines by deferring to an erroneous interpretation of those Guidelines by the U.S. Sentencing Commission.

Wiley Pro Bono Partner Theodore A. Howard served as counsel of record on the brief. Mr. Howard – along with associates Lukman S. Azeez and Boyd Garriott, legal assistant Eden Hankin, and special assistant Nicole Grodin – authored and filed the brief on Due Process Institute's behalf.

The petition in *Broadway* stems from a criminal case in which a defendant was sentenced for a drug-related offense. The district court imposed a sentencing enhancement under a provision of the Sentencing Guidelines that increases a defendant's prison time if the defendant has two prior felony convictions of a "controlled substance offense." However, one of the defendant's alleged predicate convictions in *Broadway* was an *attempted* offense – and the Sentencing Guidelines' definition of "controlled substance offense" does not include attempted crimes. The Eighth Circuit nevertheless upheld the enhancement after deferring to the Sentencing Commission's "commentary" to the Guidelines, which contend that "controlled substance offense" includes attempted crimes.

Related Professionals

Theodore A. Howard
Partner
202.719.7120
thoward@wiley.law

Lukman Azeez
Partner
202.719.3551
lazeez@wiley.law

Boyd Garriott
Associate
202.719.4487
bgarriott@wiley.law

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The brief argues that the Sentencing Commission may not receive deference for this interpretation. The brief first contends that the Commission is not entitled to deference under the Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), because the text of the Guidelines is not "genuinely ambiguous." The brief explains that because section 4B1.2 of the Guidelines "enumerates specific acts that qualify as 'controlled substance offenses,' the clear and obvious implication is that unenumerated acts do not so qualify." The brief also argues that even if there was ambiguity over this straightforward text, it should be resolved by other traditional tools of construction, not deference. The brief points out that the Supreme Court has previously explained that "criminal laws are for courts, not for the Government, to construe."

The brief also argues that the Sentencing Commission may not receive deference under the third step of *Kisor v. Wilkie* because the "character and context" of its interpretation does not warrant controlling weight. The brief explains that the normal rationales for presuming deference to federal agencies – such as political accountability and expertise – hold little sway in criminal sentencing, where district court judges are well-equipped to make individualized sentencing determinations. The brief also points out that deferring to the Sentencing Commission raises grave constitutional issues that counsel against deference.

The brief concludes by urging the Supreme Court to grant certiorari in order to correct the Eighth Circuit's error, resolve an entrenched circuit split, and ultimately to protect the criminally accused from "being wrongfully deprived of their liberty through strained and implausible readings of the Guidelines that are reflexively accepted by federal courts."

To read the *amicus* brief, please [click here](#).