NO. _____

IN THE UNITED STATES SUPREME COURT

TRE RESHAWN TATE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The United States Sentencing Guidelines ("USSG") provides a three-point enhancement under the robbery guideline, U.S.S.G. § 2B3.1, if an individual "possessed" a "dangerous weapon" during the robbery. What constitutes a "dangerous weapon" is not defined in the guideline itself, but is instead defined in the commentary thereto.

The question presented here is this:

Is the application note defining "dangerous weapon" overly broad under *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) by defining "possession" of a "dangerous weapon" to include merely pretending to possess one—by sticking one's empty hand into one's bag?

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES

There are no related cases.

All relevant opinions below are included in the Appendix filed herewith.

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JURISDICTIONAL STATEMENT

Tre Tate pled guilty in federal court to one count of bank robbery, in violation 18 U.S.C. § 2113(a). He was sentenced by the District Court for the Eastern District of Tennessee on January 7, 2020. He appealed his sentence to the United States Court of Appeals for the Sixth Circuit, which affirmed the sentence on May 28, 2021. Mr. Tate filed a timely petition seeking en banc rehearing, which was denied on July 16, 2021.

This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). Pursuant to Rule 13 of the Supreme Court, this Court's March 19, 2020 COVID-19 Order, and the Court's July 19, 2021 COVID-19 Order, the time for filing a petition for certiorari is 150 days from the order denying the petition for rehearing. Accordingly, this petition is timely filed.

Pursuant to Rule 29.4(a), appropriate service is made to the Solicitor General of the United States and to Assistant United States Attorney Cynthia F. Davidson, who appeared in the United States Court of Appeals for the Sixth Circuit on behalf of the United States Attorney's Office, a federal office which is authorized by law to appear before this Court on its own behalf.

PRAYER FOR RELIEF

Petitioner, Tre Tate, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2113(a):

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny--

Shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(d):

Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

STATEMENT OF THE CASE AND FACTS

Tre Tate pled guilty to one count of federal bank robbery and was sentenced under U.S.S.G. § 2B3.1. Even though he had no weapon with him, his guideline range was enhanced under U.S.S.G. § 2B3.1(b)(2)(E) because the district court found that the act of putting his hand inside his shoulder bag constituted "possess[ion]" of "a dangerous weapon." (Pet. Appx. at 4.) The district court reached this conclusion by relying upon the relevant application notes,[1] which today define the term "dangerous weapon" as: "(i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (e.g. a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun)." U.S.S.G. § 1B1.1, cmt. (n.1(E)).

This expansive definition of "dangerous weapon" was not utilized by the Commission when it first created the Sentencing Guidelines. (Pet. Appx. (Murphy, J., concurring) at 29.) "Dangerous weapon" was originally defined to include only "an instrument capable of inflicting death or serious bodily injury." U.S.S.G. § 1B1.1, cmt. (n.1(d)) (1987).[2] The definition was later expanded—via commentary alone—to include "objects that [are] not capable of inflicting death or serious bodily injury [but meet other

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[1] The application notes to the robbery guideline explain that "dangerous weapon" is "defined in the commentary to 1B1.1 (Application Instructions)." U.S.S.G. § 2B3.1, cmt. (n.1); *see also* (n.2) (incorporating by reprinting U.S.S.G. § 1B1.1, cmt. (n.1(E)(ii)(II)).

[2] Today the definition of "dangerous weapon" is located at U.S.S.G. § 1B1.1, cmt. (n.1(E)).

requirements]." U.S.S.G. § 1B1.1, cmt. (n.1(E)); *see also* U.S.S.G. § 2B3.1, cmt. (n.2). In the Reasons for Amendment accompanying the current iteration of this definition, the Sentencing Commission explained that the definition was "amended to clarify under what circumstances an object that is *not an actual, dangerous weapon* should be treated as one." U.S.S.G. App. C, Vol II (Amend. 601, Reasons for Amend. (2000)) (emphasis added).

Before the district court Mr. Tate objected to the three-point enhancement to his guideline range under U.S.S.G. § 2B3.1(b)(2)(E), arguing that he "neither brandished nor possessed a dangerous weapon in the course of the crime." (Pet. Appx. at 5; see also Objection, R. 22, Page ID# 59-60.) "A firearm was never brandished or recovered. There are no indications of any actual firearm being involved in the case." (*Id.* at Page ID# 60.) His attorney further argued that the final subsection of the commentary's definition of "dangerous weapon" (applying to objects used in a manner that creates the impression that the object was a dangerous weapon) did not apply because "[t]he teller's account . . . is absent of any description of gesturing, furtive movements, or a specific threat," and that "[p]lacing one's hand in a bag does not rise to the level of an *appearance* of a gun." (*Id.* at Page ID# 61; *see also* TR Sent., r. 35, Page ID# 136.) Relying on this commentary, the district court applied the enhancement. (Pet. Appx. at 5.)

On appeal, Mr. Tate argued that this expansive definition of "dangerous weapon" was an unreasonable expansion of the guideline term via commentary, and as such was impermissible under *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). (*See* Pet. Appx at 5-6.) The panel below issued a divided opinion as to the scope of the guideline phrase "possessed" a "dangerous weapon" as used in the robbery guideline, U.S.S.G. § 2B3.1. The majority,

applying de novo review,[3] looked to how the Supreme Court defined the term "dangerous weapon" in a federal robbery statute a year prior to the Sentencing Commission's promulgation of the Guidelines. (Pet. Appx. 7-14 (discussing *McLaughlin v. United States*, 476 U.S. 16, 17-18 (1986)).) It also looked to case law that both preceded and post-dated *McLaughlin*, explaining its belief that the term "dangerous weapon" as used in the robbery guideline in fact incorporated the expansive view taken by some courts. (*Id.* at 7-9.)

Thus, it held that, "the Guidelines themselves incorporate *McLaughlin's* view of a dangerous weapon. As a result, the commentary Tate invokes 'does not purport to add to (or contradict) the text of the Guidelines,' meaning 'it poses no problem under [the Sixth Circuit's] precedent in *Havis*.'" (*Id.* at 11-12 (citation omitted).) "As such, the unambiguous text of the Guidelines enhancement for dangerous weapons applies whether a robber is, or merely pretends to be, armed." (*Id.* at 10.) It concluded by emphasizing that its interpretation of "dangerous weapon" was not based on the definition contained in the commentary, but instead on the scope of the guideline text itself. (*Id.* at 14.)

In contrast, Judge Murphy in his concurrence concluded that the guideline term "dangerous weapon" has a limited meaning—which does not include individuals pretending that their hand is a gun—and that the commentary is therefore an unlawful expansion of the term. (Pet. Appx. at 18 (Murphy, J., concurring).) He ultimately concurred in the result, however, finding that plain error review applied and foreclosed relief in this case. (*Id.*)

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[3] The majority explained that whether Tate's argument "was unpreserved, and thus subject to plain error review, is a fair point of debate." (Pet. Appx. at 4 (citations omitted).) But, it chose not to resolve that question, as it found that "Tate's challenge fails even under . . . de novo review." (*Id*. (citation omitted).)

Judge Murphy explained that this case "turns on a straightforward question: Can the phrase 'possessed' a 'dangerous weapon' in § 2B3.1(b)(2)(E) be reasonably read to cover a robber who only pretends to have such a weapon by concealing his hand in a bag?" (*Id.* (citations omitted).) And, to answer this, he started by evaluating how an "ordinary English speaker" would understand the terms. (*Id.* at 21.) After looking to dictionary definitions he concluded that, "[n]o ordinary English speaker—even one who has spent years reading legal decisions—would say that a robber *possesses* a dangerous weapon when the robber merely *pretends* to possess one." (*Id.* at 18.) "It is even more unnatural to say that Tate 'possessed' his hand." (*Id.* at 23.)

He also considered the broader context of the guideline, and the state of law at the time it was created, noting that "[w]hen the Commission first used the phrase, [under prevailing case law], ordinary items regularly qualified as 'dangerous weapons' if the items were 'used in such a way as [was] likely to produce death or grievous bodily harm.'" (*Id.* at 23 (citations omitted).) "It is perfectly natural to say that an aggressor used a chair or a cane 'as a weapon' if the aggressor attacked or threatened someone with it." (*Id.* (citing *United States v. Loman*, 551 F.2d 164, 169 (7th Cir. 1977); *United States v. Johnson*, 324 F.3d 264, 266 (4th Cir. 1963)). Thus, "the phrase need not be limited to things that we typically call 'weapons.' 'Weapon' can reach 'any' object *used* or *threatened to be used* for the purpose of inflicting bodily harm." (Pet. Appx. at 22-23 (Murphy, J., concurring) (citing *Random House Unabridged Dictionary*, 2153 (2d ed. 1993); *Black's Law Dictionary*, 394 (6th Ed. 1990))).

But, Judge Murphy explained, "[e]ven if we read 'dangerous weapon' in this broad way, though, I still do not see how Tate 'possessed' a 'dangerous weapon' when he stuck his hand into a bag to mislead a bank teller into thinking he had a gun." (*Id.* at 23). Thus, while courts have long held that "a gun (loaded or unloaded) can certainly be described as a 'dangerous weapon,'" (*id*. citing *McLaughlin*, 476 U.S. at 17‑18; 2 Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law* § 8.11(f) at 456 (1986)), here Tate did not have a gun so that logic does not apply (see *id*.). And, "the guideline [at issue] "required Tate to 'possess' the gun [or weapon]." (*Id.*) Judge Murphy then pondered, since Tate did not possess a gun, "[w]hat, then, could qualify as Tate's 'weapon' (even putting aside the word 'dangerous')?" (*Id.*) He explained that Tate's hand alone could not qualify as a "dangerous weapon" as most courts have refused to treat body parts as "dangerous weapons." (*Id.*) This was "particularly true for this guideline, which prohibits a robber from 'possessing' a dangerous weapon." (*Id.* (citing U.S.S.G. § 2B3.1(b)(2)(E))).

The guideline phrase "possessed" a "dangerous weapon" was not ambiguous, and even if some ambiguity existed, the commentary's inclusion of merely pretending to possess a gun by concealing one's hand in one's bag falls outside that zone of ambiguity. (*See id*. at 21-30.) This can be seen not only in how states defined the term by statute and in case law, but also in how the Sentencing Commission itself would later modify this definition. (*Id.* at 24-27, 29-30). Judge Murphy emphasized that "even the Commission did not believe that the guideline's text could be read in the broad way that my colleagues interpret it—at least not without an amendment." (*Id.* at 29.) "The original definition of 'dangerous weapon' covered only 'an instrument capable of inflicting death or serious bodily

injury'; it did not cover an object used to create the impression that one had such a weapon." (*Id.* (citing U.S.S.G. § 1B1.1 cmt. n.1(d) (1987).) Cases recognized this, as well as the Sentencing Commission itself which "unofficially suggested that a 'toy gun [did] not meet the requirements of a . . .dangerous weapon' and thus did not trigger the dangerous-weapon enhancement." (*Id.* (citing *U.S.S.C. Answers Questions Most Frequently Asked About the Sentencing Guidelines*, 1 Fed. Sent. R. 423, 423, 425‑26 (Apr. 1989) (Question 36).)

So, Judge Murphy explained, in 1989 the Sentencing Commission first expanded the definition to include an object "that appeared to be a dangerous weapon," and then later in 2000 expanded the definition further to its current form which includes "an object that is not an instrument capable of inflicting death or serious bodily injury but . . . the defendant used the object in a manner that created the impression that the object was such an instrument." U.S.S.G. § 1B1.1 cmt. n.1(E) (2000); (Pet. Appx. (Murphy, J., concurring) at 29-30); U.S.S.G. App. C, amend. 71 (effective Nov. 1, 1989); U.S.S.G. App. C Supp., amend. 110 (effective Nov. 1, 1989) (applying to § 2B3.1). And, when making this final amendment, "the Commission effectively acknowledged that the commentary defined dangerous weapon to mean *not* a dangerous weapon: 'The definition of 'dangerous weapon' in Application Note 1(d) of §1B1.1 also is amended to clarify under what circumstances an object that is *not an actual, dangerous weapon* should be treated as one for purposes of guideline application.'" (Pet. Appx. (Murphy, J. concurring) at 30 (citing U.S.S.G. App. C, Vol. II, amend. 601 (effective Nov. 1, 2000) (emphasis in *Tate*).)

At the same time, Judge Murphy explained that the majority's reliance on *McLaughlin v. United States* was misplaced, as that case addressed possession of an

unloaded gun, not pretending that one's concealed hand was a weapon. (Pet. Appx. (Murphy, J. concurring) at 27.) He explained that "[e]ven in the context of the bank-robbery statute itself, courts have not read *McLaughlin* as broadly as the government needs here." (*Id.* at 28 (citing 18 U.S.C. § 2113(d).) And, "[a]t day's end, neither *McLaughlin* nor any other precedent can justify the atextual conclusion that a concealed hand is a 'dangerous weapon.'" (*Id.*) Thus, "[b]oth the plain meaning of 'dangerous weapon' and the legal backdrop against which the Commission first used this phrase show that we should take this commentary for what it is: an improper enlargement of the guideline's scope." (*Id.* at 21.)

Because Judge Murphy's view is more in line with *Kisor v. Wilkie,* and is faithful to how the Sentencing Commission itself first defined "dangerous weapon" when it established the Guidelines, Tate asks the Court to grant his petition for certiorari.

REASONS FOR GRANTING OF THE WRIT

This case presents an important question regarding the scope of the term "dangerous weapon" as used in the United States Sentencing Guidelines' robbery guideline. This question implicates *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) as well as the Sixth Circuit's holding in *United States v. Riccardi*, 989 F.3d 476, 479 (6th Cir. 2021), where the Courts reemphasized the contours of an agency's ability to define its own genuinely ambiguous regulations. In particular, the panel below issued a divided opinion centered around whether the Guideline phrase "possessed" a "dangerous weapon" can "reasonably be read to cover a robber who only pretends to have such a weapon by concealing his hand in a bag." (Pet. Appx. at 19 (Murphy, J., concurring); Pet. Appx. at 4.)

This issue is important because of the frequency with which the specific robbery guideline at issue, U.S.S.G. § 2B3.1, is used. In fiscal year 2020 alone, 1,297 people were sentenced under § 2B3.1 as their primary guideline, with still others being sentenced under it via a cross-reference. U.S.S.G. *FY 2020 Sourcebook of Federal Sentencing Statistics*, Table 20 "Federal Offenders Sentenced Under Each Chapter Two Guideline, Fiscal Year 2020." Given the overstep here and the frequency with which this guideline is applied, this is an important issue that warrants the attention of the Court.

This case presents a good vehicle to address this question, as both the majority and the concurrence below engage in thorough analysis touching on the major points at issue. It also presents the Court with the ability to address the Sixth Circuit's overstep in deferring to Sentencing Commission commentary that broadly expands the scope of a guideline term in a frequently utilized guideline.

ARGUMENT

I. The guideline term "dangerous weapon" is limited to an object capable of causing serious bodily injury, a meaning which cannot be expanded by a guideline's commentary to include a person pretending his hand is a gun.

In *United States v. Havis*, the Sixth Circuit sitting en banc explained that the commentary to the Guidelines cannot define the limits of a guideline term carte blanche. 927 F.3d at 386. Instead, commentary, including application notes, are cabined by the scope of the guideline itself. *Id.* ("[c]ommentary binds courts only 'if the guideline which the commentary interprets will bear the construction'" (quoting *Stinson v. United States*, 508 U.S. 36, 46 (1993))).

This limitation exists because "[u]nlike the Guidelines themselves . . . commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment." *Havis*, 927 F.3d at 386. Thus, if commentary *adds* to the guideline, instead of merely interpreting it, "the institutional constraints that make the Guidelines constitutional in the first place—congressional review and notice and comment—would lose their meaning." *Id.* at 386-87 (citing *United States v. Winstead*, 890 F.3d 1082, 1092 (D.C. Cir. 2018)). An application note that expands the reach of a guideline beyond the scope of the guideline term deserves no deference and is not binding. *Havis*, 927 F.3d at 387. Here, the Sixth Circuit erred by upholding the district court's reliance on an application note that went far beyond interpreting the guideline term, but instead drastically expanded its scope. Specifically, the Sixth Circuit erred by concluding that the meaning of "possessed" a "dangerous weapon" as used in U.S.S.G. § 2B3.1(b)(2)(E) itself encompasses an individual pretending his hand is a gun—even when no weapon is present.

However, pursuant to *Havis*, *Kisor* and *Riccardi*, both conclusions are erroneous. In *Kisor*, a case that issued shortly after *Havis*, this Court explained that deference to an agency's interpretation of its own rules (often called *Auer* or *Seminole Rock* deference) "retains an important role in construing agency regulations." 139 S. Ct. at 2408 (citing *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)). But, the Court explained, it was also "reinforce[ing the] limits," of *Auer* deference, as the doctrine "is potent in its place, but cabined in its scope." *Id.* And, in *Riccardi*, the Sixth Circuit held that *Kisor* applies to the federal Sentencing Guidelines and its commentary, requiring a fresh look at the impact of commentary. 989 F.3d at 485.

Before resorting to the commentary, three precursors must be met. *Kisor*, 139 S. Ct. at 2415-16; *Riccardi*, 989 F.3d at 485-89. First, the regulation must be genuinely ambiguous; second, the interpretation in the commentary must be a reasonable reading of the guideline—it must address the zone of ambiguity the court identifies in the guideline term, and (3) the Court must make an "independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Kisor*, 139 S. Ct. at 2415-16.

"[B]efore concluding that a rule [i.e. guideline term] is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* (citing *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9 (1984)). "[I]f there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense." *Kisor*, 139 S. Ct. at 2415. In determining whether a term is genuinely ambiguous "a court cannot

wave the ambiguity flag just because it found the regulation impenetrable on first read." *Kisor*, 139 S. Ct. at 2415. Instead "a court must 'carefully consider[ ]' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Id.*

Here, the term at issue, "dangerous weapon" is unambiguous, and limited to items capable of inflicting death or serious bodily injury. *See Kisor*, 139 S. Ct. at 2415; *Havis*, 927 F.3d at 386. The Sixth Circuit erred by relying upon this Court's *McLaughlin* cases, which interpreted of the term "dangerous weapon" in a different, but related context, instead of looking to how the Commission itself first explicitly defined "dangerous weapon." (Pet. Appx. at 7; *see id*. (Murphy, J., concurring) at 27-28.)

In *McLaughlin*, decided just a year before the Sentencing Commission first established the Guidelines, the Supreme Court interpreted the term "dangerous weapon" as that term was used in 18 U.S.C. § 2113(d). (Pet. Appx. at 7 (citing *McLaughlin*, 476 U.S. at 17-18).) There the Court gave "dangerous weapon" an expansive meaning, by holding that it encompassed the use of an unloaded gun during a robbery. (*Id.*) The Sixth Circuit then presumed that because this Court decided *McLaughlin* just a year before the Sentencing Commission established the Guidelines, the Sentencing Commission must have intended "dangerous weapon" in U.S.S.G. § 2B3.1(b)(2)(E) to also have the same reach. (*Id.*)

The problem with the panel majority's reliance on *McLaughlin* is that the Sentencing Commission specifically defined "dangerous weapon" narrowly, and without reference to *McLaughlin*. "Dangerous weapon" was originally defined to include only "an instrument capable of inflicting death or serious bodily injury." USSG § 1B1.1, cmt. (n.1(d)) (1987).

Thus, when first approving the Guidelines, Congress presumably understood the term "dangerous weapon" in U.S.S.G. § 2B3.1(b)(2) to mean *only* objects capable of inflicting death or serious bodily injury—not individuals who pretend their hand is a gun.

Since that time, the Commission has expanded "dangerous weapon" to include a broader and broader range of items and conduct. But each of those expansions occurred via commentary, and thus none were subjected to Congressional review. U.S.S.G. App. C, Vol I (Amend. 71 (1989));[4] U.S.S.G. § 1B1.1, cmt. (n.1(E)); *see also* U.S.S.G. § 2B3.1, cmt. (n.2). And, because those expansions expanded, even contradicted, the original meaning given the term by the Commission itself, those expansions cannot be read as evidence that the Commission initially intended the term "dangerous weapon" to be more expansive than the limited definition it actually used. (*See also* Pet. Appx. (Murphy, J., concurring) at 27-28 (detailing how *McLaughlin's* definition of "dangerous weapon" is still narrower than that used in the commentary at issue here).)

To the contrary, when the Commission most recently redefined "dangerous weapon" it explained it intended to expand the term to a broader range of conduct than it already encompassed. (*Id.*) In 2000, the Commission explained that the definition was "amended to clarify under what circumstances an object that is *not an actual, dangerous weapon* should

[4] The definition of "dangerous weapon" had previously be redefined, via commentary, in a way that expanded the term's scope. In 1989, *via* Amendment 71, "dangerous weapon" was defined as "an instrument capable of inflicting death or serious bodily injury," *and* "[w]here an object that appeared to be a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon" was added. U.S.S.G. § 1B1.1, cmt. (n.1(d)).

be treated as one . . . ." USSG App. C, Vol II (Amend. 601, Reasons for Amend.) (emphasis added). But, by defining "dangerous weapon" (via commentary only) to include items that are not "dangerous weapons," the Commission overstepped its authority. In short, the Court cannot assume that the Commission imported *McLaughlin's* expansive definition of "dangerous weapon" when it explicitly defined "dangerous weapon" as something far narrower. And, even if the Sentencing Commission did intent to import *McLaughlin's* definition (which was limited to an individual waiving around an unloaded firearm) that definition itself did not go so far as to include an individual concealing his empty hand in a bag. (*See* Pet. Appx at 28 (Murphy, J., concurring) (explaining that "[e]ven in the context of the bank-robbery statute itself, courts have not read *McLaughlin* as broadly as the government needs here").) The Commission told us what it intended "dangerous weapon" to mean, and that did not include *McLaughlin's* broader definition, and it certainly didn't reach people pretending their hands were guns.

The concurring judge instead has the better approach. Judge Murphy, consistent with *Kisor* and *Riccardi*, started with the ordinary meaning of the words used in the guideline, looking to the dictionary definitions of the terms. (Pet. Appx. at 21-22); *see also United States v. Hill*, 963 F.3d 528, 532 (2020). Per the Merriam-Webster dictionary, "dangerous" means either "involving possible injury, pain, harm, or loss **:** characterized by danger," or "able or likely to inflict injury or harm."[5] In turn, "weapon" means either "something (such as a club, knife, or gun) used to injure, defeat, or destroy" or in a more

[5] Available at https://www.merriam-webster.com/dictionary/dangerous (last visited Dec. 13, 2021).

figurative way "a means of contending against another" such as when a "[t]he pitcher's slider is his most dangerous weapon".[6] When we combine these two words into the term "dangerous weapon" the phrase means "an object that when used as an instrument of offense is capable of causing serious bodily injury."[7] Thus, the ordinary meaning of "dangerous weapon" is an object capable of causing serious bodily injury.

The context within which the term "dangerous weapon" is used is also important to determining its meaning. *Kisor*, 139 S. Ct. at 2415 (citation omitted); *Hill*, 963 F.3d at 533 ("we must examine the whole text and structure to decide how 'a normal speaker of English' would understand the words ["dangerous weapon"] in the 'circumstances in which they were used'" (citation omitted)). Here, as detailed by Judge Murphy, even when we look to the generally understood legal use of "dangerous weapon" at the time the Guidelines were promulgated, it was also limited to "any article which, in circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or other serious injury." (Pet. Appx. at 20 (quoting Black's Law Dictionary 1162 (6th ed. 1990).)

The traditional rules of construction permit only one reasonable meaning of "dangerous weapon"—an object capable of causing serious bodily injury to another. Given that the guideline term is unambiguous, this Court need not resort to the application note at all. "If uncertainty does not exist, there is no plausible reason for deference. The regulation

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[6] Available at https://www.merriam-webster.com/dictionary/weapon (last visited Dec. 13, 2021).

[7] Available at https://www.merriam-webster.com/legal/dangerous%20weapon (last visited Dec. 13, 2021).

then just means what it means—and the court must give it effect, as the court would any law." *Kisor*, 139 S. Ct. at 2415.

But, even if "dangerous weapon" suffers from some ambiguity, the Sentencing Commission's attempt to drastically broaden the scope of the term via commentary is unreasonable. *Kisor*, 139 S. Ct. at 2415 ("[i]f genuine ambiguity remains, moreover, the agency's reading must still be 'reasonable'" (citation omitted)). The commentary definition "must fall 'within the bounds of reasonable interpretation'" of the guideline, which is determined by "the zone of ambiguity the court has identified after employing all its interpretive tools." *Id.* at 2416 (citation omitted). Because "dangerous weapon" is limited to instruments capable of causing serious injury, the Commission's attempt to expand that term to include individuals pretending their empty hand is a gun goes far beyond any reasonable zone of ambiguity.

If the Commission wishes to expand the term "dangerous weapon" to include an item that is "not an actual, dangerous weapon," it must seek to amend the language of the guideline itself by submitting the change for congressional review. 927 F.3d at 387 (citing *Winstead*, 890 F.3d at 1092). The Court should grant the petition for certiorari to address this overstep of the Sentencing Commission and the Sixth Circuit.

II. De novo review is appropriate here, but even if plain error review applies, the guideline calculation error should be corrected.

Tate sufficiently preserved his argument that he should not receive the guideline enhancement for "possessing" a "dangerous weapon," even if his specific reasons asserted below were not precisely what he asserts on appeal. (Pet. Appx. at 6 (explaining that "[w]hether that distinction means Tate's argument today was unpreserved, and thus subject

to plain error review is a fair point of debate" (citing *United States v. Fleming*, 894 F.3d 764, 771 (6th Cir. 2018)).) Indeed, as the Sixth Circuit's decision in *United States v. Prater*, 766 F.3d 501 (6th Cir. 2014), makes clear, Tate's clear objection to the enhancement was sufficient to preserve his claim, such that de novo review is applies. *Id.* at 506-07 (concluding that, "albeit barely," the first paragraph of Prater's objection which asserted only the general argument that he did not qualify for the Armed Career Criminal Act enhancement was sufficient to preserve his specific argument asserted only on appeal as to why his third-degree burglary convictions should not subject him to the ACCA). At the same time, Mr. Tate is distinct from the defendant in *United States v. Cabrera*. 811 F.3d 801 (6th Cir. 2016), where plain error review applied because *no* objection to his sentence was raised before the district court at all. *Id.* at 808. *Prater*, not *Cabrera*, applies here.

Finally, even if the Court were to conclude that plain error review applies, it should still correct the error. This Court "repeatedly has reversed judgments for plain error on the basis of inadvertent or unintentional errors of the court or the parties below." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018) (acknowledging that federal sentencing often entails overlooked mistakes, which none-the-less should be addressed on appeal). And, a guideline calculation error is just the sort of error that meets the plain error standard in the ordinary case. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1349 (2016) (a guideline calculation error effects an individual's substantial rights because there is "a reasonable probability that the district court would have imposed a different sentence under the correct range"); *Rosales-Mireles*, 138 S. Ct. at 1907-08 (the risk that an individual will serve a sentence longer than necessary due to a guideline calculation error is an

"unnecessary deprivation of liberty [that] particularly undermines the fairness, integrity or public reputation of judicial proceedings").

The only potential question here is whether the error is plain, and it is. "It is well-established in [the Sixth Circuit] that a district court's failure to use a properly-calculated Guidelines range constitutes plain-error." *United States v. Batista*, 415 F. App'x 601, 607 (6th Cir. 2011) (citing *United States v. Baker,* 559 F.3d 443, 454 (6th Cir. 2009) (additional citations omitted). The district court's reliance on commentary that expanded the meaning of the phrase "possessed" a "dangerous weapon" is obvious under the rationales utilized in *Havis* and *Kisor*. And that is sufficient to find the error is plain. *United States v. Olano*, 507 U.S. 725, 734 (1993); *see United States v. Cavasoz*, 950 F.3d 329, 337 n.3 (6th Cir. 2020) ("[B]inding case law need not address the same statute for the district court's interpretation of that statute to be plain error . . . [r]ather, binding case law must clearly answer the question presented.").

Here, *Havis* and *Kisor* made clear that courts "should not reflexively defer to an agency's interpretation" of its regulations, [and that] courts must also awaken "'from [their] slumber of reflexive deference' to the [guidelines] commentary." *Riccardi*, 989 F.3d at 485 (*citing United States v. Nasir*, 982 F.3d 144, 158, 177 (3d Cir. 2020) (Bibas, J., concurring in part) (concluding that pre-*Kisor* cases upholding certain guideline commentary no longer control because *Kisor* "cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations")). Moreover, whether an error is plain is measured by the state of the law at the time of appeal. *See Henderson v. United States*, 568 U.S. 266, 279 (2013); *United States v. Smith*, No. 17-3368, 2019 WL 4594666, at *3 (6th Cir. Sept. 23, 2019) (finding erroneous application of the career offender enhancement

became plain only while case was on appeal, and remanding because the career offender guidelines were substantially higher than his correct range).

Even if the Court were to conclude that Mr. Tate did not preserve his challenge to the guideline enhancement, the Court should still conclude that plain error occurred and that remand for resentencing in required.

CONCLUSION

In consideration of the foregoing, Tre Reshawn Tate submits that the petition for certiorari should be granted, the order of the Sixth Circuit Court of Appeals vacated, and the case remanded for resentencing.

Respectfully submitted,

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