No. 20-6436

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL LOVATO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner's prior Colorado conviction for attempted second-degree assault is a "crime of violence" under Section 4B1.2(a) of the advisory Sentencing Guidelines.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Colo.):

United States v. Lovato, No. 18-cr-213 (Dec. 4, 2018)

United States Court of Appeals (10th Cir.):

United States v. Lovato, No. 18-1468 (Feb. 27, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-30a) is reported at 950 F.3d 1337.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2020. A petition for rehearing was denied on June 23, 2020 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 20, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of possessing a firearm and ammunition after a felony conviction, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 100 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 2a-30a.

1. a. In the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987, Congress established the United States Sentencing Commission (Commission) "as an independent commission in the judicial branch of the United States." 28 U.S.C. 991(a). Congress directed the Commission to promulgate "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case," as well as "general policy statements regarding application of the guidelines." 28 U.S.C. 994(a)(1) and (2). Congress also directed the Commission to "periodically * * * review and revise" the Sentencing Guidelines. 28 U.S.C. 994(o).

The Guidelines are structured as a series of numbered guidelines and policy statements followed by additional commentary. See Sentencing Guidelines § 1B1.6.[1] The Commission has explained, in a guideline entitled "Significance of Commentary," that the commentary following each guideline "may

[1] Except as otherwise noted, all citations to the Sentencing Guidelines refer to the 2018 edition used at petitioner's sentencing.

serve a number of purposes," including to "interpret the guideline or explain how it is to be applied." Id. § 1B1.7 (emphasis omitted). The Commission has further explained that "[s]uch commentary is to be treated as the legal equivalent of a policy statement." Ibid. And the Commission has instructed that, in order to correctly "apply[] the provisions of" the Guidelines, a sentencing court must consider any applicable "commentary in the guidelines." Id. § 1B1.1(a) and (b). Congress has similarly required district courts to consider "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission" in imposing a sentence. 18 U.S.C. 3553(b)(1).

Under 28 U.S.C. 994(x), to promulgate or amend a guideline, the Commission must comply with the notice-and-comment procedures for rulemaking by executive agencies. See 5 U.S.C. 553(b) and (c). And under 28 U.S.C. 994(p), the Commission must "submit to Congress" any proposed amendment to the Guidelines, along with "a statement of the reasons therefor." Proposed amendments generally may not take effect until 180 days after the Commission submits them to Congress. Ibid. The guidelines cited above, regarding the salience of commentary, were themselves subject to both notice-and-comment and congressional-review procedures. See, e.g., 52 Fed. Reg. 18,046, 18,053, 18,109-18,110 (May 13, 1987) (notice of submission to Congress of "Application Instructions" in Section 1B1.1 and "Significance of Commentary" in Section 1B1.7) (emphasis omitted).

Although Sections 994(p) and (x) do not apply to policy statements and commentary, the Commission's rules provide that "the Commission shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress." U.S. Sent. Comm'n R. 4.1. The rules similarly provide that the Commission "will endeavor to provide, to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary." U.S. Sent. Comm'n R. 4.3. And like Guidelines amendments, an "affirmative vote of at least four members of the Commission" is required to promulgate or amend any policy statement or commentary. 28 U.S.C. 994(a); see U.S. Sent. Comm'n R. 2.2(b).

b. Before this Court's decision in United States v. Booker, 543 U.S. 220 (2005), the Sentencing Guidelines were "mandatory" and limited a district court's discretion to impose a non-Guidelines sentence, id. at 227, 233. In Stinson v. United States, 508 U.S. 36 (1993), this Court addressed the role of Guidelines commentary and determined that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Id. at 38.

In reaching that determination, the Court drew an "analogy" to the principles of deference applicable to an executive agency's interpretation of its own regulations. Stinson, 508 U.S. at 44.

The Court stated that, under those principles, as long as the "agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Id. at 45 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). The Court acknowledged that the analogy was "not precise," but nonetheless viewed affording "this measure of controlling authority to the commentary" as the appropriate approach in the particular circumstances of the Guidelines. Id. at 44-45.

2. In 2018, a 911 caller in Colorado Springs, Colorado, reported seeing two men in a Honda shoot at another car. Pet. App. 3a. Shortly after the call, an officer located the Honda and attempted to stop it. Id. at 4a. After a 20-minute pursuit, the Honda slowed down, and petitioner jumped out before the car sped away. Gov't C.A. Br. 2-3; see Presentence Investigation Report (PSR) ¶ 9. The officer stopped to detain petitioner, who announced that he had a gun. PSR ¶¶ 9-10. The officer found a .22 caliber pistol tucked in petitioner's waistband and 32 rounds of .22 caliber ammunition in the pocket of petitioner's pants. PSR ¶ 10. The officer also found an ammunition canister in the street nearby, containing several hundred rounds of ammunition. PSR ¶ 11. Petitioner admitted that the ammunition canister was his, although he claimed that he had taken the canister, gun, and other ammunition from the driver of the car only under duress. Gov't

C.A. Br. 3. Officers also found a small amount of methamphetamine in petitioner's wallet. See D. Ct. Doc. No. 56, at 4 (July 23, 2018). At the time of his arrest, petitioner had at least six prior felony convictions. PSR ¶¶ 34-36, 38, 40, 42.

In 2018, a grand jury in the District of Colorado returned a superseding indictment charging petitioner with three counts of possessing a firearm or ammunition after a felony conviction (based on the firearm in his waistband, the ammunition in his pocket, and the ammunition in the canister), in violation of 18 U.S.C. 922(g)(1), and one count of possessing methamphetamine, in violation of 21 U.S.C. 844(a). Superseding Indictment 1-2. The government later dismissed the methamphetamine count, and the case proceeded to trial. Gov't C.A. Br. 4 & n.3. The jury found petitioner guilty on two of the three Section 922(g)(1) counts. Pet. App. 5a-6a & n.3. The district court later granted petitioner's motion to merge the two counts of conviction. Sent. Tr. 12-14.

Under the now-advisory Sentencing Guidelines, the base offense level for a violation of Section 922(g)(1) increases if the "the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense," and increases further if the defendant had two such prior convictions. Sentencing Guidelines § 2K2.1(a)(4)(A); see id. § 2K2.1(a)(2). An application note states that "'[c]rime of violence' has the meaning

given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2." Id. § 2K2.1, comment. (n.1) (emphasis omitted). Section 4B1.2, in turn, defines the term "crime of violence" to mean "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that" either (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)." Id. § 4B1.2(a). And Application Note 1 to Section 4B1.2 states that the term "'[c]rime of violence' * * * include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such [an] offense[]." Id. § 4B1.2, comment. (n.1) (emphasis omitted).

The Probation Office determined in its presentence report that petitioner's prior Colorado conviction for first-degree assault qualifies as a "crime of violence" under the Guidelines, resulting in a base offense level of 20 and an advisory guidelines range of 70 to 87 months. PSR ¶¶ 21, 42, 87. At sentencing, the district court agreed with that determination and found, based on records not available until after the preparation of the presentence report, that petitioner had a second conviction for a "crime of violence" -- namely, a Colorado conviction for attempted second-degree assault -- resulting in an offense level of 24 and

an advisory guidelines range of 100 to 120 months. Sent. Tr. 20-24, 48-53, 58-59; see PSR ¶ 40. The court imposed a sentence of 100 months, to be followed by three years of supervised release. Sent. Tr. 112. The court stated that its sentencing decision was "not driven" by the Guidelines and that "if this came out as a base offense [level] of 20," the court would "still be looking at the same range" because, "in any real-world sense, [petitioner] is violent." Id. at 111.

3. The court of appeals affirmed. Pet. App. 2a-30a. As relevant here, petitioner argued that the district court erred in treating his Colorado conviction for attempted second-degree assault as a "crime of violence," as defined in Sentencing Guidelines § 4B1.2(a), and that Application Note 1 interpreting that guideline to include attempts "impermissibly expands the text of the guideline." Pet. C.A. Br. 36 (emphasis omitted); see id. at 36-41. Petitioner conceded that his argument was contrary to circuit precedent. Id. at 36. The court of appeals agreed, explaining that its prior decision in United States v. Martinez, 602 F.3d 1166 (10th Cir. 2010), foreclosed petitioner's challenge to Application Note 1. Pet. App. 19a-20a; see Martinez, 602 F.3d at 1173-1175.

ARGUMENT

Petitioner contends (Pet. 16-22) that Application Note 1 to Sentencing Guidelines § 4B1.2 is invalid insofar as it interprets the guideline's definition of "crime of violence" to include

attempt and conspiracy offenses, and that applying the guideline to such offenses is inconsistent with this Court's decision in Kisor v. Wilkie, 139 S. Ct. 2400 (2019). That contention does not warrant certiorari in this case. The court of appeals correctly determined, in accordance with the decisions of a large majority of the circuits, that Application Note 1 is a valid interpretation of Section 4B1.2. Although some courts have recently declined to apply that guideline to attempt and conspiracy offenses, those decisions are unsound and reflect an incomplete understanding of the circumstances under which the guideline and Application Note 1 were adopted. In any event, the Commission has already begun the process of addressing the recent disagreement, obviating any need for review by this Court at this time. This case would also be an unsuitable vehicle in which to address Application Note 1, because petitioner's prior conviction for attempted second-degree assault qualifies as a "crime of violence" under the plain text of Section 4B1.2(a). Accordingly, the petition for a writ of certiorari should be denied.[2]

1. The decision below is correct.

a. Petitioner's prior conviction for attempted second-degree assault, in violation of Colo. Rev. Stat. § 18-3-203 (2004),

[2] Similar questions are presented in Tabb v. United States, No. 20-579 (filed Oct. 28, 2020); Broadway v. United States, No. 20-836 (filed Dec. 16, 2020); Jefferson v. United States, No. 20-6745 (filed Dec. 16, 2020); Clinton v. United States, No. 20-6807 (filed Dec. 30, 2020); Sorenson v. United States, No. 20-7099 (filed Feb. 1, 2021); and Roberts v. United States, No. 20-7069 (filed Feb. 2, 2021).

see PSR ¶ 40, qualifies as a "crime of violence" for purposes of Section 2K2.1(a), which incorporates the definition of that term in the career-offender guideline, Section 4B1.2(a). Section 4B1.2(a) defines the term "crime of violence" to include any felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1). Petitioner's attempted assault conviction qualifies under that definition.

Specifically, applying the modified categorical approach, see Mathis v. United States, 136 S. Ct. 2243, 2249 (2016), the district court determined that petitioner's conviction involved the subsection of the Colorado second-degree assault statute under which "[a] person commits the crime of assault in the second degree if * * * [w]ith intent to cause bodily injury to another person, he or she causes such injury to any person by means of a deadly weapon." Colo. Rev. Stat. § 18-3-203(1)(b) (2004); see Sent. Tr. 51. Petitioner has never disputed that a completed violation of that provision qualifies as a "crime of violence" as defined in Section 4B1.2(a). See Pet. 19; see also United States v. Ontiveros, 875 F.3d 533, 535, 538 (10th Cir. 2017) (explaining that such an offense "'has as an element the use * * * of physical force against the person of another'" within the meaning of Section 4B1.2(a)(1) because "Colorado second-degree assault requires intentional causation of serious bodily harm") (citation and emphasis omitted), cert. denied, 138 S. Ct. 2005 (2018).

Petitioner's conviction for attempting to violate the same provision is also a "crime of violence," because it necessarily "ha[d] as an element the * * * attempted use[] or threatened use of physical force against the person of another." Sentencing Guidelines § 4B1.2(a)(1). Petitioner contends that his prior conviction is not a "crime of violence" under Section 4B1.2(a)(1), on the theory that taking a "'substantial step'" toward the commission of second-degree assault, as required for an attempt offense under Colorado law, allows for liability in circumstances not encompassed by Section 4B1.2(a)(1)'s text. Pet. 19-20 (citation omitted). But taking a substantial step towards the commission of a crime, with the requisite mental state, is the classic formulation of an "attempt" in criminal law. See, e.g., United States v. Resendiz-Ponce, 549 U.S. 102, 106-107 (2007); Braxton v. United States, 500 U.S. 344, 349 (1991); Model Penal Code § 5.01(1)(c) (1985). Petitioner identifies no sound basis to distinguish Colorado's concept of attempt liability from the "attempted use" or "threatened use" of force contemplated in Section 4B1.2(a)(1).

Accordingly, this case does not squarely implicate any question about the validity of Application Note 1 to Section 4B1.2, which states that terms "'[c]rime of violence' and 'controlled substance offense' [in the career-offender guideline] include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses," Sentencing Guidelines § 4B1.2, comment.

(n.1) (emphases omitted). Petitioner's Colorado conviction for attempted second-degree assault with a deadly weapon is a "crime of violence" under a straightforward application of the text of Section 4B1.2(a) itself, without regard to Application Note 1.

b. In affirming petitioner's sentence, the court of appeals adhered to a precedent in which it had applied this Court's decision in Stinson v. United States, 508 U.S. 36 (1993), to reject a challenge to the validity of Application Note 1. See Pet. App. 19a-20a (citing United States v. Martinez, 602 F.3d 1166, 1173-1174 (10th Cir. 2010)). Petitioner asserts that the court of appeals erred by giving "[r]eflexive deference" to the Commission's commentary, Pet. 17 (emphasis omitted), effectively contending that the court was required to reconsider its precedent upholding Application Note 1 after this Court's clarification in Kisor v. Wilkie, supra, of the circumstances in which a federal court should defer to an agency's interpretation of its own rules. See Pet. 17-22. Kisor, however, does not require such reconsideration.

In Kisor, this Court considered whether to overrule Auer v. Robbins, 519 U.S. 452 (1997), and Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), and thus "discard[] the deference" afforded under those decisions to "agencies' reasonable readings of genuinely ambiguous regulations." Kisor, 139 S. Ct. at 2408; see Auer, 519 U.S. at 461 (stating that an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or

inconsistent with the regulation'") (quoting, indirectly, Seminole Rock, 325 U.S. at 414). The Court took Kisor as an opportunity to "restate, and somewhat expand on," the limiting principles for deferring to agency's interpretation of its own regulation. 139 S. Ct. at 2414. Among other things, the Court emphasized that "a court should not afford Auer deference" to an agency's interpretation of a regulation "unless the regulation is genuinely ambiguous." Id. at 2415.

Notwithstanding those clarifications, the Court pointedly declined to overrule Auer or Seminole Rock -- let alone the "legion" of other precedents applying those decisions, including Stinson. Kisor, 139 S. Ct. at 2411 n.3 (opinion of Kagan, J.) (identifying Stinson, 508 U.S. at 44-45, as one of numerous examples); see id. at 2422 (majority opinion) (citing this "long line of precedents" as a reason not to overrule Auer) (citation omitted); cf. id. at 2424-2425 (Roberts, C.J., concurring in part). The Court explained that it had "applied Auer or Seminole Rock in dozens of cases, and lower courts ha[d] done so thousands of times," and that "[d]eference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law." Id. at 2422 (majority opinion). And the Court adhered to Auer on stare decisis grounds in part to avoid "allow[ing] relitigation of any decision based on Auer," with the attendant "instability" that would result from overturning precedent in "so many areas of law, all in one blow." Ibid.

Kisor therefore cannot support the principle that petitioner effectively advocates here, under which a court of appeals must consider anew every one of its prior decisions deferring to the Commission's commentary under Stinson. To be sure, Kisor provides the governing standards for determining whether a court must defer to an executive agency's interpretation of a regulation, see 139 S. Ct. at 2414-2418, and Stinson reasoned that -- by "analogy," albeit "not [a] precise" one -- the Commission's commentary interpreting the Guidelines should be treated the same way, 508 U.S. at 44; see id. at 44-46. The government has accordingly taken the position that Kisor sets forth the authoritative standards for determining whether particular commentary is entitled to deference. But it does not follow that a court of appeals is required to reopen settled law in order to apply those standards to matters previously decided in reliance on Auer or Seminole Rock -- or, here, Stinson. Indeed, the Court in Kisor adhered to Auer and Seminole Rock in part to avoid such wasteful "relitigation." Kisor, 139 S. Ct. at 2422.

c. In any event, the result below would not have been different had the court of appeals reconsidered its precedent in light of Kisor. As already explained, the validity of Application Note 1 is irrelevant to the correct disposition of this case because the text of Section 4B1.2(a)(1) itself encompasses petitioner's conviction for attempted second-degree assault with

a deadly weapon. At a minimum, that is a reasonable interpretation of the text.

The context, purpose, and history of the Guidelines reinforce that Section 4B1.2 is best understood to include attempts and conspiracies. Although this case involves the guideline specifying penalties for certain gun offenses, see Sentencing Guidelines § 2K2.1, that guideline incorporates the definitions of "crime of violence" and "controlled substance offense" used in the career-offender guideline. See id. § 2K2.1, comment. (n.1). The history of the career-offender guideline is therefore instructive.

In the Sentencing Reform Act, Congress directed the Commission to "assure" that the Guidelines "specify a sentence to a term of imprisonment at or near the" statutory maximum for a felony offense if: (1) the offense was "a crime of violence" or an offense "described in" specific sections of the U.S. Code proscribing drug trafficking; and (2) the offender had two or more prior convictions for such offenses. Sentencing Reform Act § 217(a), 98 Stat. 2021; see 28 U.S.C. 994(h). Congress has, both then and now, prescribed the same penalties for conspiring or attempting to violate any of the specific drug crimes listed in Section 994(h) as for the underlying crimes themselves. See 21 U.S.C. 846, 963; 46 U.S.C. 70506(b); Act of Sept. 15, 1980, Pub. L. No. 96-350, § 3, 94 Stat. 1160.

The Commission implemented Section 994(h) by promulgating the career-offender guideline in the first edition of the Guidelines.

Sentencing Guidelines § 4B1.1 (1987). In 1989, the Commission amended the guideline's definition of "crime of violence" and "controlled substance offense" and included a version of Application Note 1 materially identical to the current version, stating that "[t]he terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." Sentencing Guidelines § 4B1.2, comment. (n.1) (1989) (emphasis omitted); see Sentencing Guidelines App. C, Amend. 268 (Nov. 1, 1989).

Application Note 1 has all the hallmarks of an agency interpretation warranting deference. First, it is the Commission's "authoritative" and "official" position, Kisor, 139 S. Ct. at 2416 (citation omitted), having been included in the official Guidelines Manual for decades. Second, Application Note 1 implicates the Commission's "substantive expertise." Id. at 2417. Congress specifically delegated to the Commission the task of assuring that the Guidelines impose substantial penalties for recidivist offenders, 28 U.S.C. 994(h), and the guidelines and commentary at issue here are the result of that mandate. And this Court itself subsequently recognized the Commission's substantive expertise in interpreting the Guidelines. See Stinson, 508 U.S. at 45 (explaining that the Commission's commentary "assist[s] in the interpretation and application of [the Guidelines], which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to

formulate and announce"); Mistretta v. United States, 488 U.S. 361, 379 (1989) ("Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate."). Third, Application Note 1 reflects the Commission's "fair and considered judgment," not an ad hoc position of convenience adopted for litigation. Kisor, 139 S. Ct. at 2417-2418 (citation omitted). The Commission has interpreted the term "crime of violence" to include attempts since that definition was first incorporated into the firearms guideline at issue here. See Sentencing Guidelines § 2K2.1(a) & comment. (n.5) (1991); id. § 4B1.2, comment. (n.1).

2. Petitioner contends that the courts of appeals are divided on a methodological question about whether a "threshold determination of ambiguity" is necessary before deferring to the Commission's commentary interpreting a guideline. Pet. 10 (emphasis omitted). But the Tenth Circuit did not address that methodological question here; instead, as explained above, it simply -- and permissibly -- adhered to a pre-Kisor precedent upholding Application Note 1. Petitioner is correct (Pet. 10-16) that a recent disagreement has arisen in the courts of appeals specifically concerning the validity of Application Note 1's interpretation of Section 4B1.2. But that disagreement does not warrant this Court's review at this time. The minority position that petitioner advocates is mistaken, and in any event the

Commission has already proposed an amendment to the text of Section 4B1.2 to resolve the disagreement.

a. The Tenth Circuit and eight other courts of appeals have accepted and applied the Commission's interpretation, in Application Note 1, that Section 4B1.2 encompasses attempt and conspiracy offenses. Pet. App. 19a-20a; see United States v. Crum, 934 F.3d 963, 966-967 (9th Cir. 2019) (per curiam), cert. denied, 140 S. Ct. 2629 (2020); United States v. Merritt, 934 F.3d 809, 811 (8th Cir. 2019), cert. denied, 140 S. Ct. 981 (2020); United States v. Adams, 934 F.3d 720, 729 (7th Cir. 2019), cert. denied, 140 S. Ct. 824 (2020); United States v. Lange, 862 F.3d 1290, 1295 (11th Cir.), cert. denied, 138 S. Ct. 488 (2017); United States v. Nieves-Borrero, 856 F.3d 5, 9 (1st Cir. 2017); United States v. Dozier, 848 F.3d 180, 183 & n.2 (4th Cir. 2017); United States v. Jackson, 60 F.3d 128, 133 (2d Cir. 1995), cert. denied, 516 U.S. 980 (1995), 516 U.S. 1130, and 516 U.S. 1165 (1996); United States v. Guerra, 962 F.2d 484, 485-487 (5th Cir. 1992). Three courts have disagreed, including one in a decision post-dating the filing of the petition for a writ of certiorari in this case. See United States v. Nasir, 982 F.3d 144, 156-160 (3d Cir. 2020) (en banc); United States v. Havis, 927 F.3d 382, 386-387 (6th Cir. 2019) (en banc; per curiam); United States v. Winstead, 890 F.3d 1082, 1090-1092 (D.C. Cir. 2018).

Those three decisions, however, not only fail to appreciate that Application Note 1 reflects the best reading of the

guideline's text, but also rest on a mistaken premise concerning the guideline. In each case, the court of appeals viewed the Application Note as an improper attempt by the Commission to "add an offense not listed in" the career-offender guideline without satisfying the procedural requirements for amending the text of the Guidelines, Havis, 927 F.3d at 386 -- i.e., publication of a proposed amendment for notice and comment, 28 U.S.C. 994(x), and submission of the amendment to Congress for review, 28 U.S.C. 994(p). See Nasir, 982 F.3d at 159 (stating that giving effect to Application Note 1 would "allow circumvention of the checks Congress put on the" Commission); Havis, 927 F.3d at 386 (asserting that commentary "never passes through the gauntlets of congressional review or notice and comment"); Winstead, 890 F.3d at 1092 (observing that, "[i]f the Commission wishes to expand the definition of 'controlled substance offenses' to include attempts, it may * * * submit[] the change for congressional review"). In fact, however, the Commission has repeatedly published Application Note 1 for comment and has submitted it to Congress for review.

The Commission submitted the first version of the career-offender guideline to Congress in April 1987 as part of the initial proposed Guidelines. See 52 Fed. Reg. at 18,094-18,095. Although that version did not include any commentary addressing attempts and conspiracies, the Commission added such commentary -- with respect to controlled substance offenses -- before the initial Guidelines took effect, as part of a broader effort to "revise[]

the commentary" to "enhance understanding and clarity" without "mak[ing] substantive changes." 52 Fed. Reg. 44,674, 44,674 (Nov. 20, 1987); see id. at 44,729 (commentary stating that a controlled substance offense includes "aiding and abetting, conspiring, or attempting to commit" such an offense). When the Commission added that commentary, it explained that, while revisions to commentary are not required by statute to go through notice-and-comment or congressional-review procedures, it nonetheless "intend[ed] to submit these revisions to Congress, after a comment period, in order to eliminate any questions as to their validity." 52 Fed. Reg. at 44,674; cf. U.S. Sent. Comm'n R. 4.1, 4.3 (stating that the Commission "endeavor[s]" to use notice-and-comment and congressional-review procedures for amendments to commentary). Accordingly, after re-promulgating the October 1987 version of the Guidelines on an emergency basis in January 1988, see 53 Fed. Reg. 1286, 1286, 1291-1292 (Jan. 15, 1988), the Commission submitted the re-promulgated version of the Guidelines and commentary to Congress in April 1988. 53 Fed. Reg. 15,530, 15,530 (Apr. 29, 1988).

Any suggestion that the Commission sought to "add" inchoate offenses while circumventing "congressional review and notice and comment," Havis, 927 F.3d at 386-387 (emphasis omitted), is therefore incorrect. To the contrary, the Commission published the relevant commentary for comment and submitted it to Congress precisely to avoid any "questions as to [its] validity."

52 Fed. Reg. at 44,674. Moreover, in 1989 the Commission published for comment a proposed amendment to "clarify the coverage" of the career-offender guideline, in part by addressing inchoate offenses -- with respect to both controlled substance offenses and crimes of violence -- in Application Note 1 in essentially its current form. 54 Fed. Reg. 9122, 9162 (Mar. 3, 1989) ("The terms 'crime of violence' and 'controlled substance offense' include aiding and abetting, conspiring, and attempting to commit such offenses."). The Commission again submitted the proposed amendment to Congress for review before adopting it. 54 Fed. Reg. 21,348, 21,379 (May 17, 1989).

The Commission has since modified other aspects of Application Note 1, with each change published for comment and submitted to Congress:

Publication for Comment	Notice of Submission to Congress
60 Fed. Reg. 14,054, 14,055 (Mar. 15, 1995)	60 Fed. Reg. 25,074, 25,087 (May 10, 1995)
62 Fed. Reg. 152, 181 (Jan. 2, 1997)	62 Fed. Reg. 26,616, 26,632 (May 14, 1997)
65 Fed. Reg. 7080, 7089 (Feb. 11, 2000)	65 Fed. Reg. 26,880, 26,897 (May 9, 2000)
66 Fed. Reg. 59,330, 59,335 (Nov. 27, 2001)	67 Fed. Reg. 37,476, 37,490 (May 29, 2002)
68 Fed. Reg. 75,340, 75,373-75,374 (Dec. 30, 2003)	69 Fed. Reg. 28,994, 29,025 (May 19, 2004)
72 Fed. Reg. 4372, 4397-4398 (Jan. 30, 2007)	72 Fed. Reg. 28,558, 28,575 (May 21, 2007)

Publication for Comment	Notice of Submission to Congress
74 Fed. Reg. 4802, 4822 (Jan. 27, 2009)	74 Fed. Reg. 21,750, 21,760 (May 8, 2009)
80 Fed. Reg. 2570, 2572-2574 (Jan. 16, 2015)	80 Fed. Reg. 25,782, 25,794 (May 5, 2015)
80 Fed. Reg. 49,314, 49,315-49,316 (Aug. 17, 2015)	81 Fed. Reg. 4741, 4742 (Jan. 27, 2016)

Notably, in one of those instances, the Commission proposed to re-promulgate Application Note 1 "without change" while altering the "background" discussion in Section 4B1.1 to clarify the Commission's authority to include inchoate offenses in the career-offender guideline. 60 Fed. Reg. at 25,087. Congress allowed that proposal to take effect while rejecting two other amendments -- which would have included changes to other commentary -- that the Commission had proposed at the same time. See Act of Oct. 30, 1995, Pub. L. No. 104-38, § 1, 109 Stat. 334; 60 Fed. Reg. at 25,075-25,077, 25,085-25,086. Had Congress disagreed with the Commission's view on inchoate offenses, it could have similarly disapproved of Application Note 1 or the change clarifying the authority on which it rests. Congress did neither.

The history described above refutes petitioner's suggestion (Pet. 3) that the Commission evaded "the constraints of notice and comment rulemaking and congressional approval" when it interpreted Section 4B1.2 to encompass attempts and conspiracies. The regulatory history also weighs against addressing any broader

methodological questions about Stinson or Kisor in this case. The loose analogy that this Court drew in Stinson between the Commission's commentary and an executive agency's interpretation of its own regulations was predicated in part on the assumption that the commentary was not subject to the same procedures that apply to rulemaking. See 508 U.S. at 39-40, 45. That assumption appears to have been correct for the particular commentary at issue in Stinson, see Sentencing Guidelines App. C, Amend. 433 (Nov. 1, 1991) (discussed in Stinson, 508 U.S. at 39); 57 Fed. Reg. 20,148, 20,157 (May 11, 1992), but it would not be correct here.

More broadly, a central point of contention in Kisor was whether executive agencies might, under the guise of interpretation, use interpretive rules that do not go through notice and comment to make substantive changes to legislative rules, which are required to go through notice and comment. See 139 S. Ct. at 2420-2421 (opinion of Kagan, J.); id. at 2434-2435 (Gorsuch, J., concurring in the judgment). Those concerns are absent here. The Commission published the relevant commentary, solicited public comment on it, and submitted it to Congress -- on multiple occasions. In other words, the Commission has already repeatedly run through the same "gauntlets of congressional review [and] notice and comment," Havis, 927 F.3d at 386, that would have applied had the Commission instead chosen to alter the text of the guideline itself.

b. In any event, further review of the validity of Application Note 1 is unwarranted at this time. This Court typically leaves the resolution of Guidelines issues to the Commission. The Commission has a "statutory duty 'periodically to review and revise' the Guidelines." Braxton, 500 U.S. at 348 (quoting 28 U.S.C. 994(o)) (brackets omitted). Congress thus "necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Ibid. Given that the Commission can and does amend the Guidelines to eliminate conflicts or correct errors, this Court ordinarily does not review decisions interpreting the Guidelines. See ibid.; see also United States v. Booker, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices.").

That prudential policy applies with special force here because the Commission has already begun the process of addressing the recent disagreement regarding Application Note 1. In December 2018, after the D.C. Circuit's decision in United States v. Winstead, supra, the Commission sought public comment on proposed revisions to Section 4B1.2 and Application Note 1. 83 Fed. Reg. 65,400, 65,412-64,415 (Dec. 20, 2018). The Commission explained that "[m]ost circuits have held that the definitions of 'crime of

violence' and 'controlled substance offense' at § 4B1.2 include the offenses of aiding and abetting, conspiracy to commit, and attempt to commit such crimes, in accordance with the commentary to the guideline," but that the D.C. Circuit had "concluded otherwise" in Winstead. Id. at 65,413. In the Commission's view, "the commentary that accompanies the guidelines is authoritative and failure to follow the commentary would constitute an incorrect application of the guidelines." Ibid. Nonetheless, to resolve the disagreement, the Commission proposed to "move the inchoate offenses provision from the Commentary to § 4B1.2 to the guideline itself as a new subsection (c) to alleviate any confusion and uncertainty resulting from the D.C. Circuit's decision." Ibid.

The Commission has not yet acted on that proposal. Since 2019, the Commission has lacked the necessary quorum of four voting members to amend any guideline or commentary. 28 U.S.C. 994(a); U.S. Sent. Comm'n R. 2.2(b); see U.S. Sent. Comm'n, 2019 Annual Report 3 (2020) (noting lack of quorum). But the December 2018 proposal demonstrates that the question whether Application Note 1 in its current form is a binding and authoritative interpretation of Section 4B1.2 is likely to be resolved by the Commission itself.

3. Petitioner's remaining arguments for review lack merit. Petitioner contends (Pet. 23-26) that certiorari is warranted to protect the separation of powers. But unlike the agencies whose interpretations were at issue in Seminole Rock, Auer, and Kisor, the Commission does not exercise any "executive Power," U.S. Const.

Art. II, § 1, Cl. 1. Instead, Congress established the Commission "as an independent commission in the judicial branch." 28 U.S.C. 991(a). At least three of its members must be federal judges. Ibid. And this Court has held that the Commission's functions are judicial in nature, akin to other "nonadjudicatory activities" that the Constitution permits Congress to assign to the Judicial Branch, such as adopting rules of procedures. Mistretta, 488 U.S. at 386; see id. at 386-391. A case concerning the Commission would thus be an unsuitable vehicle in which to address any broader questions about deference to executive agency interpretations.

Petitioner's separation-of-powers concerns are also misplaced because the Guidelines differ from the kind of legislative rules that have occasioned such concerns in other cases. The hallmark of a legislative rule, for which notice and comment is generally required, is that the rule has "the force and effect of law." Kisor, 139 S. Ct. at 2420 (opinion of Kagan, J.) (citation omitted). But the Guidelines, including the commentary, are "binding" only in a procedural sense after this Court's decision in United States v. Booker, supra. A sentencing court must apply them correctly when calculating a defendant's guidelines range and when exercising traditional departure authority. See, e.g., Gall v. United States, 552 U.S. 38, 41 (2007); Sentencing Guidelines § 1B1.1(a) and (b). But once those steps are completed, the Guidelines' text, policy statements, and commentary all operate at the same nonbinding level: to "advise sentencing courts how to

exercise their discretion within the bounds established by Congress." Beckles v. United States, 137 S. Ct. 886, 895 (2017). Petitioner fails to explain how deferring to the Commission's interpretation of its own advice could offend the separation of powers.

The Guidelines also present unique issues that would render them an unsuitable vehicle for a further examination of the issues addressed in Kisor. As previously noted, see pp. 2-3, supra, the role of commentary in interpreting the Guidelines is codified in guidelines that were themselves subject to notice and comment and congressional review. Sentencing Guidelines §§ 1B1.1, 1B1.7. Stinson's holding primarily relies on those provisions, see 508 U.S. at 41, and their promulgation provides even further reason for applying Application Note 1's interpretation of Section 4B1.2.

Finally, at all events, this case would be an unsuitable vehicle even for addressing the more limited issue of the validity of Application Note 1. As explained above, see pp. 9-12, supra, petitioner's prior conviction for attempted second-degree assault with a deadly weapon qualifies as a "crime of violence" under the plain text of Section 4B1.2(a) itself, without regard to Application Note 1. Moreover, the district court made clear at sentencing that the sentence it imposed was "not driven by" the four-level enhancement resulting from its finding that petitioner's prior conviction for attempted second-degree assault with a deadly weapon was a crime of violence. Sent. Tr. 111.

Indeed, the court explained that "if this came out as a base offense [level] of 20," as it would without the enhancement for petitioner's conviction for attempted second-degree assault, the court "would still be looking at the same range, because * * * in any real-world sense, [petitioner] is violent." Ibid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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