NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

DAMON RAMON MARTINEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

VIRGINIA L. GRADY
Federal Public Defender

HOWARD A. PINCUS
Asst. Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

QUESTION PRESENTED

This Court has applied so-called Seminole Rock or Auer deference, developed in the context of an agency's interpretation of its regulations, to commentary the United States Sentencing Commission issues to is notice-and-comment guidelines. In Kisor v. Wilkie, 139 S. Ct. 2400, 2414 (2019), the Court clarified that there cannot be any Seminole Rock deference unless a court first determine that a regulation is "genuinely ambiguous."

Section 4B1.2 of the guidelines defines "crime of violence" to "mean" certain enumerated offenses, or offenses that have as an element the use, attempted use or threatened use of physical force. The commentary states this also includes attempts and conspiracies to commit crimes of violence. The circuits are split 8-4 as to whether this commentary is entitled to deference, with many adhering to their pre-Kisor precedent that it is and refusing to reconsider that precedent.

The question presented here is:

> Does the Sentencing Commission's commentary impermissibly expand the unambiguous definition of "crime of violence" in U.S.S.G. § 4B1.2 to include attempts and conspiracies to commit crimes of violence?

STATEMENT OF RELATED CASES

United States v. Martinez, No. 18-cr-00522-WJM (D. Colo.)
Judgment entered October 16, 2019.

United States v. Martinez, No. 19-1389 (10th Cir.)
Judgment entered June 23, 2021; rehearing denied December 14, 2020.

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PRAYER

Petitioner, Damon Ramon Martinez, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on June 23, 2021.

OPINIONS BELOW

The unreported decision of the United States Court of Appeals for the Tenth Circuit, see United States v. Martinez, 860 F. App'x 584 (10th Cir. June 23, 2021), is found in the Appendix at A1. The oral decision of the United States District Court for the Colorado on the guideline issue raised here is found in the appendix at A6.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). The Tenth Circuit denied Mr. Martinez's petition for rehearing *en banc* on December 13, 2021. A6. Ninety days from that date is Sunday, March 1,

2022, making this petition due on the next business day of Monday, March 14, so this petition is timely.

GUIDELINE PROVISIONS INVOLVED

This petition concerns two provisions of the United States Sentencing Guidelines, and an application note to each provision. Section 2K2.1 of the Sentencing Guidelines provides in relevant part:

> (a) Base Offense Level (Apply the Greatest):
>
> * * *
>
> (2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or controlled substance offense;
>
> * * *
>
> (4) **20**, if --
>
> (A) 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; or . . . .

Application Note 1 to that guideline provides in relevant part:

> 1. Definitions. -- For purposes of this guideline:
>
> * * *

> "Crime of Violence" has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2.

Section 4B1.2 of the Sentencing Guidelines provides in relevant part:

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that --

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

Application Note 1 to Section 4B1.2 provides in relevant part:

1. Definitions. -- For purooses of this guideline --

> "Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

STATEMENT OF THE CASE

In Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945), this Court addressed the meaning of an administrative regulation. Although this Court deemed that meaning to be clear, id. at 414, it proceeded to state that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation," id. This Seminole Rock deference -- more recently referred to as Auer deference, after this Court's decision in Auer v. Robbins, 519 U.S. 452 (1997) -- became the definitive formulation of the weight accorded an agency's interpretation of its own rule.

This deference was meant to operate only if the governing regulation was ambiguous. But this crucial limitation was often ignored. As this Court recently recognized in Kisor v. Wilkie, 139 S. Ct. 2400 (2019), it had itself sent "mixed messages," id. at 2414. Just as the other federal courts often did, this Court too upheld "agency interpretations sometimes without significant textual analysis of the underlying regulation." Id.

This Court granted review in Kisor to decide whether to overrule Auer. Although it declined to do so, the Court in Kisor "reinforced some of

the limits inherent in the Auer doctrine." Id. at 2415. Chief among them is that "a court should not afford Auer deference unless the regulation is genuinely ambiguous." Id. at 2415. In emphasizing such limits, this Court recognized that the Seminole Rock description of deference to agency interpretation unless the interpretation is "plainly erroneous or inconsistent" with the regulation -- which is the "most classic formulation of the test" -- "may suggest a caricature of the doctrine, in which deference is reflexive." Id. at 2414-15.

This Court imported the Seminole Rock formulation into the context of the United States Sentencing Guidelines in Stinson v. United States, 508 U.S. 36 (1993). The guidelines themselves are promulgated by the United States Sentencing and are subject to the notice-and-comment provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 553. See 28 U.S.C. § 994(x). The proposed amendments are then submitted to Congress, which has six months to review them before they take effect. 28 U.S.C. § 994(p). In both ways, this resembles the rulemaking of Executive Branch agencies. 5 U.S.C. § 801. The Sentencing Commission also issues commentary about the Guidelines, which is not subject to notice-and-

comment, or to approval, rejection or modification by Congress. It was one such commentary that was at issue in Stinson.

This Court explained in Stinson that the guidelines "are the equivalent of legislative rules adopted by federal agencies." Stinson, 508 U.S. at 45. And it treated the commentary "as akin to an agency's interpretation of its own legislative rules." Id. It thus applied Seminole Rock deference to the commentary. Id. (quoting Seminole Rock, 325 U.S. at 414).

This case involves commentary that is inconsistent with guideline text. Damon Martinez pleaded guilty to being a felon in possession of a firearm, contrary to 18 U.S.C. § 922(g). The relevant sentencing guideline for that offense is § 2K2.1. It provides for a base-offense level of 24 if the possession occurs after two or more convictions for either a crime of violence or a controlled-substance offense, U.S.S.G. § 2K2.1(a)(2), and a base-offense level of 20 if it occurs after only a single such conviction, id., § 2K2.1(a)(4).

Section 2K2.1 does not itself define what is a crime of violence. Instead, application note 1 to that guideline incorporates the definition of

the term in the career-offender context. See U.S.S.G. § 2K2.1, comment. (n.1). The note states that "'Crime of violence' has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2." Id.

Section 4B1.2(a), in turn, defines crimes of violence as being completed offenses. It says the term "means" any state or federal offense, punishable by more than a year in prison, that is either an enumerated offense, U.S.S.G. § 4B1.2(a)(2), or that "has an element the use, attempted use, or threatened use of physical force against the person of another," id., § 4B1.2(a)(1).

Robbery is one of the enumerated offenses in § 4B1.2(a)(2). In the district court, Mr. Martinez agreed that his Colorado robbery conviction was therefore a crime of violence. But he urged that neither of his convictions for inchoate offenses under Colorado law -- one for attempted robbery, and the other for conspiracy to commit menacing -- qualified as a crime of violence. As to each, he insisted that the commentary impermissibly expanded the guideline text. And so, he continued, his base-offense level should be 20 based on his prior conviction for the

completed robbery, and not the 24 assigned by the presentence report, which also counted as crimes of violence his prior convictions for the inchoate offenses.

Mr. Martinez acknowledged that his position was foreclosed in the Tenth Circuit by United States v. Celso Martinez, 602 F.3d 1166 (10th Cir. 2010). That case, like this one, was a felon-in-possession case. The version of § 4B1.2(a)(2) that applied there listed burglary of a dwelling as a crime of violence, id. at 1173, and the district court increased Mr. Celso Martinez's guideline range by treating his Arizona convictions for attempted second-degree burglary as crimes of violence, id. at 1168. The Tenth Circuit rejected the contention that Application Note 1 to § 4B1.2 was inconsistent with the guideline text because it treated all attempts to commit crimes of violence (and similar inchoate offenses) as crimes of violence. In doing so, the court of appeals did not engage in a textual analysis of the guideline definition of crime of violence to determine whether it was ambiguous. Id. at 1174. Instead, the court asked only whether it was possible to reconcile the guideline definition and the application note. Id. The Tenth Circuit concluded that this was possible, as to enumerated offenses, by viewing the

application note as a "definitional provision" that showed that when the guideline speaks of a particular offense it is using a "shorthand" that also includes associated inchoate offenses, so as not to "clutter[] the guideline":

> . . . . the note may be used as a definitional provision. It tells us when the guideline uses the word for a specific offense, that word is referring to not just the completed offense, but also "aiding and abetting" the offense, "conspiring" to commit the offense, and "attempting" to commit the offense. Rather than cluttering the guideline with, say, "burglary, aiding and abetting burglary, conspiring to commit burglary, and attempting to commit burglary," the Sentencing Commission uses the shorthand expression "burglary."

Id.

The district court in this case overruled Damon Martinez's objection to his Colorado attempted-robbery conviction being considered a guideline crime of violence on the authority of Celso Martinez. Because Mr. Martinez conceded that his robbery conviction under Colorado law qualified as a guideline crime of violence, this left him with two such prior convictions, enough to set his base-offense level at 24. The district court therefore deemed his similar objection to the conspiracy-to-commit-menacing conviction, and his other independent arguments for why that conviction was not a crime of violence, to be moot.

From the base-offense level of 24, the district court imposed a four-level enhancement and a three-level reduction in offense level for acceptance of responsibility, for a total-offense level of 25. In Criminal History Category V, this yielded an advisory guideline range of 100-120 months. Had the court instead agreed with Mr. Matrtinez that the base-offense level was 20, his total-offense level would have been 21, and his advisory guideline range would have been 70-87 months. The district court varied downward from the range of 100-120 months that it believed applied and sentenced Mr. Martinez to 58 months in prison.

On appeal, the Tenth Circuit rejected Mr. Martinez's argument that the commentary improperly expanded the guideline text by including inchoate offenses on the authority of Celso Martinez. A5. The Tenth Circuit then denied his petition for rehearing *en banc* to reconsider Ccelso Martinez. A9.

REASONS FOR GRANTING THE WRIT

This case presents an important question of Seminole Rock/Auer deference in the context of the federal sentencing guidelines that requires this Court's intervention to resolve.

The definitions of "crime of violence" and "controlled substance offense" in U.S.S.G. § 4B1.2 have profound implications for sentences imposed in a large number of federal criminal cases every year. The definitions are used to determine who is a career offender, which in most cases results in a markedly higher guideline range. The definitions are also imported into other guidelines where they can cause a large increase in offense level and guideline range, as they did here. Mr. Martinez's offense level was increased by four levels, and his guideline range increased by more than 40% at the bottom of the range (from 70 months to 100 months) based on two prior convictions for inchoate offenses that he argued were not crimes of violence.

This should have been an easy case for Mr. Martinez after Kisor v. Wilkie, 139 S. Ct. 2400 (2019). The guideline text speaks of "crime of violence," as well as "controlled substance offense," only in terms of completed offenses. The commentary nevertheless provides that these

terms include as well attempts and conspiracies to commit a crime of violence.

The obvious conclusion after Kisor is that the case for deference to the commentary fails out of the gate. With no ambiguity in the guideline text, much less "genuine" ambiguity, Kisor, 139 S. Ct. at 2414, 2415, there is no "possibility of deference" to the expansion of the text that the commentary works by including inchoate offenses, id. at 2414. Indeed, two *en banc* circuits have *unanimously* reached this conclusion, one as to the guideline definition of "crime of violence" and one as to its definition of "controlled substance offense."

But the courts of appeals are actually split 8-4 against this conclusion. This is largely because they are relying on pre-Kisor authority. There is little hope this split will resolve on its own. Even in the wake of contrary decisions, at least four circuits have declined to convene *en banc* to change their prior precedent.

Only this Court's intervention can provide uniformity on the question presented. The resolution of the question is consequential not just because of the many extra years in prison that defendants will serve under

the current majority position unless this Court acts. Resolving the question is also important because it will inform the courts of appeals' approach to other guideline commentary, and because the overly broad deference of most circuits to guideline commentary raises serious constitutional concerns. This Court should therefore accept this case for review.

A. The courts of appeals are deeply split on the question presented, with most persisting in precedent issued before Kisor that wrongly defers to commentary even though the guideline text is clear, and that split is likely to persist.

What this Court recognized as the "mixed messages" it had sent as to when there can be deference to an agency's interpretation of its own notice-and-comment rule, Kisor, 139 S. Ct. at 2414, led most court of appeals to ignore a necessary prerequisite for any deference to commentary to the United States Sentencing Guidelines. They typically did not address the threshold inquiry this Court reiterated in Kisor. That is, they did not try to determine at the outset whether the guideline itself was genuinely ambiguous. Instead, they deferred to commentary even when the relevant guideline was not ambiguous at all.

The Tenth Circuit's opinion in this case is a paradigmatic example of this. Like most such cases, it involved the definition of either "crime of violence" or "controlled substance offense" in § 4B1.2. The Tenth Circuit in United States v. Celso Martinez, 610 F.3d 1066 (10th Cir. 2010), made no effort to decide whether there was ambiguity as to whether § 4B1.2(a)(2) included both completed enumerated crimes of violence and their attempts (or other inchoate offenses), before affording Application Note 1 deference.

Nor would a determination of ambiguity have been possible. By stating what the term crime of violence "means," U.S.S.G. § 4B1.2(a), the definition in the guideline text excludes anything else. "As a rule, a definition that declares what a term means excludes any meaning that is not stated." Colautti v. Franklin, 439 U.S. 379, 392 n.10 (1979); see also Burgess v. United States, 553 U.S. 124, 130 (2008) (same). An attempt to commit an offense and the completed offense are also not the same, an obvious point that this Court stressed in the Armed Career Criminal Act context in James v. United States, 550 U.S. 192, 197 (2007).

Rather than make the necessary threshold determination of whether there was genuine ambiguity in the guideline text, the Tenth Circuit took a

very different approach. It asked only whether it was possible to reconcile the text and the application note. Celso Martinez, 602 F.3d at 1174. And it concluded they could be reconciled by ascribing an unexpressed intent -- and one at odds with a normal reading of text, as reflected in cases like Colautti and Burgess -- to the guideline. Id. The Tenth Circuit theorized that Application Note 1 showed that when the Sentencing Commission wrote completed crimes in the guideline it was using them as "shorthand" for inchoate offenses like attempting to commit the listed offenses, or conspiring to commit them. Id.

This is a good demonstration of how pliable the classic Seminole Rock formulation that agency interpretation not be "plainly erroneous or inconsistent with the regulation," Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945), has been in the context of the Sentencing Guidelines. What the Tenth Circuit and other circuits have used in this area -- and what, as will be seen, most continue to use -- reflects "a caricature of the doctrine, in which deference is reflexive." Kisor, 139 S. Ct. at 2414-15.

Even before Kisor, two circuits had not been misled by this Court's mixed messages on Seminole Rock/Auer deference, and had refused to

defer to commentary in the absence of a threshold determination that the guideline was ambiguous. In United States v. Winstead, 890 F.3d 1082, 1091 (D.C. Cir. 2018), the D.C. Circuit recognized the decisions of several other circuits deferring to Application Note 1 of § 4B1.2. But it held such deference to be impermissible in light of the clear guideline text. It noted that the guideline had a detailed definition of "controlled substance offense," the provision of § 4B1.2 at issue there, and that the commentary "adds a crime, 'attempted [drug] distribution," that is not included in the guideline. Id. at 1090. Seminole Rock deference, the court explained, "surely" does not allow for such a consequential impact on defendants "with no grounding in the guidelines themselves." Id. at 1092.

The *en banc* Sixth Circuit also unanimously reached the same conclusion before Kisor. United States v. Havis, 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam). Like this case, Havis involved U.S.S.G. § 2K2.1, which incorporates in its commentary the definitions of "crime of violence" and "controlled substance offense" in § 4B1.2 and its application note 1. The *en banc* court easily determined that § 4B1.2 specifically identified what crimes qualify as controlled-substance offenses, and that "none are attempt

crimes." Id. at 386. Application Note 1, it explained, "did not interpret a term in the guideline itself -- no term in § 4B1.2(b) would bear that construction." Id. Rather, the effect of the note was impermissible "to *add* an offense not listed in the Guideline." Id. (emphasis in original).[1]

After Kisor, two other courts of appeals have agreed with the D.C. and Sixth Circuits. The *en banc* Third Circuit did so unanimously in United States v. Nasir, 982 F.3d 144, 156-60 (3d Cir. 2020) (en banc) (Part II.D of opinion); id. at 177 (Bibas, J., concurring and joining Part II.D of the *en banc* opinion); id. at 179 (Matey, J., concurring and joining *en banc* opinion in full); id. at 190 (Porter, J., concurring as to Parts I and II.D of *en banc* opinion and dissenting as to Part II.E). And the Fourth Circuit recently did

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[1] As noted, the career-offender definitions are imported into U.S.S.G. § 2K2.1 through its Application Note 1. The application note provides that "crime of violence" and "controlled substance" are to be given their meaning in § 4B1.2 and that guideline's Application Note 1. U.S.S.G. § 2K2.1, comment. (n.1). Neither the Tenth Circuit in Celso Martinez nor the *en banc* Sixth Circuit in Havis thought this changed the analysis and they were right. Application Note 1 to § 4B1.2 has legitimate currency only if it is a permissible interpretation of that guideline's text. And as the court cogently explained in Havis, requiring courts "to defer to commentary *on* other commentary [] would carry an even more tenuous connection to the guideline text." United States v. Havis, 927 F.3d 382, 386 (6th Cir. 2019) (en banc) (per curiam) (emphasis in original).

so in United States v. Campbell, 22 F.4th 438, 443-44 (4th Cir. 2022). In doing so, it observed that if there were any doubt that the plain text of § 4B1.2 required the conclusion that Application Note 1 was inconsistent with the guideline, and so was not entitled to deference, this Court's decision in Kisor "renders this conclusion indisputable." Id. at 444.

In his concurrence in Nasir, Judge Bibas aptly summarized the general state of the law in the circuits that (Winstead and Havis excepted) had obtained in the wake of Stinson v. United States, 508 U.S. 36 (1993). "For decades," he wrote, "we and every other circuit" followed Stimson and "gave nearly dispositive weight to the Sentencing Commission's commentary, not the Guidelines' plain text." Nasir, 982 F.3d at 177 (Bibas, J., concurring). But, he continued, courts "must look at things afresh." Id. As he put it, this Court in Kisor "awoke us from our slumber of reflexive deference." Id.

Or so one would have hoped. Unfortunately, a majority of the courts of appeals continue to sleep. The Fourth Circuit in Campbell observed that the First, Second, Seventh, Eighth and Eleventh Circuits "have continued to hold that inchoate crimes like attempt and conspiracy qualify as controlled

substance offenses under U.S.S.G. § 4B1.2(b)." Campbell, 22 F.4th at 443 (citing United States v. Lewis, 963 F.3d 16, 21-22 (1st Cir. 2020), cert. denied, 141 S. Ct. 2826 (2021); United States v. Richardson, 958 F.3d 151, 154-55 (2d Cir.), cert. denied, 141 S. Ct. 423 (2020); United States v. Smith, 989 F.3d 575 (7th Cir.), cert. denied, 142 S. Ct. 488 (2021); United States v. Meritt, 924 F.3d 809, 811-12 (8th Cir. 2019)). And as noted, so has the Tenth Circuit. It refused without a poll a request for initial rehearing *en banc* to revisit Celso Martinez soon after Kisor issued, see United States v. Lovelace, No. 19-1100, slip op. at 1 (10th Cir. Oct. 19, 2019) (order); and it refused post-opinion petitions for rehearing *en banc* to do so, again without a poll, in both United States v. Lovato, 950 F.3d 1337 (10th Cir. 2020), rehearing and rehearing *en banc* denied, slip op. at 1 (10th Cir. June 23, 2020) (order), cert. denied, 141 S. Ct. 2814 (2021), and this case, A9.

The two remaining circuits -- the Fifth and the Ninth -- must be added to the list of those that have stuck with pre-Kisor authority to reject the position Mr. Martinez presses here. As the Fourth Circuit observed, panels of those courts have indicated they would hold Application Note 1 to be contrary to § 4B1.2, and therefore not entitled to deference, were they

not constrained by contrary circuit precedent. Campbell, 22 F.4th at 443 (citing United States v. Crum, 934 F.3d 963, 966 (9th Cir. 2019), cert. denied, 140 S. Ct. 2629 (2020) and United States v. Goodin, 835 F. App'x 771, 782 n.1 (5th Cir. 2021) (unpublished)).

All told, then, four circuits follow the approach of Kisor. Eight do not. This split, covering every circuit that hears criminal cases, is not just a wide one, but one likely to persist without this Court's intervention. Of the eight circuits that have persisted in their deference to the commentary after Kisor, at least four, including the Tenth Circuit, have refused to re-examine their prior precedent by convening *en banc*. United States v. Lewis, No. 18-1916 (1st Cir. Oct. 2, 2020) (order); United States v. Tabb, No. 18-338 (2d Cir. June 20, 2021) (order); United States v. Sorenson, 19-30082 (9th Cir. Nov. 3, 2020) (order).

Ordinarily, of course, this Court does not involve itself in the resolution of guidelines issues, and is content to rely on the Sentencing Commission's "statutory duty 'periodically to review and revise' the Guidelines." Braxton v. United States, 500 U.S. 344, 348 (1991) (quoting 28 U.S.C. § 944(o)). But that is an unsatisfactory option here, and not only

because this is not a typical question of what a guideline means or because it implicates the validity of the Commission's exercise of authority (both in the specific context here and generally). It is also because the Commission has not had a quorum since 2019. See United States Sentencing Comm'n, 2019 Annual Report 3 (2020). The Commission thus cannot possibly fix the problem. In the meantime, every year a large number of defendants are unlawfully subjected to higher advisory guideline ranges and, as a consequence, to longer terms (likely by many years) in prison.

B. The question presented is of exceptional importance, as it implicates whether a great many defendant are receiving significantly higher sentences than they should, and also raises serious administrative-law and constitutional concerns.

The issue this petition presents is one of great importance. The sentencing guidelines are calculated in each of the some 70,000 criminal cases in which a sentence is imposed in a typical year. Ensuring the proper approach to guideline commentary, and ensuring that there is not reflexive deference under Stinson, will have consequences in a very large number of cases, influencing the ultimate sentence even though the guidelines are

advisory. See Peugh v. United States, 569 U.S. 530, 541 (2013) (advisory "sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines"); United States v. Sabillon-Umana, 772 F.3d 1328, 1333 (10th Cir. 2014) (Gorsuch, J.) (noting that guidelines affect sentences and "'[i[ndeed, that is their very *raison d'etre*'") (quotation omitted).

Nowhere is this more significant than in the context of the career-offender definitions in § 4B1.2. Those definitions, of course, are used in determining who is to be sentenced as a career offender, which usually results in large increases in offense level, and also sets the criminal-history category in all cases at the highest level of VI. U.S.S.G. § 4B1.1(b). The result will often be an increase in the advisory guideline of many years or even decades. As well, the definitions are used to increase the offense level for many who are not career offenders. Besides the present context of § 2K2.1, in which there are sizable increases in offense level where the unlawful firearm conduct occurs after one or more prior convictions for a crime of violence and/or a controlled-substance offense, there are numerous other guidelines that import the definitions to raise offense

levels and the ultimate guideline range. See U.S.S.G. §§ 2K1.3, 2L1.2, 2S2.1, 2X6.1, 3B1.5.

The too-ready deference to commentary, without inquiry as to whether there is genuine ambiguity that might allow it, is problematic for other reasons too. For starters, there is the basis for this Court's conclusion of the constitutionality of the Sentencing Commission, which sits in the judicial branch, as an "independent agency" that "wields rulemaking power." Mistretta v. United States, 488 U.S. 361, 393, 395 (1989). This Court in Mistretta relied on the fact that the Commission's "rulemaking is subject to the notice and comment requirements of the Administrative Procedure Act." Id. at 394. But unlike with the Guidelines themselves, the governing statute does not call on Congress to review and approve of Commission commentary. Stinson, 508 U.S. at 40, 46 n.5.

Without the limitations on Seminole Rock deference -- including "[f]irst and foremost," Kisor, 139 S. Ct. at 2415, the prerequisite of genuine ambiguity in the guideline text -- it would violate the APA and the separation of powers required by the Constitution to defer to Commission commentary. For absent uncertainty of the meaning of a guideline, there

is, as with any agency interpretation of a regulation passed with delegated power, "no plausible reason for deference. The regulation then just means what it means -- and the court must give it effect, as the court would any other law." Kisor, 139 S. Ct. at 2415. Deference to guideline commentary comports with the APA and the separation of powers only when Kisor's requirements are met, as those requirements are what ensure that "courts retain a firm grip on the interpretive function." Id. at 2421.

That deference in the guideline context affects how long people will spend in prison only heightens these concerns. See Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari) (agency deference "has no role to play where liberty is at stake"). As Judge Thapar wrote in his panel concurrence in Havis, "applying Auer" to "extend" a person's "time in prison" should cause alarm bells" to go off. United States v. Havis, 907 F.3d 439, 450 (6th Cir. 2018), vacated by grant of rehearing *en banc*. "The whole point of separating the federal government's powers in the first place was to protect individual liberty." Id. (citing The Federalist No. 47, at 324 (James Madison) (J. Cooke ed. 1961); Baron de Montesquieu,

Spirit of the Laws 199 (T. Evans ed., 1777) (1978)). "It is one thing to let the Commission . . . promulgate Guidelines that influence how long defendants remain in prison." Id. at 451. But "[i[t is entirely another to let the Commission interpret the Guidelines on the fly and without notice and comment -- one of the limits that the Supreme Court relied on in finding the Commission constitutional in the first place." Id. (citing Mistretta, 488 U.S. at 412; id. at 413-27 (Scalia, J., dissenting)).

The limits Kisor stressed ensure the Commission commentary does not add to the guidelines, but only interprets them in a permissible manner. It is important that this Court ensure that these limits are enforced in the guidelines context. Otherwise, "the institutional constraints that make the Guidelines constitutional in the first place -- congressional review and notice and comment -- would lose their meaning." Havis, 927 F.3d at 386-87.

C. This case is a good vehicle to consider the question presented.

This case is a good vehicle to resolve the issue presented. Mr. Martinez preserved the issue and argued it in a petition for rehearing *en banc*, urging the Tenth Circuit to revisit its pre-Kisor precedent.

The decision on the merit should also result in a decrease in his guideline range. After Kisor, the answer to the question of whether the Commission has impermissibly expanded the text of the relevant guideline should be an easy one to resolve in Mr. Martinez's favor. This is reflected in the fact that *en banc* Third and Sixth Circuits -- a total of thirty-three circuit judges, see Nasir, 17 F.4th at 461 (sixteen judges); Havis, 927 F.3d at 383 (seventeen judges) -- have unanimously ruled in the way Mr. Martinez urges. So, his Colorado attempted-robbery conviction could not qualify as a crime of violence as an enumerated offense under § 4B1.2(a)(2).

Nor could it be counted as a crime of violence under the elements clause of § 4B1.2(a)(1). That subsection requires a conviction, punishable by more than a year in prison, that "has as an element the use, attempted use, or threatened use of physical force against the person of another."

U.S.S.G. § 4B1.2(a)(1). But attempt liability in Colorado requires only that there be a substantial step that is "strongly corroborative of the firmness of actor's purpose to commit the commission of the offense." Colo. Rev. Stat. § 18-2-101(1). This need not involve the use of force, or its attempted or threatened use. So, planning to rob someone, and arranging to lure someone to the place of the intended robbery, can be attempted robbery in Colorado. See People v. Laurson, 15 P.3d 791, 794 (Colo. App. 2000) (describing such conduct), 797 (holding that several events that occurred over several days could have constituted a substantial step towards aggravated robbery); see also People v. Lehnert, 163 P.3d 1111, 1115 (Colo. 2007) (en banc) ("searching out a contemplated victim [or] reconnoitering the place contemplated for commission of a crime" can each be a substantial step). Because Colorado attempted robbery does not categorically satisfy the force clause of § 4B1.2(a)(1), it is not a crime of violence. [2]

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[2] Colorado is not unusual in this respect. As the Tenth Circuit has noted, in the context of the Armed Career Criminal Act, whose elements clause for the term "violent felony" is identical to that of § 4B1.2(a)(1) for "crime of violence," except that it also reaches juvenile adjudications, see 18 U.S.C. § 924(e)(2)(B)(i), "conspiracy and attempt crimes . . . are generally

The district court did not reach the question of whether Mr. Martinez's prior conviction for conspiracy to commit felony menacing with a deadly weapon qualified as a crime of violence. But for the same reasons, it cannot possibly satisfy the enumerated-offense clause, which reaches only completed crimes. And as conspiracy liability punishes a criminal agreement, Colo. Rev. Stat. § 18-2-201(1), it does not involve the use, attempted use or threatened use of physical force that is required by the guideline's force clause. See also United States v. Deiter, 890 F.3d 1203, 1214 (10th Cir. 2018) (noting that, like attempt, conspiracy "criminalize[s] mere preparatory conduct").

In short, Mr. Martinez was wrongly sentenced under a too-high guideline range in contravention of Kisor. Unless this Court intervenes, a great many others will suffer a similar fate.

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not violent felonies because they criminalize mere preparatory conduct." United States v. Deiter, 890 F.3d 1203, 1214 (10th Cir. 2018).

CONCLUSION

This Court should grant Mr. Martinez a writ of certiorari.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ Howard A. Pincus
HOWARD A. PINCUS
Assistant Federal Public Defender
Counsel of Record
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002